THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT MBALE

CONSTITUTIONAL PETITIONS Nos. 49 of 2017, 3 of 2018, 5 of 2018, 10 of 2018, and 13 of 2018.

CORAM:

Hon Mr. Justice Alfonse C. Owiny – Dollo, D.C.J./PCC

Hon Mr. Justice Remmy Kasule, J.A./JCC

Hon Mr. Justice Kenneth Kakuru, J.A./JCC

Hon Lady Justice Elisabeth Musoke, J.A./JCC

Hon Mr. Justice Barishaki Cheborion, J.A./JCC

1. CONSTITUTIONAL PETITION NO. 49/ 2017

MALE H. MABIRIZI ..... PETITIONER

VERSUS

ATTORNEY GENERAL ..... RESPONDENT

2. CONSTITUTIONAL PETITION NO. 03/ 2018

UGANDA LAW SOCIETY ..... PETITIONER

VERSUS

ATTORNEY GENERAL ..... RESPONDENT

3. CONSTITUTIONAL PETITION NO. 05/2018

1. HON GERALD KAFUREEKA KARUHANGA }
2. HON JONATHAN ODUR }
3. HON. MUNYAGWA S. MUBAREK }} :::::::::::::::::::::: PETITIONERS
4. HON. ALLAN SSEWANYANA }
5. HON. SSEMUJJU IBRAHIM NGANDA }

6. HON. WINIFRED KIIZA }

VERSUS

ATTORNEY GENERAL ..... RESPONDENT

4. CONSTITUTIONAL PETITION NO. 10/ 2018

1. PROSPER BUSINGE }
2. HERBERT MUGISA }} :: PETITIONERS
3. THOMAS MUGARA GUMA }
4. PASTOR VINCENT SANDE }

VERSUS

ATTORNEY GENERAL ..... RESPONDENT

5. CONSTITUTIONAL PETITION NO. 13/ 2018

ABAINE JONATHAN BUREGYEYA ..... PETITIONER

VERSUS

ATTORNEY GENERAL ..... RESPONDENT

JUDGMENT OF HON. JUSTICE ALFONSE C. OWINY – DOLLO; DCJ/PCC

Introduction:

The five Constitutional Petitions captioned herein above were severally lodged in this Court pursuant to the provisions of Article 137 (1) & (3) of the 1995 Constitution of the Republic of Uganda; and, as well, Rules 3, 4, 5, and 12 of the Constitutional Court

(Petitions and References) Rules. The Petitions each seek, and plead for, various reliefs from this Court by way of orders and declarations; and these reliefs prayed for, are set out in full detail here below.

Background:

In 2017, Hon Raphael Magyezi, a member of the 10th Parliament of the Republic of Uganda, representing Igara County West Constituency, Bushenyi District, moved a motion in Parliament seeking leave to table a private member's Bill to amend the Constitution. Leave was granted as prayed; and so, he introduced Constitutional (Amendment) Bill No. 2 of 2017 in accordance with the provisions of Articles 259 and 262 of the Constitution of the Republic of Uganda; seeking to amend Article 102 of the Constitution by lifting the Presidential age limit provision there from. The stated objectives of the Bill were:

(i) To provide for the time within which to hold Presidential, Parliamentary and Local government council elections under Article 61,

(ii) To provide for eligibility requirements for a person to be elected as President or District Chairperson under Articles 102 (b) and 183 (2) (b),

(iii) To increase the number of days within which to file and determine a presidential election petition under Article 104 (2) and (3).

(iv) To increase the number of days within which the Electoral Commission is required to hold a fresh election where a Presidential election is annulled under Article 104 (6); and,

(v) For related matters.

In the course of the passage of the Bill in Parliament, more specifically at the stage of the second reading of the Bill, when the House was sitting as a Committee of the whole House, two separate motions were moved to amend the Bill. The first motion sought to amend the Constitution by extending the tenure of Parliament and Local Government Councils from five to seven years; with a rider provision that the amendment would be effective from 2016 when each of the two legislative organs assumed office. The other motion sought to reinstate the Presidential term limit, which a previous Parliament had lifted from the Constitution. Parliament passed the

Bill as amended by the aforestated motions; and it was sent to the President for his constitutionally required assent, which he did. The Bill then became the Constitution (Amendment) Act (No. 1) of 2018.

Aggrieved by the passing of the Bill by Parliament, which became Constitution (Amendment) Act (No. 1) of 2018 upon the Presidential assent thereto, the five consolidated Constitutional Petitions named herein were severally lodged in this Court; each challenging the validity of specific provisions of the Constitution (Amendment) Act (No. 1) of 2018. However, when they came up for hearing, and owing to the fact that in many respects the five Petitions address common issues, this Court consolidated them to enable a joint hearing; which, as it turned out, was quite prudent since this afforded both convenient and expeditious hearing of the Petitions.

THE RELIEFS THE PETITIONERS HAVE SOUGHT:

1. Constitutional Petition No. 49 of 2017

This petition sought the following reliefs; namely that:

(i) The action of the respondent and his agents to claim that the term of office of the current president expires in the year 2021, after expiration of 5 years is inconsistent with and in contravention of Articles 102 (b) and 102 (c) of the

Constitution as they were in the year 2016, when the current President was elected into office, which peg the qualification of the President to those of a Member of Parliament and hence when s/ he ceases to possess the qualification of being below 75 years, such president ceases to be eligible to be so and new elections must be conducted.

(ii) The actions of Parliament to prevent members of the public, with proper identification documents to access the Parliament's gallery during the seeking of leave and presentation of the Constitutional Amendment Bill No. 2 of 2017 was inconsistent with and in contravention of Articles 1, 8A and 79 of the Constitution which require Parliament to only act in the name of the people, in conformity with the Constitution, laws and the rules of Parliament.

(iii) The actions of the combined forces of the Uganda Police Force and the Uganda People's Defence Forces to invade Parliament and beat up, torture and arrest members of Parliament on 26th September 2017 was inconsistent with and in contravention of Articles 1, 8A, 79, 208 (2), 209, 211 (3) and 212 of the Constitution which require Parliament to only act in the name

of the people, in conformity with the Constitution, laws and the rules of Parliament and require the said forces to be non-partisan.

(iv) The actions of Parliament to reconvene on the same day and in the same place where the combined forces had beaten up, tortured and arrested Members of Parliament was inconsistent with and in contravention of Articles 1, 2, 8A and 79 of the Constitution which require Parliament to only act in the name of the people, in conformity with the Constitution, laws and the rules of Parliament.

(v) The actions of Parliament to consider and grant leave to Hon. Raphael Magyezi to table a Private Member's Bill entitled The Constitutional (Amendment) Bill, No. 2 of 2017, when the Leader of Opposition, Opposition Chief Whip and other Opposition Members of Parliament were not in Parliament was inconsistent with and in contravention of Articles 1, 8A, 69 (1), 69 (2) (b), 71, 74, 75, 79, 82A, and 108A of the Constitution which guarantee a multi-party dispensation and creates two sides for government and opposition in Parliament.

(vi) The actions of the Speaker of Parliament to allow ruling party members of Parliament to cross the floor and sit at the opposition side during the presentation of the Bill was inconsistent with and in contravention of Articles 1, 8A, 69 (1), 69 (2) (b), 71, 74, 75, 79, 82A, 83 (1)(g), 83 (3) and 108A of the Constitution which guarantee a multi- party dispensation and creates two sides for government and opposition in Parliament.

(vii) The action of Parliament to entertain presentation and grant of leave of a Private Member's Bill which had the effect of charging money from the Consolidated Fund was inconsistent with and in contravention of Article 93 (a) (ii), 93 (a)(iii) and 93 (b) of the Constitution which restricts Parliament not to make such legislations from private members.

(viii) The action of Parliament to entertain and allow 8 new members on the Legal and Parliamentary Affairs Committee of Parliament almost when the same Committee had finished hearings from the public about the Bill and allowed them to sign the Committee Report as if they had attended the Committee Sessions was inconsistent with and in

contravention of Articles 44 (c), 90 (1) and 90 (2) of the Constitution which makes fair hearing a must and requires Committees of Parliament to work subject to the Constitution.

(ix) The action of Parliament to entertain the Chairperson of the Legal Affairs Committee, Hon. Oboth-Oboth, on 18th December 2017 to present the majority Committee Report on the Bill when the Leader of Opposition, Opposition Chief Whip and other opposition Members of Parliament were not in Parliament was inconsistent with and in contravention of Articles 1, 8A, 69 (1), 69 (2) (b), 71, 74, 75, 79, 82A and 108A of the Constitution; each of which guarantees a multi-party dispensation and creates two sides in Parliament; one for government and the other for the Opposition.

(x) The actions of the Parliament's Legal and Parliamentary Affairs Committee to include in the Bill items concerning:

(a) the extension of the term of Parliament from 5 to 7 years; and

(b) the restoration of Presidential term limits;

– which were neither in the Bill laid before Parliament and sent to the Committee, nor presented before the Committee in a memoranda from the people interviewed – were inconsistent with and in contravention of Articles 1, 8A, 44 (c), 79, 90 and 94 of the Constitution, which require Parliament to act in the name of the people, and in conformity with the Constitution, relevant laws, and rules of Parliament, before enacting any law.

(xi) The action of Parliament to purport to have waived the rule requiring a minimum of three sittings from the tabling of the Committee Report on the Bill before the Report could be debated by Parliament, yet the motion tabled by the Deputy Attorney General, Hon. Mwesigwa Rukutana, was not seconded by any Member of Parliament was inconsistent with and in contravention of Articles 1, 8A, 44 (c), 79 and 94 of the Constitution requiring Parliament to only act in the name of the people, in conformity with the Constitution, laws, and the rules of Parliament before enacting any law.

(xii) The action of the Speaker of Parliament to close the debate on the Bill before each and every Member of Parliament could debate and present the views of their constituents concerning

the Bill was inconsistent with and in contravention of Articles 1, 2, 8A, 44 (c), 79 and 94 of the Constitution which require Parliament to only act in the name of the people, in conformity with the Constitution, laws and the rules of Parliament before enacting any law.

(xiii) The failure by the Speaker of Parliament to close all the doors to the Chambers to Parliament before voting on the 2nd reading of debate on the Bill and during voting was inconsistent with and in contravention of Articles 1, 2, 8A, 44 (c), 79, and 94 of the Constitution which require Parliament to only act in the name of the people, in conformity with the Constitution, laws and the rules of Parliament before enacting any law.

(xiv) The failure by the Speaker of Parliament to separate the 2nd and 3rd readings of the Bill by at least 14 sitting days of Parliament was inconsistent with and in contravention of Article 263 of the Constitution which require Parliament to separate the 2nd and 3rd readings by at least 14 sitting days of Parliament.

(xv) The decision of the current Parliament to extend its own term for two more years, under the Bill was inconsistent with and in

contravention of Articles 1, 2, 77 (3) and 77 (4) of the Constitution which are clear that the current Parliament was elected for 5 years and its term can only be extended by only six months at a time and only when there is a state of war.

(xvi) The action of the President to assent to the Bill is inconsistent with and in contravention of Articles 1, 2, 8A, 44 (c), 79, 91, 94, and 263 (2) (a), of the Constitution; which require Parliament and the President to only act in the name of the people, in conformity with the Constitution, laws and the rules of Parliament before enacting any law and to have complied with Chapter 18 of the Constitution.

(xvii) The presentation, granting of leave to present a private members' Bill, first reading, second reading and third reading of the Bill was unconstitutional, null and void ab initio.

(xviii) All the actions of Parliament and the President in relation to the Bill are null, and void, ab initio for contravening the Constitution.

Affidavit evidence

Petition No. 49 of 2017 was supported by the affidavit of Male H. Mabirizi K. Kiwanuka, the Petitioner.

2. Constitutional Petition No. 3 of 2018

The Petitioner in Constitutional Petition No.3 of 2018 prayed for the following declarations:-

(i) That Article 8 of the Constitution (Amendment) Act 2018 in extending the term of the 10th Parliament is unconstitutional and inconsistent with and in contravention of Articles 1, 8A, 77 (4) and 96 of the Constitution.

(ii) That Article 10 of the Constitution (Amendment) Act 2018 which extends the term of the current local government councils is unconstitutional and inconsistent with and in contravention of Articles 1, 8A of the Constitution.

(iii) That Article 8 of the Constitution (Amendment) Act 2018 in creating a divergence in the presidential and parliamentary terms of office and the time for holding the respective elections is unconstitutional and inconsistent with and in contravention of Articles 1, 8A, 105(1), and 260 (1) and (f) of the Constitution.

(iv) That Article 3 of the Constitution (Amendment) Act 2018 undermines the sovereignty and civic participation of the people of Uganda, and is unconstitutional and inconsistent with and in contravention of Articles 1, 8A, 38 and 105(1) of the Constitution.

(v) That Articles 8 and 10 of the Constitution (Amendment) Act 2018 and the act of Parliament in proceeding on a Private Member's Bill whose effect is to authorize payments to the 10th Parliament and the current local government Councils after expiry of their initial five-year term, are unconstitutional and inconsistent with and in contravention of Article 83(b) of the Constitution.

(vi) That the actions of the security officers in entering Parliament, arresting, detaining and assaulting Members are unconstitutional and contravene Articles 23, 24 and 29 of the Constitution.

(vii) That the entire process of tabling, consulting, debating and passing of the Constitution (Amendment) Act 2018 by Parliament is unconstitutional and inconsistent with and in

contravention of Articles 1, 8A, 29, 38, 69(1), 72(1), 73 and 79 of the Constitution.

(viii) That the inclusion of the extension of the terms of the 10th Parliament and the current local government councils in the Constitution (Amendment) Act 2018 without consultation with the electorate and following due process is unconstitutional and contravenes Articles 1, 8A and 259 (2)(a) of the Constitution.

(ix) That the passing of the Constitution (Amendment) (No. 2) Bill 2017 at the second and third reading without the separation of at least 14 sitting days is unconstitutional and inconsistent with Articles 1, 105(1), 260 (2)(b)&(f) and 263 (1) of the Constitution.

(x) Grant an order that Parliament enacts a law to operationalize Chapter Eighteen of the Constitution elaborating the procedure of passing Bills amending the Constitution within 2 years from the date of Court's Judgment.

Constitutional Petition No. 05 of 2018

The Petitioners prayed that Court be pleased to make the following declarations, orders and reliefs:

(i) That the Constitution (Amendment) Act, 2017 be annulled.

(ii) In the alternative, but without prejudice to paragraph (1), the following sections of the Constitution (Amendment) Act hereunder listed be annulled;

(iii) That Section 2 of the Act in so far as it purports to extend the life/ term of the 10th Parliament from 5 to 7 years.

(iv) That Section 3 of the Act in so far as it purports to lift the minimum and maximum age qualification of a person seeking to be elected as President of the Republic of Uganda.

(v) That Sections 6 and 10 of the Act in as far as they purport to extend the life/ term of the current Local Government councils from 5 to 7 years.

(vi) That Section 7 of the Act in as far as it purports to lift the minimum and maximum age qualification of a person seeking to be elected as a District Chairperson.

(vii) That Section 8 of the Act in as far as it purports to extend the term/ life of the tenure of the 10th Parliament to 7 years.

(viii) That the invasion and/ or heavy deployment at the Parliament by the combined armed forces of the Uganda People's Defence Forces and the Uganda Police Forces and other militia in suing violence, arresting, beating up, torturing and subjecting the

petitioners and other Members of Parliament to inhuman and degrading treatment on the day the impugned Constitution Amendment Bill was tabled before the Parliament amounted to amending the Constitution using violent and unlawful means, undermined Parliamentary independence and democracy and as such was inconsistent with and in contravention of Articles 1, 3, 8A, 20, 24, 29, 79, 208 (2), 209, 211 (3) and 259 of the Constitution.

(ix) That the arbitrary action of the armed forces of the Uganda Peoples Defence Forces, Uganda Police Force and other militia in frustrating, restraining, preventing and stopping some Members of Parliament from attending and/ or participating in the debate and/ or proceedings of the House on the Constitution (Amendment) Bill was inconsistent with and in contravention of Articles 1, 8A, 20, 24, 28 (1), 79, 208 (2), 211 (3) and 259 of the Constitution of Uganda.

(x) That the actions of the armed forces of the Uganda Peoples Defence Forces, the Uganda Police Force and other militia to invade the Parliament while in plenary and thereby inflicting violence, beating, torturing several Members of Parliament at

the time when the motion seeking leave of Parliament to introduce the Private Member's Bill, Constitution (Amendment) Bill No. 2 of 2017, was being tabled was inconsistent with and in contravention of Articles 1, 3, 8A, 20, 24, 29, 79, 208 (2), 209, 211 (3) and 259 of the Constitution.

(xi) The actions of the armed forces of the Uganda Police in beating, torturing, arresting and subjecting several Members of Parliament while in their various constituencies to consult the people on the Constitution (Amendment) Bill, 2017 was inconsistent with and in contravention of Articles 1, 3, 8A, 20, 24, 29, 79, 208 (2), 209, 211 (3), 259 and 260 of the Constitution.

(xii) That the arbitrary decision of the Inspector General of the Uganda Police Force of restricting several Members of Parliament to their respective constituencies in their bid to consult their electorates on the Constitution (Amendment) Bill No. 2 of 2017 was inconsistent with and in contravention of Articles 1, 3, 8A, 20, 24, 29, 79, 208 (2), 209, 211 (3) and 259 of the Constitution.

(xiii) That the process leading to the enactment of the Act was against the spirit and structure of the 1995 Constitution enshrined in the Preamble of the Constitution, the National Objectives and Directive Principles of State Policy and other Constitutional provisions and as a result was inconsistent with and in contravention of Articles 1, 2, 3, 8A, 79, 91 and 259 of the Constitution of Uganda.

(xiv) That the actions of Parliament to prevent members of the public with proper identification documents to access the Parliament's gallery during the seeking of leave and presentation of the Act was inconsistent with and in contravention of Articles 1, 8A and 79 of the Constitution of Uganda.

(xv) That the procedure and manner of passing the Act was flawed with illegality, procedural impropriety and the same was a violation of the Rules of Procedure of Parliament and therefore inconsistent with and in contravention of Articles 79, 91, 94 and 259 of the Constitution.

(xvi) That the actions of the Speaker in entertaining and presiding over the debate on the Bill when the matter on the same was before Court was a violation of rule 72 of the Rules of

Procedure of Parliament of Uganda and therefore inconsistent with and in contravention of Articles 79, 91, 94 and 259 of the Constitution of Uganda.

(xvii) That the delay by the Committee of Legal and Parliamentary Affairs to consider and report on the Bill within the mandatory 45 days violated rule 128 (2) and 140 (1), (2) of the Rules of Procedure of Parliament therefore inconsistent with and in contravention of Articles 79, 91, 94 and 259 of the Constitution of Uganda.

(xviii) That the actions of Parliament to include in the Bill items concerning the extension of the life/ term of Parliament and Local Government Councils from 5 to 7 years and restoration of presidential term limits which were not part of the original Bill at the time it was tabled before Parliament for the first time was inconsistent with and in contravention of Articles 1, 8A, 79, 90, 91, 94 and 259 of the Constitution.

(xix) That the arbitrary actions of the Speaker of Parliament to suspend the 1st, 2nd, 3rd, 4th and 5th petitioners who were in attendance in the Parliamentary proceedings on the 18th day of December 2017, a sitting of Parliament where the two reports

on the Bill were to be debated was a violation of rules 87 and 88 of the Rules of Procedure of Parliament of Uganda therefore in contravention of Articles 28, 42, 44, 79, 91, 94 and 259 of the Constitution of Uganda.

(xx) That the actions of the Speaker of Parliament to close the debate on the Bill before each and every Member of Parliament could debate and present the views of their constituencies concerning the Bill was a violation of rule 133 (3) (a) of the Rules of Parliament and therefore in contravention of Articles 79, 91, 94 and 259 of the Constitution.

(xxi) That the actions of Parliament in waiving rule 201 (2) requiring a minimum of three sittings from the tabling of the Committee Report on the Bill was in contravention and inconsistent with the Constitution and therefore in contravention of Articles 79, 91, 94 and 259 of the Constitution of Uganda.

(xxii) That the actions of the Committee of Parliament on Legal and Parliamentary Affairs on arrogating itself the mandate and duty of entraining, considering and making recommendations to Parliament to consider extending number of years of the term

of the President from 5 to 7 years contravened Articles 1, 8A, 79, 91 and 94 of the Constitution of Uganda.

(xxiii) That the purported decision of the Government of Uganda to make an illegal charge on the consolidated fund to facilitate the Bill which was tabled as a Private member's bill was inconsistent with and in contravention of Articles 93 and 94 of the Constitution of Uganda.

(xxiv) That the purported decision of the Government of Uganda to issue a certificate of compliance in regard to the Bill was inconsistent with and in contravention of Articles 93 and 94 of the Constitution of Uganda.

(xxv) That the actions of the President of Uganda to assent to the Act was inconsistent with and in contravention of Articles 1, 2, 8A, 44 (c), 79, 91, 94 and 259 of the Constitution.

(xxvi) A permanent injunction restraining the respondent, his agents and all persons, agencies or bodies claiming and/ or acting through him from enforcing any of the provisions of the Act.

(xxvii) An award of general damages to the petitioners due to the psychological torture, mental anguish, inconvenience and pain

occasioned to them arising out of the actions complained of in the Petition.

(xxviii) Any other relief that this Honourable Court deems fit in the circumstances.

(xxix) An award of costs of this Petition to the petitioners.

(xxx) An award of interest at the rate of 25% per annum on 22 and 24 above from the date of filing this Petition till payment in full.

Affidavit evidence

The Petition was supported by the affidavits of Hon. Karuhanga Kafureeka Gerald, Hon. Munyagwa S. Mubarak, Hon. Ssewanyana Allan, Hon. Ssemujju Ibrahim and Hon. Winfred Kizza and others.

Constitutional Petition No. 10/ 2018

(i) Declare that the Constitutional (Amendment) Act No. 1 of 2018, is null and void for having been passed in contravention of the procedural requirements laid down in the Constitution, particularly in Article 93 read together with Section 10 of the Budget Act and section 76 of the Public Finance Management Act 2015 and Article 262; and

(ii) or, in the alternative, declare that the following provisions of the said Act are inconsistent with and in contravention of the Constitution:

(iii) Sections 2, 6 and 8 of the Act contravenes Article 93 read together with Section 10 of the Budget Act on certificate of financial implications; Article 77 (4) on the circumstances for enlarging the term of office of Parliament; Article 79 (1) on the functions of Parliament/ limits on Parliament's legislative powers; National Objective & Directive Principle of State Policy No. II read together with Articles 1 and 79 (3) on democratic governance; National Objective & Directive Principle of State Policy No. XXVI on eradication of corruption and abuse of office by leaders; Chapter 14 of the Constitution read together with Part III of the Leadership Code Act plus other related Articles.

(iv) Section 5 of the Act is null and void as Parliament exceeded its Constitution amendment powers under Chapter 18 of the Constitution and contravened Articles 260 (2) (a) on the procedure to amend entrenched provisions of the Constitution as well as Article 105 (1) on the Presidential term of office.

(v) Section 9 of the Act is null and void as it is inconsistent with and contravenes Article 105 (1) on the Presidential term of office and Article 260 (1)(f) on the procedure to amend the Presidential term of office. In enacting the said provision, Parliament again exceeded its Constitutional amendment powers under Chapter 18 of the Constitution rendering it null and void.

(vi) Sections 3 and 7 of the Act contravene and are inconsistent with the key anti-discrimination provisions in the Constitution particularly under Articles 21 (3) and (5) read together with the limits on fundamental rights envisaged in Articles 43 and 44 as well as many existing Constitutional Articles with age limit provisions such as Article 144 on judicial service and that on the retirement age in the civil service.

(vii) An order of redress that Government should constitute a Constitutional Review Commission to put in effect the recommendations of the Supreme Court in Presidential Election Petition No. 1 of 2016 plus other constitutional amendments in a proper manner.

(viii) Any other consequential orders and remedies that may be deemed fit by the Honourable Court to redress the matter.

Affidavit evidence

The Petition was supported by the affidavits of Prosper Businge, the 1st petitioner; Herbert Mugisa, the 2nd petitioner; Thomas Mugara Guma, the 3rd petitioner; and Pastor Sande Vincent Sande, the 4th petitioner.

Constitutional Petition No. 13 of 2018

Sought grant of a declaration that:

(i) Article 8 of the Constitution (Amendment) Act 2018 in extending the terms of the 10th Parliament is unconstitutional and inconsistent with and in contravention of Articles 1, 8A, 61 (2) and (3), 77 (4), 96, 289 of the Constitution.

(ii) Article 6 of the Act amending Article 181 of the Constitution increasing the term of all Local Government Councils from 5 to 7 years is in contravention of and inconsistent with Article 181 (4) of the Constitution and is in breach of the amendment principles.

(iii) Article 10 of the Act which extends the term of the current Local Government Councils is unconstitutional and

inconsistent with Articles 1 and 8A, 61 (2) and (3) of the Constitution.

(iv) Article 8 of the Act in creating a divergence in the Parliamentary terms of office and the time for holding the respective elections is unconstitutional and inconsistent with and in contravention of Articles 1, 8A, 105 (1) and 260 (1) (f) of the Constitution.

(v) Article 3 of the Act undermines the sovereignty and civil participation of the people of Uganda, and is unconstitutional and inconsistent with Articles 1, 8A, 38 and 105 (1) of the Constitution.

(vi) Articles 8 and 10 of the Act and the act of Parliament in proceeding on a private Member's Bill whose effect to authorise payments to the 10thParliament and the current Local Government Councils after expiry of their initial five-year term are unconditional and inconsistent with and in contravention of Article 93 (b) of the Constitution.

(vii) The inclusion of the extension of the terms of the 10th Parliament and the current Local Government Councils in the Act without consultation with the electorate and following due

process is unconstitutional and contravenes Articles 1, 8A and 259 (2) (a) of the Constitution.

Affidavit evidence

The Petition is supported by the affidavit of the Abaine Jonathan Buregyeya, the petitioner, and that of Mutyaba Mohammed, a voter who avers that he was not consulted before Parliament increased its term from 5 to 7 years.

REPRESENTATION

Except for Male Mabirizi Kiwanuka, the Petitioner in Constitutional Petition No. 49 of 2017, who appeared and argued his own Petition, the other Petitioners were each represented by learned legal counsel. These Counsel were Wandera Ogalo, the most senior learned Counsel on the side of the Petitioners, who represented the Petitioners in Petition No. 003 of 2017. Learned Counsel Byamukama James represented the Petitioners in Petition No. 10 of 2018; while learned Counsel Erias Lukwago, Ladislaus Rwakafuzi, Luyimbaazi Nalukoola, and Yusuf Mutembuli appeared for the Petitioners in Petition No. 005 of 2017; then learned Counsel Kaganzi argued the case for the Petitioner in Petition No.13 of 2018.

For the Respondent, learned Counsel Mwesigwa Rukutana (Deputy Attorney General), assisted by learned Counsel Francis Atoke (Solicitor General) learned Counsel Christine Kahwa (Ag. Director of Civil litigation), learned Counsel Martin Mwambutsya (Commissioner Civil Litigation), learned Counsel Henry Oluka and Elisha Bafirawala (Principal State Attorneys), learned Counsel Richard Adrole (Senior State Attorney), and then learned Counsel Genevieve Kampiire, Suzan Apita Akello, Johnson Kimera Atuhire, Jackie Amusugut, and Imelda Adong (each a State Attorney).

Issues for determination

The issues agreed upon by the parties to the Petitions, and were adopted by Court, are as follows:

1. ***Whether sections 2 and 8 of the Act extending or enlarging of the term or life of Parliament from 5 to 7 years is inconsistent with and/ or in contravention of Articles 1, 8A, 7, 77 (3), 77 (4), 79 (1), 96, 233 (2) (b), 260 (1) and 289 of the Constitution.***

2. ***And if so, whether applying it retrospectively is inconsistent with and/ or in contravention of Articles 1, 8A, 7, 77(3), 77(4), 79(1), 96 and 233 (2)(b) of the Constitution.***

3. ***Whether sections 6 and 10 of the Act extending the current life of Local Government Councils from 5 to 7 years is inconsistent with and/ or in contravention of Articles 1, 2, 8A, 176 (3), 181 (4) and 259 (2) (a) of the Constitution.***

4. ***If so, whether applying it retroactively is inconsistent with and/ or in contravention of Articles 1, 2, 8A, 176 (3), 181 (4) and 259 (2) (a) of the Constitution.***

5. ***Whether the alleged violence/ scuffle inside and outside Parliament during the enactment of the Act was inconsistent and in contravention of Articles 1, 2, 3 (2) and 8A of the Constitution.***

6. ***Whether the entire process of conceptualizing, consulting, debating and enacting the Act was inconsistent with and/ or in contravention of Articles of the Constitution as here-under:-***

   (a) ***Whether the introduction of the Private Member's Bill that led to the Act was inconsistent with and/ or in contravention of Article 93 of the Constitution.***

   (b) ***Whether the passing of sections 2, 5, 6, 8 and 10 of the Act are inconsistent with and/ or in contravention of Article 93 of the Constitution.***

   (c) ***Whether the actions of Uganda Peoples Defense Forces and Uganda Police in entering Parliament, allegedly assaulting Members in the chamber, arresting and allegedly detaining***

the said Members, is inconsistent with and/or in contravention of Articles 24, 97, 208 (2) and 211 (3) of the Constitution.

(d) Whether the consultations carried out were marred with restrictions and violence which were inconsistent with and/ or in contravention of Articles 29 (1) (a),(d),(e) and 29(2)(a) of the Constitution.

(e) Whether the alleged failure to consult on sections 2, 5, 6, 8 and 10 is inconsistent with and/ or in contravention of Articles 1 and 8A of the Constitution.

(f) Whether the alleged failure to conduct a referendum before assenting to the Bill containing sections 2, 5, 6, 8 and 10 of the Act was inconsistent with, and in contravention of Articles 1, 91 (1) and 259 (2), 260 and 263 (2)(b) of the Constitution.

(g) Whether the Amendment Act was against the spirit and structure of the 1995 Constitution.

7. Whether the alleged failure by Parliament to observe its own Rules of Procedure during the enactment of the Act was inconsistent with and in contravention of Articles 28, 42, 44, 90 (2), 90 (3) (c) and 94 (1) of the Constitution.

(a) Whether the actions of Parliament preventing some members of the public from accessing Parliamentary chambers during

the presentation of the Constitutional Amendment Bill No. 2 of 2017 was inconsistent with and in contravention of the provisions of Articles 1, 8A, 79, 208 (2), 209, 211 (3), 212 of the Constitution.

(b) Whether the act of tabling Constitutional Bill No. 2 of 2017, in the absence of the Leader of Opposition, Chief whip and other opposition members of Parliament was in contravention of and/ or inconsistent with Articles 1, 8A, 69 (1), 69 (2)(b), 71, 74, 75, 79, 82A, and 108A of the Constitution.

(c) Whether the alleged actions of the Speaker in permitting Ruling Party Members of Parliament to sit on the opposition side of Parliament was inconsistent with Articles 1, 8A, 69 (1), 69 (2)(b), 71, 74, 75, 79, 82A, 83 (1)(g), 83 (3) and 108A of the Constitution.

(d) Whether the alleged act of the Legal and Parliamentary Affairs Committee of Parliament in allowing some committee members to sign the Report after the public hearings on Constitutional Amendment Bill No. 2 of 2017, was in contravention of Articles 44 (c), 90 (1) and 90 (2) of the Constitution.

(e) Whether the alleged act of the Speaker of Parliament in allowing the Chairperson of the Legal Affairs Committee, on 18th December 2017, in the absence of the Leader of

Opposition, Opposition Chief Whip, and other Opposition members of Parliament, was in contravention of and inconsistent with Articles 1, 8A, 69 (1), 69 (2) (b), 71, 74, 75, 79, 82A and 108A of the Constitution.

(f) Whether the actions of the Speaker in suspending the 6 (six) Members of Parliament was in contravention of Articles 28, 42, 44, 79, 91, 94 and 259 of the Constitution.

(g) Whether the action of Parliament in:-

(i) waiving the requirement of a minimum of three sittings from the tabling of the Report yet it was not seconded;

(ii) closing the debate on Constitutional Amendment Bill No. 2 of 2017 before every Member of Parliament could debate on the said Bill;

(iii) failing to close all doors during voting;

(iv) failing to separate the second and third reading by at least fourteen sitting days;

are inconsistent with and/ or in contravention of Articles 1, 8A, 44 (c), 79, 94 and 263 of the Constitution.

8. Whether the passage of the Act without observing the 14 sitting days of Parliament between the 2nd and 3rd reading was inconsistent with and/ or in contravention of Articles 262 and 263 (1) of the Constitution.

9. Whether the Presidential assent to the Bill allegedly in the absence of a valid Certificate of compliance from the Speaker and Certificate of the Electoral Commission that the amendment was approved at a referendum was inconsistent with and in contravention of Article 263 (2) (a) and (b) of the Constitution.

10. Whether section 5 of the Act which reintroduces term limits and entrenches them as subject to referendum is inconsistent with and/ or in contravention of Article 260 (2)(a) of the Constitution.

11. Whether section 9 of the Act, which seeks to harmonise the seven year term of Parliament with Presidential term is inconsistent with and/ or in contravention of Articles 105 (1) and 260 (2) of the Constitution.

12. Whether sections 3 and 7 of the Act, lifting the age limit without consulting the population are inconsistent with and/ or in contravention of Articles 21 (3) and 21 (5) of the Constitution.

13. Whether the continuance in Office by the President elected in 2016 and remains in office upon attaining the age of 75 years contravenes Articles 83 (1) (b) and 102 (c) of the Constitution of the Republic of Uganda.

14. What remedies are available to the parties?

COURT'S DETERMINATION OF THE ISSUES FRAMED

Introduction:

(i) The Remit Of The Constitutional Court:

Because of the importance of jurisdiction, and the danger of lack of it, in any judicial undertaking, it is crucial that a Court before which a matter has been brought, determines whether or not it is seized with jurisdiction in such a matter. A Court may proceed on a matter that is entirely, or in part, outside of its remit; and thereby wasting much resources and effort for no good reason. The jurisdiction of the Constitutional Court of Uganda derives from the provision of Article 137 of the 1995 Constitution; which states as follows:

*"**137. Questions as to the interpretation of the Constitution.***

(1) Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court.

(2) ... ...

(3) A person who alleges that –

(a) an Act of Parliament or any other law or anything in or done under the authority of any law; or

(b) any act or omission by any person or authority,

is inconsistent with or in contravention of a provision of the Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate."

Two points of importance clearly come out of this provision. First, is that pursuant to the provision of Article 137(1) of the Constitution, the Constitutional Court is not a standing Court; but only a conversion of the Court of Appeal to sit as a constitutional Court. Second, is that the jurisdiction of the Constitutional Court is limited to the interpretation or construction of provisions of the Constitution; and determining whether an impugned provision of an Act of Parliament contravenes a provision of the Constitution; or whether a person, or institution has acted in a manner that violates a provision of the Constitution. Pursuant to this clear provision of the Constitution, WAMBUZI CJ succinctly and authoritatively expressed in ***Ismail Serugo vs Kampala City Council & Anor.; Constitutional Appeal No. 2 of 1998***, that:

"In my view, for the Constitutional Court to have jurisdiction, the petition must show on the face of it that the interpretation of the

Constitution is required. It is not enough to allege merely that a constitutional provision has been violated."

In ***Attorney General v Tinyefuza; Constitutional Appeal No. 1 of 1997***, the Supreme Court in a panel comprising seven was unanimous, and unmistakably clear, in holding that the Constitutional Court's jurisdiction is exclusively derived from Article 137 of the Constitution. Thus, it has no jurisdiction in any matter not involving or requiring the interpretation of a provision of the Constitution. The Court further held that for the Constitutional Court to have jurisdiction, the petition must show on the face of it that the interpretation of a provision of the Constitution is required. Hence, an application for redress can be made to the Constitutional Court, only in the context of a petition brought under Article 137 Constitution; and principally for the interpretation of the Constitution.

In ***S vs Marwane 1982 (3) SA 717 (AD)***, at p.745, MILLAR JA of the Appellate Division of the South African Supreme Court stated, with regard to acceptable approach to interpretation of a Constitution, as follows:

"... whether our courts were to regard an Act creative of a Constitution as it would any other statute, or as an Act sui generis, when construing a particular provision therein, they would give effect to the ordinarily accepted meaning and effect of the words used and would not deviate therefrom unless to give effect to the ordinary meaning would give rise to glaring absurdity; or unless there were indications in the Act – considered as a whole in its own peculiar setting and with due regard to its aims and objects – that the legislator did not intend the words to be understood in their ordinary sense. ... ...

For so long as this Constitution stands, the right to challenge the validity of legislation passed by the legislative authority will remain, as will the Supreme Court's power – and its duty, when properly called upon so to do – to test the validity of the challenged legislation by reference to the provisions of the Constitution."

The Constitutional Court, like any other Court, has the mandate bestowed upon it under the provisions of Article 126 of the Constitution, to act in the name and in accordance with the aspirations of the people in whom power vests. In the exercise of

its oversight role, this Court has to ensure that whatever amendment or alteration the Constitution is subjected to, is in accord with clear provisions of the Constitution in that regard. Thus, with regard to the several petitions before us for determination, it is incumbent on this Court to determine whether, or not, the impugned amendments to the Constitution, contravened the respective provisions of the Constitution, as are alleged by the respective petitioners.

As judicial officers, upon whom this Constitutional remit is bestowed, we exercise the responsibility with a clear sense of purpose; and do so in the full knowledge that it is a noble duty we exercise in the name, and for the good, of the people of Uganda in whom ultimate power vests. This is pursuant to the provision of Article 1(1) of the Constitution, which states that *'all authority in the State emanates from the people of Uganda; and the people shall be governed through their will and consent.'* This also applies to the Courts of judicature, since the Judiciary is one of the three arms of government. As a complementary provision to the provision of Article 1 of the Constitution reproduced above, Article 126 of the Constitution, which is more specific on the role and function of the

Courts of Judicature in the administration of justice, provides as follows:

"126. Exercise of judicial power.

(1) Judicial power is derived from the people and shall be exercised by the Courts established under this Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people."

BURDEN OF PROOF

As is the case with all other matters brought before Court, the burden to prove each of the grounds raised in a Constitutional Petition, that an impugned provision of a statute offends some provision of the Constitution, rests on the person challenging the validity of the enactment. There is only a shift of evidential burden onto the Respondent upon the Petitioner either raising a prima facie case necessitating adverse proof by the Respondent; or where the evidence required to determine the matter before Court is either in the possession, or only within the knowledge, of the Respondent. This is in accordance with the provisions of section

106 of the Evidence Act (Cap. 6, Laws of Uganda 2000 Edn.) which states as follows: –

"106. Burden of proving, in civil proceedings, fact especially within knowledge.

In civil proceedings, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon that person."

RULE OF CONSTITUIONAL CONSTRUCTION OR INTERPRETATION

One of the principles in constitutional construction or interpretation is that of presumption of constitutionality. In ***Zimbabwe Township Developers (Pvt) Ltd. vs Lou's Shoes (Pvt) Ltd 1984 (2) SA 778 (ZSC)*** Telford Georges CJ stated at p.782 that the '*presumption of constitutionality*':

> *"... is a phrase which appears to me to be pregnant with the possibilities of misunderstanding. Clearly, a litigant who asserts that an Act of Parliament or a regulation is unconstitutional must show that it is. In such a case the judicial body charged with deciding that issue must interpret the Constitution and determine its meaning and thereafter interpret the challenged piece of legislation to arrive at a conclusion as to whether it falls within*

that meaning or does not. The challenged piece of legislation may, however, be capable of more than one meaning. If that is the position, then, if one possible interpretation falls within the meaning of the Constitution and others do not, then the judicial body will presume that the lawmakers intended to act constitutionally and uphold the piece of legislation so interpreted. This is one of the senses in which a presumption of constitutionality can be said to arise.

One does not interpret the Constitution in a restricted manner to accommodate the challenged legislation. The Constitution must be properly interpreted, adopting the approach accepted above. Thereafter the challenged legislation is examined to discover whether it can be interpreted to fit into the framework of the Constitution. ... ... Even where the Constitution does not make it clear where the onus lies, as the Zimbabwe Constitution does, the onus lies on the challenger to prove that the legislation is not reasonably justifiable in a democratic state, and not on the state to show that it is. In that sense, there is a presumption of constitutionality."

It is a well-established rule of interpretation that the words of an Act of Parliament should be construed with reference to the context in which it is used. This means an Act of Parliament should be considered as a whole; for the language of one provision therein may affect the construction of another in the same legislation. This presupposes that a word is used in an Act of Parliament to mean one thing; and not to mean something else. Similarly, nor are different words used in an Act of Parliament intended to mean the same thing. As was pointed out in ***Giffels & Vallet vs The King [1955] DLR 620***, at p.630:

> *"It is not to be forgotten that the first inference is that a word carries the same connotation in all places when it is found in a statute."*

This rule of construction applies to the Constitution as with an Act of Parliament. In interpreting or construing any provision of the Constitution, care must be taken to ensure that it is not considered in isolation from the other provisions of the Constitution. The Constitution must be considered in its entirety; taking cognizance of the fact that each provision of the Constitution is an integral part of the whole. This holistic approach to constitutional construction

or interpretation avoids giving different, and at times opposite or adverse, meanings to the same word that has been used in various parts of the Constitution.

Thus, in the exercise of its constitutional oversight role, it is incumbent on this Court to apply the rule of construction and interpretation, to determine whether any person exercising an official power or function has, either through improper motive, or through inadvertence, acted in violation of the Constitution. The Court can then interfere and render rectificatory remedy when it establishes that such a wrong, as is complained of, has indeed been occasioned. Such wrong may include *mala fide* motive, or even when the powers – otherwise lawfully conferred upon any person or institution – are exercised in a capricious, or arbitrary manner; hence, done *ultra vires* the law conferring such power on the person or institution.

(ii) The Constitution as a <u>fountain</u> of the rule of law.

Before giving due consideration to each of the issues framed, I consider it most important to illuminate and make it abundantly clear, the special place, and importance, of the Constitution in the

life of the people and the future of the country. The Constitution is not an ordinary document, it is a sacred legal instrument, which is the fundamental and supreme law of the country. It is the embodiment of the expression of the people's vision, values, will, and aspirations. It governs the three arms of government or State – namely the Executive, Legislature, and the Judiciary – as much as it governs the ordinary individual and the society at large within its jurisdiction.

In ***Legislative Drafting*** (Universal Law Publishing Co. (Third Edition), 1994), B.R. Atre states at p.166 as follows:

> *"Every political community, and thus every national State, has constitution, at least in the sense that it operates its important institutions according to some fundamental body of rules. In this sense of the term, the only conceivable alternative to a constitution is a condition of anarchy. Even if the only rule that matters is the whim of an absolute dictator, that may be said to be the constitution. The constitution of a nation is therefore composed, in the first place, of the principles determining the agencies to which the task of governing the nation is entrusted and their respective powers."*

(ii) **The nature and character of the Constitution**

In ***Understanding Statutes*** (Cavendish Publishing Ltd., 1994), Crabbe V.C.R.A.C. (the Parliamentary Counsel who was placed in the unenviable position of drafting the 1966 pigeonhole Constitution of Uganda) describes the Constitution, at p.129, as the fundamental law; and so it:

- *"contains the principles upon which the government is established;*
- *regulates the powers of the various authorities it establishes;*
- *directs the persons or authorities who shall or may exercise certain powers;*
- *determines the manner in which the powers it confers are to be confined or exercised; and*

specifies the limits to which powers are confined in order to protect individual rights and prevent the abusive exercise of arbitrary power."

In the book, ***Legislative Drafting*** (supra), the learned author states at p.286 that:

"However, it is not so much that a Constitution of a country determines its nature and character. It is a mode in which a stage is constituted or organized which determines its fiscal nature or character and which ultimately determines a country's health, strength and vitality.

It is therefore, of utmost importance that the Legislators of a given country understand the constitutional document which governs their country and through which they are able to represent their constituencies in Parliament. A country is more than a collection of people with patriotic feelings. A country is kinsfolk or kindred. A country is the friendly feelings to which such kindred give birth. A country is the feeling of confidence that people have when sharing similar habits and customs."

Due to the sanctity it is clothed with, the Constitution deserves to be accorded utmost deference and veneration. It must enjoy a sufficient degree of permanence and stability. As was opined by Hyatali CJ in ***Harrikissoon vs Attorney General of Trinidad and Tobago [1981] AC 265***, it is unwise; and can only lead to undesired consequence when:

"... the Constitution as the supreme law is treated with little sympathy or scant respect, or is ignored without strong and compelling reasons."

The treatment or regard we accord the Constitution, as is attested to by our post independence experience following the abrogation of the Independence Constitution, has direct bearing on what we consequently harvest or reap as a country. The old adage that one reaps what one sows is quite pertinent here. We either reap the fortune of enjoyment of peace, development, and prosperity, or the misfortune of instability and peril that would certainly plague our country. Owing to the pivotal place the Constitution occupies in the life of the people, and the crucial role it plays in determining the direction or fate of the country, it is a compulsory requirement for every person holding a public office of national importance to take the oath binding him or her to preserve, protect, and defend the Constitution.

In the Indian public interest case of ***Pandey & Anor vs State of West Bengal [1988] LRC 241***; an urban authority had been challenged for alienating part of land hosting a zoo, for the construction of a five–

star hotel. Article 48A of the Indian Constitution, which set out a Directive Principle, provided as follows:

"The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country."

Article 51A(g) of that Constitution stated the fundamental duty of every citizen as follows:

> *"... ... to protect and improve the natural environment including forests, lakes, rivers, and wild life; and to have compassion for living creatures."*

Chinnappa Reddy J.; reproduced, at p. 245 paragraph *'f'* of his judgment, an impressive speech made by an American Red Indian Chief of Seattle to the representative of the government in Washington who had sought to acquire land from the Red Indians by purchase. In declining the request, the wise Red Indian Chief made the following response:

> *" ... ... You must teach your children that the ground beneath their feet is the ashes of our grandfathers. So that they will respect the land. Tell your children that the earth is rich with the lives of our kin. Teach your children what we have taught our children,*

that the earth is our mother. Whatever befalls the earth befalls the sons of the earth. Man did not weave the web of life: he is merely a strand in it. Whatever he does to the web he does to himself. Even the white man, whose God walks and talks with him as friend to friend, cannot be exempt from the common destiny.

We may be brothers after all. We shall see. One thing we know, which the white man may one day discover – our God is the same God. You may think now that you own Him as you wish to own our land; but you cannot. He is the God of man, and his compassion is the same for the red man and the white. This earth is precious to Him, and to harm the earth is to heap contempt on its Creator. The white too shall pass; perhaps sooner than all other tribes. Contaminate your bed and you will one night suffocate in your own waste ..."

I find this remarkably powerful speech of great significance as it metaphorically illustrates the point regarding the sanctity of the Constitution; and its special place in our life. To appreciate, and fully understand the relevance and import of this speech to our situation as a people, we need to substitute the word '*Constitution*', which is at the centre of our life, for the word '*land*' which is the

imperative point of reference in the great speech as the centre of life for the Red Indian race.

One expression of significance, which stands out in the speech, and which we should bear in mind in our treatment of the Constitution, is the caution: "*Contaminate your bed and you will one night suffocate in your own waste*". This statement is *in pari materia* with that in Robert Bolt's '*A Man For All Seasons*', cautioning against the threatened cutting down of the forest; advising that the forest is the fortress where one would seek refuge in the event that Hell breaks loose, and the Devil goes on rampage! Therefore, the Constitution is respectively the '*bed*', and the '*forest*', referred to in the two speeches quoted above. It is thus an exhibition of utter folly, and lamentable foolhardiness, to ignore these priceless words of wisdom; as the resulting ramifications, are predictably the perils that will surely visit us.

The making of the 1995 Constitution was a commendable participatory process. It included the contributions of the handmaidens to the process; such as the Justice Odoki Constitutional Commission comprising eminent Ugandans who consulted widely with the people of Uganda, and the Constituent

Assembly elected by universal adult suffrage, which deliberated on the report of, and draft Constitution by, the Commission. Then the President signified the promulgation of the resulting Constitution by appending his hand to the supreme legal instrument. The entire national Constitution making enterprise was characterised by a painstaking, elaborate, exhaustive, and costly, but justifiable and legitimate undertaking.

This owed to the fact that the Constitution making process was conducted against the tragic backdrop of our sad post independence history. We therefore seized and executed this epoch–making endeavour in the knowledge that a grand opportunity had presented itself to us, the people of Uganda, to have a fresh start in building our nation. Indeed we held the firm belief that this would mark a break with our politics of the past, whose hallmark included the high handed and reckless abuse of the Constitution in furtherance of narrow self–interest; resulting in unspeakable repercussion, which manifested itself in the tragic upheavals and incessant haemorrhage that ensued and bedevilled our country.

Further to this, the fresh memory of the protracted and bloody armed struggle, which ushered in the opportunity for a new political dispensation, informed and influenced the Constitution making process. Therefore, we embraced the process with acclaim; in the earnest hope that this had ushered in the much-desired dawn to a new political dispensation in Uganda. The 1995 Constitution is still in its infancy; it being just a couple of decades old. However, and most unfortunately, before it has sufficiently been tested, or put differently, before the ink with which the promulgation was signed has dried, the Constitution has already been subjected to as many as five amendments.

Given the effort, time and other resources that were invested in the making of the 1995 Constitution, it is not gainsaid that the frequency with which it has been subjected to amendments is disturbing; and is cause for serious and genuine concern. This is so in the light of the fact that many of the laws that stem or derive their authority from, and are therefore subordinate to, the Constitution have not suffered similar scant respect of being subjected to such frequent amendments. Indeed, the frequency with which the Constitution has been amended negates one of the

core principles that form the bedrock of the Constitution; which is clearly expressed in the preamble to the Constitution as follows:

"The Preamble

WE THE PEOPLE OF UGANDA:

RECALLING our history which has been characterised by political and constitutional instability;

RECOGNISING our struggles against the forces of tyranny, oppression, and exploitation;

COMMITTED to building a better future by establishing a socioeconomic and political order through a popular and durable national Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress;

EXERCISING our sovereign and inalienable right to determine the form of governance for our country, and having fully participated in the Constitution-making process;

NOTING that a Constituent Assembly was established to represent us and to debate the Draft Constitution prepared by the Uganda Constitutional Commission and to adopt and enact a Constitution for Uganda:

Do HEREBY, in and through this Constituent Assembly solemnly adopt, enact and give to ourselves and our posterity, this Constitution of the Republic of Uganda, this 22nd day of September, in the year 1995.

FOR GOD AND MY COUNTRY" ***(emphasis added).***

Owing to the peoples' desire to have a popular and durable Constitution for themselves and posterity, it is justified for them to seek to know the compelling change that has occurred in our aspiration and values, so soon after the promulgation of the Constitution, to merit the extravagant alterations to the Constitution at the infant stage of its life span. The people harbour legitimate concern over the apparent deviation from our earlier desire and chosen direction declared in the Constitution itself; namely to have a durable Constitution that would ensure a just socio and political order. We are justified in being apprehensive of what the future holds with regard to the nature and substance of our Constitution by the time we celebrate the silver jubilee of its historic promulgation.

Indeed, whether acting by themselves, or through their representatives in Parliament, the people must always keep in mind

that in exercising their constitutional right to amend the Constitution, it may not be sufficient justification that such amendment or alteration is in fact clothed with legality. It is more important that amendments or alterations of the Constitution reflect the popular will of the people; thereby enjoying legitimacy alongside, or over, legality. The Constitution is not made for the present generation alone; but is also intended to ensure that we, of the present generation, bequeath a worthy and stable country to future generations. In this regard, I find it apt to cite an African saying of the wise, on the importance of land; owing to its central place as a pillar in our lives.

Expressed in paraphrase, the African idiom is that the land we occupy and cultivate, and thus it is our source of living is – contrary to well-established belief – not our inheritance from our elders and ancestors; but rather, what we owe future generations from whom we have borrowed the land! It is, thus, incumbent on us to use the land to our benefit; but we should do so, cognizant of the fact that we are beholden to future generations who are the true owners, and are under duty to hand the land 'back' to them as the true owners! Therefore, it is incumbent on us to ensure that the

Constitution does not suffer such maltreatment as we did witness in the immediate post independence period; as this would sadly force the country to glide back to a repeat of the tragedy to which we resoundingly resolved "*never again*" to go through, when we gave ourselves this Constitution.

It would otherwise be most unfortunate and lamentable, in view of the still fresh, and indelible, memory of the repercussions that resulted from the failure of the immediate post independence political leaders to nurture the Constitution, to enable the rule of law to prevail. Instead, they sacrificed the rule of law on the altar of political expedience, in some instances for petty advantage; and for which we have, as a people, paid a dear price, and continue to do so, as the consequences are still reverberating to date. Should we fail to rise up to the occasion, and take the necessary action in the protection, defence, and preservation of the Constitution, then for sure, posterity, which we owe a duty, and must always have in mind in all we do, will be irreconcilably unforgiving of our generation.

Future generations will justifiably hold us complicit, either by our explicit or implicit action, in letting our country again sink into the

chaos, turbulence, and mayhem, we have had a nasty experience of; and swore to ourselves never to go through again when we made this Constitution. They will be furious and extremely harsh in their judgement over us, for having bequeathed unto them a tragedy, which we had the power and means to avert or avoid; but failed to do it due to the lack of will and courage to do so. The Nandala Mafabi motion on the restoration of Presidential term limit, to which I shall shortly advert, is a classical case justifying the need to treat the Constitution with due respect; and subject it to alteration sparingly, and only in very deserving circumstances.

Parliament scrapped the Presidential term limit; but even when the conditions that purportedly necessitated the scrapping of that provision have not changed, Parliament has overwhelmingly voted to reverse this decision, and have the provision restored in the Constitution. This is evidently a sharp rebuke and indictment of Parliament for having scrapped the provision from the Constitution in the first place, apparently without any justifiable reason; as is manifested by its immediate reinstatement. This vindicates the voices of reason, which had concertedly objected to, and

expostulated against, the lifting of the provision from the Constitution.

Issue No. 6 (g): **Whether the Amendment Act was against the spirit and structure of the 1995 Constitution.**

Because this issue is on common ground with, and is crosscutting in its application to, most of the other issues framed in the consolidated Petitions before this Court for determination, I consider it advisable and appropriate to deal with it first, before delving into the determination of the other issues.

Submission by Counsel:

The Basic Structure Doctrine:

In his support for this doctrine, learned Counsel Erias Lukwago cited the case of ***Saleh Kamba & others v Attorney General & others; Constitutional Petition No. 16 of 2013***, for the principle of constitutional interpretation requiring an understanding of the history of the country. He referred to the Indian situation where the Constitution provides for the basic structure doctrine; which is a principle curtailing the power of Parliament to amend the Constitution by excluding the power to abrogate or change the identity of the constitution or its basic features. He surveyed the

development of the doctrine, beginning with the case of ***Minerva Mills Ltd & others v Union of India (UoI) & others AIR 1980 SC 1789,*** where the Supreme Court unanimously applied it to invalidate the provision of section 55 of the Act, which had removed all limitations imposed on Parliament in the exercise of its power to amend the Constitution; thereby conferring upon it the power to amend and destroy the Constitution's essential features or basic structure. The Court reasserted and secured the constitutional limitations on Parliament's power to amend the Constitution by holding that Parliament could not enlarge the limited amending power conferred unto it by the Constitution, into an absolute power.

Counsel cited authorities from various jurisdictions where the doctrine has been applied; and this includes the Bangladesh case *of* ***Anwar Hossain Chowdry v Bangladesh 41 DLR 1989 App. Div. 165***, in which the Supreme Court identiofied the central pillars in a Constitution; and declared an amendment that had curtailed the judicial review jurisdiction of the Supreme Court, unconstitutional and void. Counsel also cited the Pakistani case

of ***Al-Jehad Trust v Federation of Pakistan PLD 1996 SC 367***, where the Supreme Court recognised the need to interpret the Constitution as a whole; taking into account the spirit and *'basic features of the Constitution'*. Counsel cited the Kenyan case of ***Njoya & others v Attorney General & others [2004] LLR 4788;*** where the High Court rejected the contention that Parliament's power to amend the Constitution includes power to make changes, which amount to the replacement of the Constitution.

He also cited the South African authority of ***Premier KwaZulu- Natal and President of the Republic of South Africa 1996 (1) SA 769 (CC)***; where the Supreme Court held that even where Parliament has followed the procedures and requirements laid down for amending the Constitution, nevertheless such amendment could be struck down as being invalid for "*radically and fundamentally restructuring and reorganising the fundamental premises of the constitution*". Counsel cited another South African case of ***Executive Council of the Western Cape Legislature v the President of the Republic 1995 10 BCLR 1289 (CC)***; where Court pointed out that *"there are certain fundamental features in a Parliamentary democracy which are not spelt out in the Constitution but which*

are inherent in its very nature, design and purpose"; hence, these features are protected against amended by Parliament.

He cited the Tanzanian case of ***Rev. Christopher Mtikila v Attorney General – 2006 (10 of 2005) [2006] TZHC 5***; in which the High Court of Tanzania stated that *'it may of course sound odd to the ordinary mind to imagine that the provisions of a Constitution may be challenged for being unconstitutional'*; but, however, it expressed itself that *'this Court may indeed declare some provisions of the Constitution, unconstitutional'*. This, Counsel submitted, raised judicial activism a notch higher. He then urged Court to appreciate the philosophy upon which the 1995 Constitution of Uganda is anchored; and to apply that doctrine in the instant case before this Court. He contended that the impugned Act substantially changed the Constitution to the extent that a resurrected member of the Constituent Assembly would today unable to recognise the 1995 Constitution; and, so, would disown it!

He also cited the authority of ***Saleh Kamba*** (supra), where Kasule, JCC, in his dissenting judgment, manifested the basic structure

doctrine of our Constitution; as reflected in the preamble, to the 1995 Constitution. The learned Kasule JCC concluded, upon reviewing the history of the country, that owing to the historical perspective compelled that the Constitution be interpreted in a manner that promotes the growth of democratic values and practices; while at the same time doing away or restricting those aspects of governance that are likely to return Uganda to a one party State and/or make in-roads in the enjoyment of the basic human rights and freedoms of conscience, expression, assembly and association.

It was thus Counsel's contention that the extension of the term of Parliament, that of the President, and the lifting of the age-limit, negate and vitiate the spirit of the Constitution which was intended to create a stable Uganda. He urged this Court to find that the will of the people to give consent on who governs them, under Article 1 (4) of the Constitution, had been violated by Parliament's extension of its term by two years; meaning that there shall be no elections until 2023, and thereby in effect disenfranchising the people. He argued further that the issue of

age–limit was a safeguard against anyone entrenching himself or herself as life President. He urged Court to take judicial notice of the fact that in the past, some people have expressly declared themselves life President; but that others could do so it by manipulating the legal processes.

He also noted that moving the guiding principles of State policy and national objectives from the preamble to the Constitution to become Article 8A thereof means it is now a justiciable provision. He implored Court to make history, by applying the doctrine of Basic Structure of the Constitution in our jurisdiction; so that whoever seeks to entrench themselves in power, will find difficulty in doing so. It is this, Counsel contended, that will create constitutional stability; and thereby guaranteeing political stability for this country, so that we do not revert back to the turbulent days of the past.

The Case for the Respondent

The learned Deputy Attorney General, Hon Rukutana Mwesigwa, relied on the submissions he had made with regard to Issues 1–4; wherein, on the issue of doctrine of basic structure he had

cited the Tanzanian case of ***Rev. Christopher Mtikila v Attorney General Misc. Civil Cause No. 10 of 2005***; in which the respondent had filed an application challenging the prohibition of independent candidates from contesting for presidential, parliamentary and civic elections introduced by the Constitution Amendment Act. The Act had compelled such candidates to be members of, and be sponsored by, a political party. The trial Judge declined to declare the Act unconstitutional; holding that such candidates could still contest as independents. On a 2nd appeal, the three judges of the Court unanimously upheld the decision of the High Court; stating therein that they could not clothe themselves with legislative powers. They explained that:

> *"we are definite that the courts are not the custodian of the will of the people, that is the property of elected members of parliament", so if there are two or more articles or portions of articles which cannot be harmonised then it is parliament which will deal with the matter and not the court unless power is expressly given by the constitution".*

On the doctrine of *'basic structure'* of the Constitution, the Court held in that case that:

> *"We agree with Prof. Kabudi that that doctrine is nebulous, (meaning it is misty, it is cloudy, it is hazy according to the dictionary) as there is no agreed yardstick of what constitutes basic structure of a constitution."*

Learned counsel relied on that case for his contention that the Constitution simply has safeguards as is in Article 260**;** and not necessarily a basic structure. It concluded that the matters that could be regarded as the basic structure were those that Parliament could not amend; but still, they were amendable. He pointed out that the learned Judges concluded that in their opinion, the basic structure doctrine does not apply to Tanzania; and further that they could not apply Indian authorities, which were merely persuasive when considering the Tanzanian Constitution. He argued that the Indian Constitution had the basic structure entrenched. However, in the case of Uganda the basic structure is contained in a number of Articles of the 4Constitution, which are not affected by the impugned Act; and

that in carrying out their constitutional duty, the elected representatives of the people act with the mandate of the people.

Court's Determination of Issue No. 6 (g):

The Spirit and Character of the 1995 Constitution:

Article 2 of the 1995 Constitution provides as follows:

"***2. Supremacy of the Constitution.***

(1) This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.

(2) If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void."

Thus, the Constitution is the supreme legal instrument in our jurisdiction; and therefore the bedrock of constitutional governance. The power the people have conferred on the Legislative arm of government to make laws for good order and good governance is enshrined in it. Accordingly then, any law passed by the Legislature that is inconsistent with, or is in contravention of, thus not in consonance with, the Constitution, is

void to the extent of the inconsistency or contravention. Put differently, because the Constitution is the repository of the will and aspiration of the people, all laws are made there under; and are therefore subordinate to it. Accordingly then, where any law is in conflict, or is incompatible, with the Constitution, it is the Constitution that prevails; and such provision of the law that is in violation of the Constitution is invalid.

Admittedly, the Constitution is liable to amendment or alteration; but, owing to its special character as the sovereign legal instrument, for any amendment or alteration thereto to be justified, there has to be compelling reason for doing so; and the amendment must be done in strict compliance with the manner expressly provided for in Chapter Eighteen of the Constitution itself. As was succinctly stated by Lord Diplock, who delivered the decision of the Privy Council in ***Attorney-General of Trinidad and Tobago & Anor vs McLeod [1985] LRC 81***, at p.84:

> *"Although supreme, the Constitution is not immutable. As was pointed out in the majority judgment of the Judicial Committee in* ***Hinds and Others vs Regina [1977] AC 195*** *at p.214, constitutions on the Westminster model ... ... provide for their future alteration*

by the people acting through their representatives in the parliament of the state. In constitutions on the Westminster model, this is the institution in which the plenitude of the state's legislature is vested."

Crabbe, in ***Understanding Statutes*** (supra), states at p.56 as follows:

"Not all of the provisions of the Constitution are justiciable, but fundamentally the Constitution creates authorities and vests certain powers in these authorities. It gives certain rights to persons as well as to bodies of persons. It imposes obligations in much the same way as it confers privileges and powers. ... ... A written Constitution thus lays down certain mechanics of enactment which a Parliament under that Constitution must obey. The Constitution establishes the fundamental maxims by which the authorities it creates must guide their conduct. It thus controls alike those who govern and those who are governed. It sets the standard by which the duties are measured, the obligations, the powers, the privileges and the rights it has conferred, or imposed."

Nonetheless, a sovereign legal instrument – that is the embodiment and reflection of our collective values and aspirations as a people – such as the Constitution is, ought not to be treated like a garment;

the use of which is determined by the weather! It must instead enjoy utmost respect and due regard as a central pillar of our life; and must at all times be characterised by substantial stability, which then naturally and directly translates into, and manifests itself in, the much desired and deeply cherished stability, peace, and development, of the country. It is thus important for, and incumbent on, the people and leaders of our country to take cognizance of this imperative; and so ensure that we do not lose sight of the need to pursue the path that will lead us to become a prosperous people, at peace with ourselves.

The Basic Structure Doctrine

This doctrine, which applies exclusively to constitutional amendments, is a judicial principle with its roots and origin in India; and is founded on the proposition that the Constitution of India has, expressly enshrined therein, certain basic features that Parliament has no power to alter or destroy through amendments. Court is, therefore, under duty to review and strike down constitutional amendments effected by Parliament; but which conflict with or seek to alter the "basic structure" of the Constitution. What constitutes the basic structure of the

Constitution has not been conclusively settled; hence, whether or not any particular feature of the Constitution amounts to a "basic" feature, is left to Court to determine. In doing so, Court must ascertain and be guided by the character of the Constitution in issue.

In ***Sajjan Singh v State of Rajasthan 1965 AIR 845***, where this doctrine was first considered by the Supreme Court of India, Mudholkar J. stated in his dissenting judgment as follows:

> *"It is also a matter for consideration whether making a change in a basic feature of the Constitution can be regarded merely as an amendment or would it be, in effect, rewriting a part of the Constitution;..."*

The Indian Supreme Court's initial position on constitutional amendments was that no part of the Constitution was saved from amendment. It supported the proposition that by passing a Constitution Amendment Act in compliance with the requirements of Article 368, Parliament could amend any provision of the Constitution; including the provisions on Fundamental Rights, and Article 368. In ***Shankari Prasad Singh Deo v. Union of India (AIR. 1951 SC 458),*** the Supreme Court unanimously held that:

"The terms of article 368 are perfectly general and empower Parliament to amend the Constitution without any exception whatever."

Later, in ***Golaknath v. State of Punjab 1967 AIR 1643*****,** a Coram of eleven judges of the Supreme Court deliberated on whether any part of the Fundamental Rights provisions of the Constitution could be revoked, varied, or limited by amendment of the Constitution. By a majority of 6 to 5, the Court held that an amendment of the Constitution is a legislative process, and that an amendment under Article 368 is "law" within the meaning of Article 13 of the Constitution; and therefore, if an amendment "*takes away or abridges*" a Fundamental Right conferred by Part III, it is void. Article 13(2) reads, "*The State shall not make any law which takes away or abridges the right conferred by this Part and any law made in contravention of this clause shall, to the extent of contravention, be void.*"

The Court also ruled that Fundamental Rights included in Part III of the Constitution have a "*transcendental position*" under the Constitution; and are beyond the reach of Parliament. It held further that the scheme of the Constitution and the nature of the

freedoms it granted barred Parliament from modifying, restricting, or impairing the Fundamental Freedoms provided for in Part III of the Constitution.

In ***Kesavananda Bharati v. State of Kerala AIR 1973 SC 1461***, a Coram of thirteen Judges reviewed the decision of the Court in ***Golaknath v. State of Punjab*** (supra); and considered the validity of the 24th, 25th, 26th, and 29th Amendments. By a majority of 7 to 6, the Court held that no part of the Constitution, including Fundamental Rights, was beyond the amending power of Parliament; thus departing from its decision in the ***Golaknath v. State of Punjab*** case (supra). However, it held that the "*basic structure of the Constitution could not be abrogated even by a constitutional amendment.*" In ***Minerva Mills v. Union of India, AIR 1980 SC 1789***, the matter in issue was the 42nd Amendment, which the Parliament had passed to counter the Court's decision in ***Kesavananda Bharati*** case (supra); thus, it limited the Supreme Court's power in the exercise of judicial review of constitutional amendments.

The Supreme Court seized the occasion of the ***Minerva Mills*** case, to declare sections 4 and 55 of the 42nd Amendment as

unconstitutional. The Court ruled that Parliament could not, in the exercise of its power to amend the Constitution, convert the limited power it has, into an unlimited power, as it had purported to do through the 42nd amendment. On section 55 of the amendment, Yeshwant Vishnu Chandrachud CJ stated as follows:

> *"Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. Indeed, a limited amending power is one of the basic features of our Constitution and therefore, the limitations on that power cannot be destroyed. In other words, Parliament cannot, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one."* ***(emphasis added).***

Thus, the Indian Supreme Court's position, as is laid down in a handful of its judgments, is that Parliament can amend the Constitution; but any amendment that destroys the Constitution's 'basic structure' is invalid. As has been sufficiently brought out by

learned Counsel Elias Lukwago, Courts in various jurisdictions have, one way or the other, adopted the Indian proposition of law on the doctrine of basic structure of the Constitution.

As to what amounts to a basic structure of the Constitution, it is for the Court before which the issue arises, to decide; depending upon the facts of each case. In India, Sarv Mittra Sikri CJ, who delivered the majority decision in the ***Kesavananda*** case (supra), spelt out that the basic structure of the Constitution consists of the following:

"The supremacy of the constitution.

- *A republican and democratic form of government.*
- *The secular character of the Constitution.*
- *Maintenance of the separation of powers.*
- *The federal character of the Constitution."*

The basic structure principle has been expressed in alternative ways; but referring basically more or less to the same thing.

In Uganda, Kasule JA/JCC, in his dissenting judgment, considered the issue of basic structure of the Constitution in ***Saleh Kamba &***

others v Attorney General & others; Constitutional Petition No. 16 of 2013; where he stated as follows:

> *"Therefore from the historical perspective, the Constitution is to be interpreted in such a way that promotes the growth of democratic values and practices, while at the same time doing away or restricting those aspects of governance that are likely to return Uganda to a one party state and/ or make in-roads in the enjoyment of the basic human rights and freedoms of conscience, expression, assembly and association."*

I have gone to considerable length to review these selected decisions on the issue of basic structure doctrine in the interpretation of provisions of the Constitution, to demonstrate a number of things. First, is that the doctrine is still at a nascent stage of its development; and so it has not yet gained universal appeal. Second, is that even in India, where it originated and has come up for consideration several times, the matter has not been authoritatively or conclusively settled; as is manifested by the ambivalence discernible in the decisions of the Indian Supreme Court on the matter. Third, is the narrow or thin margin – in the for and against decision – of the Indian Supreme Court on both

occasions when the matter was placed before a panel constituting the highest number of judges; pointing to the fact that the Court's decision could have gone either way on both occasions.

With regard to the 1995 Constitution of Uganda, this Court has to consider and determine a few matters; amongst which is the approach to adopt in giving meaning to provisions of the Constitution. While the issue of the basic structure doctrine is one that cannot be avoided in constitutional construction, maybe the proper approach is not to be bogged down in semantics or terminology in applying rules of interpretation; but rather focus on the meaning of phrases used in the Statute in issue. As Shakespeare was wont to say, there is nothing in a name. Calling anything by a different name does not change the identity of that thing! It seems to me that the term '*basic structure*' is restrictive, as it could on the face of it be understood to refer to the fundamental physical fabric or cords that hold the Constitution together; and the removal of any of which would noticeably alter or affect the character of the Constitution.

I think the approach by the Supreme Courts of Bangladesh and South Africa has a wider catchment area; and is more

accommodative. In the ***Anwar Hossain Chowdry*** case (supra), Justice B.H. Chowdhury stated thus:

> *"Call it by any name- 'basic feature' or whatever, but that is the fabric of the Constitution which cannot be dismantled by an authority created by the Constitution itself – namely the Parliament ... Because the amending power is but a power given by the Constitution to Parliament, it is a higher power than any other given by the Constitution to Parliament, but nevertheless it is a power within and not outside the Constitution."*

Justice Shahabuddin Ahmed, for his part, reasoned in the same case that the people alone have the 'constituent power' to make a Constitution; so the constitutional power that is vested in Parliament is a 'derivative' power and thus limited. He listed a number of constitutional principles, such as the people's sovereignty, supremacy of the Constitution, democracy, unitary state, separation of powers, fundamental rights, and judicial independence, which he contends are the structural pillars of the Constitution; and are therefore beyond the amendment power conferred on Parliament by the Constitution. He contended that if the exercise of the amendment power by Parliament transgresses

its limits, it is in the power of the Court to strike down such an amendment even if it is a constitutional amendment.

In ***Premier KwaZulu- Natal and President of the Republic of South Africa 1996 (1) SA 769 (CC)***, in a judgment with which the other members of the Court concurred, Mohamed DP clarified thus:

> *"There is a procedure which is prescribed for the amendment to the Constitution and this procedure has to be followed. If that is properly done, the amendment is constitutionally unassailable. It may perhaps be that a purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and reorganising the fundamental premises of the constitution, might not qualify as an 'amendment' at all."*

In ***Executive Council of the Western Cape Legislature v the President of the Republic 1995 10 BCLR 1289 (CC)***, Justice Sachs pointed out that:

> *"There are certain fundamental features of Parliamentary democracy which are not spelt out in the Constitution but which are inherent in its very nature, design and purpose. Thus, the*

question has arisen in other countries as to whether there are certain features of the constitutional order so fundamental that even if Parliament followed the necessary amendment procedures, it could not change them. I doubt very much if Parliament could abolish itself, even if it followed all the framework principles mentioned above. Nor, to mention another extreme case, could it give itself eternal life - the constant renewal of its membership is fundamental to the whole democratic constitutional order. Similarly, it could neither declare a perpetual holiday, nor, to give a far less extreme example, could it in my view, shuffle off the basic legislative responsibilities entrusted to it by the Constitution."

In the Kenyan case of ***Njoya & others v Attorney General & others [2004] LLR 4788***, the High Court, applying the basic structure doctrine, rejected the contention that Parliament's power to amend the Constitution includes power to make changes which amount to the replacement of the Constitution. It found that *'the [amendment] provision ..... plainly means that Parliament may amend, repeal and replace as many provisions as desired provided the document retains its character as the existing Constitution'*; and

further that *'alteration of the Constitution does not involve the substitution thereof with a new one or the destruction of the identity or the existence of the Constitution altered'*. Basing on the Indian 'basic structure' doctrine, the Court held that fundamental constitutional change could only be made by the exercise of *original constituent power*.

In ***Rev. Christopher Mtikila v Attorney General –2006 (10 of 2005) [2006] TZHC 5***, Court was construing the import of a constitutional amendment that had banned the participation of no–party (independent) candidates in the general elections. The High Court of Tanzania stated that *'it may of course sound odd to the ordinary mind to imagine that the provisions of a constitution may be challenged for being unconstitutional'*; but, however, it expressed itself that *'this Court may indeed declare some provisions of the Constitution, unconstitutional'*.

It would appear that both concepts of basic structure, and basic or fundamental features, as was expressed by the Bangladeshi and South African Courts, and have a very thin line dividing them, apply to the 1995 Constitution of Uganda. The principal character of the 1995 Constitution, which constitute its structural pillars,

includes such constitutional principles as the sovereignty of the people, the Constitution as the supreme legal instrument, democratic governance and practices, a unitary state, separation of powers between the Executive, Parliament, and the Judiciary, Bill of Rights ensuring respect for and observance of fundamental rights, and judicial independence.

In the fullness of their wisdom, the framers of the 1995 Constitution went a step further in clearly identifying provisions of the Constitution, which it considers are fundamental features of the Constitution. They carefully entrenched these provisions by various safeguards and protection against the risk of abuse of the Constitution by irresponsible amendment of those provisions. The safeguards contained in the provisions entrenched in the Constitution either put the respective provisions completely and safely beyond the reach of Parliament to amend them, or fetter Parliament's powers to do so and thereby deny it the freedom to treat the Constitution with reckless abandon. Article 259 of the Constitution offers the provision signifying the safeguards to the Constitution; by providing as follows:

"(1) Subject to the provisions of this Constitution, Parliament may amend by way of addition, variation, or repeal, any provision of this Constitution in accordance with the procedure laid down in this Chapter.

(2) This Constitution shall not be amended except by an Act of Parliament–

(a) the sole purpose of which is to amend this Constitution; and

(b) the Act has been passed in accordance with this Chapter."

Article 75 of the Constitution prohibits Parliament from enacting a law establishing a One Party State; meaning, in essence, that it is only the people who can do so pursuant to the provision of Article 1(4) of the Constitution. Article 260 of the Constitution lists provisions in the Constitution, the amendment of which Parliament can only recommend; but can only become law upon the approval of the people in a referendum. Similarly, Articles 69 and 74(1) of the Constitution provides for the requirement of a referendum to determine whether there should be a change in the political system to be applicable in Uganda at a given time. Other provisions, such as Articles 260, and 262**,** require special majority; to wit, two –

thirds majority of the entire membership of Parliament in the second and third readings of the Bill for the amendment of provisions referred to under Articles 260 and 261 of the Constitution.

It is only such provision of the Constitution as is referred to under Article 262, which Parliament may amend under the general powers conferred on it to make laws as is envisaged under the provision of Articles 79 and 259 of the Constitution. Otherwise, for amendment of the provisions of the Constitution covered under Articles 260 and 261 of the Constitution, as exceptions to the general rule, there is, respectively, the mandatory requirement of approval by the people in a referendum, and ratification by the specified proportion of District Councils. In addition, Article 263 provides that the votes required in the second and third readings referred to in Articles 260 and 261 of the Constitution must be separated by at least fourteen sitting days of Parliament.

Article 77 (4) for its part, as I will discuss at length below, restricts the extension of the tenure or life of a serving Parliament to six months at a time; which can only be necessitated by either a situation of war, or emergency, rendering holding an election

impossible. Furthermore, in addition to the requirement for satisfying the threshold of the stated special majority, and fourteen sitting days space between the second and third readings of the Bill, Article 260 provides that the provisions entrenched therein can only be amended after the people have positively pronounced themselves thereon in a referendum. These provisions, for the people to exercise their original constituent power in the amendment of the Constitution, are clear manifestation of the safeguards inbuilt within the Constitution to secure the provision of Article 1 of the Constitution; which recognises that ultimate power vests in the people.

Then there is the special provision of Article 44 of the Constitution; which prohibits any form of derogation whatever from the human rights and freedoms specified therein; as follows:

"Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms–

(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;

(b) freedom from slavery or servitude;

(c) the right to fair hearing;

(d) the right to an order of habeas corpus."

It is these non-derogable provisions, protecting fundamental human rights, with respect to which the phrase ***'tojikwatako'*** (do not touch it) – which gained notoriety during the Constitution amendment process, urging members of Parliament not to touch the Constitution – would have been most relevant.

Issues Nos.1 – 4. Whether the extension of the tenure of Parliament and that of the Local Government Councils contravened the various provisions of the Constitution; and whether their retrospective and retroactive operations equally contravened the various provisions of the Constitution also stated.

Submissions Of Counsel:

The case for the Petitioners:

Mr. Dan Wandera Ogalo, learned counsel for the petitioner in Petition No. 3 of 2018, led the case for the petitioners owing to his seniority at the Legal Bar. With regard to the principles of constitutional interpretation he cited ***Constitutional Petition No.16 of 2013 Saleh Kamba and Others v Attorney General***; wherein the principles are restated by Court. He reminded Court of the

constitutional and political instability, which has plagued this country since independence; and urged that in interpreting the Constitution, that history should be taken into account. He submitted that the Constitution should be interpreted in a manner that promotes democratic values and practices, while at the same time disregarding or avoiding those aspects of governance that are likely to return us to the past. He thus implored Court to give an interpretation that is progressive and giving effect to democratic principles.

Issues 1 and 2

Counsel submitted that the increase of the term of parliament from five to seven years under Section 2 of the Constitution (Amendment) Act No. 1 of 2018, was inconsistent with Article 8 (A) of the Constitution; which, he argued, imports the Directive Principles of State Policy into, and makes them part of, the Constitution. He cited ***Constitutional Appeal No. 1 of 2015; Theodore Ssekikuubo & others v Attorney General & others***, where the Supreme Court in interpreting the Constitution, imported and relied on the democratic principles enshrined in the directive policy. Court stated that one of the principles of democracy is the

doctrine of separation of powers; hence, in the interpretation of the Constitution, it would take into account that doctrine because it is a principle of democracy. He prayed that the same doctrine guides this Court in establishing whether Section 2 of the impugned Act is constitutional or not.

Counsel noted that the essence of rule of law is simply that everyone, regardless of the power they may hold or not, must obey the law. He argued that in enacting and increasing its term from five to seven years, Parliament had not followed the law; hence, it contraveed the rule of law. He therefore invited Court to use the principle of rule of law to hold that the enlargement was unconstitutional. He observed that Article 93 of the Constitution gives power to Parliament to make its own Rules of Procedure; and submitted that these Rules cannot be equated to Statutory Instruments or Regulations since they emanate from an Act of Parliament. He cited ***Biti & Anor v Minister of Justice, Legal and Parliamentary Affairs & Anor (2002) AHRLR 266 (Zw SC 2002)***, where Court referred to Section 57 of the Constitution of Zimbabwe under which Parliament makes its Rules of Procedure; and for

which Court held that having made such a law, Parliament cannot ignore it.

With regard to Hon. Magyezi's Bill, counsel observed that the long title thereto contained three major provisions; namely:

(i). Provisions providing for time within which to hold Presidential, Parliamentary and Local Government elections.

(ii). Eligibility of a person to be elected President and District Chairperson.

(iii). Matters relating to Presidential elections petitions and holding bi-elections in case of fresh elections.

He noted that Rule 121 of the Rules of Procedure of Parliament allows it to accept and debate new clauses in the Bill, if the amendments are relevant to the subject matter of the Bill. He argued further that Parliament can only introduce a new amendment to the Bill if it is relevant to the subject matter of the Bill as is contained in the long title. He thus faulted Parliament for the enlargement of its term from five to seven years; something that Hon. Magyezi's Bill did not cater for, but was only introduced during the Committee of the whole House stage after the Second

reading of the Bill; yet the enlargement of the term of Parliament had no relevance to the subject matter of the Bill.

Counsel invited Court to take into account the persuasive Zimbabwean authority to find that Parliament contravened Rules 104(1), 105(2), 121(2) and 123(4) of its Rules of Procedure; and thereby disregarded the principle of rule of law required under Article 8A of the Constitution. As such, he contended, the enactment of Section 2 of the impugned Act is unconstitutional. He added that it was important that there is a check on Parliament so that it does not make laws in contravention of the law.

Regarding the question of which Rules were applicable at the time of the passing of the Act, counsel pointed out that at the time leave was sought to present the Bill, the Rules in force was that, which came into force on 21st May 2012. However, on 10th November 2017, new Rules of Procedure of Parliament came into force. Counsel argued that Rule 123 (4) of those Rules provides that the House should consider only those amendments presented to the committee and rejected; or where the mover, for reasonable cause, did not present the amendments to the committee but instead presents them to the plenary, he or she should give reasons why

they did not. However, he submitted, this was not the case here. In this case, leave was sought on 27th September 2017, and the Bill was presented before Parliament on 3rd October 2017.

Counsel cited ***Constitutional Petition No. 8 of 2014; Oloka Onyango & others v Attorney General***; where Court, on pages 20-23, found that because Rule 23 of the Rules of Procedure of the House was contravened, the Act passed was null and void; and held further that enactment of the law is a process, and if any stage is fraudulent, then that vitiates the entire law. Counsel further pointed out that whereas Parliament set out to amend Articles 61, 102, 104 and 183 as is clearly shown in the Memorandum and body of the Bill, it indirectly amended Article 77 (4) by providing under section 8 that the term/ life of Parliament shall expire after seven years from the date of its first commencement. To counsel, by so doing Parliament gave itself two extra years.

He noted that Article 77 (4) deals with the extension of the life of Parliament and it gives the circumstances under which Parliament may extend its term and it could only do that by a resolution supported by not less than two-thirds of all members of Parliament; and for a period not exceeding six months at a time. It was his

further argument that Parliament extended its term by two years in the absence of and going against all the tenets provided for under Article 77 (4). He contended that the purpose of that Article was to ensure that Parliaments do not exceed their mandate and that they always should go back for elections when they are due. He referred to the Draft Constitution of the Republic of Uganda that was debated; which provided that only where there existed a state of war or a state of emergency or such other circumstance as would prevent a normal general election from being held, may Parliament extend its life.

He also referred to the Odoki Commission and observed that the Draft Constitution which was debated by the Constituent Assembly provided that Parliament could extend its life during war, emergency or 'any other circumstance' but the Constituent Assembly, at the instance of one of the delegates, Hon. Wandera Ogalo, proposed that the phrase *'or such other circumstances'* be deleted. He explained that this was to clearly provide for the circumstances under which Parliament could extend its life; and not in any other circumstance could it do so. He also noted that in the Report of the Select Committee, the Chairperson emphasised that

no other circumstances should be allowed to prevent general elections, since the deleted words could provide room for manipulation; and thus negate the concept of regular elections.

It was thus his contention that the intention was clearly that a member of Parliament must face election, and as such, for Parliament to go round and dodge the 2020-2021 election, went against the intention of the framers of the Constitution. The other justification was that the people did not want the recurrence of what transpired in 1967, 1989 where Parliament always chose to extend their life instead of going back for elections. Counsel noted that Article 77 (3) provides for a term of five years, and Article 96 provides that Parliament shall be dissolved at the expiration of its term. He referred to the affidavit of Francis Gimara where he averred that this Parliament first sat on the 19th of May 2016, meaning that it has to be dissolved on or before 18th of May 2021; and yet the impugned Act, in effect, extended the term to 2023, by infection amending Article 96 of the Constitution.

He referred to Articles 1 and 2 of the Constitution, which provide that people shall be governed through their will and consent, through regular and fair elections. He argued that after 2021, there

will be a Parliament but without the will and consent of the people, especially because the people were not consulted on this matter. To him, Section 8 contravened Article 1 and yet the amendment of that Article required a Referendum under Article 260 of the Constitution. He also noted that Section 8 violated the democratic principles of governance that encourage active participation of all citizens in their governance and access to leadership positions. He contended that what Parliament had succeeded to do was ring-fence the available positions to ensure that no one else can contest for a Parliamentary seat after 2021. He cited ***Constitutional Appeal No. 0001 of 2002; Ssemwogerere v Attorney General*** where Court at pages 5, 6, 16, 20, 39, 40, 73, 74 and 77, settled the point that where an amendment affects a provision of the Constitution and has an effect of adding to or repealing such provision, whether it expressly says so or not, it has amended it.

Issues 3 and 4:

Counsel adopted his submissions under Issues 1 and 2 and invited this Court, when interpreting the Constitution, to take into account the history of the Country and to interpret the Constitution relying mainly on the democratic principles as he had clearly laid out. On

this, he referred to paragraph 26 of the affidavit of Francis Gimara where he stated that Local Government Councils were elected in 2016, and Articles 176 (3) and 184 (6) require elections after every 5 years but now with this law the people will not express their will and consent to be governed in 2021. He adopted the same arguments as laid out in respect of the Articles under Issues 1 and 2.

He cited ***Ssemwogerere*** case (supra) to refer to the principle of accountability under Principle No. 26 (ii) which requires that all people holding leadership positions should be answerable to the people. To counsel, accountability for election is done at the time of elections when the Members of Parliament and of Local Government Councils go back to account for their 5 years. He argued that with the removal of 2021 to replace it with 2023, it would mean that there shall be no accountability in 2021 in effect violating the Directive Principles of State Policy. He invited Court to take into account accountability as one of the principles for democracy which is in the Directive Principles of State Policy, and hold that the enactment was in breach of that principle and therefore unconstitutional.

On retrospective application, counsel submitted that when Section 8 amended Article 289 providing that the term of the current Parliament at the time this Article comes into force, notwithstanding anything in this Constitution, shall expire after seven years of its first sitting after the general election, meant that the term of the current Parliament will be seven years from 2016. Counsel disclosed that he was unaware of any particular constitutional provision that forbade retrospective application of legislation; but pointed out that in relation to Article 1, and whereas Parliament has powers under Article 79 to make laws, these should be for the peace, order, development and good governance of Uganda and should be in compliance with and subject to all the relevant provisions of the Constitution.

Mr. Byamukama James:

He associated himself with the substantive submissions of Mr. Wandera Ogalo; and in addition to the submissions on Article 77 (4), he asked Court to take judicial notice of the fact that there was no state of war or emergency in Uganda to justify Parliament's extension of its life not just by six months but by two years from five to seven years. He noted that the back-dating of the legislation

to 2016 had the effect of giving the 10th Parliament a two year extension that clearly violates and makes the seven year extension incurable in terms of Article 77 (4). Counsel cited the affidavit of the Clerk to Parliament attached to the Answer to Petition No. 10 of 2018, wherein she averred that Parliament was at all times aware of Article 77 (4) of the Constitution but only 'prescribed' the term of Parliament but did not extend it.

He argued that the accepted practice when paraphrasing from a law is to use the words used in the law itself. He stated that Article 77 (4) provides for 'extending' and as such for Parliament to say that it was 'prescribing', that meant that Parliament had now become supreme to the Constitution, a fallacy in his view. He noted that in addition to Article 1 (4), the other provisions violated by the enactment of Sections 2 and 8 included Articles 61 (2) and 289 of the Constitution. It was his contention that the gist of Article 61 (2) is that all these elected offices are born at the same time. He stated that Article 289 made Presidential and Parliamentary offices like twins as it provided that their terms expired on the same date.

Mr. Elias Lukwago:

Counsel submitted that the amendment to extend the tenure of parliament and local councils offended Article 91 on the legislative powers of Parliament. He cited Article 91 (1) which provides that subject to the provisions of this Constitution, the power of Parliament to make laws shall be exercised through bills passed by parliament and assented to by the President. He stated that it was clear from the pleadings and the evidence on record that the issue of the extension of the tenure of Parliament was never provided for in the Bill that was presented before Parliament. It was thus his contention that there was no way Parliament could exercise its legislative power without having a Bill for an Act of Parliament and as such, it was unconstitutional to legislate especially on constitutional matters without a Bill for an Act of Parliament.

He argued that the available Bill was presented to amend Article 102 (b) and never at any time was it intended to amend any provision relating to the extension of the term of Parliament. He also referred to Rule 116 of the Rules of Procedure, which states that all Bills shall be accompanied by an explanatory memorandum setting out the policy and principles of the bill, the defects in the existing law if any, the remedies proposed to deal with those

defects and the necessity for the introduction of the bill. It was his submission that those issues were necessary so that the legislators and the people of Uganda understand what they are legislating about, and not for Parliament to exercise its mandate to amend the Constitution in such a casual manner. He noted that in case of any evolutions, there were procedural requirements about evolution as well laid out in the Rule of Procedure.

He further cited **Article 94 (2)** of the Constitution, and Rule 93 (4) of the 2017 Rules which provides that a member having any interest in any matter before the House shall declare the nature of his or her interest in the matter and shall not vote on any question relating to that matter. He contended that in this particular case, in inserting a clause in a Constitutional amendment that extended their term, the members of Parliament did what actually benefited them exclusively as it provided for the members in the 10th Parliament. On evolution of legislations, counsel cited and referred to a Kenyan authority of ***Constitutional Petition No.3 of 2016, Law Society of Kenya v the Attorney General***, where at page 80, Court held:

"Therefore by introducing totally new and substantial amendments to the Judicial Service Act 2011 on the floor of the House, Parliament not only set out to circumvent the constitutional requirements of public participation but, with due respect, mischievously short- circuited and circumvented the letter and spirit of the Constitution. Its actions amounted to violations of Articles 10 and 118 of the Constitution".

Counsel submitted that this fell on all fours with the instant case.

Mr. Lester Kaganzi:

Counsel referred to the date 27th September, 2017 in the Hansard, when the Bill was first laid on the floor of Parliament; seeking leave to table the Bill. He cited the Speaker telling Parliament that in handling that Bill, Parliament should be mindful of the sovereignty of the people under Article 1 of the Constitution and that as such, since the question of who governed them had been settled in February 2016, how to go about the Bill was a matter where the people were so central and it was not an issue Parliament could decide alone. To counsel, this touched the issue of social contract. On the 3rd October 2017, was the first reading of the Bill. The 2nd reading of this Bill was on Tuesday 19th December 2017; and the

Speaker pointed out that i*n the Chairman's report, there are two matters that were not originally part of the bill, viz:*

1. *The issue of term limit we would like to know under whose instructions that part was addressed?*
2. *There was also the issue of adjusting the tenure of the President, we would like to know how it was canvassed.*

She further noted that there was also the issue of adjusting the term of Parliament and stated:

"Honourable Members when we give responsibility to a Committee like this, with a Bill, we expect them to address the Bill and do not go into extraneous matters. Therefore, I would like to know from the chairperson to whom the recommendations you made were addressed to and how did they come to be part of your report"

Counsel thus observed that it was the same question being placed before Court as to where these matters that were not originally part of the Bill came from to form part of the same. Moreover, even the Chairperson of the Committee admitted to the Speaker that the issue of extension of Parliamentary term was neither part of the Bill nor the Committee's Report. Furthermore, the Speaker went ahead

to ask whether that should not be the subject of separate Bills on their own right in the House. Counsel further quoted some of the members of the Committee members including Hon. Medard Segona who stated that it was not true to the best of his recollection that they had any memorandum submitted in relation to the seven year term whether of Parliament or the President.

He cited Hon. Muhammad Nsereko who stated that during the Committee sittings, at no single moment did any one appear before them and state clearly that they wanted a seven year term extension of Parliament. Hon. Amoding was quoted saying that she sat in almost all the hearings of the Committee and *there was not a day that they received a proposal that Parliament should extend its tenure to seven years.* It was thus counsel's contention that the Committee members' statements proved that the issue of extending Parliament's term to seven years was never part of the Bill presented by Hon. Magyezi. Moreso, the fact that the people were never consulted on this issue was proof of the contravention of Article 1 of the Constitution and breach of the social contract. He demonstrated that the impugned amendments were proposed on 20th December by Hon. Tusiime. He prayed that Court finds that

Sections 2 and 8 of the Act are unconstitutional as the procedure taken in enacting them was flawed.

Mr. Male Mabirizi Kiwanuka:

Mr. Mabirizi cited ***Ssemwogere & Anor v Attorney General Supreme Court Constitutional Appeal No. 1 of 2002*** where Court emphasised the role of the Constitutional Court in the defense of rights and freedoms of the individual against oppressive and unjust laws and acts. He further cited ***Citizens United v Federal Elections Commission 558 US 310 (2010) the United States Supreme Court*** where the Chief Justice of USA observed that judging the constitutionality of an act of congress is the gravest and most delicate duty that the Court was called upon to perform because the stakes are so high. He pointed out to Court that the stakes were so high as their duty was so grave.

On the burden of proof, he referred to ***Amama Mbabazi vs Museveni & 2 others Supreme Court Presidential Election Petition No. 1 of 2016*** where the Court held that the burden of proof is an imperative or duty on a party to produce or place, before Court, evidence that will shift the conclusion away from a default position to one's position. This is the necessity of affirmatively proving a

fact in dispute on an issue raised between parties in a cause. Court noted that the legal burden rests on the petitioner to place credible evidence before court to satisfy it that the allegations made by the petitioner are true. He also cited ***Raila Odinga v Uhuru Kenyatta & Anor; Kenya Supreme Court Presidential Election Petition No. 1 of 2017,*** in support of this position of the law.

He submitted that Parliament was put on notice that it had to do whatever was in compliance with the principles of the Constitution. He cited Hon. Gen. Tumukunde who read to the House a portion of the decision in ***Ssemwogerere v Attorney General*** (supra), and then warned that in amending one provision of the Constitution, Parliament stood the risk of amending another that they had no authority to do. He cited ***Centre for Rights Education and Awareness & Anor v The Speaker of the National Assembly, Kenya High Court of Kenya at Nairobi, Milimani Law Courts Constitutional & Human Rights Division, Petition No. 371 of 2016***. The Court stated therein that the power of the people is superior to both the Constitution and the Legislature; and that where the will of the Legislature is adverse to that of the people as is declared in the Constitution, the judge must give effect to the latter rather than the

former. He urged the judges to regulate their decisions by fundamental laws and not by their vows, which are not fundamental. He invited Court to follow the will of the people in interpreting the Constitution.

Mr. Mabirizi recognised Parliament's mandate to amend the Constitution, but that this is subject to the Constitution; but that in this case, it amended Articles 1, 2, and 260 of the Constitution without separating the two sittings with 14 sittings days of Parliament and without referring the matter to the people in a referendum. He invited this Court not to make an ad hoc decision since it would stand for generations to come. He referred to ***Katiba Institute & Another v Attorney General & Anor [2017] Eklr, Kenya Constitutional Petition No. 3 of 2016***; where Court held that in interpreting the Constitution, it would be guided by the general principle that the Constitution is a living instrument, with a soul and consciousness of its own, as is reflected in the preamble and fundamental objectives and directive principles of State policy. As such, Courts must endeavour to avoid crippling it by construing it technically or in a narrow spirit.

He also implored the Court to bear in mind the history of the country as it interpreted the Constitution. He cited ***Ssekikubo & 4 others v Attorney General – Supreme Court Constitutional Appeal No. 01 of 2015;*** where the Supreme Court, in establishing whether the suspension of a member by a political party leads to such member ceasing to be an MP, the Court analyzed the Constitution making history to establish how we came to have that clause in the Constitution. It found that this was because the people wanted accountability; and therefore found the interpretation given by the Constitutional Court to be incorrect. He submitted forcefully that Parliament amended Articles 1, 2, and 260 of the Constitution; without authority to do so. This, he described as '*colorable legislation'*; which the Supreme Court defined in ***Semwogerere v Attorney General*** (supra), as legislation made by a Legislature which lacks legislative power, or is subject to a Constitutional prohibition, may frame a piece of legislation to make it appear to be within legislative power or to be free from the Constitutional prohibition.

He noted that Article 105 which Parliament purported to entrench, amended Article 1 by impliedly providing under clause 5 that

Parliament shall have power to determine who shall govern the people of Uganda provided that is supported by two thirds of the Parliament. He argued that under Article 2, Parliament could have as well added that although the Constitution is supreme, Parliament may determine when the Constitution may not be. He noted that by entrenching term–limits, Parliament amended Article 260; which provides that for something to be entrenched, it must be subjected to a referendum. He contended that in this case, no referendum was held; and so, in its absence, nothing was done. He also noted that there was need to separate the 2nd and 3rd readings with 14 sitting days of Parliament; which was also not done.

He referred to page 21 of the Hansard and noted that when Mr. Magyezi reported to the Committee of the whole House, he stated that the Committee of the whole House had considered the Bill and passed it in its entirety with amendments and passed new clauses amending Articles 77, 181, 29, 291, 105, and 260 of the Constitution. He submitted that the Speaker fully heard this but did not put the House on notice of the requirement to separate the two sittings by 14 days. It was thus his contention that the Speaker of Parliament abdicated her constitutional duty and more so, that in

the absence of that separation, whatever Parliament did was a nullity and the whole amendment unconstitutional without possibility of severance, especially because Article 263 (1) makes it compulsory.

Regarding the Certificate by the Speaker, Mr. Mabirizi contended that it had several issues; including the issue that the Speaker only named 4 Articles (**61, 102, 104** and **193**) as having been amended, yet in actual sense Parliament amended more than that. He thus observed that the other Articles, including 1, 2, 77 that were amended indirectly, and 260 that was amended directly, remained unsupported by the Certificate. It was his contention, therefore, that the Certificate was not sufficient to amend those Articles, which were not mentioned in the Certificate; and more so, since the Certificate is a Constitutional requirement, and therefore any defect in it invalidated each and every thing in that Bill.

On constitutional replacement, he relied on an Article, ***'Unconstitutional Constitutional Amendments in the case study of Colombia: An analysis of the Justification and meaning of the Constitutional Replacement Doctrine'*** by Carlos Bernal published in the **International journal of Constitutional law** (volume 11,

Issue 2, 1 April 2013, pages 339- 357). He observed that the learned author stated that an amendment is a partial Constitutional replacement if it is of great transcendence and magnitude for the system; an example of which is an amendment establishing a monarchy. It was his contention that looking at the impugned amendment, the Constitution had been replaced. He cited the test given by the author as to what amounts to constitutional replacement. He stated that the first test is; what is the essential element of the Constitution that is at stake and how those essential elements under pin several provisions of the Constitution.

He noted that in this case there are two elements, viz; the sovereignty of the people and the qualifications or capacity of the President/Fountain of honor. He submitted that sovereignty of the people under- pinned Articles 1, 2, 3, 5 (1), 8A, 59(1), 69(1), 77(2), 77(3), 77(4), 83(1)(g), 83(1)(h), 84(1), 96, 103(1), 107(1a) 126(1), 127, 176(2)(c), 181(4), 260, 262, 263(1) of the Constitution. To him, by dealing with the sovereignty of the people all the mentioned Articles were overthrown by the amendment. He submitted that on qualifications of the President, the amendment underpinned Articles 16(3a), 51(2), 60(1), 91(1), 95(1), 98(1), 98(2), 98(4), 99(1),

99(2), 99(3), 99(4), 99(5), 100, 101(1), 101(2), 103(1), 103(4), 103(5), 104(1), 105(1), 105(2), 105(6), and 106, of the Constitution. He thus called upon this Court to find that what Parliament did amounted to colourable legislation, as well as constitutional replacement; in effect overthrowing the Constitution.

The case for the Respondent

Deputy Attorney General Mwesigwa Rukutana:

Learned Deputy Attorney General led the team of counsel for the Respondent. He submitted that in enacting Constitutional Amendment Act No.1 of 2018, the Parliament of Uganda acted within the law pursuant to the mandate and powers bestowed upon it by the Constitution of the Republic of Uganda 1995 as well as the rules of procedure governing the enactment of Constitution amendment Acts; and as such, the Constitution was duly amended. He also submitted that the Rt. Hon. Speaker of Parliament and all the Members of Parliament acted within the law during the entire process of conceptualization, presentation, consideration and passing of the Act and that similarly, the Government of Uganda acted legally when it facilitated the process of enacting the said law.

It was his contention that the Petitioners could not, and actually did not, suffer any damage as a result of the passing of the Act. That as such, the petitions were unfounded, frivolous, and vexatious and devoid of any merit whatsoever. He gave a brief historical background to the effect that after years of turmoil, bloodshed, political and economic retrogression, Ugandans constituted a Constituent Assembly (C.A.) that considered proposals that had been gathered by a Constitutional Commission. After that, and after a protracted process, the Assembly promulgated a Constitution on the 8th October 1995. He submitted that the C.A. took time to reflect on the history of this country and forged a solid foundation for building a strong system that would guarantee that we shall never revert back to the dark years of the past. He noted that in doing so, the Assembly put in place very powerful provisions that would steer our country, stability, safety, security, and economic advancement; and indeed over the years since the promulgation of the Constitution, all that has been achieved.

He stated that the Assembly considered the fact that our society is not static but rather dynamic; and with time, there would be continuous changes for the better. So it recognised that in order to

keep at pace with the dynamism and changing circumstances it was imperative to put in place provisions and mechanisms of changing some of the provisions of the Constitution, so as to remain in concert with the changing circumstances. To learned counsel, that had to be done without destroying the spirit and the basic structure and the foundation upon which the new nation was being built. To achieve that objective, the C.A. put in place what it agreed upon as National Objectives and Directive Principles of State Policy; which are directive ideals to the Constitution.

He stated that the Constituent Assembly provided, under Article 1 of the Constitution, that the people of Uganda are sovereign and power belongs to them. The framers of the Constitution also provided, under Article 1 (4), for the manner the people shall exercise their power in the determination of their destiny. The learned Attorney General contended that under the provision of Article 1 (4), the people of Uganda had the power to determine their destiny, either through referendum or through their elected representatives. It was thus his argument that when their elected representatives take a decision, the people had in effect determined their destiny; and that could not be deemed a usurpation of the

people's power, as long as whatever Parliament did was within the confines of the Constitution and all the relevant laws.

To the learned Deputy Attorney General, all the impugned amendments were carried out in pursuance of Article 259 of the Constitution; which is explicit on the power of Parliament to amend the Constitution in accordance with the Constitution. For this, he cited the Tanzanian case of ***Rev. Christopher Mtikila vs Attorney General*** (supra), of which the facts and Court's findings thereon are brought out herein above while considering Counsel's submission on the issue of basic structure doctrine.

Mr. Francis Atooke:

The learned Solicitor General (S.G.) handled issues 1 and 3 together, and 2 and 4 also together. He pointed out that he would rely heavily on, and be guided by, the principles of constitutional interpretation as they were laid down in the case of ***Kawanga Ssemwogerere and Another v Attorney General Constitutional Appeal No. 1 of 2002***. He submitted that the entire Constitution has to be read as a whole and no one particular provision destroying the other but sustaining the other. He emphasised that in the interpretation of the Constitution, there is need to uphold

the rule of harmony, completeness, exhaustiveness, and paramountcy of the Constitution. He noted that Parliament derives its power to make law for Uganda from Article 79 of the Constitution and it exercises those powers by virtue of Article 91 of the Constitution. It was his contention that Parliament exercised that power in passing the impugned Amendment Act.

He noted that section 1 (c) of the Acts of Parliament Act (Cap 2, Laws of Uganda 2000 Edn.) defines a 'Bill' as follows:

"Bill" means the draft of an Act of Parliament and includes both a private member's bill and a Government bill."

He observed that Chapter 18 prescribes the legislative procedure for amending the Constitution under Articles 259, 260, 261 and 263; and he contended that Parliament complied with those requirements in amending the impugned Articles. On the petitioners' contention that Parliament violated Article 94 (1), which empowers Parliament to make its own rules to regulate its own procedure, under rules 104(1), 105(2), 121(2) and 123(4), the learned Solicitor General argued that at the time the Bill was first brought to Parliament, it was the 2012 Rules of Procedure applicable. But at the time of the Second Reading on 18th of

December 2017, it was the new 2017 Rules that were applicable. He referred to the affidavit deposition by Jane Kibirige, the Clerk to Parliament, that the new Rules took effect on the 10th November 2017.

He thus contended that Parliament did not violate the principle of rule of law since it complied with the Rules of Procedure. He noted that Rule 104(1) of the 2012 Rules became Rule 114(1) of the 2017 Rules, Rule 105(2) became Rule 115(2), Rule 121(2) became Rule 131(2), and Rule 123(4) became Rule 133(4). He submitted that under Rule 114(1) of the 2017 Rules, and section 3 of the Acts of Parliament Act, it is provided that the head of a Bill shall bear a Short Title, and a Long Title describing the leading provisions of the bill. This explained why the Short Title did not contain issues that were later incorporated in the Long Title to the Bill. He also pointed out that the subject matter of the Bill, among other things, provided for a situation where elections were to be held for the President, Parliament, and Local Government Councils; and so, Article 61 was intended to regulate when the election on various categories of leaders would be held.

He referred to the Hansard of 20th December 2017, as attached to the affidavit of the Clerk to Parliament, and submitted that all those issues were brought for debate by Hon. Tusiime, and the Chair put the question to the members that the new clause be introduced as proposed. He submitted that Rule 133(4) of the new Rules provides for discussion and debate on that matter; stating that the Committee of the whole House shall consider proposed amendments by the Committee to which the Bill was referred. It may consider proposed amendments on notice where the amendments were presented but rejected by the relevant Committee; or where for reasonable cause, the amendments were not presented before the relevant committee. It was thus his contention that all those issues were brought to the Committee of the whole House and were debated; and that is how they were introduced and became part of the impugned Act of Parliament.

Meanwhile, the learned Attorney General clarified that the 14 days notice provided for in the Rules is not applicable when Parliament is amending Article 159; but is required only when amending the entrenched Articles, such as 260 and 261; which to him, were not amended. He clsarified further that it was the 3 days sitting rule –

Rule 201 (2) – that provides that debate on a report of a Committee on a Bill should take place at least 3 days after it has been laid on the table by the Chairperson, or Deputy Chairperson, or a member nominated by a Committee or by the Speaker; but that, however, this was suspended.

On the petitioners' contention that Article 77 (4) had been amended by implication, the learned Solicitor General contended that Article 77 (4) had not been amended in any way by the provisions that Parliament amended under sections 2 and section 6 of the Constitutional Amendment Act 2018. He noted that the conditions that exist for extending the terms of Parliament in Article 77(4) are still firmly in existence and were not affected by the amendment of provision of Article 77(3) as alleged by the petitioners. The learned Deputy Attorney General clarified that Parliament, in its wisdom, after consultations found that it was necessary to lengthen the life of Parliament from five to seven years; and that Article 77 (3) was like any other clause, and so it could be amended.

He added that clause 4 remained intact; as it was not amended. He noted that it was why it was taken to the transitional provisions; and Parliament thought it best that the amendment of Article 77

(3) should start with the current Parliament. To him, Article 77 (4) was not and could not be said to have been amended by implication or infection. He argued that if for instance in the seven years, a state of emergency arose, Parliament could extend its term; and there was nothing wrong with that. To him, Article 77 (3) could be amended and Parliament duly did so. The learned Solicitor General argued that there was nothing wrong with Parliament extending its own term as long as they did it in compliance with the Constitution.

He submitted that it was evident that all the amendments followed thorough consultations; and it was the people of Uganda who determined that a term of five years is too short. Hence, they instructed their representatives to enlarge the term to seven years; and they further stated that because of the evils we have witnessed, and it is so urgent, it should take immediate effect. He submitted that retrospective application of the law is not inconsistent with or in contravention of Articles 1 and 8A, and it is also provided for under S. 14 (4) of the Acts of Parliament. The learned Deputy Attorney General clarified that where the framers of the Constitution thought it was necessary to prohibit retrospective legislation, they said so explicitly.

In this regard, he referred to Article 92 of the Constitution which specifically provides for incidents in respect of altering the decision or judgment of any Court; and even then only between the parties to the decision. He also cited Article 28 (7) in respect to criminal proceedings. He contended that democracy is adherence to the rule of law which entails looking at a collective will of the people and that the rule of law entails adherence to the constitution and all other laws that are in place. He noted that democracy does not necessarily mean uniformity in thinking and aspirations, and that while the petitioners may be aggrieved it does not change the fact that the majority of Ugandans are very happy with amendments that were carried out. He prayed that Court finds that the amendments were duly done in compliance with the Constitution.

COURT'S CONSIDERATION AND RESOLUTION OF THE ISSUES:

Extension of tenure of parliament and local government councils

Issues No. 1, 2, 3, and 4:

For a proper and effective determination of these issues, it is important, first, to appreciate the status, functions, and role of Parliament in the constitutional scheme of arrangement. The

relationship between Parliament and the people, from whom Parliament's legislative power derives, is a contractual one. This is a derivative, and an extension, of the classical principle of social contract between the individual and society. It is a contract executed between the people in whom all power belongs as the sovereign, as is enshrined under Article 1(1) of the Constitution on the one hand, and the respective representatives who together constitute Parliament on the other hand. By this contract, the people have, pursuant to the provisions of Article 1(3) and (4) of the Constitution, vested certain powers in Parliament to execute on behalf of the people. The contract, which binds Parliament to the people, has both general and, as well, specific terms and conditions well spelt out in the Constitution.

Article 79 of the Constitution provides, on the functions of Parliament, as follows:

"79. Functions of Parliament.

(1) Subject to the provisions of this Constitution, Parliament shall have power to make laws on any matter for the peace, order, development and good governance of Uganda."

However, in the exercise of its powers and functions pursuant to the provision of Article 79 above, Parliament is under duty to exercise its best judgment in making laws; and in this, it is guided by the provision therein that legislations it enacts must be '*for the promotion of good governance and development of the country*'. This also applies when it is carrying out its other functions of representation of the people; such as the exercise of its oversight role over the Executive. This is the general power of representation contained in the contract between the representatives and the people. It enjoins Parliament to act in the public interest in the exercise of its function of law making. In the book, ***Legislative Drafting*** (supra), the author states at p.301 that:

> *"But ultimately, the obligation to act in the public interest requires that importance must be given to the public interest over the private and personal interests of the Legislators, Ministers and Officials. The Lawmakers must rise above their narrow personal interests and see that the public interests is given due precedence.*"

Pursuant to this principle of constitutional arrangement, the opening provision of Article 79 (1) which subjects Parliamentary powers to the Constitution is a clear statement that the will of

Parliament, or powers conferred upon it by the people, is subordinate to, and must be exercised strictly in conformity with the Constitution as the supreme and overriding legal instrument. Parliament has to exercise the powers conferred upon it, within the legal framework or parameters laid down in specific provisions of the Constitution itself; which parameters qualify the general power conferred on Parliament to make laws.

Constitutional Amendments

This contentious issue of the extension of the tenure of Parliament, and the Local Government Councils, arises from the provision of section 2 of the impugned Constitution (Amendment) Act No. 1 of 2008, which amends Article 77(3) of the Constitution, by providing that the tenure of Parliament shall be seven years. Similarly, section 6 of the impugned Act amends Article 181 of the Constitution by providing for seven–year tenure for Local Government Councils. On the face of it, these two provisions in the Constitution (Amendment) Act, No1, of 2018, amending the tenure of Parliament and Local Government Councils, fall within the general power conferred on Parliament under Article 79 of the Constitution to make laws.

However, these are constitutional amendments; hence, they are governed by the provisions contained in Chapter Eighteen of the Constitution; which specifically and exclusively cover amendments to the Constitution. Accordingly then, the amendments extending tenure of Parliament and Local Government Councils can only be valid upon proof that they were so made in accordance with the Constitution. It is questionable, whether the amendment in issue meets the test for validity; namely, that it was so done for the peace, order, development, and good governance, of Uganda. The reasons given in Parliament for the two-year extension, such as the need to afford members of Parliament time within which to acclimatise themselves with the procedure in Parliament; and yet the law sets a high academic qualification for being elected to Parliament, betray the true intentions behind the amendment.

It is quite apparent there from that peace and development of Uganda, or any of the other permissible justifications for amending the Constitution, did not feature at all in Parliament's consideration of the motion for the amendment of the provision regarding the tenure of Parliament. The purported reasons given for the extension were evidently personal to Parliament; which was most

unfortunately self-serving. The reasons could not pass the requirement for reasonableness as a test for justifying the amendment of the Constitution. In ***Attorney General vs Morgan [1985] LRC 770,*** at p.777, KELSICK C.J. stated as follows:

"The reasonableness or otherwise of a law has to be judged on broad principles, keeping in view the interest of the general public."

As I pointed out, herein above, in the course of discussing the issue of basic structure of the Constitution, the framers of the 1995 Constitution were alive to the need to have certain provisions of the Constitution secured by expressly entrenching them with clear provisions of the Constitution. The provisions entrenched in the Constitution either put the respective provisions safely beyond the reach of Parliament, or fetter Parliament's powers and thereby deny it the freedom to treat the Constitution with reckless abandon.

However, and admittedly, Article 77(3) of the Constitution is not entrenched; and so, on the face of it, it can apparently be amended with less restriction than the provisions that have been entrenched. It simply requires a two-thirds majority of all members of Parliament, both at the second and third readings, for it to pass. It

does not require the space of fourteen sitting days between the second and third readings, or a referendum for people's approval, for it to become law. That not withstanding, I recognise that there are provisions of the Constitution, which are not covered by either the provision of Article 260 or 261 of the Constitution expressly requiring special majority vote of Parliament and or referendum. Nonetheless, and implicit from the object of such provisions, the general power of Parliament to amend them are as much curtailed as if they were expressly provided for under Articles 260 or 261 of the Constitution.

Such provisions also dictate that the exercise of amending them is done strictly in compliance with the manner for doing so; as is provided for in the Constitution. An instance of such specific and express provision is the term of the social contract between the people and their representatives, contained in Article 77 (3) and (4) of the Constitution before the impugned amending Act came into force. They provided as follows:

"(3) Subject to this Constitution, the term of Parliament <u>shall be five years</u> from the date of its first sitting after a general election.

(4) Where there exists a state of war or state of emergency which would prevent a normal general election from being held, Parliament may, by resolution supported by not less than two thirds of all members of Parliament, extend the life of Parliament for a period not exceeding six months at a time." ***(emphasis added).***

The phrase '*subject to this Constitution*' means, except where there is a provision in the Constitution to the contrary, the term of Parliament shall be five years. Since the Constitution grants Parliament the power to amend the Constitution, and the provisions of Article 77 (3) and (4) thereof are, on the face of it, not entrenched or require any special condition, it means Parliament is at liberty to amend the provision of this Article of the Constitution on the tenure of Parliament. The question is however, first, whether a sitting Parliament can amend the Constitution with the effect that it alters its own tenure from the five years for which it was specifically elected. The restrictive provision of Article 77 (3) of the Constitution imposes a specific and limited period of five years as the tenure of each elected Parliament.

This period is only extendable for a short time, not exceeding six months at a time; as is provided for under Article 77 (4) of the

Constitution. Its noteworthy that the provision for extension of Parliamentary tenure secures the provision by spelling out expressly that it can only be justified '*where there exists a state of war or state of emergency which would prevent a normal general election from being held*'. This is codification of the doctrine of constitutional necessity; usually resorted to for validating or legitimizing what would otherwise be considered a violation of certain constitutional tenets. However, this doctrine being one of necessity, one cannot call it to one's aid in ordinary circumstances.

I therefore hold the strong view that before Parliament can extend its tenure pursuant to the provision of Article 77 (4) of the Constitution, on grounds of war or occurrence of an emergency, there must be a state of war, which the President would have declared under Article 124 of the Constitution. The war envisaged here, is with regard to external aggression; but given the nature and ravages of wars of insurgency in modern times, this provision should to my mind, cover such wars as well. Similarly, there must be a declaration of a state of emergency under the provision of Article 110 of the Constitution. Then finally, due to either of the two situations, it must be impossible to conduct elections, before

the extension of the tenure of Parliament can be justified. Otherwise, beyond these circumstances, Parliament has no authority to amend or vary the terms of the contract on the basis of which the representatives therein were elected by the people.

Accordingly then, on the evidence, there having been no state of war or emergency as is envisaged in the provision of the Constitution, Parliament's extension of its tenure by two years, was in breach of and undermined the express powers the people, as the principal in the agency contract, had conferred upon Parliament; and also contravened the Constitution. This unilateral variation of this specific term and condition of the social contract, securely enshrined in the Constitution, is a naked and blatant contravention of the express contractual term between the two parties; which was the mandate the people gave each of the representatives in Parliament, to represent the people strictly for a specific period of five years. Instead, Parliament usurped and arrogated unto itself power that exclusively vests in the people; as is clearly expounded in Article 1 of the Constitution.

The express codification, in the Constitution, of the specific and limited tenure of five years for Parliamentary representation, is an

embodiment of the law of agency; and derivative of the principle of social contract. In this contractual relationship, entered into between the people and their representatives on Election Day, the people in whom sovereign power vests, engage their elected representatives in Parliament to serve them**,** and delegate specific powers to them to exercise; but this is strictly for a definite period of five years only. Save for the occurrence of war or emergency, falling under the provisions of the Constitution pointed out above, the people's representatives must seek fresh mandate from the people upon the expiry of the statutory contractual five-year tenure.

Article 77 (4) of the Constitution is therefore part of the fundamental features of the Constitution. Hence, although it is not an entrenched provision of the Constitution, and its amendment is seemingly constitutional, the amendment in the manner Parliament did, is nevertheless unconstitutional. This is because Parliament was elected for a specific period of five years only; and this is a provision it cannot vary.

RETROSPECTIVE AND RETROACTIVE EFFECT OF AMENDMENT

Issue No. 4:

Section 8 of the impugned Act amends Article 289 of the Constitution by substituting therefor the following:

" ***Replacement of Article 289 of the Constitution.***

'289. Term of current Parliament.

Notwithstanding anything in this Constitution, the term of the Parliament in existence at the time this article comes into force, shall expire after seven years of its first sitting after the general elections'." ***(emphasis added)***.

By this provision, the amendment of the tenure of Parliament from five to seven years does not operate prospectively from the date of its amendment; but rather in retrospect from the year 2016, which is the date of the first sitting of the current Parliament that has amended the Constitutional provision on tenure of Parliament. It is this aspect of the amendment of tenure of Parliament, which is clearly and gravely problematic; as it has either retrospective, or retroactive, effect. A critical question to answer is, therefore, whether Parliament has the power to pass laws that have retrospective or retroactive effect. As C.K. Comans has pointed out in his article, ***The Power of the Commonwealth Parliament to***

make Retrospective or Retroactive Laws is Well Established*, 27 Australian Law Journal**, the words retrospective and retroactive are often used interchangeably. Crabbe explains in ***Understanding Statutes (supra) that a statute may in fact be both retroactive and retrospective; and that statutes falling in that category could be, and are usually prospective in character.

However, in the main, there is a distinction between retroactive and retrospective statutes; subtle or thin, as that distinction may be. The difference between the two principles of law lies in the test applicable in either case. Crabbe (supra) explains at p.166 that:

> *"For retroactivity, the question is whether there is in the Act, read as a whole, anything which indicates that the Act 'must be deemed to be the law from a date antecedent to its enactment'. For retrospectivity, the question is whether there is anything in the Act which indicates that 'the consequences of an earlier event are changed, not for the time before the enactment, but prospectively from the time of the enactment, or from the time of the commencement of the Act'."* ***(emphasis added).***

He then explains at p.168 that:

"A retrospective statute operates for the future. It is prospective in character but imposes new results in respect of a past event or transaction. A retroactive statute does not operate backwards; it operates forwards from a date prior to its enactment. A retrospective statute operates prospectively but attaches new consequences for the future to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was, or from what it otherwise would be with respect to a prior event or transaction." ***(Emphasis added).***

He then sums up at p.169 that:

"It is not difficult to identify a retroactive statute. There is a specific statement that it shall be deemed to have come into force on a date prior to its enactment. Or it is expressed to be operative with respect to past transaction as of a past time"

Accordingly then, the impugned provision of the Constitution (Amendment) Act No. 1 of 2008, on the tenure of Parliament, is retroactive in nature, as it is deemed to have come into force in 2006 when the current Parliament first sat; which is long before the amendment in issue. The same position holds for the Local Government Councils; as section 10 of the impugned Act amends

Article 291 of the Constitution by providing that the seven year tenure for Local Government Councils *'shall apply to the term of the Local Government Councils in existence at the commencement of this Act.'* It is worthy of note that the two retroactive provisions of the Act, contrast with the provision of section 8 of the Act; which introduces a new Article 289A of the Constitution, providing that Clause 2 of Article 105 of the Constitution, as amended, *'shall come into effect upon dissolution of the Parliament in existence at the commencement of this Act'.* This makes the provision prospective in character.

In ***Phillips v. Eyre (1890) LR 6 QB 1 at p.23***, Willis J. stated the principle of the application of the retrospection maxim as follows: –

> *"Retrospective laws are, no doubt, prima facie of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on the faith of the existing law ... Accordingly, the courts will not ascribe retrospective force to new laws affecting rights unless by express*

words or necessary implication it appears that such was the intention of the legislature."

Retrospective or retroactive legislation may be justified when it is passed in the public interest or in protection of guaranteed rights; but not for the benefit or satisfaction of narrow interests of a section of the people only. A classical case, in our own jurisdiction, in support of the case for retrospective legislation, is the Expropriated Properties Act, No. 9, of 1982 (Cap. 87, Vol. IV, Laws of Uganda, 2000 Edn.); but whose commencement date was in 1983. It was passed in rectification of a monstrous wrong committed by the ignoble regime of Idi Amin in 1972 – ten years before the law – when it forcefully deprived a section of persons of their properties, in violation and disregard of the guarantee for such rights under the 1967 Constitution. The Act was therefore passed as a guarantee of the protection of property rights clearly spelt out in the Constitution. While it was expressly prospective in nature, it nullified all past transactions over the assets of Departed Asians from the year 1972; thereby making it a retrospective legislation since it affected past transactions.

In purporting to exercise powers beyond what the people had conferred upon it, Parliament ousted and undermined the provisions of Articles 1 and 77 (3) & (4) of the Constitution; thereby amending those provisions of the Constitution by infection. For this, it is guilty of having acted *ultra vires* the Constitution; hence, it was on a frolic of its own. This being the case, its action done in breach of the constitutional contractual terms stated above, has no binding effect on the people. This legal position applies with equal force to the purported extension of the tenure of the sitting Local Government Councils, as it violates the constitutional contract between the people and the present Local Government Councils; which provides, under Article 181(4) of the Constitution, strictly for a five–year tenure.

This would equally apply to a sitting President; since, under the provision of Article 105(1) of the Constitution, the President would have been elected for a five year tenure. Furthermore, owing to the special status accorded the President by the Constitution, and the powers conferred upon him or her therein, Article 260 (1) (f) of the Constitution entrenches the five year Presidential tenure provided for under Article 105(1); by requiring a referendum to be held to

approve any amendment or alteration of that provision. Thus, in extending its tenure and that of the Local Government Councils by two years, Parliament disturbed the need to maintain the harmony in the electoral process; provided for under Article 61(3) of the Constitution, as follows:

"(3) Except where it is impracticable to do so, the Electoral Commission shall hold Presidential, general Parliamentary and Local Government Council elections on the same day."

An amendment of Article 77 (3) and (4) of the Constitution could only be permissible, and therefore be allowed to stand, if the amendment was done alongside the provision of Article 260 (1) (f) of the Constitution on the Presidential tenure. This would leave the date for Presidential election in conformity with that for Parliamentary and Local Government Councils, as is provided for under Article 61(3) of the Constitution. As it is, the amendment of Article 77 (3) and (4) of the Constitution, has the effect of unlawfully amending the provision of Article 260 (1) (f) of the Constitution by infection, in view of the fact that the required mandatory referendum for that purpose has not been carried out. Thus, where Parliament, which exercises agency powers conferred

upon it by the people, acts in excess of such power, it is a flagrant and blatant abuse of the Constitution; which this Court, in the exercise of its judicial oversight role, cannot condone.

In ***Marbury vs Madison 1 Cranch 137, 2 L Ed 60 (1803)***, where the Supreme Court of the United States held that *'a legislative act contrary to the constitution is not law*', Chief Justice John Marshall had this to say on the power of the Constitution; and the need to strictly comply with its provisions:

> *"To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if these limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it ...*"

The relationship between the people and Parliament being a contractual one, Parliament could only lawfully act unilaterally with regard to its tenure pursuant to a clear provision of the Constitution in that regard. Instances of such provision that permit

Parliament, or a member thereof, to act unilaterally and thereby terminate their Parliamentary tenure are in Article 83 (1) (a), (g), (h), and (i) of the Constitution. These provisions prescribe, respectively, for resignation of a member of Parliament, crossing over from a political party the member was elected under and crossing over to another political party, joining a political party when the member was elected as an independent, and taking up a public office appointment.

Similarly, the people themselves are bound by the contractual terms and conditions; and can only act unilaterally to terminate the tenure of a member of Parliament if this is done in accordance with the provision of the Constitution in this regard. Circumstances under which this may happen are provided for under Article 83 (f) and Article 84 of the Constitution for recall of a member of Parliament by the people. Outside of these provisions, it seems to me that the only way a sitting Parliament could extend its tenure by amending the Constitution, is by subjecting that amendment to approval of the people in a referendum pursuant to the provision of Article 260 (1) (b). This would involve both parties to the contract –

the people and Parliament – in the alteration or amendment of the Constitution.

Finally, on this matter, for such amendment to pass the requisite test for a valid enactment, it has to be expressly included in the certificate of compliance issued by the Speaker of Parliament; and sent to the President, together with the Bill for assent, in accordance with the provisions of Article 263 of the Constitution. In the instant case, the Speaker's certificate of compliance was issued in conformity with the Form in that regard, specified in Part VI of the Second Schedule to Acts of Parliament Act (Cap. 2 Vol. 1, Laws of Uganda, 2000 Edn.). It was signed by the Speaker of Parliament, ***Hon. Rebecca Alitwala Kadaga***, on the 22nd day of December 2017; and accompanied the Bill sent to the President for assent. It reads as follows:

"I CERTIFY that the Constitution (Amendment) (No. 2) Bill, 2017 seeking to amend the following articles –

(a) article 61 of the Constitution;

(b) article 102 of the Constitution;

(c) article 104 of the Constitution;

(d) article 183 of the Constitution;

was supported by 317 members of Parliament at the second reading on the 20th day of December, 2017 and supported by 315 members of Parliament at the third reading on the 20th day of December, 2017, in Parliament, being in each case not less than two thirds of all members of Parliament, the total membership of Parliament at the time, being 434; and that the provisions of articles 259, 262, and Chapter Eighteen of the Constitution have been complied with in relation to the Bill."

As is quite evident from this certificate of compliance, Articles 77, 105, 181, 289, 289A, and 291, which form part of the provisions of Constitution (Amendment) (No. 2) Bill, 2017, sent to the President for assent, are conspicuously and inexplicably absent from the certificate. These amendments are, respectively, with regard to the following matters; namely: the extension of the term of Parliament from five to seven years, restoration of the Presidential term limit, extension of the term of Local Government Councils from five to seven years, extension of the term of Parliament to begin with the current Parliament, Presidential term limit to come into force upon the dissolution of the current Parliament, and extension of the term

of Local Government Councils to begin with the current Local Government Councils.

The requirement for a certificate of compliance issued by the Speaker of Parliament is a constitutional one; hence, as was pointed out by the Supreme Court (per Kanyeihamba JSC) in ***Ssemwogere & Anor v Attorney General; Supreme Court Constitutional Appeal No. 1 of 2002***, it is a mandatory substantive requirement. This requirement, in my view, is not only about the issuance of a certificate of compliance; but is equally about its content, as is provided for in the Format for such certificate in the Schedule to the Acts of Parliament Act referred to above. There is therefore no way any provision in a Bill sent to the President for assent can be regarded as a valid part of the Bill, when such provision is not listed in the certificate of compliance. In the event, the President ought to have sent back the Bill to the Speaker of Parliament for remedial action; owing to the glaring discrepancy between the Bill and the certificate of compliance that accompanied it.

I therefore find that the Petitioners have discharged the burden that lay on each of them to prove the allegations that constituted issues 1, 2, 3, and 4 of the consolidated petitions. This is that by the

existing Parliament amending Articles 77, 181, 289, 289A, and 291, of the Constitution; by which it purported to extend its tenure and that of the existing Local Government Councils by two years, it contravened the provisions of the Constitution pointed out above. The amendments are thus illegal; and so, cannot be allowed to stand. Accordingly, I answer those issues in the affirmative.

RESTORATION OF PRESIDENTIAL TERM LIMIT

Issue No. 10: Whether section 5 of the Act which reintroduces term limits and entrenches them as subject to referendum is inconsistent with and/ or in contravention of Article 260 (2)(a) of the Constitution.

Section 5 of the impugned amendment Act, which reintroduces the Presidential term limit, provides as follows:

"5. Amendment of article 105 of the Constitution.

Article 105 of the Constitution is amended–

(a) by substituting for clause (2) the following–

'(2) A person shall not hold office as President for more than two terms.';

(b) by inserting immediately after clause (2) the following–

'(2a)' A bill for an Act of Parliament seeking to amend this clause and clause (2) of this article shall not be taken as passed unless–

(a) it is supported at the second and third reading in Parliament by not less than two thirds of all the Members of Parliament; and

(b) has been referred to a decision of the people and approved by them in a referendum."

It is clear from the record of the Parliamentary proceedings, as is evidenced in the Hansard, that Parliament overwhelming passed the Nandala Mafabi motion seeking to amend Article 105(2) of the Constitution by the reinstatement of Presidential term limit; which had earlier been scrapped. The motion as was passed had a rider to it, providing for entrenchment of the restored provision in the Constitution. A perusal of the Hansard discloses an ambiguous and erratic record of what transpired in Parliament when this motion was introduced by Nandala Mafabi:

"MR NANDALA MAFABI: *I want to move an addition of a new clause. Madam Chairperson, since you allowed Hon. Michael*

Tusiime to raise an amendment, I want to bring an amendment to Article 105 of our Constitution to reintroduce term limits – [Memebers: Aye] – thank you. I want to say that a person shall not hold office as President for more than two terms. In addition to that, this should take effect from the next Parliament. We do not want to count this Parliament; we want this one to be entrenched as (f) in chapter 5 under amendment – entrench it as chapter 7, Article 105 (1) and (2). I beg to move." ***(emphasis added).***

After response by Hon Odonga Otto, and Hon Oboth the Chairperson of the select Legal and Parliamentary Committee, the Hansard shows what the Speaker, who was presiding as Chairperson since the House was sitting as a Committee of the whole House, did:

"***THE CHAIRPERSON****: Honourable Members, I put the question Article 105 to be amended as proposed.*

(Question put and agreed to.)"

After this, Mr NANDALA–MAFABI stood up again; and this is what the Hansard shows:

"***MR NANDALA-MAFABI:*** *Madam Chairperson, we have moved both amendments that this Article be re NANDALA-MAFABI entrenched – (Interjection) – under Article 260 we entrench it to be under (f), we add and (2). The justification is to avoid it being changed at will."* ***(emphasis added).***

To this, the Chairperson put the question; and it was agreed to. Hon Mwesigwa Rukutana then shot up; and the second leg of his contention was that Parliament could not amend Article 260 without going for a referendum. Most unfortunately, however, his voice of reason was drowned by the din of interjections that exhibited a classical case of tyranny of the majority.

Two grave issues arise from this turn of events as is recorded in the Parliamentary proceedings of that day. First, is that the question that the Speaker as Chairperson of the Committee of the whole House put, and was agreed to by the House, was that Article 105 of the Constitution be amended, and the amendment be entrenched under Article 105 itself. It is a little difficult to understand then what it was that Hon Nandala-Mafabi sought to be entrenched under Article 260; unless the import of the second motion was to have the reinstated Presidential term limit entrenched under both

Articles 105 and 260. Be it as it may, the unmistakable position is that the House voted and agreed to two questions. The first question sought to entrench the amended provision of Article 105, in Article 105 itself; while the second question sought to entrench the same amended provision of Article 105, under Article 260.

The first question the Chairperson put to the House, and was agreed to, did not provoke any concern from the learned Attorney General (Hon. Mwesigwa Rukutana); understandably because it was safe, as it did not cause any tremors. The second one was however problematic for seeking to entrench the amended provision of Article 105 under Article 260 of the Constitution; which provides for approval by the people in a referendum for any of the provisions therein to be amended, and yet no such referendum had been held. One can then appreciate or imagine the dilemma the draftsperson must have been in when struggling to give effect to the evidently conflicting intention of Parliament over the Nandala-Mafabi motion. As it is, the draftsperson entrenched the provision under Article 105 itself; the consequence whereof I shall shortly deal with.

The crux of the contention in this issue is whether the entrenchment of the provision, through the referendum safeguard provided for under Article 105 of the Constitution where the said term limit is located, rather than under Article 260 thereof as was also passed by Parliament, renders the provision invalid for only partially reflecting the intention of Parliament. To determine this issue I prefer to adopt the logical liberal rule of interpretation and construction; which propounds the principle of purposive approach in the exercise of statutory construction. This rule is that in construing or interpreting a provision of a Statute, and this applies to a Constitution, it is not so much the letter of the statutory provision in issue, but rather the spirit and substance thereof, which is of the essence; hence, deserves to be given effect to. There is a corpus of authorities on this.

Crabbe bolsters this proposition of law, in ***'Understanding Statutes'*** (supra) wherein he aptly puts it using the idiomatic maxim: *"He who sticks to the letter of the law, only gets to the bark of the tree"*; and explaining further as follows: –

> *"The principle here is that the substance of the law, the effect of the law, are matters far weightier than the niceties of form or*

circumstances. The reason behind the law makes the law what it is. For 'reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself'. Laws are not enacted for the mere purpose of enactment. They are intended in their application to achieve a purpose. That should be borne in mind when interpreting or construing an Act of Parliament.

He cites, at p.59 of '***Understanding Statutes***' (supra), a speech from the English Parliament (***209 Hansard Parl. Deb. (3rd Series***); where, in a debate in the House, Sir Roundell Palmer had this to say:

"Nothing is better settled than that a statute is to be expounded, not according to the letter, but according to the meaning and spirit of it. What is within the true meaning and spirit of the statute is as much law as what is within the very letter of it, and that which is not within the meaning and spirit, though it seems to be within the letter, is not the law, and is not the statute. That effect should be given to the object, spirit, and meaning of a statute is a rule of legal construction, but the object, spirit, and meaning must be collected from the words used in the statute."

In ***Attorney General of the Gambia vs Momodou Jobe [1984] 3 WLR 174***, at p.183, (see also [1985] LRC 556 at p.565), Lord Diplock said:

> *"A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the State are to be entitled, is to be given a generous and purposive construction."*

In ***IRC vs Saunders [1958] AC 285***, at p.298, Lord Reid had this to say:

> *"It is sometimes said that we should apply the spirit and not the letter of the law so as to bring in cases which, though not within the letter of the law, are within the mischief at which the law is aimed."* ***(emphasis added).***

In ***Minister of Home Affairs vs Bickle & others 1984 (2) SA 439 (ZSC)***, when interpreting a provision of the law regarding compulsory acquisition of property, including enemy property, by the State, Telford Georges CJ quoted with approval the words of Lord Wright in ***James vs The Commonwealth of Australia [1936] AC 578*** at p.614; that:

"It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general, and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of words changes, but the changing circumstances illustrate and illuminate the full import of that meaning ... ... The task of the Court must be to interpret the Constitution, applying the normal canons, then to interpret the challenged legislation, and then to decide whether a meaning can fairly be placed on that legislation which enables it to fit within the already determined constitutional framework ... ..."

In our own jurisdiction, in ***Salvatori Abuki vs Attorney General, Constitutional Petition No.2 of 1997***, the Court held that the Constitution must be construed 'not in a narrow and legalistic way but broadly and purposively so as to give effect to its spirit'. Similarly, in ***Moses K. Katuramu vs Attorney General Civ. Appeal No. 2 of 1985***, WAMBUZI P. (as he then was) stated thus: –

"In interpreting a provision of the law a Court must ensure justice and pay less respect to technicalities. It was perfectly open to the

Appellant to amend his plaint but chose, perhaps a little imprudently having regard to the wording of rule 6 of order 7, to file a reply, a perfectly legitimate pleading."

Basing on this principle of construction, the true purpose of, and reason behind, the requirement for a referendum to approve any amendment of the Presidential term limit provision, to my understanding, is to insulate the provision against reckless and extravagant amendment by Parliament.

It would be a strict, narrow, and indeed an unfortunate construction of the amendment, to hold that its purpose was to determine the place in the Constitution where the safeguard of a requirement for a referendum should be located, for it to be able to thwart the mischief it was intended to remedy or avert. To put it in a different way, the mischief the Constitution sought to counter, by the entrenched provision, is not the place or location in the Constitution where the entrenchment is. It is, rather, the wantonness and ease with which Parliament could otherwise amend the unentrenched and vulnerable term-limit provision; as it did, by scrapping the unsecured term limit provision from the Constitution; only to turn round now seeking to have it restored.

Second, it is noteworthy that the entrenching provision under Article 105 of the Constitution for the requirement of a referendum is textually identical with the entrenching provision for a referendum under Article 260. Thus, in entrenching the provision under Article 105 of the Constitution, the safeguard against the mischief the entrenching provision seeks to thwart is not lost or vitiated at all. It retains all the force of law it would have, if it were instead entrenched under the provision of Article 260. It is quite evident that the problem was caused by Hon Nandala Mafabi himself, and was concretised by Parliament when it went as far as identifying the place in the Constitution where the entrenchment of the Presidential term limit should be located.

In this, Parliament forayed into a function, which is the sole professional purview of the Parliamentary Counsel; who is better placed to determine how best the Constitution should be arranged. Therefore, it would be wrong and unfair to fault him or her for the order of form the Constitution takes, as long as in the choice of arrangement, the purpose of the enactment is not defeated or lost at all. In ***Understanding Statutes***, (supra), Crabbe states, at p.61, on an instance of *'casus omissus'* as follows:

"An Act of Parliament may be badly drafted. That may result in an omission of certain matters in the Act, or even of a word or words. It may be the fault of the Parliamentary Counsel who drafted the Bill for the Act, or the result of an amendment in Parliament, but whatever the source of the omission, effect must be given to the Act. In those circumstances the 'intention of the legislature, however obvious it may be, must, no doubt, in the construction of the statutes, be defeated where the language it has chosen compels to that result, but only where it compels to it'."

The case of ***Labrador vs R [1893] AC 104***, is authority for the proposition that no Court should impugn the validity of an Act of Parliament on the ground that it is based on an erroneous set of facts. In that case, Lord Hammer stated at p.123 that:

"Even if it could be proved that the legislature was deceived, it would not be competent for a Court of law to disregard its enactments. If a mistake has been made, the legislature alone can correct it. ... The Courts of law cannot sit in judgment on the legislature, but must obey and give effect to its determination."

This is a restatement of the well – known constitutional principle of separation of power between the Executive, Parliament, and the

Judiciary; which is securely enshrined in our Constitution. The remit of Court's oversight function does not extend to legislating. That is the function of Parliament. Indeed, where Parliament has committed an error in the exercise of its legislative function, such error can only be rectified by Parliament itself through the legislative remedy of repeal of the undesired legislation. It is when a piece of legislation offends a provision of the Constitution that the Court of law will declare so, and then exercise its mandate to strike it out.

In ***Henry vs Attorney General [1985] LRC 1149***, Parliament of Cook Islands had, in the exercise of its sovereign power to make laws for the peace, order and good government of the Cook Islands passed a Constitution amendment; where however it erroneously referred to the 1964 schedule, instead of the 1965 schedule, as having been amended. The petitioner challenging the amendment argued that due to the fundamental importance of the Constitution as the supreme law of the land, it was of paramount importance that any amending legislation had to refer to and identify the correct provision of that Constitution free from any error, uncertainty or ambiguity. Hence, failure to refer to the correct source in the

Constitution, as having been amended, rendered the amendment invalid.

The Court of Appeal disagreed with that line of reasoning. Dillon J., instead agreed with the submission of the Attorney General that the reference to a wrong provision of the Constitution was not the kind of substantive alteration that could be regarded as an amendment, modification, or extension. At p.1152, he stated as follows:

> *"While a reference to an enactment may contain an error, nevertheless at the same time when considered fairly it may be free from uncertainty and ambiguity. In such a case, the error in itself does not render the enactment totally ineffective. To hold otherwise would frustrate the clear intention of the legislature to amend an instrument which it had identified sufficiently (although not entirely accurately) as to leave no doubt as to the subject matter of the legislation."*

He adopted the generous interpretation of the Constitution counselled by Lord Wilberforce in ***Minister of Home Affairs vs Fisher [1980] AC 319***; and therefore advised against strict construction of the Constitution, stating, at p.1153, that:

"To do so, would require too legalistic and mechanical an approach to its construction. If the strictly literal approach contended for in this case were taken to its inevitable conclusion it would require a constitutional amendment to be passed ..."

In my considered view then, the imperative of the 'term limit' entrenchment provision is not in its location in the Constitution; but rather the fact that the provision is explicitly and clearly entrenched in the Constitution. I am of the strong persuasion that locating the entrenchment elsewhere in the Constitution – in this case doing so under Article 105 thereof, other than under Article 260 – has no vitiating effect whatever on the desired object of the amendment; which is the entrenchment of the term limit provision. Since the entrenchment serves as a remedial provision for the mischief against which the entrenchment was necessary, it therefore effectively achieves the objective of the amendment. I am reinforced in this, by the fact that there is no express or implied provision anywhere in the Constitution that all entrenchment provisions requiring a referendum must exclusively be located under Article 260.

To the contrary, there are several other provisions in the Constitution for the requirement of a referendum. Such provisions include Article 69, which is a provision for referendum as one of the modes available to the people of Uganda to choose the political system under which they wish to be governed. Article 74 is more specific and elaborate on how a referendum for change of a political system may be triggered. Article 75 of the Constitution prohibits Parliament from enacting a law that establishes a one-party State. Since this provision of the Constitution prohibits only Parliament from enacting such a law, it is implicit that the people themselves, through a referendum, may enact a law providing for a one-party State. I hold that view because the only way the people can directly involve themselves in enacting a law is by approval thereof in a referendum.

Before I take leave of this matter, I should address my mind to two aspects thereto, deserving of consideration. It is quite evident that the entrenchment of a constitutional provision under the Article of the Constitution in which the provision is – in the present instance under Article 105 – more proactive. It affords ease and convenience in identifying the entrenchment; as in this case the entrenchment is

discernible from Article 105 itself, without any need to look elsewhere in the Constitution to establish whether, or not, such provision is entrenched. Had the term limit provision in Article 105 been entrenched instead under Article 260, the entrenchment would not be obvious from reading the provision of Article 105 only; thus necessitating the cumbersome process of referring to Article 260 to determine whether this is one of the entrenched provisions.

Second, it would appear the draftsperson was conscious of the fact that entrenching the provision on Presidential term limit under Article 260 of the Constitution, as was agreed on by Parliament, would have had the effect of amending Article 260. This would have necessitated the approval of the people in a referendum; and yet this had not been catered for in the certificate of financial implication that permitted the moving of this motion. Accordingly then, the entrenchment of the term limit provision under Article 105 of the Constitution was prudent; as by this, the amendment of Article 260 was avoided withoiut causing any harm at all. This choice of drafting, therefore, laudably obviated an otherwise costly, undesirable, and unnecessary, exercise that would have ensued had

the impugned resultant Act reflected the letter, rather than the spirit and substance, of the Nandala Mafabi amendment.

Indeed, the draftsperson is tasked with a most unenviable responsibility. It is always easy to blame him or her for the text of the law; and quite often, unfairly. In ***Evelyn Viscountess De Vesci vs O' Connell [1908] AC 298***, at p.310, Lord Oliver of Aylmerton stated:

> *"I confess to having myself once described a particularly abstruse provision as 'something of a minor masterpiece of opacity', but I regret it because I think that such shafts are frequently not aimed at the right target. The draftsman doesn't draft in a vacuum and straight out of his head. It is his job as well as his misfortune to seek to reduce to writing concepts and ideas fashioned and implanted by somebody else. The Parliamentary draftsmen do an immensely important task and do it under almost intolerable pressure; but in the end they merely put into words what their political masters state as their desired object. If the object is itself bizarre or ambiguous, one can hardly be surprised that the result is bizarre or ambiguous."*

In ***Ealing LBC vs Race Relations Board [1972] AC 342***, at pp. 360–361, Lord Simon of Glaisdale stated that:

> *"The Court sometimes asks itself what the draftsman must have intended. This is reasonable enough: the draftsman knows what is the intention of the legislative initiator (nowadays almost always an organ of the executive); he knows what canons of construction the Courts will apply; and he will express himself in such a way as accordingly to give effect to the legislative intention. Parliament, of course, in enacting legislation, assumes responsibility for the language of the draftsman. But the reality is that only a minority of the legislators will attend debates on the legislation. ... ...*
>
> *Accordingly, such canons of construction as that words in a non-technical statute will primarily be interpreted according to their ordinary meaning ... are not only useful as part of the common code of juristic communication by which the draftsman signals legislative intent, but are also constitutionally salutory in helping to ensure that legislators are not left in doubt as to what they are taking responsibility for.*"

As I pointed out earlier in this judgment, the problem of the location of the entrenchment of the Presidential term limit was

caused by Parliament itself, which overstepped its role by going as far as determining the location of the entrenchment in the Constitution. However, my finding that entrenching the provision under Article 105 of the Constitution, instead of under Article 260, does not offend any provision of the Constitution at all, still leaves one matter for determination over the validity of the restoration of the Presidential term limit. While determining the validity of the extension of the tenure of Parliament and that of Local Government Councils, I was categoric that for any provision to validly constitute part of an enactment, it must be included in the Speaker's certificate of compliance; and this is a mandatory constitutional requirement.

With regard to the amendment of Article 105 of the Constitution, the Speaker's certificate, as has been shown, does not mention it as one of the provisions of the Constitution that were amended by Parliament. Without the Speaker referring to this amendment in her certificate of compliance, there is absolutely no way that the inclusion of the impugned provision in the Bill that was sent to the President, for assent, could be clothed with validity. The President ought not to have assented to such a Bill, which was at variance

with the Speaker's certificate of compliance. In the circumstance, there is no alternative, to having the provision struck out from the impugned Constitution (Amendment) Act, No. 1 of 2018; which I hereby do with much regret.

Issue No.12: ***Whether sections 3 and 7 of the Act, lifting the age limit without consulting the population are inconsistent with and/or in contravention of Articles 21 (3) and 21(5) of the Constitution.***

Lifting Presidential age – limit:

One out of the five consolidated petitions raised the issue of age limit removal. That is not to suggest that there is need for plurality of Petitions for the issue in contention to be found to be of substance; and, hence, be clothed with validity. The Petitioners' case, in Constitutional Petition No.10 of 2018, is that sections 3 and 7 of the impugned Amendment Act, which scrapped the age limits hitherto provided in the Constitution for the President and District Chairperson, amended, by infection, Article 1 of the Constitution which recognizes that all power vests in the people; who shall determine how they should be governed.

The basis of the argument for the Petitioners in this issue is that the people in the exercise of their original constituent power provided for restrictions in the Constitution against certain acts that would have the effect of amending the Constitution; so, it would be unconstitutional for Parliament to alter them. Therefore, amending the Constitution, in the terms of sections 3 and 7 of the impugned Amendment Act, has amended Article 1 of the Constitution by implication; thereby undermining the people's sovereignty. This, it was argued, conflicts with the Basic Structure Doctrine, which does not permit this type of amendment. The Petitioners also contested the Private Member's statement in the Memorandum to the Bill that restrictions on age in the Constitution were discriminatory. This, in their view, also undermines the peoples' power duly recognised in the Constitution.

The Respondent however responded in rebuttal; contending that the removal of the age limit from the Constitution through this contested amendment had no infectious effect whatever on the other provisions of the Constitution; inclusive of Article 1 of the Constitution which asserts that ultimate power belongs to the people. Counsel for the Respondent further submitted that the

contested amendments, which removed the restrictions that the people had imposed on the age required for eligibility to contest for office of President and Chairperson Local Government Council V, has instead enlarged the catchment area for potential leaders who could now contest for these two offices.

Resolution of the issue by Court

Prior to the contested Amendment Act, Article 102 of the 1995 Constitution provided for qualifications of the President as follows:

*"**102. Qualifications of the President.***

A person is not qualified for election as President unless that person is –

(a) a citizen of Uganda by birth;

(b) not less than thirty-five years and not more than seventy - five years of age; and

(c) a person qualified to be a member of Parliament."

It is noteworthy that this provision of the Constitution was not secured by any provision therein requiring holding of a referendum, or subject to any of the safeguards that characterize

the other provisions of the Constitution, which we have recognised as basic or fundamental features of the 1995 Constitution. Thus, the framers of the 1995 Constitution never treated the provisions of Articles 102 on age limit for President, and Article 183 on age limit for LCV Chairperson, as a fundamental feature of the Constitution; which would have necessitated its entrenchment. This contrasts with the institution of the Presidency, which is enshrined as a fundamental feature of the Constitution; by the requirement that the President be elected directly by universal adult suffrage; and further that before the five-year Presidential tenure provision can be altered by Parliament, it must first be approved by the people in a referendum.

It follows therefore that for the amendment of Articles 102 and 183, which provided for age limit for qualifications of the President and LCV Chairperson respectively, Parliament was obliged to comply with the provision of Article 262 of the Constitution; under the general power of legislation conferred on it by the people as I have exhaustively discussed above. For this, all that was required of Parliament was to ensure the majority vote of not less than two thirds of all members of Parliament in favour at the second and

third readings of the Bill, for the amendment to be valid. There are circumstances when an amendment to the Constitution may not, directly or discernibly, offend any of the provisions secured by Articles 260 and 261 of the Constitution; and yet such may have the effect of amending or altering some other provision of the Constitution by implication or infection.

It is therefore imperative for this Court to determine whether the contested amendments have such an effect. It is this, which would resolve the question whether the lifting of the lower and upper age limits for the President and Chairperson LCV, is constitutional; or they contravene any provision of the Constitution. As I have discussed at great length when resolving the issue of extension of Parliament's tenure, the people in whom ultimate power vests, have granted Parliament both general and limited power to make laws, and amend existing ones. For the general power conferred on Parliament under the provision of Article 79 of the Constitution, all that is required of Parliament is to exercise its best judgment to ensure that the law so passed promotes the desired peace, order, development, and good governance of Uganda.

It is only provisions secured by some safeguard, where the power conferred on Parliament to amend the Constitution is greatly curtailed through a number of impediments, which Parliament has to overcome before such an amendment can be valid. The impediments are the requirement of at least a two-thirds majority of the entire membership of Parliament, and a referendum, in fulfillment of the provisions of Articles 260 and 261 of the Constitution. Neither is Article 102, nor 183, of the Constitution such a provision whose amendment is fettered by these impediments; hence, Parliament is spared the burden of having to satisfy the requirements. Instead, the amendment of Articles 102 and 183 by Parliament is done pursuant to the power conferred on Parliament by the provisions of Articles 259 and 262 of the Constitution; and this is precisely what Parliament did.

While section 7 of the contested Amendment Act amended Article 183 (2) of the Constitution by repealing paragraph (b) on age limit for the Chairperson LCV, section 3 of the impugned Amendment Act, amended article 102 of the Constitution as follows:

"***3. Replacement of Article 102 of the Constitution.***

For Article 102 of the Constitution, there is substituted the following –

102. Qualifications and disqualifications of the President.

(1). A person is qualified for election as President if that person –

(a) is a citizen of Uganda by birth;

(b) is a registered voter; and

(c) has completed a minimum formal education of Advanced Level standard or its equivalent.

(2). A person is not qualified for election as President if that person –

(a) is of unsound mind;

(b) is holding or acting in an office the functions of which involve a responsibility for or in connection with the conduct of an election;

(c) is a traditional or cultural leader as defined in Article 246 (6) of this Constitution;

(d) has been adjudged or otherwise declared bankrupt under any law in force in Uganda and has not been discharged;

(e) is under a sentence of death or a sentence of imprisonment exceeding nine months imposed by any competent court without the option of a fine;

(f) has, within seven years immediately preceding the election, been convicted by a competent court of an offence involving dishonesty or moral turpitude; or

(g) has, within seven years immediately preceding the election, been convicted by a competent court of an offence under any law relating to elections conducted by the Electoral Commission."

Since Parliament exercised power, which the people have conferred onto them under the provision of Article 2 of the Constitution, I am unable to fault it for the process it took to effect these amendments. I am therefore a little at a loss in seeking to understand how the amendments could have either undermined or infected the provisions of Articles 1 and 2 of the Constitution, or any other, as is alleged by the Petitioners. These two amendments – sections 3 and 7 of the impugned Amendment Act – were at the core of the original Magyezi Bill. On the evidence, the process through which they were passed to amend the Constitution was

beyond reproach; as, in addition to having been done pursuant to the provisions of the Constitution in that regard, the process through which they were amended fully complied with the Rules of Procedure of Parliament.

Finally, the Speaker's certificate of compliance, which accompanied the Bill forwarded to the President for assent, and is a mandatory constitutional requirement, expressly included therein these two amendments in the list of provisions of the Constitution amended by Parliament. Therefore, and for the reasons given above, it is my considered persuasion that the two contested amendments were done by Parliament in full compliance with the Constitution; hence, they were lawfully done. This being so, the two amendments have validly become part of the Constitution. In the event, I would answer Issue No.12 in the negative.

<u>Issue No. 7:</u> **Whether the alleged failure by Parliament to observe its own Rules of Procedure during the enactment of the Act was inconsistent with and in contravention of Articles 28, 42, 44, 90 (2), 90 (3) (c) and 94 (1) of the Constitution.**

Parliament's non-compliance with its Rules of Procedure.

Counsel Erias Lukwago submitted that Article 94 of the 1995 Constitution obliges Parliament to make its own Rule of procedure; which upon coming into force, binds Parliament and its Committees. Non compliance with the Rules, he contended, would violate Article 94 of the Constitution. He cited the following authorities; namely: ***Prof. J Oloka- Onyango & 9 Others v. Attorney General, Constitutional Petition No.8 of 2014, Law Society of Kenya v. Attorney General & Another, Constitutional Petition No.313 of 2014, Kesavananda Bharati v. State of Kerala and Anor, Supreme Court of India, Petition 135 of 1970 and Njoya and Others v. Attorney General and Others (2004) AHRLR 157 (KeHC 2004),*** in support of his contention that it is mandatory for Parliament to comply with its Rules of Procedure.

He contended that the entire process of amending the Constitution, from the tabling of the Bill, to the passing thereof, manifested that the constitutional principles were compromised and the whole process tainted with illegalities. He maintained that the Bill was smuggled into the Order Paper; which came as a surprise as it was never part of the Order Paper, this , he argued, was an instance of a tainted process. He argued further that in so doing, Parliament violated Rules 26, 27 and 28 of its Rules of procedure. He referred

to paragraphs 12, 13, 14, 15, 16 and 17 of the affidavit of Hon. Ssemujju Nganda, dated 18th January 2018, and sworn in support of the petition; then paragraph 16 of the affidavit of Hon. Jonathan Odur; paragraphs 11 and 12 of the affidavit of Hon. Sewanyana Allan; then paragraphs 10, 11 and 12 of Hon. Karuhanga; and that of Hon. Mubarak Munyagwa.

The case for the respondent

Mr. Oluka Henry rebutted the alleged failure by the Parliament to comply with its own Rules of procedure during the process of enacting the Constitution (Amendment) Act; hence, there was no inconsistence or contravention of Articles 28, 42, 44, 92, 93, and 94 (1) of the Constitution. He contended that the Bill was never smuggled onto the floor of Parliament; because the inception, tabling, the enactment of any bill, or the enactment of any motion before the House is undertaken within the Rules, and those Rules are the Rules, which are set out under Article 94 (1) of the Constitution.

Court's Resolution

On Rules of Procedure in Parliament, **Article 94** of the Constitution provides as follows:

"(1) Subject to the provisions of this Constitution, Parliament may make rules to regulate its own procedure, including the procedure of its committees."

The first time the impugned Constitution (Amendment) Bill was presented to Parliament, in September 2017, Parliament's Rule of Procedure in force (the old Rules) was that of 2012. The new Rules of Procedure came into force in November 2017. Rule 26, of the old Rules, provided that the Clerk had to supply each Member with a copy of the Order paper for each sitting; and that for the first sitting of a meeting, at least two days from the sitting, while for the other sittings at least three hours before the sitting. Rule 28 provided that a weekly Order paper was to be availed to the Members through their pigeon-holes or electronically.

Rule 24(1) of the old Rules provided for Order of Business as follows:

"The Speaker shall determine the order of business of the House and shall give priority to Government business."

Rule 165 (1) of the old Rules provided that:

"It shall be the function of the Business Committee subject to rule 24, to arrange the business of each meeting and the order in which it shall be taken; except that the powers of the Committee shall be without prejudice to the powers of the Speaker to determine the order of business in Parliament and in particular the Speaker's power to give priority to Government business as required by clause 14 (a) of Article 94 of the Constitution."

It is thus clear that under the Rules, the Speaker enjoyed wide, and almost unfettered, discretionary power to determine the Order of Business in the House. From the Hansard, the record shows that on Tuesday 26th September 2017, at p.4699, the Speaker expressed satisfaction with the Magyezi motion for leave to introduce a private Members' Bill; which had met the test laid down under Rule 47, and so, could be included in the day's Order Paper.

Therefore, I fail to understand how, in allowing Hon. Raphael Magyezi's motion for leave to introduce a private Member's Bill, the Speaker could be accused of having smuggled the matter onto the Order Paper in breach of the Rules of Procedure of Parliament; as alleged by the petitioners. The Rules of procedure do not require

the Speaker to seek permission from the Members of Parliament, or any other person, to include the motion on the Order paper; which, failure to do so, would have justified her being accused of smuggling the motion onto the Order paper. The position in law is that failure by Parliament to abide by the rules of procedure provided for in the Constitution and the Rules of Parliament has adverse effect on the resultant law; as it renders it invalid **(See *Paul Ssemwogerere & Others vs Attorney General*** and ***Oloka Onyango & Others vs Attorney General (supra)***.

It is a principle of law that a Bill has a short title; and then a long title, from which the main contents of the Bill can be ascertained. This is provided for under Rule 114(1) of the Rules of Procedure. Rule 115(2) of the said Rules forbids the inclusion of any matter foreign to what is contained in the long title to the Bill. Rule 131(2) mandates the Committee of the whole House and the Select Committee to entertain such amendments as it deems are relevant to the subject matter of the Bill. Rule 133(4) of the Rules of procedure provides that:

"The Committee of the whole House shall consider proposed amendments by the committee to which the bill was referred and

may consider proposed amendments on notice where the amendments were presented but rejected by the relevant committee or where for reasonable cause the amendments were not presented before the relevant committee".

Therefore, a motion to amend the Bill for an Act can be introduced at any stage of the process of considering the Bill; as long as the rules governing the process are adhered to. In the instant case, the report by the Chairperson of the Select Committee was that the issue of Parliamentary tenure was not part of its report to the Committee of the whole House. On the evidence, it is clear that no amendment was presented before the Legal and Parlaiamentary Committee. No reasonable cause, or any at all, was presented before the Committee of the House for the failure to raise the matter before the Select Committee. The long title to the Constitution (Amendment) (No.2) Bill, 2017 stated as follows:

"An Act to amend the Constitution of the Republic of Uganda in accordance with articles 259 and 262 of the Constitution; to provide for the time within which to hold presidential, parliamentary and local government council elections; to provide for eligibility requirements for a person to be elected as President or District

Chairperson; to increase the number of days within which to file and determine a presidential election petition; to increase the number of days within which the Electoral Commission is required to hold a fresh election where a presidential election is annulled; and for related matters."

The amendments to the Bill, which later became sections 2, 5, 6, 8, 9, and 10, of the impugned Amendment Act were not part of the long title to the Bill. The reason for their non-inclusion in the long title to the Bill, is that they were foreign to the Bill; so, they became part of the Bill in contravention of the provisions of the Rules of Procedure of Parliament. Indeed, the Speaker identified and pointed them out as extraneous matters. Since they had not been subjected to the process of a public hearing, and yet they were substantive amendments introducing new matters, it was imperative that they be subjected to public participation at the hearing before the Select Committee; and more so, since this was a Bill for the amendment of the Constitution.

However, the long title of the resultant Act contains term of Parliament, Presidential term limit, and transitional provisions for

the amendments that was to be made. The memorandum to the bill manifested that the object of the Bill was:

"to provide for time within which to hold presidential, parliamentary and local government council elections under article 61, provide for eligibility of a person to be elected as President or District chairperson under Articles 102(b) and 183(2)(b), to increase the number of days within which to file and determine a presidential election petition under 104 (2) and (3), to increase the number of days within which the Electoral Commission is required to hold a fresh election where a presidential election is annulled under article 104(6); and for related matters". related matters."

The Kenyan ***Constitutional Petition No.3 of 2016, Law Society of Kenya v the Attorney General***, dealt with issue of extraneous matters brought into a Bill; and held as follows:

"Therefore by introducing totally <u>new and substantial amendments</u> to the Judicial Service Act 2011 <u>on the floor of the House</u>, Parliament not only set out to <u>circumvent the Constitutional requirements of public participation</u> but, with due respect, <u>mischievously short- circuited and circumvented the letter</u>

*and spirit of the Constitution. Its actions amounted to violations of Articles 10 and 118 of the Constitution". **(emphasis added).***

Owing to the blatant violation of the Rules of procedure of Parliament with regard to the foreign matters wrongly introduced in the Bill, the extraneous matters cannot be allowed to stand.

With regard to the action taken by the Speaker to suspend certain Members of the House from participating in the proceedings in the House, the unrebutted evidence is that the suspended members had defied the Speaker and disrupted the proceedings in the House; thus provoking the wrath of the Speaker. Where an institution's rule of good order is defied without the defiant person being held to account, it can only lead to chaos if not total mayhem. It therefore becomes necessary to wield the stick to rein such members in; so to say. There is no evidence presented before Court that in the exercise of her discretion, the Speaker either exceeded her authority or acted ultra vires the Rules permitting her to take disciplinary action to maintain the honour of the House.

On the proceedings having taken place in the absence of some of the members from the House, there is no rule requiring that all members must be in the House for matters to be proceeded with;

otherwise, there would be no reason for quorum at the voting stage. In the book *'Understanding Statutes'* (supra), at p.15, Crabbe quotes from *The Listener*, where Gerald Kaufman gives a graphic account of how the committee system works in Parliament; as follows:

> *"... once a member goes in to the committee room, the member is encapsulated in a private world; life is governed by the hours the Committee sits and the party to which the member belongs. If the member is a government backbencher, the sole expectation is that the member sits silently, except when votes take place and the member is required to call out Aye or No, as instructed by the harrassed but unrelenting whip. Apart from this, the supporters of the administration sit at their desks ... ... looking up from time to time in case something interesting might be happening.*"

The point being made here is that not every member in the House actually follows what is happening in the House; and indeed many are only awoken from their slumber by the Speakers's call for a vote. The Rules provide for a quorum for Parliamentary business to proceed; and then most importantly such number as would satisfy the requirement for majority vote where it is a requirement that a given fraction of the membership of the whole House must support

a motion brought in Parliament before it is considered as having been duly passed.

The evidence regarding the absence of the Leader of Opposition when certain proceedings took place is quite interesting. When the Speaker ruled that she should sit down, the Hon. Leader of Opposition took offence, and on her own volition, walked out of the Chamber of Parliament. I do not understand why anyone should blame the Speaker for the Leader of Opposition's free willed choice to evacuate herself from the Chambers of Parliament. If every time a Member walks out in protest, the Speaker must suspend proceedings, I can envisage a situation where Parliament would always be held at ransom; thus paralyzing the work of Parliament.

In the same vein, the fact that people who were known not to be members of the Legal Committee signed the report is not fatal to the process; though it was irregular. First is that, on the evidence, they did not participate at the hearings; but merely signed after the conclusion of the proceedings. Second is that even if they are removed from the list of those who signed the report, there would still be sufficient members who attended the Committee propceedings, and signed the report. Lastly, Article 94 of the

Constitution covers this type of situation, since it provides as follows:

"(3) The presence or the participation of a person not entitled to be present or to participate in the proceedings of Parliament shall not, by itself, invalidate those proceedings."

With regard to dispensing with the rule requiring three sittings, it is permissible for Parliament suspend its own rule under rule 16 of the rules of procedure; as long as the motion therefor is seconded. However, Rule 59 (2) of the new Rules of Procedure of Parliament, which was Rule 51 (2) of the old Rules of Procedure of Parliament, provides as follows:

"(2) In Committee of the Whole House or before a Committee, a seconder of a motion shall not be required."

In the instant matter, Parliament was proceeding as a Committee of the Whole House; so the Rule cited above applied. Accordingly then, although the motion by Hon Mwesigwa Rukutana was not seconded, it offended no rule at all. Furthermore, the determination of the issue of breach of the Rules of procedure of Parliament turns on whether the Rules are equated with the force of Constitutional

provisions. It also depends on whether the Rules are taken as mandatory or absolute, hence must be complied with or fulfilled exactly as expressed, otherwise what is done will be treated as unlawful and therefore invalid; or they are directory, hence it suffices when it is complied with substantially, or where non – compliance with them occasions no miscarriage of justice. In ***Liverpool Borough Bank vs Turner (1861) 30 LJ Ch. 379***, at p.380, Lord Campbell stated:

> *"No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed."*

This proposition of the law was approved in ***Howard vs Bodington (1877) 2 PD 203***, at p.211, where Lord Penzance stated thus:

> *"I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject–matter, consider the importance of the provision, and the relation of the provision to the general object intended to be secured by the Act,*

and upon a review of the case in that aspect, decide whether the enactment is what is called imperative or only directory."

In the instant case, the motion for suspension of rule 201(2) was not seconded; but, however, that notwithstanding, the matter was fully canvassed by Parliament, so no miscarriage of justice was occasioned by the non-secondment of the suspension motion. The evidence on record is that the members had been availed the materials they wanted four days earlier in their respective iPods. In this dot com era, loading materials onto the electronic gadget is at good as, if not better than, laying it on the table in Parliament.

For all of the actions taken by the Speaker, which have been challenged in the petitions, explanations in justification have been given to my satisfaction. Where there was a breach of the Rules, I have found them to be mere irregularities that are not fatal as they do not go to the root of the matter. It is the provision of sections 2, 5, 6, 8, 9 and 10 of the Constitution (Amendment) Act 2018 whose introduction into the Bill was incurably wrong for offending the Rules of Procedure of Parliament.

Issues No. 7(g) (1v) and No. 8:

Observance of 14 sitting days:

As I have pointed out, for amendment of provisions entrenched under Article 260 of the Constitution, it requires fourteen sitting days separation between the second and third readings; then followed by approval in a referendum, before such amendment can pass. Of the provisions of the Constitution (Amendment) Act 2018, ordinarily they do not require undergoing through the stringent amendment procedure stated above. However, by infection or implication, sections 2, 6, 8 and 10, amended other provisions of the Constitution, such as Article 1 of the Constitution on the people being the repository of power. These were not named in the Bill for amendment, or resultant Act; and yet amending them would require going through the stringent procedure.

There was thus need to amend those other provisions as well, before the directly amended provisions of the Constitution by sections 2, 6, 8 and 10 of the impugned Amendment Act could enjoy validity. For the proisions of the Constitution whose amendment had no infectious effect on other provisions of the Constitution, they are valid amendments. It follows therefore that this issue is only partially successful as explained above.

I have already dealt with the Speaker's certificate of compliance in the course of resolving the issue about extension of Parliamentary and District Council tenures. I can only reiterate that Constitution (Amendment) Act No.1 of 2018 specifically names Articles 61, 77, 102, 104, 105, 181, 183, 289 and 291, of the Constitution as having been amended; and yet, inexplicably, the certificate of compliance issued by the Speaker_only names Articles 61,102,104 and 183 of the Constitution as having been amended; thereby excluding Articles 77,105,181,289 and 291 of the Constitution, which are included in the impugned Amendment Act as having been amended.

The consequence of this exclusion of sections 2, 5, 6, 8, 9 and 10 of the Constitution (Amendment) Act 2018 from the Speaker's certificate is that they do not validly amend provisions of Articles 77, 105, 181, 289, and 291 of the Constitution, although they are included in the Amendment Act as having been amended. The sections of the Amendment Act purporting to amend these provisions of the Constitution should, therefore, be struck out from the impugned Act.

Issue No. 6: Validity of the process of conceptualizing, consulting, debating and enacting the Act.

On this, learned Counsel Wandera Ogalo faulted the entire process of amendment of the Constitution as fraudulent from the onset; while learned Deputy Attorney General, Mr Mwesigwa Rukutana argued that the entire process was conducted within the law. It is the Petitioners' case that the requisite consultation and public participation of the people, which is mandatory, was not conducted at all. It is quite clear on the evidence that the original Bill as was introduced by Hon Magyezi as a private member's Bill, and the amendments thereto were treated differently. The Bill as it was introduced by Hon Magezi was sent to the Committee of Legal and Parliamentary affairs; and it did conduct public hearings both within and outside Parliament.

The Bill then went through the other required procedure, up to its enactment. Members were facilitated and went to their respective Constituencies for a period of three weeks for consultation. Accordingly then, sections 1, 3, 7 and 9 of the Amendment Act, which amended Articles 61,102, 103 and 183 of the Constitution, were the result of a properly conducted Parliamentary process. The

faulting of the consultation by the Members of Parliament and the alleged lack of public participation is unfortunate. All that there is in the Constitution on public participation is in the National Objectives and Directive Principles of State Policy and the provision of the Constitution for a Bill to be sent to a Select Committee for conducting a hearing.

In the absence of a law that lays down a structural modus operandi for public consultation and participation beyond what the Legal and Parliamentary Committee did, no meaningful consultation can be done. The provision in the National Objectives and Directive Principles of State Policy is couched in general terms bordering on the abstract. It cannot guide anyone with any specificity on the mode of consultation and public participation. It is public hearing conducted by a Select Committee, and the people's involvement in decision making through a referendum that are properly structured so as to bring out the will and desire of the people.

As it is, whatever consultation that was carried out, on the facilitation of shs. 29m/= given to Members of Parliament, which was vulnerable to manipulation by Members of Parliament; and could have delivered different results from the same people who

were consulted by two Members of Parliament with different views on the amendment. I am fully satisfied that within the provisions of the law in force for the moment, proper consultation was carried out. However, it is the amendment thereto by Hon Tusiime and Hon Nandala Mafabi, which did not go through the same process as they were made when the Bill was already midstream.

Violence during the amendment process.

It is the Petitioners' contention that the Bill was passed amidst violence within and outside Parliament, and also in the whole of the country during public consultations; thereby vitiating the entire process, and thus making it unconstitutional. On the evidence, the violence started from within Parliament, and between Members of Parliament themselves, when for reasons that are difficult to fathom they abandoned their well known tool of communication in Parliament – namely the use of permissible speech, inclusive of occasional oral belligerence – in preference for the dishonourable and ignoble use of the fists, other limbs, chairs, and microphone stands, to express their displeasure with one another and other officials of Parliament.

It is important to take note of the fact that the commencement and execution of the two incidents of violence by the Parliamentarians preceded any deliberations on the Magyezi Bill. Furthermore, it is quite unfortunate that all this happened in defiance Speaker who spent tireless of the efforts to restore order in and decorum of Parliament; constraining the Speaker to order for the ejection of 25 Members whom she considered were unruly and disruptive. It is against this backdrop that the members of the UPDF intervened. Admittedly, the UPDF can intervene in matters of violence that are civil. The question is when the UPDF can justifiably and thus lawfully intervene in a situation that requires intervention by someone who has the superior force to do so.

The evidence adduced in Court shows that what was happening in Parliament was akin to the type of brawls and fracas one would expect to happen in a bar or a *malwaa* (local potent brew) joint. For this, the Sergeant at Arms did not consider it such a security threat as would require outside intervention. It was when certain members of the House had shown defiance to the orders of the Speaker that he sought Police reinforcement. There was absolutely no reason for the intervention of the UPDF. Proof of this is in the fact that the

members of the UPDF who intervened went barehanded in civilian attire; something they would not have done had the situation been such as to warrant their intervention.

The more important point we must always remind ourselves and posterity about, is the fact that we have had a sad and painful history of military intervention in matters that are purely civilian. There is however unanimity across the board that the UPDF is quite a different class or category of military from its predecessors. Part of this view lies in the fact that we can proudly say we have a military whose membership are professional officers – men and women – who can engage anyone in a debate on political economy. That is an attribute, which we must all guard zealously. It was therefore a gross error of judgment on the part of the Army Chief to deploy the UPDF in a situation that did not, by any stretch of classification, warrant military intervention.

It has to be stated in no uncertain language that the Police Force is a national institution whose noble duty is to ensure the maintenance of law and order in the country; and this, for the benefit of all the people of, and within, the territorial jurisdiction of Uganda. The Police Force must exercise its national

responsibility in a professional and non-partisan manner; and indiscriminately serve the people without any favour, malice, or ill will. The Circular, which the leaders of the Police Force sent to the Police throughout the country to ensure that members of Parliament were restricted in their Constituencies in their consultation of the people, and intimating that this was to ensure members of the opposition did not interfere with the process of consultation, was most unfortunate.

The Police Force does not belong to, and must never ever serve the interest of any political party, whether, as is referred to in common parlance – which in our circumstance may be a misnomer – it is the political party in government. This is owing to the fact that our Constitution and democratic dispensation recognises that Parliament is one of the three arms of government alongside the Executive and the Judiciary; hence, since the opposition parties are also in Parliament, they are together in government with the political party that forms the executive arm of government. In ***Campbell's Trustees vs Police Commissioner of Leith (1870) LR 2HL (Sc) 1***, at p.3, Lord Hatherly said:

"The courts will hold a strict hand over those to whom the legislature has entrusted large powers, and take care that no injury is done by extravagant assertion of them."

However, despite the unwarranted and wrongful intervention by the UPDF, and the Police interfering with the consultation of some of the members of Parliament, in the manner that came out in evidence, there are extenuating circumstances that point to the fact that the ramifications of the interventions did not vitiate the process in Parliament that resulted in the enactment of the Constitution Amendment Act in any way. The consultations took place fairly well. Hon Robert Kyagulany is on record as having traversed the whole country; whereat he established that the majority of the people wanted the Constitution to be left intact. Parliament continued with its business, apparently after realising the folly of turning weapons at each other. On the evidence, there was always a full House when the Speaker put the question for a vote.

Issue 13: Whether the continuance in Office by the President elected in 2016 and remains in office upon attaining the age of 75 years

contravenes Articles 83 (1) (b) and 105 of the Constitution of the Republic of Uganda.

This issue came up before the provision in the Constitution was amended by lifting the age limit. It is surprising that this is an issue at all. The provision of the Constitution on the matter was Article 105 (1); which provides as follows:

"(1) A person elected President under this Constitution shall, subject to clause (3) of this article, hold office for a term of five years."

Clause 3 provides:

"(3) The office of President shall become vacant

(a) on the expiration of the period specified in this article; or

(b) if the incumbent dies or resigns or ceases to hold office under article 107 of this Constitution."

Article 107 provides for the circumstances under which the President may be removed, including; abuse of office, misconduct, among others.

The defining provision for this issue is Article 105 (3) (a); and we take it that 'on the expiration of the period specified in this article', means until the expiration of the 5 years for which the President

was elected. What this means is that a President who attains the age of 75 years, while serving a 5 year term would still continue in office until the expiration of the term. We find the requirement of age as a qualification for being elected President is at the point of election; and not at the end or during the incumbency. A President who is elected on the day he or she attains the age of 74 years would be entitled to stay in office for the next five years. This means he or she can stay in office up to the age of 79 years!

Issue 14: What remedies are available to the parties?

The parties to the Petitions made various prayers.

Severance

At the hearing of the Petition, counsel for the petitioners prayed that Court finds that the entire process of conceptualizing, consulting, debating and enacting the Act was flawed and as such Court should declare it a nullity. Counsel Ogalo prayed that in the event that Court found that the whole process was not flawed, it should apply the principle of severance.

On the other hand, counsel for the respondent prayed that Court finds that Amendment Act was lawfully enacted and should

accordingly dismiss the Petition with costs to the respondent. He also prayed that in the unlikely event Court found that some parts of the process contravened the Constitution, it should then apply the severance principle and save the lawful bits and nullify the unconstitutional provisions.

Resolution

Severance

Having found as we have, the question then is whether to sever the valid amendments from the invalid ones; or take the whole Act as unlawful; hence invalid. 'Severance' is defined in ***Black's Law Dictionary***, 9th Edition, at page 1498 as:

> *"The act of cutting; the state of being cut off. The separation, by the court, of the claims of multiple parties either to permit separate actions on each claim or to allow certain interlocutory orders to become final."*

The principle of severance is in fact enshrined in the 1995 Constitution. Article 2 of the Constitution provides as follows:

"***2. Supremacy of the Constitution.***

(1) This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.

(2) If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void." ***(emphasis added).***

In ***Silvatori Abuki v Attorney General; Constitutional Case No. 2 of 1997***, the Constitutional Court considered the constitutionality of Sections 3 and 7 of the Witchcraft Act, Cap 108. It was argued that Section 3 contravened Article 28 (12) of the Constitution because it did not define the offence of witchcraft. It was also argued that the provision for the exclusion orders, in section 7 in particular, infringed Articles 24, 26 (2), 29 (2) and 44 of the Constitution. The Court did not declare the whole Act invalid; but only a number of sections of the Witchcraft Act, Cap 108, a nullity. It left the Act with those provisions, which were valid for being in accord with the law MANYINDO, DCJ stated in that case as follows:

"I would therefore declare as follows:

1. *Sections 2 and 3 (3) of the Witchcraft Act are vague. They do not meet the requirements of Article 28 (12) of the Constitution.*
2. *The Petitioner was not accorded a fair hearing as required under article 28(1) of the constitution.*
3. *Exclusion order is unconstitutional for being inconsistent with article 24 'and 44 and 26 in that it threatens the petitioner's life and right to property.*
4. *<u>Redress</u>: As the trial was a nullity, the Petitioner having been tried of a vague offence, the petitioner would be ordered to be set free.*

I would therefore allow the petition with costs to the petitioner."

In the instant case, I am persuaded that it is a proper case for applying the principle of 'severance' provided for under Article 2(2) of the Constitution, which is that it is only the provision of the law that is in conflict with the Constitution that is void; thereby leaving the healthy provisions of such law valid. I would therefore strike out sections 2, 5, 6, 8, 9 and 10 of the Constitution (Amendment) Act 2018, which provide for the extensions of the tenure of Parliament and Local Government Councils by two years, and

reinstatement of the Presidential term-limits. They contravene provisions of the Constitution; and are, therefore, unconstitutional.

On the other hand, I find that sections 1, 3, 4, and 7, of the Constitution (Amendment) Act No. 1 of 2018, which remove age limits for the President and Chairperson of Local Council V to contest for election to the respective offices, and for the implementation of the recommendations of the Supreme Court in ***Presidential Election Petition No. 1; Amama Mbabazi vs Yoweri Museveni***, as the lawful and valid provisions of the Act. They have, each, been passed in full compliance with the Constitution. In the event, I would allow the Petitions only in part; as shown above.

Costs

It is trite that costs are awarded to parties at the discretion of Court. That discretion must however be exercised judiciously. With regard to the Petitions herein, there is no denying that the Petitioners took on an important national task, which was not intended to benefit them personally; but for the benefit of our beloved country. People such as the Petitioners herein are the true vanguards of the desired need to protect our Constitution, and nurture the culture of constitutionalism; and thereby uphold the

rule of law. It is therefore proper that they be reasonably indemnified for the expenses and other resources they have put in their undertaking to promote the much-cherished wellbeing of the nation; and also to be rewarded for the energy, time, and expertise, they have put into the endeavour.

I would therefore award professional fee of U. shs. 20m/= (Twenty million only) for each Petition (not Petitioner). This however does not apply to Petition No. 3 of 2018 where the Petitioner prayed for disbursements only, and Petition No. 49 of 2017 where the Petitioner appeared in person. However, I would award two-thirds disbursements to all the Petitioners.

ORDERS

In the event then, this Court makes the following declarations and orders; namely:

1. By unanimous decision, the Court declares sections 2, 5, 6, 8, 9 and 10 of the Constitution (Amendment) Act 2018, which provide for the extensions of the tenure of Parliament and Local Government Councils by two years, and for the reinstatement of the Presidential term-limits unconstitutional for contravening provisions of the Constitution.

2. Accordingly, sections 2, 5, 6, 8, 9 and 10 of the Constitution (Amendment) Act 2018, are hereby struck out of the Act.

3. By majority decision (Owiny – Dollo, DCJ/PCC; Kasule, Musoke, Barishaki Cheborion, JJCC; with Kakuru JCC dissenting), the Court declares that sections 1, 3, 4, and 7, of the Constitution (Amendment) Act No. 1 of 2018, which remove age limits for the President, and Chairperson Local Council V, to contest for election to the respective offices, and for the implementation of the recommendations of the Supreme Court in ***Presidential Election Petition No. 1; Amama Mbabazi vs Yoweri Museveni***, have, each, been passed in full compliance with the Constitution; and therefore remain the lawful and valid provisions of Constitution (Amendment) Act No. 1 of 2018.

4. Court awards professional fee of U. shs. 20m/= (Twenty million only) for each Petition (not Petitioner). This however does not apply to Petition No. 3 of 2018 where the Petitioner prayed for disbursements only, and Petition No. 49 of 2017 where the Petitioner appeared in person.

5. Court awards two–thirds disbursements to all the Petitioners; to be taxed by the Taxing Master.

Dated at Mbale; this 26th day of July 2018.

Alfonse Chigamoy Owiny – Dollo

Deputy Chief Justice & President of the Constitutional Court

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA

SITTING AT MBALE

CONSOLIDATED CONSTITUTIONAL PETITIONS

1. CONSTITUTIONAL PETITION NO. 49 OF 2017

Male Mabirizi Kiwanuka :::::::::::::::::::::::::::: Petitioner

Versus

The Attorney General of Uganda :::::::::::: Respondent

AND

2. CONSTITUTIONAL PETITION NO. 3 OF 2018

Uganda Law Society :::::::::::::::::::::::::::::::: Petitioner

Versus

The Attorney General of Uganda:::::::::::::: Respondent

AND

3. CONSTITUTIONAL PETITION NO. 5 OF 2018

1. Hon. Karuhanga Kafureka Gerald
2. Hon. Odur Jonathan
3. Hon. Munyagwa S. Mubarak
4. Hon. Ssewanyana Allan
   ::::::::::::Petitioners
5. Hon. Ssemuju Ibrahim
6. Hon. Winne Kiiza

VERSUS

The Attorney General of Uganda:::::::::::::::::Respondent

AND

4. CONSTITUTIONAL PETITION NO. 10 OF 2018

1. Prosper Businge
2. Herbert Mugisa
3. Thomas Mugara Guma ::::::::::::::::::::::Petitioners
4. Pastor Vincent Sande

Versus

The Attorney General::::::::::::::::::::::::::::::::Respondent

AND

5. **CONSTITUTIONAL PETITION NO. 13 OF 2018**

Abaine Jonathan Buregyeya ::::::::::::::::::::::::::Petitioner

Versus

The Attorney General of Uganda::::::::::::::::::::Respondent

Coram: Hon. Mr. Justice Alfonse C. Owiny-dollo, DCJ
Hon. Mr. Justice Remmy Kasule, JA/JCC
Hon. Mr. Justice Kenneth Kakuru, JA/JCC
Hon. Mr. Justice Cheborion Barishaki, JA/JCC
Hon. Lady Justice Elizabeth Musoke, JA/JCC

JUDGMENT OF HON. JUSTICE REMMY KASULE

Background:

The above five Constitutional Petitions were consolidated for the purpose of being heard and determined together due to the similarity of the issues each one raised.

The Constitutional Court, in its endeavour to make Ugandans, outside Kampala where the Constitutional Court has hitherto sat to determine Constitutional issues, felt it appropriate that this time, the Court determines these issues away from Kampala, so that Ugandans elsewhere also experience how the Constitutional Court goes about determining Constitutional issues that have a bearing upon the governance structure of the country. The Court thus decided to determine the above five Constitutional Petitions at the High Court, Mbale.

Other Constitutional Petitions, with similarity of issues, like those in the consolidated ones, were also listed for hearing in Mbale with the consolidated petitions. These were:

1. Constitutional Petition No. 41 of 2014

   Benjamin Alipanga :::::::::::::::::::::::::::::: Petitioner

   Versus

   The National Resistance Movement
   Justine Lumumba
   Richard Todwong
   Rose Namayanja ::::::::::::Respondents
   Kenneth Omona
   The Attorney General of Uganda
   The National Resistance Movement

2. Constitutional Petition No. 34 of 2017

   Centre for Constitutional Governance
   Legal Brains Trust (LBT) ::::::::::::::::Petitioners
   Miria R.K. Matembe

   Versus

   Attorney General ::: Respondent

3. Constitutional Petition No. 37 of 2017

Advocates for Human Rights,
Peace and Development(AHUPED)::::::::::::::::::::: Petitioner
Versus
Hon. Raphael Magyezi
Attorney General ::::::::::::::::::::::::::::::::::Respondents

4. Constitutional Petition No. 44 of 2017
Dr. Abed Bwanika ::: Petitioner
Versus
The Attorney General ::::::::::::::::::::::::::::::::::: Respondent

All the above Constitutional Petitions were called up for hearing on 09.04.2018 and were dismissed with no order as to costs either on the ground that the parties to the petitions and their respective Counsel were absent or that the parties had withdrawn the petition(s).

The Consolidated Constitutional Petitions, the subject of this Judgment, arise from the enactment by Parliament of a member's (Hon. Raphael Magyezi) private Bill: The **Constitution** (Amendment) Bill, 2017 (The Magyezi Bill) which was finally enacted by Parliament into **The Constitution (Amendment) Act, No. 1 of 2018** (herein to be referred to as "The Act"). This Act amended the Constitution in these areas:

First, as to qualification for election as President of Uganda, or as a district chairperson of one being ***"not less than thirty-five years and not more than seventy-five years of age"*** hitherto contained

in Articles 102 and 183 (2) (b) of the Constitution was removed. Sections 3 and 7 of the Act effected this amendment.

Second, by amending Articles 77(3) and 181 (4) of the Constitution, The Act extended the term of the existing Parliament and Local Governments, and those to be elected in future, from five to seven years. Sections 2,6,8 and 10 of the Act effected these amendments.

Third, the Act amended Article 105(2), to the effect that a person shall not hold office of President for more than two terms and that this Clause shall only be amended if the amendment Bill to that effect is supported at the second and third reading in Parliament by not less than two thirds of all members of Parliament and also after the amendment has been approved through a referendum by the people. This amendment is to come into effect upon the dissolution of the Parliament in existence at the commencement of The Act. Sections 5 and 9 of The Act effected this amendment.

Fourth: The Act amends Article 61(2) of the Constitution by substituting clause 2 with a new provision to the effect that the Electoral Commission shall hold presidential, general parliamentary and local government council elections within the first thirty days of the last one hundred and twenty two days before the expiration of the term of the President, Parliament or Local Government Council, as the case may be. The previous Clause 2 provided that the Electoral Commission was to hold respective elections within the first thirty days of the last ninety days before the expiration of the term of the President. Clause 3 of Article 61 requiring the Electoral

Commission to hold presidential, general parliamentary and local government council elections on the same day was amended by the Act by deleting presidential elections from being held on the same day as the general Parliamentary and local government elections. The amendments are as per Section 1 of the Act.

Fifth: Article 104 (2) (3) and (6) was amended by Section 4 of the Act to the effect that a petition challenging the presidential election is to be lodged in the Supreme Court registry within fifteen days, after the declaration of the election results, instead of the hitherto ten days, and the Supreme Court shall inquire and determine the petition expeditiously and shall declare its findings and reasons not later than forty five days from the date the petition is filed. Where the election is annulled, then a fresh election has to be held within sixty days from the date of the annulment.

Each of the petitioners in the consolidated petitions contends that The Act effecting the above amendments was enacted in violation of the Constitution both as to the content of its provisions and also as to the process through which the same was enacted.

The respondent maintained that there is nothing unconstitutional about The Act, whether as to its contents or the process through which it was enacted by Parliament.

The following issues arose from the pleadings of the petitions and the responses to them by the respondent.

The Issues:

1. ***Whether Sections 2 and 8 of the Act extending or enlarging of the term or life of Parliament from five to seven years is inconsistent with and/or in contravention of Articles 1, 8A, 61(2)(3), 77(3)(4), 79(1), 96, 105(1), 260(1), 233(b) and 289 of the Constitution.***
2. ***And if so, whether applying the said Act retroactively is inconsistent with and/or in contravention of Articles 1, 8A, 77(3)(4), 79(1), 96 and 233(2)(b) of the Constitution.***
3. ***Whether Sections 6 and 10 of the Act extending the current life of local government councils from five to seven years is inconsistent with and/or in contravention of Articles 1,2, 8A, 176(3), 181(4) and 259(2) (a) of the Constitution.***
4. ***If so, whether applying it retroactively is inconsistent with and/or in contravention of Articles 1,2, 8A, 176(3), 181(4) and 259(2)(a) of the Constitution.***
5. ***Whether the alleged violence/scuffle inside and outside Parliament during the enactment of the Act was inconsistent and in contravention of Articles 1,2,3(2) and 8A of the Constitution.***
6. ***Whether the entire process of conceptualizing, consulting, debating and enacting the Act was inconsistent with and/or in contravention of the Articles of the Constitution as hereunder:***
   (a) ***Whether the introduction of the private member's Bill that led to the Act was inconsistent with and/or in contravention of Article 93 of the Constitution.***

(b) Whether the passing of Sections 2,5,6,8 and 10 of the Act was inconsistent with and/or in contravention of Article 93 of the Constitution.

(c) Whether the actions of Uganda Peoples Defence Forces and Uganda Police in entering Parliament, allegedly assaulting Members of Parliament in the Parliamentary Chambers, arresting and allegedly detaining the said members, is inconsistent with and/or in contravention of Articles 24, 97, 208(2) and 211(3) of the Constitution.

(d) Whether the consultations carried out were marred with restrictions and violence which was inconsistent with and/or in contravention of Articles 29(1)(a)(d)(e) and 29(2)(a) of the Constitution.

(e) Whether the alleged failure to consult on Sections 2,5,6,8 and 10 is inconsistent with and/or in contravention of Articles 1 and 8A of the Constitution.

(f) Whether the alleged failure to conduct a referendum before assenting to the Bill containing Section 2,5,6,8 and 10 of the Act was inconsistent with and in contravention of Articles 1,91(1), 259(2), 260 and 263(2)(b) of the Constitution.

(g) Whether the Act was against the spirit and structure of the 1995 Constitution.

7. Whether the alleged failure by Parliament to observe its own Rules of Procedure during the enactment of the Act was inconsistent with and in contravention of Articles 28, 42,

44, 90(2), 90(3)(c) and 94(1) of the Constitution; and in particular

i) Whether the actions of parliamentary staff preventing some members of the public from accessing the parliamentary chambers during the presentation of the Constitutional amendment Bill No. 2 of 2017 was inconsistent with and/or in contravention of the provisions of Articles 1, 8A, 79, 208(2), 209, 211(3), and 212 of the Constitution.

ii) Whether the act of tabling Constitutional Bill No. 2 of 2017, in the absence of the Leader of Opposition, Chief Whip, and other opposition members of Parliament was in contravention of and or inconsistent with Articles 1, 8A, 69(1), 69(2)(b), 71, 74, 75, 79, 82A, and 108A of the Constitution.

iii) Whether the alleged actions of the Speaker of Parliament in permitting the ruling party members of Parliament to sit on the opposition side of Parliament was inconsistent with Articles 1, 8A, 69(1), 69(2)(b), 71, 74, 75, 79, 82A, 83(1)(g), 83(3) and 108A of the Constitution.

iv) Whether the alleged act of the Legal and Parliamentary Affairs Committee of Parliament in allowing some committee members who had become Members of the Committee after the public hearings on Constitutional Amendment Bill No. 2 of 2017 had

been held and completed, to sign the Report of the said Committee, was in contravention of Articles 44(c), 90(1) and 90(2) of the Constitution.

v) Whether the alleged act of the Speaker of Parliament in allowing the Chairperson of the Legal Affairs Committee on 18th December, 2017 to submit to Parliament the said Committee's Report in the absence of the Leader of Opposition, Opposition Chief whip, and other Opposition Members of Parliament, was in contravention of and inconsistent with Articles 1, 8A, 69(1), 69(2)(b), 71, 74, 75, 79, 82A and 108A of the Constitution.

vi) Whether the actions of the Speaker in suspending the 6(six) members of Parliament was in contravention of Articles 28, 42, 44, 79, 91, 94 and 259 of the Constitution.

vii) Whether the action of Parliament in:

(a) Waiving the requirement of a minimum of three sittings before the tabling of the report which was also not seconded;

(b) Of closing the debate on the Constitutional Amendment Bill No. 2 of 2017 before every willing Member of Parliament had been afforded an opportunity to debate the said Bill;

(c) Failing to close all the doors leading to the Parliamentary Chamber where Members of

Parliament carried on the debate of the Bill, are in contravention of Articles 1, 8A, 44(c), 79, 94 and 263 of the Constitution.

8. ***Whether the passage of the Bill into an Act without Parliament first having observed 14 days of Parliament sitting between the 2nd and 3rd reading, was inconsistent with and/or in contravention of Articles 262 and 263(1) of the Constitution.***
9. ***Whether the Presidential assent to the Bill allegedly in absence of a certificate of compliance from the Speaker and a certificate of the Electoral Commission that the amendment was approved at a referendum, was inconsistent with and in contravention of Article 263(2)(a) and (b) of the Constitution.***
10. ***Whether Section 5 of the Act, which re-introduces term limits and entrenches them as being subject to a referendum is inconsistent with and/or in contravention of Article 260(2)(a) of the Constitution.***
11. ***Whether Section 9 of the Act, which seeks to harmonise the seven year term of Parliament with the presidential term is inconsistent with and/or in contravention of Articles 105(1) and 260(2) of the Constitution.***
12. ***Whether Sections 3 and 7 of the Act, lifting the age limit are inconsistent with and/or in contravention of Articles 21(3) and 21(5) of the Constitution.***

13. Whether the continuance in office of the President of Uganda by one who was elected in 2016 and who attained the age of 75 years is inconsistent with or in contravention of Articles 83(1)(b) and 102(c) of the Constitution.

14. What remedies are available to the parties?

Legal Representation:

Learned Counsel Wandera Ogalo was for the Petitioners in Constitutional Petition No. 3 of 2017, Byamukama James represented the Petitioners in Constitutional Petition No. 10 of 2018, while Erias Lukwago, Ladislaus Rwakafuzi, Luyimbaazi Nalukoola and Yusuf Mutembuli appeared for the Petitioners in Constitutional Petition No. 005 of 2017, and Counsel Lestar Kaganzi was for the Petitioner in Constitutional Petition No. 13 of 2018.

The Petitioner in Constitutional Petition No. 49 of 2017, Mr. Male Mabirizi Kiwanuka, represented himself.

For the respondent, the learned Deputy Attorney General, Hon. Mwesigwa Rukutana was the lead Counsel of the team of lawyers from the Attorney General's Chambers. He was being assisted by the learned Solicitor General, Francis Atoke, the Ag. Director Civil Litigation, Ms. Christine Kaahwa, the Commissioner Civil Litigation, Martin Mwambutsya, Principal States Attorney, Henry Oluka, Elisha bafiirawala, John Kalemera, Senior State Attorney Richard Adrole, States Attorney Godfrey Madete, Ms. Imelda Adong, Ms.

Genevive Ampiire, Ms. Suzan Akika Akello, Mr. Johnson Kimera and Ms. Jackie Amusugut. Hon. Gaster Mugoya, Member of Parliament and an advocate also asserted to Court to be part of the Counsel representing the respondent.

The Constitution as the Basic Law:

The Constitution is the basic law because it provides the rules and principles by which the people of a country agree to be governed. It represents the deepest norms and ideals by which the people govern their political life. See: B.J. Odoki: THE SEARCH FOR A NATIONAL CONSENSUS; THE MAKING OF THE 1995 CONSTITUTION**:** *2004 Edition, P. 245.* It is the collective authority of the people as a State. setting out the tasks to be carried out by Government and the principles upon which Government and State organs must govern thus preventing abuse of power and providing for the protection of the individual's rights and freedoms. It must be complied with by everyone and everything must be carried out in conformity with it. Whatever is contrary to and/or inconsistent with the Constitution is null and void and of no effect at all.

In Uganda the Constitutional Court is vested by the Constitution to carry out the duty of determining what is or what is not contrary to and/or inconsistent with the Constitution. This is the essence of interpreting the Constitution.

Article 137(1) mandates that any question as to the interpretation of the Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court.

Article 137(3) provides that:

"3 A person who alleges that

(a) An Act of Parliament or any other law or anything in or done under the authority of any law; or

(b) Any act or omission by any person or authority,

Is inconsistent with or in contravention of a provision of this Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate."

The jurisdiction vested by the above Article into the Constitutional Court is unlimited and includes the Constitutional Court interpreting or construing two or more provisions of the Constitution that may appear to be in conflict. The Court has to harmonise the Constitution: See: **Supreme Court Constitutional Appeal No. 1 of 2002 P.K. Ssemogerere & Others v Attorney General [2004] UGSC 10 (28 January, 2004)**.

Constitutional Development in Uganda

Pre-Colonial:

The Bantus, Hamites, Nile Hamites, Nilotic and Sudanic peoples occupied what later on came to be Uganda. They closely associated in the social, economic, cultural and political spheres of and as part of the Abachwezi and then Bunyoro-Kitara empires inspite of their diversity. Their governance was not upon written Constitutions. There were unwritten Constitutional arrangements in terms of cultures and traditions that evolved gradually over time in response

to their changing needs. They would be known, respected and obeyed by everyone concerned and affected, regardless of status, whether one was king, chief, elder or ordinary person.

Institutions and rules of governance based on culture and tradition began with the family, then the clan under the leadership of the clan head. Clans united and centralised themselves into kingdoms or chiefdoms whose leaders became the depository of the will of the led.

Failure to obey and/or comply with the basic laws and the institutions set up based upon traditions and/or cultures, led to severe punishments, including death of individuals or military invasions amongst kingdoms or chiefdoms. See: **The Uganda Constitutional Commission Report: Analysis and Recommendations 31 December, 1992 page 725 para 28.16.**

See also: **UGANDA: THE CRISIS OF CONFIDENCE** by A.M. Kirunda-Kivejinja, *page 6, 1995 Edition, Progressive Publishing House,* KAMPALA, and

A HISTORY OF BUGANDA: FROM THE FOUNDATION OF THE KINGDOM TO 1900, by Semakula Kiwanuka, *pages 91-94, 1971 Longman Edition.*

Colonial Period:

Colonialism, subjugated the basic laws based upon the cultures and traditions of the people to those laws that promoted colonial dominance. The native Ugandans were forcefully made to

surrender their sovereignty of determining their own affairs. Through employing local chiefs like Simei Lwakilenzi Kakungulu, and with co-operation with the Buganda Kingdom, colonial governance was established throughout Uganda.

The colonial era also opened up Uganda to the religions of Islam and Christianity from 1840 to the 1870s. The foreign religious leaders sought for political support from the Kings of kingdoms and leaders of other peoples of Uganda so as to be able to spread the word of God and Allah amongst the people. This of necessity resulted into political and religious rivalries that were later on to affect the course of constitutionalism in the country.

In 1900-1933 Great Britain, the colonial power, executed agreements with Kingdoms, and issued ordinances defining the power and obligations of the colonial power vis-à-vis the kingdoms and chiefdoms. All the agreements and ordinances had an overriding provision of subjugating everyone and every institution to the power of Great Britain, the colonial power.

Through the above agreements and ordinances, colonial Great Britain, introduced religious considerations into the governance of Ugandans. Important political offices of governance in the kingdoms and chiefdoms were allocated according to religion, the most important ones like that of the prime minister and treasurer going to those professing the religion of the colonial power. Hence religious considerations and biases became formalised in the

governance of the people. Constitutional development was, in the future, to be affected by all these.

Further, as regards Buganda Kingdom, the 1900 Agreement introduced "Mailo land" tenure with mainly chiefs having titled land while the majority ordinary people, "Abakopi", lost their interests in these lands that they had owned and occupied under the cultural and traditional land tenure systems. These were to form the Bataka movement whose activities affected the future constitutional development of the country.

The 1900 agreement also deprived the Bunyoro kingdom of its lands in the "lost counties" whereby the colonial power passed on this land to Buganda kingdom for the co-operation the Buganda kingdom gave to the colonial power against the resistance of the Bunyoro kingdom to colonial domination. This matter was to result in the "lost counties" issue that partly led to the 1966 Constitutional crisis.

In terms of social, economic and education development the colonial power governed Uganda on the broad division of southern and northern Uganda. The two were treated differently.

Southern Uganda that broadly included central, Eastern and western Uganda were Bantu speaking, had cash crops and cattle from which they earned money that they used for their development, including pursuit of education.

By way of contrast, Northern Uganda, comprising of Nilotic and Sudanic speaking Ugandans, was considered and treated as a

labour and recruitment reserve for the army, police and prisons. Hence, by independence in 1962, the army leadership was in hands of soldiers from northern Uganda, including Idi Amin, whose role in unconstitutionalism in Uganda is unmatched so far.

With the conclusion of the second wold war in 1944-45, the struggle for independence against colonialism grew in Africa, Uganda inclusive.

As between Great Britain and the Buganda Kingdom, the close co-operation was ceasing to be. Buganda asserted for independence as a state separate from the rest of Uganda while colonial Great Britain opposed this. The result was that the king of Buganda was deported in 1953 to Great Britain with a view of having another king appointed in his stead. Virtually all Ugandans rose up in opposition against the acts of the colonial power against the Kabaka. The colonial power gave in and the Kabaka was returned to his throne in 1955. He became a hero by reason of having, at least in appearance, challenged the colonial power. The Kabaka and his Buganda kingdom were to influence the Constitutional development very drastically before and after independence.

Political parties, influenced by tribal and religious considerations had been formed, the Uganda National Congress in 1945 and the Democratic Party in 1954.

The colonial power had also began to consult at a very limited scale native Ugandans about formulating a Constitution. The Wild Constitutional Committee was appointed and its report came out in

December 1959. The Report recommended Uganda to have a Westminster Model of Government with a cabinet responsible to the legislature that is elected by all Ugandans. Elections were soon held in 1961, which Buganda boycotted, and the Democratic Party won, with its leader, Ben Kiwanuka, becoming the Chief Minister soon thereafter.

Two London Constitutional Conferences on Uganda's Independence were held in London, with very limited consultation and participation of ordinary Ugandans. All these resulted in the 1962 Constitution which was effected by the London Agreement on March 1, 1962, as the Constitution of Uganda. On 9th October, 1962, after the general elections held in April, 1962, Uganda got its independence from colonial Great Britain with Apollo Milton Obote, the leader of UPC Party that had the majority in Parliament, as Prime Minister and, through an alliance, Sir Edward Mutesa I, the Kabaka of Buganda became the titular Head of State of Uganda. The 1962 Constitution never earnestly addressed the issues of unity in diversity of the peoples of Uganda, the economic and educational imbalances between northern and southern Uganda, the issue of having a nationalistic and truly Ugandan army and the issues of land ownership including the "lost counties". Thus ended the constitutional development under the pre-colonial period.

The Post-Independent Constitutional Era

In September, 1960, at the opening of the Parliamentary Building, Ian Macleod, then the United Kingdom Secretary of State for the colonies, addressed the Uganda Legislative Council thus:

> *".....As the years go on I am sure that this chamber will witness many varied scenes. .....so in the future, there will be many hours of hard slogging at the day to day business of Government. There will be bitter scenes when matters of great controversy are under discussion and party feeling is at its height. There will be scenes of high drama and sometimes, of low comedy as well."*

See: **CONSTITUTIONAL LAW AND GOVERNMENT IN UGANDA**, by G.W. Kanyeihamba, *page 32, 1975 Edition, EA Literature Bureau.*

Uganda's post independent constitutional development has witnessed" hard slogging" "bitter Scenes", "high drama" and indeed "low comedy" in Parliament and elsewhere as Macleod predicted in 1960.

The 1962 Independent Constitution lasted up to 1966. In 1964, a referendum on the "lost counties", agreed upon at the London Conference to be held amongst the occupants of the disputed areas soon after independence, was held with the majority of those concerned voting to revert to Bunyoro Kingdom from Buganda Kingdom. Kabaka Mutesa II, as President, was required to sign an Instrument that the counties of Buyaga and Bugangazi be returned to Bunyoro. He refused to do so for that would be giving a way part of his kingdom to Bunyoro kingdom. The Prime Minister, Milton

Obote, being authorized by the Constitution to do so if the President declined to act, signed the Instrument. This led to the collapse of the political alliance between the Kabaka and his Buganda kingdom and that of Obote's Uganda Peoples Congress.

The 1962 Constitution was abrogated by Apollo Milton Obote with support of the UPC Government he led as Prime Minister. Relying on the military dominated with Ugandans of northern origin, prominent of which was Colonel Idi Amin, Obote crushed the Kabaka, by attacking the Kabaka's palace and the seat of Government of the Buganda kingdom at Mengo, sending the Kabaka, and also the first President of independent Uganda, into exile in the United Kingdom, the former colonial power, where he died in 1969.

Without in any way affording an opportunity to all Ugandans to participate in formulation of a new Constitution for independent Uganda, Obote and the Government he now led, unconstitutionally imposed upon the country on 22nd February, 1966, the 1966 Constitution, and later on, the 1967 Constitution whereby all executive powers of State were vested in the President and kingdoms were abolished. Mr. Obote, without holding any elections, became the President of Uganda, and the legislative Assembly now dominated, through crossings from other political parties and entities, by members of UPC, the party that Mr. Obote led, whose term was due to expire in 1967, self-extended the terms of the President as well as theirs for another five years. It is these

Members of Parliament who approved and adopted the 1967 Constitution as the Constitution of the country, after each one had been given a copy, by the same being placed in a pigeon hall of each Member at Parliament. On collecting the same the Members proceeded in Parliament to adopt and approve the same. Hence the derogatory reference of the 1967 being a "pigeon hall" Constitution. Ugandans never put their collective input in the same.

Mr. Obote, as Executive President, relied heavily on the army, of which he was now commander in chief, to crush any political opposition, through suppression of basic rights of the people, particularly by use of the declaration of a state of emergency in Buganda and then detaining political opponents by use of the detention law, with Courts of Law having no power to question such detention orders. See: Uganda vs Commissioner of Prisons, Ex-parte Matovu [1966] EA 54.

Amongst the army leadership was Colonel Idi Amin, whom Obote had relied upon for his acts in 1966 and 1967 of attacking Mengo, arresting and detaining his five Cabinet Ministers, as well as introducing and implementing the 1966 and 1967 Constitutions.

On 25th January, 1971 Major-General Idi Amin took over Government, while President Obote was attending the Commonwealth Conference in Singapore.

Idi Amin's regime destroyed Constitutionalism in Uganda. He ruled by decrees exercising both executive and legislative powers. All institutions of State were subjected to his will and wishes. He

executed the Chief Justice Benedicto Kiwanuka, the Archbishop of the Church of Uganda, Janan Luwum, the Vice Chancellor, Makerere University, Frank Kalimuzo and very many other innocent Ugandans. He expelled from Uganda all people of Asian origin without any payment of adequate compensation to them.

In 1979, on attacking Tanzania, in the "Kagera War" Idi Amin was attacked driven out of Uganda into exile by a combination of Tanzanian army and Ugandan exiles.

The Uganda National Liberation Front, (UNLF) constituted of Ugandan groups of exiles, who had met in Moshi, Tanzania, set up an interim Government in Uganda after the overthrow of Idi Amin, with Prof. Yusuf Lule as interim President of Uganda.

Once Idi Amin was no longer around, the UNLF had nothing else to unite them. They took amongst themselves, to scheming against each other, without taking any positive steps towards involving all Ugandans into a Constitution making process Uganda. Soon, Yusuf Lule was removed as President and was replaced by Godfrey Lukongwa Binaisa, who too, after eleven months, was overthrown, and the Military Commission, led by Paulo Muwanga, assumed the leadership of the country. Dr. Obote was the force behind the military commission. He was still exiled in Tanzania, but was desirous of assuming the presidency of Uganda once again.

The Military Commission organised the December 1980 general elections, allowed Obote to return to Uganda and participate in the elections as leader of the Uganda Peoples Congress (UPC). At the

conclusion of the elections, the military Commission declared the UPC as the winner of the elections and Obote, as the leader of the Party in Parliament with majority seats, proceeded to form a Government and to lead the country. Ugandans disputed the results of these elections.

One Yoweri Kaguta Museveni, who for a long time, had fought to change the status quo in Uganda, this time merged with other dissatisfied groups of Ugandans and formed the National Resistance Movement (NRA) to remove Obote from power and to give Uganda a people generated Constitution representing the desires and aspirations of Ugandans.

The NRA/NRM waged its war inside Uganda in the Luwero Triangle against the Government led by Milton Obote. Meanwhile the Acholis were at loggerheads with the Langis in the army of the Government led by Dr. Obote. On 27th July, 1985, the Acholi soldiers led by Tito Okello Lutwa overthrew Obote from power driving him into a second exile, this time in Zambia, from where he later died.

The military junta, led by Tito Okello, assumed power over Uganda and Tito Okello became President. Peace Talks between the Junta and NRA were held in Nairobi, Kenya, but did not produce any positive results. On 26th January, 1986, the NRA/NRM drove the Military Junta from power and Yoweri Museveni became President.

One of the priorities of the new regime was to set up a Constitutional Commission to receive views of all Ugandans as to

what they want their Constitution to be. Through Statute No. 5 of 1988, a Constitutional Commission, named the Odoki Commission, after its chairman, was set up to get the views of all Ugandans, write a Report and a draft Constitution and submit the same to the Government. This was done on 31st December, 1992.

Ugandans then proceeded to elect, through National Elections, representatives to a Constituent Assembly that the NRA/NRM Government established to debate the commission Draft Constitution and to adopt and enact a Constitution for Uganda. The Constituent Assembly so elected curried out its mandate and on 22nd September, 1995, adopted and enacted the 1995 Constitution which became effective on 8th October, 1995.

Since its promulgation, the 1995 Constitution has been amended five times with the Fifth Amendment having given rise to the consolidated Constitution Petitions, the subject of this Judgment.

Amendment of the Constitution:

To amend the Constitution is to effect a change in a provision of the Constitution. An amendment is an expression as to how the Constitution has been varied.

The Supreme Court in **Constitutional Appeal No. 1 of 2002: Paul Ssemogerere & 2 Others –vs- Attorney General** upheld Justice of Appeal Twinomujuni in his dissenting Judgement in

Constitutional Court Petition No. 7 of 2000 from which the appeal arose, as to the meaning of amending the Constitution:

> *"If an Act of Parliament has the effect of adding to, varying or repealing any provision of the Constitution, then the Act is said to have amended the affected Article of the Constitution. There is no difference whether the Act is an ordinary act of Parliament or an Act intended to amend the Constitution. The amendment may be effected expressly, by implication or by infection, as long as the result is to add to, vary or repeal a provision of the Constitution. It is not material whether the amending Act states categorically that the Act is intended to effect a specified provision of the Constitution. It is the effect of the amendment that matters."*

This Court is bound by the above observations as regards amending the Constitution.

Uganda's Constitution is written and drawn up in legal form, unlike those countries that have unwritten Constitution that govern themselves on the basis of customs and conventions such as the United Kingdom. Uganda's 1995 Constitution is both flexible, capable of being altered by ordinary legislative acts in some respects, and rigid in other respects, where its alteration can only be by special procedure. Being the basic law the Constitution is not to be amended as a matter of course. The amendments must be as a result of serious considerations and must follow strict procedures.

Chapter eighteen, Articles 259 to 263 provide for the amendment of the Constitution.

According to Article 259(1) and (2) the Constitution may be amended by Parliament by way of addition, variation or repeal of any of its provisions in accordance with the procedure laid down in its chapter eighteen. The Constitution is only amended by an act of Parliament, the sole purpose of which is to amend the Constitution and the Act has been passed in accordance with chapter eighteen.

Special procedures and requirements have to be fulfilled before certain provisions of the Constitution are amended. The following amendments can only be carried out after the people of Uganda have agreed to the amendment through a referendum:

(1) Article 260 that sets out instances where a referendum has to be first held.
(2) Articles 1 and 2 on the sovereignty of the people and supremacy of the Constitution.
(3) Article 44 prohibition of derogation of the human rights and freedoms of freedom form torture, cruel, inhuman or degrading treatment/punishment, slavery/servitude, fair hearing and habeas corpus.
(4) Articles 69, 74 and 75 on political systems, including Parliament having no power to enact a law establishing a one party state.

(5) Article 71(2): Only Parliament has power to make laws through its own acts.

(6) Article 1059(1): president to hold office for a term of five years that may be renewed from time to time.

(7) Article 128 (1): Courts are to be independent without being subject to the control/direction of any one when exercising judicial power.

(8) Chapter 16: Article 246 on Institution of traditional/cultural leaders.

Then they are amendments that require first approval by district councils before they become law. These are:

(a) Article 261(1) itself on such Amendments

(b) Article 5(2) that Uganda is to consist of regions Kampala and districts.

(c) Article 152 on Taxation.

(d) Articles 176(1), 178, 189 and 197 respectively on Local Government system, Regional Governments, functions of Government and District Councils and financial autonomy of urban authorities.

For any amendment of the Constitution, including those stated above that require a referendum to be held or require approval by district councils before they become law, Parliament must first consider a bill setting out the amendment and must pass that bill

by being supported at the second and third readings by the votes of not less than two thirds of all Members of Parliament.

In respect of those bills that require approval through a referendum or approval by district councils, Article 263(1) sets a Constitutional requirement that the votes on the second and third readings in respect of those bills shall be separated by at least fourteen sitting days of Parliament. This is to give sufficient time and opportunity to members of Parliament to seriously ponder and carry out consultations about the subject matter before them, given its gravity, before taking a final decision on the same. For those other Bills to amend the Constitution that do not require a referendum or approval of district councils, the votes on the second and third readings can be taken on them without being separated by at least fourteen sitting days of Parliament.

It has to be appreciated that an amendment of the Constitution does not become effective unless and until the requirements of Article 263 of the Constitution have been complied with. This Article mandatorily requires the Speaker of Parliament to prepare and forward to the President a certificate certifying that the provisions of Chapter Eighteen of the Constitution on Amendment of the Constitution have been complied with and in case of an amendment to which Articles 260 or 261 apply, the Bill must be accompanied by the certificate of the Electoral Commission that the amendment had been approved at a referendum or, as the case may be, ratified by the district councils, as required by Chapter

Eighteen. Any assenting to such bills, in the absence of any of the requisite certificates has been held to be unconstitutional and the assented to Act of Parliament to be null and void by reason thereof. See: The Judgement of Kanyeihamba, JSC, with which the rest of the Supreme Court agreed, in **Ssemogerere & 2 Others vs Attorney General (Supra).** The Justice held**:**

"In my opinion, the requirements of Chapter Eighteen are mandatory and cannot be waived, not even by Parliament".

The above principles as to amendment of the Constitution are to guide this Court as it interprets the Constitution in order to determine whether or not any of the provisions of the Constitution (Amendment) Act No. 1 of 2018 contravened or were inconsistent with any provisions of the Constitution.

Principles of Constitutional Interpretation:

The Judiciary is the guardian of the Constitution.

To interpret, is to ascertain the meaning of the specific provision of the Constitution as well as the meaning of that provision of the Act of Parliament, any other law or any act or omission by any one or authority and then decide whether, given the ascertained meaning, there is contravention and/or inconsistency with an alleged provision of the Constitution.

The Uganda Constitution has National Objectives and Directive Principles of State Policies of which No. 1 is to guide all organs and agencies of the State, all citizens and organisations in applying or

interpreting the Constitution for the establishment and promotion of a just, free and democratic, society. This is the "first canon of construction of this Constitution". See: Egonda-Ntende Ag. JA in **Tinyefuza V AG: Constitution Petition No. 1 of 1997**. See also: **Ssekikubo & 4 Others vs Ag: Constitutional Appeal No. 1 of 2015 (SCU), Spelser V Randerl (1958) 375 US 513, Romesh Thapper V State of Madras [1950] SCR 594** and also: **The Queen Dakes (1987) LRC (Const) (Canada) 477 at 489-499**.

In interpreting the Constitution, the principle to be followed is that where the words of the Constitution are clear and unambiguous, then they are given their primary, plain, ordinary and natural meaning. However where the language of the Constitution is imprecise, unclear and ambiguous, then the same is given a liberal, broad, generous and purposive interpretation so as to give effect to the spirit of the Constitution as a continuing instrument whereby governance is upon principles that are acceptable and demonstrably justifiable in a free and democratic society.

Interpreting the Constitution, requires Court to look at the Constitution as a whole. All the provisions of the Constitution touching on the issue have to be considered together. The Court must give effect to all the provisions of the Constitution. This is because each provision is an integral part of the Constitution and must be given meaning or effect in relation to others. Failure to do so leads to an apparent conflict within the Constitution. Where a Constitutional provision is in conflict or inconsistent with another

Constitutional provision, the Constitutional Court has jurisdiction to resolve the inconsistency so that the Constitution remains whole. See: **Ssemogerere & Another v AG: Constitutional Appeal No. 1 of 2002 (SCU).** See also: **Mtikila V AG: High Court Tanzania Civil Case No. 5 of 1993.**

The Constitution must be interpreted in such a way that it does not whittle down any of the rights and freedoms contained in it, unless there are clear and unambiguous words to that effect within the Constitution itself. See **Dow –v- AG (1992) LRC (Const) 623** at 668. The interpretation must be directed at ascertaining the foundation values inherent to the Constitution and not merely the literal meaning of its provisions. See: **Matison & Others –v- The Commanding Officer Port Elizabeth Prison & Others [1994] 3 BCLR 80 at 87.** Interpreting the Constitution should take account of the context, scene and setting under which it is operating, not necessarily when it was enacted, so as to take account of the growth and the changing circumstances of the society it is regulating. See: **Archbishop Okogie V AG (1981) 2 NCLR 337 at 348 (Nigeria COA).**

Where Constitutional history is relevant in interpreting the Constitution, particularly so as to point out past mistakes so that they are not repeated or revived, then such a history should be resorted to. Indeed this is very well brought out by the preamble to the 1995 Constitution that:

"We the People of Uganda:

Recalling our history which has been characterised by political and Constitutional instability";

That *"Recalling of our history"* cannot be left out when interpreting the Constitution. See: **Karuhanga vs AG: Constitutional Court Petition No. 39 of 2013.**

The principles that govern interpretation of ordinary Statutes also apply to interpretation of a Constitution. However, because of the very important objectives of a Constitution that evolve upon the development and aspirations of the people and being the framework for the legitimate exercise of government power as well as the protection of basic individual rights and liberties, the Court interpreting the Constitution must go further than the one interpreting an ordinary Statute, by reading the words of the Constitution and attaching to them great purposes that were intended to be achieved by the Constitution as a continuing instrument of government. It is only this way that the people can have full protection of their fundamental rights and freedoms as well as that of the whole Constitution: See: **Attorney General V Whiteman [1991] 2 WLR 1200 at 1204 and Attorney General of Gambia V Momadu Jube (1984) AC 689 (Privy Council).**

Under the purpose and effect rule of Constitutional interpretation, the purpose and effect of an impugned Act go to determine the Constitutionality of that Act. If the purpose or its effect infringes a Constitutionary guaranteed right, then the Act is declared

unconstitutional. See: **Abaki & Another V AG**: **Constitution Petition No. 2 of 1997.**

Related to the above, is the rule of interpretation that the Constitution must be interpreted to give logical and practical meaning and effect to its provisions. Hence the right to life guaranteed under the Constitution has been interpreted to include the right to livelihood: See **Abuki & Another V AG (Supra)** where the Uganda Constitutional Court relied in the Indian Supreme Court decision of **Tellis & Others V Bombay Municipal Council (1987) LRC (Const) 351**.

In interpreting the Constitution resort is also made, where necessary and relevant, to international and regional treaties and instruments. This is because, in the case of Uganda, paragraph 28 of the National objectives and Directive Principles of State Policy, provides that Uganda is to respect international law and treaty obligations and actively participate in international and regional organisations that stand for peace, well-being and progress of humanity. The Uganda Human Rights Commission under Article 52(i) (h) monitors the Government's compliance with the international treaty and convention obligations on human rights. It follows therefore that under the Constitution the role of the international and regional treaties and Instruments is a recognized one. It is therefore right of the Constitutional Court to hold that in matters of interpreting the Constitution:

" …… we may have to use aids in construction that reflect an objective search for the correct construction. These may include international instruments to which this country has acceded and thus elected to be judged in the community of nations." Per Egonda-Ntende AG JA, in **Tinyefuza –v- AG (Supra).**

The above principles, and others, where necessary, will be followed in resolving the set issues.

Issue 1:

This issue requires determination whether or not Sections 2 and 8 of the Constitution (Amendment) Act No. 1 of 2018 contravened or were in consistent with Articles 1, 8A 61(2)(3), 77(4), 79(1), 105(1), 233(b), 260(1) and 289 of the Constitution.

Section 2 of the Act amended Article 77(3) of the Constitution by substituting five years with seven years as the life of Parliament. The original Article 77(3) provided that:

"Subject to this Constitution, the term of Parliament shall be five years from the date of its sitting after a general election".

After the amendment the term of Parliament is put at seven years from the date of its sitting after a general election.

Article 1 of the Constitution is on the sovereignty of the people of Uganda. They are the depository of power and they exercise their sovereignty in accordance with the Constitution. They govern themselves through their will and consent in accordance with the Constitution. They express their will and consent on who shall

govern them and how they are to be governed through regular, free and fair elections of their representatives or through referenda.

There is no specific Article in the Constitution whereby Parliament is vested with powers to self-prolong its term beyond the five years stipulated in Article 77(3).

It is also a fact that Members of Parliament become representatives of the people only after the people have exercised their sovereignty under Article 1(4) of the Constitution, when they express their will and consent on who shall govern them and how they should be governed, through regular, free and fair elections.

The elections that resulted in sending Members of Parliament to the current 10th Parliament were on the basis that the Parliament was to last for a term of five years, and Article 96 provides that:

"Parliament shall stand dissolved upon the expiration of its term as prescribed by Article 77 of this Constitution."

In my appreciation of the above Articles of the Constitution, on the principle that the Constitution must be interpreted as a whole, Article 77(3) must be read and interpreted together with Article 1 of the Constitution. Therefore Parliament cannot self-prolong its term of office from five to seven years as from the time it was elected without first getting the will and consent of the people who are vested with the power to exercise their sovereignty in accordance with the Constitution. To so prolong the term of Parliament is to amend Article 1 of the Constitution, and as such, pursuant to Article 260(2)(b), such an amendment must be supported at the

second and third readings, the two readings separated by at least fourteen siting days of Parliament between them, and supported at each of the readings being by not less than two-thirds of all Members of Parliament. Thereafter the Bill must be referred to a decision of the people for their approval in a referendum. The speaker must also forward the Bill to the President for his assent only when the same is accompanied by a certificate of compliance with the requirements of Chapter Eighteen of the Constitution including a certificate from the Electoral Commission that a referendum was held and the result of that referendum.

The respondent's submission that Article 79 vests powers in Parliament to make laws on any matter for the peace, order, development and good governance of Uganda and that Parliament was exercising those powers in prolonging the term of Parliament from five to seven years cannot be a proper interpretation of the Constitution. Taking the Constitution as a whole, Article 79 has to operate not to the exclusion of Article 1 which vests all power in the people who exercise their sovereignty in accordance with the Constitution. Thus Article 79 has its foundation in Article 1. That relationship of Article 79 to Article 1brings into operation Article 260, thus making the amendment to the Constitution whereby the term of Parliament is prolonged from five to seven years to be the subject of a peoples' referendum before it becomes law. The exercise of legislative powers by Parliament under Article 79(1) of the Constitution is in the very language of the same clause "subject to the provisions of this Constitution". Article 1 is, in the

circumstances, one of the provisions to which Article 79(1) is subject to, in this regard.

It is significant that in the whole 1995 Constitution, there is only one instance under Article 77(4) where the Constitution allows Parliament to extend its life; and even in this instance, the extension is not to be more than six months at a time. This is when there exists a state of war or a state of emergency which would prevent a normal general election from being held. Parliament may by resolution supported by two thirds of its members extend its life only in that situation. Had the framers of the Constitution envisaged vesting power in Parliament to extend its life, basing on other causes, then they would have expressly so provided in the Constitution. That they did not do so, and given the guidance of the National Objective and Directive Principles of State Policy No. 2(1) that:

"The State shall be based on democratic principles which empower and encourage the active participation of all citizens at all levels in their own governance",

a conclusion is drawn that the framers of the Constitution never envisaged Parliament to self-prolong its term. As already noted earlier in this Judgment, self-prolongation of those in power to continue to be in power has been a prominent factor in the tyranny and unconstitutionalism in the past in Uganda. Parliament self-prolonged its term in 1966 to 1971. So too did President Idi Amin who was president for life. The UNLF never held any elections. It is

therefore the duty of this Court, as an interpreter of the Constitution, given the country's past history, not to put forward an interpretation of the Constitution that will empower Parliament, both now and in the future, to self-prolong its term as and when Parliament chooses to do so; without first seeking the mandate of the people of Uganda through a referendum. To interpret the Constitution otherwise will be to repeat the very evils of the past history of this country since independence in 1962.

Article 289 of the Constitution, before being amended, provided for the expiration of the term of Parliament to be on the same date as the one when the five year term of the President would also expire. The amendment of this Article by Section 8 of the Act, now separates the expiration of the term of Parliament from the expiration of the term of the President in that, with the amendment, the expiration of the term of Parliament is to be seven years of its sitting after the general elections while that of the President is to be five years after the general elections. Hence the set up by the framers of the Constitution of having all elections of political leaders within the same period under Article 61(2) of the Constitution is being done away with. This is being done without first obtaining the will and consent of the people as to their being governed, thus further contravening Article 1 of the Constitution. That amendment too can only be carried out only after the same has been effected in compliance with the requirements of Articles 259, 260(1)(a) and (b) and 263(1) and (2) of the Constitution.

It is therefore my holding that the amendment as effected by Section 8 of the Constitution (Amendment) Act No. 1 of 2018 is contrary to the Constitution and as such is not in the national interest of the country.

For the reasons given above, I come to the conclusion that, Sections 2 and 8 of the said Act are contrary to and are in contravention of Articles 1, 8A, 61(2)(3), 77(3), 79(1), 260(1)(2)(b) and 263(1) (2)(a) and(b) of the Constitution. Issue 1 is accordingly so resolved.

Issue 2:

For the reasons given in resolving issue 1, it follows that, applying the Constitution (Amendment) Act No. 1 of 2018, retroactively is also inconsistent with and in contravention of the same provisions of the Constitution like those stated in issue 1.

Issue 3:

This issue requires Court to determine whether Sections 6 and 10 of the Constitution (Amendment) Act No. 1 2018 extending the current life of Local Government Councils from 5 to 7 years is inconsistent with and in contravention of Articles 1, 2, 8A, 176(3), 181(4) and 259(2) (a) of the Constitution.

Section 6 of the Act amended Article 181(4) of the Constitution in that all local government councils are to be elected every seven years instead of every five years. Section 10 of the Act, amended Article 291 of the Constitution by substituting it with the following:

"291. Term of current local government councils.

For the avoidance of doubt, the term of seven years prescribed for local government councils by clause (4) of Article 181 of this Constitution shall apply to the term of the local government councils in existence at the commencement of this Act".

The sum effect of the amendments brought about by Sections 6 and 10 of the Act is to extend the term of the local government councils in existence as at the time of the amendment and those to be in place thereafter, from five to seven years.

The system of Local Government is based on the district as a unit under which there are lower local governments and administrative units as Parliament may by law provide.

A Local Government under Article 207 of the Constitution and under the Local Governments Act, Cap 243, is a District Council, Urban Council, and a Sub-County Council.

It is to be noted that neither in Chapter eleven of the Constitution that deals with local governments, nor elsewhere in the Constitution, is there a specific Constitutional provision vesting power in Parliament to increase or shorten the term of a local government that is prescribed in Article 181(4) of the Constitution, thus:

"181

(4)

All local government Councils shall be elected every five years".

Local Governments are manned by and their governance is for the benefit of the people of Uganda. It follows therefore that they are equally covered by the already stated National Objectives and Directive Principles of State Policy, paragraph No. 2(1) thereof.

Therefore Article 1 of the Constitution: Sovereignty of the people: equally and strictly applies to local governments like it applies to Parliament. The people, even at local government levels, must be governed through their will and consent.

As already held, the Constitution (Amendment) Act No. 1 of 2018, by extending the term of local governments from five to seven years, brought into application Article 1 of the Constitution. The people have to determine their governance by expressing their will and consent. For any law to provide otherwise, is to amend the said Article 1 of the Constitution and inevitably to bring into play Article 260 (2)(b) of the Constitution whereby a referendum must first be held before the enactment becomes law.

Since no referendum was ever held before this Act became into law and there was no compliance with the other Constitution requirements set up by Article 263(1) and (2) of the Constitution, I accordingly hold in respect of issue 3 that Sections 6 and 10 of the Act extending the current life of the local government Councils from 5 to 7 years is inconsistent with Articles 1,2,8A, 176(3) and 181(4) and 263(1) and (2) of the Constitution.

Issue 4:

As to issue, my holding above in issue 3 renders Sections 6 and 10 of the Constitution (Amendment) Act No. 1 of 2018, to be null and void ab initio by reason of its being unconstitutional. Accordingly applying those Sections retrospectively also *ip so facto* becomes contrary and inconsistent with the Constitution.

Issues 5, 6, 7, 8 and 9

Issues 5, 6, 7, 8 and 9 question the process by which the Constitution (Amendment) Act, 2018 was enacted into law by Parliament. I will consider them together.

It is the case for the petitioners that in a number of aspects, Parliament acted contrary to specific Constitutional provisions, as well as its own Rules, in the way it handled the process of enacting this Act and that this rendered the Act to be unconstitutional and thus null and void.

For the respondent, the Hon. Deputy Attorney General maintained that Parliament strictly observed the Constitutional provisions and its rules, and that where there was any lapse as regards compliance with any Rules of Parliament, this was merely procedural and of no effect to the validity of the enacted Act.

It has to be appreciated that, given the country's history characterised by political and Constitutional instability as well as tyranny, oppression and exploitation, a culture of strict constitutional observance has been developed in Uganda so as to ensure that the country does not revert to its dark history. Thus the Supreme Court through the Judgement of Kanyeihamba, JSC,

with the approval of the whole Court on this aspect, has expressed itself in this regard that:

> *".....the overriding constitutional dogma in this country is that Constitutionalism and the 1995 Constitution of Uganda are the Alpha and Omega of everything that is orderly, legitimate, legal and decent. Anything else that pretends to be higher in this land must be shot down at once by this Court using the most powerful legal missiles at its disposal..... . Judges have the responsibility to pronounce themselves on a disputed matter guided only by the Constitution and laws of Uganda".*

See: **Besigye v Museveni: Presidential Election Petition No. 1 of 2006** (SCU, Kanyeihamba, JSC).

In adherence to strict constitutionalism, Parliament has, as the legislature, to set standards for compliance with the Constitution and its own rules. The Constitutional Court, has, stated in **Oloka-Onyango & 9 Others v AG: Constitutional Petition No. 8 of 2014,** that:

> *"Parliament as a law making body should set standards for compliance with the Constitutional provisions and its own rules..... .The enactment of the law is a process, and if any of the stages therein is flawed, that vitiates the entire process and the law that is enacted as a result of it".*

Uganda is not alone in East Africa in this regard. In the persuasive **High Court of Kenya Constitutional Petition No. 371 of 2016: Centre for Rights Education and Awareness & Another v The Speaker of the National Assembly,** it was observed in respect of the Constitution being the Supreme law in Kenya that:

> ***"When it exercises its legislative authority, Parliament 'must act in accordance with, and within the limits of the Constitution; and the supremacy of the Constitution requires that the obligations imposed by it must be fulfilled'. Courts are required by the Constitution 'to ensure that all branches of government act within the law' and fulfil their Constitutional obligations".***

Issue 5:

This issue requires this Court to determine whether there was any violence both inside and outside Parliament, and if there was, whether that violence disabled members from freely enacting the Act.

Some of the evidence on this issue is the Parliament Hansard of September, 2017, the affidavits of General David Muhoozi, Chief of Defence Forces who also verbally answered questions in Court in person, that of Hon. Gerald Karuhanga MP, Hon. Jonathan Odur, MP, Hon. Betty Namboze, MP, Mrs. Jane Kibirige, Clerk to Parliament and Ahmed Kagoye, Sergeant at Arms of Parliament.

From the evidence on record it is established that there was a ruffle in Parliament during the period of the introduction and debate of

the Bill of removing the age limits as a qualification for one to stand for election as President of Uganda and also as District Chairperson. The opposition Members in Parliament grouped themselves, planned, and even put on a special uniform dress to oppose the said Bill at all stages of its being debated. The majority of the ruling NRM Members of Parliament with support of Cabinet Ministers vehemently supported the Bill. This state of affairs led to the Parliamentary proceedings of 21st, 26th and 27th September, 2017 to be highly very volatile. The Speaker acting within the Rules of Procedure of Parliament had to, suspend some Honourable Members of Parliament.

Apparently there was resistance to the orders of suspension and some of the Members of Parliament so suspended had to be forcefully removed from the Parliamentary Chamber. At one time this was followed by all members of the opposition exiting the chamber: See Hansard page 4740 proceedings of 27th September, 2017.

It was possibly during these scuffles that the police and army confronted the Members of Parliament, particularly those of the opposition both in the Parliamentary Chamber, but when no Parliamentary business was going on and when the Speaker was not in Chair. Confrontations also went on outside the Parliamentary Chamber on the precincts of Parliament.

This Court received no evidence that, at any material time, the police and/or the army personnel, entered the Parliamentary

Chamber, when the business of Parliament was going on and the Rt. Hon. Speaker was in Chair, and interfered with the Parliamentary business of debating the Bill.

This Constitutional Court in **Constitutional Petition No. 47 of 2011: Severino Twinobusingye vs AG,** with the greatest respect, called upon Honourable Members of Parliament, whether of the opposition or Government side, to carry out their honourable roles and responsibilities as peoples representatives in Parliament very fiercely, but always in a manner that respects and gives honour and respect to the institution of Parliament as the fountain of Constitutionalism.

While, in my considered view, on the basis of the evidence availed to this Court, there was no justification at all for the army and other security forces to join in this scuffle, which should have been handled by the normal police personnel and within the normal security systems of Parliament, I regretfully find that a number of the Honourable Members of Parliament acted, on some of these occasions, without the necessary restraint, decorum, responsibility and respect to the chair of the Speaker expected of them as Honourable Members of Parliament.

While under Articles 1,2,3(2), 8A and 97 of the Constitution as well as the provisions of the Parliamentary (powers and privileges) Act, Honourable Members of Parliament, are entitled to rights and privileges that enable and empower them to effectively represent Ugandans in Parliament, that representation must not be at the

expense of some of the Members of Parliament misconducting themselves and acting in disobedience of the lawful directions and guidance of the Speaker of Parliament. In this particular instance, within and inside the Chamber of Parliament, it is the misconduct, particularly of failing to obey and heed the orders, directives and guidance of the Honourable Speaker, that led to the scuffle, and the Honourable Members of Parliament concerned have to bear the blame for the same. On the whole however, the evidence that there is, is to the effect that Parliament carried on its business as the peoples legislator with the Honourable Speaker in the chair, without any disruption or interference from any internal forces in finally enacting what ultimately came out as the Constitution (Amendment) Act No. 1 of 2018.

There is however evidence that outside the Parliamentary Chamber the army, police and other security State organs purported to interfere with the work of some Members of Parliament as representatives of the people both at the Parliament premises and when they proceeded in their Constituencies, and elsewhere in the country, consulting the people on the Constitutional (Amendment) Bill (No. 2) of 2017.

This Court holds this interference to be very unlawful and most regrettable, however limited it may have been. The history of the 1966 crisis when the Executive deployed the army under Idi Amin and other State security organs to suppress Parliament and to arrest and detain, without trial of five Ministers of the Cabinet and

other Ugandans, is still part of our ***"Recalling our history which has been characterised by political and constitutional instability";*** as is born out of the Preamble to the 1995 Constitution.

Ugandans, through the Constituent Assembly, made provision for the army to be represented in Parliament. It should restrict its role in political disputes through its representatives in Parliament. To conduct itself otherwise, is to overlook and disregard the very painful lessons of the history of Constitutionalism in Uganda.

For the Uganda Police, AIGP Asumani Mugenyi, proceeded to issue directions to all police stations throughout the country instructing the police to restrict Members of Parliament from exercising their freedom of association and movement within their respective constituencies, and elsewhere in Uganda, to consult the people about the Bill. By the directive of this very senior police officer, a number, however few, Honourable Members of Parliament were prohibited from interfered with by police joint rallies or seeking support outside each one's Constituency, thus preventing them from seeking participation of Ugandans whom they represent in Parliament, on the proposed Bill. The directive was contrary to Article 29(1)(d)(e) and (2)(a) as well as the Provisions of the Parliamentary (Powers and Privileges)Act.

It is of significance, and this Court received no evidence to the contrary, that both the Uganda army and the Uganda Police acted as they did in this matter without first holding any prior

consultations and/or seeking permission from the Honourable Speaker of Parliament, the head of the legislature, the second arm of State. This was a subjugation of Parliament as the country's legislature to the unlawful orders of this police officer. It is hoped, it will not be repeated.

The Court, however received no sufficient evidence that AIGP Asuman Mugenyi's directive was carried out throughout the country. The only evidence was of isolated incidents from Lango sub-region and in Kampala where a few meetings and rallies by a few Members of Parliament were disrupted by police. The overwhelming number of Members of Parliament held and carried out their meetings of consultations of the people uninterrupted.

In conclusion, the answer to this issue is that the Constitution (Amendment) Act No. 1 of 2018 was not enacted as a result of violence having been exerted upon the Honourable Members of Parliament.

Issue 6(a)(b):

The essence of this issue is whether the enactment of the constitution (Amendment) Act, 2018 that commenced as a private members Bill, was inconsistent with and/or contrary to Article 93 of the Constitution.

Article 93 bars Parliament from taking action on a private Member's Bill, that imposes or alters a tax or a charge on the consolidated or public fund other than by reduction, causes the payment, issue or

withdrawal or causes the composition or remission of any debt due to Government.

The case of the petitioners, set out in the affidavits of the Hon. Winne Kiiza, Leader of the Opposition, Jonathan Odur and Gerald Karuhanga, Members of Parliament, was that Article 93 was contravened when a charge was made on the Consolidated Fund by paying each Member of Parliament UGX 29 million as facilitation to each member to carry out consultations with the public regarding the Bill. Further, that in non compliance with Sections 76 and 77 of the Public Finance Management Act and Rules 117 and 123(1) of the Rules of Procedure of Parliament, Parliament proceeded debating the Bill, when the certificate of financial implication issued in respect of the Bill did not cover the amendments in the Bill extending the life of the current and the future Parliaments as well as the local government councils from five to seven years which amendment imposed an additional charge on the Consolidated Fund.

For the respondent, it was submitted that the facilitation of UGX 29 million to each Member of Parliament was part of the already appropriated parliamentary budget and not an additional charge to the Consolidated Fund.

I find, on the basis of the evidence adduced before the Court, that the petitioners adduced no evidence to rebut the assertion of the respondent that the facilitation of UGX 29 to each Member of Parliament was not an additional charge on the Consolidated Fund

and that the same was within what had already been appropriated to Parliament within the approved budget.

This Court therefore finds that the said facilitation to Members of Parliament did not make the enactment of the Constitution (Amendment) act, 2018 to be contrary to Article 93 of the Constitution.

However, I find merit in the Petitioners submissions as relate to the extension of the term of Parliament, Local government councils from five to seven years. These amends are Sections 2, 6, 8 and 10 of the Act.

The stated amendments were not part of the original Bill presented by Hon. Magyezi. The original Bill intended to amend the Constitution to provide for the time within which to hold presidential, general parliamentary and local government council elections, as well as the eligibility requirements for one standing for election as President or District Chairperson. Apart from the amendments on the age limits, the other amendments were being proposed pursuant to the recommendations of the Supreme Court in **Presidential Election Petition No. 1 of 2016: Amama Mbabazi vs Yoweri K. Museveni**.

The Certificate of Financial Implications dated 28th September, 2017 was issued in respect of only the above matters and nothing else. Parliament received the same on 29th September, 2017 and was laid before Parliament on 3rd October, 2017. This Court accepts this Certificate of Financial Implications as being valid in

law as a correct certification by Government, through the Ministry of Finance, that the proposed amendments in the original Bill satisfied the provisions of Article 93 of the Constitution, the Public Finance Management Act and the appropriate Rules of Parliament.

By the 20th December, 2017, when Hon. Tusiime Michael, introduced the amendments to extend the term of Parliament and local government councils, the certificate of Financial Implications issued only in respect of the original amendments had already been laid before Parliament. Accordingly the amendments by Hon. Tusiime were not covered at all by that certificate.

At the hearing of the petitions, when the Clerk to Parliament, Mrs. Jane Kibirige, was being cross-examined, she produced to Court another certificate of Financial Implications issued by the Minister of Finance pursuant to a request dated 18th December, 2017 by Hon. Mugoya Kyawa Gaster, a Member of Parliament, Bukoli County North, Bugiri. The certificate was issued by the minister pursuant to a request by this Honourable Member of Parliament. The request is for the Minister of Finance to issue a Certificate of Financial Implications in respect of a Constitutional amendment proposal expanding the five year term of President, Parliament and local governments to seven years.

It is unexplained in what capacity and under what law, Hon. Mugoya Kyawa Gaster, requested for this certificate since he was not a mover and indeed never moved any amendment in Parliament. He is also not the Finance Officer of Parliament.

Though the letter requesting for the certificate is dated 18th December, 2017, the Deputy Secretary to Treasury received it on 17th December, 2017 and the Minister of Finance appears to have given instructions to work on it on 16th December, 2017 according to the endorsements and receipt stamp on it, some days earlier than it was written! No dates and particulars were given to Court as to who received it for and on behalf of Parliament. Apart from tendering the same to this Court during cross-examination on her affidavits, the Clerk to Parliament, gave no further details as regards this document, although she told Court that, as the accounting officer of Parliament, it was her responsibility to originate a letter to the Minister of Finance requesting for a Certificate of Financial Implications as regards any Bill or amendment to be tabled before Parliament.

I too, like my brother Kenneth Kakuru, JCC, come to the conclusion that this Certificate of Financial Implications was wrongly applied for, wrongly issued and, on the face of it, is not genuine given the circumstances under which it was issued. The same stands rejected as a plausible piece of evidence.

I too therefore hold that the amendment brought about by Sections 2,6,8 and 10 of the Act, extending the term of Parliament and local government councils from five to seven years as from the date of the last elections are unconstitutional being contrary to Article 93 of the Constitution. I so answer issue 6(a)(b).

Issues (6)(c) and (f) have been resolved while resolving the earlier issues.

Issues 6(d) and (e):

These issues call for determination whether there was participation of the people through their being consulted by Parliament or whether those consultations were interfered with.

With respect to participation and consultation of the people so as to enable them exercise their sovereignty with regard to those amendments of the constitution where the holding of a referendum or the approval by district councils, it remains, as of now, to Parliament and the individual Members of Parliament to devise ways and means as to how this can be achieved. Through the Rules of Procedure, Parliament refers a proposed Bill to its appropriate committee for scrutiny and to seek views from stakeholders and members of the public interested to do so. Parliament may also go further and facilitate Members of Parliament to go to the people of their respective Constituencies and elsewhere in the country and obtain the necessary participation and consultation as regards the subject matter at issue.

The evidence available to this Court is that both of the above were carried out in respect of the original Bill whose proposed amendments comprised of removal of age limits as a qualification for one to stand for the office of President or that of a Chairperson of a district, and also the amendments to implement into an Act of Parliament the Supreme Court recommendations in the

Parliament never formally arranged, either through the committee on Legal and Parliamentary Affairs or through facilitation of Members of Parliament to seek the participation and consultation of the people in the respective constituencies about the amendments of extension of the term of Parliament and the reinstatement of term limits as an entrenched provision of the Constitution.

I therefore hold that there was participation and consultation of the people formally arranged and facilitated by Parliament as regards amendments that resulted in Sections 1,3,4 and 7 of the Constitution (Amendment) Act, 2018. There was no such participation and consultation in respect of amendments that resulted in Sections 2,5,6,8 and 10 of the Act.

Whether or not the participation and consultation that was carried out was adequate, this Court can only go by the evidence availed to Court and through the Hansard. The Committee on Legal and Parliamentary Affairs submitted its Report to Parliament as to how it had gone about the exercise and the in-put it had got. The Members of Parliament also asserted they had consulted and sought participation of the electorates in their respective constituencies. Hon. Winnie Kiiza, the Leader of the Opposition testified of her meetings in Kasese and in Kampala being interfered with by the Police. Hon. Jonathan Odur, on his part, asserted that meetings of the consultation and searching the people had been

interrupted by the police in the Lango sub-region. In the city of Kampala, a few of the Hon. Members of Parliament complained of also having had their meetings with the people interrupted by police.

The interference by police with the meetings of the Honourable Members of Parliament seems to have been rather isolated and affected only a few Honourable Members of Parliament. This is because during the debate on the Bill, Honourable Members of Parliament one after the other reported having consulted their electorates throughout the country.

I accordingly conclude that on the whole, circumstances permitted the Honourable Members of Parliament to consult and provide an in-put in those amendments that were ultimately enacted into Sections 1,3,4 and 7 of the Constitution (Amendment) Act No. 1 of 2018.

In the absence of any rules and/or guidelines of Parliament setting out what must be done and the methods to take by parliament itself, as well as the individual Members of Parliament, in their respective constituencies to facilitate and ensure effective public participation of the people, in cases of amendments that do not require a referendum or approval of district councils, there is no basis for holding that the steps taken by Parliament to obtain the participation of the people were inadequate and that the people did not participate as regards the amendments that resulted in

Sections 1,3,4 and 7 of the Constitution. Issues 6(d) and (e) are so answered.

Issue 6(g): Whether the Constitution (Amendment) Act 2018 is against the spirit and structure of the 1995 Constitution.

The petitioners contended that though Parliament has been vested with powers to amend the Constitution by Article 259, those powers are subject to the doctrine of the basic structure of the Constitution, which prevents Parliament from amending the Constitution if the amendment is to result in fundamentally destroying the essential structures of the Constitution itself.

The case of the respondent, as put by the Deputy Attorney General, was that, as long as Parliament followed and complied with the requisite procedures, then it can amend anything in the Constitution.

The basic structure doctrine is to the effect that the Constitution, as the basic law, has in it those very fundamental features upon which the Constitutional order founded in the country is based upon, and that those features can not to be amended by Parliament. They are fundamental to the whole democratic constitutional order of the country. The power to amend is within the Constitution and as such the said power ought not to be used to create a situation where such a power can be used outside the Constitution. Only the people in the exercise of their sovereignty can amend such features. See: **Anwar Hussain Chowdhury vs Bangladesh, 41 DLR, 1989,**

AAPP DIV 169. See also: The Kenya High Court decision of **Njoya vs AG & Others (2004) LLR 4788 HCK.**

The Odoki Constitutional Commission in a way addressed this issue of basic structure of the Constitution.

The Commission stated in paragraph 28.99 of its Report:

"28.99: Owing to the experience the people of Uganda have gone through in the last 30 years, they strongly expressed in their views that they would like to see more constitutional stability and steady constitutional development in the future. Most of them have expressed a preference for a rigid constitution which cannot be amended by one person or a small group of people without the consent of the majority of the people. The people no longer wish to see hasty or too frequent amendments of their basic law", and then in paragraph 28.105

> *"……. This procedure [of referendum], therefore, should be restricted to a few most fundamental or controversial provisions of which the people should have the final say. These include provisions on the supremacy of the Constitution and the political system. The provisions declaring the supremacy of the Constitution are the foundation of constitutionalism and the entire constitutional order. They are basic to the character and status of the Constitution and should not be altered without the consent of the people."*

The Constituent Assembly too accepted these recommendations and reflected them in the 1995 Constitution.

Therefore, the doctrine of basic structure is embedded in the 1995 Constitution. As the **Njoya vs Ag & Others (Supra)** case shows, Kenya has also embraced the said doctrine. Tanzania seems not to have embraced it fully, given the Tanzania Court of Appeal decision of **AG vs Mtikila: Civil Appeal No. 45 of 2009**. But our history of tyranny, violence and Constitutional instability is different from that of Tanzania that has had Constitutional stability since her becoming an Independent State, and it is fitting that Uganda adopted the doctrine of basic structure.

Accordingly by application of the doctrine of basic structure, the Parliament of Uganda can only amend the Constitution to do away or to reduce those basic structures such as sovereignty of the people (Article 1), the supremacy of the Constitution (Article 2) defence of the Constitution (Article 3), non-derogation of particular basic rights and freedoms (Article 44), democracy including the right to vote (Article 59), participating and changing leadership periodically (Article 61), non-establishment of a one-party State (Article 75), separation of powers amongst the legislature (Article 77): The Executive (Article 98): The Judiciary (Article 126) and Independence of the Judiciary (Article 128), with the approval of the people through a referendum as provided for under Article 260 of the Constitution.

Parliament offends the basic structure of the Constitution if, on its own, without the consent of Ugandans through a referendum self extends its term and that of local government councils from five

years to seven years. It follows therefore that Sections 2,6,8 and 10 of the Act are contrary to Articles 1 and 260 of the Constitution. The amendments that brought them about were contrary to the Constitution. I so hold in respect of issue 6(g).

Issue 7(a)(b)(c)(d)(e)(f) and (g):

Issue 7 calls upon this Court to determine whether there was any failure on the Part of Parliament to observe any of its Rules of Procedure when enacting the Constitution (Amendment) Act No. 1 of 2018; and if so, whether Parliament contravened Articles 28,42,44,90(2)(3)(c) and 94(1) of the constitution.

The petitioner's contention as respects this issue is that Parliament did not follow its Rules of Procedure when enacting the stated Act, thus contravening the pointed out Articles of the Constitution.

It is asserted that the Constitution (amendment) Bill by Hon. Magyezi was smuggled onto the Order Paper by the Hon. Speaker when there was an earlier motion by Hon. Nsamba for parliament to resolve that a Constitutional Review Commission be set up. Hon. Members of Parliament Ssemujju Nganda, Jonathan Odur and Allan Ssewanyana deponed affidavits supporting this contention.

Secondly, it was submitted there was illegal suspension of some members of Parliament from the chambers of Parliament without first being given an opportunity to be heard, when the Bill was being debated. Hence some Members of Parliament did not participate in the enactment of the Act

Third, Parliament illegally waived Rule 201(2) of its Rules of Procedure, doing away with a requirement of a minimum of three sittings from the tabling of the Committee Report on the Constitution (Amendment) Bill No. 2 of 2017, when the motion to waive that Rule had not been seconded thus contravening Article 94 of the Constitution. This way members of Parliament were denied adequate time to scrutinize the report of the committee of Parliament on the said Constitution (Amendment) Bill No. 2 of 2017.

Forth, Parliament failed to close the doors of the Chamber of Parliament during the time of voting on the said Bill contrary to Rule 98(4) of the Rules of Procedure of Parliament. This led Members who had not participated in the debate to also vote. Further, some Members of the ruling NRM party had occupied seats on the opposition side and this was contrary to the multi-party set up of sitting in Parliament, which contravened the Constitution.

Mr. Mabirizi, a petitioner in his own right, submitted that he had been prevented from accessing the Parliamentary gallery contrary to Rule 23 of the Rules of Procedure of Parliament that provides that sittings of Parliament shall be public.

He also further submitted that during the debate on the Bill, Parliament was not properly constituted on the basis of a multi-party system as some opposition members had been suspended and others moved out in protest, thus contravening Articles 75, 82A, 90, 95(4) and 108A of the Constitution as well as the provisions of the

Administration of Parliament Act, and Rules 9,14,15 and 183(1) of the Parliamentary Procedure Rules.

It was also submitted that additional members had joined the Legal and Parliamentary Affairs Committee when they had not been part of the committee at the time of consulting with different people and organisations about the Bill and the Report was as a result of those consultations.

The Solicitor General, submitting for the respondents, contended that at the time the Magyezi Bill was first brought to Parliament, Parliament was still applying the 2012 Rules of Procedure, but by the time of the second reading of the Bill on 18th December, 2017, Parliament had adopted the new 2017 Rules of Procedure as from 10th November, 2017. He contended that whatever transpired and was done by Parliament was in conformity with the 2017 Rules of Procedure of Parliament including giving priority and precedence to the Motion of Hon. Magyezi regarding his Private Members' Bill over that of Hon. Nsamba.

It was further submitted for the respondent that the Members of Parliament who had been suspended had misbehaved in Parliament and the Speaker acted under Rule 7 of the 2012 Rules of Procedure, then applicable, in suspending them. Then on 18th December, 2017 the Speaker used the same Rule which is also in the 2017 Rules to preserve order and decorum in the House.

As to suspension of Rule 201(2) it was submitted for the respondent that the Deputy Attorney General's motion to suspend the Rule

under Rule 16 of the Rules of Procedure had been seconded even though the Rules did not require such a secondment. With regard to the doors of the Chamber of Parliament not being closed it was submitted that the Speaker had powers under Rule 7 to decide on how business was to be conducted in Parliament, including not closing the doors, if circumstances so demanded.

As to accessing the Parliamentary gallery, the Speaker had discretion to decide as to who of the public is to access the gallery.

In respect of additional members joining the Legal and Parliamentary Affairs Committee of Parliament, it was submitted that the additional members joining the committee at the time they did, was after when everything had been explained to each one of them and as such there was nothing wrong in their joining and signing the report. At any rate the report of the said committee had been initialled by at least one third of the original committee members and so it was a valid report.

It was also the contention of the respondent that the Constitution (Amendment)(No.2) Bill, 2017 which was submitted to the committee of the whole House contained all the matters that ultimately constituted the Constitution (Amendment) Act No. 1 of 2018.

I have carefully considered all the submissions on this issue. I note that the applicable Rule 133(4) of the Rules of the Procedure of Parliament, 2017, mandatorily required the committee of the whole House to consider proposed amendments by the committee to

which the Bill had been referred, those on notice, where those amendments had been submitted to and had been rejected by the committee to which the Bill was referred, or those amendments, which for reasonable cause were not presented before the committee that considered the Bill.

It follows therefore that the amendments accepted by the committee that considered the Bill should be reflected in the final Bill that is submitted to the committee of the whole House. The long title of the Constitution (Amendment) (No. 2) Bill, 2017 stated that the Act is to amend the Constitution to provide for the time within which to hold presidential, parliamentary and local government council elections, to provide eligibility requirements for a person to be elected as President or District Chairperson, and to increase the number of days within which the Electoral Commission is required to hold fresh election in case of annulment of the presidential election and for related matters. The Memorandum to the Bill also stated the same, mentioning Articles 61, 102(b) and 183(2)(b), 104(2) and (3) and 104(6), as the ones affected by the proposed amendments.

There was nothing in the Bill relating to amending the Constitution to provide for the extension of the term of Parliament and local government councils from five to seven years and for the amendment to be retrospective starting with the last general elections.

In strict compliance with Rule 133(4) of the 2017 Parliamentary Rules the committee of the whole House ought to have restricted itself on debating and resolving on the amendments as set out in the long title and the Memorandum to the Bill. Any amendments in the committee of the whole House ought to have been related only to those matters in the long title and the Memorandum to the Bill.

Contrary to what the long title and the Memorandum to the Bill stated, the Chairperson of the Legal Affairs Committee in delivering his report to Parliament, without explaining why and stating under what Rules of Procedure he was proceeding to do so, brought in his said report, matters to do with extension of the term of Parliament and local government councils and limits on the tenure of the term of the President.

Rightly and quickly, as the Hansard of Tuesday, 19th December, 2017, page 5137 clearly states, the Hon. Speaker of Parliament challenged the Chairperson of the Legal Affairs Committee for an explanation as to how he had come to include in his report and on whose instructions and how it was canvassed, the issue of term limits, adjusting the tenure of the President, adjusting the term of Parliament. The Speaker also challenged the Chairperson to state:

> *".....to whom the recommendations you made were addressed and how did they come to be part of your report."*

In his response, the Chairperson explained that the committee had got everything contained in the report through a process of consultation and consideration of the Bill.

Later on at p. 5138 of the Hansard, the Hon. Speaker addressed the Chairperson thus:

> *"The Speaker: Honourable Chairperson, I am not saying it is not the truth. What I am asking is, what do you expect this House to do? Don't you think those would be the subject of separate Bills in their own right in this House? That is my issue",*

and on p.5139: the Hon. Speaker repeated it twice to Hon. Nandala-Mafabi that:

> *"Honourable Member, there is no Bill. We are dealing with a report. There is no Bill at the moment. We are dealing with the report".*

There was of course before Parliament The Constitution (Amendment) No. 2 Bill, 2017. What the Hon. Speaker must have meant was that there was no Bill at that moment containing proposals to extend the term of parliament and local government councils and therefore the matters that were being debated at that moment were not part of the Bill that was before Parliament. Thus Rule 127 of the Rules of Procedure of Parliament had been and was being violated.

It is unfortunate that Parliament proceeded to debate in the 2nd and 3rd readings of the Bill with matters that had been clearly identified as being external to the Bill and in respect of which the Hon. Speaker had stated on 19th December, 2017 at page 5137 of the Hansard, referring to the Committee on Legal and Parliamentary Affairs, that:

"Honourable Members, when we give responsibility to a committee like this with a Bill, we expect them to address the Bill and not to go into extraneous matters".

It is these "extraneous matters" that were later purportedly introduced as amendments by Hon. Tusiime and ultimately constituted Sections 2,5,6,8,9 and 10 of the Constitution (Amendment) Act 1 of 2018.

By proceeding the way they did, the Honourable Members of Parliament circumvented the participation of the sovereignty of the people; Article 1 and Supremacy of the Constitution, Article 2, and that way acted contrary to the letter and spirit of the Constitution.

In the persuasive Kenya High Court decision of **Centre for Rights Education and Awareness & Another V The Speaker of the National: Constitutional & Human Rights Division Petition No. 371 of 2016,** the Court held:

"When it exercises its legislative authority, Parliament must act in accordance with, and within the limits of the constitution, and the Supremacy of the Constitution requires that the obligations imposed by it must be fulfilled".

The Rules of Procedure of Parliament spring from Article 94 of the Constitution and as such their violation is a violation of that Article. This is what the Honourable Parliament did in respect of enacting Sections 2, 5, 6, 8, 9 and 10 of the Constitution (Amendment) Act No.1 of 2018.

Article 93 of the Constitution and Section 96(1) of the Public Finance Management Act, 2015 compulsorily require every Bill presented to Parliament to be accompanied by a certificate of financial implications from the Minister of Finance. The fact that it was found necessary by those Members of Parliament that brought in "extraneous" amendments to have a second certificate of financial implications issued in respect of those amendments, is proof, in my considered view, that the "extraneous" amendments had no relevancy with the matters contained in the original Bill. This supports the guidance of the Hon. Speaker to the House that the "extraneous" amendments should be introduced to Parliament through a separate Bill.

It is doubtful whether Section 76(1) of the Public Finance Management act envisages issuance by the Minister of Finance a multiplicity of Certificates of Financial Implications in respect of a single Bill being laid before Parliament.

At any rate, for the reasons I have already given, I have already held that the Certificate of Financial Implications that Hon. Tusiime laid before Parliament on 20th December, 2017 together with his proposed amendment, was null and void.

As for the Speaker deciding to proceed with the Magyezi Bill, instead of the earlier one of Hon. Nsamba, I find that under Rule 25 the Speaker is vested with overall power to determine the order of business of the House and under Rule 7 the Speaker presides at any sitting of the House and decides on questions of order and

practice. The Speaker in her wisdom made a decision to proceed with the Magyezi Bill and not the earlier motion of Hon. Nsamba. The Speaker acted within the overall powers given by the Rules. But even if the Speaker acted in contravention of some Rule, it does not follow in these circumstances that this would make this Act unconstitutional. There was no violation of the Constitution.

Specifically with regard to whether any member of the public was prevented from accessing the Parliamentary Chambers while the Constitutional amendment Bill, 2017 was being debated and whether this was in contravention of the Constitution, the only evidence received as to a member of the public being so prevented was that of Mr. Mabirizi, petitioner in Petition No. 49 of 2017.

It is appreciated that Rules 23 and 230 of the Rules of procedure of Parliament make the sittings of Parliament and its committees to be public. This is pursuant to Paragraph 2(1) of the National objectives and directive principles of State Policy of Uganda being based on democratic principles wherein the people are empowered and encouraged to actively participate at all levels in their governance. However in pursuance of the above, Rule 230(3) of the Rules of Procedure of Parliament vest in the Speaker to control the admission of the public to the Parliament premises so as to ensure law and order as well as the decorum and dignity of Parliament.

It is a fact that at the time Parliament debated the Constitution (Amendment) Bill, 2017, there was tension and some chaos, unfortunately originated by some Members of Parliament

themselves and from and within the Parliamentary Chamber itself. This, of course, caused extra-ordinary measures to be taken around all the premises of Parliament, including accessing the Parliamentary gallery. As already decided in this Judgment, this situation did not justify the army and other security forces to conduct themselves the way they did. I however find that the Hon. Speaker of Parliament and the Parliamentary staff and security acted properly and within the Constitution in making the orders they made as regards admission of the public to the parliamentary gallery and other parliamentary premises. Petitioner Mabirizi was unfortunately a victim of these measures, but this did not make the whole process of enacting the Act unconstitutional. Issue 7(a) is thus answered in the negative.

Issue 7(b) requires this Court to resolve whether the tabling in Parliament of the Constitutional Bill No. 2 of 2017 in absence of the leader of the opposition, the opposition Chief Whip and other opposition Members of Parliament was unconstitutional.

Uganda has a multi-party system of governance. Article 75 prevents Parliament to enact a law establishing a one party State. In parliament there is the Government side led by the Prime Minister and the opposition led by the Leader of the Opposition pursuant to Articles 82(1) and 108A (2)(a) of the Constitution. The opposition keeps the Government in check and occupies the seats to the left hand of the Speaker while the Government side occupies the seats on the right hand of the Speaker. Therefore, in the

normal course of things, Parliament is constituted by both the ruling party members and those of the opposition occupying their seats in Parliament.

Rule 24 of the Rules of Parliament enacted pursuant to Article 88 of the Constitution provides that the quorum for the business of Parliament shall be one third of all Members of Parliament entitled to vote. It follows therefore, that the business of Parliament can go on in the absence of the leader of the opposition, opposition chief whip and opposition members of parliament as long as there is the requisite quorum in Parliament. Indeed under Article 94 of the Constitution, Parliament may act notwithstanding a vacancy in its membership.

There was no evidence received by Court as to why the Leader of the Opposition, Opposition Chief Whip and other opposition members were not in Parliament, when the Constitution Bill No. 2 of 2017 was tabled for debate. It is not also asserted by the petitioners that there was no requisite quorum of Members of Parliament entitled to vote at that material time. There is therefore no basis for holding that any constitutional provision was contravened. At any rate in the course of debating the Bill, the Leader of Opposition and the other Honourable Members returned to parliament and participated in the debate of the Bill. Thus Issue 7(b) also is answered in the negative.

Issue 7(c) is whether the Speaker in permitting the ruling party Members of Parliament to sit on the opposition side of parliament was inconsistent with the Constitution.

Rules 7(1) and (2) and 9(1) and (4) of the Rules of Procedure of Parliament vest in the Speaker powers to preside at any sitting of the House, to preserve order and decorum, to reserve seats for every member of the House and to assure that each member has a comfortable seat.

It is accordingly within the powers of the Speaker, depending on the circumstances obtaining at a particular moment, to permit Members of Parliament to sit at particular places in the Chamber of Parliament. This Court received no credible evidence to the effect that the Hon. Speaker prejudiced any Member of Parliament, by the way she permitted members to sit in Parliament during the debate of this Bill. I find no merit in Issue 7(c). I answer the same in the negative.

Issue 7(d) is whether the act of the legal and Parliamentary Affairs Committee of Parliament in allowing some committee members to sign the Report of the Committee after the public hearings on the Constitutional Amendment Bill No. 2 of 2017 had been completed, was in contravention of the Constitution.

The Committees of Parliament are a creature of Article 90 of the Constitution and rule 183(1) of the Rules of Procedure of Parliament.

The evidence that this Court received was to the effect that a number of other Members of Parliament were added to the Legal and Parliamentary Affairs Committee when the committee had done some work on the Bill including carrying out consultations and receiving views from members of the public about the Constitution (Amendment) Bill, 2017. It was not clearly established at what stage these members began participating in the deliberations of the committee. Some of these members, it was asserted, signed the report of the committee. This, if true, was irregular. However, Article 94(3) of the Constitution provides that the presence or the participation of a person not entitled to be present or to participate in the proceedings of Parliament shall not, by itself, invalidate those proceedings. Accordingly the proceedings of the Legal and Parliamentary Affairs Committee cannot be invalidated because of the signing of the report by those very few members who joined the committee late.

Accordingly as to Issue 7(d) the answer is that there was no provision of the Constitution contravened.

Issue 7(e) has been resolved with issue 7(b).

Issue 7(f):

The essence of this issue is whether the Speaker acted unconstitutionally in suspending the six Members of Parliament.

The evidence that has been availed to Court is that from the very beginning a number of Members of Parliament opposed to the Magyezi Bill of removing the age limits as a qualification for one to

stand as President or as Chairperson of the District at an election, were bent not only to seriously oppose, but also to disrupt the proceedings of Parliament. The Speaker had to deal with this situation inside the Chamber of Parliament. Verbal confrontations amongst members ensued during the parliamentary proceedings of 18th December, 2017: See **The Hansard: pp1-15** and at 11.58 a.m. the Speaker suspended Parliament and ordered six Members of Parliament not to come back in the afternoon.

The powers of the Speaker emanate from Article 82 and Rules 5,7 and 25 of the Rules of Procedure of Parliament. The Speaker is elected from and by Members of Parliament. No business is transacted in Parliament, other than election of Speaker, if the office of Speaker is vacant. Hence the office of Speaker is an inseparable component of Parliament. Under Rule 7 the Speaker presides at any sitting of the House and decides questions of order and practice. Under Rule 25 the Speaker determines the order of Business of the House. Under Rule 87(2) the Speaker has powers to order a Member of Parliament whose conduct is grossly disorderly to withdraw immediately from the House for the remainder of that day's sitting and the member so suspended has immediately to withdraw from the precincts of the House until the end of the suspension period under Rule 89. Under Rule 86(2) the decision of the Speaker on any point shall not be open to appeal and shall not be reviewed by the House, except upon a substantive motion made after notice.

It is asserted by the petitioners that the Speaker ought to have afforded a hearing and also have provided reasons for suspending the six Honourable Members of Parliament under Articles 28(1) and 44(c). It is however unexplained by the petitioners what fair hearing the Speaker should have given to the suspended members. Like in contempt of Court proceedings the members affected misconducted themselves in the very eyes and hearing of the Speaker, including disobeying her very orders to them to be orderly and the very members were exchanging defiant words and physical gestures to the chair.

This Court did not receive any evidence whether any of the suspended members moved a substantive motion to question the decision of the Speaker. At any rate, later on, the Members of Parliament with the necessary quorum, freely participated in debating the Constitutional (Amendment) Bill, 2017 in the Second and Third Readings. It cannot therefore be concluded that the suspension of the six Members of Parliament made the enactment of the Constitution (Amendment) Act No. 1 of 2018 to be unconstitutional. Issue 7(f) is answered in the negative.

Issue 7(g):

Whether the action of Parliament in waiving the requirement of a minimum of three sittings from the tabling of the Report, yet it was not seconded, of closing the debate on the Constitutional Amendment Bill No. 2 of 2017 before every Member of Parliament could debate on the said Bill, failing to close all doors during voting

and of failing to separate the second and third readings by at least fourteen sitting days, are inconsistent with and/or in contravention of the Constitution.

It is to be noted that Parliament was sitting as a committee of the whole House and therefore under Rule 59(2) of the Rules of Procedure the motion by the Hon. Deputy Attorney General to suspend the Rule requiring a minimum of three sittings required no seconder.

Article 26(1) provides that the votes on the second and third readings in the Articles covered by Article 260, that is Articles 260 itself and then Articles1,2,44,69,74,75,79(2), 105(1), 128(1) and 246, and also those covered by Article 261, that is Article 261 itself, and then Articles 5(2), 152, 176(1), 178, 189 and 197, shall be separated by at least fourteen sitting days of Parliament.

I have already held in resolving issues 1 to 4 that Sections 2,5,6,8 and 10 amended by infection and/or implication Articles 1,2,61,77(3), 260, 261 and 263(1) and (2). Accordingly Sections 2,5,6,8 and 10 are held to be unconstitutional. On the other hand Sections 1,3,4,7 and 9 of the Constitution (Amendment) Act No. 1 of 2018 did not amend any of the Articles covered by Articles 260, 261 and 263 and therefore they did not require the second and third readings of the Bill to be separated by fourteen sitting days of Parliament. Each of those Sections is therefore not unconstitutional by that reason.

This Court received no evidence that any Member of Parliament was prevented in any way from further contributing on the debate before the Bill was read for the third time and passed. I therefore find no basis for the assertion that the debate was closed before every Member of Parliament could debate the same. Therefore issue 7(g)(iii) is also answered in the negative.

As to the failing to close all the doors during voting, no evidence was availed as to how this made the enactment of the Act to be unconstitutional. Issue 7(f) is also answered in the negative.

Issues 8 and 9 have been resolved while resolving issues 1 to 4.

Issue 10 is whether Section 5 of the Act that re-introduces term limits and entrenches them so that their removal is subjected to a referendum is unconstitutional.

This Section was the result of an amendment moved by Hon. Nandala-Mafabi on 20th December, 2017 and he stated, when tabling the amendment, according to Hansard, page 5263: *"Madam Chairperson, we have moved both amendments that this Article be re-entrenched-(interjections)-under Article 260. We entrench it to be under (f), we add (2). The justification is to avoid it being changed at will".*

Immediately the Hon. Deputy Attorney General guided the House that this amendment had to be by referendum. His guidance was not taken by the House. Hence Section 5 was enacted into the Constitution (Amendment) Act No. 1 of 2018. It was unconstitutional. Issue 10 is thus answered in the affirmative.

Issue 11 has already been resolved while dealing with issues 1 to 4.

Issue 12:

This is whether Sections 3 and 7 of the Act lifting the age limit on the one who stands for the office of the President is inconsent with and/or in contravention of Articles 21(3) and (5) of the Constitution.

The lifting of the age limit of one who stands to be President/or District Chairperson and the recommendations made by the Supreme Court in the **Amama Mbabazi vs Yoweri Kaguta Museveni, the Electoral Commission & Attorney General, Election Petition No. 01 of 2016 c**onstituted the amendments in the original Magyezi Bill.

The original Bill proposed to amend the Constitution by removing the age limit of one standing for election to be President or District Chairperson being aged not less than thirty-five years and not more than seventy five years of age. This meant amending the Constitution by deleting therefrom Article 102(b) and 183(2)(b).

The other amendments recommended by the Supreme Court to Parliament to amend the Constitution in the **Amama –v- Museveni Presidential Election Petition No. 1 of 2016** were first to extend the number of days within which presidential, general parliamentary and local government council elections are to be arranged and held by the Electoral Commission before the expiration of the term of the President.

Before the amendment, Article 61(2) of the Constitution provided that such elections had to be held within the first thirty days of the last ninety days before the expiration of the term of the President. The amendment under Section 1 of the Act has now increased the period by providing that:

> *"(2) The Electoral Commission shall hold presidential, general parliamentary and local government council elections within the first thirty days of the last one hundred and twenty two days before the expiration of the term of the President, Parliament or local government councils as the case may be."*

The amendments go further to amend Article 61(3) to the effect that the Electoral Commission shall only hold general parliamentary and local government council elections on the same day.

Section 4 of the Constitution Amendment Act 1 of 2018 is also as a result of the original Magyezi Bill and also a recommendation of the Supreme Court. It increases the period within which one challenging the election of the President may lodge a petition in the Supreme Court. Before the amendment, a petition had to be lodged within ten days. The amendment has now increased the days within which a petition may be lodged to fifteen days after the declaration of the election results.

Before the amendment, the Supreme Court had to determine the Presidential Election Petition within thirty days. After the amendment, the period within which the decision has to be given has been increased to forty five days.

Where the presidential election is annulled, a fresh election had to be held within twenty days from the date of the annulment. With the amendment, a fresh election is to be held within sixty days from the date of the annulment.

The above amendments are Section 4 of the Constitution (Amendment) Act No. 1 of 2018 and the Article amended is article 104 Clauses (2)(3)and (6).

It is of some importance to note that apart from Constitutional **Petition No. 5 of 2018 Karuhanga and Others –v- AG,** no other Constitutional Petition, amongst the Consolidated Petitions, specifically challenged the amendment of Article 61(2) and (3) as well as Article 104(2), (3) and (6) as being unconstitutional on their own.

It is possibly implied that these specific amendments are unconstitutional because they are part of the Constitution (Amendment) Act 1 of 2018 as Sections 3 and 7.

The framers of the 1995 Constitution, that is the Constituent Assembly, in their wisdom saw it fit to have the age limits of one who is to stand for election as President of Uganda, under the category of the qualifications of the President. They provided for these qualifications under Article 102 of the Constitution. They did not put this Article 102 amongst those Articles that have to be amended after first getting the approval of Ugandans through a referendum. They left it as one of those Articles that Parliament, on its own, can amend from time to time under Article 259 by passing

an Act of Parliament, the sole purpose of which is to amend the Constitution and the amendment is supported in Parliament at the second and third readings by not less than two thirds of all Members of Parliament.

I also note that there is nothing in the Odoki Constitutional Commission Report proposing that the age limits of the President or other local government leaders should be entrenched provisions of the Constitution. The Report only proposed minimum age limit of 40 years for one standing for the office of President and never put a maximum age limit of the President, reasoning that:

> *"Since we have proposed the minimum age, we are of the view that there is no need to fix the maximum age; the electorate will decide on the appropriate candidate".*

See: **Chapter 12, Paragraph 12.50(a) pages 322, 323, Report of the Uganda Constitutional Commission**.

The above quotation clearly shows that the Odoki Constitutional Commission itself did not consider age limits on the President and other local government leaders as one of the structural pillars to be entrenched in the Constitution. The Constituent Assembly also adopted the same attitude, which has been shown above.

I therefore come to the conclusion that age limits on the President and on the District local government leaders as enacted in Articles 102(b) and 183(2)(b) do not constitute a fundamental structure of the Constitution.

Accordingly the amendment of Articles 102(b) and 183(2)(b) does not by implication and/or infection amend Article 1 of the Constitution so as to require a referendum by the people to approve such an amendment. Parliament thus proceeded within its powers to amend Articles 102(b) and 183(2)(b) by removing the age limits as qualifications for the office of the President or District Chairperson.

I am however not in agreement with the reasons given that the imposition of age limits as a qualification for office of President or District Chairperson, or any other office is discriminatory in terms of Article 21 of the Constitution. Article 21(3) defines to

"discriminate" as meaning:

> *"to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability."*

There is no "age" as one of the attributes of discrimination.

Aging is part of a human process that comes within its own attributes.

Hence they are years one qualifies to go to school or to carry out certain tasks, such as registering for voting at general elections. Article 59(1) cannot, for example, be taken to be discriminatory against those who are below eighteen years, by providing that every citizen of Uganda of eighteen years of age or above has a right to vote. It must be appreciated that even with the removal of age

limits, it is only those who can qualify, in terms of age, to be Members of Parliament, who shall be eligible to stand for election for office of President or District Chairperson, which in a way is also an age limit.

The reality of the matter is that the amendments brought about by Sections 3 and 7 of the Constitutional amendment Act No. 1 of 2018 lower the minimum age for one to stand for election to be President or District Chairperson to eighteen years, which is the minimum age one qualifies to register as a voter, and then removes any upper age limit for any of those offices.

In conclusion, I answer issue 12 to the effect that Sections 3 and 7 of the Act do not contravene Article 21 of the Constitution and as such do not contravene the Constitution in any way.

Issue 13 is whether the continuing in office by the incumbent President elected in 2016 on attaining the maximum age of 75 years, is contrary to Articles 83(1)(b) and 102(c) of the Constitution.

Article 102 of the Constitution, as already pointed out, sets out the qualifications of the President, one of them, being if the amendments brought about by Sections 3 and 7 of the Constitution (Amendment) Act No. 1 of 2018, are to be taken as not yet operating for purposes of resolving this issue in this Judgment, that:

"A person is not qualified for election as President unless that person is ……..

(a)……..

(b) Not less than thirty-five years and not more than seventy-five years of age;"

The ordinary meaning I attach to the above Article is that the qualification of one being aged thirty-five years and not more than seventy five years of age relates to qualifying for election. I am unable to read in that Article that if one qualifies for election and is actually elected as President, that such a one has to vacate the office of President, the moment he/she clocks seventy-five years of age. Such a one, in my considered view, is entitled to serve the full term for which he/she was elected, since the electors sent him/her to the office well knowing that the age of seventy five years will find him/her in the office. Had the framers of the Constitution intended that one has to leave the office of President the moment one clocks the age of seventy five years, then they would have put in the Constitution an express provision to that effect. They did not do so.

Mr. Mabirizi who raised this issue also brought in Article 84(1)(b) of the Constitution and reasoned that the President who attains seventy five years of age ought to vacate office in the same way as a Member of Parliament vacates his/her seat in Parliament if such circumstances arise that if that person were not a member of Parliament, those circumstances would cause that person to be disqualified for election as a Member of Parliament.

With respect, I do not agree with Mr. Mabirizi. Article 84(1)(b) deals with different circumstances pertaining to a Member of Parliament, and not to one holding the office of President of Uganda. Indeed

even with a Member of Parliament, the Court of Appeal has held that the legal requirements that one aspiring to be nominated as a Member of Parliament must have, are very different from those that such a one must have in Parliament after the nomination and the election has been completed. See: **Election Petition Appeal No. 51 of 2016: Ouma Adea –vs- Oundo Sowedi & Another**.

It is therefore not the requirement of the Constitution that a sitting President or District Chairperson who clocks seventy-five years of age, while in office, must vacate the office before the expiration of the term he/she was elected to serve. Issue 13 is answered in the negative.

Having resolved all the issues the way I have done so, it is necessary to consider what remedies that have to be given. It is necessary to determine whether the whole Constitution (Amendment) Act No. 1 of 2018 has to be declared unconstitutional or whether only some parts of it are to be declared unconstitutional and the constitutional ones preserved. This brings into play the principle of reading in and or severance of an Act of Parliament.

By "reading in" the Court implies into a Statute, words that bring the Statute into conformity with the Constitution. While doing so the Court must be very conscious of its role of only being an interpreter of the Constitution, and not being the legislator of Statutes, of which the legislature is the authority vested with such powers. The Court's constitutional duty is to strike down legislation inconsistent with the Constitution and leave the legislature to

amend or repeal where the Court has struck down the offending legislation. The lesser the Judicial branch of Government intrudes into the domain of Parliament, the better for the functioning of democracy. See: **Kauesa V Minister of Home Affairs & Others (1995) LRC (Const) P 1540 at p.1558, Supreme Court of Namibia**. It is not the function of the Court to fill in the lacunae in Statutes: See: **Matiso V Commanding Officer of Port Elizabeth Prison & Others (1994) 3 BCLR 80 p.114 (Supreme Court of South Africa)**.

There is therefore reluctance by Courts to adopt the principle of "reading in" a Statute because, apart from interfering with the legislative role of Parliament, Courts of law may introduce further vagueness in a Statute or cause budgetary considerations of which the Court is not in control.

However Courts may by express law be called upon to carry out the role of "reading in" Statutes. Article 274 of the Constitution allows Courts in Uganda to "read in" by construing the law, existing at the time the Constitution was promulgated, with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution. This "reading in" does not apply to laws passed after the promulgation of the Constitution.

The alternative to applying the "reading in" principle is for the Court to resort to the principle of "severance". It is constitutionally provided for under Article 2(2) of the Constitution that:

"2

(2) If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and the other law or custom shall, to the extent of the inconsistency, be void."

I venture to state that the statement of the holding in the **Constitutional Court Petition No. 08 of 2014 Oloka-Onyango & Others –vs- AG** that: *" the enactment of the law is a process, and if any of the stages therein is flawed, that vitiates the entire process and the law that is enacted as a result of it",* must be understood as being subject to Article 2(2) of the Constitution that provides for the principle of severance which principle the Supreme Court applied in **AG v Salvatori Abuki, Constitutional Appeal No. 1 of 1998.**

It follows therefore that where in a Statute the provisions that are not inconsistent or in contravention with the Constitution can be severed from those provisions of the Act that are contrary to the Constitution and the valid provisions that are retained, can carry out the purpose of the Act, then the Court may carry out the severance of the impugned Act: See: **Attorney General for Alberta V Attorney General for Canada (1947) AC 503 at 518**.

The Court determining whether to carry out severance or not in an Act has to consider the intention of Parliament when the legislation was enacted or amended: See: **Matiso V Commanding Officer, Port Elizabeth Prison (supra).**

The Constitution (Amendment) Act No. 1 of 2018 originally was placed before Parliament as a private members' Bill entitled "The Constitutional (Amendment) Bill, 2017; contained proposed amendments to the Constitution first, to effect the recommendations of the Supreme Court made on 31 March 2016 in **Presidential Election Petition No. 1 of 2016 Amama Mbabazi vs Museveni**, relating to election in Uganda. Article 104(2)(3) and (6) of the Constitution was to be amended. Second, the amendment sought to do away with the age limits of a minimum of thirty five and a maximum of seventy-five years as an eligibility requirement for one to be nominated to stand for the office of President of Uganda or District Chairperson. Articles 102(b) and 183(2)(b) were proposed to be amended. Hon. Raphael Magyezi, MP, Igara County West, Bushenyi, sought leave to table the motion to amend and on receiving leave tabled the motion: See: **The Hansard: 27 September, 2017**. It is these issues that Parliament from the very beginning intended to deliberate upon and resolve one way or the other. The facilitation to Members of Parliament to consult the people and the issuance of the valid certificate of Financial Implications dated 29 September, 2017 were all in respect of these issues. The consultations were made at both committee stage and also by Parliament facilitating members to do so countrywide. These proposed amendments are now Sections 1,3,4 and 7 of the Constitution (Amendment) Act, 2018. They have all been held to be constitutional while resolving all the issues of the consolidated petitions.

The amendments as to the increase of the term of Parliament and that of local government councils from five to seven years and for the amendments to be retrospective and also to reinstate the presidential term limits and for the same to be entrenched under Article 260 of the Constitution were formally moved by Hon. Tusiime on 20 December, 2017 during the second reading of the Bill originally moved and tabled by Hon. Magyezi as a private members' Bill. See: **The Hansard, 20th December, 2017 pages 5247, 5248** and also at **page 5262** when Hon. Nandala Mafabi moved an amendment to reinstate term limits as an entrenched provision of the Constitution.

These amendments amended Articles 77, 105(2), 181(4), 289, and 291 of the Constitution. They constitute Sections 2,5,6,8 and 10 of the Constitution (Amendment) Act, all of which have been found to be unconstitutional in the course of resolving the issues.

I am satisfied that in this case when the constitutionally valid Sections are severed from the unconstitutional Sections the original purpose of the Act will still be carried out.

It is therefore my holding and order that Sections 2,5,6,8, 9 and 10 that provide for the extension of the term of Parliament and local government councils from five to seven years from the time they were elected as well as for the reinstatement of the two term limits on the holder of the office of the President, and for this provision to be added to Article 260 of the Constitution as an entrenched

provision, be struck off the Constitution (Amendment) Act No. 1 of 2018 for being unconstitutional.

I also hold and order that sections 1,3,4,and 7 of the Constitution (Amendment) Act No. 1 of 2018, providing for the removal of the age limits as a qualification for one to be nominated for election for the office of the President of Uganda, or for the office of Chairperson of the District and for implementing the recommendations of the Supreme Court in **Presidential Election Petition No. 1 of 2016: Amama Mbabazi -vs- Yoweri Museveni**, be and are hereby retained as constituting the said Act by reason of their having been enacted in compliance and in conformity with the Constitution.

With the above holding and orders I find that the Consolidated Petitions have succeeded on the issue of seeking declarations to be issued that the extension of the term of Parliament and local government council from five to seven years and also that the reinstatement of the Presidential term limits are unconstitutional. The petitioners have not been successful on the issues of the prayer to declare as unconstitutional the amendment to remove the age limits as being a qualification for being nominated to stand for election for the office of President or Chairperson of the District.

No petitioner specifically contested on its own the constitutionality of amending the Constitution to implement the recommendations of the Supreme Court in the **Amama Mbabazi V Museveni Presidential Election Petition 1 of 2016**.

In conclusion, I appreciate the tremendous work of the petitioners and the respondent as well as their respective Counsel in terms of research, preparing records and submissions, availing authorities, and being available in Court for the resolution of these petitions that are crucial for the Constitutional governance of the country.

I, with the greatest respect observe, that had appropriate attention been paid to the guidance, given now and then to the House by the Honourable Speaker as well as the Honourable Deputy Attorney General, in the course of the enactment of the Act, and had some members of the House not resolved to prevent at any cost deliberations of the House over the business before it, a number of these Constitutional Petitions would possibly not have arisen.

I, too given the above circumstances, award costs to the petitioners on the terms that are set out in the Judgment of the Honourable Deputy Chief Justice

Recommendations:

Before taking leave of this matter; I humbly and respectfully recommend that:

First, that Parliament puts in place Rules/guidelines to provide for and facilitate public participation of the people in issues of amendment of the Constitution that are not the subject of a referendum or approval by district councils, and also in others where such participation is necessary.

These Rules/guidelines should enable Parliament and the Courts of law to determine whether or not the people have effectively participated in the amendment of the constitution.

The appropriate provisions of the Kenya and South Africa Constitutions may provide some guidance in this respect.

Second, the provisions of the Parliament (Powers and Privileges) Act, and other relevant laws and Rules notwithstanding, there is need for Parliament to put in place a mechanism whereby, Honourable Members of Parliament lawfully carrying out their duties and responsibilities as representatives of the people, are not prevented and/or interfered with in carrying out their responsibilities by directives be they of a security nature or otherwise, like those AIGP Asuman Mugyenyi issued to all Police Stations as regards the consultative meetings that the Honourable Members of Parliament were carrying out. A mechanism whereby, for example, amongst other proposals, the Hon. Speaker's input is first sought before any such actions and/or directives are taken and issued by any authority, may go a long way in enhancing the very essential role of Parliament as the springboard through which all of us Ugandans participate in promoting Constitutionalism in Uganda.

Dated at Mbale this 26 day of July 2018.

Remmy Kasule
Justice of Appeal/Constitutional Court

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA

SITTING AT MBALE

CONSOLIDATED PETITIONS:

1. CONSTITUTIONAL PETITION NO.49 OF 2017

MALE MABIRIRZI KIWANUKA ::::::::::::::::::::::::::::::::PETITIONER

AND

2. CONSTITUTIONAL PETITION NO.3 OF 2018

UGANDA LAW SOCIETY :: PETITIONER

AND

3. CONSTITUTIONAL PETITION NO.5 OF 2018

1. HON. GERALD KARUHANGA KAFUREEKA
2. HON. ODUR JONATHAN
3. HON. MUNYAGWA S. MUBARAK ::::: PETITIONERS
4. HON. SSEWANYANA ALLAN
5. HON. SSEMUJJU IBRAHIM
6. HON. WINNIE KIIZA

AND

4. CONSTITUTIONAL PETITION NO.10 OF 2018

1. PROSPER BUSINGE
2. HERBERT MUGISA :::::::::::::::::::::: PETITIONERS
3. THOMAS MUGARA GUMA
4. PASTOR VINCENT SANDE

AND

5. CONSTITUTIONAL PETITION NO.13 OF 2018

ABAINE JONATHAN BUREGYEYA :::::::::::::::::::::: PETITIONER

VERSUS

ATTORNEY GENERAL ::RESPONDENT

CORAM: Hon. Mr. Justice Alfonse C. Owiny-Dollo, DCJ
Hon. Mr. Justice Remmy Kasule, JA/ JCC
Hon. Mr. Justice Kenneth Kakuru, JA/ JCC
Hon. Lady Justice Elizabeth Musoke, JA/ JCC
Hon Justice Cheborion Barishaki, JA/ JCC

JUDGMENT OF JUSTICE KENNETH KAKURU, JA/ JCC

Brief background

Uganda is a constitutional democratic Country, which evolved from a British Protectorate declared in 1894. On Tuesday 9th October 1962 the Country attained its independence from the British and became a sovereign state. Its independence Constitution became the supreme law of the land. That Constitution was amended in 1963 to create the office of a Constitutional President. In April 1966, the Constitution was suspended and later abolished. It was replaced with an interim Constitution in May of that year.

The interim Constitution paved way for the 1967 Republican Constitution on 8th September 1967. The 1967 Constitution, remained in force until 8th October 1995 when the current Constitution was enacted by a Constituent Assembly on behalf of the people of Uganda.

Since 1995, as provided for in the Constitution, general elections have been conducted every five years. The last general elections were held on 18th February 2016. General Yoweri Kaguta Museveni has been a candidate in all the Presidential elections held since 1996, and has each time emerged victorious. Since the re-introduction of multiparty politics in Uganda in 2005, the National Resistance Movement Party with President Museveni at its helm has consistently won the majority seats in Parliament sufficient to gunner a two thirds majority vote.

Article 102 (b) of the 1995 Constitution of Uganda provides:-

"*A person is not qualified for election as President unless that person is—*

(a) . . .

(b) not less than thirty-five years and not more than seventy-five years of age."

Born in 1944 President Museveni will not have been qualified for election as President under the Constitution as it stood in 2017, as he would have attained the age of 75 years in 2019, the next General Elections being due in 2021.

With this brief background, which I shall expound on later in this Judgment, a Member of Parliament, Mr. Raphael Magyezi, on 3rd October 2017, brought on the floor of Parliament a motion to present a private member's bill, (herein referred to as the "impugned bill") to amend *Article 102(b)* of the Constitution and remove the 75 years presidential age limit. Apparently, this was intended to enable the President seek another term in office in the next general elections should he desire to do so.

In the same bill, Mr. Magyezi also sought to have the Constitution amended so as to incorporate therein the recommendations made by the Supreme Court, in *Amama Mbabazi vs Yoweri Kaguta Museveni and two others, Presidential Election Petition No. 1 of 2016.*

As expected members of the opposition parties in Parliament, some independent members and a few ruling party members strongly opposed the move to have the Constitution amended. However, the majority of the Ruling NRM Party members supported the motion vigorously. The bill, after amendments was passed into law and assented to by the President on 27th December 2017. Its commencement date is 5th January 2018, as the Constitution (Amendment) Act No. 1 of 2018 provides.

The petitioners in the above consolidated Petitions filed their respective Petitions in this Court challenging constitutionality of the entire process leading to the passing into law of the said Act (herein referred to as) "the impugned Act". They also challenge the constitutionality of the "impugned Act" itself.

At the preliminary hearing of the Petitions, it was proposed by all the petitioners that the following Petitions be consolidated. An order for consolidation awaited the date of the commencement of the hearing of the Petitions.

1. Constitutional Petition No.41 of 2014

Benjamin Alipanga :: Petitioner

Versus

1. The National Resistance Movement
2. Justine Lumumba

3. Richard Todwong
4. Rose Namayanja
5. Kenneth Omona
6. The Attorney General of Uganda
7. The National Electoral Commission::::::::::::::::::::::::::::Respondents

2. Constitutional Petition No. 37 of 2017

Ahuped

(Advocates For Human Rights, Peace And Development):::Petitioner

Versus

1. Hon. Raphael Magyezi
2. Attorney General :: Respondents

3. Constitutional Petition No. 44 of 2017

Dr. Abed Bwanika ::Petitioner

Versus

The Attorney General :: Respondent

4. Constitutional Petition No. 34 of 2017

1. Center For Constitutional Governance
2. Legal Brains Trust (LBT)
3. Miria R. K. Matembe :::::::::::::::::::::::::::::::::::::: Petitioner

Versus

The Attorney General :::::::::::::::::::::::::::::::::: Respondent

5. Constitutional Petition No.18 of 2018

Male Mabirizi Kiwanuka ::::::::::::::::::::::::::::::::Petitioner

Versus

Attorney General :::::::::::::::::::::::::::::::::::: Respondent

6. Constitutional Petition No.45 of 2018

Male Mabirizi Kiwanuka :::::::::::::::::::::::::::::: Petitioner

Versus

Attorney General :::::::::::::::::::::::::::::::::::::: Respondent

7. Constitutional Petition No.46 of 2018

Male Mabirizi Kiwanuka :::::::::::::::::::::::::::::: Petitioner

Versus

Attorney General ::::::::::::::::::::::::::::::::::::Respondent

8. Constitutional Petition No.49 of 2017

Male Mabirizi Kiwanuka ::::::::::::::::::::::::::::::::Petitioner

Versus

The Attorney General :::::::::::::::::::::::::::::::::::::: Respondent

And

9. Constitutional Petition No.3 of 2018

Uganda Law Society ::Petitioner

Versus

The Attorney General :::::::::::::::::::::::::::::::::::::: Respondent

And

10. Constitutional Petition No.5 of 2018

1. Hon. Gerald Karuhanga Kafureeka
2. Hon. Odur Jonathan
3. Hon. Munyagwa S. Mubarak :::::::::::::::::: Petitioners
4. Hon. Ssewanyana Allan

5. Hon. Ssemujju Ibrahim
6. Hon. Winnie Kiiza

Versus

The Attorney General :: Respondent

And

11. Constitutional Petition No.10 of 2018

1. Prosper Businge
2. Herbert Mugisa ::::::::::::::::::::::::::::::::::::Petitioners
3. Thomas Mugara Guma
4. Pastor Vincent Sande

Versus

The Attorney General :: Respondent

And

12. Constitutional Petition No.13 of 2018

Abaine Jonathan Buregyeya :::::::::::::::::: :::Petitioner

Versus

Attorney General :::::::::::::::::::::::::::::::::: Respondent

When the Petitions came up for hearing on 9th April 2018 at Mbale, an order was made by the Court consolidating the following Petitions:-

1. Constitutional Petition No.49 of 2017

Male Mabirizi Kiwanuka Versus Attorney General

And

2. Constitutional Petition No.3 of 2018

Uganda Law Society Versus Attorney General

And

3. Constitutional Petition No.5 of 2018

1. Hon. Gerald Karuhanga Kafureeka
2. Hon. Odur Jonathan
3. Hon. Munyagwa S. Mubarak Versus Attorney General
4. Hon. Ssewanyana Allan
5. Hon. Ssemujju Ibrahim
6. Hon. Winnie Kiiza

And

4. Constitutional Petition No.10 of 2018

1. Prosper Businge
2. Herbert Mugisa Versus Attorney General
3. Thomas Mugara Guma
4. Pastor Vincent Sande

And

5. Constitutional Petition No.13 of 2018

Abaine Jonathan Buregyeya Versus Attorney General

The following Petitions were dismissed having been abandoned or withdrawn by the petitioners.

1. CONSTITUTIONAL PETITION NO.41 OF 2014 (Supra)
2. CONSTITUTIONAL PETITION NO. 37 OF 2017 (Supra)
3. CONSTITUTIONAL PETITION NO. 44 OF 2017 (Supra)
4. CONSTITUTIONAL PETITION NO. 34 OF 2017 (Supra)
5. CONSTITUTIONAL PETITION NO.18 OF 2018 (Supra)
6. CONSTITUTIONAL PETITION NO.45 OF 2018 (Supra)
7. CONSTITUTIONAL PETITION NO.46 OF 2018 (Supra)

Representation

The representation of the parties is already set out in the Judgments of my learned brothers Kasule JCC and Cheborion JCC and I will not belabour to reproduce them here.

Issues

The issues to be determined were agreed upon by Counsel for the parties and framed by Court immediately before the commencement of the hearing as follows:-

1. *Whether sections 2 and 8 of the Act extending or enlarging of the term or life of parliament from 5 to 7 years is inconsistent with and/ or in contravention of Articles 1, 8A, 77(3), 77(4) 79(1), 96, 61(2) and (3), 105(1), 233(2)(b), 260(1) and 289 of the Constitution.*

2. *And if so, whether applying it retroactively is inconsistent with and/or in contravention of 1, 8A, 77(3), 77(4) 79(1), 96, 61(2) and (3), 105(1), 233(2)(b), 260(1) and 289 of the Constitution.*

3. *Whether sections 6 and 10 of the Act extending the current life of Local Government Councils from 5 to 7 years is inconsistent with and/or in contravention of Articles 1, 2, 8A, 176(3), 181(4) and 259(2)(a) of the Constitution.*

4. *If so, whether applying it retroactively is inconsistent with and/or in contravention of Articles 1, 2, 8A, 176(3), 181(4) and 259(2)(a) of the Constitution.*

5. *Whether the alleged violence/ scuffle inside and outside Parliament during the enactment of the Act was inconsistent and/or in contravention of Articles 1, 2, 3(2) and 8A of the Constitution.*

6. *Whether the entire process of conceptualizing, consulting, debating and enacting the Act was inconsistent with and/ or in contravention of Articles of the Constitution as hereunder:-*

    (a) *Whether the introduction of the Private Member's Bill that led to the Act was inconsistent with and/or in contravention of the Articles 93 of the Constitution.*

    (b) *Whether the passing of sections 2, 5, 6, 8, and 10, of the Act, are inconsistent with and/or in contravention of Article 93 of the Constitution.*

    (c) *Whether the actions of Uganda Peoples Defence Forces and Uganda Police in entering Parliament, allegedly assaulting Members in the chamber, arresting and allegedly detaining the said Members is inconsistent with and/or in contravention of Articles 24, 97, 208(2), and 211(3) of the Constitution.*

    (d) *Whether the consultations carried out were marred with restrictions and violence which were inconsistent with and/or in contravention of Articles 29(l)(a)(d)(e) and 29(2)(a) of the Constitution.*

    (e) *Whether the alleged failure to consult on sections 2, 5, 6, 8, and 10, is inconsistent with and/or in contravention of Articles 1, and 8A of the Constitution.*

(f) *Whether the alleged failure to conduct a referendum before assenting to the Bill containing sections 2, 5, 6, 8, and 10, of the Act was inconsistent with, and in contravention of Articles 1, 91(1) and 259(2), 260 and 263(2)(b) of the Constitution.*

(g) *Whether the Constitutional Amendment Act of 2017 was against the spirit and structure of the 1995 constitution.*

7. *Whether the alleged failure by Parliament to observe its own Rules of Procedure during the enactment of the Act was inconsistent with and in contravention of Articles 28, 42, 44, 90(2), 90(3)(c) and 94(1) of the Constitution.*

(a) *Whether the actions of Parliament preventing some members of the public from accessing Parliamentary chambers during the presentation of the Constitutional Amendment Bill No.2 of 2017 was inconsistent with and in contravention of the provisions of Articles 1, 8A, 79,208(2),209,211(3),212, of the Constitution.*

(b) *Whether the act of tabling Constitutional Bill No.2 of 2017, in the absence of the Leader of Opposition, Chief Whip, and other opposition members of Parliament was in contravention of and/or inconsistent with Articles 1, 8A, 69(1), 69(2)(b), 71, 74, 75, 79, 82A, and 108A, of the Constitution.*

(c) *Whether the alleged actions of the Speaker in permitting Ruling Party Members of Parliament to sit on the opposition side of Parliament was inconsistent with Articles 1, 8A, 69(1), 69(2)(b), 71, 74, 75, 79, 82A, 83(1)(g), 83(3), and 108A, of the Constitution.*

(d) *Whether the alleged act of the Legal and Parliamentary Affairs Committee of Parliament in allowing some committee*

members to sign the Report after the public hearings on Constitutional Amendment Bill No.2 of 2017, was in contravention of Articles 44(c), 90(1), and 90(2) of the Constitution.

(e) *Whether the alleged act of the Speaker of Parliament in allowing the Chairperson of the Legal Affairs Committee, on 18th December 2017, in the absence of the Leader of Opposition, Opposition Chief Whip, and other Opposition Member of Parliament, was in contravention of and inconsistent with Articles 1, 8A, 69(1), 69(2)(b), 71, 74, 75, 79, 82A, and 108A, of the Constitution.*

(f) *Whether the actions of the Speaker in suspending the 6 (six) Members of Parliament was in contravention of Articles 28, 42, 44, 79, 91, 94, and 259 of the Constitution.*

(g) *Whether the action of Parliament in:-*

(i) waiving the requirement of a minimum of three sittings from the tabling of the Report yet it was not seconded.

(ii) of closing the debate on Constitutional Amendment Bill No.2 of 2017 before every member of Parliament could debate on the said Bill.

(iii) failing to close all doors during voting.

(iv) failing to separate the second and third reading by at least fourteen sitting days are inconsistent with and/or in contravention of Articles 1, 8A, 44(c), 79, 94, and 263 of the Constitution.

8. *Whether the passage of the Act without observing 14 sitting days of Parliament between the 2nd and 3rd Reading was inconsistent with and/or in contravention of Articles 262 and 263(1) of the Constitution.*

9. *Whether the Presidential assent to the Bill allegedly in absence of a valid certificate of compliance from the Speaker and certificate of the Electoral Commission that the amendment was approved at a referendum was inconsistent with and in contravention of Article 263(2)(a) and (b) of the Constitution.*

10. *Whether section 5 of the Act, which reintroduces term limits and entrenches them as subject to referendum is inconsistent with and/or in contravention of Article 260(2)(a) of the Constitution.*

11. *Whether section 9 of the Act, which seeks to harmonies the seven year term of Parliament with Presidential term, is inconsistent with and/or in contravention of Articles 105(1) and 260(2) of the Constitution.*

12. *Whether sections 3, and 7, of the Act, lifting the age limit are inconsistent with and/or in contravention of Articles 21(3) and 21(5) of the Constitution.*

13. *Whether continuance in office by a President elected in 2016 and by remaining in office on attaining the age of 75 years is contrary to Articles 83(1) (b) and Article 102 (c) of the Constitution.*

14. *What remedies are available to the parties?*

In resolving the issues set above I have endeavored to follow both the law and the legal principles applicable.

The Law

For ease of reference, *Article 137* provides that:-

> *"(1) Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court.*
>
> *(3) A person who alleges that__*
>
> *a) an Act of Parliament or any other law or anything in or done under the authority of any law; or*
> *b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this constitution, may petition the constitutional court for a declaration to that effect, and for redress where appropriate.*
>
> *(4) Where upon determination of the petition under clause (3) of this article the constitutional court considers that there is need for redress in addition to the declaration sought, the constitutional court may__*
>
> *a) grant an order of redress; or*
> *b) refer the matter to the High Court to investigate and determine the appropriate redress."*

Principles of Constitutional interpretation

Let me restate some of the time tested principles of constitutional interpretation I consider pertinent in the determination of the Constitutional Petitions before me. These have been laid down in several decided cases by the Supreme Court, this Court and Courts of other jurisdictions. They have also been expounded upon in a number of legal literature of persuasive authority.

They are:-

1) The Constitution is the Supreme law of the land and forms the standard upon which all other laws are judged. Any law that is inconsistent with or in contravention of the Constitution is null and void to the extent of the inconsistency. See:- *Article 2(2)* of the Constitution. See:- also The Supreme Court decision in Presidential Election Petition No.2 of 2006 *(Rtd) Dr. Col Kiiza Besigye Vs Y.K. Museveni, Supreme Court Constitutional Appeal No.2 of 2006.*

2) In determining the constitutionality of a legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining constitutionality, of either an unconstitutional purpose or an unconstitutional effect animated by the object the legislation intends to achieve. See:- *Attorney General vs. Salvatori Abuki Constitution Appeal No. 1 of 1998.(SCU)*

3) The entire Constitution has to be read together as an integral whole and no particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness. See:- *P.K Ssemogerere and Another vs. Attorney General, Supreme Court Constitutional Appeal No. 1 of 2002 and The Attorney General of Tanzania vs Rev. Christopher Mtikila [2010.].EA 13.*

4) A constitutional provision containing a fundamental human right is a permanent provision intended to cater for all times to come and therefore should be given a dynamic, progressive, liberal and flexible interpretation, keeping in view the ideals of the people, their socio economic and political cultural values so as to extend the benefit of the same to the maximum possible. See:- *Okello Okello John Livingstone and 6 others Vs The Attorney General and another, Constitutional Court Constitutional Petition No. 1 of 2005, Dr. Kiiza Besigye vs Attorney General: Constitutional Court Constitutional Petition No.1 of 2006 and South Dakota vs. South Carolina 192, U.S.A 268, 1940.*

5) Where words or phrases are clear and unambiguous, they must be given their primary, plain, ordinary or natural meaning. The language used must be construed in its natural and ordinary sense.

6) Where the language of the statute sought to be interpreted is imprecise or ambiguous, a liberal, generous or purposeful interpretation should be given to it. See: *The Attorney General Versus Major General David Tinyefuza, Supreme Court Constitutional Appeal No. 1 of 1997.*

7) The history of the Country and the legislative history of the Constitution is also relevant and a useful guide in constitutional interpretation. See: *Okello Okello John Livingstone and 6 others Versus the Attorney General and Another, Constitutional Court Constitutional Petition No.4 of 2005.*

8) The National Objectives and Directive Principles of State Policy in the Constitution are also a guide in the interpretation of the Constitution.

9) In searching for the purpose of the Act, it is legitimate to seek to identify the mischief sought to be remedied by the legislation. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We are obliged to understand the provisions within the context of the grid, if any, of the related provisions and of the Constitution as a whole, including the underlying values of the Constitution that must be promoted and protected. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous. See:- *Apollo Mboya Vs Attorney General and others, High Court of Kenya, Constitutional and Human Rights Division Petition No. 472 of 2017.*

10) In construing the impugned provisions, we are obliged not only to avoid an interpretation that clashes with the Constitutional values, purposes and principles but also to seek a meaning of the provisions that promotes constitutional purposes, values, principles, and which advances rule of law, human rights and fundamental freedoms in the Bill of Rights. We are obliged to pursue an interpretation that permits development of the law and contributes to good governance. See:- *Apollo Mboya Vs Attorney General and others* (Supra).

11) It is an elementary rule of constitutional construction that no one provision of the constitution is to be segregated from the others and to be considered alone. All constitutional provisions bearing upon a particular subject are to be brought into view and interpreted as to effectuate the greater purpose of the instrument. See: *Smith Dakota Vs North Carolina, 192 US 268(1940).*

12) The duty of a court in construing statutes is to seek an interpretation that promotes the objects of the principles and values of the Constitution and to avoid an interpretation that clashes therewith. If any statutory provision, read in its context, can reasonably be construed to have more than one meaning, the court must prefer the meaning that best promotes the spirit and purposes of the Constitution and the values stipulated in *Article 8A(1).*

See:- *Apollo Mboya Vs Attorney General and others, High Court of Kenya, Constitutional and Human Rights Division Petition No. 472 of 2017.*

Bearing in mind the above principles of Constitutional interpretation among others, I now proceed to consider submissions of Counsel for all the parties and the evidence before me and relate them to the issues raised in the said Petitions.
The submissions of Counsel for the petitioners and the respondent's replies thereto in respect of all the issues have already been set out in the Judgments of my learned brothers Kasule JCC and Cheborion JCC.

I have found no reason to reproduce those submissions here. However, I will refer to them in my resolution of issues.

Resolution of issues

I will determine the issues in the order and manner in which they were presented, argued and replied to by Counsel.

Issues 1,2,3 and 4 were agreed upon and framed by the Court as follows:-

1. *Whether sections 2 and 8 of the Act extending or enlarging of the term or life of parliament from 5 to 7 years is inconsistent with and/ or in contravention of Articles 1, 8A, 77(3), 77(4) 79(1), 96, 61(2) and (3), 105(1), 233(2)(b), 260(1) and 289 of the Constitution.*

2. *And if so, whether applying it retroactively is inconsistent with and/or in contravention of Articles 1, 8A, 77(3), 77(4), 79(1), 96 and 233(2(b) of the Constitution.*

3. *Whether sections 6 and 10 of the Act extending the current life of Local Government Councils from 5 to 7 years is inconsistent with and/or in contravention of Articles 1, 2, 8A, 176(3), 181(4) and 259(2)(a) of the Constitution.*

4. *If so, whether applying it retroactively is inconsistent with and/or in contravention of Articles 1, 2, 8A, 176(3), 181(4) and 259(2)(a) of the Constitution."*

Under the above issues the petitioners challenged the Constitutionality of Sections 2,6,8 and 10 of the Constitution. The above sections are set out in the Act (Act 1 of 2018) as follows:-

"2. Amendment of article 77 of the Constitution.

Article 77 of the Constitution is amended in clause (3) by substituting for the word "five" appearing immediately before the word "years" the word "seven".

6. Amendment of article 181 of the Constitution.

Article 181 of the Constitution is amended in clause (4), by substituting for the word "five" appearing immediately before the word "years" the word "seven".

8. Replacement of Article 289 of the Constitution.

Article 289 of the Constitution is amended by substituting for article 289 the following-

"289. Term of current Parliament.

Notwithstanding anything in this Constitution, the term of the Parliament in existence at the time this article comes into force, shall expire after seven years of its first sitting after the general elections. "

10 . Replacement of article 291 of the Constitution.

Article 291 of the Constitution is amended by substituting for Article 291 the following-

"291. Term of current local government councils.

For the avoidance of doubt, the term of seven years prescribed for local government councils by clause (4) of Article 181 of this Constitution shall apply to the term of the local government councils in existence at the commencement of this Act."

I have found it imperative to set out a historical background of the Constitution of Uganda, to give light to the reasoning behind the determination of these issues in accordance with the principles of constitutional interpretation first set out above.

Historical and Constitutional background:

Uganda has had a checkered constitutional history.

On 22nd March 1894, the British Government formally annexed Uganda, and declared it to be a Protectorate. By this declaration Uganda came within the ambit of the Africa Order-in-Council of 1889, which authorised the Local Consul to establish local jurisdiction under which the Consul was to exercise considerable executive, judicial and administrative powers[1].

The geographical and political boundaries of Uganda were established by European powers at the Berlin Conference of 1884-5. On paper, the people who were placed under British colonial rule had consented to their subjugation through treaties, grants made by their Kings, Chiefs or Rulers. In areas where there were no centralized authority to sign such agreements with the British, their lands were simply incorporated into the protectorate by Orders–In-Council. The protectorate was administered by a Commissioner who had powers to make

[1] Kanyeihamba, Constitutional History of Uganda. Page 8

laws, Rules and Regulations. His legislative power was subject only to general or special instructions of the British Secretary of State. He could by ordinance, order that the laws of the United Kingdom, India or any other colony be applied to Uganda generally or subject to stated modifications. Some British statutes were made applicable to Uganda under the Foreign Jurisdiction Act of 1890.[2]

Prof. Kanyeihamba, in his book Constitutional History of Uganda, described the period between 1902-1920 as dictatorial and despotic if not in practice, as least in law. In 1920 a new Order-in-Council was made establishing executive and legislative Councils. The members of those bodies were distinguished by His Majesty the King of the United Kingdom.

As late as 1945, no African was sitting on the legislative Council. The people were being ruled without their voices ever being heard. On 23rd October 1945, the British Government approved the appointment of three indigenous Africans to the legislative Council. They were to represent Buganda, Western and Eastern provinces. Kigezi and the North remained unrepresented because "they had not yet advanced to the stage of requiring the creation of centralized native executives." The first African Legislators entered the House on 4th December 1945. By 1950 the unofficial members of the legislative Council had become 16 constituted as follows; 8 Ugandans, 4 Asians, and 4 Europeans.[3]

The first Ugandan Ministers were appointed in 1955. In 1956, the first African woman legislator entered the House, she was Mrs. Pulma Kisosonkole, a South African married to a Ugandan. In 1957 the Governor constituted a committee to consider and recommend a number of Constitutional reforms, aimed at

[2] Ibid

[3] Ibid

preparing the Country for self rule and eventual independence. It was headed by J.V Wild and his report bore his name. It was published in 1959, it recommended as follows:-

> *That direct elections be held all over the Country in 1961. A common roll or register be introduced. The elected representatives be 76, 20(twenty) for Buganda, 20(twenty) for Eastern province, 17 (seventeen) for Western province and 4 (four) for Urban areas.*

Buganda rejected direct elections to the legislature. The other Kingdoms too objected to direct elections. General elections were held in 1961 and UPC obtained the majority votes. However, Democratic Party (DP) won more seats in Parliament and formed Government because Buganda had opposed the elections.

In 1961, a conference was held in London, United Kingdom, to determine the constitutional dispensation that the independent Uganda would adopt. All delegations from different parts of Uganda were flown to London, the now famous or infamous Lancaster Conference. The delegates wanted a workable Constitution. Many issues remained unresolved notably, Bunyoro's demands for the return of its counties that had been annexed to Buganda by the British colonialists after their defeat of Kabalega the King of Bunyoro famously referred to in our political history as the *"lost counties"* the status of Buganda and other Kingdoms.

When finally a comprise was reached, on March 1st 1962, the London agreement was signed, bringing into force a new Constitution. Still many issues remained unresolved, necessitating another conference in London in June 1962 to review and resolve the remaining obstacles, and amend the Constitution and confirm the date of independence.

In August 1962, the British Parliament passed an Act called, the Uganda Independence Act, which provided *inter alia* a follows:-

> "As *from October* 9, *the territories comprised in the Uganda Protectorate will together form part of Her Majesty's dominions with the, name of Uganda and henceforth Her Majesty's Government will have no responsibility for the government of Uganda, and no Act of Parliament of the United Kingdom passed after that date shall extend to Uganda. The Colonial laws Validity Act of* 1865 *will no longer apply to any law made by the Uganda Legislature and no such law can be rendered void on account of repugnance to the law of England."(Sic)*

This was the much hyped 1962 Constitution, made almost entirely without the input of the citizens of Uganda. It was made by their Rulers whose interests were considered paramount by the British. It appears to me to have been a pay-off to the Rulers for their corroboration with the British imperialists. No meaningful consultations had been made, at least not with the people. Many constitutional issues remained unresolved. Some of the constitutional issues were embedded in the Constitution itself. These included the status of Buganda, the indirect elections in Buganda, the lost counties of Bunyoro, the legal status of Busoga and its rulers and the land question. Uganda, under the 1962 Constitution, was neither a Republic nor a Monarchy. It was neither a federation of states nor a unitary one. There were a number of other petty but intricate constitutional questions that were embedded in the Constitution, as whether a Muganda commoner Bendicto Kiwanuka, could head the central Government and constitutionally occupy an office higher than that of the Kabaka, the Ruler of Buganda. Later the question arose as to whether the Kabaka or the King of Buganda could assent to a law ceding part of his Kingdom's territory to another

kingdom within Uganda, such a law having been passed by the Parliament of Uganda. There was even an issue as to whose a photograph was the official portrait of the Head of State and Government, the Kabaka's or that of the Prime Minister, Milton Obote.

There were also issues of revenue collection and sharing between the central government, Buganda and other territories. There were two High Courts. The High Court of Buganda and the High Court of Uganda, both presided over by the same Judges. Each federal state had a cabinet, legislature and judiciary. In this regard Prof. Kanyeihamba has observed:-

> *"The Independence Constitution emphasized division rather than unity. It placed regional interests above national interests and exalted regional leaders at the expense of national leaders....."*[4]

The Constitution was designed to cater for a historical Uganda where traditions and economic power which had been placed was in the hands of a few by the British Colonialist were guaranteed. The Constitution can claim to have had legality in the sense that those who intended to protect it were in effective control of the nation's affairs. However, it lacked political legitimacy for it was not an expression of the will of the majority nor did it claim to have the consent of the masses even though it can be claimed that the framers were acting through the elected representatives. Lacking political legitimacy, the Constitution could not withstand the test of political pressure for if it were threatened with abrogation the masses would be reluctant to defend it.[5]

[4] Ibid

[5] Ibid

Although Section 1 of the 1962 Constitution declared it to be the Supreme law of Uganda this Section was subject to Sections 5 and 6. Section 5 dealt with amendment of the Constitution. Under Section 5, Parliament could alter the Constitution except the provisions set under schedule 1, 2, 3, 4 and 5. These schedules were:- (1) The Constitution of Buganda, (2) special provisions relating to the Kingdom of Ankole, (3) special provisions relating to Bunyoro, (4) special provisions relating to Toro, (5) special provisions relating to the territory of Busoga. This Constitution was in fact an Act of Parliament having been enacted as such in Britain and adopted as a law in Uganda upon independence. It contained a Bill of Rights. The Constitution was a delicate balancing act between the Central Government on one hand, the Buganda Kingdom government and the rest of Uganda on the other.

Then again, there was a balancing act between the central government and the semi federal states and territory.

In this regard Sections 73, 74(1), 75(1), 123 and 124 of the Constitution provided as follows:-

> *73. Parliament shall have power to make laws for the peace, order and good government of Uganda (other than the Federal States) with respect to any matter.*
>
> *74. (1) The Legislature of the Kingdom of Buganda shall have power, to the exclusion of Parliament, to make laws for the peace, order and good government of the Kingdom of Buganda with respect to the matters specified in Part I of Schedule 7 to this Constitution.*
>
> *75. (1) The Legislature of a Federal State (other than the Kingdom of Buganda) shall have power, to the exclusion of Parliament, to*

make laws for the peace, order and good government of the State with respect to the matters specified in Schedule 8 to this Constitution.

123. The Ruler of a Federal State and the constitutional head of a District shall take precedence over all persons in the State or District other than the President:

Provided that in the case of a traditional ceremony relating only to a particular Federal State or District the Ruler of the State or the constitutional head of the District, as the case may be, shall take precedence over all persons in the State or District.

By looking at the above Sections of the Constitution, it is apparent that there were in it a number of inherent contradictions that would inevitably lead the country to a crisis. The crisis did emerge when in 1964 a referendum was held in the *"lost counties"* of Buyaga and Bugangaizi. These counties had been transferred from Bunyoro Kingdom to Buganda Kingdom by the British upon the military defeat of the former. In that referendum of the 1964 the population in those counties voted to leave Buganda and return to Bunyoro. An Act of Parliament was passed to that effect. The President who was also the Kabaka (King) of Buganda refused to assent to it, on the ground that he would not transfer part of his Kingdom to another.

The Prime Minister signed the bill into law. Under *Section 20* of the Buganda Constitution, which could not be amended by the National Assembly, the Lukiiko (Buganda Parliament) consisted of elected representatives, Kabaka's Ministers and his personal nominees. This Lukiiko indirectly elected the Buganda's representatives to the National Assembly.

With this background a motion of no confidence in the Prime Minister was tabled in the National Assembly by one of the prominent Buganda representatives nominated by the Lukiiko Daudi Ochieng. It was supported by some members of the ruling party and government. It alleged corruption against Prime Minister Obote and Idi Amin the Army Commander. A commission of inquiry was set up to investigate the matter, headed by a High Court Judge from Tanzania.

Amidst accusations of and allegations of treason, on 22nd February 1966 upon the orders of the Prime Minister, five Cabinet Ministers were arrested at a cabinet meeting, together with others, they were detained and deported. Two days later the Prime Minister 'suspended' the Constitution, abolished the post of President, and Vice President and assumed the Power of government. Without doubt this was unconstitutional. Uganda remained without a Constitution, until 15th April 1966, when an interim Constitution was passed by Parliament. There was no consultation, no debate. The Members of Parliament were reportedly asked to enact the Constitution and afterwards pick their copies from their pigeon holes. This is the so called "Pigeon hole" Constitution. It is stated that Parliament was surrounded by the Army during this process.

The 1962 Constitution therefore was abrogated by means other than those set out in the Constitution. The federal nature of the 1962 Constitution, where it applied, was replaced with a unity government. The executive powers of government were vested in the President who now assumed the powers previously held by both the President and Prime Minister. The National Assembly was granted more powers than it enjoyed under the 1962 Constitution. Most importantly for the purpose of this Judgment, the rest of the provisions in the Constitution remained the same.

As expected, Buganda protested accusing the central government of having breached a social contract between the two. The entrenched provisions of the 1962 Constitution had been ignored.

Although no shots were fired on that day, the acts of the Prime Minister and Parliament amounted to a *coup d'etat* against the established Constitutional Order. The events that surrounded the abolishment of the 1962 Constitution were set out in detail in the Judgment of the Constitutional Court in *Uganda vs Commissioner of Prisons Exparte Matovu 1966 EA [P.54].* The Judgment was delivered by *Sir Udo Udoma CJ*. The other Judges on the Coram were *Sheridan* and *Jeffrey Jones JJ*, on February 22, 1967.

I am constrained to reproduce it in *extenso*. The relevant parts read as follows:-

> *"On February 22, 1966, the then Prime Minister of Uganda issued a statement headed "Statement to the Nation by the Prime Minister", annexure A, declaring that in the interests of national stability and public security and tranquility he had taken over all powers of the Government of Uganda. The statement is of great importance and we therefore reproduce it hereunder. It reads:*
>
> > *"In the interest of national stability and public security and tranquility, I have today – February 22, 1966 –taken over all powers of the Government of Uganda.*
>
> *I shall henceforth be advised by a council whose members I shall name later. I have taken this course of action independently because of the wishes of the people of this country for peace, order and prosperity.*

Five former ministers have today been put under detention pending investigations into their activities.

I call upon the judges and magistrates, civil servants – both Uganda and expatriate – members of the security forces and the general public to carry on with their normal duties.

I take this opportunity to assure everybody that the whole situation is under control."

On February 24, 1966 there followed another statement made to the nation by the then Prime Minister, annexure B, in which, among other things, the Prime Minister disclosed that he had been forced to take "certain drastic measures" because of events and "unwelcome activities of certain leading personalities", who had plotted to overthrow the Government; that during his tour of the Northern Region of Uganda early in the month an attempt was made to overthrow the Government by the use of foreign troops; and that certain members of the Government had requested foreign missions for military assistance consisting of foreign troops and arms for the purpose of invading the country and overthrowing the Government of Uganda.

The Prime Minister then declared:

"The Constitution (of Uganda) shall be suspended temporarily with effect from 7 o'clock tonight.

In order however to provide for effective administration for the smooth running of the Government machine and also for the

promotion of unity the following subjects contained in the Constitution [said the Prime Minister] shall be preserved:

(a) The Courts, Judges and Magistrates;

(b) The Civil Service;

(c) The Army, Police and Prison Services;

(d) The Rulers of Federal States and Constitutional Heads of Districts;

(e) The District Administration and Urban Authorities;

(f) The Schedules to the Constitution of Uganda; and

(g) The National Assembly."

There was to be established a council composed of ministers including the Attorney-General and certain members of the armed forces and the police. The ministerial portfolios were to function as before and certain vacancies caused by the absence of the ministers under detention were to be filled. The statement ended with an appeal to the people to remain calm and to co-operate with the security forces in the maintenance of law and order.

On February 25, 1966, the statement and declaration contained in annexure B were repeated and more elaborately spelt out in annexure C, which established a security council of which the Prime Minister was chairman. In annexure C however, which was signed by all the ministers then supporting the Prime

Minister, item (f) in annexure B was omitted.

On March 2, 1966, annexure D was published. In it the Prime Minister declared that acting with the advice and consent of the cabinet:

> *"(a) The executive authority of Uganda shall vest in the Prime Minister and shall be exercised by the Prime Minister acting in accordance with the advice and consent of the cabinet; and*
>
> *(b) The duties, powers and other functions that are performed or are exercisable by the President or Vice-President immediately before February 22, 1966, shall vest in the Prime Minister by and with the advice and consent of the cabinet."*

Thus by that declaration both the President and Vice-President of Uganda were not only deprived of their offices, but divested of their authorities. Immediately thereafter the President of Uganda was forcibly ejected from state house, which is the official residence of the President of Uganda.

For the proper appreciation of the state of affairs and the changes purported to have been made by the above mentioned statements and the declaration, we pause here to note that the Constitution referred to in the statement of February 24, 1966, was the Constitution of Uganda promulgated by the authority of the Uganda (Independence) Order-in-Council 1962, which came into force on October 9, 1962, and subsequent amendments thereto. Throughout this judgment therefore that Constitution will hereinafter be referred to as the 1962 Constitution.

In the 1962 Constitution, the offices of President and Vice-President of Uganda were created by arts 34 and 35, the President being therein described as the Supreme Head and Commander in Chief of Uganda. The provision of art 37 was that the Parliament of Uganda should consist of the President and the National Assembly, while arts. 61, 62, 64 and 65 vested the President with the executive authority of Uganda with power to appoint a Prime Minister; and thereafter, acting in accordance with the advice of the Prime Minister, to appoint other Ministers, including the Attorney General; and to assign to such Ministers responsibilities for the business of Government, including the management of Departments.

In art 36 it was provided that the President and the Vice-President might at any time be removed from office by a resolution of the National Assembly, moved either:

> *"(a) by the Prime Minister; or*
>
> *(b) by a member of the Assembly other than the Prime Minister who satisfies the Speaker that not less than one half of all the members of the Assembly have signified in writing the intention to vote in support of the resolution, and which is supported by the votes of not less than two-thirds of all the members of the Assembly."*

In other words, by this article, the President and Vice-President could not be removed from their office except by a resolution passed by the votes of not less than two-thirds of all the members of the National Assembly.

To return to the chronology of events. On March 5, 1966, the Prime Minister issued another statement, annexure E. The statement was in reply to a press report purported to have been published by Sir Edward Mutesa who, until February 22, 1966, when the Prime Minister seized all the power of Government, was the President and Supreme Head and Commander in Chief of Uganda. In his statement, the Prime Minister pointed out that in the press statement made by Sir Edward Mutesa the latter had openly admitted that unknown to him as Prime Minister or any of his Cabinet Ministers, he, Sir Edward, had made request for military assistance from foreign countries as a precautionary measure, because there were then rumours current in the country that troops were being trained somewhere in the country for the purpose of overthrowing the Constitution.

Then on April 15, 1966, at an emergency meeting of the National Assembly, the following resolution, annexure F at p. 20, which was proposed by the Prime Minister was passed:

"Whereas in the interest of national stability, public security and tranquility, the Prime Minister, on February 22, 1966, suspended the then Constitution of Uganda and took over all the powers of the Government as a temporary measure.

And whereas the Government, on February 24, 1966, approved the action taken by the Prime Minister in order to ensure a speedy return to the normality which existed before the occurrence of the events which led to the suspension of the Constitution, and Whereas

it is desirable, in order to return to the state of normality that a Constitution should be adopted.

Now, therefore, we the people of Uganda hereby assembled in the name of Uganda do resolve and it is hereby resolved that the Constitution which came into being on October 9, 1962, be abolished, and it is hereby abolished accordingly, and the Constitution now laid before us be adopted this day of April 15, 1966, as the Constitution of Uganda until such time as the Constituent Assembly established by Parliament enacts a Constitution in place of this Constitution."

On the adoption of the Constitution of April 15, 1966 (hereinafter to be referred to as the 1966 Constitution) oaths under the new Constitution were administered to the Prime Minister, who thereupon by virtue of provisions of art 36 (6) of the new Constitution became automatically by operation of law elected President and the Head of State and Commander in Chief of the Sovereign State of Uganda.

Thereafter oaths were administered to members of the National Assembly, both Government supporters and Opposition and other Officials of State. Members of the National Assembly were only able to take their seats in the State Assembly after the taking of the oath under the new Constitution.

On May 22, 1966, the applicant was arrested and detained at Masindi Prison under the Deportation Act (Cap. 308). He was subsequently transferred to Luzira Prison within the Kingdom of Buganda.

On May 23, 1966, by proclamation, Legal Notice No. 4 of 1966, a state of public emergency was declared to exist in Buganda Kingdom; and on May 25, 1966 by a resolution of the National Assembly the proclamation was affirmed and Emergency Powers Act (Cap. 307), and regulations made thereunder including the Emergency Powers (Detention) Regulations 1966, Statutory Instrument No. 65 of 1966were brought into force and in full operation.

On July 16, 1966, the applicant was released and ordered to go. Soon thereafter at about 12.45 p.m. as the applicant stepped out of prison, he was rearrested and detained again in Luzira Prison.

In respect of the validity of the 1966 Constitution the Court concluded as follows at page 539 of the Judgment:-

B. Applying the Kelsenian principles, which incidentally form the basis of the judgment of the Supreme Court of Pakistan in the above case, our deliberate and considered view is that the 1966 Constitution is a legally valid constitution and the supreme law of Uganda; and that the 1962 Constitution having been abolished as a result of a victorious revolution in law does no longer exist nor does it now form part of the Laws of Uganda, it having been deprived of its de facto and de jure validity. The 1966 Constitution, we hold, is a new legal order and has been effective since April 14, 1966, when it first came into force.

F. After a perusal of these affidavits, the contents of which have not been in any way challenged or contradicted, we are satisfied and find as a fact that the new Constitution has been accepted by the

people of Uganda and that it has been firmly established throughout the country, the changes introduced therein having been implemented without opposition, as there is not before us any evidence to the contrary."

It is evident from the above cited constitutional case that the Judiciary, the Parliament, the Army, the Police and public servants accepted the new constitutional order as did the most of the people of Uganda. However, the picture was different in Buganda.

The events that followed enactment of the 1966 interim Constitution are narrated by Prof. Kanyeihamba as follows:-

"The new Constitution had required members of the National Assembly to swear allegiance to it, and to the new Uganda. Leadership of the Buganda and members of the Assembly refused to do so. Without consulting their minister, the Buganda leadership summoned a meeting of the Lukiiko to take stock, as it were.

. . . this was an utter rejection of the new Constitution by the Buganda Lukiiko, and a direct challenge to the central authorities, and so the latter regarded it. When Obote heard about the resolution, he is reported to have said: "This is an act of rebellion. Government will study it and deal with all those involved.

In the meantime, having passed the resolution, the committed Buganda county chiefs hurried back to their areas to prepare for battle, and the Central Government began to receive alarming reports that Buganda was planning to secede from the rest of the

country, and that weapons and ammunition were being stock-piled in, the Kabaka's palace at Mengo. It was also rumoured that ex-soldiers and other able bodied persons had been summoned to go to the palace to await the Kabaka orders . . .

. . .Three of the more defiant County chiefs were arrested and detained. The beating of war drums in many parts of Buganda followed these arrests. Many unruly elements in the kingdom decided to take the law into their own hands. Roads were blocked or damaged; law and order broke down in many parts of Buganda. As if chaos had been let loose, government property was indiscriminately and wantonly destroyed. Lawlessness was the order of the day. The Government could no longer tolerate this state of affairs. Rebellion had to be quelled. To that end, the Cabinet met and decided to send a small detachment to investigate the existence or otherwise of arms and ammunition at the palace. Unfortunately, however, when the unit arrived at the palace gate, the palace guards opened fire and the former were virtually wiped out in the exchange that followed. Inevitably, the Uganda Army found it necessary to dispatch reinforcements, and after a lengthy spasmodic exchange of fire, the palace was surrounded but miraculously, the Kabaka escaped undetected by jumping over the wall of the palace and, eventually, found his way to the United Kingdom, where he settled and later died a poor and broken man."[6]

With the capitulation of the Kabaka, the *coup d'etat* that had overthrown the Constitution of 1962 was now complete both *de jure* and *de facto.*

[6] Ibid

The 1966 Constitution provided under *Article 145* that it would continue in force until a constituent assembly was established by the National Assembly for the enactment of a new Constitution.

The general political environment in which the constitutional proposals were to be debated was nothing but conducive in Buganda which was under a state of emergency. The Buganda region did not only contain a large percentage of the national population, but was also the location of the national capital, the seat of the Parliament, the only University, the only Radio and T.V stations were also located there. All major Newspapers, Magazines and Journals were printed and published there. As to whether or not the people of Buganda and the residents of the capital and other towns in the region were able to effectively debate the proposed Constitution remains a question. However, there is no doubt that the political atmosphere in Buganda and in the Country at large had a chilling effect on the population, on the debate in the National Assembly.

Nelson Kafir an academician and accomplished researcher compiled from different sources including newspapers, journals and the Hansard, what transpired in Parliament during the debate preceding the enactment of the 1967 Constitution. I have taken the liberty to repeat some of the excerpts here below:-

> *"The Transition 33*
>
> > *The Government issued its Constitutional proposals on the 9th of June, 1967 and Parliamentary Debate began on the 22nd of June. The debate was adjourned on the 27th of July. On the 4th of August the Government announced that it would submit new amendments to its own Constitutional proposals when Parliament reconvened. These*

amendments were published on the 29th of August. Parliament reconvened on the 6th of September to consider the sections of the proposed Constitution one by one. Only the Government proposals, as modified by its own amendments, were accepted and the Constitution was adopted on the 8th of September, 1967."

From the floor of Parliament as reported in the Hansard:-

Apparently Uganda was making good progress and he had not heard any Minister say he was being held up because he was being hampered by the Constitution. If that was the case why was it necessary to have a new Constitution? We should not change our Constitutions in the way some men change their shirts. The Constitution should be a document of great sanctity. We should respect it and we should abide by it. ABU MAYANJA (UPC, Kyagwe N.E.) Uganda Argus 6th July.

A Constitution which would suit Uganda should be a flexible one, which would be easy to amend. ABBAS BALINDA (UPC Ankole S.E.) U.A. 13th July.

The President had spoken about a revolution in the country that was still going on. Were they going to have a new Constitution every time there was a revolution?

H. M. LUANDE (Ind. Kampala E) U.E 29th July

Muslims believe that on the day of Judgment an angel would read out an indictment – but that at least the person concerned has a chance to defend

himself. Even God did not assume such powers as were envisaged under this Constitution……

We are not here to govern this country like savages. We are not going to reject the standards which have been accepted by the rest of the civilised world. We are part and parcel of the civilised community. We are not going to justify autocracy and the granting of dangerous powers on the grounds that Uganda is backward and cannot have a civilised government. ABU MAYANJA (UPC, Kyagwe N.E)

The system of presidential elections could bring into that important office a person who is not a true representative of the people. As that same person is empowered to nominate up to 27 Members of Parliament, that meant that key Ministries could also go to some of those nominated persons who were not true representatives of the people. The country could then end up by being ruled by those people who were not representatives of the people. A. LATIM (Leader of Opposition) 27th June.

It was not democracy for the President to nominate 30 members of the House. It would be better for him to nominate all the Members of Parliament so that the country would clearly know that it was a dictatorship. If a man was nominated he was bound to be a 'yes man." This was a clear step back to the dark days. H.M. LUANDE (Ind. Kampala E.) 29th June.

As far as the people nominated by the President were concerned, some people had said they would not be stooges, but what else could they be? They would be the remnants of the politicians who had failed at the polls. If the purpose of bringing these 27 people was to bring stability to the

country, then it was better to find some other way. There were only a limited number of people available who could maintain the dignity of the House. A.A. NEKYON (UPC, Lango S.E.) 30th June.

If someone fails at the vote, let him not poke his nose in this noble House, Mr. Obwangor said amid cheers from both sides of the House. C. OBWANGOR (Min. of Planning and Econ. Dev.) 8th July.

One of the most serious indictments against the colonialists was the deprivation of some of the fundamental rights and freedoms of the individual. But still there were some rights which the colonialists guaranteed, and added that it was disappointing that even those rights and freedoms which were enjoyed during colonial times were going to be taken away by the present proposals. ABU MAYANJA (UPC, Kyagwe N.E.) 6th July.

What a shame that Members of Parliament should be asked by our President to give him powers to detain us and after he had done so to give him powers not to be taken to a court of law. J. W. KIWANUKA (UPC, Mubende N.) 14th July

In the Kingdoms there had been a ready-made system for providing for peace, order and good government-the three things African governments found it most difficult to obtain. The chiefs were accepted by the people as the representatives of the king. What was needed was not to reject kings, but to rechannel the loyalty to them to wider issues of nation building.

That is how we were elected.

E.M. K. MULIRA (UPC, Mengo N.) 30th June.

I am not in the House as a representative of the people. I was elected by the President on April 15 last year, as had every other member of the House. Since May 6 this year the mandate of every elected member of the House had expired. G.O. B. ODA (DP, W. Nile & Madi W.) 28th June.

Winding up, Mr. Mayanja underlined the fact that democratic government, of which he was unashamedly a supporter, could not be created by writing a Constitution. Ultimately, democracy did not reside in the Constitution, but in the hearts and minds of the people. ABU MAYANJA (UPC, Kyagwe N.E.) 8th July.

Democracy did not work anywhere. Some people confused democracy with general elections. He said that if Uganda decided not to have a general election for a generation it was up to it. He referred to the political situation in many European countries, where there had been no elections or real elections for years. VINCENT RWAMWARO (Deputy Minister of Foreign Affairs) 15th July.

Mr. Obonyo said certain individuals could be called bad, but this did not mean that the institution of kingship as such was bad. When the DP wanted to revise anything regarding institutions, they would go back to the people who were wiser than they were and ask their views. J.H. OBONYO (DP, Acholi S.E.) 20th July.

The Democratic Party proposed that before the start of the proposed new Constitution there should be a general election because the term of office of the present Parliament has expired and to prolong the life of the present Parliament is tantamount to taking away the powers of the electors. PAUL SSEMOGERERE (Publicity Secretary D.P.) 4th September.

We on this side of the House are few, but in spite of that we shall do our best and we shall speak without fear.... They had said that the Buganda Emergency should be lifted. They had said that the representatives of the people should be free to talk to the masses of the people they represented. But all this had not been given to them. People were in fear. The people could not express their views freely. A Member of Parliament had been quoted as saying he feared giving an opinion about the new proposals. If he could say that, how many more people outside could say it? This house is fearing to tell the truth. If a Member of Parliament is frightened to comment, how many people in the country are afraid to express their views? A.A. LATIM (Opposition Leader) 24th June.

The mere fact that the Government had brought the Constitutional proposals in this way indicated that the Government also believed that some of the proposals could be rejected and the House should have freedom to say what it wanted about each and every one. Party considerations were one reason why the proposals were difficult to debate. The members should be speaking as representatives of their constituents. If this were the case, they could see what was the right thing to include and what would please some people. If the proposals were being debated on a party basis, then there was only need for two members to speak: one from each party. There could not be 82 members speaking on party matters... I

think we should speak as if there were no government now, no parliament now, no president now, and no judiciary now, because the Constitution is meant not only for today's government but for tomorrow's government and the government after that. Another reason why the proposals were difficult to debate was that it appeared that certain members of the House were now under the impression that they were in real danger of being attacked by the security forces at any time because of their views. The sense of fear should be removed if the Constitution was going to be a good guide to the country for the future. A.A. NEKYON (UPC, Lango S.E.) 30th June.

Mr. Okelo said the opposition had not been afraid to speak their minds and would never be afraid to speak, even in the face of threats. They would sooner die. [He said] We will defend this principle against all comers. The ship of freedom is being torpedoed, and Ugandans are waiting to see what we, their elected representatives, are going to do to save the ship. M.A. OKELO (D.P., West Nile & Madi)

He read in full a letter to members of the Government side signed by the Chief Whip. This stated that members absenting themselves from the House without permission would be causing subversion, and no member should oppose or vote against the proposals. The letter stated that as far as he (the Chief Whip) was concerned, opposition had been dealt with at a Parliamentary group meeting, and members who opposed the proposals would be liable to be dealt with severely. We can now see what sort of Parliament we have got. M.A. OKELO (D.P., West Nile and Madi) 1st July.

Dr. Sembeguya criticised Government MP's whose "insulting and threatening" interjections during the past week's debates in the Constituent

Assembly suggested that, already having prior knowledge of the proposals, they were intent on seeing that they were bulldozed through the Assembly. DR. F. G. SEMBEGUYA (UPC, Specially Elected) Daily Nation 4th July.

The debate went on and on. What is strikingly important for the purpose Judgment is the similarity in issues and undertones in this 1967 debate and the debate that followed the enactment of the impugned Act in 2017, fifty years later.

The 1967 Constitution was debated and enacted by Parliament which had constituted itself into a Constituent Assembly. The same Parliament extended its term for another five years under the new Constitution. The President was deemed to have been elected under the new Constitution as there were no general elections that year. The term of Parliament of five years had lapsed. The Members of Parliament who had constituted themselves into a Constituent Assembly in 1967 had been elected for a period of 5 years in 1962. Fresh elections were due to have been held in May of 1967. Instead Parliament extended its own term and that of the presidency for another five years.

I have found no reason to dwell on what happened between 1967 and 1971. Suffice it to say, the government remained in power and was accepted by the population especially outside Buganda, however, it lacked popular legitimacy. Both the President and the Parliament had not been elected. The Constitution, the Supreme Law of the land, had been enacted without the participation of the population. The state of emergency remained in force in Buganda causing wide spread hardship. The government became more and more intolerant of criticism and relied more and more on the Army and the Police to keep down any political dissent or even discussion. There was no space for political opposition, compelling a number of opposition Members of Parliament to cross the floor to

the ruling Uganda People's Congress (UPC) party. They followed the leader of the opposition, Mr. Basil Bataringaya, who had crossed earlier and was rewarded with a ministerial post, that of internal affairs.

David Martin in his book *General Amin (Faber and Faber Ltd London 1974)* Summaries the events that followed the enactment of the 1967 Constitution as follows at page 119:-

> *"It was a month after the Kabaka's death, as he was leaving a UPC conference, which had adopted a resolution demanding Uganda should become a one-party state, that Obote was shot. His assailant and the rest of the would-be assassins were all Baganda. Uganda's British Chief Justice five months later sentenced six people to life imprisonment including a defrocked clergyman, the Revd. Erisa Sebalu, while five others received terms of fourteen years for conspiracy. Sebalu said that a plot had begun in June 1969. After the assassination attempt, road blocks were set up in Buganda and the army behaved harshly towards civilians. The government said seven people were killed but it seems probable the figure was higher. Twenty six people-twenty-one of them Baganda-were arrested including Members of Parliament and a former Vice-President, Sir Wilberforce Nadiope. Opposition parties were banned and Uganda became a de facto one-party state."(Sic)*

Not unsurprisingly no elections were held in 1971, as on 25th of January of that year, the Uganda Army overthrew Obote's government and installed Major General Idi Amin as the Military Head of State. The Army gave 18 reasons for the *coup d'etat* as follows:-

> *1. The unwarranted detention of people without trial;*

2. Prolonged state of emergency, which had been declared in October 1969;

3. Lack of freedom to air political views;

4. The frequent loss of life and property through armed robberies;

5. The proposals for National Service;

6. Widespread corruption in high places, especially ministers and civil servants;

7. The failure of political authorities to organise any elections and the proposed three-plus-one electoral method which would only favour the rich;

8. Economic policies that had caused poverty and unemployment;

9. High taxes;

10. Low prices for crops as opposed to high cost of food and education;

11. Isolating Uganda from East Africa by expulsion of Kenyans and rejecting of Kenya and Tanzania currencies;

12. The creation of a wealthy class of leaders;

13. Failure of the Defence Council to meet under its chairman, the President;

14. Training of a private army with recruits from Akokoro county Obote's home area;

15. The Lango Development Master Plan which was designed to give all key positions in politics; army and commercial/industrial sectors to people of Akokoro in Lango;

16. Dividing the army and giving the Langi top positions;

17. Using the cabinet and officers to divide the army through bribery;

18. All above mentioned were leading to bloodshed.

See:- *David Mukholi "A Complete Guide to Uganda's Fourth Constitution, History, Politics and law (Fountain Publisher, 1995).*

Following the 25th January 1971 *coup d'etat*, the Army issued Legal Notice No. 1 of 1971. It stated:-

Legal Notice No. 1 of 1971

WHEREAS on the 25th day of January, 1971 the Armed Forces of Uganda, for the reasons given in the statement by them to the Nation on that day, took over the powers of the Government of the Republic of Uganda and vested those powers in me MAJOR- GENERAL IDI AMIN DADA.

Now PURSUANT to such powers I HEREBY PROCLAIM

1. *Chapters IV and V of the Constitution are suspended and all appointments and offices excepting public offices held immediately before the 25th day of January, 1971, pursuant to the powers contained in those chapters are hereby terminated with effect from that date.*
2. *All the titles, privileges, prerogatives, powers, functions and exemptions formerly enjoyed or exercised by the former President of the Republic of Uganda under the Constitution are hereby vested in me with effect from the 25th day of January, 1971, and accordingly the Military Head of State shall be the Commander-in-Chief of the Armed Forces.*

3. *Parliament is hereby dissolved and all legislative powers referred to in the Constitution are herby vested in me .*
4. *All legislative powers shall be exercised by me through the promulgation of decrees evidenced in writing under my hand and sealed with the Public Seal.*
5. *There shall be a Council of Ministers which shall be appointed by me and which shall advise me in the exercise of my executive and legislative powers.*
6. *Subject to this Proclamation, all liabilities and obligations incurred by the Government of the Republic of Uganda before the 25th day of January, 1971, shall continue in full force and effect.*
7. *No action or other legal proceedings whatsoever, whether civil or criminal, shall be instituted in any court for or on account of or in respect of any act, matter or thing done during the continuation of operations consequent upon or incidental to the said take-over of the powers of the Government if done in good faith and done or purported to be done in the execution of his duty or for the defence of Uganda or the public safety or for the enforcement of discipline or law and order or otherwise in the public interest by any other person holding office under or employed by a person holding office under or employed in the public service of Uganda or a member of the Armed Forces of Uganda or by any other person acting under the authority of a person so holding office or so employed.*
8. *(1) Those provisions of the Constitution, including articles 1, 3 and 63 thereof, which are inconsistent with this Proclamation shall, to the extent of such inconsistency be void.*

   (2) Subject to this Proclamation, the operation of the Constitution and the existing laws shall not be affected by this Proclamation but shall be

construed with such modifications, qualifications and adaptations as are necessary to bring them into conformity with this Proclamation.

Made under my hand and the public seal, this 2nd day of February, 1971

MAJOR-GENERAL IDI AMIN DADA
Military Head of State, head of government and commander –in chief of the armed forces.

Date of publication: 2nd February, 1971

From the time this proclamation was made until 11th April 1979 when Legal Notice No.1 of 1979 was issued by the forces that toppled Idi Amin's regime, the 1967 Constitution remained in force subject to Legal Notice No.1 of 1971.

During this whole period of more than 8 (eight) years there were no elections, and therefore, no Parliament. Political party activities were banned. Amin declared himself life President, although he had at the time of the *coup* promised to stay in power for only five years and hand over government to elected leaders.

What happened to Uganda and its citizens during the 8 years of Idi Amin reign of terror cannot be summarised here. If all were to be written, there would be no space left in any library in this country, to house the literature.

Prof. Kanyeihamba describes Amin's regime in the following words;-

" . . . murdered or ordered the murders of such important people as the Chief Justice of Uganda, the Archbishop of the Church of Uganda, Ministers, public officers including the

Vice Chancellor of Makerere University and others, in their thousands. . .

. . . thousands of Ugandans innocent suspected of treason and other offences were arrested and butchered everywhere. Official murders and assassinations became, under Amin, the normal way of, settling disputes, actual or imagined, between government and its citizens. It was again with great sadness and mortal fear that Ugandans recalled Amin's ominous words that he would not take prisoners.

. . .government that had violated the rights of citizens, mismanaged the economy and performed abysmally in running the affairs of the nation.[7]

Prof. A.B.K.Kasozi in his book *The Social Origins of Violence in Uganda* under a section of the book headed *Government by Terror*: In regard to Idi Amin's reign of terror he observes as follows:-

"*The Military police stated under Obote, was expanded. Makindye, its headquarters became notorious as a slaughterhouse in Amin's time. As the economy worsened, another paramilitary unit, the Anti Smuggling Bureau, was created under Bob Astles. It accused successful businessmen of smuggling and hording . . . Thousands of people in Uganda were tortured by Government agents. Detainees might be made to go through humiliating muscular ordeals such as*

[7] Ibid Page 159

hopping like a frog, while being beaten. The victim's eyes might be gauged out and left hanging out of their sockets.(Sic)

During the wheel- torture, the victim's head was put in a wheel- rim that was repeatedly struck with iron bars. People were beaten with hammers, mallets, or iron bars to break their limbs as well as to kill them. Wires were attached to victim's genitals, nipples, or other sensitive parts of the body and then connected to an electric battery or wall socket. Women were raped or otherwise sexually abused. Prisoners were slashed with knives and bayonets, body organs were mutilated and Limbs cut off. Prisoners might be lined up and every second one would be ordered to hammer the first to death, the second would hammer the third, and so on, until only one was left to tell the tale to other prisoners. Such incidents often happened at Makindye prison. These were by no means the only forms of torture, there were many others ... Important or prominent people were killed like other prisoners. However their bodies were dismembered and there parts used for ritual purposes .. .few victims were given a proper burial. Their bodies were thrown into rivers such as the Nile at Karuma, Jinja and other places in Uganda's many lakes, Victoria, George, Albert, Salisbury, Kioga, Wamala, etc, in mass graves or burnt in their houses or cars."(Sic)

The reign of terror went on and on until Idi Amin was overthrown in April 1979 by the Tanzanian Army assisted by Ugandan exiles. A government in waiting had been formed under the umbrella of Uganda National Liberation Front (UNLF), its armed faction was Uganda National Liberation Army (UNLA). On 8th May

1979, the following proclamation was issued in Kampala as Legal Notice No. 1 of 1979.

Legal Notice No. 1 of 1979.

Proclamation

WHEREAS from the 23rd day to the 25th day of March, 1979, the Moshi Unity Conference brought together 28 organizations of Ugandans both inside and outside Uganda which united and determined to overthrow the regime of Idi Amin for the good of every Ugandan.

WHEREAS the Uganda National Liberation Front was committed to the achievement of the objectives specified in Article 11 of its draft Constitution.

AND WHEREAS on the 11th day of April, 1979 the objective of overthrowing Idi Amin's regime was effectively achieved , the Uganda National Liberation Front assumed the powers of the Government of the Republic of Uganda headed by me, Y. K Lule.

Now PURSUANT to such powers and with the approval and advice of the National Consultative Council, I HEREBY PROCLAIM:

1. *Chapters IV and V of the Constitution are hereby suspended and all appointments and offices excepting public offices held immediately before the 11th day of April , 1979 pursuant to the powers contained in those chapters are hereby terminated with effect from that date.*

2. *All the titles, privileges, prerogatives, powers, functions and exemptions formerly enjoyed or exercised by the former President of*

the Republic of Uganda under the Constitution are hereby vested in the President with effect from the 11th day of April, 1979.

3. *All legislative powers referred to in the Constitution are hereby vested in the National Consultative Council until such time as a Legislative Assembly is elected.*

4. *All legislative powers shall be exercised by the National Consultative Council through the passing of statues assented to by the President and published in the Gazette.*

5. *There shall be a Cabinet of Ministers appointed by the President which shall advise the President in the exercise of his execution functions.*

6. *No action or other legal proceedings whatsoever whether civil or criminal, shall be instituted in any Court of or on an account of or in respect of any act, matter or thing done during the continuation of operations consequent upon or incidental to the said assumption of the powers of the government if done in good faith and done or purported to be done in the execution of his duty or for the defence of Uganda by a member of the Uganda National Liberation Army of those of our allies.*

7. *All liabilities and obligations incurred by the .government of the Republic of Uganda before the 11th day of April 1979, shall continue in force and effect but such liabilities and obligations shall be construed with such modifications, exemptions, qualifications arid adaptations as are necessary to bring them into conformity with the policy of the government and the Uganda National Liberation Front.*

8. (1) Articles 3 and 63 of the Constitution shall not apply to the passing of a statute under the provisions of this Proclamations

(2) Subject to this Proclamation, the operation of the Constitution and the existing laws shall not be affected by this proclamation but such existing laws shall be construed with such modifications, qualifications and adaptions as are necessary to bring them into conformity with this proclamation.

9. The Proclamation published under Legal Notice No.1 of 1971, is hereby revoked.

10. This Proclamation shall be deemed to have come into force on the 11th day of April 1979.

Y.K.Lule
President
Date of Publication: 8th May 1979.

What is pertinent here is that once again the 1967 Constitution remained in force. In June 1979, Prof. Lule, the President was removed by the Legislative Council known as the National Consultative Council by a vote of no confidence. He was replaced by Godfrey Binaisa, Obote's former Attorney General.

The constitutionality of President Lule's removal from power was contested in Court in *Constitutional Petition No.1 of 1979, Andrew Lutakome Kayira and Paul Kawanga Ssemogerere vs Edward Rugumayo, Fredrick Ssempebwa and the Attorney General*. The decision of this Court is summarised below as follows:-

"Andrew Lutakome Kayira and Another vs. Edward Rugumayo and 2 Others - Court of Appeal Const. Case No. 1 of 1979 - 10/21/1980.

Facts

1) *On or about the 19th day of June, 1979 the National Consultative Council consisting of 30 members sought to approve ministerial appointments made by professor Y.K Lule; the then president of Uganda.*
2) *At the same meeting the council passed a vote of no confidence in Prof. Lule as a result of which he ceased to hold office as the chairman of UNLF and as president.*
3) *It was contended that the council acted unconstitutionally and therefore sought orders that*
    - *(a) the Supreme law of Uganda is the constitution.*
    - *(b) that the powers to make ministerial appointments to the public service is solely vested in the president and that the consultative council has no valid powers to ratify and approve such appointments.*
    - *(c) that the National Consultative Council has no powers to remove the President from his office.*
    - *(d) that when deciding upon matters of national interest the National Consultative Council must sit in the legislature and be governed and guided by the constitution of Uganda.*

Decision

1) *The Constitution of 1967 is the Supreme law of Uganda. The power to make ministerial appointments vested solely in the President and the National Consultative Council had no and has no valid powers to ratify and approve such appointments.*
2) *Further, the National Consultative Council acting in its capacity as the legislature had and has no powers to remove the President from office.*

Order

1) *Appeal partially succeeds.*
2) *The defendant shall jointly and severally pay the costs of the second plaintiff.*
3) *The A.G will pay the costs from public funds.*
4) *There will be no order as to costs of the 1st plaintiff Kayira."*

Inspite of the above decision, the Kelsen theory of pure law was applied and the illegal removal of the President was never reversed. In this case the President, and I may say the government, remained in power 'illegally' and since it had not been elected and it also lacked legitimacy. That notwithstanding, there was a *defacto* government nationally and internationally recognised and all the arms of government functioned normally including Courts of law.

President Binaisa's government was overthrown by the Army on 10th of May 1980 and power was vested in the Military Commission of UNLF. The President was accused of a number of things, principally, the removal of the powerful Army Chief of Staff without following procedure.

General elections were held in December 1980, under the 1967 Constitution. Four political parties contested the elections, which were held in a tense environment. There were Commonwealth observers who issued a report stating that the elections had irregularities but were generally free and fair. The majority of Ugandans had a different view. The elections did not reflect their will.

A new government came into force on 17th December 1980 amidst widespread allegations of vote rigging and a host of other electoral malpractices including intimidation, harassment, unjust and illegal disqualification of candidates.

On 6th February 1981 Yoweri Kaguta Museveni in protest against a government that had assumed power, through a rigged election, launched an armed resistance to overthrow that government and to have it replaced with a legitimate one that embodied the people's will. He had been one of the leading fighters against Idi Amin since 1971 and had effectively participated in the overthrow of Amin, he was a prominent figure in the post Amin government, Vice Chairman of the military commission of UNLF. In 1980 elections, he was the leader of the Uganda Patriotic Movement, a political party that participated in the disputed elections. He had led an armed faction during the fight against Idi Amin's regime known as the Front For National Salvation (FRONASA). See:- President Yoweri Kaguta Museveni: *The Struggle for Freedom and Democracy in Uganda: Sowing the Mustard Seed: Moran (EA) Publishers Ltd 2016*.

Between 1980 and 1985, the Country was plunged into a civil war causing untold suffering to the citizens. It is estimated that over 500,000 Ugandans lost their lives. Many more lost their properties and livelihoods.

Obote's second Uganda People's Congress government was overthrown in a military coup on 27th July 1985. That government lasted only 6 months in power.

On 25th of January 1986, Yoweri Kaguta Museveni led the National Resistance Army into Kampala and ceased state power.

His army consisted of intellectuals and a great mass of ordinary peasants, men, women and children. Some bare footed, others in torn clothes, women carrying children on the backs with machine guns and rocket launchers on their shoulders. They were from all walks of life. Many had never been to Kampala. The people themselves had got fed up. They had risen up in a popular revolt against the legal but illegitimate government and had won.

Nowhere in Africa, except perhaps in Chad, had ordinary citizens taken up arms, defeated a national Army and overthrown their own government. In his own words, President Yoweri Kaguta Museveni narrates the events in his book, *Sowing the Mustard Seed: (Supra) as follows at page 248:-*

> *"...Kampala was so quiet that night. Unlike 1979, there was no looting whatsoever; neither by civilians nor by soldiers. Ugandans had never seen such a disciplined army. It was a marvel. As a consequence, the soldiers were "over-appreciated"...*
>
> *...There was no raping – not even a single one was reported...*
>
> *The following morning, the 27th of January, 1986, I did three things. I drove through Kampala. It was deserted but not looted. Secondly, I went to Radio Uganda and they, eventually got me somebody that could enable me to announce that the NRA had taken over the governance of the country but details would be given later. Thirdly, I convened a meeting of the High Command, Army Council members who could be spared from the operations and NRC members who*

were around. That is when I was elected by that body as the new President and that is where legal Notice No. 1 of 1986 was drafted and proclaimed...

...Eventually, I was sworn in, as were a few ministers. That is when I addressed a mammoth crowd at Parliamentary Square. That is when I made the speech of the "Fundamental Change."

As already stated, on the 29th January 1986, at the steps of the Parliamentary buildings, Yoweri Kaguta Museveni, was sworn in by the Chief Justice P.J Allen, as the 9th president of Uganda.

In his maiden speech to the people of Uganda he stated;-

"NO ONE should think that what is happening today is a mere change of guard: it is a fundamental change in the politics of our country. In Africa, we have seen so many changes that change, as such, is nothing short of mere turmoil. We have had one group getting rid of another one, only for it to turn out to be worse than the group it displaced. Please do not count us in that group of people: the National Resistance Movement is a clear-headed movement with clear objectives and a good membership.

Of course, we may have some bad elements amongst us – this is because we are part and parcel to Ugandan society as it is, and we may, therefore, not be able completely to guard against infiltration by wrong elements.

It is, however, our deliberate policy to ensure that we uplift the quality of politics in our country. We are quite different from the previous people in power who encouraged evil instead of trying to fight it.

You may not be familiar with our programme, since you did not have access to it while we were in the bush so I shall outline a few of its salient points;

The first point in our programme is the restoration of democracy. The people of Africa-the people of Uganda-are entitled to democratic government. It is not a favour from any government: it is the right of the people of Africa to have democratic government. The sovereign power in the land must be the population, not the government. The government should not be the master, but the servant of the people.

In our liberated zones, the first thing we started with was the election of village Resistance Committees. My mother, for instance, cannot go to parliament; but she can, surely, become a member of a committee so that she, too, can make her views heard. We have, therefore, set up village, muluka, gombolola and district committees.

Later we shall set up a national parliament directly elected by the people. This way we shall have both committee and parliamentary democracy. We don't want to elect people who will change sides once they are in parliament. If you want to change sides, you must go back and seek the mandate of the people who elected you.

Democracy

Some of these points are for the future, but right now I want to emphasise that the first point in our political programme is democracy for the people of Uganda. It is a birthright to which all the people of Uganda are entitled.

The committees we have set up in these zones have a lot of power. You cannot, for instance, join the army or the police without being cleared by the village committee.

You must get a recommendation from the people in your village to say that you are not a rogue. Hence, the soldiers who are joining us from other armies will have to be referred back to their villages for recommendation. The same applies to the police.

Another important aspect of the committees is that they should serve as a citizens' intelligence system. If I go to address a rally in Semuto, Kapeka or Nakaseke, I shall first meet the muluka and gombolola committees in the area. They will tell me whether the Muluka chiefs are thieves, or the hospital personnel are selling drugs, or whether there are soldiers in the area who are misbehaving. They are thus able to act as watchdogs for the population and guard against the misuse of power.

The second point in our programme is the security of person and property. Every person in Uganda must be absolutely secure to live wherever he or she wishes. Any individual or any group of persons who threatens the security of our people must be smashed without mercy.

Security

The people of Uganda should only die from natural causes that are beyond our control, but not at the hands of fellow citizens who continue to walk the length and breadth of our land freely. When we were in Nairobi during the peace talks, it was a very painful experience sitting in a room with criminals across the table. I was advised that being a leader, you have to be diplomatic.

Therefore, the security of the people of Uganda is their right and not a favour bestowed by any regime. No regime has a right to kill any citizen of this country, or to beat any citizen at a road block. We make it clear to our soldiers that if they abuse any citizen, the punishment they will receive will

teach them a lesson. As for killing people – if you kill a citizen, you yourself will be killed.

People in Bulemezi call me Yoweri or Mzee wa Kazi. Now, these Excellencies, and honourable ministers and high-ranking military personnel, and what have you went to Luwero. Can you imagine what they did? We were told that they had transferred the person who had killed the people in Luwero to another station! Can you imagine? Someone kills 100, 50 or even two people and you say you have transferred him to another area? It was suggested that the solution to some of our problems would be for Kampala to be completely demilitarized.

The third point in our programme is the question of the unity of our country. Past regimes have used sectarianism to divide people along religious and tribal lines. But why should religion be considered a political matter? Religious matters are between you and your god. Politics is about the provision of roads, water, drugs, in hospitals and schools for children.

Case for unity

Take the road from here, Parliament Buildings, to Republic House. This road is so bad that if a pregnant woman travels on it, I am sure she will have a miscarriage! Now, does that road harm only Catholics and spare Protestants? Is it a bad road only for Moslems and not for Christians, or for Acholis and not for Baganda? That road is bad and it is bad for everyone.

All the users of that road should have one common aspiration: to have it repaired. How do you become divided on the basis of religion or tribe if your interests, problems and aspirations are similar? Don't you see that people who divide you are only using you for their own interests not connected with that road? They are simply opportunists who have no

programme and all they do is work on cheap platforms of division because they have nothing constructive to offer the people.

Our Movement is strong because it has solved the problem of division: we do not tolerate religious and tribal divisions in our Movement, or divisions along party lines such as UPC, DP, UPM and the like. Everyone is welcome on an equal basis. That is why you find that when our army goes to Buganda, the people there call it "amagye gaffe, "abaanabaffe". When it goes to the West, it is "amahegaitu", "abaanabaitu": which means that wherever the NRA goes, it is called 'our army', 'our children'. Recently, Buloba was captured by our army, and the commander in charge of the group was an officer called Okecho. He comes from Pakwach in West Nile.

Therefore, the so-called division between the north and south is only in people's heads. Those who are still hoping to use it are going to be disappointed. They ought to dig a large grave for such aspirations and bury them. Masindi was captured by our soldiers led by Peter Kerim: he, too, is from West Nile. Dr. Ronald Batta here, who is from Madi, has been our Director of Medical Services for all these years in the bush.

There is, in philosophy, something called obscurantism, a phenomenon where ideas are deliberately obscured so that what is false appears to be true and vice versa. We in the NRM are not interested in the politics of obscurantism: we want to get to the heart of the matter and find out what the problem is. Being a leader is like being a medical doctor. A medical doctor must diagnose his patient's disease before he can prescribe treatment.

Similarly, a political leader must diagnose correctly the ills of society. A doctor who does not diagnose his patient's disease adequately is nothing but a quack.

In politics we have also got quacks – and Uganda has had a lot of political quacks over the past two decades or so. I also want to talk about co-operation with other countries, especially in our region. One of our weaknesses in Africa is a small market because we don't have enough people to consume what we produce.

Regional cooperation

Originally we had an East African market but it was messed up by the Excellencies and Honorable ministers. It will be a cardinal point in our programme to ensure that we encourage co-operation in economic matters, especially in transport and communication within the East African region.

This will enable us to develop this area. We want our people to be able to afford shoes. The Honorable Excellency who is going to the United Nations in executive jets, but has a population at home of 90 per cent walking barefoot, is nothing but a pathetic spectacle. Yet this Excellency may be busy trying to compete with Reagan and Gorbachev to show them that he, too, is an Excellency. These are some of the points in our political programme. As time goes on, we shall expand more on them.

Last appeal

To conclude, I am appealing to those people who are trying to resist us to come and join us because they will be integrated. They should not waste their time trying to fight us because they cannot defeat us.

If they could not defeat us when there were just 27 of us with 27 guns, how can they defeat this army which you saw here? They cannot defeat us, first of all, because we have a correct line in politics which attracts everyone.

Secondly, we have a correct line of organisation. Thirdly, our tactics are correct.

We have never made a mistake either in strategy or tactical calculation. I am, therefore, appealing to these people not to spill more blood, especially of the young men who are being misled by older people who should know better." (Emphasis Mine)

Following the swearing in of the President, Legal Notice No.1 of 1986 was issued setting out the new constitutional order. It stated;-

"Legal Notice No.1 of 1986

Proclamation

WHEREAS on the 26th day of January, 1986 , the National Resistance Army, (or the reasons given in the Statement to the Nation by the Chairman of the High Command of the National Resistance Army and the National Resistance Movement on that day, took over the powers of the Government of the Republic of Uganda and vested those powers in the National Resistance Council:

Now pursuant to such powers I HEREBY PROCLAIM

1. *Chapters IV save Article 24, V and Articles and 3 of the Constitution arc hereby suspended and all appointments and offices excepting public offices held before the 26th day of January 1986, pursuant to the powers contained in those Chapters are hereby terminated with effect from that date .*

2. *(i) The National Resistance Council which shall have supreme authority of the Government is hereby established.*

(ii) The National Resistance Council shall consist of;-

(a) the Chairman of the National Resistance Movement who shall be the Chairman;

(b)the Vice-Chairman of the National Resistance Movement ;

(c) representatives of the National Resistance Movement

(d)) representatives of the National Resistance

(iii)The membership of the Council may from time to time, be increased to include representatives of,

(a) Political forces or groups; and

(b) Districts

and such representatives shall be appointed, nominated. Or elected, as the case may be, in such manner as may be prescribed by national Resistance Council.

(iv) The National Resistance Council may establish such Committees and sub-committees as it consider; necessary.

3. *The Chairman shall preside at all meetings of the National Resistance Council and in his absence the Vice Chairman shall preside. The Vice-Chairman shall deputize for the Chairman in all his functions and shall exercise such other function as the Chairman may direct.*
4. *There shall be a Secretary to the National Resistance Council who shall be appointed by the Chairman.*
5. *The Military Council is hereby dissolved.*

6. *The President shall be appointed by the National Resistance Council.*

7. *All legislative powers referred to in the Constitution are hereby vested in the National Resistance Council. These powers shall be exercised by the Council through the promulgation of Decrees evidenced in writing under the hand of the President and the Public Seal.*

8. *(i) There shall be a Prime Minister who shall be appointed by the President after he has been vetted by the National Resistance Council or its Committee.*

(ii) The Prime Minister shall be the leader of Government business, and shall perform such other duties as the President may, from time to time, direct

9. *There shall be a Cabinet of Ministers who shall be appointed by the President after they have been vetted by the National Resistance Council or its Committee.*

10. *(i) For the reasons given hereunder, that is to say, previously an Army Council composed of members of High Command, Directors of Departments , Senior Army Officers and Battalion Commanding Officers together with members of the National Resistance Council who were engaged in the armed struggle played an important role as the policy making body in the liberated areas during the struggle and the said members of the National Resistance Council have now become part of the National Resistance Council established by this Proclamation. An Army Council to be known as the National Resistance Army is hereby established consisting of :-*

(a) Members of the High Command

(b) Directors of Departments

(c) Senior Army Officers at the date of this Proclamation and;-

(d) Battalion Commanding Officers of the National Resistance Army

(ii) The National Resistance Council shall seek the views of the National Resistance Army Council on all matters the National Resistance Council considers important

(iii) The National Resistance Army Council may forward its views on any matter it considers important to the National Resistance Council and the National Resistance Council shall take such views into account when making a decision on such matter.

11. Subject to this proclamation all liabilities and legitimate obligations incurred by the Government of the Republic of Uganda before the 26th day of January, 1968 shall continue in full force and effect.

12. No action or other proceedings whatsoever whether civil or criminal shall be instituted in any court for or on account of or in respect of any act, matter or thing done during the continuation of operations consequent upon or incidental to the said assumption of powers of the Government if done in the execution of his duty or for the defence of Uganda by a member of the National Resistance Army as defined by the Code of Conduct of the National Resistance Army, set out in the Schedule to his Proclamation.

13. (i) Those provisions of the Constitution including Article 64 thereof, which are inconsistent with this Proclamation shall, to the extent of such inconsistency, be void.

(ii) Subject to this Proclamation the operations of the Constitution and the existing Laws shall not be affected by this Proclamation, but shall be construed with such modifications, qualifications and adaptations as are necessary to bring them in conformity with this Proclamation,

14. The National Resistance Movement Government shall be an interim Government and shall hold office for a period not exceeding four years from the date of this Proclamation.

15. (i) Legal Notices Nos, 4 and 5 of 1985 arc hereby revoked.

(ii) This Proclamation shall be deemed to have come into force on the 26th day of January, 1986.

Following the assumption of power by the National Resistance Movement in 1986, the Government expanded the legislative Council by including therein directly elected members. They were originally elected for two years, in 1989. Their term was extended to allow a Constitutional making process to begin. The government then proposed that a new Constitution be enacted, one that would embody the views, aspirations and will of all the people of Uganda. In this regard a Constitutional Commission was established in 1988. It was to be headed by a prominent jurist and Justice of the Supreme Court, Benjamin Odoki, who later become the Chief Justice of Uganda. It is now referred to as the 'ODOKI Commission' and its report bears his name. The terms of reference of the

commission as set out in the law that established it may be summarized as follows;-

> *"...to develop a draft Constitution based on the consensus views... to ensure the widest possible popular consultation. Consultations, ought to educate the people about Constitution and constitutionalism, elicit views from all sections of the people and reconcile opposing positions with a view to developing a consensus and ensure that the people generally both understood the constitutional issues and were committed to the views they submitted to the Commission.*

The Commission for a period of four years, 1988 to 1992 traversed Uganda and sought views from all the people of Uganda who were able to give them. Individuals, groups, political parties, academicians, traditions leaders, and all others.

The commission produced a report on 31st December 1992 with analysis and recommendations. Part of that report is listed as No. 11 on the petitioner's list of authorities in Petition No.3, Uganda law Society vs Attorney General.

I have no intention of reproducing that report here. It is 800 pages long. I will endeavor to reproduce excerpts therefrom as far as they are relevant to the issues before me. As a way of introduction, the report at pages 55 and 56 states thus:-

> 2.58. *The relative peace and security in most parts of Uganda and the unprecedented freedom of expression and of press have been stressed as offering great hopes for the future. Above all the concrete implementation of the principle of participatory democracy which has given a powerful voice and active participation to the hitherto voiceless and oppressed sections of our society is seen by most people as a tremendous opportunity*

and new vision for the reconstruction of the nation. Uganda's name abroad has been redeemed. Uganda is no longer the "sick" nation of Africa but rather a country of great promise and opportunities once it succeeds to resolve the fundamental issues of nation-building and democratization

2.59. Lessons from history, both remote and recent, are the sure guide for the present and the future of our nation. All chapters in the Report give summary historical insights to the topic treated. The aim is to recapture the lessons from our past. It is only such an approach that can assist us to avoid the mistakes and pitfalls which have hindered our unity and development, while identifying the values which have, despite problems, brought us where we are today as a nation.

SECTION FOUR: OBSERVATIONS ON THE NATURE OF PAST PROBLEMS AND FUTURE DIRE TIONS

2.60. From this historical background, we can make observations about the nature of our past problems which should be borne in mind in the current constitution-making process:

a) Uganda's political development has been characterised by authoritarianism dating from the pre pre-colonial period and continuing through colonialism and Independence, inspite of attempts to establish democratic structures.

b) There are groups whose political behaviours have been historically determined and these groups tend to look on all political and constitutional developments, including the current, the constitution-making process, as exercises in power sharing or monopolising power.

c) In the absence of viable political institutions which can successfully mediate between them, groups have always tried and in many cases have succeeded in capturing supposedly national institutions such as parties, legislature, and security forces mainly to serve their own interests.

d)Whenever groups are in positions of strength ,they tend to ignore the formally established constitutional rules and attempt to dictate terms which inevitably provoke negative reactions , culminating in instability – coups d'etat, civil war and other forms of conflict.

e) Uganda is characterized by conflicting political and cultural traditions ranging from monarchism, authoritarianism and liberalism, but lacks a culture of constitutionalism.

f) Uganda has been adversely affected by ethno-religious conflicts which have usually led to sectarianism and closed communities.

g) There is no consensus over national political values to sustain political institutions.

h) There are perceived "historic injustices" among some groups, "injustices" which may need to be seen to be set right if such groups are to feel committed to any long term constitutional settlement.

2.61 A new Uganda constitutional order should take into account the following observations about future directions based on its historical background:

(a) The Constitution should provide institutional mechanisms for strengthening national unity taking into account the cultural, religious, regional, gender, class, age and physical diversities of Uganda peoples.

(b) While taking into account Uganda's social, cultural and political diversities, the Constitution should transcend interests of narrow groups.

(c) The Constitution should identify those residual Ugandan values which can serve as firm foundations for the new Constitution.

(d) The new Constitution should make institutional provisions for setting perceived historic injustices right.

(e) There should be efforts to provide for such a balance of forces that no one single socio-political force or institutional structure can manipulate such resources as it has to subvert the Constitution and dominate other groups and structures.

(f) A new Constitutional order should ensure that institutional structures are viable, coherent and integrated to promote a culture of constitutionalism and ultimate socio economic and political objectives which guide future development.

(g) There should be institutional mechanisms for ensuring transfer of power by peaceful and democratic means.

(h) Since the NRM assumed power, institutional frameworks have been established and appear to be gaining legitimacy. There

should be serious evaluation of these to see the extent to which they may be integrated into the new constitutional order.

(i) *The new Constitutional order should positively come to terms with Uganda's past and present and respond to its aspiration for the future.* (All Emphasis Mine).

Chapter eleven of the report deals with the analysis and recommendations regarding the legislature. Under Section Three of that chapter the report analyses the view and concerns of the people in respect of their representation in Parliament as follows:-

Section three: Concerns and principles emphasized in the people's views:-

11.27 The experience of the past thirty years has shaped the people's concerns about the legislature and how it should work in future. This experience has also influenced the principles the people have indicated should guide the development of constitutional provisions on the legislature

Concerns of the People

Failure of the legislature to be representative of the people:

11.28 There is concern that the legislature has often not been representative of the people. During much of the time since Independence, appointed - usually self-appointed – individuals or bodies have taken on the powers of the legislature. Even when there have been elected Legislature bodies, the principle of elected representation has been

watered down through the addition of numerous appointed members.

Poor quality of representation by members:

11.29 Some elected members of the legislature have been found to be self-seeking and corrupt. Some members have shown little interest in the needs and problems of their electorates once elected. As a result, many people have indicated concern that the principle of recall of members of the legislature be fully established.

Lack of accountability – extension of term of office:

11.30 Our post-independence legislatures have extended their terms in office without reference to the people. To be accountable to the people it represents, the legislature must face regular elections.

Lack of accountability - "crossing the floor":

11.31 The tendency of elected members of the multi-party legislature to ignore the choices made by the electorate in terms of party affiliation has been a matter of grave concern expressed in the people's views

Domination by the military:

11.32 The armed forces have on several occasions ignored the right of the 'people to choose their own representatives and usurped the role of the legislature through coups d'etat. This has marginalised the people- It is in large part as a result of this

concern that there is considerable debate about the future role of the armed forces in the legislature.

Manipulation by the executive:

11.33 The executive arm of government has often dominated and manipulated the legislature by undermining opposition groups, dictating the work programme of the legislature and ignoring laws and other decisions made by it.

Lack of acceptance of the role of the opposition

11.34 Where the governing party has felt threatened by an opposition group, it has been difficult for the opposition to play a constructive role.

Excessive centralization of legislature power:

11.35 Since the abolition of semi-federal arrangements of the 1962 Constitution, there has been too much centralization of legislative power. The result has been inability of local decision –making bodies to develop to develop laws and other policies reflecting local needs.

The report, following the analysis above made the following recommendations under Chapter Eleven:-

Length of Terms, Summoning Meetings, Number of Sessions and Dissolution

Terms of Parliament

11.110 The people's views expressed great concern about the legislature in Uganda usurping the people's powers by extending its term of office without reference to the voters. It was almost unanimously proposed that Parliament should have a term of five years, with many saying it should not be possible to extend the term under any circumstances. Others accepted the necessity for some provision for unforeseen circumstances where it is not possible to organise general elections at the time required. Although similar provisions in both the 1962 and 1967 Constitutions have been abused, there is some support for the necessity for inclusion of some such provision in the fact that the constitutions of many other countries do so.

11.111. If there is to be such provision, the people's interests must be safeguarded by strict limits on both circumstances where an extension is permitted and its maximum length. So while extensions might be open during a time of war or declared state of emergency, it should only be where it is clear - that elections are not possible. In some situations of war or emergency there may not be major impediments to holding elections. The maximum period of extension should be constitutionally fixed at one year.

11.112 Recommendations

(a) Parliament should have a term of five years.

(b) The normal term may be cut short by a vote of Parliament

(c) The normal term may be extended for a period not exceeding one (1) year, when there exists a state of emergency or a state of war but only when the circumstances are such as to prevent a normal election from taking place.

Dissolution of Parliament

11.117. The people's views expressed reservations about giving the President powers to dissolve Parliament. Such powers are open to abuse in times of political crisis and would tip any balance between the organs of the State too much towards the executive. Most people giving views on the issue indicated that Parliament should never be dissolved except at the expiry of its term.

11.118 Recommendation

Parliament should be dissolved only at the expiry of its normal term, with the President taking the formal steps to dissolve it. (Emphasis Mine)

Chapter twenty eight of the report deals with safe guards and amendments of the new Constitution. This chapter appears to be the one most relevant to the issues before us and I am constrained to reproduce it in *extenso.*

SAFEGUARDS AND AMENDMENT OF THE NEW CONSTITUTION

28.1 The Independence Constitution of 1962 was suspended in 1966 by the then Prime Minister contrary to its provisions. An interim Constitution was hurriedly put in place within two months without consulting the people. The following year the Constitution of 1967 was promulgated by Parliament without ample consultation of the people. Since then, successive governments have suspended parts of that Constitution and added to it amendments which suited them without reference to the people.

28.2. In their views submitted to us, people have been quick to connect the political instability, social turmoil and violence which have been experienced in Uganda since the 1966 crisis to the manner in which successive regimes have arbitrarily dealt with the national Constitution without consulting the people. To the successive regimes, the Constitution has not enjoyed the respect, significance and a sense of sacredness which are due to it.

28.3 During the Constitutional debate, the vast majority of Ugandans expressed the belief that unless the new Constitution being made is effectively safeguarded both by the political and military leaders and by the people of Uganda generally, there would be little meaning in wasting a lot of resources, both human and financial, to its making. They contributed important proposals on the subject of safeguards and amendments of the new Constitution. The Commission is convinced that the issue of safeguards and amendment of the new Constitution is one of the most important aspects of the new

Constitution. It has served as one of the important guiding principles in all the recommendations we have made on every aspect of the new Constitution.

28.4 This chapter is divided into four sections. The first discusses the importance the people attach to the subject. The second section examines the concerns expressed and the principles emphasized in relation to safeguards and amendment of the constitution. The third section assesses people's proposals on a range of safeguards for the new Constitution and gives our recommendations on them. The final section concentrates on the manner suggested for the amendment of the Constitution and offers the Commission's recommendations on it.

SECTION ONE: THE IMPORTANCE OF SAFEGUARDS IN PEOPLE'S VIEWS

Nature and Importance of Safeguards

28.5 A constitution provides the rules and principles by which the people of a country agree to be governed. Its authority comes from the people. It should embody the basic political and social values of the people and the state. *It should identify the tasks to be performed by government and formulate principles according to which government functions should be performed. It provides the various organs of state with the necessary powers to enable them fulfill responsibilities effectively and efficiently. It places limits on the exercise of such powers in order to prevent any abuse of*

power and to protect the individual's rights and freedoms. To command people's respect and support, a national constitution should embody their aspirations, values and visions both for the present and a better future.

28.6 Written constitutions become the fundamental law of any nation. A national constitution enjoys a completely special status to any other law and this is normally evident in at least two senses. First, as the source of power and of limits on that power of all government authorities, a national constitution obliges all people to comply with it. Whatever is done by any leader, organ of government or any other person or group should be consistent with the constitution. Anything that is inconsistent with the Constitution should be overruled. The power to overrule such acts or decisions is usually vested in the judiciary and/or any other body set up for that very purpose. The power of the judiciary or the constitutional court to review and strike down laws or decisions which offend the Constitution is of special importance. It obliges all government organs to conform to the Constitution and defends the rights of the individuals and groups against violation by the state organs, other bodies or individuals.

28.7 The second sense in which written constitutions are considered fundamental is in the way they are usually made and the unique manner in which they are amended. In both aspects they essentially differ from other laws. They are often made' using procedures that involve wide consultation of the

people or even national referenda or special representatives of the people. They are harder to amend or change because they contain the basic principles of the nation and the basic norms for all governmental institutions.

28.8 Once government authorities and the people as a whole fail to recognise the national constitution as the fundamental and sacred law of the country, that constitution has little value or none at all. A constitution which is overthrown, suspended or amended by government in ways that are contrary to its own provisions quickly becomes a nullity. Such has been the experience in Uganda since the unfortunate precedent of 1966. The issue of safeguards, therefore, concerns the measures which can be taken to ensure the respect, sanctity and protection of the supremacy of the Constitution.

28.9 Safeguards to a national constitution can be considered under three general aspects. First, the manner in which the Constitution is made is important to its safeguard. A constitution which is made with full involvement of the people is more likely to be respected and defended than one made without consulting the people.

28.10 Second, the very contents of the Constitution form an essence of its safeguard. The power of judicial review of unconstitutional acts and decisions protects the sanctity of the Constitution. The distribution of power among the organs of

state with adequate checks and balances aims at safeguarding the Constitution. The provisions on amendment procedures of the Constitution emphasize the significance of the basic law. The provisions for the defence of the Constitution bring out the special importance of the Constitution. The provision for special constitutional institutions to check the exercise of power and defend the people's human rights is another important way of safeguarding the Constitution.

28.11 Third, constitutions are -specially safeguarded by knowledge of respect, and commitment the people have for their constitution. It is through an acquired culture of constitutionalism that the Constitution can enjoy the full respect due to it.

28.12 From the very beginning of the constitutional debate people recognized and emphasized the importance of safeguards for the new Constitution. They advocated for a dramatic change of attitudes among the leaders and among themselves towards the importance of the Constitution.

Different attitudes to safeguards·

28.13 We identified three main sets of attitudes on the issue of safeguards in the views submitted to us. The first was a pessimistic view, very much influenced by constitutional history since independence. The basic position was that it was futile to bother with making a new constitution which would inevitably be both violated routinely by those in power and

undemocratically overthrown. This was a minority viewpoint expressed mainly at the beginning of the constitutional debate. The vast majority of people were soon convinced that it was possible to have a positive change in the future and contributed constructive ideas on that basis.

28.14 The second view was that development of adequate safeguards was the first task, and that only if there were assurances on that subject was there any point in proceeding with making the Constitution itself. Again, this view was expressed mainly in the early stages of the debate, after which most people became convinced that a major part of the answer in developing safeguards involved the proper design of the contents of the new Constitution itself, particularly in the way power was distributed.

28.15 The third view, which was expressed by the vast majority who commented on the issue, was that Ugandans are quite capable both of developing adequate safeguards as part of the constitution-making process and of making them effective after the Constitution comes into force. In order to find effective and durable remedies for our past problems, however, many people emphasized the need to reflect critically on our past history in order to identify the factors which have undermined constitutionalism and democracy. We need also to identify factors in societies with more positive experience of

safeguarding their constitutions which have contributed to that experience.

SECTION TWO: CONCERNS AND PRINCIPLES

28.24 All the concerns expressed by the people on all constitutional issues aimed at eliminating those factors and aspects in the past which have undermined the Constitution and the culture of constitutionalism. Likewise the principles emphasized on all issues were intended to safeguard the new Constitution. We only single out some of those concerns and principles which are directly related to the specific issue of safeguards and amendment of the Constitution.

Concerns of the People

Instability and lack of National Unity:

28.25 Many people were deeply concerned that without adequate safeguards for the new Constitution there would be no assurance of the future stability they yearned for. They were convinced that without stability there could be no development. They noted that other countries have been able to successfully confront great problems in part because of the basic stability fostered by commitment to constitutional order.

28.26 There was widespread concern that national unity has been an elusive goal, with many forces at work to encourage people to look to ethnic or religious or other allegiances as more important than the nation. This was seen as a factor in

behavior groups which ignore the Constitution in their efforts to get power or hold on to it even that means going against the established constitutional arrangements.

Excessive concentration of power in the executive:

28.27 People agreed almost unanimously that the 1967 Constitution had concentrated far too much power in the hands of the executive arm of government, and in particular in lit President. There were no other institutions which could effectively check on executive and presidential power. As a result, those exercising such power had little concern constitutional limits, and tended to feel free to set aside the Constitution or parts of the Constitution which did not suit their interests.

Politicisation of constitutional office

28.28 Concentration of power in the executive was accompanied by a reduction in the independence of constitutional offices such as the Auditor-general, the Electoral Commission and the Judicial Services Commission. Even the independence of the judiciary was sometimes threatened in various ways, including the use of violence. Constitutional officeholders could be appointed and removed by the executive with few controls. They were not guaranteed

adequate resources or even sufficient freedom from direction and control.

Militarism:

28.29 People were concerned about the early reliance of civilian authorities on military power to resolve constitutional and political disputes. The military thereby gained an unwarranted role in government and exercised excessive power. Once civilian authorities came to rely heavily on the military to remain in power, it was a relatively small step for the military to believe it could run things better on its own. Having so decided, the Constitution was seen as a minor issue to be largely ignored.

Lack of sufficient accountability of government officials:

28.30 It was noted by many that government officials, including members of security forces, have often been able to violate the constitution with impunity. In particular, where human rights and freedpl11s of people have been ignored and no action taken against offenders, the standing of the Constitution has been damaged.

Weak civil society:

28.31 It was recognized by many people that far too much power and resources were concentrated in the suite and its

institutions. The ordinary person remained weak and powerless in comparison. There have not been strong and autonomous civil organisations to act as powerful checks on the state and as guarantors of constitutional stability.

Ease with which constitutions can he changed:

28.32 Quite apart from the numerous times constitutions - or parts of them - have been abrogated and suspended without lawful authority, people were concerned that it has been too easy for the government of the day change, the Constitution. As soon as a government happens to have support of two thirds of all the members of Parliament, it is in position to change whatever suits it without regard for minority opinion. Disregard of significant minority opinions was seen as a divisive influence in a country of diverse peoples and interests.

28.33 Governments have shown little or no interest in helping the people grow to understand and love their Constitution. Knowing little or nothing-about it, people have had little interest in protecting it.

Principles Emphasized by the People.

Sovereignty of the people, and supremacy of the constitution:

28.34 People wanted assurances that in future it would be generally acknowledged that the Constitution and all authority under it derive from the people. The Constitution must therefore recognise that all authority and power in the state

derive from the people. Sovereignty of the people is not to be seen as something granted by the Constitution; rather, it is the basis of the Constitution and the Constitution should give due recognition to that fact. In general, power under the Constitution must be exercised in the interests of the people.

28.35 It follows from the principle of people's sovereignty that the law through which the people authorize the arrangements for their governance should be accorded the highest possible respect. The people in the views submitted to us, have made it clear that they want to be assured that the Constitution is treated as the fundamental law, supreme to all other laws and to all persons. Any law which is contrary to the Constitution must be illegal. This principle should extend to acts by the executive, the legislature and the judiciary, as well as those of other groups and individuals. It will be important that there are mechanisms for enforcing the supremacy of tile Constitution. Action should be provided for to deal with anyone who ignores the people's interests by seeking to abrogate or violate the Constitution.

Distribution of power among institutions which act as checks on one another:

28.36 The people submitting views on the issue agreed that the national government should be composed of a number of institutions each with clearly delimited power and all of which act as checks on one another. No single institution should have sufficient power to

unlawfully and unconstitutionally dominate and silence other institutions.

28.37 The constitutionally recognised institutions of government should extend beyond the three traditionally recognised organs of state (legislature, executive and judiciary) to other specialised and independent bodies. Anybody carrying out responsibilities which could be politically sensitive should be given constitutional protection so that it cannot be interfered with for political reasons. Such bodies should include the Electoral Commission, the Judicial Services Commission, and many others discussed in other chapters of this Report.

Popular participation transparency and accountability:

28.39 Government would be under more pressure to deal with the people in accordance with the Constitution and more accountable for its actions if people were able to participate fully in their own government. Hence people wanted to see local level governments continue to operate to the village level but with increased powers, responsibilities and resources. They also wanted guarantees of regular and affair elections from the village to the national levels.

The people should always be consulted and involved in any major constitutional process.

28.57 The third implication is that where the people's representatives in the Constituent Assembly cannot reach a reasonable degree of consensus on matters of controversy in the draft Constitution, the issue should be referred back to the people for a final decision. This can be done through a referendum. In this way, the people can be satisfied that decisions on all major issues concerning the contents of the new Constitution originate with them. We recommended so in the mentioned Interim Report.

28.58 The unprecedented degree of involvement of the people in the constitution making process to date has ensured that people generally believe that a democratic constitution can only emerge from themselves. We are convinced that this belief is the strongest safeguard of a national constitution. This belief once sustained and encouraged by proper action should in turn foster people's preparedness to later defend the Constitution.

Sovereignty of the People and Supremacy of the New Constitution

28.59 We have already discussed the closely related principles of sovereignty of the people and supremacy of the Constitution. They are the ultimate basis for all safeguards and so should themselves be enshrined in the Constitution.

28.60 As to sovereignty of the people, it is necessary that the principle be given due recognition not only by a bare statement but also by provisions that give it full effect. As to the bare statement, it should make it clear that state organs should not take to themselves

powers which the Constitution does not clearly vest in them, for the people retain ultimate power. As to provisions which give effect to the principle, the powers of the people to recall elected representatives and the reference of matters of controversy to decisions of the people in referenda are important examples.

28.61 Turning to the question of supremacy of the Constitution, it must be clearly provided that the Constitution is superior to all other laws and customs, and that all acts of the executive and other governmental bodies must be consistent with it. As discussed in Chapter Sixteen (Judiciary), the courts, and in particular the High Court, should be given responsibility for ruling on questions as to the interpretation and application of the Constitution. In doing so, the court will be determining whether or not the supremacy of the Constitution has been challenged, intentionally or otherwise. The courts should have clear powers to make rulings on the issues and to make orders preventing continuations of breaches and providing for other remedies where breaches of the Constitution have occurred.

28.62. In carrying out their vitally important roles in relation to the Constitution, the law courts should seek to give full effect both to the spirit and the letter of the Constitution. In so doing, they will find the people's expressed concerns and the principles they have emphasized and contained in our Report particularly useful. This Report together with the documents containing the original submissions of the people should be made use of by the judiciary in aspects which concern it.

(c) a flexible Constitution usually undermines the growth of a culture of constitutionalism since such a Constitution cannot be usefully studied in schools due to frequent changes;

(d) once people are not assured that the principles under which they have chosen to be governed will remain intact they are likely to lose interest in their Constitution.

28.101 Therefore, it is not surprising that the majority of people proposed that the Constitution should be amended through national referendum. Others proposed that the alterations should be effected by a two thirds majority of Parliament with the approval of two thirds of the District Councils. Some people were satisfied with only two-thirds majority of Parliament. There were also proposals for periodic review of the Constitution after a specified period of between 10 to 25 years. They were virtually no views recommending the extreme positions that the provisions of the Constitution should be unalterable or that they should be amended by a simple majority in Parliament.

28.102 We agree with the views of the people that Parliament should have power to amend the Constitution but that the procedure for amending the Constitution should be rigid. Constitutionalism can better be secured if the procedure for amending the Constitution is made more demanding than for ordinary legislation. Secondly, since the people have participated in making the new Constitution which reflects their values, wishes, interests and aspirations, it should not

be changed without consulting them. They should continue to be involved in the evolution, growth and development of the Constitution. Thirdly, there is a need to take the greatest care and serious consideration before amendments to the Constitution are made. They should not be effected merely to meet political expediency. Proposals for amendment should be published and the public given adequate opportunity to debate them.

Amendment by referendum

28.104 We accept in principle that the procedure for amending the new Constitution should be rigid in order to promote a culture of constitutionalism, to protect the supremacy of the Constitution, and to safeguard the sovereignty of the people and the stability of the country.

28.105. Amendment by referendum would satisfy the above objectives and it would provide one of the highest forms of rigidity or encroachment. It would ensure that amendments receive the popular approval of the population. However we think that submitting every proposed amendment to a referendum may be too cumbersome and expensive and it may even be too difficult to obtain popular approval of desired constitutional charges. This procedure, therefore, should be restricted to a few most fundamental or controversial provisions of which the people should have the final say. These include provisions on the supremacy of the Constitution and political system. The provisions declaring the supremacy of the Constitution are the foundation of constitutionalism and the entire constitutional

order. They are basic to the character and status of the Constitution and should not be altered without the consent of the people.

28.106 The provisions on the political system the basic to the new political order. They have been the most hotly debated and they have serious implications for the democratic governance of the country. The people should have the ultimate power to decide on how they should be governed.

28.107 Recommendation

The following provisions in the Constitution should not be amended unless the proposed amendment has been approved by a national referendum:-

(a) provision on the supremacy of the Constitution;
(b) provisions on referendum on political system;
(c) provisions prohibiting and one-party state.

Amendments Requiring Approval of District Councils

28.108 People in their views emphasised another method of involving the people in the amendment of the Constitution by requiring, approval or consent of the District Councils after Parliament has passed the amendments. Through this method the people in the districts being represented by their local leaders share with the national Parliament the responsibility of effecting fundamental changes in the Constitution. It is a procedure which is common in federal constitutions. It promotes national acceptance of

amendments and may also protect minorities. We agree with this method which can greatly promote national unity while at the same time adequately catering for our diversity.

28.109 The provisions which should be governed by this method of amendment include those guaranteeing the people their sovereignty, and those providing for the defence of the Constitution. The people should be involved in the alteration of these provisions to prevent the government of the day disregarding the Constitution or the people. The provisions describing the character of the State of Uganda, its form of government, its districts, capital and official language should not be amended without the approval of the districts because they have an interest in these provisions which affect their well-being. Other provisions which should require, approval of districts include those on human rights and freedoms, representation of the people, the executive, the National Council of State, the judiciary, local government, defence and national security, taxation, traditional leaders, and amendment of the Constitution.

28.110. Recommendation

Provisions in the Constitution relating to the following matters should not be amended unless a Bill seeking to amend any of them has been passed by a vote of not less than two thirds majority of all members of parliament and it has been ratified by the District Councils of at least two thirds of the districts of Uganda:

Safeguards and Amendment of the new Constitution (Page 743)
(a) the sovereignty of the people;

(b) the defence of the Constitution;

(c) representation of the people - establishment and independence of the Electoral Commission and the right to vote;

(d) the Republic as the form of government;

(e) the boundaries of districts;

(f) the territorial boundaries;

(g) the Capital of Uganda;

(h) executive authority of Uganda;

(i) election of the President;

(j) term of office of the President;

(k) removal of President;

(1) declaration of war;

(m) emergency powers of the president;

(n) the National Council of State;

(o) human rights;

(p) Local Government system;

(q) authority to raise armed forces;

(r) taxation;

(s) amendment of the Constitution;

Amendment by Absolute Majority

28.111 Most of the provisions of the Constitution should be capable of being amended by Parliament alone provided the prescribed majority is realised. There would be provisions which deal mainly with the structural formation of the state institutions and not the foundation, or human social values of the socio-political order. A special majority of two thirds of all members of Parliament should he required to pass a constitutional amendment. Such amendments, however, should not be done in a hurry. People should be informed of any proposed amendment and allowed time to discuss it through the media and offer their views to their elected members of Parliament.

Following the Odoki report, a draft Constitution was tabled before the Constitution Assembly on 18th May 1994.

The people of Uganda had elected from amongst themselves, delegates, to represent them in the Constituent Assembly. The National Resistance Council remained as the Country's legislative body and did not debate the draft Constitution

I have not found it necessary to reproduce excerpts of the debate on the draft Constitution, here. I may, however, have to refer to it in the resolution of some of the issues before us.

Suffice it to say, the draft was debated for a period of 29 months. Most of the Articles were passed by consensus. A number of modifications were made to the draft following the debates, but even then, after wide public consultations had been made.

On the 8th of October 1995, the eve of the 42nd anniversary of Uganda's independence, a new Constitution was promulgated, replacing the 1967 one.

Since its promulgation, the Constitution has been amended three times as follows:-

- *The Constitution (Amendment) Act, 2000, Act No.13 of 2000 which commenced on 15th September, 2000;*
- *The Constitution (Amendment) Act, 2005, Act No.11 of 2005 which commenced on 30th September 2005; and*
- *The Constitution (Amendment) Act, 2005, Act No.21 of 2005 which commenced on 30th December 2005.*
- *The Constitution (Amendment) Act, 2015, Act No.12 of 2015.*

The first amendment, the Constitution (Amendment) Act, 2000, Act No.13 of 2000 provided for the repeal and replacement of article 88 of the Constitution; amended article 89; repealed and replaced article 90; amended article 97 and inserted a new article 257 A. The amendment Act was however successfully challenged in the Supreme Court case of Ssemogerere and Others -vs- Attorney General, Constitutional Appeal No.1 of 2002. The court noted that the creation of article 257 A in the Constitution, now article 258 in the 2000 revised edition, was inconsistent with Article 88 of the Constitution, which provides for the quorum of Parliament when voting on any question.

The second amendment is the Constitution (Amendment) Act, 2005, Act No. 11of 2005. The objectives of this amendment were to:

- *amend the Constitution in accordance with article 261;*
- *distinguish Kampala as a capital city of Uganda and to provide for its administration and for the delineation of its boundaries;*
- *provide for Swahili as a second official national language of Uganda;*

- *provide for the Leader of the Opposition in Parliament under the multi-party political system;*
- *remove the limits on the tenure of office of the President;*
- *create the offices of Prime Minister and Deputy Attorney General;*
- *provide for the independence of the Auditor General and to provide for procedure for his or her removal;*
- *provide for the creation of special courts to handle offences relating to corruption;*
- *establish and prescribe the functions of a Leadership Code Tribunal;*
- *provide for the control of minerals and petroleum;*
- *provide for the holding of referenda generally;*
- *make miscellaneous repeals to the spent provisions; and*
- *provide transitional provisions having regard to the amendments made to the Constitution,*

The third amendment is the Constitution (Amendment) (No.2) Act, 2005, Act No.21 of 2005. The objectives of this amendment were to:

- *provide for Kampala as the capital city of Uganda;*
- *provide for the new districts of Uganda;*
- *provide that subject to the existence of regional governments the system of local government in Uganda shall be based on a district as a unit of administration;*
- *provide for the creation of regional governments as the highest political authority in the region with political, legislative, executive, administrative and cultural functions and to provide for the composition and functions of the regional governments; provide for grants for districts not forming regional governments; replace the Fifth Schedule to provide for details relating to regional governments; and*

- *amend article 189 to recognise the functions and services of regional governments.*

The preamble to the Constitution has remained unchanged it states:-

WE THE PEOPLE OF UGANDA:

RECALLING our history which has been characterised by political and constitutional instability;

RECOGNISING our struggles against the forces of tyranny, oppression and exploitation;

COMMITTED to building a better future by establishing a socio-economic and political order through a popular and durable national Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress;

EXERCISING our sovereign and inalienable right to determine the form of governance for our country, and having fully participated in the Constitution-making process;

NOTING that a Constituent Assembly was established to represent us and to debate the Draft Constitution prepared by the Uganda Constitutional Commission and to adopt and enact a Constitution for Uganda:

DO HEREBY, in and through this Constituent Assembly solemnly adopt, enact and give to ourselves and our posterity, this Constitution of the Republic of Uganda, this 22nd day of September, in the year 1995.

FOR GOD AND MY COUNTRY.

This preamble sums up all that I have endeavored to narrate above. In this preamble and in the whole Constitution the people of Uganda, emphasized the Country's history, acknowledging sadly that it has been characterized by political and Constitutional instability. Lest we forget. My attempts to recount the Constitutional history was to re-echo the people's cry, in the preamble to the Constitution.

We must always recall our history. *"Lest we forget"*. Indeed lest we forget our people, the brave, who shed blood in battle, who were killed, starved or jailed

during the period when we were under colonial rule. Those who struggled for our independence and endeavored to bring us together as a nation state. Those who were killed in the lost counties. Those who were killed at Nakulabye and those that fell during the Battle of Mengo. Those who lost their lives and those who spent long days in prison during the state of emergency. Those who were deported from their homes to distant places because they dared to speak out. Those who lost their lands, properties and livelihoods unjustly to the powerful and greed government officials. Those who were killed during the murderous regime of Idi Amin and the years that followed his rule. Those who lost their lives in a bid to overthrow the regime of Idi Amin and never saw its aftermath. Those who were killed, jailed, tortured simply because of their ethnicity, religion, political beliefs or simply for no reason during the dark days of our history. Those who lost their lives so that we may have peace and stability during the civil war that ended in 1986. This is our history, the history the people of Uganda were recalling in the preamble to their Constitution.

This is what the preamble refers to when it calls us to "recongnise our struggles against the force of tyranny, oppression and exploitation."

In this Constitution, unlike any other, the people are sovereign and affirm their sovereignty and their inalienable right to determine the form of government they want through their Constitution. In this regard, the Constitution itself is not supreme, it simply embodies the supremacy of the people who through an armed struggle captured power from tyrants and dictators and vested it into themselves, and set out their will in the Constitution. They are the ones who gave Parliament the power to make laws, the Judiciary to adjudicate on cases and the Executive to pass and implement policies. The Constitution did not make the people, they made it, themselves.

Each and every provision of the Constitution of this Country ought, by necessity, be understood and interpreted with the knowledge of our history and the spirit

set out in its preamble and the National Objectives and Directive Principles of State Policy enshrined therein.

RESOLUTION OF ISSUES

With this background, I now proceed to determine the first four issues, which were all argued together by the petitioners' Counsel and Mr. Mabirizi in their respective Petitions.

The submissions of Counsel and those of Mr. Mabirizi have been ably and exhaustively set out in the Judgments of My Lord the Hon. The Deputy Chief Justice, my two brothers and sister Justices and I have no reason to reproduce them here.

Issues, one to four have already been set out earlier in this Judgment. However, I feel constrained to reproduce them here again. They are set out as follows;-

1. *Whether sections 2 and 8 of the Act extending or enlarging of the term or life of Parliament from 5 to 7 years is inconsistent with and/ or in contravention of Articles 1, 8A, 7, 77(3), 77(4) 79(1), 96, 61(2) and (3), 105(1), 233(2)(b), 260(1) and 289 of the Constitution.*

2. *And if so, whether applying it retroactively is inconsistent with and/or in contravention of Articles 1, 8A, 77(3), 77(4), 79(1), 96 and 233(2(b) of the Constitution.*

3. *Whether sections 6 and 10 of the Act extending the current life of Local Government Councils from 5 to 7 years is inconsistent with and/or in contravention of Articles 1, 2, 8A, 176(3), 181(4) and 259(2)(a) of the Constitution.*

4. *If so, whether applying it retroactively is inconsistent with and/or in contravention of Articles 1, 2, 8A, 176(3), 181(4) and 259(2)(a) of the Constitution.*

The Sections of the Constitutional (Amendment) Act 1 of 2018 (herein referred to as the impugned Act) complained of in the above issues are 2, 6, 8, and 10. They are set out as follows in the Act.

> *"2. Amendment of article 77 of the Constitution.*
> *Article 77 of the Constitution is amended in clause (3) by substituting for the word "five" appearing immediately before the word "years" the word "seven".*
> *6. Amendment of article 181 of the Constitution.*
> *Article 181 of the Constitution is amended in clause (4), by substituting for the word "five" appearing immediately before the word "years" the word "seven".*
> *8. Replacement of article 289 Of the Constitution.*
> *Article 289 of the Constitution is amended by substituting for article 289 the following-*
> *"289. Term of current Parliament.*
> *Notwithstanding anything in this Constitution, the term of the Parliament in existence at the time this article comes into force, shall expire after seven years of its first sitting after the general elections. "*
> *10. Replacement of Article 291 of the Constitution.*
> *Article 291 of the Constitution is amended by substituting for article 291 the following-*
> > *"291. Term of current local government councils.*
> > *For the avoidance of doubt, the term of seven years prescribed for local government councils by clause (4) of article 181 of this*

Constitution shall apply to the term of the local government councils in existence at the commencement of this Act."

(1). Whether the extension of the term of Parliament and Local Government Councils from 5-7 years is unconstitutional.

(i) <u>Whether the Basic structure doctrine applies to Uganda.</u>

The petitioners contend firstly, that the procedure adopted by Parliament in amending the Constitution was itself unconstitutional. Secondly that the Parliament has no power to extend its term and that of the local councils, as doing so would destroy the basic structure of the Constitution.

I will deal with the latter argument first as it has the capacity of disposing of the former.

It was submitted that *Sections 2, 6, 8* and *10* of the Act which extended the term of Parliament for 5 to 7 years are inconsistent with and in contravention of Articles 1 and 2 of the Constitution.

Articles 1 and 2 provide as follows;-

Sovereignty of the people.

(1) All power belongs to the people who shall exercise their sovereignty in accordance with this Constitution.

(2) Without limiting the effect of clause (1) of this article, all authority in the State emanates from the people of Uganda; and the people shall be governed through their will and consent.

(3) All power and authority of Government and its organs derive from this Constitution, which in turn derives its authority from the people who consent to be governed in accordance with this Constitution.

(4) The people shall express their will and consent on who shall govern them and how they should be governed, through regular, free and fair elections of their representatives or through referenda.

Supremacy of the Constitution.

(1) This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.

(2) If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void.

It was submitted by learned Counsel Wandera Ogalo that *Article 96* of the Constitution prescribes that Parliament shall be dissolved upon the expiration of its term. The term of Parliament is 5 years as provided under *Article 77(3).* The term of the current Parliament commenced at its first sitting on 19th May 2016 and by law shall be dissolved on 18th May 2021. The amendment seeks to extend the term of this Parliament to 18th May 2023. Counsel argued that in that case, members of Parliament shall be sitting without having been elected by the people, in contravention of *Article 1* of the Constitution.

Mr. Lukwago, learned Counsel also for the petitioners, introduced a new aspect of law. He argued that we should apply the basic structure doctrine adopted from the Indian jurisprudence, which is rooted in English tradition. According to this doctrine, Counsel submitted, the power of Parliament to amend the Constitution is not unlimited.

This is in sharp contrast to the argument of Mr. Mwesigwa Rukutana, the Hon. The Deputy Attorney General for the respondent who submitted rather strongly that, every Article in the Constitution can be amended, through the procedures provided therein, under chapter eighteen.

In this regard, *Articles 259* and *260* and *261* provide as follows;

259. *Amendment of the Constitution.*

(1) Subject to the provisions of this Constitution, Parliament may amend by way of addition, variation or repeal, any provision of this Constitution in accordance with the procedure laid down in this Chapter.

(2) This Constitution shall not be amended except by an Act of Parliament—

(a) the sole purpose of which is to amend this Constitution; and

(b) the Act has been passed in accordance with this Chapter.

260. Amendments requiring a referendum.

(1) A bill for an Act of Parliament seeking to amend any of the provisions specified in clause (2) of this article shall not be taken as passed unless—

(a) it is supported at the second and third readings in Parliament by not less than two-thirds of all members of Parliament; and

(b) it has been referred to a decision of the people and approved by them in a referendum.

(2) The provisions referred to in clause (1) of this article are—

(a) this article;
(b) Chapter One—articles l and 2;
(c) Chapter Four—article 44;
(d) Chapter Five—articles 69, 74 and 75;
(e) Chapter Six—article 79(2);
(f) Chapter Seven—article 105(1);
(g) Chapter Eight—article 128(1); and
(h) Chapter Sixteen.

261. Amendments requiring approval by district councils.

(1) A bill for an Act of Parliament seeking to amend any of the provisions specified in clause (2) of this article shall not be taken as passed unless—

(a) it is supported at the second and third readings in Parliament by not less than two-thirds of all members of Parliament; and

(b) it has been ratified by at least two-thirds of the members of the district council in each of at least two-thirds of all the districts of Uganda.

(2) The provisions referred to in clause (1) of this article are—

(a) this article;
(b) Chapter Two—article 5(2);
(c) Chapter Nine—article 152;
(d) Chapter Eleven—articles 176(1), 178, 189 and 197.

The question is whether or not the above Articles permit the amendment of any of the provisions of the Constitution. The learned Deputy Attorney General asserts that, they do. Counsel for the petitioners do not accept that Parliament has the authority to amend the Constitution at will.

In this regard, Mr. Lukwago for the petitioners cited a study by one Yaniv Roznai entitled "Unconstitutional amendments; A study of the Nature of Constitutional Amendments Power." *A thesis submitted to the Department of Law at the London School of Economics for the degrees of Dr of Philosophy, London 2014.*

Mr. Lukwago was unable to avail us with a published copy. The copy availed to us appears not to have been published, at least the record does not indicate so. To that extent it is of little value in itself as an authority.

However, the thesis contains references which are primary sources of information, specifically decisions of Courts from different jurisdictions and published studies. I shall therefore refer to the original sources which I have endeavored to obtain.

On this subject Roger Sherman, an American Congressman in the 19th Century wrote;

"The Constitution is the act of the people and ought to remain entirely. But the amendments will be the act of state Governments. Again all authority we possess is derived from that instrument, if we mean to destroy the whole and established a new Constitution we destroy the basis on which we mean to build. (Annals of U.S Congress (1789, 735).(Sic)

Another American John Calhoun in his study. *"Discourse on the Constitution and Government of the United States, published in 1857 wrote :*

> *"If an amendment is inconsistent with the character of the Constitution and ends for which it was established or the nature of the system or radically changes the character of the Constitution or the nature of the system then the amendment power transcends its limits."(Sic)*

But the most appealing argument to me is that of Otto Bachof (1951):-

> *"Above positive law exists natural law, which limits even constitutional legislation. A constitution is valid only with regard to those Sections within the integrative and positivist legal order that do not exceed the predetermined boarders of a higher law. An amendment that violates "higher law" would contradict both natural law and the constitution and it should be in power of the courts to declare such amendment as unconstitutional and void"*

A number of democratic countries have accepted the doctrine of basic structure expressly or by implication. In India, the Supreme Court in *Minever vs Union of India (AIR 1980 SC 1759)* unanimously held that a law that removed all limitations on Parliament's amendment power, was unconstitutional. The Court explained that;-

"if by constitutional amendment, Parliament were granted unlimited power to amendment, it would cease to be an authority under the constitution but would become supreme over it, because it would have power to alter the entire constitution including the basic structure and even put an end to it by totally changing its identity."

In Bangladesh, the Supreme Court in *Anwar Hossain Chowdhury vs Bangladesh 41 DLR 1989 App Div 169* while striking down a Constitutional amendment that abolished the judicial review jurisdiction of the Supreme Court said:-

"Call it by any name, basic structure or whatever, but that is the fabric of the Constitution which cannot be dismantled by an authority created by the Constitution itself namely the Parliament... Because the amending power is power given by the Constitution to Parliament and nevertheless it is a power within and not outside the Constitution".

In the same case, Judge Shehebuddin reasoned that, the power to make a Constitution belongs to the people alone. The power vested in Parliament to amend the Constitution is derived from the Constitution and therefore such power is limited. He named a number of principles that cannot be removed from the Constitution by way of amendment, which include the people's sovereignty, supremacy of the Constitution, democracy, unitary state (in as far as it related to Bangladesh) separation of powers, fundamental rights and judicial independence which he contended are structural pillars of the Constitution, and therefore, beyond the amendment power of Parliament. Where Parliament transgresses its limits, it is in the power of the Court to strike down such an amendment.

In *Bangladesh Italian* Marble *Works Ltd vs. Bangladesh* (*2006) 14 BLT* (*Special*) (*HCD*) *1.* The Supreme Court while annulling the Constitutional (Fifth

Amendment) Act, 1979 which had been enacted to ratify, confirm and validate Martial law proclamations, regulations and orders held that:-

> *"Parliament may amend the Constitution but it cannot abrogate it, suspend it, or change its basic feature or structure... The enabling power to amend cannot swallow the Constitutional fabrics. The fabrics of the Constitution cannot be dismantled even the Parliament, which is a creation of the Constitution itself. While the amendment power is wide it is not that wide to abrogate the Constitution or to transform its democratic republican character into one of dictatorship or monarchy."*

In Kenya, the basic structure doctrine was accepted when the Court in *Njoya vs Attorney General and Others (2004) LLR 4788(HCK)* held that:-

> *"Parliament may amend, repeal and replace as many provisions as it desired provided that the document retains its character as the existing Constitution and that alternation of the Constitution does not involve the substitution thereof a new one or the destruction of the identity or the existence of the Constitution attained."(Sic)*

While discussing the doctrine of basic structure Justice Albie Sachs of the South African Constitutional Court in *Executive Council of Western Cape Legislature Vs The President of the Republic of South Africa and Others (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995)* noted as follows:-

> *"There are certain fundamental features of Parliamentary democracy which are not spelt out in the Constitution but which are inherent in its very nature, design and purpose. Thus, the question-has arisen in other countries as to whether there are <u>certain features of the</u>*

constitutional order so fundamental that even if Parliament followed the necessary amendment procedures, it could not change them. I doubt very much if Parliament could abolish itself, even if it followed all the framework principles mentioned above. Nor, to mention another extreme case could it give itself eternal life - the constant renewal of its membership is fundamental to the whole democratic constitutional order. Similarly, it could neither declare a perpetual holiday nor, to give a far less extreme example, could it in my view, shuffle off the basic legislative responsibilities entrusted to it by the Constitution."(Emphasis mine)

Needless to say, the doctrine of basic structure has not yet attained universal acceptance. It was rejected in Tanzania, when the Court of Appeal reversed the Judgment of the High Court that had upheld it in *Attorney General vs Christopher Mtikila (Civil Appeal No. 45 of 2009).*

It has not been fully accepted in Pakistan or even in South Africa where it has been alluded to but not adopted.

The Supreme Court of Sri Lanka, also rejected it because the language in its Constitution permitted expressly any amendment or repeal of any Constitutional provision. The doctrine has also been rejected in Malaysia, where the Court granted Parliament an unlimited power to amend the Constitution.

In Belize, a Commonwealth Country in Central America, its Supreme Court in *Barry M. Bowen vs Attorney General No. 445 of 2008 BZ 2009 SC*, applied the basic structure doctrine. In that case, the Government had come up with the sixth Amendment Bill 2008, which aimed at allowing the government to exploit a recent oil discovery in that country. The bill proposed to exclude petroleum and minerals from the Constitutional protection of property rights. Apparently the

Parliament had followed all the required procedures required for the passing of that Constitutional amendment.

The Supreme Court nonetheless held that, compliance with the procedure is not sufficient. The amendment just like any other law must be subject to the Constitution. Any view to the contrary would subject constitutional supremacy to Parliamentary supremacy. Therefore, Parliament's law making powers are limited so that it cannot enact laws which are contrary to the basic structure of the Constitution of Belize which includes the characteristics of Belize as a sovereign and democratic state, the supremacy of the Constitution, the protection of fundamental rights and freedoms that are set out in the Constitution, the limited sovereignty of Parliament, the principle of separation of powers and the rule of law.

The Supreme Court found that, the amendment bill which sought to infringe the citizens' right to property by obstructing their access to Courts of law violated the principles of separation of powers, the rule of law and the protection of the right to property, thus offending the basic structure of the Constitution. "The Sixth Amendment Act" was declared unconstitutional and void, by the Court.

However, the government was not yet done. In response to the decision of the Supreme Court above, the government proposed another amendment to the Constitution which was quickly passed, as "The Eighth Amendment Act of 2011". It stipulated that, *Section 2* of the Constitution which provides that, this Constitution is the Supreme law of Belize and if any other law is inconsistent with the Constitution that other law shall to the extent of its inconsistency be void, does not apply to a law to alter provisions of the Constitution. In other words, the judiciary was deprived of its power to question a Constitutional amendment law.

"The Eighth Amendment Act" was itself challenged in *British Caribbean Bank Ltd vs Attorney General Belize No. 597 of 2011 (SC)*. The Supreme Court of Belize held that there are implied, in the Constitution limitations on the National Assembly's amendment power so that it cannot destroy or remove the basic structure of the Constitution. The Court found that "The Eighth Amendment Act" was contrary to basic principles of separation of powers and the basic structure of the Constitution. That amendment, too, was accordingly declared null and void.

From the aforegoing, it appears to me clearly that, whether or not the doctrine of basic structure applies, depends on the constitutional history and the Constitutional structure of each country. Every Constitution is a product of historical events that brought about its existence. The classic example is the American Constitution. But there are a host of others. The American Constitution differs in a fundamental way from that of the United Kingdom because each of the two countries has had a very distinct history.

Uganda's Constitutional history is unique and differs in many aspects from that of Kenya and Tanzania, its neighboring countries.

In that regard therefore, the question as to whether in this Country's Constitution, there are indeed express or implied conditions that limit the amending power of Parliament can only be answered by looking at our unique constitutional history which has already been set out earlier in this Judgment.

I have already set out the Constitutional history of this Country *albeit* in brief earlier in this Judgment. I will not repeat it here. Suffice it to state, that our constitutional history serves as a guide, as to whether or not the current Constitution incorporates in it the basic structure doctrine.

The 1962 Constitution appears clearly to have been put together by the British colonialist in collusion with traditional Rulers, politicians and administrators. The contract was between the British, on one hand and the traditional rulers and politicians on behalf of the people, on the other. The views of the people were never sought directly. The constitutional arrangement was more concerned with putting together a Colonial State, sharing of power and resources. It had nothing to do with the people themselves or their interests

In this regard the basic structure of the 1962 Constitution was the relationship between the federal states, semi-federal states, the territories and the districts. The main basic structure of the 1962 Constitution consisted of the following:-

1. *The federal and semi-federal structure.*
2. *The power sharing between the central government and the federal state of Buganda other than kingdoms and districts*
3. *The limited power of Parliament in respect of the administration of the federal and semi federal states.*
4. *Direct and indirectly elected members of Parliament*
5. The President was ceremonial and unelected.
6. *The Prime Minister had executive powers, was not directly elected but was chosen by the party with majority in Parliament.*
7. *The country was neither a republic nor a monarchy.*
8. *It was neither unitary nor federal.*

This was a constitutional order set up for convenience and appears to have been intended to be an interim measure. Soon it developed cracks, when the President was torn between his Constitutional duty as the President of the country and defending the territorial integrity of his Kingdom of Buganda.

The Constitutional battle between the Prime Minister and the President led to the former abrogating the Constitution in April of 1966 only 4 years after its enactment.

Under the 1962 Constitution, Parliament could not amend or in any way interfere with the Constitutions of the federal states and the territory of Busoga, under its Section 1.

The basic structure of 1962 Constitution could not be changed through a constitutional amendment. Any attempt to do so would have altered the nature of the whole Constitution. In April 1966, the UPC government had a comfortable majority in Parliament sufficient to pass a constitutional amendment, but it did not. The reason, in my view, is that any attempt to change the Constitution by way of amendments that were introduced by the 1966 Constitution would have had the same result as its replacement or abrogation. The amendments would have been so radical as to change the entire nature and character of the Constitution, which power Parliament did not possess. In the result the Prime Minister and his government decided to have the Constitution abrogated and replaced with another one, through an unconstitutional process.

The 1967 Constitution introduced its own basic structure. The Country became a one united republic. The President was chief executive and could appoint the Vice President and cabinet. The federal states were abolished. Members of Parliament were directly elected by the people through a multi-party system.

When Amin took power in January 1971, he suspended the basic structure of the 1967 Constitution, including Parliament, elections of President and distinct councils and practically ruled the Country as a dictator with absolute power. He later declared himself life President and ruled as if there was no Constitution, although most of the constitutional provisions remained in force. Amin's Legal Notice No. 1 of 1971, abrogated the Constitution, when he suspended its basic structures.

Therefore, in my humble view once the basic structure of the Constitution are removed, suspended or replaced the Constitution ceases to exist even if the rest of the provisions remain operational.

When the NRM government came to power in 1986, it had resolved that the people of Uganda themselves would for the first time fully participate in the making of a new Constitution that is their own. It would have been simpler, cheaper and less time consuming for the Parliament at the time to introduce and pass amendments to the 1967 if it so desired. Again such amendments would have been so radical as to amount to abrogation of the 1967 Constitution.

It was the overwhelming desire of both the Government and the people to enact a new Constitution with its own basic structure, radically different from all the past Constitutions. As far as I can discern, the basic structure of the 1995 Constitution are.

1) *The sovereignty of the people of Uganda and their inalienable right to determine the form of governance for the Country.*

2) *The Supremacy of the Constitution as an embodiment of the sovereign will of the people, through regular free and fair elections at all levels of political leadership.*

3) *Political order through adherence to a popular and durable Constitution.*

4) *Political and constitutional stability based on principles of unity, peace, equality, democracy, freedom, social justice and public participation.*

5) *Arising from 4 above, Rule of law, observance of human rights, regular free and far elections, public participation in decision making at all levels, separation of powers and accountability of the government to the people.*

6) *Non-derogable rights and freedoms and other rights set out in the extended and expanded Bill of Rights and the recognition of the fact that fundamental Rights and Freedoms are inherent and not granted by the State.*

7) *Land belongs to the people and not to the government and as such government cannot deprive people of their land without their consent.*

8) *Natural Resources are held by government in trust for the people and do not belong to government.*

9) *Duty of every citizen to defend the Constitution from being suspended, overthrown, abrogated or amended contrary to its provisions.*

10) *Parliament cannot make a law legalizing a one-party state or reversing a decision of a Court of law as to deprive a party.*

In this regard, the Odoki Commission recommended as follows (at P.741 28.104 and 28.105);-

> *28.104. We accept in principle that the procedure for amending the new Constitution should be rigid in order to promote a culture of constitutionalism, to protect the supremacy of the Constitution, and to safeguard the sovereignty of the people and the stability of the country.*
>
> *28.105 Amendment by referendum would satisfy the above objectives and it would provide one of the highest forms of rigidity or entrenchment. It would ensure that amendments receive the popular approval of the population. However, we think that submitting every proposed amendment to a referendum may be too cumbersome and expensive and it may even be too difficult to obtain popular approval of desired constitutional changes. This procedure, therefore, should be restricted to a few most fundamental or controversial provisions of which the people should have the final say. These include provisions on the supremacy of the Constitution and the political system. <u>The provisions declaring the supremacy of the Constitution are the foundation of constitutionalism and the entire constitutional order. They are basic to the character and status of the Constitution and should not be altered without the consent of the people.</u>*
>
> (Emphasis mine)

Parliament, in my view, has no power to amend alter or in any way abridge or remove any of the above pillars or structures of the Constitution, as doing so would amount to its abrogation as stipulated under *Article 3 (4).* This is so, even if Parliament was to follow all the set procedures for amendment of the Constitution as provided.

In this regard therefore, I find that the basic structure doctrine applies to Uganda's Constitutional order having been deliberately enshrined in the Constitution by the people themselves.

My view expressed above is fortified by the following provisions of the Constitution.

Articles 1 and 2 : These Articles establish the foundation of the Constitution upon which all other Articles are archived therefore in my view cannot be amended, not even by a referendum. Doing so would offend Article 3(4).

Article 3. This article is really unique, and I have not seen or known of any other Constitution with a similar Article, which effectively renders inapplicable to Uganda the Kelsen Theory of pure law.

Under Article 3(4) an amendment by Parliament may have the effect of abrogating the Constitution even if such an amendment has been enacted through a flawless procedure.

I say so, because an Act of Parliament amending the Constitution is still subject to Article 2 thereof. It must pass the constitutionality test.

I have already set out the views expressed by the people of Uganda during the Constitutional making process in regard to its basic structures earlier in this Judgment where I set out the views of the people of Uganda in respect of the basic structure of the Constitution.

The people made it clear that, Parliament must not be permitted to usurp the sovereignty of the people by extending its term of office. It was also unanimously expressed that Parliament should have a term of five years, with many saying it should not be possible to extend the term under any circumstances. Reference

was made to the 1966 Constitution under which Parliament extended its term of five years without having gone through elections. Further reference was made to the regime of Idi Amin where legislative power was vested in him and there were no elections for the entire 8 years he was in power. This is the said history the people of Uganda were determined not to repeat *See: Report of the Constitution Commission 11.110 Term of Parliament* (supra).

In my humble view, therefore the principle of free and fair election, held regularly every five years forms one of the basic structure of the Constitution and is beyond the power of Parliament to amend. Any attempt to do so would amount to usurping the sovereignty of the people and the supremacy of the Constitution and this would contravene *Article 1* of the Constitution.

To hold otherwise, would create an absurdity. It would in theory and practice, mean that, Parliament may every five years or seven years as set out in the impugned Act, extend its term without having to go for elections, perpetually! Even worse, it could abolish elections and declare its current members to be members for life!

This is what Idi Amin did when he declared himself life President, at that time all legislative powers of Parliament were vested in him, he was not just the life President he was also the life Parliament. This is what Justice Sachs of the South African Constitutional Court alluded to when he stated that, unchecked amendment powers of Parliament would in principle enable it to give itself "eternal life". *See: Executive Council of Western Cape Legislature Vs The President of The Republic of South Africa* (Supra).

Parliament could even abolish the Judiciary and vest judicial powers in itself! It could repeal the whole Bill of Rights from the Constitution, as long as it has a

majority to do so. It could even abolish the Republic of Uganda and in its stead create a Monarchy.

The argument by the learned Deputy Attorney General that Parliament can at will amend any Article of the Constitution provided the set procedure is followed appears to me to be fiction based on a legal misconception. This misconception of our history and jurisprudence appears to emanate from an apparent right of entitlement held by a majority of the Members of Parliament and the Executive.

Once the principle is set that Parliament has a right to amend any Article of the Constitution, simply by voting "yes" there would be no limit to their demands. Nothing would stop them from amending the Constitution to provide that they would be Members of Parliament for life and upon death, their Parliamentary seats be inherited by their children. They cannot do so because the Constitution put in place this Court to stop them. This Court shall not stand by and let our Country's democracy and hard-worn values set out in the Constitution wither on the vine. It will not happen on our watch.

Members of Parliament have no power on their own to legislate. The power to legislate belongs to the people of Uganda, who every five years delegate it to some amongst themselves under *Article 1* of the Constitution. This power therefore delegated as it is very limited in both in time and scope.

Clearly, the notion that, Parliament has unlimited power to amend the Constitution does not appeal to me in the least. The notion that every Article of the Constitution can be amended has no legal basis in our history and in our current jurisprudence. It must be rejected and I hereby reject it. I would, on the basis of this alone answer issues 1, 2, 3, and 4 in the affirmative.

Be that, I still have to consider whether or not the *Sections 2, 6, 8* and *10* of the impugned Act are Constitutional or not in view of the importance of the other issues raised in this Petition.

(ii) <u>Public Participation</u>

Whether there was lack of public participation in respect of amendments that introduced *Sections 2, 6, 8,* and *10* of the impugned Act, if so whether it vitiated the Act.

I now proceed to determine whether or not a number of procedural irregularities raised by the petitioners were valid and if so whether they vitiated the process of enacting the impugned Act.

This Court in *Oloka–Onyango and 9 Others versus Attorney General Constitutional Petition No. 8 of 2014* (unreported), discussed the question as to whether or not Parliament while passing legislation may ignore or waive legal requirements. It was held as follows:-

> *"Parliament as a law making body should set standards for compliance with the Constitutional Provisions and with its own Rules. The speaker ignored the law and proceeded with the passing of the Act. We agree with Counsel Opiyo, that the enactment of the law is a process, and if any of the stages therein is flawed, that vitiates the entire process and the law that is enacted as a result of it."(Sic)*

I agree with the above proposition of the law, as clearly set out by this Court. I have found no reason to falter it.

Counsel for the petitioners also raised the issue of lack of Public consultation in the process of enacting the above Sections of the impugned Act. I must state from the onset that, public participation in the legislative process is not a privilege granted to the people by Parliament. It is a basic constitutional

requirement. All the past Constitutions as already set out lacked legitimacy because they failed to allow the people to participate in the constitutional and legislative process. The Uganda Agreement of 1900 and the Order-in-Council of 1902, were illegitimate on that basis alone. Similarly, the 1962 Constitution, lacked popular support. When it was abrogated the people did not rise in its defence as they had no attachment to it. It had been made by and for their rulers. The worst example was the 1966 interim Constitution which was enacted without having been seen even by the members of Parliament who passed it and swore allegations to it.

The 1967 Constitution was debated and passed by Parliament which had constituted itself into a Constituent Assembly. The people's participation was extremely limited as already set out above. .

The 1995 Constitution specifically provided for Public participation in the legislative process and the government. This was one of the fundamental changes President Museveni had promised the people in his maiden speech which I have already reproduced above.

The Odoki report (Supra) sets out the recommendations on this aspect at P. 741 as follows:-

Sovereignty of the people and Supremacy of the New Constitution.

> *28.102. We agree with the views of the people that Parliament should have power to amend the Constitution but that the procedure for amending the Constitution should be rigid. Constitutionalism can better be secured if the procedure for amending the Constitution is made more demanding than for ordinary legislation. Secondly, since the people have participated in making the new Constitution which reflects their values, wishes, interests*

and aspirations, it should not be changed without consulting them. They should continue to be involved in the evolution, growth and development of the Constitution. Thirdly, there is a need to take the greatest care and serious consideration before amendments to the Constitution are made. They should not be effected merely to meet political expediency. Proposals for amendment should be published and the public given adequate opportunity to debate them. (Emphasis mine)

Counsel for the petitioners submitted that *Sections 2,6,8* and *10* of the impugned Act were smuggled into the bill. Those provisions extending the term of Parliament and that of the District Local Councils from five to seven years were neither in the original "Magyezi bill" nor did they emanate from the views and demands of the people. The people, petitioners contend, were never consulted on those amendments.

A number of affidavits were presented putting forward the argument that, the Magyezi bill as first presented did not refer to or contain a proposal to extend the term of Parliament and /or that of Local Governments.

For the sake of brevity I will refer only to the affidavit of by Morris Wodamida Ogenga Latigo dated 12th January 2018, sworn in support of *Petition No. 3 of 2018, Uganda Law Society versus Attorney General*. The paragraphs relevant to this issue are set out in that affidavit as follows:-

1. *That I am an adult male Ugandan of sound mind, a Member of Parliament representing Agago North County Constituency in the tenth (10) Parliament and I make and swear this affidavit in support of the above petition in that capacity .*

6. *THAT on the 27th day of September 2017, I attended the Parliamentary session in which Hon. Raphael Magyezi, Member of Parliament for Igara County West Constituency in Bushenyi District moved a motion seeking leave of Parliament to introduce a Private Member's Bill entitled "The Constitutional (Amendment) Bill 2017".*

7. *THAT prior to the tabling of the said motion, on the 26th day of September 2017, the Rt. Hon. Speaker of Parliament in her communication outlined two notices of motion for leave to introduce Private Members Bills and one of the notices of motion was for "a resolution of Parliament urging Government to urgently constitute a constitutional review commission to comprehensively review the Constitution", which notices she said met the test for inclusion in that day's order paper.*

18. THAT the memorandum of the Constitution (Amendment) (No.2) Bill, 2017 circulated to the members of parliament prior to the first reading laid out the object of the said Bill, and long title of the Bill stated as follows:-

> *"Act to amend the Constitution of the Republic of Uganda in accordance with articles 259 and 262 of the Constitution/ to provide for the time within which to hold presidential, parliamentary and local government council elections: to provide for eligibility requirements for a person to be elected as President or District Chairperson; to increase the number of days within which the Electoral Commission is required to hold a fresh election where a president election is annulled: and for related matters. "*

19. THAT when I read the memorandum of the said Bill, I established that the substance of the motion for which leave was granted was premised on Hon. Raphael Magyezi's basing the amendment on "the Supreme Court decision in Amama Mbabazi vs Yoweri Kaguta Museveni, Electoral Commission and The Attorney General in Presidential Election Petition No. 01 of 2016."

20. THAT in justification of a Private Member's Bill, Hon. Raphael Magyezi presented the said Bill with the view of meeting the time lines set by the Supreme Court even though the Bill touched on the minor recommendations of reforming electoral laws as opposed to the actual reforms needed to govern the conduct of a free and fair election in Uganda.

22. THAT the Bill which was circulated to the Members of Parliament after publication in the Gazette captured the prayers of Hon. Raphael Magyezi for which leave was granted by Parliament to bring a Private Member's Bill to amend the Constitution, which Bill did not include provisions on extension of terms of Members of Parliament and the current local government councils, and restoration of terms limits for the President.

25. THAT following the Bill circulated among the Members of Parliament and the Speaker's directive, the consultations by Members of Parliament were not required and neither did they address issues of extension of the term of the current Parliament and local government councils.

27. THAT after the consultations I attended the Parliamentary session of 18th December 2017 in which the Constitution (Amendment) (No.2) Bill, 2017 was presented to the House for the second reading.

28.THAT the presentation of the Report of the Committee on Legal and Parliamentary Affairs on the Constitution (Amendment) (No.2) Bill, 2017 was interrupted by several procedural interventions by Members, among which was the Deputy Attorney General's motion under Rule 16 of the Rules of Procedure of Parliament to suspend Rule 201 (2) which requires a report of a Committee on a bill to be debated at least three days after the laying of the report on the Table of Parliament by the Chairperson or Deputy Chairperson, or Member nominated by the committee or by the speaker.

30.THAT in the Parliamentary sitting of Monday 18th December 2017, Hon. Kafeero Robert Sekitoleko, MP for Nakifuma County in Mukono District made an oral notice to the Speaker of his intention to propose amendments to the tenure of Parliament extending it to seven years.

31.THAT I attended the Parliamentary sitting of Tuesday 19th December 2017, and Hon. Monicah Amoding, MP Woman Representative of Kumi and a member of the Committee on Legal and Parliamentary Affairs informed the House that the proposal to amend the term of Parliament and the local government councils was never presented or received by the Committee, which information was ignored.

32.THAT I am aware that during the same Parliamentary sitting of Tuesday 19th December 2017, Hon. Violet Akurut, MP Woman Representative of Katakwi informed the House that consultation with the electorate was **not** done on the issue of extending the term of Parliament, submitting her personal view on the matter as opposed to representing the people.

33.THAT I attended the Parliamentary sitting of Wednesday 20th December 2017, in which Hon. Hellen Kahunde, MP Woman Representative of Kiryandongo prayed to the Speaker to allow the Members go and consult the people on the issue of extending the term of Parliament, which request was ignored.

34.THAT in the same sitting of Wednesday 20th December 2017, Hon. Tusiime Michael, MP for Mbarara Municipality in Mbarara District presented the justifications for the proposed amendment to extend the term of Parliament citing court battles facing Members of Parliaments and the time taken preparing for preliminary elections as the five-year term comes to an end.

38. THAT I read the Report of the Sectoral Committee on Legal and Parliamentary Affairs on the Constitution (Amendment) (No.2) Bill 2017, and save for the 'proposal to expand the term of President from 5 to 7 years' (at pages 92 -93), the Committee never received any proposal on the extension of the term of Parliament or the local government councils.

39.THAT I have read the Rules of Procedure of the Parliament of Uganda, 2017 and I am aware that any proposed amendments to a Bill which are not part of the Report of the Committee to which a Bill was referred may only be considered on notice where the following conditions under the Rules (Rule 133 (4)) are met: -

(a) where the amendments were presented but rejected by the relevant committee , or

(b) where for reasonable cause, the amendments were not presented before the relevant committee. (Emphasis on all paragraphs is mine)

The reply to this affidavit is contained in the affidavit of Ms. Jane L. Kibirige the Clerk to Parliament deponed to on 22nd March 2018, and specifically in paragraph 13, 15, 16, 28, 30 53, 54, 57,58, 64 as follows:-

*13. **THAT** in specific response to paragraph 10 and 11 of the affidavit of Morris Wodamida Ogenga Latigo, I know that the Rt. Hon. Speaker addressed her mind to a number of procedural issues raised by Members of Parliament including the leader of opposition and in her opinion found no merit in the issues raised by virtue of her powers as the Speaker of the House.*

*15. **THAT** I know that on 27th September 2017, the Hon. Raphael Magyezi a Member of Parliament for Igara County West, Bushenyi tabled in the House of Parliament a motion for leave to introduce a private Members' Bill titled The Constitution (Amendment) (N0.2) Bill of 2017.*

*16. **THAT** I know that the object of Bill titled The Constitution (Amendment) (No.2) Bill of 2017 was;*

" An Act to amend the Constitution of the Republic of Uganda in accordance with articles 259 and 262 of the Constitution; to provide for the time within which to hold presidential, parliamentary and local government council elections," to provide for the eligibility requirements for a person to be elected as President or District Chairperson)' to increase the number of days within which to file and determine a presidential election petition)' to increase the number of days within which the Electoral Commission is required to hold a fresh election where a presidential election is annulled,' and for related matters."

*28.**THAT** in specific response to paragraph 16 of the affidavit of Morris Wodamida Ogenga Latigo, I know that prior to Hon. Raphael Magyezi, moving the motion for leave to introduce a private Member's Bill, the Rt. Hon, Speaker of Parliament addressed her mind to the protest raised by the leader of opposition and similarly found no merit in the protest as raised.*

***30.**THAT in specific response to paragraphs 19, 20 and 21 of affidavit of Morris Wodamida Ogenga Latigo, I know that the substance of the motion moved by the Hon. Raphael Magyezi was not only premised on the Supreme Court ruling in Amama Mbabazi vs Yoweri Kaguta Museveni Electoral Commission and .Attorney General in Presidential Election Petition No. 1 of 2017 but also other concerns raised which included the eligibility requirement for a person to be elected as President or District Chairperson, being necessary electoral reforms.*

53. THAT in specific response to Paragraph 30 of affidavit of Morris Wodamida Ogenga Latigo Morris, I know that the Hon. Kafeero Robert Sekitoleko made an oral notice, in accordance with the Rules of Procedure of Parliament to the Rt. Hon. Speaker of Parliament of his intention to propose amendments to the term of Parliament.

***57.THAT** in specific response to paragraph 31, 32, 33,34,35,36,37 and 40 of affidavit of Morris Wodamida Ogenga Latigo, I know that the issues raised by the Hon. Monicah Amoding, MP Woman Representative of Kumi, Hon. Hellen Kahunde, MP Woman Representative of Kiryandongo, Hon. Tusiime Michael, MP for Mbarara Municipality in Mbarara District, Hon Joy Atim, MP*

Woman Representative of Lira were extensively debated in the House and at the conclusion of the debate, a question was to Members in line with Parliamentary procedure and a decision was taken.

*58. **THAT** in further response to the paragraph 37 of affidavit of Morris Wodamida Ogenga Latigo, I am advised by the Attorneys in the Attorney General's Chambers which information I verily believe to be true that not all amendments in the House of the Parliament should be contained in the Bill and that amendment can be proposed at the time of the debate and later at the Committee stage of the whole House.*

*64. **THAT** I know that on 20th December 2017, after another round of lengthy debate on the Report of the Committee on Legal and Parliamentary Affairs on the proposed amendments, Members of Parliament were asked by the Rt. Hon. Speaker of Parliament, in accordance with the Rules of Procedure of Parliament to vote on the second reading of the Constitution (Amendment) (No.2) Bill 2017."*

The averments reproduced above, were repeated in the submissions of the respondent, in opposition to the Petitions. I have read the Hansard, a copy of which was submitted to Court by the petitioners in *Petition No.10 Prosper Businge and others vs Attorney General.* I have read the proceedings of Parliament of 21st, 26th, and 27th of September 2017. I have also read the proceedings of 3rd, October 2017, 18th December 2017, 19th December and 20th December 2017.

It is not in question that when the Magyezi Bill was first introduced, it did not contain or refer to the extension of the term of Parliament or that of the District Local Councils.

My finding is that the above proposal was never presented or received by the Committee on Legal and Parliamentary Affairs at any time. The first time this proposal was presented was on Wednesday 20th December 2017 after Members of Parliament had voted on the second reading of the original Magyezi Bill.

Let me take liberty to reproduce the proceedings of Parliament as recorded in the Hansard of that date at page 5247, at which Mr. Tusiime Hon. Member of Parliament Mbarara municipality who tabled the proposed amendment and justified it.

> *Mr. Tusiime: Thank you very much Madam Chairperson. My proposed amendments of Article 61, of the Constitution are as follows:*
>
> *Amendment 1,*
> *By substituting for clause (2), the following "The Electoral Commission shall hold Presidential, general parliamentary and local government council elections within the first 30 days of the last 172 days, before the expiration of the term of the President, Parliament or local Government Council as the case maybe" To amend clause (3) by deleting the word "Presidential" appearing immediately after the word "hold"*
>
> *Justification*
> *This is intended to separate the tenure of the office of the President as provided for under Article 105(1) from the term of Parliament and*

Local Government Councils, and the election of the President since the presidential term cannot be amended by Parliament alone.

Amendment 2

This is the amendment of Article 77 of the Constitution. Article 77 of the Constitution is to be amended in clause (3) by substituting for the word "five" appearing immediately before the word "years" with "seven years".

Justification

The proposed amendment of Article 77 (3) of the Constitution is intended to increase the term of Parliament from five years to seven years to give Members of Parliament enough time to accomplish parliamentary business for the development of Uganda since five years have been found to be too short for purposes of development.

Madam Chairperson, this is because during the first two years, Members of Parliament are getting acclimatised to parliamentary procedures, conducts and business. Secondly, the other Members of Parliament in the first two years are still held up in courts of law defending their status. Accordingly, most Members of Parliament settle in the third year to start serious parliamentary business. During the fourth year, Members of Parliament are preparing for primaries within their political parties for another election and the fifth year is all eaten up by the general elections. This means that

Parliament has only one year to engage in serious parliamentary business.

Amendment 3

Article 181 is to' be amended in clause (4) by substituting for the word "five" appearing immediately before the word "years" the word "seven".

Justification

The amendment of Article 181 (4) of the Constitution is intended to increase the term of Local Government Councils from five years to seven years to align it with the tenure of the office of the President and the term of Parliament since Government must act as one .

Amendment 4

Replacement of the Article 289 of the Constitution Article 289 of the Constitution should be amended by substituting for Article 289 the following: Article 289. Term of the current Parliament "Notwithstanding anything in this Constitution, the term of the parliament in existence at the time of this Article comes in into force, shall expire seven years from its first sitting."

Justification

This provision is intended to replace the current Article 289 of the Constitution since it was introduced in 2005 in the Constitution (Amendment) Act, 2005 as a transitional provision and has since served its useful purposes and it is now a spent provision in the Constitution.

In addition, Madam Chairperson, the replacement is intended to provide for the transitional provision to extend the term of the current Parliament from five years to seven years from 2016 to 2023.

Amendment 5

Madam Chairperson, replacement of Article 291 of the Constitution. Article 291 of the Constitution is amended by substituting for Article 291 the following:

Term of the current Local Government Councils

"For the avoidance of doubt, the term of seven years prescribed for Local Government Councils by clause (4) of Article 181 of the Constitution shall apply to the term of the Local Government Councils in existence at the time that clause came into force."

Justification

This provision is intended to substitute for the current Article 291 of the Constitution since it was introduced in 2005 in the Constitution (Amendment) Act of 2005 as a traditional provision and it has since served its purposes and is now a spent provision.

Madam Chairperson, the replacement is, therefore, intended to avoid the transitional provision to extend the term of Local Government Councils from five years to seven years and to be precise, from 2016 to 2023, I beg to move, Madam Chairperson.

The chairperson: Therefore, honourable members, those are the proposals.

Following a heated debate, the sponsor of the Bill, Mr. Raphael Magyezi, gave a report from the committee of the whole House. The proceedings are set out in the Hansard as follows:-

MR RAPHAEL MAGYEZI (NRM, Igara County West, Bushenyi): Madam Speaker, I beg to report that the Committee of the whole House has considered the Bill entitled, "The Constitution (Amendment) (No.2) Bill, 2017" and passed the entire Bill with amendments and also introduced and passed new clauses - amending articles 77, 181, 29, 291, 105 and 260. I beg to report.

8.57. MR RAPHAEL MAGYEZI (NRM, Igara County West, Bushenyi): Madam Speaker, I beg to move that the report of the Committee of the whole House be adopted.

8.58. THE SPEAKER: Honourable members, I put the question that the report of the Committee of the whole House be adopted.

The speaker then wound up the proceedings as follows:-

THE SPEAKER: Honourable members, I put the question that the report of the Committee of the whole House be adopted.

THE SPEAKER: Honourable members, we shall go for the third reading. I will now invite the Clerk to ring the Bell for 15 minutes.

Therefore, I will suspend proceedings for 15 minutes. The bell will be rung and we reassemble.

(House suspended at 8.59 p.m, for 15 minutes)

(On resumption at 9:25pm) the speaker presiding

THE SPEAKER: Honourable members, we are going for third reading. I invite all the Members who are able to sit in the Chamber to come in inside so that we can take the vote. I would like to appeal that you do not make preambles. Just vote because the preambles are taking time. They were done on the second reading. You do not need to do preambles on the third reading. Just vote. Vote either Yes, No or Abstain.

From the above proceedings which I have gone to all pain to reproduce *verbatim* from the Hansard, the amendments to the Magyezi Bill, were introduced by Mr. Tusiime on 20th December 2017. The proposals were debated and passed on the same day. They were incorporated in the bill which was eventually enacted into *Sections 2, 6, 8* and *10* of the impugned Act without any input from the public.

The Public participation alluded to by the respondent in the affidavits in support of the answer to the Petition had nothing to do with the enactment of *Sections 2, 6, 8* and *10* of the impugned Act, because at the time those consultations took place, the sections mentioned above had not yet become part of the bill. I find that lack of public participation vitiated the impugned Sections of the Act.

There is no question that *Sections 2, 6, 8* and *10* of the impugned Act were introduced by Mr. Michael Tusiime's amendments extending the term of Parliament from five to seven years and they were passed on the same day they

were introduced. No consultation at all was possible or had been done by Members of Parliament, prior t their introduction.

My reading of the Hansard suggests to me that the majority of the members were unaware of the amendments introduced by Mr. Tusiime and even fewer understood them. This appears to have been a well planned ambush, premeditated and executed by a few backbenchers with the tactical support of the Deputy Attorney General and other front benchers. This is evident from the clandestine way the "Certificate of Financial Implications" was requested for and issued without the knowledge of the Clerk to Parliament days before the proposed amendments were revealed to anyone else in Parliament. They were brought up on the floor to Parliament to appear as if they were as a result of the debate, whereas not. Even the Members of Parliament present at the time the amendments were introduced were not availed time to debate the proposed amendments. I find that, there was no public consultation at all in respect of those amendments to the bill. Mr. Mwesigwa Rukutana, the learned Deputy Attorney General, suggested tongue in cheek from the bar, that the Members of Parliament had been able to consult the people through social and electronic media using their newly acquired "tablets" (computer devices). This was evidence from the bar, which has no value. This statement just helps to confirm the level of unseriousness and cynicism of Members of Parliament and the Executive attached to the constitutional duty to consult the people of Uganda upon whom the supreme authority vests, under *Article 1* of the Constitution.

The question I am required to determine is whether or not lack of public consultation or public participation would vitiate the process of passing a Constitutional Amendment Act or any other legislation for that matter. The East African Court of Justice in *East African Law Society and 5 others vs The Attorney*

General of the Republic of Kenya and 4 others Reference No.3 of 2010 found that:-

> *"lack of people's participation in the impugned amendment process was inconsistent with the spirit and intendment of the Treaty in general, and that in particular, it constituted infringement of principles and provisions in Articles 5(3) (g), and 7(1) (a)."*

I accept the submissions of Counsel Byamukama that lack of people's participation in process of amending the Constitution would vitiate the resulting Constitutional Amendment Act, and I find so. In this case it vitiated the enactment of *Sections 2, 6, 8* and *10* of the impugned Act

I will later in this Judgment, while determining the remaining issues, consider more extensively the question of lack of people's participation in constitutional amendments.

(iii) Article 93 Restriction on Financial matters in Respect of Private members Bills

Whether the amendment that introduced *Sections 2, 6, 8* and *10* contravened *Article 93* of the Constitution.

It is common ground that the Constitutional Amendment bill as first presented by Mr. Magyezi, the Hon. Member of Parliament for Igara West constituency, did not include the extension of the term of Parliament and or that of the Local Government councils. Those provisions were introduced at a much later stage during the debate on the floor of Parliament. In this regard, the Certificate of Financial Implications required under *Article 93* of the Constitution to

accompany a private members bill was only in respect of the bill as first presented.

Therefore, that certificate did not cover the provisions of *Sections 2,6,8* and *10* at the time it was issued those provisions had not been introduced. There was an attempt to introduce another Certificate of Financial Compliance, to remedy the situation, but it was flawed. It had not been requested for by the accounting officer of Parliament, but rather by one Hon. Gaster Mugoya, a Hon. Member of Parliament on the Committee of Legal and Parliamentary affairs. The Clerk to Parliament, in her testimony in Court, said it was irregular. The provisions of *Article 93* are mandatory. In this case they were not complied with in respect of *Sections 2, 6, 8* and *10* of the Act, which were, as already stated, introduced much later.

It appears clearly to me that the framers of *Article 93* of the Constitution intended to ensure that a private member's bill did not contain any provision that would impose on government any financial obligations including increment or reduction in taxes or any charge on the consolidated fund. In my view the Certificate of Financial Implications must cover the bill as it appears before it is moved, voted into law or assented to by the President. On that account also l would find that *Sections 2, 6, 8* and *10* of the impugned Act are unconstitutional, Parliament having failed to comply with the provisions of *Article 93* of the Constitution in the process of their enactment.

Uganda Law Society, the petitioner in Petition No. 03 contends in ground 1 (e) of that Petition as follows:-

> *"The act of Parliament in proceeding on a private members bill whose effect is to authorize payments of the 10th Parliament and the current local*

government councils after expiry of their initial constitutional five-year term is inconsistent with Article 93(b) of the Constitution."(Sic)

While submitting on this ground, Mr. Wandera Ogalo, learned Counsel for the Petitioner in that Petition, argued that the Parliament acted contrary to *Article 93* of the Constitution when it passed the impugned private members bill which bill had the effect of imposing a charge on the consolidated fund.

The respondent in the answer to the Petition denied any wrong doing, and sought to prove that indeed a Certificate of Financial Implications for the proposed bill had been issued by the Minister responsible for finance in that respect.

In her affidavit in support of the answer to the Petition the Clerk to the Parliament, Ms. Jane Kibirige deponed thus:-

"That I know that thereafter Hon. Raphael Magyezi, then laid on the table of Parliament the Constitutional (Amendment) (No.2) Bill of 2017 accompanied by a certificate of Financial Implications as required under the provision of Section 76 of the Public Financial Management Act, 2015 and Rules of procedure of Parliament"

The said afore mentioned certificate was annexed to the affidavit. It reads as follows:-

Certificate of Financial Implications

(Made under Section 76 of The Public Finance Management Act 2015)

THIS IS TO CERTIFY that the Bill entitled, THE CONSTITUTION (AMENDMENT) BILL, 2017, has been examined as required under

Section 76 of the Public Finance Management Act, 2015 (as Amended). I wish to report as follows:

(a) Background:

In accordance with Articles 259 and 262 of the Constitution of the Republic of Uganda, on the 27th September, 2017, Parliament granted leave to Hon. Raphael Magyezi (MP) to introduce the Constitution Amendment Bill, 2017.

The amendment of the Constitution of the Republic of Uganda is also premised on the Supreme Court decision in Amama Mbabazi Vs Yoweri Kaguta Museveni, Electoral Commission and Attorney General in Presidential Election Petition No. 01 of 2016.

(b) objective of the Bill.

The objective of the Bill is to amend the Constitution of the Republic of Uganda;

(i) To provide for the time within which to hold presidential, parliamentary and local government council elections under article 61;

(ii) To provide for eligibility requirements for a person to be elected as President or District Chairperson under articles 102(b) and 183(2)(b);

(iii) To increase the number of days within which to file and determine a presidential election petition under 104(2) and (3) and;

(iv) To increase the number of days within which the Electoral Commission is required to hold a fresh election where a presidential election is annulled under article 104(6).

(c) Expected outputs and the Impact of the Bill on the economy.

The proposed amendments to the Constitution will strengthen the Constitution's provision of Article 1 which gives the people of Uganda the absolute right to determine how they should be governed and articles 21 and 32 which prohibit any form of discrimination on the basis of age and other factors.

As a result, discrimination will be eliminated and this will strengthen the provisions of Equality and Freedom in the Constitution and provide a non-discriminatory environment for all Ugandans in terms of leadership aspirations.

In addition the amendment is expected to provide for the key recommendations of the Supreme Court ruling in Presidential Election hence strengthening the Electoral process and fairness.

(d) Planned Expenditure by major components over the MTEF period:

The planned expenditure will be accommodated within the Medium Term Expenditure Framework for the Ministries, Departments and agencies concerned.

(e) Funding and budgetary implications

There are no additional financial obligations beyond what is in the Medium Term Expenditure Framework and thus the Bill is budget neural.

(f) Expected benefits/ savings and/or revenue to Government:

i) Enhance democracy of Ugandans;
ii) Strengthen the provisions of Equality and Freedom in the Constitution of the Republic of Uganda; and
iii) Strengthen the electoral process in Uganda.

Submitted under my hand this 28th day of September, 2017.

Matia Kasaija (MP)
Minister of Finance, Planning and Economic Development

Received by: Ambanyira Joshua
Date: 29/9/2017

There is nothing in the above Certificate relating to the extension of the term of Parliament. This certificate is dated 28th September 2017. It was received at Parliament on 29th September 2017. It was laid before Parliament on 3rd October 2017. The amendment in respect of extension of the term of Parliament was proposed, debated and passed on 20th December 2017.

I find therefore, that the Certificate of Financial Implications referred to above did not relate to or cover the amendment introduced by Mr. Tusiime. There was another Certificate of Financial Implications, which was introduced in evidence during the cross examination of Ms. Jane Kibirige , the Clerk to Parliament. It was admitted as exhibit P1. Interestingly or perhaps strangely, this Certificate had not been put in evidence at all earlier by the respondents. It only appeared during cross-examination of the Clerk to Parliament in Court during the hearing.

That Certificate was exhibited together with a letter dated 18th December 2017, written by one Mugoya Kyawa Gaster (MP) and addressed to the Minister responsible for finance. It reads as follows:-

"*18th December, 2017*

Our Ref: POU/GEN/2017

The Minister of Finance, Planning and
Economic Development
Kampala

Dear Hon.

RE: REQUEST FOR A CERTIFICATE OF FINANCIAL IMPLICATIONS FOR A CONSTITUTION AMENDEMENT PROPOSAL EXPANDING THE FIVE-YEAR TERM OF PRESIDENT, PARLIAMENT AND LOCAL GOVERNMENT TO SEVEN YEARS.

As you may be aware the legal and Parliamentary Affairs Committee of Parliament, while considering the Constitution amendment (NO.2) Bill 2017 (The Magyezi Bill), came up with a number of recommendations among which is that the Parliamentary and Local Council tenure of Office be expanded from the current five years to seven years.

While Parliament has jurisdiction to amend the Parliamentary and Local Government tenure of office, an Amendment for the

<u>Presidential term requires a referendum to align the latter tenure with the former</u>

The Purpose of this letter therefore is to request for issuance of a Certificate of financial implications given the above proposal for the extension of the above tenure(s).

Mugoya Kyawa Gaster (MP)
BUKOOLI COUNTY NORTH-BUGIRI

c.c: Attorney General
c.c: Government Chief Whip"

Apparently in response to the said letter, a Certificate of Financial Implications was issued by the Minister responsible for Finance, Mr. Matia Kasaija (Mp) on 19th December 2017. There is no indication as to when the Certificate was received at Parliament and by whom. The spaces for receipt and date are blank. Interestingly, although the letter is dated 18th December 2017 it bears a rubber stamp of the office of the Deputy Secretary to the Treasury, indicating that it was received at his office on 17th December 2017 a day before it was written. I could have dismissed this as a mere discrepancy in dates resulting from an inadvertent error, but I cannot. This is because on the same letter is a hand written insertion marked "(1)" to Acting Permanent Secretary to the Treasury. It reads.

"Ag PS/ST. Please handle urgently. I have to sign before end of today 16/12".

The letter is initiated and not fully signed. I have no doubt in my mind that it was initiated by the Minister responsible for Finance, as that is the person to whom it

was addressed and the only one above the Permanent Secretary/Secretary to Treasury who could direct him as he did. This is the only reasonable inference I could make.

I was quite unprepared for a jest when I discovered the discrepancies apparent on the face of this document. A letter written on 18th December, was received by the Minister on or about 16th December, and was forwarded to and received by the Deputy Permanent Secretary on 17th December and the request set out therein was prepared and signed by the Minister on 19th December and was laid on the table of Parliament on 20th December in respect of a motion that until then had not been presented. These facts are not just interesting they are disturbing revealing as they do the fallacy of an ill and shabby attempts to conceal the obvious. Let me leave this at that.

The proposals contained in the amendment brought by Mr. Tusiime, to extend the term of Parliament and that of District Local Council were not contained in the Report of the Committee of Legal and Parliamentary Affairs Committee, otherwise they would have been part of its recommendations.

Ms. Jane Kibirige testified in Court, and stated that as the Accounting Officer of Parliament she is the only one who could have originated a letter requesting for a Certificate of Financial Implications. She did not write the letter in question.

There is nothing in the Hansard, to indicate that before Mr. Tusiime proposed the amendment as he did, similar proposals had earlier been made and adopted as recommendations of the Committee of Legal and Parliamentary Affairs upon which Mr. Gaster Mugoya could have based his letter. I find that this letter did not satisfy the requirements of *Section 76* of the Public Finance Management Act and those of *Article 93* of the Constitution. The letter requesting for a Certificate of Financial Implications was written by a person without authority to do so a

prankster I would call him. The Certificate issued in response to the letter was therefore in my view invalid. It also appears to have been a forgery or an afterthought and a very poor one at that.

Therefore the amendment to the bill, as introduced by Mr. Michael Tusiime, was and remains invalid, null and void, Parliament having proceeded upon it and passed it without having first obtained a valid Certificate of Financial Compliance as required by the law. I have no hesitation in finding that, the Tusiime amendment to the bill contravened *Article 93* of the Constitution.

For the reasons I have given above, I would answer issues 1, 2, 3 and 4 in the affirmative.

(iv) <u>Retroactive application of Act 1 of 2018</u>

Whether *Sections 2, 6, 8* and *10* of the impugned act are unconstitutional in so far as they were applied retroactively.

The case for the petitioners as I understood it is that Parliament had no power to extend its term in office from 5 to 7 years effective from 2016 when its current term commenced. I will not dwell on the theory of social contract in the answer to this issue. It has been discussed in the Judgments of my learned brother Justices and in that of my sister Hon. Lady Justice Elizabeth Musoke. I have already set out in detail the constitutional history of this country which I perceive gives an introduction to this subject.

All I can say is that, Hobbes' theory of social contract appears to me to have been more suited to a feudal system than a democracy. It is quite evident from the Constitution itself that the people through the Constitution are supreme. The Executive, the Parliament and the Judiciary and other state organs and agencies are not supreme but they are subject to the people through the Constitution. It seems to me that the relationship between the people and the Parliament is that

of principal and agent. The people appoint agents through an election process with specific mandate set out in the Constitution. The people retain the power to determine how they are governed. Parliament, therefore, has no absolute power to legislate in any way it desires even if it has an absolute majority because legislative powers remain vested in the people. The majority in Parliament must exercise power within the confines of the Constitution, bearing in mind that they do not legislate for themselves or for the Political Party to which they belong, but for all the people the living and those yet unborn. The individual interests of each Member of Parliament must, therefore, take the back seat in regard to constitutional amendments.

In all Constitutions Uganda has had since independence the people have given Members of Parliament a mandate of only five years. Every five years, the mandate expires and has to be renewed by the principal, through an election.

The last time the people renewed the agency of each and every individual member of the current Parliament was during the 2016 general elections. The agency of the President was also renewed at the same time for the same period. The Constitution provided so. The President, all political party candidates, independent candidates campaigned and sought the mandate of the people for five years on the basis of their respective five years programmes.

All the manifestos for all political parties presented their five years programmes to the people prior to the general elections. This was the basis of their campaign upon which they sought from their principal the people of Uganda a fresh five year mandate in Parliament. The same applied to all independent candidates. The NRM manifesto in this regards states:-

> *"In February 2016, the people of Uganda will participate in yet another important general election. It is now a democratic tradition in Uganda to hold elections every five years so that the people*

exercise their right to choose their leaders at all levels — Local Government, Parliament and President.

Having been overwhelmingly elected in 2011, the NRM is now seeking the renewal of the electoral mandate to continue serving the people with diligence and dedication. Therefore, it is presenting itself and her candidates for President, Parliament, Local Government, Youth, Women, People with Disabilities and Older People's Councils — to the people of Uganda.

In this manifesto, the NRM lays out the policies and programmes, which will guide the NRM Government over the next five years following its reelection by the people of Uganda.

Consolidate the establishment of the rule of law

Increase people's participation

Empower women and the youth

Promote freedom of speech and worship

Hold regular free and fair elections, and consolidate of equity" (Emphasis mine)

Having been elected on a five-year contract, Members of Parliament could not, and had no power to extend their own term of office for an extra two years, as the mandate given to them in 2016 was for only 5 years. More importantly, neither the members of Parliament nor the President have any political agenda approved by the people for the extra two years.

While determining a similar issue Karokora JSC in *Ssemogerere and 4 others vs Attorney General; Constitutional Appeal No.1 of 2002,* firmly put is as follows:-

> *"It is the people of Uganda who are sovereign and exercise their sovereignty through the Constitution. It is the Constitution, not the Parliament nor Executive nor Judiciary which is supreme. Each of these organs can only exercise the jurisdiction conferred on it by the Constitution. None can confer on itself jurisdiction not authorised by the Constitution."*
>
> *Under 1995 Constitution, independence of organs of state must go with responsibility and accountability. Each of these organs must be transparent and accountable in their operations. Under articles 1 and 2 people are sovereign and exercise their sovereignty through the Constitution which is Supreme Law or Uganda and has a binding force on all authorities and persons throughout the country."(Sic)*

I am bound by the above decision and I also share the sentiments expressed by the learned Justice of the Supreme Court. This position of law has not changed. I find that Parliament by enacting *Sections 2, 6, 8* and *10* of the Constitution Amendment Act 1 of 2018 and providing in that law that they would operate retroactively contravened *Articles 1* and *2* of the Constitution. This issue is answered in the affirmative.

(v) <u>Reasonableness and justification.</u>

Whether Parliament acted reasonably and was justified when it introduced Sections 2, 6, 8 and 10 of the impugned Act.

Finally in respect of issues 1,2,3 and 4 regarding Sections 2,6,8 and 10 of the impugned Act, I would still have answered them in the affirmative on account of the decision of Parliament having been irrational and as such in total contravention of Articles 1,2(1) and 2(2) and 8A of the Constitution. Irrational because, the amendment of the Constitution, extending the term of Parliament to 7 (seven) years was brought in bad faith, as I have already shown above. In addition, the justification for the amendment had nothing to do with the principles of national interest, and common good of the people of Uganda. The amendment appears to have been based solely on the self interest of members of Parliament.

The amendment was not proposed by the people. It was not discussed in the select Committee and was not mentioned in that Committee's Report to the House. It did not form part of the original draft bill. It did not form part of the bill that was published in the gazette and presented to Parliament. The justification was stated by Mr. Michael Tusiime to be:-

> *"Because during the first two years, members of Parliament are getting acclimatised to parliamentary proceeds, conducts and businesses.*
>
> *Secondly, other members of Parliament in the first two years are still held up in Courts of law defending their status. Accordingly most members settle in the third year to start serious parliamentary business. During the fourth year, members of Parliament are preparing for primaries within their political parties, for another election and the fifth year is all eaten up by the general elections. This means Parliament has only one year to engage in serious parliamentary business."*

This justification for the extension of the term of Parliament has absolutely nothing to do with the will and aspirations of the people of Uganda. It is bluntly

in the self interest of the Members of Parliament and as I have already stated, it is irrational. The people of Uganda did not elect Members of Parliament for them to go and learn Parliamentary rules and procedures for two years. That is why the law provides for minimum qualification for Members of Parliament.

Mr. Tusiime appeared to suggest that Members of Parliament are either unknowledgeable or unqualified. I do not accept that our Members of Parliament are unknowledgeable or unqualified. All Members of Parliament are well qualified. The majority have post graduate qualifications. It would not be an exaggeration to state that, Parliament has a concentration of the best brains in this Country, almost in all disciplines. Some Members of Parliament have been in the House for 10 years or more. It cannot therefore be true that the same people require two years to study and understand Parliamentary rules and procedure.

Looking at this Country's constitutional history which I endeavored to set out earlier in this Judgment, more than 50 years ago in 1962, Members of Parliament were able to debate intricate issues and pass legislation without precedents. From the reading of the Hansard of 1962-1967 and 1967 to 1971, excerpts of which I have reproduced earlier in this Judgment the level of debate, the language, the ethics and etiquette was only comparable to that of British House of Commons. I am hesitant to say the same of the current Parliament. Perhaps it was for this very reason that Mr. Tusiime moved the motion that he did. If that be the case, probably a Parliamentary pre-entry aptitude examination would have remedied the mischief. There is no absurdity in supposing that had Parliament passed legislation tightening the qualifications of its members, the Constitution would have in this respect been left intact and the ends of justice would have been met.

I am unable to find any reasonable justification as to why Members of Parliament would amend the Constitution to grant themselves two more years on top of their

current five years simply to get acclimatised to Parliamentary procedure, conduct and business. Having done so, for the learned Deputy Attorney General to simply insist that, the amendment was the reflection of the will of the people, whom the Members of Parliament had consulted, using 'Ipads'.

The reason why Parliament has to give justification for the passing of a law is the legal requirement that the law must be rational and its enactment must be desirable. In the case of a constitutional amendment law, it must also be in national interest and for the common good of the people as provided for under *Article 8A(1)* which provides that:-

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

Mzolo, Nkosinathi a South African Author, in his essay "*The Rule of law, the principle of legality and the test for rationality: a critical analysis of the South African jurisprudence in the light of the separation of power"* noted as follows:-

> *"...the Constitution of the Republic of South Africa provides that all actions will only be valid if they comply with the rule of law as a constitutional value thereof. However this is not to imply that other values of the constitution like transparency, openness and accountability are less important than the rule of law but most litigation has occurred under rule of law, hence why the focus of this thesis is on the rule of law. Under this legality principle, there are a lot of principles like the principle of authority, but rationality appears to be the most significant and the courts have focused mostly on it. In defining what legality rationality is, our courts have pronounced that it is a legal safety-net applicable to every exercise of*

public power but more particularly where no constitutionally defined right has been violated, it protects individuals against the abuse of power…"

I am unable to find that the amendment introduced into the bill, by Mr. Tusiime was rational, justifiable, and was based on national interest and the common good of the people of Uganda as required by the Constitution.

The framers of our Constitution, in their wisdom, anticipating that such bizarre circumstances may arise in future, granted power to this Court to guard the gates of justice and to defend the Constitution from any such affront. We are now required to do so. With a sword in one hand and scales of justice in the other, this Court stands guard at the gates of justice to declare as I do that:- the extension of the term of Parliament and that of the District Local Councils from 5 to 7 years as provided for retroactively, under *Sections 2,8, 6* and *10* of the Constitution (Amendment) Act (Act 1 of 2018) is null and void *abnitio* and has no effect.

(vi) Re -introduction of Presidential term limits

Whether or not *Section 5* of the impugned Act, which reintroduced into the Constitution, a term limit for the President and entrench the same is constitutional.

The Hansard which is annexture 'F' to *Petition No. 10 of 2018, Prosper Businge & 3 others vs Attorney General*, sets out the proceedings of Parliament on 20th December, 2017 that gave birth to *Section 5* of the impugned Act as follows:-

"MR NANDALA-MAFABI: I want to move an addition of a new clause. Madam Chairperson, since you allowed hon. Michael Tusiime to raise an amendment, I want to bring an amendment to Article 105 of our

Constitution to introduce term limits -[Members: Aye] - thank you. I want to say that a person shall not hold office as President for more than two terms. In addition to that, this should take effect from the next Parliament. We do not want to count this Parliament; we want this one to be entrenched as (f) in chapter 5 under amendment - entrench it as chapter 7, Article 105 (I) and (2). I beg to move."

This amendment coming on the same day the bill was passed into law had no input from the public. It was not accompanied with a Certificate of Financial Implications and as such contravened *Article 93* of the Constitution.

It is contended by the petitioners that, the amendment also directly amended *Article 260* which stipulates as follows:-

260. Amendments requiring a referendum.

(1) A bill for an Act of Parliament seeking to amend any of the provisions specified in clause (2) of this article shall not be taken as passed unless—

(a) it is supported at the second and third readings in Parliament by not less than two-thirds of all members of Parliament; and

(b) it has been referred to a decision of the people and approved by them in a referendum.

(2) The provisions referred to in clause (1) of this article are—

(a) <u>this article;</u> (Emphasis mine)
(b) Chapter One—articles l and 2;
(c) Chapter Four—article 44;
(d) Chapter Five—articles 69, 74 and 75;

(e) Chapter Six—article 79(2);

(f) Chapter Seven—article 105(1);

(g) Chapter Eight—article 128(1); and

(h) Chapter Sixteen .

Article 260 being an entrenched Article cannot be amended by Parliament without first being approved by the people in a referendum. Since the words of *Article 260* are plain and clear I will not belabour its interpretation.

During the debate the learned Deputy Attorney General warned Members of Parliament that the proposed amendment would require a referendum under *Article 260* to no avail. Having been passed and realising that it was unconstitutional a futile attempt was made to present the amendment as a separate clause under *Article 105.* I say futile because, *Section 5* of the impugned Act by implication, attempts to amend *Article 260* without the amendment bill first being referred to a decision of the people in a referendum. I accept the submissions of Mr. Mabirizi, that such amendment, also referred to a colorable legislation is unacceptable. This was the holding by the Supreme Court in *Ssemogerere & others Attorney vs General Constitutional Appeal No. 1 of 2002* in which:-

"In the instant case the parliament transplanted the nullified provision of section 121 of the Evidence Act see Major General David Tinyefuza Vs Attorney General (supra) and into section 5(2) of the Act 13/2000.

Whereas Parliament had powers under article 259 of the constitution to amend any provisions of the Constitution, I agree with Mr. Lule (SC)'s submission that the amendment brought about by section 5(2) of the Act 13/2000 had the effect of amending articles 1, 2(1) (2), 28, 41, 44 (c) and

128 (1) of the Constitution by implication/infection. A number of decided cases from common Law Jurisdiction illustrate amendments by infection."

Further, Karokora JSC went on to state that:-

"In my view, if it was to be otherwise, Parliament could amend any provisions of the Constitution, including the entrenched provisions without complying with the prescribed procedure in chapter 18 of the Constitution as long as it avoided mentioning them in the amending Act.

Now, the question is whether Act 13/2000 amended articles 1 and 2 of the Constitution. Article 1 of the Constitution provides:-
"1. All powers belong to the people who shall exercise their sovereignty in accordance with this constitution. Article 2 of the Constitution provides: -
"2 (1) the Constitution is the Supreme Law of Uganda and shall have binding force on all authorities and persons throughout Uganda.

(2) If any other law or any custom is inconsistent with any of the provisions of this constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void."

The provisions of these articles are very clear. It is the people of Uganda who are sovereign and exercise their sovereignty through the Constitution. It is the Constitution, not the Parliament nor executive nor judiciary which is supreme. Each of these organs can only exercise the jurisdiction conferred on it by the Constitution. None can confer on itself jurisdiction not authorised by the Constitution."

In the above cited appeal, the Supreme Court upheld the minority decision of the Constitutional Court and re-echoed with approval of the Judgment of Twinomujuni JA when he stated that:-

> *"The above amendment section (5) (2) of Act 13/2000) which amended article 97 of the Constitution can only survive in a jurisdiction where parliament, like in United Kingdom, is supreme... In Uganda today, the amendment amounts to a coup against the sovereignty of the people and the Supremacy of the Constitution. It cannot exist side by side with articles 1 and 2 in the same constitution. It contravened the two articles and Parliament alone cannot pass such amendment unless it first consults the people in a referendum in accordance with chapter 18 of the constitution. I would hold that although section 5 (2) of the Constitution (Amendment) Act 13/2000 did not expressly and specifically name articles 1 and 2 of the Constitution as being amended, yet it had the effect of repealing or varying the articles and therefore it amended them by necessary implications"*

In this particular case, the impugned *Section 5* of Act 1 of 2018, did not just amend *Article 260* of the Constitution by effect, infection or impliedly. It amended it directly by introducing therein a new clause 105(2). In *Ssemogerere and Another vs Attorney General (Supra)* on this very point, Order JSC stated as follows:-

> *"In the instant case the effect of article 97 (2) and (3) as amended by section 5 of Act 13/2000 is to restrict the citizens' access to information in the hands of Parliament subject to the absolute discretion of Parliament to release or not to release the information. In my view the provisions of section 5, conflict with the right of access to information, guaranteed by article 41. They are, therefore, null and void.*

Act 13/2000 expressly amended article 41 by the introduction of the new clauses (2) and (3) to article 97. Part of the appellant's case is that other articles of the Constitution were amended by implication or infection. These are articles 1, 2(1) and (2), 28, 44 (c), 128 (1), (2) (3) and 137 (3). The respondent's contention is that these articles were not amended, just as article 41 was not amended, because the preamble to Act 13/2000 did not specifically state that they were to be amended.

Amendment of the Constitution is provided for by article 258 of the Constitution, the provisions of which are to the effect that the Constitution can only be amended if an Act of Parliament is passed for that purpose; the Act has the effect of adding to, varying or repealing any provision of the Constitution; and the Act has been passed in accordance with the provisions of Chapter Eighteen of the Constitution. To me, it follows that if an Act of Parliament has the effect of adding to, varying or repealing any provisions of the Constitution, then the Act must be said to have amended the affected article of the Constitution. The amendment may be effected expressly, by implication or by infection, as long as the result is to add to, vary, or repeal a provision of the Constitution. It is immaterial whether the amending Act states categorically that the Act is intended to affect a specified provision of the Constitution or not. It is the effect of the amendment which matters."

In the same case Kanyeihamba JSC who delivered the lead Judgment held:-

> *"In my opinion, the requirements of Chapter Eighteen are mandatory and cannot be waived, not even by Parliament. Consequently, and with the greatest respect, the majority of the learned Justices of the*

Constitutional Court erred in law in holding that those provisions could be waived and that in any event, they were not essential to validating any constitutional amendment. Be that as it may, it is apparent that Parliament failed to comply with the Constitutional provisions when attempting to amend by implication or infection Articles 2(1), 28, 41(1), 44(c), 128(2), (3) and 137(3). Any amendments to Articles 2(1), 44 and 128 need to be referred to a decision of the people for approval by them in a referendum. The amendment of the Articles 28, 41(1) and 137(3) need to be passed by two-thirds majority on each of the second and third readings of the bills. Thereafter, a bill must be accompanied by the certificate of the Speaker to the effect that it has been passed in accordance with the provisions of Chapter Eighteen. Since the respondent has persistently denied that any of these Articles and clauses were amended, the Attorney General was hardly in a position or mood to show that these provisions were properly amended and indeed, in my opinion, he failed to do so.

Regarding the provisions which the respondent admits to have been expressly amended, namely Articles 88, 89, 90 and 97, it is my view that their amendment failed to comply with the provisions of the Constitution in that the bill effecting their amendment should have been accompanied by a certification by the Speaker of Parliament indicating that the bill had complied with the provisions before the Presidential Assent. In my opinion since the respondent failed to prove that the Constitution was complied with, the amendment failed to become an Act of Parliament and consequently, cannot be regarded as part of the Constitution."

In my view this is a matter that has been determined already by the Supreme Court in the above cited cases. I agree entirely with the above decision, in any event I am bound to follow the decision of the Supreme Court, as provided for Under *Article 132 (4)* of the Constitution.

I am constrained to go beyond the letter of the impugned legislature, because it is desirable to do so in the circumstances of this case since the process of enacting the impugned Act is being challenged. The impugned Bill as presented by Raphael Magyezi did in fact list *Article 260* being one of those that it had directly amended. However, *Article 260* did not appear in the final bill that eventually became the law. Instead the Nandala Mafabi amendment was placed under *Article 105* of the impugned Act. The Clerk to Parliament during cross-examination, did state that a bill must reflect exactly what is set out in the Hansard and the first Parliamentary Counsel cannot amend or alter that record. At page 5263 *of the Hansard of 20th December 2017.* It is recorded as follows;-

> *"REPORT FROM THE COMMITTEE OF THE WHOLE HOUSE*
> *8.57*
>
> *MR RAPHEAL MAGYEZI (NRM, Igara County West, Bushenyi): Madam Speaker, I beg to report that the committee of the whole House has considered the Bill entitled "The Constitution (Amendment) (No.2) Bill, 2017" and passed the entire Bill with amendments and also introduced and passed new clauses- amending articles 77, 181, 29, 291, 105 and 260. I beg to report."*

It is apparent for the above excerpt that the Magyezi bill listed *Article 260* as one of those that had been amended. Why the same did not eventually appear in the impugned Act, is self evident. It was removed by the Attorney General for the

reasons he gave on the floor of Parliament. That remained a hollow and futile attempt to conceal that what is obvious to the legal mind.

There is no doubt, therefore, that *Article 260* was amended by the impugned Act either directly or indirectly or both.

I find, therefore that *Section 5* of the impugned Act is unconstitutional as it contravened Article 260 of the Constitution and I hold so.

(2). Whether or not *Sections 3 and 7* of the impugned Act which removed the 75 year age limit of the President and lowered age limit of District Chairpersons from 35 to 18 years is unconstitutional.

Although the thrust of the original Magyezi bill, as set out in its preamble, and the justification that followed later, was to amend *Articles 102 (b)* and *183 (2) b* of the Constitution, the constitutionality of those amendments as subsequently set out in *Sections 3* and *7* of the impugned Act was only challenged in *Petition No. 5 of 2018, Hon. Karuhanga Kafureeka Gerald & 5 Others vs Attorney General* and *Petition No. 10 of 2018, Prosper Businge & 3 others vs Attorney General.*

All the other Petitions challenged the constitutionality of the entire process of enacting the impugned Act they did not directly challenge *Sections 3 and 7*.

The petitioners contended in Petition No.5 of 2018 paragraph 14(d) thereof as follows:-

> "*(b)That Section 3 of the Constitution (Amendment) Act, 2017 in as far as it purports to lift the minimum and maximum age qualification of a person seeking to be elected as President of the Republic of Uganda is inconsistent*

with and in contravention of Articles 1, 3, 8A, 79, 90 and 94 of the Constitution.

(*d*) *That Section 7 of the Constitution (Amendment) Act, 2017 in as far as it purports to lift the minimum and maximum age qualification of a person seeking to be elected as a district chairperson is inconsistent with and in contravention of Articles 1, 3, 8A, 79, 90, 94, and 259 of the Constitution.*"

In reply therein to the respondent in his answer to the petition replied in paragraph 17(d):-

"(b) The Respondent denies that Section 3 of the Constitution (Amendment) Act, 2018 which lifts the minimum and maximum age qualification of a person seeking to be elected as President of the Republic of Uganda is inconsistent with and in contravention of Articles 1,3, 8A, 79, 90 and 94 of the Constitution of Uganda.

(*d) The Respondent denies that Section 7 of the Constitution (Amendment) Act, 2018 which lifts the minimum and maximum age qualification for a person seeking to be elected as district chairperson in inconsistence with or in contravention of Articles 1,3, 8A, 79, 90, 94 and 259 of the Constitution of Uganda.*

I have found nothing to suggest, let alone prove that Parliament cannot, through the established constitutional process, vary the qualifications of the President or that of the District Chairperson. The qualifications of the President and those of Chairpersons District local governments do not in my view form part of the basic structure of the Constitution which I set out earlier in this Judgment. I, therefore, accept the submissions of the Hon. Learned Deputy Attorney General that

Sections 3 and 7 of the impugned Act are not inconsistent with or in contravention of Articles 1, 3, 8A, 79, 90 and 94 of the Constitution.

The people of Uganda, through their Constitution, should be able to freely, whenever it is absolutely necessary to do so, vary the qualification of their leaders. These qualifications include but are not limited to citizenship, age, and academic qualifications. The same ought to apply to the disqualifications of the same leaders. It may be, for example, found necessary in future to require every Presidential candidate to be computer literate, fluent in both English and Swahili and at least two local languages the list is endless.

The framers of the Constitution did not and for good reason, find it necessary to entrench the provisions that relate to qualifications and disqualifications of the President and /or members of Parliament. I have read the Odoki report excerpts of which I have produced earlier in this Judgment. Nowhere in the report did the people of Uganda, suggest, propose or debate, the age limit of the President. This issue appears for strange reasons to have sprung up during the Constituent Assembly debate.

Be that as it may, it eventually found its way into the Constitution. For that reason alone I would not regard it one of the basic structures of our Constitution.

The Magyezi bill, as first tabled in Parliament, covered two specific areas in the Constitution. The first was *Article 102* and *183* in respect of the age limits for the President and Chairpersons of District Local Councils, the second was in respect of *Articles 61, 104* in respect of the recommendations of the Supreme Court in *Amama Mbabazi vs Yoweri Kaguta Museveni and Others; Supreme Court Election Petition No. 1* of 2016.

None of the petitioners presented any serious challenge to the constitutionality of the original bill as first presented. I have already found that it was not in-contravention of or inconsistent with *Articles 1, 2* and *8A* of the Constitution. There was evidence that a Certificate of Financial Implications was properly obtained and was indeed available before the motion to introduce the said bill was proceeded with upon in Parliament. It was suggested by the Petitioners that, the Supreme Court's directions were issued to the Hon. The Attorney General and not to anyone else and as such only him could have initiated a constitutional amendment bill in compliance thereto.

This argument does not appeal to me in the least. If the Hon. The Attorney General was to neglect his duty or simply went to sleep, would the Country grind to a constitutional stand still? I do not think so. That is why in their wisdom, the framers of the Constitution provided for private members bills.

In *Greenwatch vs Attorney General & NEMA; High Court Civil Suit No. 140 of 2002* the High Court directed the Attorney General to initiate a law to regulate the importation, manufacture and use of plastics. The Attorney General, to my knowledge, has never brought such law. The impact of plastics on the environment and on the lives of Ugandans is a mess. In my view, nothing would stop any Member of Parliament from sponsoring a private members bill to bring into effect the order and recommendation of the High Court in the above cited case in fact there was an attempt to do so.

The only serious issue raised against the original Magyezi bill is that, it was vitiated by the introduction of the *Tusiime* and *Nandala Mafabi* amendments, extending the term of Parliament and that of the District Local Councils, and the reintroduction and entrenchment of the Presidential term limit, which I have already dealt with earlier in this judgment.

Further, that the entire process of conceptualising, consulting, debating and enacting the whole of the impugned Act was inconsistent with and in contravention of *Articles, 1, 2, 3(2), 8A, 93, 160* and the spirit of the Constitution

I will now proceed to determine whether the impugned Act may be saved by severing therefrom *Sections 2, 5, 6, 8, 9, 10* and retaining *Sections 1, 3, 4* and *7.* I have found no reason why the impugned *Sections 2, 5, 6, 8, 9* and 10 cannot be severed from the impugned Act the same having been declared unconstitutional and retain remaining sections. This is possible, because, *Sections 2, 5, 6, 8, 9*and *10* were introduced later into bill. It follows therefore that *Sections 1, 3, 4* and *7* which constituted the original bill would be able to still stand on their own, after the impugned *Sections 2, 5, 6, 8, 9* and 10 which were introduced later have been removed.

However, I have to consider all the pleadings and submissions in respect of the procedural and substantive issue raised and determine whether or not they vitiated the impugned Act as whole rendering it unconstitutional, the above notwithstanding.

In his affidavit in support of the petition Ssemujju Ibrahim depones as follows:-

> *15. THAT on the 26th day of September, 2017, the Speaker of Parliament, the Rt. Hon. Rebecca Alitwala Kadaga, contrary to the ruling of Deputy Speaker, amended the order paper to include a motion by Hon. Raphael Magyezi that sought leave of Parliament to introduce a private member's Bill to amend the Constitution to among others amend Article 102(b) of the Constitution to remove the age limit. (See copy of the Hansard dated September 26th 2017 hereto attached as Annexture "E".*

16. THAT the decision of the Speaker of Parliament to amend the Order Paper to include a motion by Hon. Raphael Magyezi that sought leave of Parliament to introduce a private member's Bill was inconsistent with and in contravention of Rules 8, 27, 29, 174 of the Rules of Procedure of Parliament, Article 94 of the Constitution of Uganda.

17. THAT shadow Minister for Constitutional Affairs Hon. Medard Lubega Sseggona asked the Speaker why Hon. Raphael Magyezi's motion that was submitted on September 21st 2017 was being placed on the Order Paper first ahead of Hon. Patrick Nsamba's which was submitted on September 18th and met all the requirements first, something the Speaker ignored. (See copy of the Hansard dated September 26th 2017 hereto attached as Annexture "E").

In reply thereto, Jane Kibirige the Clerk to Parliament stated in her affidavit in support of the answer to the petition as follows:-

11. THAT in specific reply to paragraphs 12, 13, 14, 15, 16,28,29,30,31 of the affidavits of Ssemujju Nganda, Munyagwa Mubarak, Odur Jonathan, Gerald Karuhanga and Winfred Kizza I know that under the provisions of Rule 24 of the Rules of Procedure of Parliament of Uganda the Speaker of Parliament has the authority to determine the order of business of the House.

12. THAT in further response to paragraph 16 of the affidavit of Hon Ssemujju Nganda, paragraph 12 of the affidavit of Munyagwa I know that the

provisions of Rule 165 of the Rules of Procedure of Parliament which provides for the functions of the House Business committee are subject to Rule 24.

13. THAT in specific reply to paragraph 17 of the affidavit of Ssemujju Nganda I know that according to the Rules of Procedure of the Parliament of Uganda a motion for introduction of Private Members' Bill takes priority over a motion such as that which the Hon. Patrick Nsamba proposed to move.

What transpired in Parliament is set out clearly in the Hansard, copies of which are annexed to the affidavits of the petitioners in Petition No. 5 of 2018.

"MOTION SEEKING LEAVE OF PARLIAMENT TO INTRODUCE A CONSTITUTIONAL AMENDMENT BILL TO AMEND THE CONSTITUTION

THE SPEAKER: Honourable members, I indicated earlier that these motions are not for substantive debate; they are just seeking leave.

MR SSEGGONA: Thank you, Madam Speaker. I rise on two points of procedure. The first -

THE SPEAKER: Honourable members, can you take off your bandanas.

MR. SSEGGONA: Thank you, Madam Speaker. Earlier on, I rose on a point of procedure and you over ruled me – I agree that my procedural point was premature.

Madam Speaker, this is the greatest test in our lives as Members of Parliament. Members of this House petitioned you on various dates,

seeking for your indulgence to be placed on the Order Paper, and you clearly read out the order of presentation of these motions and the notices. The notice and motion of Hon. Nsamba was the first in time. Your office received both the notice and the motion accompanying the notice before the notice presented by Hon. Raphael Magyezi.

Madam Speaker, this is a difficult time for us as a Parliament. Earlier, I asked whether it would not be procedurally correct that you deal with the first motion and we deal with the motions in their order of presentation.

The second procedural question, – and maybe for avoidance of doubt – arises out of rule 26 of our Rules of Procedure. Rule 26(1) states thus:

"(1) The Clerk shall send to each Member a copy of the Order Paper for each sitting -

(a) in the case of the first sitting of a meeting, at least two days before that sitting.

(b) in the case of any other sitting, at least three hours before the sitting without fail."

We received the Order Paper without this particular motion and when we appeared here, Madam Speaker, you used your power to amend the Order Paper. My understanding, and this is where I seek your procedural guidance, is that you can only amend and issue an Order Paper a minimum of three hours before the sitting and without fail.

Why am I very insistent on this, Madam Speaker? Apart from my own reputation as a Member of this House and the institution of

Parliament, I am more deeply concerned about my Speaker and I insist, my Speaker. You have sailed us so well so far. However, this time, we are concerned that you are being stampeded by Members – (Interjections)- if I am one of them, I apologise – to have their business added onto the Order Paper, contrary to the manner stipulated by the rules. I seek your guidance.

THE SPEAKER: Honourable members, when this matter began, I was out of the country. The Speaker presiding then, on the Floor of this House, informed you that I had received these notices and the motions and that a date would be appointed. That was before I came back. So, you received notice.

MR SSEGGONA: We did not have this motion on the Order Paper, Madam Speaker. Actually, the presiding Speaker was categorical that we would never be ambushed. If we could not be ambushed by anyone else, how about our very own? I think we are moving the wrong way.

MR SSEKIKUBO: Thank you, Madam Speaker. As you are aware, I am a seconder of the motion by Hon. Patrick Nsamba and our motion is for a motion for a resolution of Parliament urging Government to urgently constitute a constitutional review commission. This was moved under rule 47 of our Rules of Procedure.

Our motion and notice were received on 18 September 2017. You are aware that the motion you are giving space now to come before ours was only submitted on 22 September 2017, four days after our motion and notice were submitted to your office and the office of the Clerk.

Madam Speaker, rule 26(3) provides thus, and I would like you to listen to this, Members: "The Clerk shall keep a book to be called Order Book in which he or she shall enter and number in succession all matters intended for discussion at each meeting." If that book can be brought here, it will show how our motion was brought in first, four days before hon. Magyezi brought in his notice and motion.

Madam Speaker, we pray for your fairness. We are all backbenchers in this matter and even our motion is ready for debate. We are not even seeking leave but we are ready for debate. Allow us just a few minutes to move our motion -

THE SPEAKER: Hon. Ssekikubo, you will move your motion. I also want to remind you that under our rules, Bills take priority.

MR SSEKIKUBO: Yes, Madam Speaker. However, at this stage, it is still a motion. There is no Bill yet on the Floor of Parliament. It is a mere motion."

Following this exchange, the Speaker adjourned the house to Wednesday 27th September at 2.00 p.m. The relevant part of the proceedings of Parliament on that day are set out in the Hansard as follows:-

"MOTION SEEKING LEAVE OF PARLIAMENT TO INTRODUCE A PRIVATE MEMBERS' BILL ENTITLED, "THE CONSTITUTIONAL (AMENDMENT) BILL, 2017"

THE SPEAKER: Honourable members, before the motion is moved, I would like to reiterate that what is happening here is only seeking leave. There is no amendment being done today. It is a question of seeking leave to bring a Bill. When the Bill is printed, gazetted,

brought here for first reading and sent to the committee, that is when the process will start. For now, this is just seeking leave.

MR RAPHAEL MAGYEZI (NRM, Igara County West, Bushenyi): Thank you. Madam Speaker, I beg to move a motion under rules 47, 110 and 111 of the Rules of Procedure of Parliament seeking leave of this House to introduce a private Members' Bill under Article 94(4)(b) of our Constitution for a Bill entitled, "The Constitutional (Amendment) Bill, 2017."

From the above proceedings, it is evident that the Rt. Hon Speaker of Parliament erred when she proceeded with the motion of Mr. Magyezi, on 27th September 2018 instead of proceeding with the motion of Mr. Nsamba which had been received earlier as required by the Rules of Parliament.

She also erred when she amended the order paper to specifically introduce therein and include the motion of Mr. Raphael Magyezi without sending the same to Members of Parliament at least three hours before the sitting. Rule 26(1) clearly stipulates that, this requirement must be fulfilled "at least three hours before the sitting without fail" I find that this mandatory requirement was not complied with.

This Court has held before in *Oloka-Onyango & others (supra*) and the Supreme Court in *Ssemogerere vs Attorney* (Supra), that Parliament must comply with its own Rules. This is not without a history which is referred to in the Preamble to the Constitution.

In view of our Constitutional history especially what transpired on 15th April 1966, when Parliament enacted an interim Constitution without having debated

it or even seen it, the 1995 Constitution requires Parliament, while conducting its business, especially passing any legislation to comply strictly with all the legal procedures set out in the law and with its Rules that is the ratio decision of the *Oloka-Onyango and Others Vs Attorney General (Supra)* in which an act of Parliament was declared unconstitutional on account of Parliament having failed to comply with its own Rules and Procedures. See also: *Paul Kawanga Ssemogerere and Others Vs Attorney General Supreme Court Constitutional Appeal No.1 of 2012 (supra)* specifically page 57 of the Judgment of Odoki CJ.

In this case it failed to do so, even when the Rules set out were couched in mandatory terms and the members had brought to the attention of the Speaker the specific Rules that Parliament was required to comply with.

It was submitted for the petitioners and by Mr. Mabirizi as set out in his Petition and on paragraphs 146, 147, 148, 149 and 150 of his affidavit in support of his Petition that Parliament erred when it failed to observe Rule 201(2) of its own Rules, which requires that:-

> *"(2) Debate on a report of a Committee on a bill, shall take place at least three days after it has been laid on the Table by the Chairperson or the Deputy Chairperson or a Member nominated by the Committee or by the Speaker."*

It was further submitted that, during the debate, the learned Deputy Attorney General, Hon. Mwesigwa Rukutana, moved a motion to suspend that Rule, which motion was not seconded. They asked this Court to find that Parliament, failed to comply with the said Rule of procedure during the enactment of the impugned Act in the result that said Act is a nullity.

I have perused the Hansard, specifically the proceedings of the 18th December 2017. The excerpts relevant to this issue are reproduced below.

> *10.56*
>
> *THE CHAIRPERSON, COMMITTEE ON LEGAL AND PARLIAMENTARY AFFAIRS (Mr .Jacob Oboth): Madam Speaker, I beg to lay on the Table a copy of the main report before I make the presentation, which is accompanied by the minutes of the proceedings of the committee.*
>
> *THE SPEAKER: Honourable members, take your seats. The practice of Parliament _*
>
> *MR. OBOTH: Madam Speaker, I also beg to lay on the Table copies of stakeholders , submissions.*
>
> *Madam Speaker, this is the report on the Constitutional (Amendment) (No.2) Bill, 2017, which was read for the first time, on the 3rd October 2017, and subsequently referred to the Committee on Legal and Parliamentary Affairs for scrutiny.*
>
> *Madam Speaker, by the time this matter was referred to our committee, it was under rule 110 of our old Rules of Procedure, which is now rule 120 of the new Rules of Procedure. The reference made to rule 110 is the same in wording with rule 120.*

Madam Speaker, since this report was uploaded on the iPad, could you guide me on whether I should read it verbatim or go to the main observations and recommendations? I seek your guidance.

THE SPEAKER: Just a minute. Hon. Karuhanga, what is your procedural point? The rest of you sit down.

MR KARUHANGA: Thank you, Madam Speaker. My point of procedure is specifically on rule 201(2) of the new Rules of Procedure. Rule 201(2) provides that, "Debate on a report of a committee on a bill, shall take place at least three days after it has been laid on the Table by the Chairperson or the Deputy Chairperson or a Member nominated by the Committee or by the Speaker ."

Madam Speaker, the procedural point I am raising is specifically from rule 201 (2). The chairperson of the committee laid the report a few minutes ago and the rule instructs that once the report of the committee on a Bill is laid on the Table by the chairperson or deputy chairperson or a Member nominated by the committee or by the Speaker, the debate shall ensue three days later.

Madam Speaker, the coining of this particular rule is mandatory in nature. The language here is "shall". I would like to believe that when we were passing these rules, a situation like this had been anticipated and the curing of it was well coined to stop any mob justice of sorts that may ensue.

Therefore, I would like to believe equally that this was intended to allow us, as Members, to deal with all the issues and objections, to

analyse, study, assess and consult because we represent the people of Uganda so that when we come here, we speak for Ugandans and not ourselves (Applause)

THE SPEAKER: Honourable members, ever since the Ninth Parliament, we agreed to use less paper and that is why we bought you iPads. Last week, on Thursday, I directed the Clerk to upload all these reports on your iPads so this rule does not apply.

THE DEPUTY ATTORNEY-GENERAL (Mr Mwesigwa Rukutana): Madam Speaker, I beg to move that for the elaborate reasons you have given, rule 201 of our Rules of Procedure of Parliament be suspended so that we can proceed with the debate - (Interjections)

THE SPEAKER: Order! Please take your seats first.

MR. RUKUTANA: With the establishment of e-communication, when Members of Parliament were availed with iPads, the rule no longer serves any useful purpose. This is because that rule was intended to ensure that Members of Parliament take note of what is coming on the Floor. For that reason, Madam Speaker, I beg to move, under rule 16 of the Rules' of Procedure of Parliament, that rule 201(2) be suspended. (Interjections)

THE SPEAKER: Order! Honourable members, I would like to remind you about rule 88 of the Rules of Procedure of Parliament: your conduct in this House.

MR. SSEKIKUBO: Thank you very much, Madam Speaker. I rise on a point of procedure. This House is guided by rules and we hold these rules dear because any House without rules is bound to hit trouble.

Madam Speaker, it is for that reason that when we are debating these matters, whichever side of the political divide you are, we should listen to one another. (Applause)

However, you all know that once a Member raises a point of procedure, it is also proper that a Member is listened to. I am raising a critical matter and I raise it in accordance with rule 154(1) of the Rules of Procedure of Parliament. The rule provides that, "Except as provided by these rules in respect to the Business Committee, Appointments Committee and the Budget Committee, a Member shall not belong to more than two Committees ...

This goes down to the root of the reports we make before this House, Madam Speaker. In regard to rule 154(1); the first rule on page 149 of the Rules of Procedure. I beg your pardon, Members. Let us reach there together; do not worry, we shall reach there. It is rule I54(1), page 149. It says, "Except as provided by these rules in respect to the Business Committee: Appointments Committee, and the Budget Committee, a Member shall not belong to more than two committees ...

Madam Speaker, I have herewith the report of the Committee on Legal and Parliamentary Affairs, chaired by hon. Oboth. However, the Members who signed the report - it is fatal that Members who belong to other committees were imported to this committee. For

what reasons - you may have wanted to have the majority on the committee but the moment you endorse a report when you are not a Member of the committee, it is fatal to the report - (Interjection). I am mentioning it here but I would like to agree with Members that once you do that, the findings of the report become fatal.

Madam Speaker, in my hand is the list of Members of the Committee on Defence and Internal Affairs, where the said Members participated in party activities and got stationary from the committee. To our surprise, they appended their signatures to this report. The Members under contention include hon. Lilly Akello and hon. Akampurira Prossy Mbabazi who both sit on the Committee of Defence and Internal Affairs.

Members here can bear me witness that before they went for a retreat in Entebbe, we were together inspecting Katuna and Mirama Hill and they participated as Members of the committee. To that extent, I would like to request hon. Tumwebaze, who has been vocal, to challenge me on this.

Madam Speaker, with that, how do we proceed with this report that has mercenaries that were brought to append their signatures? These members belong to the Committee of Defence and Internal affairs but appended their signatures to the report.

Madam Speaker, this is the procedural matter I would like you to look at. I beg to lay on the Table the list of members who sit on the Committee on Defence and Internal Affairs. The rule is very clear

that you cannot belong to more than one committee. Therefore, this report cannot proceed to be debated. I rest my case."

According to the Hansard, the debate went on without the motion raised by the Deputy Attorney General having been seconded or voted upon. It appears from the record that the Rt. Hon. Speaker of Parliament had at the time the motion to suspend *Rule 201(2)* was moved, ruled that, she had already given the notice required under *Rule 201(2)* to members electronically through their Ipads (hand held computers).

Rule 201(2) has been reproduced above. It is couched in mandatory terms. It requires that Members of Parliament to be given sufficient time to read and internalise a report of a committee on a bill before debating on it. Again we have to go back to our history and remind ourselves that, Parliament ought not to be stampeded into passing any law and more so Constitutional Amendment Bill.

I observe that this rule is not one of those that cannot be suspended. However, this rule was not suspended as the motion which sought to suspend it was not seconded by anyone as required by *Rule 59,* of the Rules of Procedure of Parliament which stipulates thus;-

"59. Seconding of motions

(1) In the House, the question upon a motion or amendment shall not be proposed by the Speaker nor shall the debate on the same commence unless the motion or amendment has been seconded.

The Speaker of Parliament with all due respect failed to apply Rule 201(2) which is mandatory. I accept the submission of Counsel in this regard that "laying on

the table" means physically presenting the bill on the table of Parliament and does not include sending an electronic copy to members. I note that, Parliament amended and adopted new Rules as recently as October 2017. Had Parliament intended to amend Rule 201 to take into account "electronic notice", or "electronic laying on the table" it would have done so, since according to the Hon. Speaker, the practice was already in place. The fact the Rule remained unchanged following the 2017 amendment means that, there was no intention to adopt a new procedure or turn the existing practice into law. Therefore the submissions of the Hon. The Deputy Attorney General on the floor Parliament that when the Members of Parliament were availed with Ipads Rule 201 no longer serves any useful purpose has no legal basis .

I therefore, find that, Parliament while passing the impugned Act, failed to comply with *Rule 201(2)* of its Rules of Procedure, which is mandatory. I find that failure contravened *Article 94(1)* of the Constitution and as such vitiated the whole process of enactment of Act 1 of 2018.

The petitioners also submitted that, Parliament contravened *Rule 154(1)* of its Rules of Procedure when it allowed members belonging to other committees of Parliament to sit on its Committee on Legal and Parliamentary affairs and when those members were permitted, signed the report of that committee, regarding the impugned bill now Act 1 of 2018.

Rule 154(1) provides as follows:-

> *"(1) The House shall have Standing Committees and Sectoral Committee as provided in this part of Rules."*

Rule 154(2) (1) provides as follows:-

"(1) Except as provided by these rules in respect to the Business Committee, Appointment Committee, and the Budget Committee, a Member shall not belong to more than two Committees."

And Rule 155(2) provides as follows:-

"(2)Except as provided by these rules in respect of the Business Committee and the Budget Committee, a member may not be a Member of more than one Standing Committee."

What transpired in Parliament during the debate on this issue, is set out in the Hansard, of Wednesday 18th December 2017 as follows:-

"MR SSEKIKUBO: Thank you very much, Madam Speaker. I rise on a point of procedure. This House is guided by rules and we hold these rules dear because any House without rules is bound to hit trouble.

Madam Speaker, it is for that reason that when we are debating these matters, whichever side of the political divide you are, we should listen to one another. (Applause)

However, you all know that once a Member raises a point of procedure, it is also proper that a Member is listened to. I am raising a critical matter and I raise it in accordance with rule 154(1) of the Rules of Procedure of Parliament. The rule provides that, "Except as provided by these rules in respect to the Business Committee, Appointments Committee and the Budget Committee, a Member shall not belong to more than two Committees."

This goes down to the root of the reports we make before this House, Madam Speaker. In regard to rule 154(1); the first rule on page 149 of the Rules of Procedure. I beg your pardon, Members. Let us reach there together; do not worry, we shall reach there. It is rule 154(1), page 149. It says, "Except as provided by these rules in respect to the Business Committee, Appointments Committee, and the Budget Committee, a Member shall not belong to more than two committees."

Madam Speaker, I have herewith the report of the Committee on Legal and Parliamentary Affairs, chaired by hon. Oboth. However, the Members who signed the report - it is fatal that Members who belong to other committees were imported to this committee. For what reasons - you may have wanted to have the majority on the committee but the moment you endorse a report when you are not a Member of the committee, it is fatal to the report – (Interjection). I am mentioning it here but I would like to agree with Members that once you do that, the findings of the report become fatal.

Madam Speaker, in my hand is the list of Members of the Committee on Defence and Internal Affairs, where the said Members participated in party activities and got stationary from the committee. To our surprise, they appended their signatures to this report. The Members under contention include hon. Lilly Akello and hon. Akampurira Prossy Mbabazi who both sit on the Committee of Defence and Internal Affairs.

Members here can bear me witness that before they went for a retreat in Entebbe, we were together inspecting Katuna and Mirama Hill and they participated as Members of the committee. To that extent, I would like to request hon. Tumwebaze, who has been vocal, to challenge me on this.

Madam Speaker, with that, how do we proceed with this report that has mercenaries that were brought to append their signatures? These Members belong to the Committee of Defence and Internal Affairs but appended their signatures to the report.

Madam Speaker, this is the procedural matter I would like you to look at. I beg to lay on the Table the list of Members who sit on the Committee on Defence and Internal Affairs. The rule is very clear that you cannot belong to more than one committee. Therefore, this report cannot proceed to be debated. I rest my case.

THE SPEAKER: Honourable members, this morning, hon. Ssekikubo objected to the names of two of the Members of the House on grounds that they belong to more than one sessional committee. I have had time to check the records and these are my findings:

On 29 November 2017, on the Floor of this House, the Government Chief Whip designated the following Members to serve on the standing committees and others to sessional committees:

1. *Hon. Herbert Kabafunzaki, Rukiga County, ICT sectoral committee*
2. *Hon. Prossy Akampurira, Rubanda County, Legal and Parliamentary Affairs Committee*

3. *Hon. Taban Idi Amin, Kibanda County North, Legal and Parliamentary Affairs Committee*
4. *Hon. Rose Lilly Akello, Kaabong, Legal and Parliamentary Affairs Committee*
5. *Hon. Suubi Asinde, Iganga, Legal and Parliamentary Affairs Committee*
6. *Hon. Caroline Kamusiime, Rukiga County, Legal and Parliamentary Affairs Committee*
7. *Hon. Grace Watuwa, Namisindwa, East African Community Affairs*
8. *Hon. Jane Avur Pachuto, Pakwach, Committee on Foreign Affairs*
9. *Hon. Robert Kasule, Nansana Municipality, Legal and Parliamentary Affairs Committee.*

On the same day, the Government Chief Whip again nominated the same Members to the following standing committees:

1. *Hon. Herbert Kabafunzaki, Committee on HIV/AIDS*
2. *Hon. Prossy Akampulira, Committee on Rules and Privileges*
3. *Hon. Rose Lily Akello, Kaabong, Committee on Rules and Privileges*
4. *Hon. Suubi Asinde, Iganga, Committee on Government Assurances*
5. *Hon. Caroline Kamusiime, Rukiga, Committee on Government Assurances*
6. *Hon. Grace Watuwa, Namisindwa, Committee on Local Government Accounts*
7. *Hon. Jenifer Pachuto, Packwach, standing Committee on Budget*
8. *Hon. Taban Idi Amin, Kibanda North, standing Committee on Local Government Accounts*
9. *Hon. Robert Kasule, Nansana Municipality, COSASE.*

On the same day, the Opposition Chief Whip, Hon. Ibrahim Ssemujju nominated hon. Robinah Ssentongo of Kyotera to the

sessional Committee on Health and to the standing Committee on Local Government Accounts.

Honourable members, the question was put on all these names and was accepted on the Floor of this House. (Applause)

I have inquired as to why the honourable member went out with the Committee on Defence and Internal Affairs and I have been told that she had been facilitated to go for a site meeting with that committee before she was nominated to the Committee on Legal and Parliamentary Affairs. Having received the money, she felt obliged to go and fulfill that obligation.

Honourable members, this is an issue of accountability. You have been complaining here that Members receive money and do not go for the trips. By the way, honourable members, those that are saying that she should return the money, remember that Members are free to attend any committee as long as they do not vote.

I know that on the Appointments Committee, I have had several Members coming to sit and listen in. The right of the members to attend cannot be fettered. They cannot vote but they can attend; so she was lawfully on that committee because you accepted it on 29 November, 2017. (Applause)

MR NIWAGABA: Madam Speaker, I move under rule 86 (2) of our Rules of Procedure to give notice to the House that we, on the Opposition side, shall move a substantive motion tomorrow to challenge that decision because of the available matters of evidence

in our possession, including attendance sheets and signatures of the Member in issue in respect of committee meetings.

The Hansard shows that when this Member was designated to the Committee on Legal and Parliamentary Affairs, she was not formally withdrawn first from the committee, where she was earlier allocated. Therefore, we will move a substantive motion to challenge that decision based on the rules and the evidence we have.

I, therefore beg, Madam Speaker, that you allow us space tomorrow at a time to be given by you for us to present that substantive motion.

THE SPEAKER: What is the motion about because you are talking about the decision of the Speaker?

MR NIWAGABA: To review your decision, Madam Speaker -

THE SPEAKER: Which decision?

MR NIWAGABA: Through rule 86(2) of our Rules of Procedure; the ruling you have just made.

THE SPEAKER: I am restating what you did on 29 November 2017. That is what you agreed to in this House.

MR NIWAGABA: Madam Speaker, the evidence we have is contrary to your ruling. We cannot appeal against your decision but your decision can be reviewed by the House when we bring it here -

THE SPEAKER: Take it to the Committee on Rules, Privileges and Discipline. On 29 November 2017, this House, in my absence, decided that those Members are moving to those committees; so it cannot be under rule 86.

MR SSEGGONA: Madam Speaker, I think with your permission, you have a duty to guide. In light of Rule 86 (2) of our Rules of Procedure, if I am not satisfied with your decision, where do I go? I am asking the Speaker because I know she knows.

THE SPEAKER: Honourable members, this is a decision of the House not of the Speaker. You sat here on 29 November 2017 and took that decision; so it is not the Speaker's decision. That rule is not applicable.

MR SSEKIKUBO: Madam Speaker, in my possession is a set of evidence and it is not my strong point to put back a matter that you seem to have taken a position on. However, if I could be allowed to draw your attention to particular facts in relation to this matter -

THE SPEAKER: Hon. Ssekikubo, that is an issue for the Committee on Rules, Discipline and Privileges. If she has misconducted herself, take her to that committee."

From the above excerpts, it is very clear that some Members of Parliament who were not originally on the Legal and Parliamentary committee when the impugned bill was sent to it for consideration, later joined it while they were still Members of other committees.

With all due respect, to the Rt. Hon. Speaker, her Ruling that the issue should be treated as simply indiscipline had no legal justification. It is clear from the excerpts above that some members who signed the Legal and Parliamentary Affairs Committee report in respect of the impugned bill which was later enacted into law, were not legally members of that committee. This is a legal matter that has an impact on the validity of the process of enacting legislation. It is not an issue of discipline.

I am, however, unable to find that, in ordinary circumstances failure to comply with *Rule 155* of the Rules of Procedure of Parliament, would vitiate the proceedings of a Parliamentary committee in view of the provisions of *Article 94 (3)* of the Constitution which provides that:-

> *(3) The presence or the participation of a person not entitled to be present or to participate in the proceedings of Parliament shall not, by itself, invalidate those proceedings.*

In this particular case however, the said members who were not entitled to seat of the Legal and Parliamentary Affairs Committee not only participated but also voted and signed the report. *Article 94(3)* does not in my view extend to voting as this would go to the root of decision making. In this particular case, the committee's opinion was split in the result that dissenting members had to issue a minority report. Members of the committee had to vote. Only members could do so. See: *Rule 193* and *201* of the Rules of Parliament reproduced in the judgment of my sister Elizabeth Musoke JCC.

Invariably a minority report is as a result of numbers. It could as well be that in absence of all persons not entitled to participate, the minority would perhaps have constituted the majority. For this reason alone I find that non-compliance

with *Rule 154(1)* Parliament vitiated the whole process of enacting the impugned Act.

It was again submitted for the petitioners that Parliament offended *Rule 72* of its rules also known as *"the Subjudice Rule"* when it proceeded to hold a debate on issues that were pending before a Court of law touching on the impugned bill, now Act 1 of 2018.

I have perused the pleadings. I have not found any evidence to prove that there was a pending suit or Court proceeding at any time during the debate in respect of the impugned Act. On the Court record before me I have not been able to find any Court pleadings, proceedings or any other evidence by affidavit or otherwise to support this contention. I would have expected to see an affidavit by the Registrar of the concerned Court confirming that there were indeed civil or criminal proceedings pending before Court at the time, but no such evidence was availed. I am unable to find that the Parliament violated *Rule 72* of its Rules.

Mr. Male Mabirizi, the petitioner in *Petition No. 49 of 2017* contended in paragraphs 175,176,177 ,178 and 180 of his affidavit in support of the Petition as follows:-

> *"175. THAT it was visible that the 3rd reading of the bill was done contrary to the constitution since the constitution requires separation of the 2nd reading and the third reading with at least 14 sitting days of parliament, which never lapsed.*
>
> *176. THAT I know that the framers of the constitution were sober in making this requirement in the constitutional amendment and the speaker cannot be allowed to circumvent that intention.*

177. THAT the intention was to enable members consult more, rethink and conduct further research about the intended amendment.

178. THAT by the speaker conducting the two readings in the same evening, moreover at night, she committed 'rape' against the constitution since most of the members, who were in parliament from 9.00am in the morning were exhausted by the time of the voting on third reading after 11pm in the night.

180. THAT; I know that the failure by the speaker of parliament to separate the 2nd reading of The Constitutional Amendment Bill No.2 of 2017 and the 3rd reading by at least fourteen sitting days of parliament was inconsistent with and in contravention of Article 263 of the Constitution which require Parliament to separate the 2nd and 3rd readings by at least 14 sitting days of Parliament."

It is undisputed and evident from the Hansard of 20th December 2017 that the 2nd and 3rd readings of the impugned Constitution (Amendment) Bill were done on the someday.

In her affidavit in support of the answer to the Petition the Clerk to the Parliament Ms. Jane Kibirige accepts that indeed the 2nd and 3rd readings of the impugned Bill were made on the someday, 20th December 2017. However, she contends in paragraph 39 of the said affidavit that:-

"I have been advised by our legal Counsel in Attorney General's Chambers which advice I verily believe to be true that the statutory period of 14 (fourteen) days between the 2nd and 3rd readings was not applicable to the Constitution (Amendment) No.2 Bill of 2017."

She did not substantiate. The respondent in its address to Court did not provide us with any authorities to back up its advice to Parliament.

This is not surprising, as the respondent's case has always been that the impugned Act did not in any way Amend *Article 260,* therefore the Provision of *Article 263* did not apply. This issue is now moot as I have already found that, *Article 260* was amended by the impugned Act, by implication. I have already determined the issues relating to the amendment of *Article 105* to which this complaint related. Had I found that the amendment of *Article 105* was constitutional, I would have found that the procedure of passing it into law required compliance with *Article 263*. As l have already stated above that this is all now moot.

The other issue raised by the petitioners is that, Parliament failed to give effect and to comply with the provisions of *Article 1, 2* and *8A* of the Constitution. It is contended by the petitioners that, Parliament did not in the entire process of enacting the impugned Act, purposefully and meaningfully consult and involve the people of Uganda. Mr. Ssemuju Nganda a petitioner in Petition N0.5 of 2018, in his affidavit in support of the Petition paragraphs 24 (a), (b) and (c) deponed as follows:-

> *"24. THAT I am a Member of the Committee on legal and Parliamentary Affairs to which the impugned Constitution (Amendment) Bill was referred to for scrutiny by the Speaker during the sitting of Parliament on October 23rd 2017 with instructions to involve (consult widely) the people of Uganda because in the Speaker's wisdom the matter touched Articles 1 and 2 of the Constitution. (See copy of Hansard dated October 3rd attached hereto and Marked 'J')*

a) *That the committee on legal and parliamentary affairs in internal meeting drew a program, and budget for national consultation and divided its members.*

b) *That the committee even met the Speaker Rt. Hon Kadaga requesting for funds to carry out consultations and she promised to avail the same.*

c) *That I was shocked when the vice chairperson of the committee on legal Hon. Robinah Rwakojo hastily called another internal meeting and proposed that we retreat in Entebbe to write a report on the Bill before consultations were done contrary to the ruling of the Speaker of October 3rd 2017."*

In reply to the above Ms. Jane Kibirige the Clerk to Parliament deponed in her affidavit in support of the answer to the Petitions as paragraphs 28, 29, 30 and 31 as follows:-

"28. That I know that Rt. Hon. Speaker of Parliament then referred the Constitution (Amendment) (No.2), Bill 2017 to the Committee on Legal and Parliamentary Affairs of Parliament and informed Members of the House that owing to the fact that the proposed amendments touched on Articles 1 & 2 of the Constitution, the people were to be consulted on the proposed Bill to see their views.

29. That in specific reply to paragraphs 1,2,3,15(a),16(a) of the affidavits of Ssemujju Nganda, Munyagwa S. Mubarak, Ssewanyana Allah, Odur Jonathan, Gerald Karuhanga and Winifred Kizza I know that the process leading to the enactment of the Constitution (Amendment) Act, 2018 was preceded by wide public consultations

both by the Committee of Legal and Parliamentary Affairs of Parliament and individual Members of Parliament.

That I know that the consultations were carried out in accordance with the provision of Articles 38 and 90 of the Constitution so that the civic participation of the people is exercised directly by themselves or indirectly by their elected representatives and civil society , interest groups were afforded an opportunity to present their views on the bill.

That I now that under the auspices of Article 90(3) Parliament consulted the public on the proposals made in the Constitution (Amendment)(N02), Bill, 2017 as exemplified by-

(i) the consultations done by the committee on legal and Parliamentary Affairs of Parliament during bill scrutiny which extended invitations to all interested parties to appear before it to give their views on the proposal in the Bill.

(ii) the request by the Clerk to Parliament, who, through both print and electronic media, invited the general public to provide written memoranda on the contents of the Constitution (Amendment) Act, 2017; and

(i) Parliament facilitation of Members of Parliament to consult their constituents on the proposals made in the Bill."

I have already discussed the relevance and importance of public participation in the constitutional process, specifically in respect of a Constitution Amendment. I have already stated that, in my humble view, public participation is one of the basic structures of our Constitution. Public participation, therefore cannot be wished away or taken lightly by Parliament.

Parliament was certainly well aware of this constitutional requirement when, the Speaker, herself on October 3rd 2018, cautioned Members of Parliament to comply with *Articles 1* and *2* of the Constitution in the process of enacting the impugned Act. She stated at page 4791 of the Hansard of the Tenth Parliament on Tuesday, 3rd October 2017 as follows:-

> *"THE SPEAKER: Honourable members, the Bill is sent to the Committee on Legal and Parliamentary Affairs. However, I would like to remind you, honourable members, that this matter touches Articles 1 and 2 of the Constitution; people must be involved in this deliberation. Thank you."*(Emphasis mine)

The affidavits of Jane Kibirige, Margret Muhanga Mugisha, James Kakooza, Moses Grace Balyeku, Lokeris Samson, Henry Musasizi Ariganyira, Ongalo Obote Clement Kenneth, Tumusiime Rosemary Bikaako and the submissions of Counsel for the respondent in this regard all point to the fact that the respondent considered public participation to be a key constitutional requirement in the passing of the impugned Act. The question this Court is required to determine is whether or not the people of Uganda effectively participated in the entire process of enacting the impugned Act as required or envisaged under Articles *1, 2* and *8A* of the Constitution.

On Wednesday 27th September, Mr. Raphael Magyezi, The Hon. Member of Parliament representing Igara County West, Bushenyi District, moved a motion seeking leave of Parliament to introduce a private members bill under *Article 94(4) b* of the Constitution, entitled "The Constitution (Amendment) Bill, 2017. On Wednesday 20th December 2017, that bill was passed into law by Parliament, and on 27th December 2017, it was assented to by the President.

From the beginning to end, the whole process took 85 days including weekends and public holidays. The bill was before Parliament on the following days 27th September, 3rd October, 18th December, 19th December and 20th December 2017 a total of 5 (five) days. The bill was read out for the first time on 3rd of October 2017. It was then referred to the Committee on Legal and Parliamentary Affairs for scrutiny. The report of that committee was received by Parliament on 18th December 2017, debated on that day, and also on the following day 19th December 2017. It was subsequently passed into law on 20th December 2017.

The Committee on Legal and Parliamentary Affairs therefore was able to scrutinize the bill, seek views of the people of Uganda, involve them in the process and write a report including a minority report in 75 (seventy five) days. That is two and half months including weekends and public holidays considering that it may have taken the committee at least 15 (fifteen) days to put together the information and data gathered and to write both reports, then the time spent collecting views for Ugandans could not have been more than 60 (sixty) days taking into account weekends and public holidays. I do not consider, two months to be sufficient time for Parliament to seek views of Uganda taking into account the following facts:-

The information provided by Electoral Commission on its official website indicate that in 2016 General Elections, there were,

(a) Registered voters - 15, 277, 198
(b) Parliamentary Constituencies - 290
(c) Number of Districts - 112
(d) Sub –Counties – 1, 403
(e) Parishes – 7, 431
(f) Villages – 57, 842

In addition to the above, there are a number of Constitutional and statutory bodies, different categories of interest groups, at all levels including, the women, the youth, persons with disabilities, workers, the Armed forces, Political parties including those not represented in Parliament. There are also other established and organised interest groups that include Civil Society Organisations Community Based Organisations, established churches and Moslem faith Council and organsiations, the academia, Ugandans living in the Diaspora, Professional Associations, students and student organizations, among others. The Legal and Parliamentary Affairs Committee report set out the list of the stake holders it was able to consult at page 4 as follows:-

1. Hon. Raphael Magyezi (MP) Igara West
2. Equal Opportunities Commission
3. Ministry of Justice & Constitutional Affairs
4. The Rt. Hon. Prime Minister of the Republic of Uganda;
5. Uganda Law Reform Commission;
6. The Electoral Commission:
7. The National Resistance Movement Party
8. The Democratic Party;
9. The Conservative Party;
10. Dr. Mwambutsya Ndebesa
11. Justice Forum -JEEMA
12. Professor Tarsis Bazana Kabwegyere
13. Leader of the Opposition (LOP)
14. Uganda Local Government Association (ULGA)
15. Uganda Association of Uneducated persons (TUAUP)
16. Cpt. Ruhinda Maguru Daudi II
17. University School of Psychology

18. Mr. George W. Bakka
19. Mr. Gilbert Mutungi
20. Mr. Moses Mfitumukiza
21. Mr. Egole Lawrence Emmy
22. Fr. Peter Bakka
23. Mr. Langoya Alex
24. Mr. Owachgiu Richard
25. Maj. Gen. Rtd. General Jim Muhwezi
26. FRONASA Veterans
27. Society for Justice and National Unity (SoJNU)
28. Prof. Venansius Baryamureeba
29. Prof. F. E Ssempebwa
30. Mr. Peter Mulira
31. Hon. Amanya Mushega
32. Dr. Tanga Odoi
33. Kick All Age Limits Out of the Constitution (KALOC)
34. Centre for Information Research and Development
35. Hon. Kenneth Lubogo
36. Masindi District Local Government Council
37. Mr. Fred Guweddeko
38. Buganda Region NRM Youth Voluntary & Advocacy Mobilizers (BREVOM)
39. Guild Presidents' Forum on Governance (GPFOG)
40. Mr. Gabula Sadat
41. Kampala Business Community Informal Sector (KBCIS)
42. Kampala Arcades Traders Association (KATA)
43. Wansanso Kibuye Co-operative Saving & Credit Society Ltd
44. Kampala Operational Taxi Stages Association (KOTSA)
45. Kampala Tukolebukozi Timbers Association (KATUTA)

46. Nakivubo Road Old Kampala (Kissekka) Market Vendors Ltd
47. Uganda Mechanics and Engineering Association
48. Urban Community Vector Control Group (UCOVEC)
49. Uganda Markets & Allied Employees Union (UMEU)
50. Hon. Thomas Tayebwa.
51. St. Balikuddembe Market Stalls, Space & Lock Up Shops Owners Association Ltd
52. Uganda Printing and Publishing Corporation
53. Minister of Finance, Planning and Economic Development

These above are the only stakeholders who were able to present their views to that committee. They are 22 individuals and eight Government ministries, commission or agencies including the Rt. Hon Prime Minister in his official capacity, four political parties, the leader of the opposition Parliament and one District Local Government. The rest appear to be a collection of obscure and amorphous groups, that include Fronasa Veterans, Uganda Association of uneducated person, Kick all Age limit out of the Constitution and others.

With all due respect to the members of the committee referred to above, for them to suggest that the above persons and groups are the stake holders representing the whole of the people of Uganda as envisaged under *Article 1* of the Constitution, in view of our past history, is unfortunate to say the least. I must state here that I have restrained myself from using a stronger language. I say so because of the Electoral Commission statistics from the 2016 General Election I have reproduced above. Since the number of persons consulted as individuals were only 22, it means that it represent about 0.0001375% of the registered voters. Even if all the 455 Members of Parliament were added to this list of those assuming they were all consulted and debated the motion, which they did not, the percentage of people consulted in relation to registered voters would still be less

than one percent. They would be 0.8194 percent to be exact of the voters registered in 2016.

I am alive to the fact that the passing of a bill into law does not require the input of every individual Ugandan, or even every Member of Parliament. However, every bill requires public participation that is purposeful, well intended and meaningful. What happened in this case appears to have been just window dressing, even then a very clumsy one.

The framers of our Constitution, the people of Uganda, were not contended with simply the right to vote in a free and fair election as the only expression of their will. They expressly provided in the Constitution for a wider role in the democratic process by people. In *Articles 1, 2* and 8A of the Constitution, the people reserved for themselves a role in the legislative process as had been echoed by President Museveni in his maiden speech on the steps of Parliament on January 29th 1986, which I have reproduced earlier in this Judgment.

The same sentiments were repeated by the people of Uganda during the Constitution making process as set out in the Odoki Report (Supra). This was a complete departure from the past when only Parliament and the President (during Amin's regime) had the unquestionable power to legislate. Parliament having abused that power in 1966, 1967, 1971, and 1979, the people in 1995 Constitution decided to retain that power themselves under Articles 1, 2 and 3 of the Constitution and only to delegate part of it to Parliament under Article 79.

Since Uganda and the Republic of South Africa have both gone through a history of tyranny and oppression, it is pertinent that I reiterate the words of Ngcobo J, of the Constitutional Court of South Africa who wrote the lead Judgment in

Doctors for life international and other the Speaker of National Assemble and other CCT/12/05 wherein he stated as follows:-

> *115. In the overall scheme of our Constitution, the representative and participatory elements of our democracy should not be seen as being in tension with each other. They must be seen as mutually supportive. General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.*
>
> *116. Therefore our democracy includes as one of its basic and fundamental principles, the principle of participatory democracy. The democratic government that is contemplated is partly*

representative and partly participatory, is accountable, responsive and transparent and makes provision for public participation in the law-making processes. Parliament must therefore function in accordance with the principles of our participatory democracy.(Emphasis mine)

Neither the Constitution nor any other law prescribes the nature and scope of public participation. Parliament is granted the discretion to determine how best to fulfill this Constitutional requirement.

This Court however, under *Article 137*(3) (b) is clothed with the power to determine whether any act or omission by any person or authority contravened the Constitution. I must emphasize here that the word "omission". It appears to me here that we are dealing with the issue of Parliamentary omission. It is quite evident, in my humble view, that the Constitution may be violated by omission of any person or authority. In this case we are dealing with Parliament as an authority established by this Constitution, having failed to permit, facilitate, ensure and carry out meaningful public participation in the process of amending the Constitution.

We can only use and apply an objective test to determine the above question. Parliament on its part set out its own subjective test and declared that it had complied with the constitutional requirement of public participation when it received presentation from 53 individuals and groups listed above and when it paid money to Members of Parliament to go out and consult the people on the impugned bill. This Court under Article 137 has the final say as to whether or not the Parliament passed the Constitutional public participation test. Left on its own it is apparent Parliament will tend to use a subjective standard as is

evidenced by the affidavit of Jane Kibirige in reply to the Petition *No. 49 of 2018 Male Mabirizi vs Attorney General,* already reproduced above.

What is required is for this Court to determine parameters of an objective standard of public participation in the legislative process without being intrusive or crossing the Constitutional boundary of separation of powers.

The Constitution gives us a guide to the objective test, when in Article 20 it provides that:-

> *"20. Fundamental and other human rights and freedoms.*
>
> *(1) Fundamental rights and freedoms of the individual are inherent and not granted by the State.*
>
> *(2) The rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of Government and by all persons."*

The rights of citizens to participate in democratic process is a social, economic and political right. Parliament has a duty to uphold and promote this right. Therefore, in my humble view, there is no limitation to the right to participate in the legislative process except as provided for under Article 43(2) (c) of the Constitution. It provides:-

> *"43(2)(c) any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution."*

The only limitation, therefore, that Parliament can impose on the people's right to participation in the legislative process is :

"What is acceptable and democratically justifiable in a free and democratic society or what is provided in this Constitution."

The Supreme Court discussed in detail the meaning and scope of *Article 43(2)* in *Onyango Obbo & Another vs Attorney, Supreme Court Constitution Appeal No.2 of 2002.* I will not endeavor to rephrase all that was stated in that decision but rather I have reproduced what *Mulenga JSC* stated:-

"It is common ground that the protection of the right to freedom of expression is subject to Article 43, ...

The provision in 43 (1) is couched as a prohibition of expressions that "prejudice" rights and freedoms of others and public interest. This translates into a restriction on the enjoyment of one's rights and freedoms in order to protect the enjoyment by "others", of their own rights and freedoms, as well as to protect the public interest. In other words, by virtue of the provision in clause (1), the constitutional protection of one's enjoyment of rights and freedoms does not extend to two scenarios, namely: (a) where the exercise of one's right or freedom "prejudices" the human right of another person; and (b) where such exercise "prejudices" the public interest.

It follows, therefore, that subject to clause (2), any law that derogates from any human right in order to prevent prejudice to the rights or freedoms of others or the public interest, is not

inconsistent with the Constitution. However, the limitation provided for in clause (1) is qualified by clause (2), which in effect introduces "a limitation upon the limitation". It is apparent from the wording of clause (2) that the framers of the Constitution were concerned about a probable danger of misuse or abuse of the provision in clause (1) under the guise of defence of public interest. For avoidance of that danger, they enacted clause (2), which expressly prohibits the use of political persecution and detention without trial, as means of preventing, or measures to remove, prejudice to the public interest. In addition, they provided in that clause a yardstick, by which to gauge any limitation imposed on the rights in defence of public interest. The yardstick is that the limitation must be acceptable and demonstrably justifiable in a free and democratic society. This is what I have referred to as "a limitation upon the limitation". The limitation on the enjoyment of a protected right in defence of public interest is in turn limited to the measure of that yardstick. In other words, such limitation, however otherwise rationalised, is not valid unless its restriction on a protected right is acceptable and demonstrably justifiable in a free and democratic society."(Emphasis mine)

The above provides the broad principle. However, in practice Parliament has to apply the well known and established subjective test of research in the process of actualising the people's right to public participation. The process of public participation in my humble view is required to pass the SMART test. That is, it has to be Specific, Measurable, Attainable, Relevant and Time bound. I will now endeavor to apply this test to facts before us.

I now proceed to apply the facts before to ascertain whether or not they pass the objective SMART test.

The respondent in a bid to prove that there was indeed sufficient public participation during the process that led to the enactment of the impugned Act, filed 8 affidavits deponed to by the following persons:-

1. Mugisa Margaret Muhanga
2. Jane Kibirige
3. James Kakooza
4. Moses Grace Balyeku
5. Lokeris Samson
6. Henry Musasizi Ariganyira
7. Ongalo Obote Clement Kenneth
8. Tumusiime Rosemary Bikaako

For clarity and posterity, I am constrained to reproduce the evidence adduced by each of the above witnesses in their endeavor to prove that the people of Uganda participated in the debate that led to the enactment of the impugned Act 1 of 2018.

The relevant parts of the affidavit of *Margaret Mugisa Muhanga reads as follows:-*

9. *That in specific response to paragraph 10 of the affidavit of Prosper Businge and related paragraphs 3 & 4 of Herbert Mugisa, 4 and 5 of Thomas Mugara Guma and 3,4 & 5 of Pastor Vincent Sande, I went to my constituency and held numerous consultative meetings regarding the proposed constitutional amendments in 15 sub counties in Burahya county with, inter alia, the district councilors youth leaders, sub county Chairpersons and the general population of Burahya County on various dates.*

10. *That on 5th October, 2017 a consultative meeting was held with youth leaders in Burahya County , Kabarole District, A copy of the minutes of meeting held on 5th October 2017 and pictures of my constituents who attends the meeting are attached hereto and marked as annexture 'A' & 'B'.*

11. *That on 7th October 2017, I held consultations with sub-county leaders regarding the proposed amendments in the Constitution (Amendment) (No.2) Bill of 2017 and it was agreed and resolved that the people of Burahya County would be consulted and sensitized through radio talk shows and their views about the age limit debate popularly termed "Gikwateko, Togikwatako" sought . A copy of the minutes of the meeting held with sub county leaders on 7th October 2017 are attached hereto and marked as Annexture 'C'.*

12. *That on 2nd November 2017 I held further consultative meetings with LCIII Chairperson of each sub county within my constituency including Karago town council, Busoro, Karambi, Karangura, Kasenda, Kijura*

town council Bukuku, Ruteete, Kicwamba, Harugongo, Hakibaale, Mugusu and Kabende sub county and among others in Kabarole District. A copy of the minutes of the meeting held on 2nd November 2017 and the attendance list are hereto attached and marked as annexure 'D'.

13. That I know that in all the sub counties that I went to, save for a few opposing voices, the overwhelming majority of my constituents feely, willingly and openly expressed their support for the Constitutional (Amendment) (No.2) Bill of 2017.

14. That I hereby stated that consultations in Burahya county were conducted peacefully with no interference and on 19th of December 2017 when the August House convened and the debate was called, I voted yes in support of the Constitutional amendments with the full mandate of the people of Burahya county, Kabarole District.

The relevant parts of the affidavit of Jane Kibirige *the Clerk to Parliament reads as follows:-*

32. That I know that on the 18th of December 2017 the August House reconvened after the consultations with the general Public and I also know that Constitutional (Amendment) (No.2) Bill of 2017 was read in Parliament for the second time. A copy of the Hansard depicting the proceedings in parliament date 18th, 19th& 20th December are hereto attached and Marked 'D', 'E' and 'F' respectively.

33. That I know that the Rt. Hon. Speaker of Parliament then invited the Chairperson on the committee on Legal and Parliamentary Affairs to

respond to queries raised by the August House why the committee considered two issues i.e. the term limits and the issue of adjusting the term of the President and Parliament that were not originally in the Constitutional (Amendment) (No.2) Bill of 2017 presented by Hon. Raphael Magyezi.

34. That I know that the Hon. Jacob Oboth, the Chairperson, of the committee on legal and Parliamentary Affairs then made his presentation to the House and he informed the House that the Committee gathered the views from the consultation process and submissions from their inter alia the Leader of Opposition and her team, the Rt. Hon. Prime Minister, Civil Society.

35. That in specific response to paragraph 26 of the affidavit of Ssemujju Nganda, the Chairperson of the committee on Legal and Parliamentary Affairs categorically stated on record to the House, that there was nothing in the Report of the committee on Legal and Parliamentary Affairs that the committee did not get through the process of consultation and consideration of Bill.

36. That in further response to paragraph 26 of the affidavit deposed by Ssemujju Nganda, I know that Chairperson of the committee on Legal and Parliamentary affairs cited an example of the Prof. Fredrick Ssempebwa, who was quoted in both the majority and minority report, having made persuasive submissions before the committee on the presidential term and age limits.

37. That I know that in specific response to paragraph 24 (c) of the affidavit of Hon. Ssemujju Nganda I know that it is not true that the Vice Chairman of the committee on Legal and Parliamentary Affairs of

Parliament acted contrary to the directive of the Rt. Hon. Speaker of Parliament to carry out national consultations.

James Kakooza on his part deponed as follows:-

3. THAT I know that when the Constitutional (Amendment) No.2 Bill 2017 was first tabled and read in Parliament, the Rt. Hon. Speaker of Parliament granted all Members of Parliament leave to go and consult on the proposed amendments to the Constitution of the Republic of Uganda, 1995.

4. THAT I know that Parliament dispatched Ug. Shs. 29,000,000/= (Twenty nine million shillings) to the Bank accounts of each Member of Parliament to facilitate the consultation process.

5. THAT when I received the said facilitation, I proceeded to draw a program for the consultation meetings to be conducted and I proceeded to my constituency, Kabula County, prepared a program and run radio announcements calling upon the people of Kabula County Constituency to attend the consultative meetings.

6. THAT I held consultative meetings in each and every Sub county (Gombolola) within my constituency including Kasagama Sub county, Kaliiro Sub-county among others in Lyantonde District.

7. That in all the Sub-counties that I went to, save for a few negative responses, the overwhelming majority of my constituents freely, willingly and openly expressed their support for the Constitutional (Amendment) No.2 Bill 2017.

8. That I conducted the last consultations with the District leadership where the District council even passed a resolution supporting the amendment of the Constitution.

9. That I know that the consultations in Kabula Constituency were conducted peacefully with no interference in the form of beatings arrests and or brutality from officers of the Uganda Police or the Uganda People's Defence forces (UPDF).

10. That on the above basis, when the Bill was presented on the floor of Parliament, I voted YES as advised by my constituents.

Lokeris Samson, sets out the facts relating to this issue in his affidavit as follows:-

3. THAT in the month of October 2017, the Rt. Hon. Speaker of Parliament dispatched all Members of Parliament leave to go and consult on the proposed amendments to the Constitution of the Republic of Uganda, 1995; as contained the Constitutional (Amendment) No.2, Bill, 2017.

4. THAT I know that Parliament through the Parliamentary Commission facilitated the consultation process of each Member of Parliament.

5. THAT on the 25th October, 2017 I proceeded to my constituency, Dodoth East, where I made a program with my Political Assistant with the object of how to consult the Community in my Constituency by way of physical contact with the Public of consultative meetings, rallies at sub counties and at the kraals.

6. THAT I then proceeded to conduct several consultative meetings.

7. THAT I first held meetings with the Elders and clan leaders, these were at Oyoro, Lotem, Kathile south and Kalapate sub counties.

8. THAT I later proceeded to Morulem, Moruita and Lolelia kraals, that at each of these meetings I explained to the People in my Constituency the matter of Constitution Amendment.

9. THAT I made the Electorate and all the Public understand the proposed amendments to the age limit presidential terms, how the amendment was being initiated and undertaken through the guidance of the Constitution.

10. THAT I met the NRM structures comprising of officials from the village level to the constituency level, I explained to them the details of the proposed amendments to the Constitution and I also carefully listened to their views

11. THAT I carefully explained to them the purpose of the consultations a majority of them advised that I should support the Constitutional (Amendment) Bill No.2 of 2017.

12. THAT at each of these meetings I let them vote on their views the majority of them agreed that we should proceed and amend or 'Touch it.

13. THAT I also met the elected leaders in the Constituency including Councilors at all levels such as LC 1 Chairpersons and all Local Councils

Executives up to the District level including the LCV and as I had done before with the other groups, I took them through the proposed amendments and yet again, they with an overwhelming majority advised me to second and vote for the proposed amendments.

14. THAT in reply to the allegations of alleged beating, torturing of people, using tear gas and firing of live bullets in an attempt to disperse people as stated in the Affidavit of Hon Winfred Kizza at Paragraph13(x) and (y), I know that the consultations in Dodoth East were conducted peacefully with no interference in the form of beatings, arrests and or brutality from officers of the Uganda Police or the Uganda People's Defence Forces (UPDF).

15. THAT I further know, in these consultations I had held two meetings with Hon Akello Rose Lilly the Kaabong Woman Member of Parliament where nobody was beaten tortured and or arrested as alleged.

16. THAT when we returned to Parliament against the overwhelming recommendations of my people I voted YES as advised by them.

Moses Grace Balyeku , deponed as follows on this issue of public consultations.

3. *That on 3rd October 2017, the Rt. Hon. Speaker of Parliament granted all members of Parliament leave to go and consult on the proposed amendments to the Constitution of the Republic of Uganda, 1995 as contained the Constitutional (Amendment) No.2 Bill, 2017.*

4. That I know that Parliament dispatched Ug. Shs. 29,000,000/= (Twenty nine million shillings) to the Bank accounts of each Member of Parliament to facilitate the consultation process.

5. That on the 17th October, 2017 I proceeded to my constituency, Jinja Municipality West, I prepared a program and run radio announcements calling upon the people of Jinja Municipality West constituency to attuned the consultative meetings.

6. That I then proceeded to conduct several consultative meeting as follows:-

a) *THAT I first met the youth groups in Jinja Municipality West on 18th October, 2017 at Bax Conference Hall and I carefully explained to them the purpose of the consultations and by show of hands, majority of them advised that I should support the Constitutional (Amendment) No.2 Bill 2017.*

b) *THAT the next day on 19th October, 2017 I met the NRM structures comprising of officials from the village level to the constituency level (District level), I explained to them the details of the proposed amendments to the Constitution and I also carefully listened to their views and eventually, by show of hands, majority of them agreed that we should proceed and amend or 'Touch it' as it was commonly referred to.*

c) *THAT the next day, I met 'bodaboda' cyclists and taxi drivers in my constituency at Nalufenya and yet again, I took them through the interpretation of the relevant provisions of the Constitution and the proposals in the Constitutional (Amendment) No.2 Bill, 2017 and although a few of them said no, the majority of them agreed to the proposed amendment.*

d) *THAT on the following day, 21st October, 2017, I met another group of youths from Jinja West at Main Street Road Open area and I thoroughly explained to them the purpose of the consultations and they all agreed and thanked me for taking their views and they also told me to support the Constitutional (Amendment) No.2 Bill, 2017.*

e) *That on the following day, 21nd October, 2017, I met the elected leaders in the Constituency including Councilors at all levels such as L.C.1 Chairpersons and all Local Councils Executives upto the District level including the LCV and as I had done before with the other groups, I took them through the proposed amendments and yet again, the overwhelming majority advised me to the proposed amendments.*

f) *The next day on 23rd October, 2017, I met elders and members of the markets within my constituency including Jinja Central market, Amber court market, Mpumude market and Rubaga market and I still explained to them the purpose of the consultations and the proposed amendments to the Constitution especially on Art. 102(b) and save for a few exceptions, the bigger number told me that I should go ahead and support the proposed amendments.*

7. *THAT on 24th October, 2017, I held a press conference with all my agents and media groups and disclosed to them how my consultations had been peaceful and informed them that the people of Jinja Municipality West had fully endorsed the proposals in the Constitutional (Amendment) No.2 Bill, 2017.*

8. *THAT I know that the consultations in my Constituency Jinja Municipality West were conducted peacefully with no interference in*

the form of beatings, arrests and or brutality from officers of the Uganda Police or the Uganda People's Defence Forces (UPDF).

9. That the above basis, when the Bill was presented on the floor of Parliament, I voted YES as advised by my Constitutes.

Henry Musasizi Ariganyira, filed an affidavit in which he deponed as follows:-

5. *That I know that following the Right Honourable Speaker's directive, I with other Political mobilisers conducted consultative meetings in my Constituency about the Constitutional (Amendment) (No.2) Bill of 2017.*

6. That I know that our consultative methodology involved public meetings in the four sub counties of Rubanda East and Nineteen parishes and four wards.

7. That I know that all meetings were conducted peacefully without any interference from the public or security forces.

8. That I know that people were given chance to express their views about the proposed amendments and they overwhelmingly supported the amendment.

9. That I know that these consultations were made between 30th October, 2017 and 6th November 2017.

10. That I know that radio announcements were run on voice of Kigezi, Kabale from 20th of October , 2017 as a tool of mobilization inviting people for consultative meeting.

Ongalo Obote Clement Kenneth, on his part deponed as follows:-

6. That I know that following the Right Honourable Speaker's directive, I with other Political mobilisers conducted consultative meetings in my Constituency about the Constitutional (Amendment) (No.2) Bill of 2017.

7. That I know that on the 2nd November 2017, I received UGX 29,000,000/= as facilitation and proceeded to my Constituency to consult the electorate.

8. That I know that after meeting with relevant stakeholders i.e. RDC, DPC, DISO, LCV Chairperson, District Councilors LCIII Chairpersons and various party leaders, it was agreed that consultations be done at sub county level and be open to the general public.

9. That I immediately placed announcements on three Radio stations that serve Kaberamaido i.e Delta FM, Soroti Radio, Dwanwa, Kaberamaido and Dokolo FM informing the public about the consultation program which were aired from 4th to *7th November, 2017.*

10.That I know that my team and I carried out consultations between 5th November , 2017 and 10th November , 2017 in the six sub counties that form Kalaki constituency and received overwhelming support in favour of the amendment of the Constitution.

11. That I know that all meetings were conducted peacefully without any interference from public or security forces

12. That I know that people were given a chance to express their views about the proposed amendments and they overwhelmingly supported the amendment.

Tumusiime Rosemary Bikaako, stated as follows in his affidavit.

1. *That I know that the Rt. Hon Speaker issued a directive to all Members of Parliament to consult in their respective constituencies and the Parliamentary Commission facilitate every Member of Parliament with finances to carry out consultations within their respective constituents.*
2. *That my consultation approach involved first, meeting with the smaller groups of people and thereafter I organsied and held a bigger meeting involving the entire population of Entebbe Municipality.*
3. *That I then proceeded to conduct several consultative meetings as follows:-*
    a) *That I met with the people with disabilities at Kiwafu ward in Entebbe Municipality and carefully explained to them the purpose of the consultations and by show of hands, majority of them advised that I should support the Constitutional (Amendment) No.2 Bill 2017.*
    b) *That I met the youth leaders at Kiwafu ward in Entebbe Municipality West and I carefully explained to them the purpose of the consultations and although a few of them said no, the majority of them advised that I should support the Constitutional (Amendment) No.2 Bill 2017.*
    c) *That I met the Local Council I and II Chairperson as well as the NRM councilors at central ward in Entebbe Municipality and I explained to them the details of the proposed amendments to the Constitution and I also carefully listened to their views and eventually , by show hands, majority of them agreed that we should proceed and amend.*

d) *That I met the elderly people at Katabi ward in Entebbe Municipality and I carefully explained to them the purpose of the consultations and by show of hands, majority of them advised that I should support the Constitutional (Amendment) No.2 Bill 2017.*

e) *That I met with religious leaders at central ward in Entebbe Municipality West and I carefully explained to them the purpose of the consultations and by show of hands , majority of them advised that I should support the Constitutional (Amendment) No.2 Bill 2017.*

4. *That after meeting with the above mentioned groups , I together with the party leadership and other agents organised and held another meeting at the Children's park in Entebbe Municipality to get views and consensus of the people in Entebbe Municipality*
5. *That I know in all the meetings conducted, save for a few opposing voices, the overwhelming majority of my constituents freely , willingly and openly expressed their support for the Constitutional (Amendment) No.2 Bill 2017.*
6. *That I know that all consultative meetings were conducted peaceful and without any interference from the public or security forces and on 19th of December 2017 when the August House convened and the above debate was called , I voted yes in support of the Constitutional Amendments) with the full mandate of the of Entebbe Municipality in Wakiso District.*

The above is the total sum of the evidence adduced to rebut the evidence of the petitioners that there was no sufficient public participation envisaged under *Articles 1, 2* and *8A* of the Constitution. I have carefully studied the evidence and

I have applied to it a quantitative test. I find that the nature, extent and depth of consultation is unascertainable. It cannot even be ascertained whether or not these consultations took place at all except for Hon. Margret Muhanga who attempted to attach photographs unauthenticated as they were and some minutes of a meeting. The rest simply were stories that would not pass as sufficient evidence in a Court of law. Even if the averments were true, they related to very few people in relation to country's population and demography.

Applying the qualitative test, I find that only 7 out of 455 Members of Parliament who were on the Roll call, when the bill was passed were proved to have consulted the people in some way.

The number of constituencies in which consultations were made appears to have been only 7 out of 290 constituents representing 2.41% of the total.

- Obote stated that he consulted in six Sub-counties
- Tumusiime consulted only in Entebbe Municipality
- Muhanga on her part consulted in 15 sub-counties
- Lokeris he consulted in only one constituency and does not mention the number of sub-counties.

Out of total of 1,403 sub-counties, consultations were carried out in 25 of them representing 1.8% of the total sub-counties.

In terms of demography it was Moses Balyeku and Margret Muhanga who stated that they had consulted the youth in his constituencies. Lokeris showed he consulted some elders. Kakooza consulted in 3 sub-counties in Kabura constituency. Moses Balyeku stated he consulted Jinja Municipality according to his affidavit.

Out of the 290 Constituencies in the Country, with a voting population of 15,277,198, I find that the percentage of the people consulted, was so negligible almost meaningless as to amount to the public participation envisaged under the Constitution.

Perhaps I should apply the facts before me to another test, that was first expounded upon by Lord Diplock in *Donoghue v Stevenson [1932] All ER Rep 1.* That of a reasonable man. It has since evolved into that of a 'reasonable person.' The test is :- Can a reasonable person presented with the facts before me conclude that, the people of Uganda participated in the process of enacting the Constitution (Amendment) Act, Act 1 of 2018?

The concept of a reasonable person can be traced way back to the Roman law, the figure of *bonus Paterfamilias*, used by Romans jurists to define a legal standard. It belonged to a family of hypothetical figures in law that include "the right thinking member of society, the officious by-stander, a fair minded and informed observer, among others. The learned author Percy Henry Winfred while discussing the consent of a reasonable man observed that:-

> *"He has not the courage of Achilles, the wisdom of Ulysses or the strength of Hercules, nor has he the prophetic vision of a clairvoyant. He will not anticipate folly in all its forms but he never puts out of consideration the teachings of experience. . ."*

In the context of this Country an ordinary reasonable person, is probably, one who has a national identification card, a mobile phone, listens regularly to radio, attends LCI meetings, has a job or tends to his/her garden or businesses, rides on a boda to town, and takes his /her children to school.

The question I ask myself again is whether any ordinary reasonable Ugandan with attributes set out above can positively state that the public reasonably and adequately participated in the legislative process that resulted in the enactment of Act 1 of 2018. In determination of this question, I am persuaded by the decision of *South African Constitutional Court in Doctors for Life* (Supra) in which Ngcobo J, while discussing a similar concept stated:-

> *"In determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the Court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances. And factors relevant to determining reasonableness would include rules, if any, adopted by Parliament to facilitate public participation, the nature of the legislation under consideration, and whether the legislation needed to be enacted urgently. Ultimately, what Parliament must determine in each case is what methods of facilitating public participation would be appropriate. In determining whether what Parliament has done is reasonable, this Court will pay respect to what Parliament has assessed as being the appropriate method. In determining the appropriate level of scrutiny of Parliament's duty to facilitate public involvement, the Court must balance, on the one hand, the need to respect parliamentary institutional autonomy, and on the other, the right of the public to participate in public affairs. In my view, this balance is best struck by this Court considering whether what Parliament does in each case is reasonable." (Emphasis mine)*

Taking all the above into account, I am unable to find that an ordinary reasonable person in Uganda, would consider that the people of this Country

were availed sufficient opportunity, time, information and resources to meaningfully participate in the process that led to the enactment of the impugned Act.

I find further that Parliament did not act reasonably and diligently to ensure that the National Objectives and Directive Principles of State Policy are attained, specially the democratic principle 11 (i) which stipulates as follows:-

> *"(i)The State shall be based on democratic principles which empower and encourage the active participation of all citizens at all levels in their own governance."*

This principle is part of the provisions of the Constitution under *Article 8A* already reproduced above. I cannot explain the principle of active/actual public participation in better words than those used by Ngcobo J, in *Doctors for Life* (Supra) when he stated that:-

> *"Public participation in the law-making process is one of the means of ensuring that legislation is both informed and responsive. If legislation is infused with a degree of openness and participation, this will minimise dangers of arbitrariness and irrationality in the formulation of legislation. The objective in involving the public in the law-making process is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy, and thus the acceptance, of the legislation. This not only improves the quality of the law-making process, but it also serves as an important principle that government should be open, accessible, accountable and responsive. And this enhances our democracy."*

Applying the above principle and the tests set out above I can only find that, Parliament failed to ensure and encourage active participation of all citizens of Uganda at all levels in the process that led to the enactment of the impugned Act, contravened *Article 8*A of the Constitution.

This Court has a right and duty under *Article 137* of the Constitution, to ensure that the law making process is observed and adhered to by Parliament as the Constitution prescribes. Where Parliament, by omission, fails to meet the conditions required by the Constitution for the law making process, this Court has a duty to say so and to declare the resulting law invalid.

I find that Parliament failed to encourage, empower and facilitate active public participation of all citizens in the process of enacting the impugned Act in contravention of *Articles 1, 2* and *8A* of the Constitution and this omission vitiated the whole of the impugned Act.

(3).Whether the Police and Army intervention vitiated the whole process in the passing the impugned Act

The others issues for me to determine are 5, 6(a), 6(d) and 6(f). These issues have already been reproduced above.

Broadly, they seek an answer to the question whether during the process of enacting the impugned statute the Members of Parliament and public were subjected to violence, intimidation and restrictions, inside and outside Parliament by the Uganda Police Force and the Army in contravention of the Constitution. Further, whether the said violence, intimidation and restrictions vitiated the whole process of enactment of the impugned Act.

I have had the opportunity of reading in draft the Judgments of their Lordships on this Coram in regard to this issue. They have extensively discussed the issue above and concluded that:- although there was indeed violence, intimidation and restrictions imposed on Members of Parliament and the public during the process of enacting the impugned Act, there is no evidence that the entire process was vitiated as a result. I agree, however. I only wish to add as follows:-

That the actions of some Members of Parliament prior to and during the process of enacting the impugned Act created an environment that precipitated and eventually led to the intervention of both the Police and Army.

I have found no evidence to prove let alone to suggest that, the Police and Army planned to initiate and perpetuate violence and intimidation against the Members of Parliament and the public in order to influence the results of the debate on the impugned Act. From the evidence on record, it is likely and indeed probable, that neither the Police nor the Army would have had a reason to do what they did had the Members of Parliament conducted themselves in an orderly, professional and honourable manner outside and inside the chambers of Parliament during the process that resulted into the enactment of the impugned Act.

However, in view of our history, the hasty intervention of the Army was uncalled for. There was no evidence whatsoever requiring its intervention, as the police force in Uganda is equipped and professional enough to evict unarmed people from a building that is not even on fire. Our history requires that the Army be kept out of partisan politics.

During the constitutional making process the people expressed a view that, the Army must be kept out of politics. I have already reproduced the excerpt of the

Odoki report in this respect earlier in this Judgment. The Uganda Police is subject to the law and must at all times treat citizens with respect and dignity. Article 44(a) of the Constitution provides:

> *Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms—*
>
> > *44(a) freedom from torture and cruel, inhuman or degrading treatment or punishment.*

The petitioners have set out in their affidavits wide ranging allegations against the Police, accusing them of brutality and torture.

Degrading treatment of citizens by Police is unconstitutional and unacceptable. Even if the persons being arrested are really suspected of any criminal activity, they ought to be treated with respect and their presumption of innocence must be protected. It is in my view, an extremely serious matter when individuals and state agencies violate with impurity non-derogable rights.

We know from the Bible that more than 2000 years ago, a Roman citizen enjoyed certain rights and could not be subjected to cruel or humiliating punishment. St. Paul being a Roman citizen could not be put in chains or flogged! Any Roman soldier or officer who flogged a Roman citizen was subject to severe punishment. A Roman citizen could not be crucified. St. Paul was beheaded in a dignified mode of execution reserved for only Roman citizens at the time. This fact is set out in the Bible as follows:-

> *"Acts of the Apostles 24-29 New International Version (NIV)*

[24]the commander ordered that Paul be taken into the barracks. He directed that he be flogged and interrogated in order to find out why the people were shouting at him like this.

[25]As they stretched him out to flog him, Paul said to the centurion standing there, "Is it legal for you to flog a Roman citizen who hasn't even been found guilty?"

[26]When the centurion heard this, he went to the commander and reported it. "What are you going to do?" he asked. "This man is a Roman citizen."

[27]The commander went to Paul and asked, "Tell me, are you a Roman citizen?" "Yes, I am," he answered.

[28]Then the commander said, "I had to pay a lot of money for my citizenship." "But I was born a citizen," Paul replied.

[29]Those who were about to interrogate him withdrew immediately. The commander himself was alarmed when he realized that he had put Paul, a Roman citizen, in chains."

The Constitution demands that citizens of this Country be treated with respect and dignity by all agencies of the State. Again I am constrained to refer to the maiden speech of President when in 1986 he promised Ugandans that no citizen would be beaten b the army (read or the Police) as it had been the norm in the past regimes.

The upholding of the dignity of the citizens is what makes them proud and promotes patriotism.

The police in Uganda have no right to frog match Members of Parliament, beat them and humiliate them the way they now routinely do which this Court takes judicial notice of being a notorious fact. This is unacceptable and it must stop forthwith. The Attorney General must ensure that this is brought to an immediate end. Today a Member of Parliament is flogged. Tomorrow it shall be a Minister, then God forbid the Chief Justice. We would have gone through full circle.

I find that the action of Police and Army in forcefully evicting Members of Parliament from the Chambers and arresting them after manhandling them violated the Constitution. In my considered view Speaker of Parliament should simply have adjourned the House to the next day and then the Sergeant at Arms would have denied entry to the members who had been suspended. Members of Parliament who were injured, manhandled or otherwise mistreated are at liberty to institute civil and/ or criminal proceedings in an appropriate Court of law to seek redress.

Having said that, the question is whether the intervention of the Police and the Army in Parliament had the effect of vitiating the entire process of the enactment of the impugned Act.

It appears to me, as found by the Hon. the Deputy Chief Justice, that the process was not adversely effected by the violence, intimidation and restrictions set out by the petitioners. I find so because on 18th December 2018 the day when Parliament was besieged by the Police and when Members of Parliament, including the Speaker were prohibited by police from parking their motor vehicles outside the Parliament, the House was so full that the Deputy Speaker who was presiding remarked thus:-

"THE DEPUTY SPEAKER: Honourable members, I welcome you to this sitting which looks like a very special one. I am seeing Members that I have not seen in a long time. (Laughter) I should always engage the services of those who mobilised you to do the same always because today is really special. (Laughter) I am even surprised my register is showing 214; it looks like there are more than 214 Members. That means probably the Members who have not been attending do not know that they have to press a button to register. (Laughter)They may want to go back and put their finger print so that we can have the total number of Members properly recorded."

On Tuesday 19th December 2017, Mr. Robert Kyagulanyi an Independent Member of Parliament representing Kyadondo County East, Wakiso District stated as follows on the floor of Parliament:-

"*Today, we know that studies have been made and surveys have been carried out. Madam Speaker, I have had the rare opportunity to traverse the whole country and everywhere I have been, from the north , south , from the east to the west, people are saying do not amend our Constitution. These people know what they are talking about, they know what this is about and who is pushing for it. They are not saying do not amend because it a fashionable thing to do, no. It is because they know what will come if this Parliament disregards the popular view and amends this Constitution."*

On 20th December, 2017 when the impugned Bill came up for the third reading, 479 Members of Parliament were present. 315 voted for the Bill, 62 against and 2 abstained. The House was so full that Members were standing in the lobby and the Speaker could not close the doors. I am unable to find that Members of

Parliament were prevented from attending Parliamentary proceedings during the debate and voting on the impugned Bill as contended by the petitioners. I am equally unable to find that the Members of Parliament were prevented from consulting the public in view of the above statement made by Hon. Kyagulanyi. Indeed a careful perusal of the Hansard reveals that, each time a Member of Parliament stood to speak, he or she stated that she or he had consulted the people in one way or the other. I have already held that the nature and mode of public participation fell short of the Constitutional requirement. However, I am not satisfied that the reason for poor public participation was a result of the Members of Parliament having been prevented to do so by the police or anyone else within the precincts of Parliament. Although the opportunity to consult was availed it was purely conceived and was not well utilized.

It is on record that, Parliament did provide each Member of Parliament with Shs. 29,000,000/= (Twenty nine million shillings) for the purpose of consultations. A few Members of Parliament on their own volition returned the money. I must mention here that they were only 14 members according to the evidence of Jane Kibirige the Clerk to Parliament.

This list did not include Mrs. Betty Nambooze Bakireke. She was not truthful when she stated in her testimony in Court that she did return the money. All she did was to write a cheque which was never cashed. She knew very well at the time she came to Court to testify that, that money had never left her account. She did not appear at all as a truthful witness. I can safely conclude that since Members of Parliament were given money which they accepted they had the freedom to consult the people. All in all no sufficient evidence was provided to prove that Members of Parliament were prevented by the police from consulting the people.

Before I leave this issue I am constrained to comment on the Shs. 29,000,000/= (Twenty nine million shillings) given to Members of Parliament. I must state that, it was very disturbing to find out that whereas all Members of Parliament were given this money, almost all of them did not use it for the purpose of facilitating public participation.

Those who attempted to do so, simply held a few meetings and talked to the few they had selected. This is not because they were prevented by the police from consulting. They simply did not bother to consult. I have stated above that this consultation fell short of the required Constitutional standard. It is disturbing to note that the money was given to Members of Parliament irrespective of the location of their constituencies. A Member of Parliament for Kampala Central where Parliamentary Building is located was given the same amount of money as a Member of Parliament for Kisoro, Arua or Kotido hundreds of miles away.

Similarly, Members of Parliament who have no voting rights, being Ex-Officio Members were also given this money although they clearly had no constituencies to consult.

It appears to me clearly that the money was paid to Members of Parliament as a gratification. That money must be accounted for by the Parliament's accounting officer in respect of Members of Parliament with constituencies. In respect of Members of Parliament without constituencies, the money must be refunded or recovered from them through the process established under the law.

Having stated that, I must reiterate what my brothers the Hon the Deputy Chief Justice and Justice Kasule have stated that the Police had no powers to issue directives stopping Members of Parliament and specifically Members of the Opposition in Parliament from consulting the people of Uganda. The Police Officer who issued that directive ought to be brought to account by relevant

authorities. This is a free and democratic society, it is not a Police state. The Public Order and Management Act must be implemented subject to the Constitution and in its implementation, the resultant effect must not violate or contravene Constitutional provisions. The act of the Police in issuing the letter in question violated *Articles 1, 2, 23, 29* and *39* of the Constitution.

(4) Whether consultations were marred with Police restrictions and violence and if so whether that was inconsistent with and in contravention of Articles 29(1),(a),(d),(e) and 29(2)(a) of the Constitution.

It was also contended by the petitioners that Members of Parliament were prevented from consulting the electorate by the Assistant Inspector general of Police, who on 16th October 2017 issued a message directing all Police officers to ensure they are not allowed to freely consult. This, Counsel for the petitioners contended violated the Constitution and vitiated the process of enacting the impugned Act. The said Police message is set out in the Judgment of Lady Justice Elizabeth Musoke. I have therefore found no reason to reproduce it here.

Suffice it to say, it was issued by Assistant Inspector General of Police, Mr. Assuman Mugenyi to all Police stations throughout the Country. It required the Police to stop Members of Parliament from moving from one Constituency to another. I agree entirely with the observations and findings of my brother Justice Cheborion that the act of issuing the Police directive mentioned above was unconstitutional for the reasons he has given.

The Police directive was issued in complete and total disregard of the Constitution. The Police appears to have acted and continue to act as if this Country has no Constitution. They assume, quite wrongly that, being a Police officer puts one above the law. The Police has no power to curtail the liberty of

Ugandans except as provided for under the Constitution. The Police message does not mention under what law it was issued and how it was to be implemented. It criminalises intent. It goes against every letter and spirit of this Constitution and takes us back to the dark days of the past which I have attempted to set out earlier in this Judgment.

By directing the police to stop the intimidation of persons perceived to be supporting the removal of the age limit without issuing a similar directive in favour of those who were not supporting the age limit removal, the police acted in a partisan manner. In the process it also criminalised an otherwise legitimate political issue. By criminalising a section of the society in this case the people who did not support the removal of the age limit, the Police pursued an extremely dangerous path. This kind of trend is what the Constitution was put in place to stop. The Police directive violated the promise of freedom and liberty the President gave to the people of Uganda in 1986 when NRA took power.

Throughout the early colonial years perhaps up to 1955, the colonial policy discriminated and criminalized all the people of Bunyoro. Many had to change their names, dropping Runyoro names and adapting Kiganda ones. More than three quarters of the population of Bunyoro was killed on starved during the Kabalega war leaving empty land that was later turned into National Parks and Game and Forest Reserves by the colonial government. There was also discrimination against and marginalisation of Catholics during the colonial period.

From 1966 to 1971 there was wide spread criminalization of Baganda and the members of the opposition Democratic Party and Kabaka Yekka. From 1971-1978 there was criminalization of Acholi, Langi and members of UPC party. Amin's

wrath did not spare the Indian community, who were expelled and their property confiscated by government including those of Ugandan citizens of Indian descent.

Almost the whole population of West Nile Region was forced into exile between 1979- 1986 simply because Idi Amin happened to have been born there. Muslims were persecuted, criminalized and discriminated against after the fall of Idi Amin. The Banyarwanda and Banyankole followed suit between 1981- 1986. During this time many DP and UPM supporters were tortured, killed or exiled on that account alone. All the above are notorious facts of our history that I take judicial notice of.

The 1995 Constitution put to an end to this cycle of violence in *Article 21 (1) and (2).*

> *21. Equality and freedom from discrimination.*
>
> *(1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.*
>
> *(2) Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.*

Under Article 43(2) (a), freedom from political persecution cannot be curtailed in public interest. There is always a danger that, if the Constitution is not strictly complied with our hard earned democracy shall degenerate into authoritarianism, which leads to totalitarianism and dictatorship. Totalitarianism leads to tyranny and oppression both of which inevitably lead into anarchy. This is the trend that our Constitution of 1995 was put in place to stop. It is for this

very reason that we must defend every letter of this Constitution and condemn every act that violates it.

I find therefore that the act of the police issuing the said letter contravened Articles 1,2,21,23, 29 and 39 of the Constitution and I hold so.

Having said that, I agree with my brother Cheborion JCC, that no sufficient evidence was adduced to prove the above Police directive unconstitutional as it was, on its own vitiated the whole process of enacting the impugned Act.

(5) <u>Denying the public access to Parliament</u>

I shall proceed to resolve the remaining issues. Issue 7 (a), (c), (e) (g) (iii) relate to the proceedings in Parliament

> *Issue 7 (a) is whether the actions of Parliament preventing some members of the public from accessing Parliamentary chambers during the presentation of the Constitutional Amendment Bill No.2 of 2017 was inconsistent with and in contravention of the provisions of Articles 1, 8A, 79,208(2),209,211(3),212, of the Constitution.*

It was contended and pleaded by Mr. Mabirizi in his affidavit in support of Constitutional Petition No. 49 of 2017, that he was prevented from accessing Parliamentary Chambers during the presentation of the Constitutional Amendment Bill which was in contravention of Rule 23 of the Rules of Procedure of Parliament. The relevant paragraphs in light of the above are 39, 40, 14, 42, 43, 47, 48, 49, 50, 51 and 53.

It was further contended that, the prevention from Parliament was contrary to *Article 79(3)* of the Constitution and II (i) of the National Objectives and Directive Principles of State Policy where Parliament is obliged to promote the

democratic principles and democracy which is only accomplished when people participate in the processes.

Rule 23 of the Rules of Procedure of Parliament, 2017 provides as follows:-

"23. Sittings of the House to be public.

1) Subject to these Rules, the sittings of the House or of its Committees shall be public.

(2) The Speaker may, with the approval of the House and having regard to national security, order the House to move in closed sitting."

Rule 230 of the Rules of Parliament, 2017 also provides for admission of the public and press into the House and Committees subject to the rules made by the Speaker.

I find that one of the principles of open participation was indeed violated when the Petitioner was prevented from accessing Parliament during the presentation of the Constitution (Amendment) Bill. People should be able to monitor what their representatives are doing during the Parliamentary proceedings since the same is provided for under the Rules of Procedure of Parliament. However, I do not find that, this omission had any impact on the passing of the impugned Act into law.

(6) Sitting arrangement in Parliament

Issue 7(c) is *whether the alleged actions of the Speaker in permitting Ruling Party Members of Parliament to sit on the opposition side of Parliament was inconsistent with Articles 1, 8A, 69 (1),69 (2)(b), 71, 74, 75, 79, 82A, 83 (1)(g), 83 (3) and 108A of the Constitution.*

It was contended by the petitioners that failure by Parliament to observe its Rules of Procedure was in contravention with above articles of the Constitution. The above issue was specifically raised by Mr. Mabirizi in his affidavit in support of Constitutional Petition No. 49 of 2017at paragraphs 74, 75 and 76. He relied on the Supreme Court decision of *Ssekikubo and 4 others Vs Attorney General and others Constitutional Appeal No. 01 of 2015,* in which Court interpreted the aspect of "crossing the floor" which I find inapplicable to the above issue. Rule 9 of the Rules of Procedure of Parliament 2017 stipulates as follows;-

"Sitting arrangement in the House

(1) Every Member shall, as far as possible, have a seat reserved for him or her by the Speaker.

(2) The seats to the right hand of the speaker shall be reserved for the Leader of Government Business and Members of the Party in Government.

(3) The seats to the left hand of the Speaker shall be reserved for the Leader of the Opposition and Members of the Opposition party or parties in the House.

(4) The speaker shall ensure that each Member of Parliament has a comfortable seat."

Rule 82(1) (b) provides that;-

"a Member shall not cross the floor of the House or move around" unnecessarily."

According to the Hansard of the Tenth Parliament of Wednesday, 27th September 2017 at page 4743, the Speaker called upon Honourable Members take comfortable seats, the Members were not in violation of Rule 82(1) (b) as contended by the petitioner of Constitutional Petition No. 49 of 2017. It was within the Speaker's powers to ensure that all Members have comfortable seats as provided under Rule 9(4). At the time the Speaker made this directive, Members of the Opposition had on their own walked out of Parliament. It would have been difficult if that had not been the case. The order was meant to be temporary and indeed when the Opposition Members returned they occupied their seats comfortably. I find that this order of the Speaker did not have any significant implication on the process of enacting the Constitution (Amendment) Act and was not in contravention with *Articles 1, 8A, 69 (1), 69 (2)(b), 71, 74, 75, 79, 82A, 83 (1)(g), 83 (3) and 108A of the* Constitution as contended.

(7) <u>Absence of leaders of Opposition during the debate</u>

In respect of issue 7(e), it is clear that the leader of opposition voluntarily exited the House well knowingly that the majority Committee Report was to be presented by the Chairperson of the Legal Affairs Committee.

The Hansard of the same day, reveals that leader of opposition actually came back into the House shortly afterwards and was present during the presentation of the Majority Committee Report.

Therefore I find no merit in this ground.

(8) <u>Issue 7 (g) (iii) failing to close all doors during voting.</u>

This issue was raised during the parliamentary proceedings by Hon. Katuntu at page 5229 of the Hansard of the Tenth Parliament on Wednesday, 20th December 2017, follows;-

"Madam Speaker, I seek your indulgence. Rule 98(4) of the Rules of Procedure reads: "The speaker shall then direct the doors to be locked and the bar drawn no Member shall thereafter enter or leave the House until after the roll call has been taken." All doors are open and Members are moving in and out. I am sorry to have raised this point so that we obey the rules. If the members think that we do not have to obey rules-thank you very much."

The Rt. Hon. Speaker explained the reason why the doors could not be closed during the voting

"SPEAKER: Honourable members ideally I was supposed to have closed the doors under rule 98(4). However, that exists in a situation where all Members have got seats, but in this Parliament, 150 Members do not have seats. Therefore, it was not possible to lock them out and that is why I did not lock the doors. I hope there is nobody in the lobby. Is there anybody who has not voted? We now close the ballot..." (Hansard Page 5234)

The Speaker explained why the rule could not be complied with. I find that voting when the doors were open offended the Rule of Parliament cited above, however this did not in any way violate the Constitution and vitiate the enactment of the impugned Act. The Hansard of Wednesday, 20thDecember 2017 at pages 5264-5269 indicate that all Members of Parliament who were present and wanted to vote, voted and there is no evidence to the contrary. I find no merit in this ground. The issue is resolved in the negative.

(9) <u>Continuance in office by the President upon attaining 75 years.</u>

Issue 13 *is whether continuance in office by a President elected in 2016 and remains in office on attaining the age of 75 years which is contrary to Articles 83(1) (b) and Article 102 (c) of the Constitution.*

Mr. Mabirizi contended that, continuance in office by the President on attaining the age of 75 will be contrary to *Articles 83(1) (b)* and Article *102 (c)* of the Constitution, because the President would have ceased to be qualified as it is for Member of Parliament.

Article 83 (1) (b) stipulates as follows;-

> *(b) if such circumstances arise that if that person were not a member of Parliament would cause that person to be disqualified for election as a member of Parliament under article 80 of this Constitution."*

Article 102 provides as follows;-

> *"Qualifications of the President.*
>
> *A person is not qualified for election as President unless that person is*
>
> *(a) a citizen of Uganda by birth;*
>
> *(b) not less than thirty-five years and not more than seventy-five years of age; and*
>
> *(c) a person qualified to be a member of Parliament."*

The words used in *Articles 83(1) (b)* and *102(b)* are plain and ought to be given their natural and ordinary meaning. Clearly under this Article the age limit of the President applies only at the time of nomination and not otherwise. Had the framers of the Constitution intended that the President and Members of Parliament have same qualifications, they would have stated so but they did not.

The factors that disqualify Members of Parliament are not applicable to the President. This is simple and clear. Therefore, I find that, this ground is misconceived and devoid of any merit whatsoever. The issue is resolved in the negative.

In conclusion I find that, all the consolidated Petitions have substantially succeeded.

(10) Remedies

I find and declare that:-

(1) The entire Constitution (Amendment) Act 1 of 2018 is unconstitutional and is therefore null and void. All its provisions ought to be expunged from the Constitution of Uganda.

(2) The petitioners shall be paid by the respondents 2/3 of the costs of this Petition, in respect of only their disbursements, since this matter was brought in public interest. In respect of each Petition Ug Shs. 20.000.000/= is awarded on account of professional fees save for Petition No. 49 of 2017 in which the petitioner represented himself and Petition No. 3 of 2018 in which no professional fees were prayed for.

I so order.

Recommendations

Before I take leave of this matter, I would like to make the following recommendations.

(1) In view of the fact that, there are pending in Parliament a number of motions seeking to introduce Private Members bills proposing a

number of Constitutional amendments and in view of the observations of the Committee on Legal and Parliamentary affairs of Parliament that "A number of stake holders" had requested (read recommended) that the Constitution should be amended after the establishment of a Constitutional Review Commission. Further in view of the recommendations of the Supreme Court in *Amama Mbabazi and other Vs Y.K Museveni* (Supra).

There is urgent need for the Attorney General to bring before Parliament a proposal to constitute a Constitutional Review Commission under the Commission of Inquiry Act Cap 166 detailing therein terms of reference, for amendment of the Constitution.

That Commission be tasked with a duty of seeking the views of the people of Uganda in a period of not less than six months on all proposed amendments and to make proposals to Parliament.

(2) A similar commission of inquiry be set up to investigate, determine and make recommendations regarding the apparent brutality of the Police against the citizens of this Country with a view of seeking a remedy to this mischief.

(3) The Government provides sufficient funds for this purpose.

(4) The Attorney General issues within a period of six months from date hereof guidelines to the Police in their implementation of the Public Order and Management Act and a copy thereof be submitted to this Court.

(5) The Auditor General carries out a forensic audit of Accounts of the 10th Parliament, and a copy of the resultant report be submitted to this Court and to the Minister of Justice and Constitutional Affairs.

I so recommend.

Dated at **Mbale this 26 day of July 2018.**

Kenneth Kakuru
Justice of Appeal/Constitutional Court

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT MBALE

CONSOLIDATED PETITIONS

1. **CONSTITUTIONAL PETITION NO.49 OF 2017**

MALE MABIRIZI KIWANUKA :: PETITIONER

VERSUS

ATTORNEY GENERAL :: RESPONDENT

AND

2. **CONSTITUTIONAL PETITION NO. 003 OF 2018**

UGANDA LAW SOCIETY :: PETITIONER

VERSUS

ATTORNEY GENERAL :: RESPONDENT

AND

3. **CONSTITUTIONAL PETITION NO.5 OF 2018**

7. HON. GERALD KARUHANGA KAFUREEKA
8. HON. ODUR JONATHAN
9. HON. MUNYAGWA S. MUBARAK **:::::::::: PETITIONERS**
10. HON. SSEWANYANA ALLAN
11. HON. SSEMUJJU IBRAHIM
12. HON. WINNIE KIIZA

VERSUS

ATTORNEY GENERAL :: RESPONDENT

AND

4. **CONSTITUTIONAL PETITION NO.10 OF 2018**

5. PROSPER BUSINGE
6. HERBERT MUGISA **:::::::::::::::::::::::::::::::: PETITIONERS**
7. THOMAS MUGARA GUMA
8. PASTOR VINCENT SANDE

VERSUS

ATTORNEY GENERAL :: RESPONDENT

AND

5. **CONSTITUTIONAL PETITION NO.13 OF 2018**

ABAINE JONATHAN BUREGYEYA :: PETITIONER

VERSUS

ATTORNEY GENERAL :: RESPONDENT

CORAM: HON. MR. JUSTICE ALFONSE OWINY DOLLO, DCJ
HON. MR. JUSTICE REMMY KASULE, JCC
HON. MR. JUSTICE KENNETH KAKURU, JCC
HON. LADY JUSTICE ELIZABETH MUSOKE, JCC
HON. MR. JUSTICE BARISHAKI CHEBORION, JCC

JUDGMENT OF HON. LADY JUSTICE ELIZABETH MUSOKE, JCC

Introduction:

The above five Petitions were brought under Article 137(3) of the Constitution and Rule 13 of the Constitutional Court (Petitions and References) Rules, S.I 91 of 2005 seeking various declarations, orders and other remedies. The Constitutional Petitions No. 49 of 2017, No. 03 of 2018, No. 05 of 2018, No. 10 of 2018, and No. 13 of2018 were filed separately.

However, in view of the fact that all the Petitions were premised on essentially similar facts, raised similar questions of law and fact and sought similar reliefs, this Court granted leave to the parties to have the Petitions consolidated, heard and determined together as such. By consent of the Parties and their respective legal counsel, the Petitions were consolidated and heard together.

Background to the Petition

The facts from which the consolidated Constitutional Petitions arise are that: on the 27th day of September, 2017, Hon. Raphael Magyezi, Member of Parliament for Igara County West Constituency, Bushenyi District, moved a motion in the 10th Parliament of the Republic of Uganda seeking leave to introduce a private member's Bill to amend the Constitution vide Constitutional (Amendment) Bill No. 2 of 2017 in accordance with Articles 259 and 262 of the 1995 Constitution of the Republic of Uganda.

The objectives of the impugned Constitutional (Amendment) Bill No.2 of 2017 were to:- provide for the time within which to hold Presidential, Parliamentary and Local Government Council elections under Article 61; to provide for eligibility requirements for a person to be elected as President or District Chairperson under Articles 102 (b) and 183 (2) (b); to increase the number of days within which to file and determine a presidential election petition under Article 104 (2) and (3); to increase the number of days within which the Electoral Commission is required to hold fresh elections where a presidential election is annulled under Article 104(b) and for related matters.

Prior to the tabling of the impugned Bill on the 19th day of September, 2017, the Deputy Speaker of Parliament, the **Rt. Hon. Jacob Oulanya**, while presiding over Parliament assured members that the Constitution (Amendment) Bill was not going to be introduced by way of amending the Order Paper. Further, on the 20th day of September, 2017, the Deputy Speaker who again chaired

the proceedings, informed Parliament that he had received two notices of motion relating to Constitutional amendment and that they would be referred to the Business Committee for re-scheduling. The first notice, together with the motion, was submitted by Hon. Patrick Nsamba Oshabe, Member of Parliament for Kassanda North.

On 26th September, 2017, the Speaker of Parliament, the **Rt. Hon. Rebecca Alitwala Kadaga**, however, amended the Order Paper to include a motion by Hon. Raphael Magyezi that sought leave of Parliament to introduce a private member's Bill to amend the Constitution and to amend Article 102 (b) of the Constitution removing the presidential age limit among others.

Thereafter, the shadow Minister for Constitutional Affairs, Hon. Medard Lubega Sseggona questioned the Speaker as to why Hon. Raphael Magyezi's motion which was submitted on 21st September, 2017 was being placed on the Order Paper ahead of Hon. Patrick Nsamba's motion, which had been submitted prior on 18th September, 2017, and had met all the requirements but the Speaker went ahead with her earlier stand on the matter.

On 26th September, 2017, Parliament was besieged and blockaded by the Uganda Police, Special Forces, and Uganda People's Defence Forces (UPDF) personnel. They ordered the Members of Parliament to park at the National Theater and made their access to Parliament difficult, and the public was prevented from attending

Parliament and the live broadcast of the Parliamentary proceedings was banned.

The Petitioners contended that the use of violence and unlawful means at the time of tabling and actual enactment of the Constitution (Amendment) Bill, 2017 was inconsistent with and in contravention of the Constitution as it undermined Parliamentary independence and democracy and as such, it was inconsistent with and in contravention of Articles 1, 3, 8A, 79, 208(2), 209, 211(3) and 259 of the Constitution. Further, that the impugned Private Member's Bill did not meet the requirements of Rules 121 and 117 of the Rules of Parliament because an order to print and gazette the said Bill had been issued on 29th September, 2017 yet its title appeared in the gazette of 28th September, 2017.

At conferencing, upon consultation with Counsel for all parties, the following issues were framed for determination by this court:-

1. ***Whether sections 2 and 8 of the Act extending or enlarging of the term of life of Parliament from 5 to 7 years is inconsistent with and/or in contravention of Articles 1, 8A, 77(3), 77(4), 79(1), 96, 61(2) & (3), 260(1), 105(1), 289 and 233(2)(b)***
2. ***And if so, whether applying it retrospectively is inconsistent with and/ or in contravention of Articles 1, 8A, 77(3), 77(4), 79(1), 96 and 233 (2)(b) of the Constitution.***
3. ***Whether sections 6 and 10 of the Act extending the current life of Local government councils from 5 to 7 years is inconsistent with and/ or in contravention of Articles 1, 2, 8A, 176 (3), 181 (4) and 259 (2) (a) of the Constitution.***
4. ***If so, whether applying it retroactively is inconsistent with and/ or in contravention of Articles 1, 2, 8A, 176 (3), 181 (4) and 259 (2) (a) of the Constitution.***

5. ***Whether the alleged violence/ scuffle inside and outside Parliament during the enactment of the Act was inconsistent and in contravention of Articles 1, 2, 3 (2) and 8A of the Constitution.***
6. ***Whether the entire process of conceptualizing, consulting, debating and enacting the Act was inconsistent with and/ or in contravention of Articles of the Constitution as here-under:-***
    a) ***Whether the introduction of the Private Member's Bill that led to the Act was inconsistent with and/ or in contravention of Article 93 of the Constitution.***
    b) ***Whether the passing of sections 2, 5, 6, 8 and 10 of the Act are inconsistent with and/ or in contravention of Article 93 of the Constitution.***
    c) ***Whether the actions of Uganda Peoples Defence Forces and Uganda Police in entering Parliament, allegedly assaulting Members in the chamber, arresting and allegedly detaining the said Members is inconsistent with and/ or in contravention of Articles 24, 97, 208 (2) and 211 (3) of the Constitution.***
    d) ***Whether the consultations carried out were marred with restrictions and violence which were inconsistent with and/ or in contravention of Articles 29 (1) (a),(d),(e) and 29(2)(a) of the Constitution.***
    e) ***Whether the alleged failure to consult on sections 2, 5, 6, 8 and 10 is inconsistent with and/ or in contravention of Articles 1 and 8A of the Constitution.***
    f) ***Whether the alleged failure to conduct a referendum before assenting to the Bill containing sections 2, 5, 6, 8 and 10 of the Act was inconsistent with, and in contravention of Articles 1, 91 (1) and 259 (2), 260 and 263 (2)(b) of the Constitution.***
    g) ***Whether the Constitutional Amendment Act was against the spirit and structure of the Constitution under paragraph 12 of the National Objectives of State Policy.***
7. ***Whether the alleged failure by Parliament to observe its own Rules of Procedure during the enactment of the Act was inconsistent with and in contravention of Articles 28, 42, 44, 90 (2), 90 (3) (c) and 94 (1) of the Constitution.***
    a) ***Whether the actions of Parliament preventing some members of the public from accessing Parliamentary chambers during the presentation of the Constitutional Amendment Bill No. 2 of 2017***

was inconsistent with and in contravention of the provisions of Articles 1, 8A, 79, 208 (2), 209, 211 (3), 212 of the Constitution.

b) Whether the act of tabling Constitutional Bill No. 2 of 2017, in the absence of the Leader of Opposition, Chief whip and other opposition members of Parliament was in contravention of and/ or inconsistent with Articles 1, 8A, 69 (1), 69 (2)(b), 71, 74, 75, 79, 82A, and 108A of the Constitution.

c) Whether the alleged actions of the Speaker in permitting Ruling Party Members of Parliament to sit on the opposition side of Parliament was inconsistent with Articles 1, 8A, 69 (1),69 (2)(b), 71, 74, 75, 79, 82A, 83 (1)(g), 83 (3) and 108A of the Constitution.

d) Whether the alleged act of the Legal and Parliamentary Affairs Committee of Parliament in allowing some committee members to sign the Report after the public hearings on Constitutional Amendment Bill No. 2 of 2017, was in contravention of Articles 44 (c), 90 (1) and 90 (2) of the Constitution.

e) Whether the alleged act of the Speaker of Parliament in allowing the Chairperson of the Legal Affairs Committee, on 18th December 2017, in the absence of the Leader of Opposition, Opposition Chief Whip, and other Opposition members of Parliament, was in contravention of and inconsistent with Articles 1, 8A, 69 (1), 69 (2) (b), 71, 74, 75, 79, 82A and 108A of the Constitution.

f) Whether the actions of the Speaker in suspending the 6 (six) Members of Parliament was in contravention of Articles 28, 42, 44, 79, 91, 94 and 259 of the Constitution.

g) Whether the action of Parliament in:-

- ***i. waiving the requirement of a minimum of three sittings from the tabling of the Report yet it was not seconded.***
- ***ii. closing the debate on Constitutional Amendment Bill No. 2 of 2017 before every member of Parliament could debate on the said Bill.***
- ***iii. failing to close all doors during voting.***
- ***iv. failing to separate the second and third reading by at least fourteen sitting days are inconsistent with and/ or in contravention of Articles 1, 8A, 44 (c), 79, 94 and 263 of the Constitution.***

8. ***Whether the passage of the Act without observing the 14 sitting days of Parliament between the 2nd and 3rd reading was inconsistent with and/ or in contravention of Articles 262 and 263 (1) of the Constitution.***
9. ***Whether the Presidential assent to the Bill allegedly in the absence of a valid Certificate of compliance from the Speaker and Certificate of the Electoral Commission that the amendment was approved at a referendum was inconsistent with and in contravention of Article 263 (2) (a) and (b) of the Constitution.***
10. ***Whether section 5 of the Act which reintroduces term limits and entrenches them as subject to referendum is inconsistent with and/ or in contravention of Article 260 (2)(a)of the Constitution.***
11. ***Whether section 9 of the Act, which seeks to harmonise the seven year term of Parliament with Presidential term is inconsistent with and/ or in contravention of Articles 105 (1) and 260 (2) of the Constitution.***
12. ***Whether sections 3 and 7 of the Act, lifting the age limit are inconsistent with and/ or in contravention of Articles 21 (3) and 21 (5) of the Constitution.***
13. ***Whether the continuance in Office by the President elected in 2016 and remains in office upon attaining the age of 75 years contravenes Articles 83 (1) (b) and 105 of the Constitution of the Republic of Uganda.***
14. ***What remedies are available to the parties?***

Representation

Petitioners

At the hearing of the consolidated Constitutional Petitions, Wandera Ogalo, Learned Counsel, represented the Petitioners in Constitutional Petition No. 003 of 2017.

Byamukama James, Learned Counsel appeared for the Petitioners in Constitution Petition No. 10 of 2018.

Erias Lukwago, Ladislaus Rwakafuzi, Luyimbaazi Nalukoola and Yusuf Mutembuli, Learned Counsel represented the Petitioners in Constitutional Petition No. 005 of 2017.

Lestar Kaganzi, Learned Counsel represented the Petitioner in Constitutional Petition No. 13 of 2018.

Mr. Male Mabirizi Kiwanuka, the Petitioner in Constitutional Petition No. 49 of 2017 represented himself.

Attorney General

The Attorney General who was the Respondent in all the above consolidated Petitions was represented by the Learned Deputy Attorney General, Honourable Mwesigwa Rukutana; Mr. Francis Atoke, the Learned Solicitor General; Ms. Christine Kahwa, the Ag Director of Civil Litigation; Mr. Martin Mwambutsya, Commissioner Civil Litigation; Mr. Henry Oluka, Principal State Attorney; Mr. Elisha Bafirawala, Principal State Attorney; Mr. Richard Adrole, Senior State Attorney; Ms. Genevive Kampiire, Ms. Suzan Apita Akello, Mr. Johnson Kimera Atuhire, Ms. Jackie Amutugut and Ms. Imelda Adong, all of whom are Learned State Attorneys at the Attorney General's Chambers.

Form of Evidence

The hearing proceeded on affidavit evidence and annextures attached thereto of the various witnesses. The Petitioners sought and were granted leave to cross examine some of the deponents, to wit;

the Permanent Secretary to the Treasury, Mr. Keith Muhakanizi, the Chief of Defence Forces General David Muhoozi, the Clerk to Parliament, Ms. Jane Kibirige and Assistant Inspector General of Police, Asuman Mugenyi. The Respondent equally sought, and was granted leave to cross-examine witnesses who had deponed affidavits in support of the Petition, to wit; Honourable Betty Nambooze. All evidence has been considered.

All parties filed skeletal submissions and made oral high lights at the hearing. Learned Counsel for the parties as well as Mr. Male Mabirizi cited various authorities in support of their respective submissions.

I am grateful to Counsel for the parties and Mr. Mabirizi for the extensive and valuable research, which I believe has assisted this Court in the fair determination of this matter.

In determining constitutional matters, this court derives its mandate from **Article 137** of the Constitution which provides:-

> ***"(1) Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court.***
>
> ***(3) A person who alleges that__***
>
> ***c) an Act of Parliament or any other law or anything in or done under the authority of any law; or***
>
> ***d) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this constitution, may petition the constitutional court for a declaration to that effect, and for redress where appropriate.***
>
> ***(4) Where upon determination of the petition under clause (3) of this article the constitutional court considers that there is need for redress in addition to the declaration sought, the constitutional court may__***
>
> ***c) grant an order of redress; or***

d) refer the matter to the High Court to investigate and determine the appropriate redress."

Principles of constitutional interpretation

I shall at this juncture, restate some of the time tested principles of constitutional interpretation, which are relevant to the determination of the Consolidated Constitutional Petition before this Court. These have been laid down in several decided cases by the Supreme Court, this Court, other courts in other common wealth jurisdictions and expounded in some legal literature of persuasive authority.

This Court had the opportunity of reiterating the said principles in **Constitutional Petition No. 016 of 2013, Hon. Lt. Rtd. Saleh Kamba & Anor vs. Attorney General & Others** which was equally alluded to by Learned Counsel for the Parties.

These principles are:-

1) The Constitution is the Supreme law of the land and forms the standard upon which all other laws are judged. Any law that is inconsistent with or in contravention of the Constitution is null and void to the extent of the inconsistency. See **Article 2(2)** of the Constitution. See also **Supreme** Court **Presidential Election Petition No. 2 of 2006, (Rtd) Dr. Col Kiiza Besigye vs. Y.K. Museveni** and **Supreme Court Constitutional Appeal No.2 of 2006, Brigadier Henry Tumukunde versus The Attorney General and Another.**

2) In determining the constitutionality of legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining constitutionality, of either an unconstitutional purpose or an unconstitutional effect animated by the object the legislation intends to achieve. **See Attorney General vs. Salvatori Abuki Constitution Appeal No. 001 of 1998.**

3) The entire Constitution has to be read together as an integral whole and no particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness. See **P.K Ssemwogerere & Another vs. Attorney General, Constitutional Appeal No. 001/2002 (SC**) and **The Attorney General of Tanzania vs. Rev. Christopher Mtikila [2010] E.A 13.**

4) A constitutional provision containing a fundamental human right is a permanent provision intended to cater for all times to come and therefore should be given a dynamic, progressive, liberal and flexible interpretation, keeping in view the ideals of the people, their socio economic and political cultural values so as to extend the benefit of the same to the maximum possible. **See Okello Okello John Livingstone and 6 Others vs. The Attorney General and Another, Constitutional Petition No. 001 of 2005 (CA), Kabagambe Asol and 2 Others vs. The Electoral Commission and Dr. Kiiza Besigye, Constitutional**

Petition No. 1 of 2006 (CA) and South Dakota vs. South Carolina 192 U.S.A 268, 1940.

5) Where words or phrases are clear and unambiguous, they must be given their primary, plain, ordinary or natural meaning. The language used must be construed in its natural and ordinary sense.

6) Where the language of the Constitution or a statute sought to be interpreted is imprecise or ambiguous, a liberal, generous or purposeful interpretation should be given to it. **See Major General David Tinyefuza versus The Attorney General, Constitution Petition No. 001 of 1996.**

7) The history of the Country and the legislative history of the Constitution is also relevant and a useful guide in constitutional interpretation. **See Okello Okello John Livingstone and 6 others Versus the Attorney General & Another, Constitutional Petition No. 4 of 2005 (CA)**.

8) The National Objectives and Directive Principles of State Policy in the Constitution are also a guide in the interpretation of the Constitution.

Bearing in mind the above principles of constitutional interpretation, I shall now proceed to consider submissions of Counsel for all the parties, the evidence and authorities before me and relate them to the law and the issues raised in the said consolidated Petitions.

Issues 1, 2, 3 and 4:

Decision of Court

The above four issues were argued together by all counsel that handled them. I shall consider them together.

The gist in those issues is whether **Sections 2** and **8,** as well as **6** and **10** of the Constitutional Amendment Act 2018, regarding extension of the life of Parliament and that of local government councils respectively contravened the Constitution; and whether their retrospective applicability also contravened the Constitution.

I will start by putting into view the impugned provisions of the Constitution (Amendment) Act, 2017.

Section 2

> **2. Amendment of Article 77 of the Constitution**
> ***Article 77 of the Constitution is amended in clause (3) by substituting for the word 'five' appearing immediately before the word 'years' for the word 'seven'.***

Section 8

> **8. Replacement of Article 289 of the Constitution.**
> ***Article 289 of the Constitution is amended by substituting for Article 289 the following_***
> ***"289. Term of current Parliament***
> ***Notwithstanding anything in this Constitution, the term of the Parliament in existence at the time this article comes into force, shall expire after seven years of its first sitting after the general elections."***

Section 6

> **6. Amendment of Article 181 of the Constitution.**
> **Article 181 of the Constitution is amended in clause (4), by substituting *for the word 'five' appearing immediately before the word 'years' for the word 'seven'.***

Section 10

10. Replacement of Article 291 of the Constitution

Article 291 of the Constitution is amended by substituting for article 291 the following_

"291. Term of current local government councils

For the avoidance of doubt, the term of seven years prescribed for local government councils by clause (4) of article 181 of this Constitution shall apply to the term of the local government councils in existence at the commencement of this Act."

The Articles which are said to have been thereby amended are Articles 1, 8A, 7, 77(3), 77(4), 79(1), 96, 61(2) & (3), 260(1), 105(1), 289 and 233(2) (b). They are:-

Article 1 Sovereignty of the people.

(1) All power belongs to the people who shall exercise their sovereignty in accordance with this Constitution.

(2) Without limiting the effect of clause (1) of this article, all authority in the State emanates from the people of Uganda; and the people shall be governed through their will and consent.

(3) All power and authority of Government and its organs derive from this Constitution, which in turn derives its authority from the people who consent to be governed in accordance with this Constitution.

(4) The people shall express their will and consent on who shall govern them and how they should be governed, through regular, free and fair elections of their representatives or through referenda.

Article 61 Functions of the Electoral Commission

(2) The Electoral commission shall presidential, general, parliamentary and local government council elections within the first thirty days of the last ninety days before the expiration of the term of the president.

(3) Except where it is impracticable to do so, the Electoral Commission shall hold presidential, general parliamentary and local government council elections on the same day.

Article 77(3) Parliament of Uganda

(3) Subject to this Constitution, the term of Parliament shall be five years from the date of its first sitting after a general election.

Article 79(1) Functions of Parliament

(1) Subject to the provisions of this Constitution, Parliament shall have power to make laws on any matter for the peace, order, development and good governance of Uganda.

Article 96 Dissolution of Parliament

Parliament shall stand dissolved upon the expiration of its term as prescribed by Article 77 of this Constitution.

Article 105 (1) Tenure of office of a President

(1) A person elected President under this Constitution shall, subject to clause (3) of this article, hold office for a term of five years.

Article 233 (2) (b) (2) Leadership Code of Conduct

(2) The Leadership Code of Conduct shall_

(b) prohibit conduct—

i. likely to compromise the honesty, impartiality and integrity of specified officers;

ii. likely to lead to corruption in public affairs; or

iii. which is detrimental to the public good or welfare or good governance.

Article 260(1) Amendments requiring a referendum.

(1) A bill for an Act of Parliament seeking to amend any of the provisions specified in clause (2) of this article shall not be taken as passed unless—

(a) it is supported at the second and third readings in Parliament by not less than two-thirds of all members of Parliament; and

(b) it has been referred to a decision of the people and approved by them in a referendum.

Article 289 Term of current Parliament.

Notwithstanding anything in this Constitution, the term of the Parliament in existence at the time this article comes into force, shall expire after seven years of its first sitting after the general elections.

It was Counsel for the Petitioner's contention that the extension of the life of Parliament and the local government councils from 5 to 7 years and 4 to 7 years respectively was introduced into the Magyezi Bill at a later time as an amendment during the Committee stage of the whole House after the 2nd reading yet it had no relevance to the subject matter of the Bill in question. In the Petitioners' view, whereas Parliament set out to amend only Articles 61, 102, 104 and 183 as clearly shown in the memorandum and body of the Bill, it indirectly amended Article 77 (4) by including Section 8 on extension of life of Parliament.

Further that, **Rule 123 (4)** of Rules of Parliament, 2012, allowed the Committee of the Whole House to consider proposed amendments, on notice, where the amendments were presented but rejected by the relevant Committee or where, for reasonable cause, the amendments were not presented before the relevant Committee. The Petitioners argued that the reasons for not presenting the amendments in this case were not given. Leave was sought on 27th

September, 2017, and the Bill was presented before Parliament on 3rd October, 2017.

The Respondent on the other hand, maintained that in enacting Constitutional Amendment Act No.1 of 2018, the Parliament of Uganda acted within the law pursuant to the mandate and powers bestowed upon it by the 1995 Constitution of the Republic of Uganda as well as the Rules of Procedure of Parliament. It was contended that through Article 1 (4), the people of Uganda had the power to determine their destiny, either through a referendum or through their elected representatives. Further, that where their elected representatives took a decision, the people had in effect determined their destiny and it could not, therefore, be deemed as usurping the people's power as long as it was within the confines of the Constitution and all the relevant laws as was the case in the enactment of the Constitution (Amendment) Bill, 2017.

In reply, the Respondent submitted that Parliament derived its power to make laws for Uganda from Article 79 of the Constitution, which powers are exercised pursuant to Article 91 of the Constitution which sets out the manner in which Parliament enacts laws. Further, that Parliament had also complied with the provisions of Chapter 18 of the Constitution while enacting the impugned Sections 2, 6, 8 and 10 of the Act. The Respondent further objected to the reference by the Petitioners to the old Rules of Procedure of Parliament of 2012, when the applicable Rules at the time of the 2nd reading of the Bill on 18th December, 2017, were the 2017 Rules that became effective on the 10th November, 2017.

It was the Respondent's further submission that Sections 2, 6, 8 and 10 of the Constitution (Amendment) Act, 2018 enlarging the term of Parliament and that of the local government councils were neither inconsistent with, nor in contravention of Articles 1, 8A, 61(2)(3), 77(3), 79(1), 96, 105(1), 233(2)(b), 260 (1), 289, 176(3), 181(4) and 259(2)(a) of the Constitution.

I accept the Respondent's submission that the enlargement of time of Parliament and local government councils was done after the amendment of the Rules of Procedure of Parliament. **Rule 128 (4)** of the 2017 Rules of Procedure of Parliament, empowers Parliament to propose and accept amendments in the Bill as it considers fit, if the amendments (including new clauses and new schedules), are relevant to the subject matter of the Bill. The long title in the Constitution (Amendment) Bill, (No.2), 2017 attached to the affidavit of Ms. Jane Kibirige stated:-

> ***"A Bill for an Act entitled THE CONSTITUTION (AMENDMENT) (NO.2) ACT, 2017.***
> ***AN ACT TO AMEND THE Constitution of the Republic of Uganda in accordance with articles 259 and 262 of the Constitution; to provide for the time within which to hold presidential, parliamentary and local government council elections; to provide for the eligibility requirements for a person to be elected as president or district chairperson; to increase the number of days within which to file and determine a presidential election petition; to increase the number of days within which the Electoral Commission is required to hold a fresh election where a presidential election is annulled; and for related matters."***

I have carefully considered the long title and find that the extension of the life of Parliament and local government councils as well as the

retrospective application of the said amendment are not in any way related to the objectives of the original Bill. I find that it violated Rule 105(2), of the 2012 Rules which is in *pari materia* with Rule 115(2) of 2017 Rules of Parliament to the effect that no Bill shall contain anything foreign to what its long title imports.

Further, I accept the Petitioners' contention that by extending their term going against **Article 94 (2)** of the Constitution and **Rule 93 (4)** of the 2017 Rules, without declaring their interests and voting on that very question, the Members of Parliament grossly violated the **National Leadership Code of Conduct** enshrined in Chapter 14 of the Constitution and **Part III of the Leadership Code Act** which prohibit leaders including Members of Parliament from personal or conflict of interest in the execution of their official duties.

I now turn to the contention by the Petitioners that **Article 77(4)** of the Constitution was amended by infection through the extension of the term of Parliament and local government councils. Court was referred to the minutes of the Constitutuent Assembly in support of the argument that the intention behind Article 77(4) was for Members of Parliament and local government councils to be subjected to elections and that in extending their term from five to seven years, Parliament contravened Article 1(4) of the Constitution.

Article 1 provides for the sovereignty of the people. It states thus:-

1. Sovereignty of the people.

(1) All power belongs to the people who shall exercise their sovereignty in accordance with this Constitution.

(2) Without limiting the effect of clause (1) of this article, all authority in the State emanates from the people of Uganda; and the people shall be governed through their will and consent.

(3) All power and authority of Government and its organs derive from this Constitution, which in turn derives its authority from the people who consent to be governed in accordance with this Constitution.

(4) The people shall express their will and consent on who shall govern them and how they should be governed, through regular, free and fair elections of their representatives or through referenda.

It is abundantly clear that the above provisions vest power in the people which they exercise in accordance with the Constitution. Meanwhile, **Article 96** of the Constitution provides that Parliament shall stand dissolved upon the expiration of its term as prescribed by **Article 77** of the Constitution. While **Article 77(3)** provides for the term of Parliament as being five years; **Article 77(4)** provides an exception that this term may be extended by a resolution supported by not less than two-thirds of all Members of Parliament for a period not exceeding six (6) months at a time when there exists a state of war or a state of emergency which would prevent a normal general election from being held. Mr. Francis Gimara averred in his affidavit in Constitutional Petition No. 003 of 2018, that this Parliament first sat on the 19th day of May 2016, meaning that it has to be dissolved on or before 18th of May 2021 in accordance with Article 94. The Petitioners' complaint is that by extending the term of the 10th

Parliament to 2023, Parliament by infection amended Articles, 77(3), 77(4) and 96 of the Constitution.

In **Supreme Court Constitutional Appeal No. 001 of 2002; Paul K. Ssemwogerere vs. Attorney General, Odoki C.J** (as he then was) had this to say on amendment by infection:-

> ***"In this connection, I agree with the dissenting Judgment of Twinomujuni JA, that an amendment may be effected expressly or by implication or infection, and that both the purpose and effect of the amendment are relevant in determining constitutionality.***
>
> ***If an Act of Parliament had the effect of adding to, varying or repealing any provision of the Constitution, then the Act is said to have amended the affected Article of the Constitution. There is no difference whether the Act is an ordinary Act of Parliament or an Act intended to amend the Constitution. The two are treated the same under Article 137(3) of the Constitution. The amendment may be effected expressly, by implication or by infection as long as the result is to add to, vary or repeal a provision of the Constitution... It was stated in the Canadian Supreme Court Case of the <u>Queen vs. Big M Drug Mart Ltd (1986) LRC 332</u> that:-***
>
> > ***'Both purpose and effect are relevant in determining Constitutionality that is to say, either an unconstitutional purpose or an unconstitutional effect can invalidate legislation.'***
> >
> > ***If it was to be otherwise, Parliament could alter the entire Constitution, including the entrenched provisions, without following the procedure prescribed in Chapter 18 of the Constitution as long as it took care not to specify them in the Head note of the amending Act."***

Relying on the principles laid out by the learned Chief Justice in **Ssemwogerere versus Attorney General (Supra)**, I will consider whether in the present case there were some amendments by infection. **Articles 1** and **2** of the Constitution provide that the people

shall be governed through their will and consent through regular and fair elections. Mr. Mabirizi described the legislation by Parliament in which they extended their term without the people's authority thus amending **Articles 1, 2,** and **260** of the Constitution as '*colorable legislation'*. Court was referred to **Semwogerere vs. Attorney General (Supra)**, for the proposition that 'colorable legislation' arose where a legislature lacking legislative power or subject to a constitutional prohibition may frame its legislation so as to make it appear to be within legislative power or to be free from the constitutional prohibition.

The question to ask is whether the will of the people in this case was disregarded. I shall begin by respectfully disagreeing with the Respondent's contention that by voting elected representatives pursuant to **Article 1(4)** and **38** of the Constitution, the people in effect determined their destiny through the decisions of elected representatives. The people expressed their will through electing their representatives. However, this was for a specified period of time as the Constitution provided under Article 61. Even if the Respondent's contention that the people determine their destiny through elected representatives is correct, it has to be restricted within the confines of the constitutional provisions. The Members of Parliament are indeed representatives, but who were given a mandate of only five (5) years. Anything above that would be representing the people without their will and consent. When the Members of Parliament are elected by the people for the period

provided under the Constitution, there is thereby created a social contract between the two that the Members of Parliament are expected to abide by. The terms cannot be unilaterally changed.

I am unable to accept the Respondent's submission that in enacting **Sections 2** and **6** of the Constitution (Amendment) Act, 2018, Parliament was exercising its legislative mandate in the name of the people, by virtue of the authority entrusted to it by the people. It is also not in dispute that the amendment to extend the term of Parliament and local government councils, was never part of the issues that were taken back to the people during the consultative process, as this matter was introduced later on in the legislative process.

I find that the amendments on extension of the life of Parliament and local government councils affected **Article 1** by implication or infection. **Article 1** deals with the sovereignty of the people. The doctrine of the sovereignty of people was in my view compromised by amending Articles **77** and **181**, in such a way that it took away the right of the people to choose who should govern them. **Sections 2** and **6** of the Constitutional Act amended by infection **Article 1** of the Constitution which is an entrenched provision under **Article 260(2) (b)**. An entrenched provision cannot be amended without first carrying out a referendum.

I, therefore, find that Sections 2 and 6 of the Constitution (Amendment) Act, 2018, extending the term and life of Parliament

and that of the local government councils from five to seven years is inconsistent with and in contravention of Articles 1, 8A, 61 (2)(3), 77(3), 79(1), 96, 105(1), 233(2)(b), 260 (1), 289, 176(3), 181(4), and 259(2)(a) of the Constitution.

Issue 2: **And if so, whether applying it retrospectively is inconsistent with and/ or in contravention of Articles 1, 8A, 77(3), 77(4), 79(1), 96 and 233 (2)(b) of the Constitution.**

Issue 4: **And if so, whether applying it retrospectively is inconsistent with and/ or in contravention of Articles 1, 8A, 77(3), 77(4), 79(1), 96 and 233 (2)(b) of the Constitution.**

The gist of the Petitioners' contention in the above two issues is that by providing that the extended seven year term takes effect from the current Parliament, the said sections in essence rendered the Act applicable in a retrospective manner, which in their view contravenes Articles 1, 8A, 77(3), 77(4), 79(1), 96, 332 (2)(b), 61(2)(3), 105(1), 233(2)(b), 260(1), and 289 of the Constitution.

The Petitioners' contention as I understood it, emanated from the wording of **Section 8** of the Act which amended **Article 289** of the Constitution that provides for the current term of Parliament to expire after seven (7) years of its first sitting after the general elections, and **Section 10** of the Act which amended **Article 291** by making the term of the current local government councils to seven (7) years applicable from current local government councils. It was contended that the retrospective application of the law had

deprived the people of their right to elect new leaders and provide accountability at the end of their term contrary to the Directive Principles of State Policy, specifically National Objective XXVI (ii), and is in contravention of Articles 1, 8A, 77(3) (4), 79(1), 96 and 223 (2) (b) of the 1995 Constitution.

In response to the Petitioner's contention, the Respondent submitted that the retrospective application of the Act created by **Sections 8** and **10** was not inconsistent with, and or in contravention of Articles 1, 8A, 77(3), 79(1), 96 and 223(2)(b) of the 1995 Constitution. Further that the said sections have not deprived the people of their right to hold their leaders accountable as any exercise of their mandate is required to be in accordance with their constitutional duty to the people.

I reiterate my earlier finding on issues 1 and 3 in respect of the effect of the amendment on Articles 1(2) & (4), 79 and 259, as I agree with the Petitioners' submission that the tenets of the rule of law include among others, good governance and compliance with the democratic principles of law and the right of the people to determine, how they should be governed, which is the import of Article 1(2) of the Constitution.

The Respondent further contended that having amended **Article 77(3)** and **181(4)** of the Constitution, there was no constitutional bar against operationalization of the Act and the retrospective operation created by **Section 8** and **10** of the Act; and no provision

of the Constitution had been cited by the Petitioners as constituting a bar against Parliament enacting a law giving it retrospective application. Court was referred to what the Respondent called the only barring retrospective application of the law which is stated to be **Article 28(7)** but this only relates to criminal liability, which is not the subject matter before us.

Since I have already found under issues (1) and (3) that the amendments complained of were inconsistent with and/or in contravention of the stated provisions of the Constitution, it goes without saying that the retrospective application of the same enactments becomes unconstitutional too and contrary to Articles 1, 8A, 77(3) (4),79(1), 96 and 223 (2) (b) of the 1995 Constitution.

Issues 5 and 6(c)

For convenience I shall consider both issues No.5 and No.6 (c) together.

Issue 5: **Whether the alleged violence/scuffle inside and outside Parliament during the enactment of the Act was inconsistent and in contravention of Articles 1, 2, 3 (2) and 8A of the Constitution.**

Issue 6(c): **Whether the actions of Uganda Peoples Defence Forces and Uganda Police in entering Parliament, allegedly assaulting Members in the chamber, arresting and allegedly detaining the said Members is inconsistent with and/ or in contravention of Articles 24, 97, 208 (2) and 211 (3) of the Constitution.**

The Petitioner's case

It was the Petitioner's case that the Constitution (Amendment) Act, 2018, was passed through violence and that the entry of the army into Parliament on 27th September, 2017, which was confirmed by the Chief of Defence Forces, (CDF) General David Muhoozi amounted to legislation at gun point since it caused a lot of anxiety and disturbance to the members who were present. Earlier on, on 26th September, 2017, a Member of Parliament had entered with a gun making Members of Parliament legislate at gun point and this contravened Article 3(2). **(See Hansard of 26th September, 2017)**.

The Petitioners pointed out that there was no justification for the military to enter into Parliament and their presence created a chilling effect. Further that henceforth, violence spilled over all over the country when District Police Commanders and Regional Police Commanders were ordered by the Assistant Inspector General of Police, Asuman Mugenyi to stop Members of Parliament from carrying out consultations in other constituencies. This resulted in Police stopping any consultations in many areas like Lango sub-region as deponed by Hon. Jonathan Odur in his affidavit attached to Constitutional Petition No. 005 of 2018. This is said to have been contrary to Articles 1 and 29 of the Constitution which stipulates that the people shall be sovereign and shall exercise their sovereignty through elections or referenda by choosing the people who want to govern them and how they want to be governed and that people must be free to associate.

The Petitioners further argued that from October, 2017 up to the time the law was passed, the conditions that prevailed in this country which included the police orders, the army presence at Parliament, the eviction of Members of Parliament and the absence of participation of the people in the process were such that no valid Act of Parliament could be passed.

Mr. Male Mabirizi moved this Court to expunge paragraphs 7, 8 and 10 of the affidavit of Gen. David Muhoozi for containing hearsay evidence and submitted that the violence which was in Parliament was orchestrated by the Speaker's failure to follow to **Rule 88(4)** of the Rules of Procedure of Parliament, which required that suspension of members from the House ought to have commenced at the next sitting, not immediately. He concluded that the violence at Parliament was in contravention of Article 43(2) of the Constitution since it was orchestrated by the armed forces and the Police, and was not demonstrably justifiable in a free and democratic society.

The Respondent's case

In reply Mr. Kalemera submitted that in order for the Court to appropriately address the issue of violence at Parliament, it ought to take into account the events leading up to the 27th of December, 2017, including the incidents on the 21st and 26th day of September, 2017, as deponed to in the affidavit of Jane Kibirige, the Clerk to the Parliament. Further, that in paragraphs 8, 12, 13, 14, 15, 16, 17 and 18 of the affidavit of Mr. Ahmed Kagoye, the Sergeant at Arms, he

narrated the events that led to the eviction of the Members of Parliament on the 27thday of September 2017. It was his submission that the scuffle resulted from failure of evicted Members of Parliament to respect the lawful order given by the Speaker which she issued in line with the Parliamentary Rules of Procedure.

Counsel contended that under **Part 8 of the Rules of Procedure of Parliament**, the Speaker had powers to maintain internal order and discipline during debate by means which she considered appropriate such as excluding from Parliament for temporary periods members who disrupted proceedings. Further, that much as the Members of Parliament enjoyed rights under Articles 1, 2, 3, 8A and 97 to debate and enjoy the privileges under those Articles, the enjoyment of these rights was only valid when it was done in a manner that was acceptable and demonstrably justifiable in a free and democratic society under **Articles 43(1) and (2)** of the 1995 Constitution. Therefore, public interest in this case was very much curtailed when a group of Members of Parliament ensured that the debate process of the Bill could not proceed by causing uncontrollable chaos within the house.

Counsel referred Court to **Charles Onyango Obbo and Andrew Mujuni Mwenda vs. Attorney General Constitutional Petition No.15 of 1997**, for the proposition that that there were two principles that needed to be met in the proportionality test to determine whether the action was acceptable, that is to say, the limit on the right or

freedom which must be designed to serve a sufficient importance to warrant overriding a constitutional right or freedom and the ability to show the Court that once a significant objective was recognized then the party invoking it must show that the means that were used were the most reasonably and demonstrably justifiable.

In this case, the test was met because according to the evidence of the Sergeant at Arms, support from the Uganda Police and UPDF was sought because he and his staff were out-numbered and the circumstances prevailing at Parliament justified the extra support. Further still, according to the Chief of Defence Forces, General David Muhoozi, the reason why the army had been called in by the Inspector General of Police for assistance was because they had a permanent SFC establishment at Parliament suited for treatment of VIP personnel which could immediately handle the emergency.

He further submitted that the nature of Uganda's political system is multiparty and the implication of such a democracy is that members from political dispensations need to be given a chance to open the debate and air their views by contributing in the debate of parliamentary processes prior to a final decision being made on the particular issues. Counsel referred court to the case of **Paul Kafeero and Haman Kazibwe vs. Electoral Commission and the Attorney General, Constitutional Petition No. 22 of 2006** to state that a free and democratic society was defined by values and principles,

essential to a free and democratic society such as the accommodation of a wide variety of beliefs.

Counsel asked this court to rely on the principle of harmony and completeness in interpreting the Constitution and referred it to **Hon. Rtd. Lt. Kamba Sale and Others vs. Attorney General (supra) and Paul Ssemwogere vs. The Attorney General (Supra),**for the proposition that the refusal of Members of Parliament to abide by the Speaker's order to leave the house could not be confused as their right to legislate or to selfishly disrupt other people's representatives during the conduct of parliamentary proceedings and debates.

Regarding Mr. Mabirizi's submission that the affidavit of Gen. David Muhoozi be struck out for being riddled with hearsay evidence, it was the Respondent's reply that the Chief of Defence Forces had clearly testified and illustrated to the Court that all the matters that he deponed to were within his knowledge. He was requested by the Inspector General of Police to assist. He was also briefed by his subordinate commander as to the events that transpired in the house on that day. Counsel referred Court to **Col. Rtd. Kiiza Besigye versus Yoweri Kaguta Museveni & the Electoral Commission, Presidential Election Petition No. 001 of 2006,** for the proposition that where some paragraphs of an affidavit contained hearsay evidence and the deponent did not specify the source of his/her information, it was not proper for the whole affidavit to be declared a nullity and as such, the offending parts could be struck out of the affidavit.

Resolution of Court

I have reviewed the affidavit of General David Muhoozi and I respectfully disagree with Mr. Mabirizi's submissions and prayer to expunge some paragraphs therefrom. General Muhoozi stated his source of information, and during cross-examination, he explained that he was watching the events as they transpired on the camera, and he was also briefed by his subordinate commander on that day.

I have also carefully evaluated the evidence on record relating to the events that transpired in Parliament during the proceedings of the 21st, 26th, and 27th September attached to the affidavits of Jane Kibirige, the Clerk to Parliament and Ahmed Kagoye, the Sergeant at Arms. I have also considered the affidavit evidence of Hon. Betty Nambooze and her evidence during cross examination. It is evident from the Hansard and the affidavit evidence that repeated calls were made by the Rt. Hon. Speaker of Parliament to maintain order and decorum and allow the debate process to proceed. On page 4702 for example, the following transpired:-

> **"Speaker:** ***Hon. Ssewanyana, please sit down. Order! Can I request Hon. Ronald Kibuule to exit the Chamber?***
>
> **Mr. Rukutana:** ***Madam Speaker, this is a well-orchestrated plan to stifle the business of this House.***
>
> **Speaker:** ***Honourable members, can you take your seats. Order! Members, take your seats. First take your seats. Minister, please proceed.***

Ms. Muloni: ***Thank you Madam Speaker_ (members rose)_ and honourable members_***

Speaker: ***Honourable members, take your seats. Hon Ssemujju, take your seat. Honourable members, the word 'Parliament' comes from the French word 'parle', which means a place where you speak. Therefore let us speak with our mouths, not fists. Please it is part of Parliamentary etiquette to listen to each other and I had invited the Minister to speak.***

Ms. Muloni: ***Thank you Madam Speaker. The purpose of this statement is, first, to update the House on the current status of the country's oil and gas subsector, including preparedness to produce oil and gas in 2020; secondly_***

Speaker: ***Hon. Allan Ssewanyana can you please either take your seat or get out! Honourable members, take your seats.***

Ms. Muloni: ***Madam Speaker, as I was saying, the purpose of this statement is to update the House on the current status of the country's oil and gas subsector, including preparedness _***

Speaker: ***Honourable members, I would like to remind you that you are here on behalf of your people. The minister is giving information for your people. Please, take your seats."***

This type of conduct continued for quite some time with the Speaker imploring members to observe order. On the 27th day of September, 2017, the Speaker had this to say:-

"Speaker: At the sitting of yesterday, the unruly conduct of last week was repeated. The Speaker could not be heard in silence. Members were standing, climbing on chairs and tables, and they were dressed in a manner that violates Rule 73 of our Rules of Procedure. I made several calls to the Members to sit down and be orderly, but this was not adhered to. Some Members crossed from one side to the other in a menacing manner, contrary to Rule 74 of our Rules of Procedure. The Speaker could

not address the House in silence as many Members were menacingly standing near the Speaker's Chair."

The Speaker then proceeded under Rule 7(2) of the Rules of Procedure of Parliament which enjoins her to preserve order and decorum in the House, and Rules 77, 79(2) and 80 to name and order the immediate withdrawal from the House of any member whose conduct is grossly disorderly, and to suspend any misbehaving member. She named 25 Members of Parliament and invited them to exit the House. She invited the Sergeant at Arms to remove them and suspended the House for 30 minutes for the Sergeant at Arms to do his work. What happened during the eviction can be gleaned from the interjection of Hon. Winfred Kiiza who stated:-

"Madam Speaker, I cannot just pretend that life is as usual. I cannot pretend that it is business as usual. What has just happened to Members in this Chamber, Madam Speaker, is something we should not just ignore. Members were brutally moved out of the Chamber by the SFC_ (interjections)."

It appears not to be in dispute, therefore, that on the 27th September, 2017, the Rt. Hon. Speaker made an order to the Sergeant at Arms to cause the removal of the named twenty-five (25) Members of Parliament who in the opinion of the Speaker had become unruly and had continuously disrupted the proceedings of the House. On the 26th September, 2017, the Hon. Speaker suspended the House for thirty minutes. What I am able to discern from the affidavit evidence on record is that in the process of execution of the order of the Rt. Hon. Speaker, there was a scuffle

arising out of failure by the named Members of Parliament to exit the House, which could have caused their forceful eviction by the staff of the Sergeant at Arms and security officers, who caused the Members of Parliament subsequent arrest and detention.

In light of the aforementioned events, we were invited by the Petitioners to consider and determine the constitutionality of the actions of the Sergeant at Arms together with the back-up security of the Uganda Police and Uganda People's Defence Forces in evicting the said Members of Parliament in light of Articles 1, 2, 3(2), 8A, 97, 208(2), and 211(3) of the 1995 Constitution. The Respondent on the other hand, argued that the actions of the Uganda Police and Uganda People's Defence Forces were legal and demonstrably justifiable given the prevailing circumstances at the time whereby the Members of Parliament had turned rowdy, disruptive, and violent and refused to leave the House despite the order of the Rt. Hon. Speaker.

I have also perused the affidavit of the Sergeant at Arms, Mr. Ahmed Kagoye, filed on 29th March, 2018, specifically paragraphs 11, 13, 14 and 16. He averred thus:-

> ***"11. THAT as a result of the disruptive events that took place in the House on the stated days, I found it necessary to request and indeed requested the Commandant of the Parliamentary Police Directorate, to stand ready to provide security back-up to my security staff of the Chamber in the event that the sitting of the 27th September, 2017 presents the recurrence of the events of 21st and 26th September, 2017.***

13. THAT I know that on the naming and suspension of the 25 Honourable Members of Parliament, the suspended Members of Parliament refused to vacate the House despite repeated calls by the Rt. Hon. Speaker of Parliament to these Members to leave the House.

14. THAT I know that the Rt. Hon. Speaker of Parliament suspended the House at 3:16pm on 27th September, 2017, and in accordance with Rule 88(6) of the Rules of Procedure of Parliament applicable at the time, directed me to evict or remove the 25 Honourable Members that she had named.

16. THAT in specific response to paragraph 15 of the affidavit of Morris Wodamida Ogenga-Latigo, I know that in the process of evicting or removing the named Members of Parliament, some of their colleagues obstructed and prevented security from evicting or removing the named members from the House and this led to a scuffle between these Members and the security back-up."

It is pertinent at this point to consider the powers conferred upon the Speaker during proceedings in Parliament. I have considered the contents of Part XII of the Rules of Procedure of parliament specifically Rule 77 and 80(6) of the said Rules. I am inclined to accept the Respondent's submissions that the Speaker is mandated and conferred with authority to maintain internal order and discipline in proceedings of Parliament by means which she considers appropriate for that purpose. This would ordinarily include the power to exclude any member from Parliament for temporary periods, where the conduct or actions of such a member continuously cause any disruption or obstruction of proceedings or adversary impact on the conduct of Parliamentary business. I find that the Speaker acted

within the confines of Rule 77 and 80(6) of the Rules of Parliament when she ordered for the suspension in issue.

While I agree with the Petitioners' submission that a Member of Parliament has a right to participate in proceedings of Parliament, to enable him or her express the will of the people he/she so represents, this right is not absolute. Neither can the conduct of a Member of Parliament, whose effect is to curtail proceedings of Parliament, be condoned. In my view, the question to be addressed is whether the measures taken by the Sergeant at Arms and the security forces in implementing the order of the Rt. Hon. Speaker were 'acceptable and demonstrably justifiable' under Article 43(2) of the 1995 Constitution. Court's attention was drawn to the decision of this Court in **Charles Onyango Obbo and Andrew Mujuni Mwenda versus the Attorney General, Constitutional Petition No. 19/1997**, where it was held:-

> ***"To establish that a limit to rights and freedoms is reasonable and demonstrably justifiable in a free and democratic society, two criteria must be satisfied. First the objective that the measures responsible for the limit on a charter right or freedom are designed to serve must be of sufficient importance to warrant overriding a constitutionally protected right or freedom.***
>
> ***Secondly, once a sufficiently significant objective is recognized, then the party invoking must show that the means chosen are reasonably and demonstrably justified. This involves a form of proportionality test… Although the nature of the proportionality test will vary depending on the circumstances, in each case the Court will be required to balance the interest of society with those of individuals and groups."***

Learned Counsel for the Respondent further alluded to the interpretation of the phrase in a "free and democratic society" in Article 43 (2) (c) of the Constitution which was explained in **Constitutional Petition No. 22/2006, Paul Kafeero & Anor versus the Electoral Commission and Attorney General**. In that case, Kitumba JCC cited with approval a Canadian case at page 12 para 4, the Supreme Court in **The Queen Oakes [1987] (Const) 477 at 498-9** said:-

> ***"The court must be guided by the values and principles essential to a free and democratic society which I believe embody to name but a few, respect for inherent dignity of human rights, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity and faith in social and political institutions which enhance the participation of individual and groups in society. The underlying value and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect to be reasonable and democratically justified".*** (Emphasis mine).

I am in agreement with the submissions of the Petitioners that a Member of Parliament is entitled to enjoy the rights enshrined in Article 1, 2, 3(2), 8A, 97 to debate and be accorded the privileges accruing to him or her as such under the 1995 Constitution. However, construing the said provisions in isolation of other provisions relating to the legislative work of Parliament or those imposing limitation on exercise of such rights would offend the cardinal rule of constitutional interpretation succinctly summarized in **Constitutional Petition No. 016 of 2013, Hon. Lt. Rtd. Saleh Kamba & Anor vs. Attorney General & Others** viz:-

"The entire constitution has to be read together as an integral whole and no particular provision destroying the other but each sustain the other. This is the rule of harmony, rule of completeness and exhaustiveness"

In my view, where the conduct of a Member of Parliament in the exercise of the aforementioned right as is evident from the evidence on record is adverse to the mandate of Parliament to conduct a debate and conclude the process of enacting any law, such right may be curtailed as long as the limitation does not go beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution within the context of Article 43(2)(c) of the Constitution.

Upon evaluation of the evidence on record, I find that the affected Members of Parliament right to fully participate in the debate leading to the enactment of the Constitutional Amendment act was curtailed. I am however of the view that the curtailing of such rights did not amount to violation of Articles 1, 2 3(3), 8A, and 97 of the Constitution as it was necessitated by their rather exceptionally unusual conduct, which was disdainful of the Rules of Parliament and the orders of the Rt. Hon. Speaker of Parliament.

The presence of the security forces was explained in the evidence of Mr. Ahmed Kagoye during cross-examination where he stated that basing on the violence and unruly conduct of the Members of Parliament, on 21st and 26th September, 2017, and the violent refusal to exit Parliament by Members of Parliament who had been ordered

to exit, he saw the necessity to call on the Police which was always stationed at Parliament to assist, as his forces were clearly overpowered. The Chief of Defence Forces, General David Muhoozi had also explained that the army presence as being necessitated by a call from the Inspector General of Police to offer back-up force since they already had a permanent SFC establishment at Parliament suited for the treatment of VIP personnel, who could be called upon to handle any emergency.

It is clear from the available evidence that public interest was curtailed when a group of Members of Parliament by their conduct made it impossible for the debate process of the Bill to proceed peacefully. There was need for reasonable force to be used to ensure that order was restored within the precincts of Parliament.

On whether the army personnel presence was justified, my view is that the forces sent by the IGP could have been enough to contain the situation under the circumstances. There was no indication that the Members of Parliament causing the tumult were armed. Any fight without fire having been discharged could be contained by the Police alone. The deployment of the army, albeit from the permanent establishment at Parliament/President's office, was in my view not justified. This is more so when the Sergeant at Arms did not request for the back-up from the UPDF even when he knew they had a permanent establishment at the Parliament. The allegation that the IGP called the UPDF for assistance could not justify their presence

when the civil authority concerned (Parliament) did not require their back-up.

Section 42 of the **Uganda People's Defence Forces Act**, regarding UPDF aid to the civil power and states:-

> ***"The Defence Forces, any part of the Defence Forces, and any officer or militant, are liable to be called out for service in aid of the civil power in any case in which a riot or disturbance of the peace occurs or is, in the opinion of the appropriate civil authority the riot or disturbance of the peace is likely to be beyond the powers of the civil authority to suppress or prevent."***

The state agency would then in that coordinated way be calling upon the UPDF to execute its constitutional mandate under **Article 209(a-c)**, which provides that:-

> ***"209. The functions of the Uganda Peoples' Defence Forces are-***
>
> ***(a) to preserve and defend the sovereignty and territorial integrity of Uganda;***
>
> ***(b) to co-operate with the civilian authority in emergency situations...***
>
> ***(c) to foster harmony and understanding between the Defence Forces and civilians; ..."***

In my view, the situation at Parliament did not necessitate Special Forces especially where the Speaker or Sergeant at Arms did not foresee the necessity for requesting for their intervention. In the estimation of the Sergeant at Arms, the situation at Parliament could have ably been handled by the Uganda Police Force. The Uganda Police Force has its own Very Important Persons Protection Unit (VIPPU) which, if the necessity arose, could have been called upon

and would be equal to the task. I find that on the 26th September, 2017, the acts of the security agents at the Parliament premises constituted acts of security interference that contravened Articles 1, 2, 8A, 176(3), 181(4) and 259(2)(a) of the Constitution.

The important question to be answered here would be whether the interference by the armed forces caused so much intimidation and such a chilling effect in the minds of the Members of Parliament that the ensuing process that led to the passing of the impugned Act was so impacted as to end up being a sham. I agree with the Respondent through the Clerk to Parliament's affidavit that the deployment of security forces under the Command of the Sergeant at Arms was intended to assist him in carrying out his duties as required by the Rules of Procedure of Parliament and to stop and prevent any further disturbance of the debate by the suspended Members of Parliament and to ensure that Parliament executes its constitutional mandate under Article 79 of the Constitution.

The fact that the UPDF came in did not in any way negate the justifiable nature of the back-up intervention in the first place, which was necessitated by the rowdiness and violence that engulfed the House that day; and the unruly conduct of the previous sittings of Parliament. I am more fortified in my finding that the process leading to the enactment of the impugned Act was not negatively impacted because from the Hansard reports, business went back to normal after the eviction of the offending Members of Parliament.

Even on the very day the Bill was passed into law, the House was full to capacity and according to the Hansard, for that reason, the Speaker ordered that the doors of Parliament remain open during voting, as some Members of Parliament had nowhere to sit. Issues 5 and 6(c) are therefore answered in the negative.

Issue 6: Whether the entire process of conceptualizing, consulting, debating and enacting the act was inconsistent with and or in contravention of articles of the Constitution as hereunder:-

a) Whether the introduction of the Private Member's Bill that led to the act was inconsistent with and/or in contravention of Article 93.

b) Whether the passing of sections 2, 5, 6, 8 and 10 of the Act are inconsistent with and/or in contravention of Article 93 of the Constitution.

On issue 6(a), it was the Petitioners' case that the Private Member's Bill moved by Hon. Raphael Magyezi contravened **Article 93** of the Constitution, in that an illegal charge was imposed on the Consolidated Fund in the process of debating and passing of the Bill. Erias Lukwago, Learned Counsel for the Petitioners referred Court to the Affidavits of Hon. Winnie Kiiza, Hon. Jonathan Odur, and Hon. Karuhanga Kafureka who had deponed that as Members of Parliament, they had received a sum of Ugx 29,000,000/=, and further that the decision of the Uganda Government to make an illegal charge on the Consolidated Fund by paying Uganda Shillings Twenty Nine Million, (29,000,000/=) to every Member of Parliament as facilitation for the consultations relating to Constitution (Amendment) Bill, tabled as a Private Member's Bill, was inconsistent

with and/or in contravention of Article 93 (a) (i) and (ii) of the Constitution.

Counsel referred Court to **Rule 117 of the Rules of Procedure of Parliament**, requiring every Bill introduced in the house to be accompanied by a Certificate of Financial Implications issued by the Minister responsible for Finance; and **Rule 117(2)** which requires the Certificate of Financial Implications to indicate the estimates of revenue and expenditure over the period of not less than 2 years after the coming into effect of that Bill. Other budgetary implication requirements are also to be found under **Section 76** and **Section 77** of the **Public Finance Management Act** which are to the same effect.

The Petitioners further complained that the amendment regarding the extension of the life of Parliament and that of local government councils was not captured in the Certificate of Financial Implications and yet it had an effect of imposing a charge on the Consolidated Fund which would have very serious financial implications on the economy. It was pointed out that the provisions of Article 93 were coached in mandatory terms, and the Committee on Legal and Parliamentary Affairs was alive to the legal fetters in the relevant provisions, to which they made no comment(s).

Regarding **Article 93 (b)**, the Petitioners contended that the Speaker notified Parliament of the importance of the people's participation before the Bill could be passed and went ahead and appropriated

funds for members to carry out that duty, giving each Member of Parliament 29 million Uganda shillings, and yet the Members of Parliament had a duty to consult people with or without this money. Hon. Jonathan Odur averred in his affidavit that Members of Parliament were adequately facilitated from their consolidated emoluments to do consultations and, therefore, the said sums were unnecessary in the circumstances.

Court's attention was drawn to **Gakuru & Others vs. The Governor Kiambu County, Constitutional Petition No. 532 of 2013,** on the requirement for the participation of the people without charging them. Further that the right to political participation was a fundamental human right set out in a number of international and regional human rights instruments. **See also Doctors for Life international vs. the Speaker of the National Assembly**.

The Petitioners further referred Court to **Rule 123(1)** of the Rules of Parliament, which provides that no question shall be proposed upon any Bill, motion or amendment which has not been introduced or moved by a Minister and has the capacity of creating a charge on the Consolidated Fund and/or any other public fund.

The Petitioners concluded that according to **Oloka Onyango vs. Attorney General (Supra)**, the Speaker was obliged to uphold the Constitution and the Rules of Parliament. In the present case where she was alerted and she did not take heed, Court ought to set aside and declare the impugned Constitution (Amendment) Act a nullity.

The Respondents, in their reply, relied on **Hon. Lt. Rtd Saleh M.W Kamba & Anor vs. the Attorney General and others, Constitutional Petition No. 16 of 2013**, to submit that during Constitutional interpretation, where words or phrases were clear and unambiguous, they must be given their primary, plain, ordinary or natural meaning; and that the import of Article 93 (a)was that Parliament could not proceed upon a Bill including an amendment Bill that made provision for any of the enumerated circumstances thereunder unless the Bill or motion was introduced on behalf of Government. They contended that the Constitution (Amendment) Bill did not make provision for a charge on the Consolidated Fund since it did not contain a provision that would impose a charge or taxation or withdrawal of monies from the Consolidated Fund and that the Twenty Nine million shillings (29,000,000/=) which was given to the Members of Parliament as facilitation for the Bill did not contravene the provisions of Article 93A (i) to (iv) of the Constitution.

The Respondent pointed out that Article 93(b) could not have been contravened since it dealt with only motions or amendment of motions and yet what was in issue was a Bill in Parliament.

Referring to the evidence of Mr. Keith Muhakanzi, the Secretary to the Treasury, the Respondent contended that when the Bill was presented to the Ministry of Finance, it was examined and as a result a Certificate of Financial Implications was issued, and it certified that there were no additional financial obligations beyond what was in

the Medium Term Expenditure Framework (MTEF) and thus the Bill was budget neutral. According to the Respondent, the mischief intended to be cured by Article 93 was to avoid putting a strain on the Consolidated Fund and other public funds so that Parliament should not enact a law which would not be implemented due to the non-availability of resources. Counsel concluded that the Bill did not make any provision(s) for the imposition of the listed restrictions that are covered in Article 93 of the Constitution.

Regarding issue 6(b), Mr. Mabirizi asked Court to expunge paragraphs 5 and 8 of the affidavit of Mr. Keith Muhakanizi regarding this issue for containing hearsay evidence. He submitted that the said Bill had an effect of creating a charge on the Consolidated Fund other than by reduction. He distinguished the prohibition of 'proceeding' as against 'passing' any Bill which has an effect of creating a charge on the Consolidated Fund under Article 93 and 92 of the Constitution. He referred Court to the **Black's Law dictionary 8th Edition, at pages 3807 to 3808**, for the definition of the word '*proceeding'* and to '*pass'* a legislation.

Mr. Mabirizi concluded by referring Court to **Exparte President of Republic of South Africa in Re Constitutionality of the Liquor Bill, (CCT 12/1999),** for the proposition that that once Parliament was prohibited from legislating in a given area and it did so, such enactment was unconstitutional.

In reply, Learned Senior State Attorney, Adrole reiterated his submissions on issue 6(a), and added that the application by Mr. Mabirizi to strike off paragraphs 5 and 8 of Mr. Keith Muhakanizi's affidavit was ill-conceived. His case was that in paragraph 5, Mr. Keith Muhakanizi had disclosed his source of information as his 'office' which had examined the Bill and found that the proposed amendments to the Constitution were budget neutral. In Counsel's assessment, this was not hearsay evidence as indicated by Mr. Mabirizi.

Counsel referred court to **Section 59 of the Evidence Act, Cap 6**, for the proposition that oral evidence must in all cases be direct. He submitted that during cross-examination, Mr. Muhakanizi had re-affirmed that he was the Accounting Officer of the entire nation in as far as financial matters were concerned. Further, that he had based his affidavit on a letter of request from the Clerk to Parliament for a Certificate of Financial Implications. He prayed that Court should be pleased to find that the application by Mr. Mabirizi was without merit.

Resolution by Court

I have reviewed the affidavit of Mr. Keith Muhakanizi and I respectfully do not accept the submission of Mr. Mabirizi and his prayer to expunge paragraphs 5 and 8 of this affidavit. In paragraph 5, Mr. Muhakanizi stated his source of information, and during cross-examination, he explained that he was the Accounting Officer of

the nation with sufficient knowledge to depone to the contents of his affidavit.

On the Articles of the Constitution which are in issue, these are produced hereunder:-

Article 93

93. Restriction on financial matters.
Parliament shall not unless the Bill or motion is introduced on behalf of government:

a) Proceed upon a Bill including amendment Bill that makes provision for any of the following;

i. The imposition of a taxation or the alteration of a taxation otherwise than by reduction.

ii. The imposition of a charge on the consolidated fund or other public fund of Uganda or the alteration of any such charge otherwise done by reduction.

iii. The payment, issue, withdraw from the consolidated fund or other fund of Uganda any monies not charged on that fund or any increase in the amount of that payment issue or withdrawal or

iv. Decomposition or remission of any debt due to government of Uganda or

b) Proceed upon a motion including an amendment to a motion the effect of which would be to make provisions for any of the purposes specified in para A of this article. (Emphasis mine).

The Clerk to Parliament's letter dated 28th September 2017 addressed to the Minister of Finance seeking a Certificate of Financial Implications, listed the objectives in the Constitution (Amendment) Bill, 2017 as follows:-

1. to provide for the time within which to hold Presidential, Parliamentary and local government council elections, under Article 61.

2. ***to provide for the eligibility requirements for a person to be elected as President or District Chairperson; that is Article 102 and 183.***
3. ***to increase the number of days within which to file and determine a presidential election petition.***
4. ***to increase the number of days within which the Electoral Commission is required to hold a fresh election in case of a successful presidential election petition; and for related matters.***

From the record, at the time of presenting the Constitution (Amendment) Bill, a Certificate of Financial Implications dated 28th September, 2017, was issued certifying that the proposed amendments could be accommodated within the Medium Term Expenditure Framework (MTEF) for the Ministries, Departments and Agencies concerned. However, by the time of passing the Constitution (Amendment) Act, 2018, the Magyezi Bill had metamorphosed to include enlarging the period/life of Parliament and local government councils from five and four years respectively to seven years, and an amendment for the restoration of term limits.

One of the questions to determine is the effect of the Bill on the Consolidated Fund as regards money for consultation and money for payment of emoluments of Members of Parliament and local government councils for the extended period of two years. In resolving the above, I have kept in mind that the main function of Parliament is to make laws, as enshrined in **Article 79**of the Constitution, which provides:-

Article79. Functions of Parliament.

(1) Subject to the provisions of this Constitution, Parliament shall have power to make laws on any matter for the peace, order, development and good governance of Uganda.

(2) Except as provided in this Constitution, no person or body other than Parliament shall have power to make provisions having the force of law in Uganda except under authority conferred by an Act of Parliament.

(3) Parliament shall protect this Constitution and promote the democratic governance of Uganda.

Rule 2 (1) of the Rules of Procedure of Parliament, 2017, defines a 'Bill' to mean the draft of an Act of Parliament and includes both a Private Member's Bill and a Government Bill. In this respect, I must respectfully disagree with Counsel for the Respondent's submission that Article 93 (b) could not have been contravened since it dealt with only motions or amendment of motions and the Magyezi Bill was in Parliament. It is pertinent to note that the motion that was sought was for purposes of leave to introduce the impugned Bill.

In **Ssekikubo and 4 Others versus Attorney General & Others, Supreme Court Constitutional Appeal No. 001 of 2015**, it was re-stated that where words are clear and un ambiguous, they should be given their primary, plain, ordinary and natural meaning, but where the language of the Constitution is imprecise, unclear and ambiguous, the liberal, generous and purposive interpretation should be applied. The wording of **Article 93** is very clear that, except when presented on behalf of Government, Parliament is precluded from considering a Bill or motion for the imposition of a charge on the Consolidated Fund or other public fund of Uganda, otherwise than by reduction.

According to the **Black's Law Dictionary, 8th edition at page 701**, a "charge" means to impose a burden, obligation, or lien; to create a claim against property; to claim, and/or to demand among others.

In **Oloka Onyango & 9 Others versus Attorney General, Constitutional Petition No. 008 of 2014**, it was held that Parliament as a law making body should set standards for compliance with the constitutional provisions and its own rules. Further, that the enactment of the law is a process and if any of the stages therein is flawed, that vitiates the entire process and the law that is enacted as a result of it.

Further still, in **Troop vs. Dulles 356 US 2 L. Ed. 785 at 590 [1956]**, a decision of the Supreme Court of the United States, Wallen C.J. stated:-

> ***"We are mindful of the gravity of the issue inevitably raised whenever the constitutionality of an Act of the National Legislature is challenged... The task requires the exercise of judgment, not the reliance on personal preferences. Courts must not consider the wisdom of statutes but neither can they sanction as being merely unwise that which the constitution forbids.***
>
> ***We are oath bound to defend the Constitution. This obligation requires that congressional enactments be judged by the standards of the Constitution. The judiciary has the duty of implementing the Constitutional safe guards that protect the individual rights. When the government acts to take away the fundamental rights... the safeguards of the Constitution, should be examined with special diligence.***
>
> ***The provisions of the Constitution are not time worn adages or hollow shibboleths. They are vital, living principles that authorize and limit government powers in our nation. When the constitutionality of an Act of congress is challenged in Court, we must apply these rules. If we do not, the words of the Constitution become little more than good advice.***
>
> ***When it appears that an Act of congress conflicts with one of those provisions, we have no choice but to enforce the paramount demands of the Constitution. We***

are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate a challenged legislation. We must apply these limits as the constitution prescribes them, bearing in mind both the broad scope of legislative discretion and the ultimate responsibility of constitutional adjudication."

I have perused the Bill as introduced by Hon. Raphael Magyezi. The proposed Private Member's Bill in its original form and with its proposed four amendments was not likely to impose a charge on the Consolidated Fund and was budget neutral as certified in the Certificate of Financial Implications that accompanied the Bill. However, I would not say the same for the amendments to the Constitution (Amendment) Bill (No. 2), 2017 which re-introduced term limits and re-entrenchment the same as well as increasing the life of Parliament and local government councils, which would in my view, impose a charge on the Consolidated Fund. The amendments envisage different timelines for holding the Parliamentary and Presidential elections; payment of emoluments to current Members of Parliament and members of the local government councils for two extra years; and huge costs of a referendum to be necessitated by the re-entrenchment of term limits. Clearly such an important Bill, heavily loaded as it was, ought to have been presented by the Government but it was not, and neither was it presented on behalf of the Government. The Bill in its final form, therefore, grossly contravened the provisions of Article 93. It raises the issue of budget framework process going beyond the normal five year projection for the emoluments of the Members of Parliament and local government councils.

On whether the payment of Uganda Shillings Twenty Nine Million Only, (29,000,000/=) to every Member of Parliament as facilitation for consultation contravened Article 93 (a)(i) and (ii) of the Constitution, it was the contention of the Petitioners that the decision of the Uganda Government to make an illegal charge on the Consolidated Fund by paying (29,000,000/=) as facilitation for the Constitution (Amendment Bill) which was tabled as a Private Members Bill was inconsistent with and/or in contravention of Article 93 (a)(i) and (ii) of the Constitution.

The Secretary to the Treasury, Mr. Keith Muhakanizi, in paragraph 9 of his affidavit deponed that Government did not make an illegal charge on the Consolidated Fund when it paid Ugx 29,000,000/= to Members of Parliament as this was already in the existing budget for the Parliamentary Commission. There is no evidence to the contrary. I agree with the Respondent that since the money paid to the Members of Parliament for consultation had already been appropriated for use by the Parliamentary Commission, it is not a fresh charge on the Consolidated Fund. However, the funds that would be used for payment of emoluments of Members of Parliament and local government councils for the extended two years would raise the issue of the budget framework process going beyond the normal five year projection for these emoluments.

Accordingly, I find that the introduction of the Private Member's Bill that led to the Constitution (Amendment) Act, 2018 was not

inconsistent with and/or in contravention of Article 93 of the Constitution, except for the introduction of sections 2,5,6,8 and 10.

I find in the negative for issue 6(a) and in the affirmative for 6(b).

Issue 6(d): Whether the consultations carried out were marred with restrictions and violence which were inconsistent with and/ or in contravention of Articles 29 (1) (a), (d), (e) and 29(2) (a) of the Constitution.

Petitioner's Case

The Petitioners case in para 2(j) of the Constitutional Petition No. 003 of 2018 was that the process leading to the enactment of the Constitution Amendment Act, 2018 was marred with violence, intimidation, abuse of human rights and general mayhem, and so the consultations that happened, if any, were accordingly marred by violence.

Prof. Fredrick Ssempebwa's affidavit deponed in his affidavit (paragraph 8(n)) that no proper nationwide consultation process was undertaken to rebut the majority opinion of people in the Constitutional Review Commission Report and the removal of the age limit without proper consideration of the views of people due to violence which marred the consultation process and undermined the sovereignty and civic participation of people in Uganda.

Mutembuli Yusuf, Learned Counsel for the Petitioner submitted that according to the evidence of A/IGP Mugenyi, a message from the Joint Operations Committee was passed to all the Regional Police

Commanders (RPCs) and District Police Commanders (DPCs) to restrict the Members of Parliament from going to other constituencies and this contravened Article 29(1)(d) of the Constitution regarding freedom to assemble and to demonstrate together with others peacefully and unarmed. As a result of the restrictions, the Members of Parliament were only restricted to their constituencies. He referred Court to paragraphs 23, 24, 25, 26 and 27 of the affidavit of Hon. Ogenga Latigo who deponed that he viewed the media coverage of the various consultation rallies nationwide which were broadcasted in electronic and private media print and witnessed mass police brutality and interference with consultation. As a result of the restrictions, the Members of Parliament did not freely move to other areas to consult their people.

Counsel further submitted that the restrictions contravened Article 29 (1) (e) regarding freedom of association, including the freedom to form and joint associations and unions; and since Members of Parliament in Uganda belonged to different parties the restrictions prevented them from consulting under their political party umbrellas. Relying on Ogenga Latigo's affidavit, Counsel concluded that when people in other areas heard that people who had gone for consultations in Kampala were beaten and tear-gassed, they feared to turn up in their areas when called upon for the consultative meetings.

Respondent's case

Exercising the Respondent's right of reply, Mr. Elisha Bafirawala submitted that there was no evidence put before Court regarding any restrictions throughout the consultation process. The evidence of Assistant IGP, Asuman Mugenyi, and the Commissioner of Police, Frank Mwesigwa had clarified that the restrictions were meant for maintaining peace during consultations. Counsel further pointed out that the rights under Article 29 of the Constitution were not absolute and could as such be limited under Article 43 for justifiable cause, since a free and democratic society envisaged the exercise of rights without unduly impairing rights of other members of the society.

Counsel further submitted that in instances where Members of Parliament wanted to consult while other members of society preferred to proceed with their daily business; there was need for the police to balance the two competing interests. He referred Court to the affidavit of Ms. Jane Kibirige and the Hansard attached thereto and submitted that the leader of opposition in Parliament, Hon. Winnie Kiiza engaged in consultation and further that every Member of Parliament stood up to contribute to the debate and gave feedback of how they had carried out the consultations and how their people wanted them to vote on the amendment.

Counsel further referred Court to page 5188 of the Parliamentary Hansard, where Hon. Bernard Atiku, Member of Parliament for Arua, Ayivu County, stated that he had an opportunity to consult his

people in Ayivu County one of the six (6) constituencies in Arua District with over 300,000 people and a voting population of about 103,000 people. He consulted all the people in their sub-counties; held 8 public consultative meetings; two radio talk shows and a press conference. Moreover, on the voting day, all those Members of Parliament came and voted and they expressed the will and the consent of the people who voted them. He concluded that given the prevailing circumstances, the restriction was justifiable and in conformity with Article 202 of the Constitution on powers granted to the Police.

Resolution by Court

On the 16th day of October, 2017, circular ref OPS/234/214/01 was issued and sent out to all Regional Police Commanders, District Police Commanders and all Police Stations with the following instructions:-

UGANDA POLICE MESSAGE

***FM**: GENPOL*

***TO**: ALL RPCS, DPCS AND ALL POLICE STATIONS*

***DATE**: 16 OCT 17*

REF: OPS/234/214/01. CONSULTATIVE MEETINGS BY MEMBERS OF PARLIAMENT ON ARTICLE 102 (b) OF THE CONSTITUTION OF THE REPUBLIC OF UGANDA

AS YOU ARE AWARE, THERE IS A PROPOSAL TO AMMEND ARTICLE 102(b) OF THE CONSTITUTION OF THE REPUBLIC OF UGANDATO REMOVE PRESIDENTIAL AGE LIMITS.

MEMBERS OF PARLIAMENT ARE TO CONSULT IN THEIR RESPECTIVE CONSTITUENCIES TO SEEK THE VIEWS OF THEIR ELECTORATE.

DURING THE CONSULTATIVE MEETINGS, ENSURE THE FOLLOWING:-

MEMBERS OF PARLIAMENT SHOULD STRICTLY CONSULT IN THEIR CONSTITUENCIES ONLY.

THOSE MEMBERS OF PARLIAMENT MOVING OR INTENDING TO MOVE IN ORDER TO SUPPORT COUNTERPARTS OR CONSULT OUTSIDE THEIR CONSTITUENCIES MUST BE STOPPED (R) MUST BE STOPPED.

CONSULTATIONS MUST NOT INCLUDE THE FOLLOWING:

a) ILLEGAL DEMONSTRATIONS

b) ILLEGAL PROCESSIONS

c) INCITING VIOLENCE

d) USE OF HATE CAMPAIGNS

e) USE OF ABUSIVE LANGUAGE

f) ACTS OF HOOLIGANISM OF ANY SORT

g) INTIMIDATION OF PERSONS PERCEIVED TO BE SUPPORTING THE REMOVAL OF THE AGE LIMIT.

ALL RPCS, DPCS AND OC STATIONS ARE THEREFORE DIRECTED (R) DIRECTED TO ENFORCE THIS DIRECTIVE.

ACKNOWLEDGE RECEIPT OF THIS MESSAGE AND ACT AS INSTRUCTED.

SIGNED

AIGP ASSUMAN MUGENYI

I have carefully examined the above circular and other evidence plus the arguments of Counsel on either side on this issue. The Assistant IGP, Asuman Mugenyi, acknowledged in paragraphs 5 and 6 of his affidavit of 29/03/2017 issuing a circular addressed to all Regional Police Commanders of Uganda, all District Police Commanders and all Police stations in Uganda to ensure that

Members of Parliament did not consult outside their respective constituencies. The Petitioners complained that Articles 29(1) (a) (d) (e) and 29(2) (a) of the Constitution were thereby contravened.

The relevant sections of Article 29 of the 1995 Constitution provide:-

29. Protection of freedom of conscience, expression, movement, religion, assembly and association.

1) Every person shall have the right to—

a) freedom of speech and expression which shall include freedom of the press and other media;

b) freedom of thought, conscience and belief which shall include academic freedom in institutions of learning;

c) freedom to practice any religion and manifest such practice which shall include the right to belong to and participate in the practices of any religious body or organization in a manner consistent with this Constitution;

d) freedom to assemble and to demonstrate together with others peacefully and unarmed and to petition; and

e) freedom of association which shall include the freedom to form and join associations or unions, including trade unions and political and other civic organizations.

2) Every Ugandan shall have the right—

a) to move freely throughout Uganda and to reside and settle in any part of Uganda;

My examination of the circular reveals that the instructions were directed within the Police itself and not addressed to individual Members of Parliament. The Uganda Police Force is enjoined under **Article 212** of the Constitution of the Republic of Uganda, to protect life and property, preserve law and order, prevent and detect crime.

In the present case, there is evidence from the affidavits of Hon. Winnie Kiiza, Member of Parliament for Kasese District and Hon. Odur

Jonathan, Member of Parliament for Erute County South Constituency that their consultative processes were interfered with. Now the question that I must answer is whether such restriction was justifiable in a free and democratic society.

In **Charles Onyango Obbo & Andrew Mujuni Mwenda vs. Attorney General, Constitutional Petition No. 15 of 1997**, it was held that anyone who wished to enact or sustain any law which restricted the rights and freedoms guaranteed under Chapter Four of the Constitution had the burden to prove that such a law was justified under Article 43 of the Constitution, and that the burden was quite high but not as high as proof beyond reasonable doubt.

In the Canadian Case of **Regina vs Oakes, 26 DLR (4th) 201** the Supreme Court of Canada at page 225 held:-

> ***"The onus of proving that a limit on a right or freedom guaranteed by the charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of S.I (Equivalent to our article 43 of the Constitution) that the limit on the rights and freedoms enumerated in the charter are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking S.I can bring itself within the exception criteria which justify their being limited. This is further substantiated by the use of the word "demonstrably" which indicate that the onus of justification is on the party seeking to limit."*** **See also <u>Patel vs. Attorney General [1963] ZLR 99</u>**

It is pertinent to bear in mind that human rights granted by the Constitution in Chapter Four thereof are inherent and not granted by the State. (**See**

Article 20 of the Constitution). They are, however, not absolute. They can be limited in a manner authorised by Article 43 of the Constitution. Therefore, once a citizen establishes that a guaranteed right has been contravened by an act of the State, the burden shifts to the State, the Respondent in this case, to prove that the restriction on the rights is permitted under Article 43 of the Constitution.

According to the evidence before court, there are several complaints by Members of Parliament over police interference and violence. The areas that were affected by violence and police interference were Makindye West; Rubaga North; Rubaga South, Mbale and Lira. The Petitioners case is that this state of affairs, even if it occurred only in the areas mentioned herein, it affected citizens everywhere in the country and they felt intimidated and never turned up for the consultative meetings as a result.

The Petitioners have adduced evidence that there was violence in some constituencies and that in several of them, consultation was made impossible. The issue to resolve is whether the violence had any effect on the resultant consultative process, and eventually the voting to pass the Bill into law.

There is the evidence of Hon. Winnie Kiiza, Woman MP for Kasese District who deponed in para 13(w) of her affidavit that after the dispatch to consult, as leader of the opposition, she agreed with other Members of Parliament to carry out nationwide joint consultative meetings and rallies where she joined Hon. Ssewanyana Allan- MP Makindye West; Hon. Kasibante Moses- MP Rubaga North; Hon. Kato Lubwama- MP Rubaga

South, and Hon. Jack Wamai Wamanga- MP Mbale, among others to consult jointly in their areas. She averred that in all the above places, police disrupted the consultations by beating, torturing and using teargas to disperse people and as such, the envisaged participation and consultation did not happen.

Hon. Odur Jonathan, MP Erute South Constituency deponed in para 15 (s) of his affidavit on 24/10/2017, that Hon. Atim Joy Ongom (Woman MP Lira), Hon. Abacacon Angiro Gutomoi Charles (MP Erute County North), Hon. Akello Sylvia (MP Otuke District), Hon Felix Ogong (MP Dokolo South), Hon. Atim Barbara Cecilia Ogwal (Woman MP Dokolo) and himself were violently and unlawfully stopped from consulting people. Police dispersed people gathered at Adyel Division in Lira for the consultations even though the Police had been notified of the intention to carry out joint consultations and a program had been forwarded to it.

On the other hand, Hon. Katoto Hatwib, MP for Katerera Constituency, Rubiri District; Hon. James Kakooza, MP for Kabula County Constituency; Hon. Moses Balyeku Grace, MP for Jinja Municipality, West Constituency; Hon. Lokeris Samson, MP for Dodoth East in Kabong District of Karamoja; Hon. Ongalo Obote Clement Kenneth, MP for Kalaki County, Kaberamaido District and Hon. Henry Musasizi Ariganyira, MP Rubanda East Constituency, Rubanda District all deponed in their affidavits in support of the Answer to Constitutional Petition No. 003 of 2018, that they carried out consultations in their constituencies in their respective districts and the consultations were all peaceful.

What this Court has to determine is whether the alleged police orchestrated violence affected the process of consultation and people participation thereby also negatively impacting the enactment of the Constitution(Amendment) Act, 2018, in a substantial manner such as to render the resultant Act null and void. It is important to decide whether the test to apply would be qualitative or quantitative, or both.

In **Supreme Court Presidential Election Petition No. 1 of 2001, Col. Dr. Kiiza Besigye versus Y.K Museveni & The Electoral Commission**; a similar question arose under circumstances similar to the ones cited in the present case. It was submitted for the Petitioner that it was dangerous to use numbers to determine whether non-compliance affected the results, as it was a value judgment. Further that non-compliance, for example, intimidation and lack of freedom, could not be quantified in numbers; and that numbers were only relevant for proving non-compliance but for proving the effect, one had to look at the principles and values, the gravity, the climate and the activities to see how they affected the results. Reliance was placed on the Tanzanian case of **Attorney General versus Kabourou, 1995 2 LRC 757**, for the proposition that the underlying principle that elections should be free and fair meant that an election which was generally unfree and unfair was not an election at all as envisaged by the Constitution and the Elections Act, and anything which rendered an election unfree and unfair was a valid ground to overturn the election.

Odoki CJ, (as he then was) held that value judgment as regards the effect of non-compliance on the results, was only relevant in considering

the process of the election and the principles underlying the process. The learned Chief Justice stated thus:-

> ***"At the end of the elections, a value judgment can be made that an election was not free and fair, but that is not the result of the election. It is only one of the principles of non-compliance which may render the election to be set aside if it has affected the result in a substantial manner."***

Quoting the Tanzanian case of **Mbowe versus Eliufoo (1967) EA, 240**, the learned CJ went on to say that the other question to answer was whether the result was said to be affected by irregularities in elections or non-compliance. Further that, Georges, CJ in **Mbowe versus Eliufoo (supra)** while defining the phase "affected the results of the election" which appeared in Section 99 (b) of the National Assembly (Elections) Act 1964, referred to the authority of **Re: Kensington North Parliamentary Election Petition (1 960) 2 ALLER 1 50** where the Court said:-

> ***"Even if the burden rested on Respondent, I have come to the conclusion that the evidence is all one way. Here out of a total voting electorate of persons who recorded their votes, three or possibly four are 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 reminder of 111 persons, whom we have not seen were in somewhat similar case, there does not seem to be a thread of evidence that there is any substantial non-compliance 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 of three, or possibly four people who are affected in that they recorded their votes without having a mark placed against their names, each voted only once, one cannot possibly come to the conclusion that although there was a breach of the 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 this 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."

Georges, CJ defined the phrase "affected the result" in this way, at page 242:-

"In my view in the phrase "affected the result," the word "result" means not only the result in the sense that a certain candidate won and another lost. The result may be said to be affected after making adjustments, the effect of proved irregularities the contest seems much closer than it appears to be when first determined. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non-compliance of the rules."

Odoki, CJ concluded that for the effect to be declared substantial, it must be calculated to really influence the result in a significant manner. Therefore, in order to assess the effect, the Court has to evaluate the whole process of election to determine how it affected the result, and then assess the degree of the said effect. He added:-

"In this process of election, it cannot be said that numbers were not important first as the conditions which produced these numbers are useful in making adjustments for the irregularities. The crucial point is that there must be cogent evidence direct or circumstantial to establish not only the effect of non-compliance or irregularities, but to satisfy the Court that the effect on the result was substantial."

The principles in the above cases would in my view apply to the incidents of violence alluded to by the Petitioners in the present Petitions. From the

evidence before Court, some Members of Parliament deponed that there was violence and disruption of consultations, while others said that they had peaceful consultations. However, taking into account the results of the voting and the preceding discussions where majority of the Members of Parliament reported peaceful consultations, I fail to see evidence cogent enough to show that the violence, intimidation or absence of conditions of freedom and fairness affected the process that led to the passing of the impugned Act, and the eventual voting in the House. The results of the Roll-call voting after the 3rd Reading of the Bill, as read out by the Speaker revealed that the absent members were only two (2), sixty two (62) were against and Three Hundred Fifteen (315) were in favour of the Bill, and as such the Bill was declared passed into an Act. The difference in the votes for and against is a very big margin. True, Court should apply both qualitative and quantitative tests. The Petitioners have failed on the quantitative side as they did not prove that the disruptions cited did affect a substantive part of the country or had a substantive effect on the process.

It is true that intimidation and harassment of the people gathered for consultations in some of the areas was proved to have occurred, with intensities ranging from area to area, which must have had some effect. But as indicated in **Dr. Kiiza Besigye v YK Museveni & The Electoral Commission (Supra),** it is not enough to prove that these malpractices occurred. Apart from proving the existence of those isolated incidents of violence and disruptions, the Petitioners also had to prove the degree and

substantial effect which they had on the entire process up to the passing of the Bill into law.

With such overwhelming support which the Bill received at the voting/ roll-call stage, the effect on the consultative process can hardly be said to have been fatal. Therefore, although the said violence and restrictions in themselves are to be condemned in the strongest terms, there is no evidence on the whole, that the entire consultative process and the passing of the Act were adversely affected. Indeed the incidents cited were too few to prove that the consultations countrywide were not conducted under conditions of freedom and fairness. Accordingly, this ground of the Petition must fail.

Issue 6(e): Whether the alleged failure to consult on sections 2, 5, 6, 8 and 10 is inconsistent with and/or in contravention of Articles 1 and 8A of the Constitution.

Mr. Ogalo in his introductory statement relied on Article 8A on the democratic principles and stated that the Speaker had acknowledged the sovereignty of the people and made it clear that people were central to the issue of passing this Bill, and it could not be decided without them. **(See pages 46-48 of the Hansard attached to Jane Kibirige's affidavit)**.Counsel complained that although consultation was put in place, according to the supplementary affidavit of Mr. Francis Gimara, it was not structured at all, and it was left to the individual whims of the Members of Parliament; no notice of dates for the consultations were given to the people, nor did they circulate the Bill to the people. Further still,

the consultations of the Legal and Parliamentary Committee were only restricted to Kampala.

Counsel further pointed out that there was no participation by the people. He referred Court to **Robert Gakuru & Others vs. The Governor Kiambu County (supra),** a Kenyan authority on what amounts to public participation. Counsel submitted that because the process was marred with violence and other human rights violations, the outcome was a nullity. Counsel urged the Court to use a qualitative rather than a quantitative test.

On the same issue of consultation/participation, Counsel Byamukama agreed with Mr. Ogalo that there was no active participation of the people in the process of amendment of the Constitutional Amendment Act, 2018.

Counsel Lukwago also referred Court to **Law Society of Kenya versus Attorney General, (2016) e KLR**, and emphasized that Parliament, in enacting legislation, had the duty to ensure that the spirit of public participation is attained both quantitatively and qualitatively, and that it should not be illusory.

Mr. Mabirizi on the other hand relied on paragraph 2 (i) of the Objective Principles of National Policy to state that although the Speaker knew of the importance of public participation, she deviated and led Parliament into amending several Articles of the Constitution without participation of the public or even without

conducting a referendum contrary to **Rule 128 (3)** of the Rules of Parliament.

He referred Court to **Rule 128 (4)** of the Rules of Parliament which allows amendment by adding relevant matters to the subject matter and stated that the amendments herein were not relevant to the original Bill. He relied on **Doctors for Life International vs. The Speaker of National Assembly (supra)** for the proposition that participatory democracy was mutually supportive to representative democracy and people's participation in this process of constitutional amendment was important, and failure to observe it was therefore unconstitutional.

On his part, Lestar Kaganzi, Counsel for the Petitioner in Constitution Petition No. 13 of 2018, also referred to Mr. Mabirizi's complaints over lack of people's participation on sections 2, 5, 6, 8 and 10 arguing that by the time Hon. Tusiime introduced the amendments to the Magyezi Bill to include extension of the tenure of Parliament and local government councils, on 20th December, 2017, Parliament had finished the consultation process, if any, alluded to by the Respondents. He adopted the same argument for Hon. Nandala Mafabi's amendment which was passed within a couple of minutes.

Counsel referred Court to **Article 38(1)** of the Constitution which provides for the right of Ugandans to participate in the affairs of Government through their representatives and/or the referendum. He also referred to Articles 8A, 1, 2 and 4 and stated that failure to

allow people to participate in these amendments fell short of the constitutional requirements.

Counsel Lukwago referred court to **Law Society of Kenya vs. Attorney general (supra)** for the proposition that public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfillment of the constitutional dictates. He submitted that it behooves Parliament in enacting legislation to ensure that the spirit of public participation was attained both quantitatively and qualitatively.

Counsel submitted that Parliament had a duty to exhort people to participate in the process of the enactment of legislation by making use of as many forum as possible such as churches, mosques temples, public bazaars, national and vernacular Radios, broad casting stations and other avenues where the public were known to converge to disseminate information with respect to the intended action, and failure to comply with this obligation therefore rendered the resulting legislation invalid. He also pointed out that the failure by the Committee on Legal and Parliamentary Affairs to consult outside Kampala was fatal to the consultations process.

Counsel further referred to the affidavit of Hon. Odur Jonathan to demonstrate how members within the entire Lango region were blocked by Police from conducting consultative meetings. He further referred Court to the affidavit of Hon. Semujju Nganda who, while working as Chief Whip of the Opposition rolled out a Program for all

members of the opposition to conduct country-wide consultative meetings and this communication was forwarded to the IGP subject to the Public Order and Management Act but the IGP, while relying on the directive, blocked their planned consultative meetings. Further that, Hon. Kiiza Winfred had also deponed that rallies in Kasubi where she was present were blocked. Hon. Kasibante in paragraph 13 of his affidavit also deponed that rallies in Makindye West, Rubaga South, Busiro East were blocked and individual Members of Parliament were beaten by the forces, arrested, detained and not allowed to consult their constituencies.

Counsel concluded the alleged consultations, if any, were insufficient and not genuine and public participation was never given the desired importance. He referred to the affidavit of Hon. Balyeku Moses where he stated that when the Speaker ordered that they go out for consultation on 3rd of October, 2017, he started on 18th of October and conducted only three meetings within the NRM structures. He neither consulted any other political party nor conducted any other public consultative hearings.

Respondent's case

In reply, Senior State Attorney Adrole submitted that according to the evidence on record, when the Bill was introduced in Parliament, the Speaker referred the Bill to the Committee of Legal and Parliamentary Affairs for consideration and Bill scrutiny, and also urged members to consult members of the general public and

engage them on the Bill. **(See page 4746 of the Hansard dated 27th September 2017)**.

Counsel pointed out that during the Committee stage, the Committee interacted with a number of stake holders and some amendments were brought up as a result, including the amendments by Hon. Tusiime, Hon. Nandala Mafabi and Hon. Robert Kafeero. Counsel relied on **Article 1(1)** of the Constitution to state that all power belongs to the people who shall express their sovereignty in accordance with the Constitution; **Article 1(2)** that the people shall be governed through their will and consent; and **Article 1(4)** 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.

Counsel laid emphasis on **Article 38** which provides that every Uganda Citizen has a right to participate in the affairs of Government individually or through their elected representative but in accordance with the law, and the principles laid down under **Articles 1, 8A, 38, 79, 90, 91, 94** and **Rules 23, 116 120, 128, 205, 230** of Rules of Procedure of Parliament, which allowed representative and participatory democracy. Counsel concluded that Members of Parliament represent the collective will of the people of Uganda and unless the Constitution dictates otherwise like it does in Article 260 and Article 1(4), when Parliament speaks, it speaks for the people of Uganda.

In addition, Mr. Solomon Kirunda, Principal Legal Counsel to the Parliament of Uganda, referred Court to the authority of **Doctors for Life International vs. The Speaker of National Assembly of South Africa (supra)** for the proposition that in determining whether Parliament had complied with its duty to facilitate public participation in any particular case, the Court ought to determine whether what Parliament had done was reasonable in all circumstances by including Rules if any, adopted by Parliament to facilitate public participation. It would also include the nature of legislation and consideration and whether the legislation needed to be enacted urgently. Ultimately what Parliament had to determine in each case was what methods of facilitating public participation would be appropriate.

Counsel then pointed out that according to the Rules of Procedure of Parliament, the Bill was gazetted as required by the Acts of Parliament Act and therefore the whole Country was put on notice of what was going on in Parliament of Uganda; the Bill was referred to the Committee on Legal and Parliamentary Affairs in compliance with article 90(3) and Rule 205; the Committee of Parliament extended invitations to identified stakeholders and other interested parties to come before it and submit written memoranda expressing their views. The Committee received memoranda from 53 individual groups of citizens including Hon, Raphael Magyezi and His Excellency the President of the Republic of Uganda.

Further, both the Committee and the Parliament of Uganda conducted open public and accessible hearing in compliance with Rule 23 and Rules 230 of the Rules of procedure. The Rt. Honorable Speaker had also implored the members to consult and involve the people and Parliament adjourned the house to allow Members of Parliament to go and conduct consultations, and also facilitated them financially after which the Members of Parliament voted in reflection of the will of the people that they represent.

Counsel invited Court to refer to paragraphs 123 and 124 of the **Doctors for Life International vs. The Speaker of National Assembly of South Africa(Supra),** where it was held that Parliament or respective legislatures must be given a significant measure of freedom to determine how best to fulfill the duty to facilitate public involvement. In the present case, the evidence of consultation could be found in the affidavits of Jane Kibirige, Honorable Grace Balyeku, Honorable Samson Okello, Honorable James Kakooza attached to Constitutional Petition No. 5 of 2018.

Counsel contended that Parliament was not a congress of ambassadors from different hostile interests, but a deliberative assembly of one nation with one interest and one hall. Where the interest of a constituent deferred from that of the whole nation, then the MP is required to stay away from the constituent and go with the interest of the general good of the Country.

Counsel also pointed out that the South African and Kenyan cases relied on by Counsel for the Petitioners were distinguishable from the present case. In Kenya public participation and consultation is mandatory in **Article 118** of the Constitution of the Republic of Kenya and in South Africa, **Sections 59** for the National Assembly, **Section 72** for the National Council of provinces and **Section 118** of the provincial legislatures, are couched in mandatory terms, which is not the case in Uganda.

He prayed that Court finds that the Parliament of Uganda complied with Rules 23, 230, 128, 133 and Article 90(3) of the Constitution and it sufficiently facilitated public involvement and consultation.

Resolution by Court

I have listened to the submissions of all Counsel on this issue. It is the Petitioners' contention that the alleged failure to consult on sections 2, 5, 6, 8 and 10 of the Constitution Amendment Act was inconsistent with and/ or in contravention of Articles 1 and 8A of the Constitution. These sections provide for extension of life of Parliament under Article 77, introduction and entrenchment of term limits under Article 105, extension of the term of local government councils under Articles 181, extension of the term of Parliament from five to seven years of its first sitting, and that of local government councils under Articles 289, and replacement of Article 291 of the Constitution.

The Respondent as I understand him, contends that people participate in democratic practices through their representative and

that in this case they were bound by the decision of their representatives. Further that Parliament fulfilled its obligation regarding public involvement. This, the Respondent says was done by tasking the Committee on Legal and Parliamentary Affairs to carry out consultations which was done through consulting 50 groups of people including the President, and gazetting the Bill.

This issue revolves around the necessity and the role of the public in the law making process. I note that generally a public authority's duty to consult those interested before taking a decision can arise in a variety of ways. Most commonly, the duty is generated by statute. Not infrequently, as here, it is generated by the duty cast by the common law upon a public authority to act fairly. The search for the demands of fairness in this context is often generated by the doctrine of legitimate expectation. Such was the source, for example, of its duty to consult the residents of a care home for the elderly before deciding whether to close it in **R vs. Devon County Council, ex parte Baker [1995] 1 All ER 73**. But irrespective of how the duty to consult has been generated, that same common law duty of procedural fairness will always inform the manner in which the consultation should be conducted.

The requirements of fairness in this context must be linked to the purposes of consultation. In **R (Osborn) v Parole Board [2013] UKSC 61, [2013] 3 WLR 1020**, the Court addressed the common law duty of procedural fairness in the determination of a person's legal rights. The first two of the purposes of procedural fairness identified by Lord

Reed were that, the requirement "is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested" and secondly that, it avoids "the sense of injustice which the person who is the subject of the decision will otherwise feel." But underlying it is also a third purpose, reflective of the democratic principle at the heart of our society. This third purpose is particularly relevant in a Petition like the present, in which the question was about the extension of life of Parliament and local government councils which is relevant to all Ugandans.

In ***R v Brent London Borough Council, ex p Gunning,*** **(1985) 84 LGR 168** Hodgson J stated:-

> ***"…These basic requirements are essential if the consultation process is to have a sensible content. First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit for intelligent consideration and response. Third that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalizing any statutory proposals."***

I note that both the Petitioners and Respondents have relied on the authority of **Doctors for Life International vs. The Speaker of National Assembly of South Africa (supra).** The duty to facilitate public involvement is provided for under the public involvement provisions in the South African Constitution. Similarly in Uganda, the public participation which is an aspect of the right to political participation is provided for under Articles 1 (4) and 38 of the 1995 Constitution.

Article 1(4) provides:-

The people shall express their will and consent on who shall govern them and how they should be governed, through regular, free and fair elections of their representatives or through referenda.

Article 38 states:-

38. Civic rights and activities.

(1) Every Uganda citizen has the right to participate in the affairs of government, individually or through his or her representatives in accordance with law.

Further **Article 8A** requires that governance should be based on principles of national interest and common good enshrined in the National Objectives and Directive Principles of State Policy.

I note that the right to political participation involves a general right to take part in the conduct of public affairs directly or through freely chosen representatives; and a more specific right to vote and/or be elected. This imposes a duty on the state to ensure that their citizens have an opportunity to take part in the political decisions affecting their rights. **See Article 25 of the International Covenant on Civil and Political Rights (ICCPR).**

What I must determine now is whether what the Parliament of Uganda did was reasonable and sufficient in the circumstances to facilitate public participation before passing Sections 2, 4, 6, 8 and 10 of the Constitutional Amendment Bill. Was the Committee's consultation with 50 groups of People, including the President and the gazette of the Bill sufficient consultation? And since the Members

of Parliament were on notice, must the electorate be bound by the Members of Parliament's decision having chosen to be represented under **Articles 1(4)** and **38** of the Constitution.

I note that the Constitution (Amendment) Act, Act 1 of 2018, was gazetted in the Uganda Gazette No. 1, volume CXI of 05/01/2018. The Bill was gazetted vide the Uganda Gazette No. 54, volume CX dated 28th September, 2017. From the record of the Hansard dated 20th December, 2017, at pages 5247-5248 when the Bill came up at the Committee stage, Hon. Tusiime sought leave to propose amendments to Articles 61, 105(1), 181, 289 and 291. Hon. Nandala Mafabi then informed Parliament that the amendments had not been in the report of the Committee for Legal and Parliamentary Committee and warned of the danger of skipping that step. There was a debate which lasted about 7 minutes before the question was put to the House and amendments agreed to.

I find that these amendments were introduced at a stage after the consultation on Article 102 (b) had been conducted and concluded. Parliament violated its power to make laws under Article 79 and Rule 93 of the Rules of Parliament and Article 1(4), 38 and 8A of the Constitution. The people having voted the Members of Parliament into the House for period specified by the Constitution, had a right to be consulted on whether or not they wanted to extend that social contract especially with regard to serving Members of Parliament.

From the reading of the Preamble, our Constitution was inspired by a vision of a democratic society in which Government is based on the will of the people. It is apparent from the preamble that one of the basic objectives of our Constitution is the establishment of a democratic and open Government in which the people have a right to participate to some degree. Further Public participation requires access to information. From the record the amendments were never part of the report, they were introduced as a surprise to members and debated in one sitting for a couple of minutes and agreed to without seeking the people's input on this very important issue.

Regarding the 50 groups of people who were consulted by the Committee on these issues, it was, in my view, insufficient consultation. Members of Parliament are elected by their constituents, with respective constituencies clearly known. They sought to be sent, and the constituents agreed to send them for five years, knowing that after five years, they had to make an accountability of what they accomplished. If this social contract were to be altered to enlarge the term of service, the constituents who sent the Members of Parliament had to be consulted. Members of Parliament usually visit their constituencies while campaigning, use radios and televisions and even carry out home visits popularly known as "*kakuyege*" when seeking votes. It is amazing that when they wanted to enlarge their stay in Parliament, they would simply look for groups of people and not care about the views of their constituents who sent them out for a specific period of time.

I find that what Parliament did in this case did not fit the test of reasonableness. They violated their own Parliamentary **Rule 93** which requires members with an interest in the matter before Parliament to make appropriate disclosure and refrain from participating. This was not done. I find that there was no consultation and/or participation of the people on sections 2, 5, 6, 8 and 10 of the Constitutional (Amendment) Act, 2018. This was in contravention of Articles 1 and 8A of the Constitution. This issue is answered in the affirmative.

I will now handle issues 6(f), (9) and (10) together as they are all interrelated.

Issue 6(f): Whether the alleged failure to conduct a referendum before assenting to the Bill containing sections 2, 5, 6, 8 and 10 of the Act was inconsistent with, and in contravention of Articles 1, 91 (1) and 259 (2), 260 and 263 (2)(b) of the Constitution.

Issue 9: Whether the Presidential assent to the Bill allegedly in the absence of a valid Certificate of Compliance from the Speaker and Certificate of the Electoral Commission that the amendment was approved at a referendum was inconsistent with and in contravention of Article 263 2(a) and (b) of the Constitution.

Issue 10: Whether Section 5 of the Act which reintroduces the term limits and entrenches them as subject to referendum is inconsistent with and /or in contravention of Article 260(2)(a) of the Constitution.

Case for the Petitioners

It was the Petitioners contention that Hon. Nandala Mafabi proposed an amendment to Article 105 of the Constitution to reintroduce term limits such that a person could not hold the office of the President for more than two (2) terms and moved that the said

amendment be entrenched as paragraph (f) in Chapter 5 under Article 260 of the Constitution. Further, Parliament using its power under Article 259 of the Constitution had added a new clause to the Constitution in a restricted field. The Petitioners relied on Hon. Raphael Magyezi's report to the Committee of the Whole House that the Committee of the Whole House had considered the Bill entitled the Constitution Amendment Bill (No.2) of 2017 and passed the entire Bill with amendments and also introduced and passed new clauses amending Articles 77, 181, 29, 291, 105 and 260 and that he had moved that the Report of the Committee of the Whole House be adopted and it was.

Mr. Mabirizi on this issue referred Court to **Oloka Onyango & Others vs. Attorney General (supra)**, where this Court, while striking out the Anti-homosexuality Act, held that the Speaker had been prompted three times by Hon. Mbabazi and Hon. Awor to the effect that there was no quoram in the House and she was obliged to ensure compliance with the provisions of Rule 23 of the Rules of Procedure, but she did not. In this case, the Speaker was prompted by the Attorney General, Hon. Rukutana, but she nonetheless overruled him and proceeded to unilaterally amend Article 260. Court was also referred to **Ssemwogerere vs. Attorney General (Supra)**, where Justice Kanyeihamba, JSC (as he was then) stated that the requirements of Chapter 18 were mandatory and could not be waived by Parliament.

Counsel for the Petitioners relied on **Section 9(1) of the Acts of Parliament Act**, to state that the President had to, subject to Articles 91 and 263 of the Constitution, assent to a Bill, and that a Presidential assent was an integral part of the law making process. Therefore, the Presidential assent had to comply with the requirements prescribed by the Constitution. Counsel further referred Court to **Ssemwogerere vs. Attorney General (Supra)** for the proposition that the Constitution allowed the President discretion to refuse to assent to a Bill where necessary and provided for what had to be done in such circumstances.

It was the Petitioners' further submission that **Article 263** of the Constitution requires a Certificate from the Speaker indicating that there was compliance with the provisions of the Constitution and a Certificate from the Electoral Commission where a Bill is to amend a provision under Articles 260 and 261, to the effect that the amendment had been approved at a referendum or subject to a district council in accordance with this Chapter. The Certificates were essential and failure to produce them as accompaniments to the Constitution (Amendment) Bill (No.2), 2017 was fatal. In their view, the Constitution commanded the President to assent to a Bill only if specified conditions were satisfied. The command was as such mandatory and not discretionary.

The Petitioners pointed out that the Certificate by the Speaker on record specified only four (4) Articles as having been amended, yet

the Constitutional (Amendment) Act No. 1 of 2018, contained ten (10) Articles as amended. The President was, therefore, not guided with relevant considerations and requirements to the assenting to the Bill. Further still, that the Respondent had not discharged his burden to produce valid Certificates before this Court under Section 106 of the Evidence Act.

It was the Petitioners' further contention that there was need for a referendum prior to the passing of the impugned Act, because Articles 1, and 2 were amended by infection, while Articles 105 and 260 were amended directly, and these required a referendum to ascertain the will of the people. They referred Court to **Ssemwogerere vs. Attorney General (Supra)** for the proposition that a Presidential assent to a Bill, could not in itself validate such an Act of Parliament.

Regarding entrenchment, it was the Petitioners case the Parliamentary Hansard was clear where Hon. Nandala Mafabi added two amendments by proposing the amendment to Article 105(1) and (2) and yet clause (1) of Article 105 is an entrenched provision in itself which could only be amended by way of a referendum. It was their case that the amendment introduced by the Hon. Nandala Mafabi was considered by Hon. Odongo Otto as a "good trade-off" in re-instating the term limits while removing the age limit; and that Mr. John Mitala, the Secretary to the Cabinet, had confirmed to Court during cross-examination that no

referendum had been planned to fulfill the above stated requirements. The amendment was passed into law even as it fell short of various constitutional requirements precedent to its passing.

Respondent's case

In reply, it was submitted for the Respondent that there was no contravention and/or inconsistence with the said provisions of the Constitution. Court was referred to Mr. John Mitala's evidence and paragraphs (a), (b) and (c) of the Cabinet Information Paper attached to his affidavit stating that there was never any intended referendum by the impugned Constitution (Amendment) Bill. That accordingly, there was no need for a Certificate from the Electoral Commission to certify that requirements of a referendum had been complied with.

Regarding **Article 105**, the Respondent contended that the question which was put and agreed to by the Committee of the Whole House was in relation to the amendment of **Article 105,** the clause under discussion, in as far as it sought to re-introduce term limits only, and that Article 260 in itself was not amended. Counsel contended that had Article 260 been amended, it would have been included as having been amended in the Constitution (Amendment) Act, 2018.

It was the Respondent's further submission that both Honorable Nandala Mafabi and Honorable Raphael Magyezi in their reporting erroneously referred to Article 260 and when Ms. Jane Kibirige, the

Clerk to Parliament was correcting the Record, she cleared out the erroneous part and put in place the proper Article amended which is what appeared in the final Act. Further, that the Hansard was a verbatim recording of whatever happened in the House on that day and that under **Section 8(2) of the Acts of Parliament Act,** corrections relating to misprints, typographical errors and wrong references, if any, where necessary could be made to copies of the Hansard and carefully compared to the copies of the text of the Bill passed, before signing on each copy a statement certifying correctness, which was done in this case.

On issue 10, the Respondent's argument was that throughout the whole process of amendment, there was no amendment to Article 260(2) (a). Rather that, having promulgated Article 260 to include entrenched provisions, Parliament was not precluded from creating other entrenched provisions in other Articles which in their wisdom they may also entrench.

Regarding the Certificate of Compliance from the Speaker, the Respondent's case was that even though some Articles were amended but were not included in the Certificate of Compliance by the Speaker, the said Certificate was in accordance with the form provided for under the schedule of the Acts of Parliament Act; and that the law only required that the Bill should be accompanied by a Certificate of the Speaker that the provisions of Chapter 18 had

been complied with, but there was no requirement that each item which had been amended must be mentioned.

Resolution by Court

Prior to the impugned amendments, the Articles in contention provided as follows:-

105. Tenure of Office of the President

1) A person elected as President under this Constitution shall, subject to clause (3) of this Article, hold office for a term of 5 years.

2) A person may be elected under this Constitution to hold office as President for one or more terms as prescribed by this article.

91. Exercise of Legislative powers.

(1) Subject to the provisions of this Constitution, the power of Parliament to make laws shall be exercised through bills passed by Parliament and assented to by the President.

(2) A bill passed by Parliament shall, as soon as possible, be presented to the President for assent.

(3) The President shall, within thirty days after a bill is presented to him or her—

(a) assent to the bill;

(b) return the bill to Parliament with a request that the bill or a particular provision of it be reconsidered by Parliament; or

(c) notify the Speaker in writing that he or she refuses to assent to the bill.

Article 259. Amendment of the Constitution

(1) Parliament may amend by way of addition, variation or repeal, any provision of this Constitution in accordance with the procedure laid down under Chapter 18.

Article 260. Amendments requiring a referendum.

1) A Bill for an Act of Parliament seeking to amend any of the provisions specified in clause (2) of this article shall not be taken as passed unless—

a) it is supported at the second and third readings in Parliament by not less than two-thirds of all members of Parliament; and

b) it has been referred to a decision of the people and approved by them in a referendum.

2) The provisions referred to in clause (1) of this article are—

a) <u>this article</u>;

b) Chapter One—articles I and 2;

c) Chapter Four—article 44;

d) Chapter Five—articles 69, 74 and 75;

e) Chapter Six—article 79(2);

f) <u>Chapter Seven—article 105(1);</u> (Emphasis added)

g) Chapter Eight—article 128(1); and

h) Chapter Sixteen.

Article 263(2) (a) and (b)

263. Certificate of compliance.

(2) A Bill for the amendment of this Constitution which has been passed in accordance with this Chapter shall be assented to by the President only if—

a) it is accompanied by a certificate of the Speaker that the provisions of this Chapter have been complied with in relation to it; and

b) in the case of a Bill to amend a provision to which article 260 or 261 of this Constitution applies, it is accompanied by a certificate of the Electoral Commission that the amendment has been approved at a referendum or, as the case may be, ratified by the district councils in accordance with this Chapter.

Pages 5262 to 5263 of the Hansard attached to the affidavit of Ms. Jane Kibirige, the Clerk to Parliament, indicate that during the second reading of the Constitution (Amendment) Bill, Hon. Nandala Mafabi moved a motion and stated:-

"I want to bring an Amendment to Article 105 of our Constitution to introduce term limits- (Members: Aye) - thank you. I want to say that a person shall not hold office as president for more than two terms…we want this one to be entrenched as (f) in chapter 5 under amendment. Entrench it as chapter 7, Article 105(1) and (2), I beg to move.

…we have moved both amendments that this Article be re-entrenched…under Article 260 we entrench it to be under (f), we add and (2). The justification is to avoid it being changed at will. "

Hon. Odonga Otto stated:-

"… that would be a good trade off… we need to have term limits reinstated to two terms and we have that Article entrenched…"

The Speaker thereafter said:-

"Okay. Honourable members, I put the question that the clause be further amended as proposed. (Question put and amended)."

Section 5 of the Constitution (Amendment) Act, 2018 provides:-

5. Amendment of article 105 of the Constitution

Article 105 of the Constitution is amended_

(a) By substituting for clause (2) the following _
(2) A person shall not hold office as President for more than two terms.
(b) By inserting immediately after clause (2) the following-
(2 a) A Bill for an act of Parliament seeking to amend this clause and clause (2) of this article shall not be taken as passed unless_
(a) it is supported at the second and third reading in Parliament by not less than two-thirds of all Members of parliament; and
(b) has been referred to a decision of the people and approved by them in a referendum."

An entrenched clause or entrenchment clause of a basic law or Constitution is a provision that makes certain amendments either more difficult or impossible to pass. Further as earlier mentioned, in constitutional interpretation, where the language of the Constitution

is imprecise or ambiguous, then a liberal, flexible and purposive interpretation must be given to cure the ambiguity. The rationale for this is that the Constitution is not an ordinary statute capable of amendment as and when legislators choose. The interpretation should be a generous one rather than a legalistic one aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the charter's protection. **See Salvatori Abuki vs. Attorney General, Constitutional Case No. 002 of 1997**.

From the clear and unambiguous provisions of the Constitution (Amendment) Act, 2018 as well as the submissions of the Petitioners and the Hansard, Article 105 (2) was amended. According to the Parliamentary Hansard, the intention of the legislature as passed by the Committee of the Whole House, was to amend it as an entrenched Article under Article 260, (Chapter 18) which Article provides for a referendum. Parliament was within its mandate to amend the Constitution by creating an entrenched Article. Having done so, however, provisions of Article 260 had to come into play.

I respectfully do not accept the submissions of the Respondent as I find that Article 260 was indeed amended. Under Article 259 (Supra), amendment may be by way of addition, variation or repeal as long as it is done in accordance with the Constitution. By amending Article 105 (2) and making it entrenched under Article 260(2) (f), the latter was also amended. This necessitated a referendum and since none was held, the amendment offends Article 260(1) (b). I am not

persuaded with the submission by the Respondent that Article 260 was mentioned in the reports to the Committee of the Whole House in error and that by not including it verbatim in the Constitution (Amendment) Act, the Clerk to Parliament was correcting the error.

With specific reference to the amendment to Article 105, when Hon. Nandala Mafabi moved that the amendments be entrenched under Article 260(2)(f) of the Constitution, and after the Speaker put the question and pronounced it passed, the Attorney General sounded a warning as follows:-

> ***"Mr. Rukutana: Madam Chairperson, I want us to move well aware of exactly what we have just passed. The motion by Hon. Nandala Mafabi, if I heard him very well, was to reinstate term limits. We have not had occasion to debate that motion- (interjections) – if we had occasion, we would demonstrate that the same reasons we have used to remove age limit are the same reasons for which in 2005 we removed term limits.***
>
> ***Secondly, this matter cannot be amended by this Parliament- (interjections)- It is a question of a referendum- (interjections)- Yes, in 2005 it was a referendum that removed term limits I beg that you consider this matter exhaustively and we take a decision well knowing what it is we are deciding. I beg to move."***

(See page 5263 of the Hansard attached to the affidavit of Ms. Jane Kibirige, the Clerk to Parliament).

The Honourable Deputy Attorney General's pleas were ignored and the Bill was passed without holding the referendum.

In the Canadian Supreme Court case of **The Queen vs. Big M. Drug Mart Ltd. (Supra)** at p. 322, it was stated:-

"Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislations object and thus the validity."

The purpose of amending Article 105(2) and entrenching it was so that it would not be amended at will without the participation of the people. By entrenching it therefore, Article 260 was also thereby amended.

I find that having amended Article 260, the provisions of Article 263 came into play and a Certificate of Compliance from the Speaker, and the Electoral Commission certifying that the referendum provision had been complied with should have been attached thereto to the Assented Bill. The Certificate of Compliance from the Electoral Commission was not attached since no such referendum was conducted or planned for. Failure to attach the same annulled the amendment to Articles 105(2) and 260.

Further still, having found on issues 1, 2, 3, 4, and 6(e), that sections 2, 5, 6, 8 and 10 of the Constitution (Amendment) Act, 2018, amended **Articles 1 and 8A** of the 1995 Constitution by infection, the said sections of the impugned Act could not have been validly passed without a referendum as stipulated under Article 260 since Article 1 is an entrenched provision in itself. I accordingly find that failure to conduct a referendum before assenting to the Bill containing

sections 2, 5, 6, 8 and 10 of the Act was inconsistent with Articles 1, 91(1), 259(2), 260 and 263 of the Constitution.

The Certificate of Compliance by the Speaker was also a subject of complaint by the Petitioners. It only made reference to the Articles mentioned in the original Magyezi Bill. I respectfully disagree with the Respondent's submissions that since the Certificate of Compliance issued by the Speaker dated 22nd December, 2017, was made in accordance with the form stipulated in the schedule to the Acts of Parliament Act, it was valid. It left out a number of constitutional provisions which were amended directly and/or by infection. From perusal of the same, the Speaker's Certificate read as follows:-

> ***"…. I CERTIFY that the Constitution (Amendment) (No.2) Bill, 2017, seeking to amend the following articles_***
>
> ***(a) article 61 of the Constitution;***
>
> ***(b) article 102 of the Constitution;***
>
> ***(c) article 104 of the Constitution; and***
>
> ***(d) article 183 of the Constitution;***
>
> ***was supported by 317 members of parliament at the second reading on the 20th day of December, 2017 and supported by 315 members of Parliament at the third reading on the 20th day of December, 2017, in Parliament, being in each case not less than two thirds of all members of Parliament, the total membership of Parliament at the time, being 434; and that the provisions of articles 259, 262, and Chapter Eighteen of the Constitution have been complied with in relation to the Bill."***

From the above, it is clear that the Certificate of Compliance issued by the Speaker only included four (4) Articles and yet ten (10) Articles of the Constitution, that is to say, Articles 61, 77, 102, 104, 105, 181, 183, 289, 291, were directly amended. The ones left out included Article 105 which was entrenched under Article 260 and so, required

a referendum before the President could assent to its inclusion. There are other Articles mentioned earlier which were amended by infection, for example Article 1. This should have been included too. In my view, the Certificate of Compliance could not be valid in respect of the amendments which it did not specify. It is a mystery why the Speaker chose to mention only those 4 amended Articles.

I am accordingly inclined to agree with the Petitioners that the Presidential assent in respect of the amendments omitted from the Certificate of Compliance and in absence of the Certificate from the Electoral Commission in respect of the amendments that required a referendum, was unconstitutional. The above provisions in the Constitution were indeed intended to save the President from signing something not legally passed by Parliament. The Speaker's Certificate of Compliance having referred to only four (4) Articles, as contained in the original Magyezi Bill, would further and of necessity mean that the omitted provisions, whether intentionally or otherwise, could not become law.

I accordingly answer grounds 6(f), (9) and (10) in the affirmative in respect of the Articles not mentioned in the Certificate of Compliance concerned.

Issue 6(g): Whether the Constitution (Amendment) Act, was against the spirit and structure of the Constitution.

Case for the Petitioners

Counsel Erias Lukwago extensively relied on an Article by Yaniv Roznai entitled **Unconstitutional Constitutional Amendments: A study of the Nature and Limits of Constitutional Amendment Powers, 2014,** *(a thesis submitted to the London School of Economics for the degree of Doctor of Philosophy London, 2014*), to state that according to the basic structure doctrine, the amendment power of Parliament was limited and it did not include the power to abrogate or change the identity of the Constitution or its basic features. He pointed out that this doctrine has been used by the Indian Supreme Court, to review and even annul constitutional amendments several times and asked Court to be persuaded by the same.

Counsel relied on the Indian decision of **Minerva Mills vs. Union of India AIR 1980 SC 1789,** where the five (5) Supreme Court justices held unanimously that since section 55 of the amendment removed all limitations on the Parliament's amendment power conferring upon it the power to destroy the Constitution's essential features or basic structure, it was beyond Parliament's amendment power and therefore void. He further submitted that by so doing the Court had established Parliament's limited amendment power.

Counsel contended that the basic structure identified the philosophy upon which a Constitution is based which is to the effect that the amendment power is delegated and thus implicitly limited in scope. He invited Court to look at the philosophy upon which the Ugandan constitution is anchored in order to apply this basic structure doctrine

to Uganda. He made reference to the preamble to Uganda's Constitution to argue that the doctrine is applicable in our jurisprudence and constitutional interpretation.

Counsel further contended that the basic structure doctrine had been applied in other countries such as Bangladesh, Kenya, Tanzania, South Africa and Pakistan. He referred Court to **Njoya vs. Attorney General [2004] LLR 4788,** where the High Court of Kenya rejected the claim that the amendment power included the power to make changes which amounted to the replacement of the Constitution. In that case, Court found that the '*amendment*' provision plainly meant that Parliament could amend, repeal, and replace as many provisions as desired provided the document retained its character as the existing Constitution. Further that basing on the said structure, fundamental constitutional change could solely be made by the exercise of original constituent power that is, the authority of the people.

He also referred Court to **Premier of KwaZulu-Natal vs. President of the Republic of South Africa, 1996 (1) SA 796,** for the unanimous view that there was a procedure prescribed for the amendment of the Constitution which had to be followed, and if it was properly done, the Constitution was constitutionally unassailable. Further, that radically and fundamentally restructuring and reorganizing the fundamental premises of the Constitution did not qualify as an 'amendment' at all. **See also Executive Council of the Western Cape**

Legislature vs. the President of the Republic 1995 10 BCLR 1289 (CC); Rev. Christopher Mtikila vs. the Attorney General (10 of 2005) TZHC 5, (Tanzania) and British Caribbean Bank Limited vs. AG Beliz, Claim No. 597 of 2011.

Counsel emphasized that the power to change the Constitution's basic principles was appropriately part of the primary duty of the Constituent Assembly and that the adoption of a new Constitution ought to flow from the people in whom ultimate sovereignty rested and from whom all legitimate authority sprung. He then referred Court to the dissenting Judgment of Kasule, J in **Saleh Kamba vs. Attorney General (supra)**, for the proposition that from Uganda's historical perspective, the Constitution was to be interpreted in a way that promoted the growth of democratic values and practices.

Counsel further submitted that from the perusal of Constitution (Amendment) Act No. 1 of 2018, extension of the term of Parliament, extension of the term of President, and lifting of the age limit negated and vitiated the spirit of the Constitution which was intended to create a stable Uganda so that Ugandans do not revert back to the turbulent days of the past. Further, that the actions of Parliament in passing the impugned amendment also contravened **Article 1(4)** of the Constitution which provides that the people of Uganda shall consent by who and how they should be governed through regular free and fair elections and that extension of life of Parliament disenfranchised Ugandans and rendered **Article 1(4)**

illusory. Further still, amending the age limit under **Article 102 (b)** of the Constitution opened a road to the President's entrenchment of himself or herself in power. Counsel invited Court to take judicial notice of the fact that Uganda has had a history of people declaring themselves "life Presidents" expressly and/or through manipulation of legal processes. He relied on **Article 8(A)** of the 1995 Constitution for the view that the principles enshrined in the Preamble and the National Objectives of State Policy and Democratic Governance are justiciable. Further that, under **Article 3** of the said Constitution, any illegal amendment of the Constitution amounted to treason.

Counsel prayed that this Court be pleased to make history for Uganda by applying the basic structure doctrine, in order to create constitutional stability and to guarantee political stability for this nation by ensuring that leaders do not entrench themselves in power for life.

Case for the Respondents

The Learned Deputy Attorney General submitted that the Constituent Assembly had indeed reflected on the history of Uganda while forging a solid foundation for building a strong system that would bring peace in the country. The provisions of the Assembly considered that Uganda's society was not static but dynamic and over time, there would be continuous changes necessitating changing some of the provisions of the Constitution, without destroying the spirit and the basic structure and the foundation upon which the new nation was being built. To achieve this, the Constituent Assembly put in place the National Objectives and

Directive Principles of State Policy which are ideal to the Constitution. Further that, the Constitution (Amendment) Act No. 1 of 2018, was consistent with the ideals and aspirations as set out in the Directive Principles of State Policy; and that in enacting the said Act, the Parliament of Uganda acted within the law, pursuant to its mandate, and powers bestowed on it by the 1995 Constitution of Uganda.

Counsel pointed out that the Parliament of Uganda had power to amend any provision of the Constitution provided it did so constitutionally and in this case, it had followed all the laws and rules of procedure governing enactment of the Constitution(Amendment) Act and therefore, the Constitution was duly amended.

Counsel relied on **Article 1** of the Constitution to state that the people of Uganda were sovereign and power belonged to them. Further, that under **Article 1(4)**, people are to express their will and consent on who shall govern them and how they shall be governed through regular free and fair elections of the representatives or through referenda, and so, when their elected representatives take a decision the people have determined their destiny.

Counsel referred Court to **Rev. Christopher Mtikila vs. Attorney General (supra)** where the Respondent had filed an application challenging the prohibition of independent candidates from standing for presidential, parliamentary and civic elections introduced by the Constitution (Amendment) Act. The Act had made it compulsory for such candidates to be members of and be sponsored by a political party. The trial Judge held that such candidates could still contest and he did not declare the Article

unconstitutional. There was a first appeal where the Judges upheld the decision of the single Judge and the appellant filed a second appeal before 3 Judges. The three Judges too did not strike out the amendment as in their own words they could not close themselves with legislative powers. He argued that Counsel Lukwago, and Mr. Male Mabirizi had argued strenuously for the application of the basic structure doctrine. On that doctrine in the *Mtikila case*, it was held that the doctrine was nebulous, (meaning it was misty, cloudy, and hazy according to the dictionary) as there was no agreed yardstick of what constituted basic structures of a Constitution. The learned Judges further held that under Article 98 of the Constitution of the Republic of Tanzania, 1977, which is in *pari materia* with Article 259 of the Ugandan Constitution on the alteration of any provision of the Constitution, there was no Article which could not be amended and there were, therefore, no basic structures but rather safeguards. The basic structure doctrine did not apply to Tanzania, and this Court could not apply the Indian authorities relied upon by Counsel for the Petitioners in this case since they were merely persuasive.

Counsel contended that the Indian Constitution had the basic structure entrenched therein which was not the case in Uganda. He further contended that **Article 44** which could be said to contain the basic structure was not affected by the Amendment at all. He stated that people were given power by the Constitution and they decided on what could and could not be amended and whatever

was amended did not in any way abrogate what would be termed as the basic structure of Uganda's Constitution.

Resolution by Court

In order to determine applicability of the basic structure doctrine to this Petition, it is important to answer the following questions:-

1) ***Whether there are features in the Ugandan Constitution which are not legally amenable to amendment; and***

2) ***If not, then whether there are features of the Ugandan Constitution which, if removed or amended, would lead to a product that is something other than the Ugandan Constitution.***

The basic structure doctrine was first enunciated by the Supreme Court of India in 1973 in the case of **Kesavananda Bharati vs. The State of Kerala**. The doctrine is to the effect that a national Constitution has certain basic features which underlie not just the letter, but also the spirit of that Constitution, and any amendment, which purports to alter the Constitution in a manner that takes away that basic structure is void and of no effect. *Kesavananda Bharati's case* involved six different writ petitions by a number of Petitioners who represented the propertied class, land proprietors opposed to land ceiling laws, sugar companies in Maharashtra, coal mining companies and former Princes seeking to preserve their earlier privileges. The writ petitions questioned whether there were limitations on the power of Parliament to amend the Constitution, particularly the fundamental rights.

The lead petitioner, His Holiness *Kesavananda Bharati Sripadagalvaru*, leader of a *math* in Kerala, challenged the Constitution (29th Amendment) Act, 1972, which placed the Kerala Land Reforms Act, 1963 and its amending Act into the IX Schedule of the Constitution. A bench of 13 judges was constituted to hear the matter. In a seven-six majority, the bench held that Parliament's power to amend the Constitution was not explicitly limited, but was limited to not altering or modifying the basic features or structure of the Constitution. The Supreme Court in *Kesavananda Bharati* ultimately upheld the Land Reform Acts and the Amendment Acts that had been challenged. The only provision that was struck down was that portion of the Constitution (25th Amendment) Act, which denied the possibility of judicial review. Aside from the limit imposed on the ability of Parliament to alter the basic structure, the case was an overall success for the Government.

The rationale of that decision was that an amendment, which makes a change in the basic structure of the Constitution, is not really an amendment, but is in effect, tantamount to re-writing the Constitution, which Parliament has no power to do. In its wisdom, the Court did not lay down a list of provisions it considered to constitute the basic structure. The claim of any particular feature of the Constitution to be a "basic structure" was left to be determined by the Court on a *case by case* basis.

The basic structure doctrine has since been upheld and relied on in subsequent decisions in that country, for example, in **Minerva Mills Ltd y. Union of India (1980) and Indira Nehru Gandhi v. Raj Narain (1975)**. It has also been widely accepted, adopted and cited with approval in many other commonwealth countries, or what we call common law jurisdictions, for example in **Anwar Hossain Chowdhary vs. Bangladesh (Supreme Court of Bangladesh, 1989), Phang Chin Hock vs. Public Prosecutor (Federal Court of Malyasia, 1980), Sivarasa Rasiah vs. Badan Peguam (Federal Court of Malaysia, 2010), Pakistani Lawyers' Forum vs. Federation of Pakistan (Supreme Court of Pakistan, 2005)**.

In the process, Courts have suggested various guidelines which can be relied on to determine whether an amendment touches the basic structure of a particular Constitution and is, therefore, void. Whether or not a provision is part of the basic structure varies from country to country, depending on each country's peculiar circumstances, including its history, political challenges and national vision. Importantly, in answering this important question, Courts will consider factors such as the Preamble to the Constitution, National Objectives and Directive Principles of State Policy (in countries which have them in their constitutions, such as Uganda), the Bill of rights, the history of the Constitution that led to the given provision, and the likely consequences of the amendment.

In the **Namibian case of S vs. Acheson, 1991 (2) SA 805 (Nm HC) at 813,** Mahomed, Ag. JA stated that:-

> ***"the Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion."***

According to **Benjamin Odoki: The Search for a National Consensus: The making of the 1995 Constitution, 2004**, Uganda's Constitution was enacted against the historical reality that since independence, Uganda had never had a peaceful transfer of power, but was instead characterized by Presidents hanging on to power by all sorts of stratagems until they were violently removed, including even a life president. It was reported that a Constitution represented the deepest norms and ideals by which the people governed their political life. Majority of the Ugandans favored a term of five (5) years to be served by both the President and Parliament.

It should however be noted that although Ugandans had favored term limits for the President in the 1995 Constitution to that effect, the provision was amended by way of a referendum in 2005 to remove term limits. It has now been re-introduced in the Constitution (Amendment) Act, Act No. 1 of 2018, and is among the contested amendments.

I find that in Uganda the Preamble to the Constitution captures the spirit behind the Constitution. The Constitution was made to address a history characterized by political and constitutional instability. It states:-

The Preamble.

WE THE PEOPLE OF UGANDA:

RECALLING our history which has been characterised by political and constitutional instability;

RECOGNISING our struggles against the forces of tyranny, oppression and exploitation;

COMMITTED to building a better future by establishing a socio-economic and political order through a popular and durable national Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress;

EXERCISING our sovereign and inalienable right to determine the form of governance for our country, and having fully participated in the Constitution-making process;

NOTING that a Constituent Assembly was established to represent us and to debate the Draft Constitution prepared by the Uganda Constitutional Commission and to adopt and enact a Constitution for Uganda:

DO HEREBY, in and through this Constituent Assembly solemnly adopt, enact and give to ourselves and our posterity, this Constitution of the Republic of Uganda, this 22nd day of September, in the year 1995.

FOR GOD AND MY COUNTRY."

The new Constitution is for ourselves and our posterity, and the Preamble is meant to emphasize the popularity and durability of the Constitution. Further still, a critical aspect of the basic structure of our Constitution is the empowerment and encouragement of active participation of all citizens at all levels of governance. This is the hallmark of the *Democratic Principle No. II (i) of the National*

Objectives and Directive Principles of State Policy. All the people of Uganda are assured of access to leadership positions at all levels. *[See Directive Principle II (i)]*.The goal of ensuring stability is echoed in *Directive Principle No. III.* And pursuant to Article 8A, the Objective Principles are now justiciable.

Another of the basic pillars of our Constitution is Article 1(1), which guarantees the sovereignty of the people by providing that all power belongs to the people who shall exercise their sovereignty in accordance with the Constitution.

The Bill of Rights to be found in Chapter Four of the Constitution contains fundamental human rights which are inherent and not granted by the State. The ones in Article 44 are non-derogable and are part of the basic structure which if removed or amended would be replacing the Constitution altogether.

What I have to determine is whether the amendments, in extending the term of Parliament and local government councils, and removal of age limits, derogate from this basic structure.

In answering the above, I have to consider whether the amendments promote sovereignty of the people or effectively curtail it and surrender their power to Parliament or the President.

Parliament under Article 79(1) is empowered to make laws on any matter for peace, order, development and good governance. In doing this they act as people's representatives. However, the

ultimate power belongs to the people although some of it is delegated to Members of Parliament.

The above notwithstanding, the amendments under sections 2,6,8 and 10 relating to the extension of the terms of Parliament and local government councils did effectively derogate from the basic structure in that Parliament usurped the people's power to express their will, to consent on who shall govern them and how they should be governed through regular, free and fair elections of their representatives or through a referendum. The two (2) year extension was not sanctioned by the people the Members of Parliament represent. And having done it this once, if not checked in time, nothing would stop Parliament from extending their term again without reference to the people and in contravention of the Constitution. Further, the citizens who had hoped to contest after 5 years would have their rights to participate in elective politics dashed. They would have much longer to wait. This would cause instability.

The removal of age limits for the President and local government councils does not, in my view, derogate from the basic structure. Article 102 is not an entrenched provision. The amendment does not infect Article 1 or any of the mentioned Articles that form the basic structure. True the removal of age limit may encourage an incumbent President to wish to keep himself in office perpetually, but the citizens still remain with the power to either return the same

President or elect a different one. Citizens are even more encouraged to aspire to elect a leader of their choice; and for those who have hitherto been dormant, to actively participate in politics and elections.

I will resolve this issue in the affirmative only as far as sections 2, 6, 8 and 10 of the Constitution (Amendment) Act is concerned.

Issue 7: Whether the alleged failure by Parliament to observe its own Rules of Procedure during the enactment of the Act was inconsistent with and in contravention of Articles 28, 42, 44, 90 (2), 90 (3) (c) and 94 (1) of the Constitution.

Learned Counsel Erias Lukwago submitted that Article 94 of the 1995 Constitution enjoins Parliament to make rules to regulate its own procedure, including the Procedure of its Committees and as such Parliament was obliged to comply with these rules since non-compliance of the same amounted to violation of Article 94 of the Constitution. **See Prof. J Oloka- Onyango & 9 Others vs. Attorney General, Constitutional Petition No.8 of 2014; Law Society of Kenya vs. Attorney General & Another, Constitutional Petition No.313 of 2014; Kesavananda Bharati vs. State of Kerala and Anor, Supreme Court of India, Petition 135 of 1970 and Njoya and Others vs. Attorney General and Others (2004) AHRLR 157 (KeHC 2004).**

Counsel further submitted that the record and the pleadings clearly showed what transpired in Parliament from the time the Constitutional (Amendment) Bill, No. 2 of 2017, was tabled and that the constitutional principles were compromised and the whole

process was tainted with illegalities. One such illegality was the smuggling of the Bill onto the Order Paper as averred in paragraphs 12, 13, 14, 15, 16 and 17, of the affidavit of Hon. Ssemujju Nganda, and the suspension of Rule 201(2) of the Rules of Procedure of Parliament.

In reply, the learned Attorney General submitted that there was no alleged failure by the Parliament of Uganda to observe its own Rules of Procedure during the enactment of the impugned Act. He argued that there was no act of smuggling in of the Bill since during the enactment of any Bill, a motion before the House is undertaken within the Rules and that those were the Rules set out under Article 94(1) of the Constitution. The Respondent argued that Hon. Magyezi's motion came prior and it had a copy of the proposed draft Bill, which the other Members of Parliament notices and motions did not have.

On the issue of suspension of **Rule 201(2)** of the Rules of Procedure of Parliament, 2017, the Respondent's case was that Rule 201 (2) was not cast in stone, and it could be suspended under Rule 16 of the Rules of Procedure of Parliament, 2017 which allowed for suspension of the Rules.

Resolution by Court

I have read the record and reviewed the evidence on how the Constitution (Amendment) Bill, 2017, found its way on the Order

Paper. Parliament has power to make Rules of Procedure which are intra-vires the Constitution. The issue of smuggling Hon. Magyezi's motion to the Order Paper arose from the said motion having been received by the Office of the Deputy Speaker on 21st September, 2017. It was given precedence over Hon. Patrick Nsamba's motion seeking to constitute a Constituent Assembly which had been received earlier on 18th September, 2017; and Hon. Dr. Sam Lyomoki's motion which had also been received earlier on 21st September, 2017.

Rule 120 of the Rules of Procedure of Parliament provides for a Private Member's Bill and **Rule 121** provides for the procedure of its introduction in Parliament. It states:-

> **"121. Procedure for Private Members' Bills**
>
> ***(1) A Private Member's Bill shall be introduced first by way of motion to which shall be attached the proposed draft of the Bill."***

Hon. Ssemujju Ibrahim Nganda deponed in his affidavit attached to Constitutional Petition No. 5 of 2018 that on 26/9/2017, the Speaker, contrary to the Ruling of the Deputy Speaker, amended the Order Paper to include a motion by Hon. Raphael Magyezi to introduce a Private Member's Bill to amend the Constitution, in contravention of Rules 8, 27, 29, and 174 of the Rules of Procedure of Parliament and Article 94 of the Constitution.

In reply, the Clerk to Parliament deponed that under Rule 27 of the Rules of Procedure of Parliament, the Speaker had the authority to determine the order of business of the House and that a motion

introduced by a Private Member to introduce a Bill took priority over the motion that Hon. Nsamba intended to introduce.

I further note that the shadow Minister for Constitutional Affairs asked the Speaker why she was prioritising Hon. Magyezi's Bill over Hon. Patrick Nsamba's by placing it on the Order Paper but she ignored him. The Hansard of 26th September, 2017, attached to the affidavit of Ms. Jane Kibirige, the Clerk to Parliament, recorded that:-

> ***"Speaker: The following notices for motions of leave to introduce Private Member's Bills have met the test under Rule 47 for inclusion in today's Order Paper.***
>
> 1. ***A motion for leave of Parliament to introduce a Constitutional amendment by Hon. Raphael Magyezi to amend the constitution to provide for the time within which to hold Presidential, Parliamentary and Local Council elections under Article 61 and amend Articles 102(b) and 183(2)(b) to remove the age requirement as a qualification. This notice was received in the office of the Deputy Speaker on 21/9/2017. A copy was also received by the Clerk to Parliament. It also had a draft motion and Bill attached to it.***
> 2. ***A motion for leave of Parliament to introduce a Constitutional amendment by Hon. Dr. Sam Lyomoki, MP Workers, to amend the Constitution under Article 98 to provide for a transitional term and arrangements for peaceful, smooth and democratic transition for the first President under the 1995 Constitution while providing immunities, exemptions and privileges to the same individual when they cease to be President; and to amend Article 105(2) to introduce term limits on the tenure of the Office of the President; and to amend Article 105(2) to introduce term limits on the tenure of the President. The notice was received by the Speaker on 21/9/2017. There was a slight amendment on 25/9/2017. A copy was received by the office of the Clerk. It had a draft motion and Bill attached to it.***
> 3. ***The Speaker's office also received a notice of motion submitted by Hon. Patrick Nsamba of Kassanda County North for a resolution of***

Parliament urging Government to urgently constitute a Constitutional Review Commission to comprehensively review the Constitution. The notice was received by the Office of the Speaker on 18/9/2017, and a copy received by the Office of the Clerk to Parliament. It had a draft motion to it. This motion therefore also meets the test under Rule 47 of our Rules of Procedure.

Mr. Sseggona: Madam Speaker, as you read out motions and dates, as you rightly did, I was very keen on the order of presentation. Would it not be procedurally correct that we deal with motions in their order of dates of presentation? In which case, the motion by Hon. Patrick Nsamba would have to come in first, in that order of precedence, for consistency.

Speaker: Hon. Members we have not yet come to those motions; we are going to item No. 3."

At pages 4735-4736 it was state thus:-

"Speaker: Honourable members, I indicated earlier that these motions are not for substantive debate; they are just seeking leave.

Mr. Sseggona: Thank you Madam Speaker, I rise on two points of procedure… Madam Speaker, this is the greatest test in our lives of Members of Parliament. Members this House petitioned you on various dates, seeking for your indulgence to be placed on the Order Paper, and you clearly read out the order of presentation of these motions and notices. The notice and motion of Hon. Nsamba was the first in time. Your office received both the notice and the motion accompanying the notice before the notice presented by Hon. Magyezi.

Madam Speaker this is a difficult time for us as the Parliament. Earlier, I asked whether it would not be procedurally correct that you deal first with the motions in the order of presentation.

The second procedural question and may be for avoidance of doubt arises from Rule 26 of our Rules. It states (1) The Clerk shall send to each Member a copy of the Order Paper for each sitting-(a) in the case of the first sitting of a meeting, at least two days before that sitting and (b) in the case of any other sitting, at least three hours before the sitting without fail.

We received the Order Paper without this particular motion and when we appeared here, Madam Speaker, you used your power to amend the Order Paper. My understanding and that is where I seek your procedural guidance is that you can only amend and issue an Order Paper a minimum of three hours before the sitting and without fail…

Speaker: Hon. Members when this matter began, I was out of the country. The Speaker presiding then, on the Floor of this House, informed you that I had received these notices and the motions and that a date would be appointed. That was before I came back. So you received notice.

Mr. Sseggona: We did not have this motion on the Order Paper, Madam Speaker. Actually, the presiding Speaker was categorical that we would never be ambushed. If we could not be ambushed by anyone else, how about our very own? I think we are moving the wrong way."

It is clear from the above extract that the Magyezi motion came after Hon. Patrick Nsambu's motion. The Speaker informed Parliament that both motions had passed Rule 47 and qualified to be added on the Order Paper. I agree with the Respondent that the motion by Hon. Patrick Nsambu did not have a draft Bill attached to it contrary to Rule 121 of the Rules of Procedure of Parliament. Nonetheless, by the time the proceedings of Parliament started the motion by Hon. Magyezi was not on the said Order Paper. It was included without giving the Members of Parliament the mandatory notice of three hours. They were in my view ambushed with the inclusion of Hon. Magyezi's motion on the Order Paper. The Speaker knew this and her assertion that members had notice and yet one of them had informed her otherwise shows that she intentionally ignored the advice of the members and proceeded on a frolic of

her own. She adjourned the sitting to 27/9/2017 and when they sat she proceeded to let Hon. Magyezi present his motion.

In the **Ssemwogerere versus Attorney General (Supra)**, it was emphasized that Parliament should follow its own Rules of Procedure. I note that putting Hon. Magyezi's Bill onto the Order Paper ahead of the earlier one went against the Rules of Procedure of Parliament. Nonetheless, it was only Hon. Raphael Magyezi's motion that had a proposed draft of the Bill attached to it. Hon. Nsamba's Bill which was filed prior did not have a proposed draft Bill attached to it contrary of Rule 121 of the Rules of Procedure of Parliament. I accordingly hold the view that failure to abide to the particular rule did not in any way affect the process or the eventual outcome which is the Constitution (Amendment) Act No. 1 of 2018, since the Members of Parliament went ahead to debate and pass the Bill with amendments.

Issue 7(a): Whether the actions of Parliament preventing some members of the public from accessing Parliamentary chambers during the presentation of the Constitutional Amendment Bill No. 2 of 2017 was inconsistent with and in contravention of the provisions of Articles 1, 8A, 79, 208 (2), 209, 211 (3), 212 of the Constitution.

Mr. Mabirizi complained vide paragraphs 39, 43, 47 and 53 of his affidavit in support of Constitutional Petition No. 49 of 2017 that as a citizen of Uganda in exercise of his rights under Article 38 of the Constitution, he was prevented from accessing the gallery, contrary

to Rule 23 of the Rules of Procedure of Parliament, 2017; and if there was need for a closed sitting, a certain procedure had to be followed but it was not in this case.

In reply, the Respondent submitted that under **Section 1(K) of the Parliament (Powers and Privileges) Act 1955,** a "stranger" which term is defined to mean any person other than a Member or an Officer of Parliament, is prohibited under **Section 5** thereof as of right, to enter or to remain within the precincts of Parliament. Therefore, the Speaker acting within the provisions of **Section 6** of the Parliament (Powers and Privileges) Act, 1955 had discretion to either allow the public to access the gallery or not.

According to **paragraph II (i) of the National Objectives and Directive Principles of State Policy**, the State shall be based on democratic principles which empower and encourage the active participation of all citizens at all levels in their governance. Further, Democracy is defined by **Black's Law Dictionary, 8th Edition at page 257** as Government by the people, either directly or indirectly through representatives.

I accept the Petitioners' submission that one of the core principles of democracy is that people should be able to monitor what their representatives are doing by leading them. The Rules of Parliament also provide for access to the gallery to enable members of the public access and attend Parliamentary proceedings.

Rule 23 of the Rules of Procedure of Parliament, 2017 provides:-

> ***23. Sittings of the House to be public.***
> ***1) Subject to these Rules, the sittings of the House or of its Committees shall be public.***
> ***(2) The Speaker may, with the approval of the House and having regard to national security, order the House to move in closed sitting."***

Rule 230(1) to (7) of the Rules of Parliament, 2017, also provide for admission of the public and press into the House and Committees subject to the rules made by the Speaker. It was averred in paragraph 2 of Constitutional Petition No. 49 of 2017, that the actions of Parliament to prevent members with proper identification from accessing the Parliament's gallery during the seeking of leave and presentation of the impugned Bill, contravened the Constitution. The Respondent made a general denial of the said allegation in their Answer to the Petition.

The Petitioner's contention was that there was no evidence of a resolution from the House to prevent the public from accessing the gallery and so the decision to prevent him from accessing the gallery was illegal. I find that the right of the Petitioner in Constitutional Petition No. 49 of 2017 to access Parliament during the passing of the Constitution (Amendment) Act, 2018 was violated. Be that as it may, **Section 5** of the Parliament (Powers and Privileges) Act, 1955 states that no stranger shall be entitled as of right to enter or to remain within the precincts of Parliament. Considering the incidents within

the precinct at that time as referred to earlier on in this Judgment, entry was not an absolute right and was subject to limitations. The Speaker had a discretion to either allow the public access to the gallery or not, under the provisions of **Section 6** of the Parliament (Powers and Privileges) Act, 1955.

I find that restricting entry to the gallery, inconveniencing as it may have been to the members of the public, did not negatively impact the process ending in the passing of the Constitution (Amendment) Act No. 1 of 2018.

Issue 7(b): **Whether the act of tabling Constitutional Bill No. 2 of 2017, in the absence of the Leader of Opposition, Chief whip and other opposition members of Parliament was in contravention of and/ or inconsistent with Articles 1, 8A, 69 (1), 69 (2) (b), 71, 74, 75, 79, 82A, and 108A of the Constitution.**

Issue 7(c): **Whether the alleged actions of the Speaker in permitting Ruling Party Members of Parliament to sit on the opposition side of Parliament was inconsistent with Articles 1, 8A, 69 (1),69 (2)(b), 71, 74, 75, 79, 82A, 83 (1)(g), 83 (3) and 108A of the Constitution.**

Issue 7(e): **Whether the alleged act of the Speaker of Parliament in allowing the Chairperson of the Legal Affairs Committee, to present the report of the Committee on 18th December 2017, in the absence of the Leader of Opposition, Opposition Chief Whip, and other Opposition members of Parliament, was in contravention of and inconsistent with Articles 1, 8A, 69 (1), 69 (2) (b), 71, 74, 75, 79, 82A and 108A of the Constitution.**

Issue 7(f): **Whether the actions of the Speaker in suspending the 6 (six) Members of Parliament was in contravention of Articles 28, 42, 44, 79, 91, 94 and 259 of the Constitution.**

The Petitioners case was that during the proceedings in Parliament, Parliament as a body was not properly constituted in a multi- party system because some of the opposition Members of Parliament were suspended from the House, while others voluntarily moved out in protest. They invited Court to look at **Articles 75, 82A** and **108Aof the Constitution**, **Sections 6(E), 6(I) and 6(G) of the Administration of Parliament Act, Cap 257** and **Rules 9, 14 and 15 of the Rules of Procedure of Parliament** which are to the effect that in a multi-party dispensation, proceedings in Parliament can only proceed when both members of the party in Government and members of the Opposition are represented.

The Petitioners submitted that six (6) Members of Parliament were illegally suspended from Parliament. During cross-examination, the Clerk to Parliament, Mrs. Jane Kibirige admitted that the Members were suspended without being given an opportunity to be heard. Further that it was a well-known principle that a party should be heard before being condemned. Court was referred to **Kesavananda Bharati vs. State of Kerala and Another, Supreme Court of India, Petition (Civil) 135 of 1970**in support of the above submission.

The Respondent did not agree, and submitted that the members of the opposition who were absent had been evicted for being rowdy. Further, that under **Rule 7(2)** of the Rules of Procedure of Parliament, 2012, the Speaker is enjoined to preserve order and decorum in the

House and thereby decide questions of order and practice. The Respondent argued that the rowdy conduct of some Members of Parliament on 18th December, 2017 necessitated the Speaker to preserve order and decorum in the House by suspending the said members.

Resolution by Court

Article 82 A of the Constitution provides:-

> ***(2) Under the multi Organization or multi party form of democracy, there shall be, in Parliament a leader of the Opposition.***

In furtherance of the above Constitutional provision, Parliament enacted the following provisions in the Administration of Parliament Act as amended in 2006.

Section 6(E).

> ***The principle role of the Leader of the opposition shall be to keep the Government in check.***

Section 6(I)

> ***(1) There shall be in Parliament a Chief Opposition Whip appointed by the Party in opposition to the Government and having the greatest numerical strength in Parliament.***
> ***(2) The role and functions of the Chief Opposition Whip is to ensure due attendance, participation in proceedings and voting in Parliament of***

members of the party in opposition to the Government and having the greatest numerical strength in Parliament.

Rules 9(2) and (3) of the Rules of Parliament provide that the seats to the right hand of the Speaker shall be reserved for the Leader of Government Business and Members of the party in Government, while the seats to left hand of the Speaker shall be reserved for the Leader of the Opposition to keep the Government in check.

The Hansard of 18th December, 2017, reports what transpired in Parliament as follows:-

"Speaker: Honourable Members, I have made my ruling on that issue. I will ascertain the issue which has been raised about membership on that Committee, particularly the number of members. I also would like to check on the daily Hansard because I was not here when the transfers were made. Therefore I will suspend the proceedings for today up to 2 o'clock, I suspend the proceedings up to 2 O'clock but in the meantime, the following members are suspended: Hon. Ibrahim Ssemujju; Hon. Allan Ssewanyana; Hon. Gerald Karuhanga; Hon. Jonathan Odur; Hon. Mubarak Munyagwa; Hon. Anthony Akol."

From the above constitutional provision and Rules of Parliament, I agree with the submission of the Petitioner that Parliament is properly constituted when there are both members of the opposition and ruling parties. Be that as it may, I find that the absence of the Chief Whip and certain members of the opposition was occasioned by their suspension from the ill-disposed way they had conducted themselves on the previous sitting. The Speaker had warned the members at the beginning of the sitting that members who

misbehaved would be suspended and she continually asked members to sit down and listen to one another in vain.

The Speaker invoked Rules 7(2), 77, 79(2) and Rule 8 and suspended some members including Opposition members. He who comes to equity must come with clean hands. As such, the members who were suspended, some of whom are Petitioners in this matter, were authors of their own misfortune. Indeed some members of the opposition, such as the Leader of the Opposition, Hon. Winnie Kiiza, chose to walk out of Parliament on their own accord. It could not be argued that Parliament was not properly constituted because quoram is what determines whether Parliament was properly constituted or not and in this case it was. I, accordingly, find that the Speaker was within her powers to maintain order in the House by ordering any member whose conduct was considered disruptive to be suspended and the business of the House had to continue without them.

Regarding the sitting arrangement, when the Speaker allowed some members of the ruling party to occupy the seats on the left side, it was the contention of the Petitioners that in the eyes of an ordinary voter, this would cast doubt as to whether such a member still represented the interest of the voter(s) and whether as such, it was constitutional.

Rule 9(1) of the Rules of Parliament provides that every member shall as far as possible have a seat reserved for him or her by the Speaker. Sub-sections (2) and (3) thereof provide for the side of the opposition and ruling party members. In **Ssekikubo & 4 others vs. Attorney General, Constitutional Appeal No.1 of 2015,** the Supreme Court held that the context in which the word 'leave' while referring to leaving a political party (crossing the floor) was used implied a voluntary act of leaving one of the political parties to join another or join as an independent member.

In this case, Parliament was full with over 455 members and the Speaker offered some members seats on the other side of the floor for purposes of voting, and with no implication of switching alliances whatsoever. I am alive to the provisions of Rule 9(2) and (3) which stipulate for the ruling party and opposition to sit on different sides; and Rule 16 on suspension of the Rules where there is a motion by a member.

I find that even though there was no motion allowing members of the ruling party to sit on the other side, there was no crossing over within the political sense of the word and as such, this did not have any impact on the process leading to the passing of the Constitution (Amendment) Act No. 1 of 2018.

Issue 7(d): Whether the alleged act of the Legal and Parliamentary Affairs Committee of Parliament in allowing some Committee members to sign the Report after the public hearings on

Constitutional Amendment Bill No. 2 of 2017, was in contravention of Articles 44 (c), 90 (1) and 90 (2) of the Constitution.

The Petitioners submitted that Committees of Parliament were a creature of Articles 90 and 95(4) of the Constitution, and Rule 183(1) of the Rules of Procedure of Parliament, 2017. They complained that by the time the Committee started considering the Bill, it was fully constituted and after the hearing of witnesses had almost been concluded, 8 new members to the Committee including Hon. Idi Amin, Hon. Akello Rose, Hon. Akampulira Prossy, Hon. Suubi Brenda Asinde, Hon. Kamusiime Caroline and Hon. Kasule Robert Ssebunya were appointed. They participated in the signing of the Report, yet they had not participated in the proceedings.

Further, that under **Article 90(3)(c)** of the Constitution, the Committee of Parliament had powers of the High Court, hence it was incumbent upon it to apply all the principles of fair hearing under Articles 28(1), 42 & 44 of the Constitution. Court was referred to **Mohammed vs. Roko Construction Ltd, Supreme Court Civil Appeal No.01 of 2013** for the proposition that it was improper and contrary to natural justice for a stranger to the hearing to sign a purported Judgment or Ruling. In this case it was the Report of the Committee.

In reply, the Respondent submitted that the members who belonged to this Legal and Parliamentary Affairs Committee of Parliament were directed to start their work on the 3rd of October, 2017, and

additional members were later designated to this Committee. They argued that their joining of the Committee at a later point did not negatively affect their participation in the proceedings of the Committee because they were adequately briefed. Court was referred to **Rule 201(1)** of the Rules of Procedure of Parliament, 2017, which is to the effect that a Report of a Committee shall be signed and initialled by at least one third of all the Members of the Committee and shall be laid on the table. The Respondent argued that the Committee Report was signed and initialled by at least a third of all the Members of the Committee.

Resolution by Court

Article 90 of the Constitution provides:-

> **90. Committees of Parliament.**
>
> ***(1) Parliament shall appoint standing committees and other committees necessary for the efficient discharge of its functions.***
>
> ***(2) The committees of Parliament shall include sessional committees and a committee of the whole house.***

The contention of the Petitioners was that eight (8) new members were appointed late to the Committee of Parliamentary and Legal Affairs and they did not have sufficient time to conduct the hearings from the public about the Constitution (Amendment) Bill, 2017, and never heard all witnesses and therefore their signature and participation in the writing of the report was invalid. Court was

referred to Article 28(1), 42 and 44 (c) for the proposition that a person cannot make a decision in a matter he/she did not hear.

On this issue, I am inclined to agree with the Respondent's submission that the fact that 8 members joined the Committee at a later stage, did not negatively affect their participation in the proceedings of the Committee because they were adequately briefed. **Rule 201** of the Rules of Parliament provides interalia:-

> **201. Report to be signed by Chairperson and Members.**
> ***(1) A report of a Committee shall be signed and initialled by at least one third of all the Members of the Committee, and shall be laid on the table.***

I also find Rule 193 of the Rules of Procedure of Parliament instructive. It states:-

> **193. Quoram of Committees**
>
> ***(1) Unless the House otherwise directs or these Rules otherwise provide, the quoram of a Committee shall be one third of its members and shall only be required for purposes of voting.***

From perusal of the Report and the signatures attached, I find that with or without the additional 8 members to the Committee of Parliamentary and Legal Affairs, the original members who signed the Report constituted a third of the total number. The report was, therefore, validly signed since under subsection (2) of Rule 201, the decision of the Committee is collective.

I therefore resolve this issue in the negative.

Issue 7(g): **Whether the action of Parliament in:- i) waiving the requirement of a minimum of three sittings from the tabling of the Report yet it was not seconded; ii) closing the debate on Constitutional Amendment Bill No. 2 of 2017 before every member of Parliament could debate on the said Bill and failing to close all doors during voting.**

It was the Petitioners' case that when the Bill came up for the second reading, Hon. Rukutana moved a motion that the Rule requiring separation of 3 sitting days of Parliament from the date of tabling of the Committee Report to debate be suspended. However, this motion was not seconded by any Member of Parliament and the Speaker ignored this requirement before putting it to the vote. This contravened **Rule 59(1)** of the Rules of Procedure of Parliament, 2017 which requires that the question upon a motion or amendment shall not be proposed by the Speaker nor shall the debate on the same commence unless the motion or amendment has been seconded.

Counsel further submitted that the actions of Parliament in waiving the rule requiring a minimum of three sittings from the tabling of the Committee Report on the Constitution (Amendment) Bill No.2 of 2017 was inconsistent with and in contravention with **Article 94** of the Constitution. It was the Petitioners' case that a resolution was made to suspend the said rule and each member was given three (3) minutes within which to make submissions yet the Rules required that

members be given adequate time to scrutinize the report and make meaningful contribution to the matter.

The Petitioners faulted the Speaker for not giving a chance to some Members of Parliament to vote and submitted that since the Members of Parliament were representatives of the people, it was not right for the Speaker to prevent them from presenting the views of their people.

It was the Petitioners' further complaint that the failure to close the doors of the Parliamentary Chamber and drawing the bar during the time of voting on the impugned Bill contravened **Rule 98(4)** of the Rules of Procedure of Parliament which regulates the manner and method of roll call and tally voting. Court was referred to page 5269 of the Hansard where the Speaker of Parliament indicated that some members who were in the lobby should be called. The Petitioner added that a total of 55 members were called to vote yet the rationale of **Rule 98(4)** was to bar members who had not participated in the debate to vote on the same.

The Respondent submitted in reply that that **Rule 98(4)** of the Rules of Procedure of Parliament, 2017, came into play only when there was a roll call and tally in the House and that is when the Speaker would direct that the doors be locked. However, under **Rule 7**, the Speaker had the discretion to look at the circumstances that were prevailing in the House and decide on the manner in which business would be

conducted and this is what was done in a bid to preserve order. Therefore, the Speaker exercised her discretion under Rule 7 not to close the doors.

Resolution of Court.

Rule 16. Suspension of Rules.

(1) Any Member may, with the consent of the Speaker, move that any Rule be suspended in its application to a particular motion before the House and if the motion is carried, the Rule in question shall be suspended.

Rule 59. Seconding of motions.

(1) In the House, the question upon a motion or amendment shall not be proposed by the Speaker nor shall the debate on the same commence unless the motion or amendment has been seconded.

(2) In the Committee of the Whole House or before a Committee a seconder of a motion shall not be required.

It is the Petitioners contention that when the Bill came up for the 2nd reading, Hon. Rukutana moved a motion that the rule requiring separation of 3 sitting days of Parliament from the date of tabling of the Committee report to the debate be suspended but that the motion was not seconded and the Speaker did not ascertain this before putting it on vote.

I respectfully find that this contention was misconceived since under **Rule 59(2)** of the Rules of Parliament (Supra), clearly stipulates that in the Committee of the Whole House, where Hon. Rukutana made his motion in this Petition, a seconder of a motion was not required.

Further according to **Rule 98** of the Rules of Parliament, roll call and tally voting shall be held (a) at the second and third reading of the Bill for an Act of Parliament to amend a provision of the Constitution. Sub-section (4) thereof provides that the Speaker shall direct the doors to be locked and the bar drawn and no Member shall thereafter enter or leave the House until after the roll call vote has been taken. The Petitioners contended that from the record the Speaker was reminded that the doors had to be closed but she neglected her duty to follow the Rules of Procedure. The Respondent on the other hand maintained that the Speaker maintained the discretion to decide on the manner of doing business in Parliament.

Rule 7 of the Rules of Procedure states:-

> **(2)** ***In deciding a point of order or practice, the Speaker shall state reasons for the decision and shall cite any Rule of Procedure or other applicable authority.***

Since this was a clear case of a roll call and tally voting, the Speaker should have followed the procedure of closing doors. The intention was that since voting was loud, there was a chance of a member's choice being distorted. Be the above as it may, there was no evidence or complaint of any distortion by any Member of Parliament's vote from the record as all ayes and nays were clearly indicated in the report.

On the whole, these issues are answered in the negative.

I will turn to issue 8 which I will handle together with issue 7(g) (iv).

Issue 8: Whether the passage of the Act without observing the 14 sitting days of Parliament between the 2nd and 3rd reading was inconsistent with and/ or in contravention of Articles 262 and 263 (1) of the Constitution.

Issue 7(g) (iv): Whether the action of Parliament in failing to separate the second and third reading by at least fourteen sitting days are inconsistent with and/ or in contravention of Articles 1, 8A, 44 (c), 79, 94 and 263 of the Constitution.

Case for the Petitioners

When Hon. Nandala Mafabi moved for Article 105(2) to be amended that entrenched under Article 260, as 260(f), it was added to Article 260(2), as an entrenched Article. Further, Hon. Magyezi reported to the Committee of the Whole House, that the House had agreed to amend Article 260. Following this, the Speaker ought to have adjourned the House and applied Article 263(1) on separation of the 2nd and 3rd sittings with 14 sitting days of Parliament. The period of 14 days was put there to allow Members of Parliament to re-think and ensure that members of the public participated in that process. Further, from the Hansard, between the 2nd and 3rd readings, there were changes in the numbers who voted Yes, as

some were absent while others did not turn up. The amendment of this Constitution was, therefore, a sham and was short of any validity. Court's attention was referred to **Col. Dr. Kizza Besigye vs. Attorney General, Constitutional Petition No.13 of 2009**, where Ekirikubinza JSC held that if there was evidence of substantial departure from constitutional imperatives, the process could be said to have been devoid of merit, and the Court should annul the outcome.

Respondent's case

The passage of the Constitution(Amendment) Act, 2018 without observing 14 sitting days of Parliament between the 2nd and 3rd reading was not inconsistent with and/or in contravention of Articles 1, 8A, 44(c), 79, 94, 262 and 263(1) of the Constitution. Hon. Nandala Mafabi's amendment only referred to the amendment of Article 105(2) to reintroduce term limits but was not meant to amend Article 260. Further that, had Article 260 been amended, it would have been reflected in the Constitution (Amendment) Bill, 2017, and/or the Act but it was not. Therefore, there was no need to observe the 14 sitting days.

Resolution of Court

Articles 262 and 263(1) provide as follows:

> ***262. Amendments by Parliament.***
>
> ***A bill for an Act of Parliament to amend any provision of the Constitution, other than those referred to in articles 260 and 261 of this Constitution, shall not be taken as passed unless it is supported at the second and third***

readings by the votes of not less than two-thirds of all members of Parliament.

263. Certificate of compliance.

(1) The votes on the second and third readings referred to in articles 260 and 261 of this Constitution shall be separated by at least fourteen sitting days of Parliament.

From pages 5263- 5264 of the Hansard, during the 2nd reading of the Bill Hon. Raphael Magyezi, reported that:-

" I beg to report that the Committee of the Whole House has considered the Bill entitled 'The Constitution (Amendment) (No. 2) Bill,2017' and passed the entire Bill with amendments and also introduced and passed new clauses-amending Articles 77, 181, 29, 291, 105 and 260. I beg to have the report of the Committee adopted."

The Speaker put the question that the report of the Committee of the Whole House be adopted. The question was put and agreed to. The following transpired thereafter:-

"Speaker: Honourable Members, we shall go for the third reading. I will now invite the Clerk to ring the bell after 15 minutes. Therefore, I will suspend the proceedings for 15 minutes. The bell will be rang and we will reassemble.

(House suspended at 8:59p.m for 15 minutes. On resumption at 9:25p.m the Speaker presiding)

Honourable members, we are going for the third reading. I invite all the members who are able to sit in the Chamber to come in so that we can take the vote…

This is the outcome 62 were against the vote and 315 were in favour. The Constitution (Amendment) Act has now been passed."

In **Ssemwogerere vs. Attorney General (Supra)**, Court held that Parliament had power to make rules of procedure to govern its

business as stipulated under Article 94 of the Constitution. Nonetheless, these rules have to be intra-vires the Constitution. Parliament can only, therefore, make Rules to implement the provisions of the Constitution. Having found herein above that the amendment of Article 105(2) and entrenchment of the same led to the amendment of Article 260, the procedure laid down under Articles 262 and 263 had to be strictly complied with, and could not be waived by Rules of Parliament. In the present case, the mandatory provisions relating to entrenched provisions which required the separating of the second and third readings of the amendment Bill by at least 14 sitting days of Parliament, were not complied with.

I, however, note that not all the amended provisions required complying with Article 263. The proposed amendments that were contained in the original Magyezi Bill did not touch on the entrenched Articles of the Constitution. I also noted earlier on in this Judgment that the Speaker's Certificate of Compliance specified only 4 of the 10 amendments in Act No. 1 of 2018.

Be the above as it may, the amendments which came in after the original Magyezi Bill, that is to say, Constitution (Amendment) Bill No. 2 of 2017, all required the separation between the 2nd and 3rd reading of 14 days, but this requirement was not complied with, the passing into law of those provisions, therefore, was in contravention of and inconsistent with Articles 262 and 263 of the Constitution.

The question now is what would then happen to the remaining provisions which did not require a mandatory separation of 14 days between the 2nd and 3rdreading. The remaining amended Articles are the ones in sections 1, 3, 4 and 7 which constituted the original Magyezi Bill. Having declared the amendments under sections 2, 5,6,8,9 and 10, inconsistent with the Constitution, and also having found earlier on in this Judgment that it is only the amendments in the original Magyezi Bill that were listed in the Speaker's Certificate of Compliance, I find no reason why the unconstitutional parts would not be severed from the rest of the Act, leaving sections 1,3,4, and 7 to remain in the Constitution (Amendment) Act, Act 1 of 2018.

Issue 11: Whether section 9 of the Act, which seeks to harmonise the seven (7) year term of Parliament with Presidential term is inconsistent with and/ or in contravention of Articles 105 (1) and 260 (2) of the Constitution.

The Petitioners contended that section 9 of the Constitution (Amendment) Act, which sought to harmonise the seven-year term of Parliament with Presidential term was inconsistent with and/ or in contravention of Articles 105 (1) and 260 (2) of the Constitution in as far as it put the current President in office for two more years and yet the public had only voted him for a term of 5 years.

The Respondent did not agree. In reply they submitted that Section 9 was created under part IV of that Constitution (Amendment) Act which was produced under Chapter 19 of the Constitution which relates to transitional provisions, by inserting immediately after Article 289 the new Article. Further, that the use of transitional provisions was to regulate a process that had started before an amendment or

enactment of a statute came into force, and ended when an amendment or enactment of that statute had come into force, by addressing possible lacunas in the law that may be created.

The Respondent referred Court to Articles 61(2) and (3) of the Constitution which provide for the conduct of the election of the President and the general election of Parliament and the local government councils on the same day and argued that since Parliament in its wisdom had amended and only aligned the two terms of Parliament and the local government councils, Section 9 was created to harmonise the same with the term of President.

It is pertinent to spell out the provisions of Sections 8 and 9 below for effect. They state:-

8. Replacement of Article 289 of the Constitution.

> ***Article 289 of the Constitution is amended by substituting for Article 289 the following_***
>
> ***"289. Term of current Parliament***
>
> ***Notwithstanding anything in this Constitution, the term of the Parliament in existence at the time this article comes into force, shall expire after seven years of its first sitting after the general elections."***

Section 9. Insertion of new Article 289(A)

> ***9. There is inserted, immediately after article 289. The following new article.***
>
> ***"289 A. Application of Clause 2 of Article 105 shall come into effect upon dissolution of the Parliament in existence at the commencement of this Act."***

Section 10 applies to local government councils mutatis mutandis.

From my findings on issues 1 and 3 of this Petition, I note that the intention of Parliament in adding the amendment under section 9 to the Constitution (Amendment) Act, 2018, was to harmonise the proposed extension of the term of Parliament and local government councils with the Presidential term by extending the said terms to 7 years. Under Article 105, a person elected as the President shall serve a term of 5 years in office. The Respondent pointed out that the enactment of Section 9 was to harmonise the Presidential elections with that of the parliamentary and local government councils, so as to fulfill the requirements of Articles 61(2) and (3) of the Constitution.

However, Chapter 19 under its transitional provisions, commands Parliament to enact laws to give effect to the provisions in the Articles of the Constitution. Bringing this amendment under Chapter 19 in itself did not do away with the fact that Article 105(1) which was under amendment was an entrenched Article. This Article was entrenched under Article 260 (2) (f) and extending the Presidential term to seven years to avoid disharmony with the parliamentary and local government council elections, without a referendum as required under the Constitution, was unlawful in the circumstances. I accordingly find that Section 9 was unconstitutional and contravened Articles 105(1) and 260(2) of the Constitution of Uganda.

Issue 12: Whether sections 3 and 7 of the Act, lifting the age limits are inconsistent with and/ or in contravention of Articles 21 (3) and 21 (5) of the Constitution.

The Petitioners' case was that **Sections 3 and 7** of the Constitution (Amendment) Act, 2018, lifting the age limits were inconsistent with or in contravention of **Articles 21(3)** and **21(5)** of the Constitution following the principle of interpretation of harmony and completeness of a Constitution. The import of section 3 of the Act was to remove the minimum and maximum age limit. This was laid down in the memorandum by Hon. Raphael Magyezi, as one of the objectives of the impugned Act, under paragraph 3 as the need to review the eligibility requirements for a person to be elected as President or District Chairperson under **Articles 102(b) and 182(2)** to comply with **Article 1** which gives the people of Uganda the absolute right to determine how they should be governed and **Articles 21** which prohibit any form of discrimination based on age and others.

In his memorandum, Hon. Magyezi suggested that that Article 102(b) contravened Article 1 and yet the said Article stipulates that all power and authority of Government and its organs is derived from this Constitution which in turn derives its authority from the people who consent to be governed in accordance with this Constitution. The Petitioners argued that in 1995, the people of Uganda agreed not to be governed by a President who was neither below 35 years nor above 75 years. Further that **Article 21(5)** of the Constitution could not be termed as discrimination as Hon. Magyezi suggested because it provided that nothing would be taken to be inconsistent with this article which was allowed to be done under any provision of

this Constitution. Therefore, it was a mis-statement in this memorandum that prescribing the age upon which a person should hold office was discrimination. They further argued that if this amendment was upheld, it would mean that it was unconstitutional for Judges to retire at 70 years or 65 years because that would be discriminatory according to Parliament.

The Respondent was of a different view, that Court's duty in interpreting the Constitution was to create a sense of harmony and that the amendment was giving the people the right to choose under **Article 1(4)** how they would be governed regardless of age restrictions. They argued that there was need to embrace the old and youthful generations and not exclude any one because of age. Further that when interpreting the Constitution for purpose of giving it the spirit that it is a living document, it needs to mirror society and all Articles have to be considered. Court was referred to **Articles 21(3) and Article 21(5)** for the proposition that the amendment did not accord a different treatment to different individuals in society. Instead what it did was widen the scope of opportunities to people around the element of participation in the presidency and in leadership of district local governments.

Court was further referred to **No. II of the National Objectives and Principles of State Policy** which emphasizes that the State shall be based on democratic principles which empower and encourage

the active participation of all citizens at all levels in their own governance.

Resolution by Court

I have considered the submissions from either side. The Petitioners argued that Sections 3 and 7 of the Constitution (Amendment) Act, 2018 were inconsistent with or in contravention of Articles 21(3) and (5) of the Constitution. On the other hand the Respondent argued that people should be given the right to choose how they should be governed regardless of age limit. The Articles in issue provide:-

> 21. Equality and freedom from discrimination.
>
> ***(3) For the purposes of this article, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.***
>
> ***(5) Nothing shall be taken to be inconsistent with this article which is allowed to be done under any provision of this Constitution.***

Equality and freedom from discrimination is not absolute or boundless, even in the most democratic societies. Instead limitations may be imposed on the freedom from discrimination, which strike a balance. The general standard set for testing the permissible limitations is contained in Article 43. From the reading of the above article, I note that age is not one of the attributes that constitute discrimination in Uganda. Further, even if it were, under Article 43(2)(c) of the Constitution, public interest shall not permit any

limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution. The meaning of the term 'demonstrably justifiable in a free and democratic society' was discussed and elaborated in **Onyango Obbo, Andrew Mwenda vs. Attorney General (supra),** by the Supreme Court. The Constitutional Commission by Justice Odoki and the Constituent Assembly deliberations considered this matter very thoroughly before the promulgation of the 1995 Constitution.

Democracy is a fundamental constitutional value and principle in Uganda. The preamble to the Constitution declares that the people of Uganda are committed to establishing a socio-economic and political order through a popular and durable national Constitution.

Provisions relating to the fundamental human rights and freedom should be given purposive and generous interpretation in such a way as to secure maximum enjoyment of rights and freedoms guaranteed. In **Major General David Tinyefuza versus Attorney General, Constitutional Petition No. 1 of 1996**, it was stated: -

> ***"The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each article sustaining the other. This is the rule of harmony, the rule completeness and exhaustiveness and the rule of law of the constitution".***

On appeal to the Supreme Court in **Attorney General vs. Major General David Tinyefuza Constitutional Petition No. 001 of 1997**, Justice Oder J.S.C (RIP) stated:-

> ***"Another important principle governing interpretation of the constitution is that all provisions of the constitution governing an issue should be considered all together. The constitution must be looked at as a whole."***

The preamble of the Constitution re-calls the history of Uganda as characterized by political and constitutional instability; recognizes the people's struggle against forces of tyranny, oppression and exploitation and says that the people of Uganda are committed to building a better future by establishing, through a popular and durable constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress. According to the report of the Commission of Inquiry (Constitutional Review), 2003, attached to the affidavit of Fredrick Ssempembwa in Constitutional Petition No. 5 of 2018, one of the Terms of Reference was to review the qualifications and disqualifications of Members of Parliament and the President and in particular Article 80(1) (c) and Article 102 in order to make appropriate recommendations. Age limits were, however, not part of the recommendations. Neither had they been so in the Odoki Report. The Constitution however put the limits.

It is stated by the Petitioners that effecting the amendment would be discriminatory and would affect other public offices for example the

Judiciary (Article 143 and 144), and Chapter 10 on the Public Service on which there is limitation of age imposed. I am unable to agree with this as a strong argument against the lifting of the age limits in respect to the President and the local government councils. This is because the president and local government councils are political offices and the office bearers are elected and not appointed like in the case of the Judges and the public servants. I would relate the amendment to other political offices where there is no age limit, for example the Member of Parliament. **(See Article 80 of the Constitution).**

It is possible, as I indicated earlier, that removal of term limits especially in the circumstances of Uganda, may encourage the incumbent President to want to stay on in power, but the power to decide who governs/rules them, shall remain with the people who exercise it through regular general elections. The people's power to elect a President or district chairperson of their choice is not taken away, by lifting the respective age limits. If anything, citizens would in my view be encouraged to aspire to elect leaders of their choice and to actively participate in politics and elections.

Most importantly, the role of this Court is to determine whether the amendments in the Constitution (Amendment) Act 2018, did contravene any of the provisions of the Constitution from the issues I have not found Sections 3 and 7 among the ones that have offended or contravened the Constitution. Articles 102 and 181 are

not among the entrenched Articles and their amendment did not infect any other provisions of the Constitution. Section 102 was listed in the Speaker's Certificate as one of those being amended where many others were left out. The people's sovereignty and freedom to choose who will govern them under Article 1 was not affected or infected.

I shall answer this issue in the negative.

Issue 13: Whether the continuance in Office by the President elected in 2016 and remains in office upon attaining the age of 75 years contravenes Articles 83 (1) (b) and 105 of the Constitution of the Republic of Uganda.

On whether the continuance in office by a President elected in 2016 and stay therein upon attaining the age of 75 years was contrary to Articles 1 and 102(b) of the Constitution, one of the Petitioners, Mr. Mabirizi, submitted that the President who was 72 years at the time of election in 2016 would be 75 years in 2019 and so by direct implication, he would cease to qualify as President and must therefore vacate office.

In reply, the Respondent's argument was that this matter was now moot because the said article that was quoted by the Petitioners was no longer law since it had been amended by repeal.

Court was referred to **Attorney General of the United Republic of Tanzania vs. Africa Network for Animal Welfare, East African Court of Justice Appeal No. 3 of 2014**, on the doctrine of mootness where it

was held that where there were no live disputes between the parties, Court need not hear the matter. They argued that this matter had been overtaken by events and in the alternative that should Court decide to look at the argument of petitioner herein; it finds that the qualifications of the President are required at the entry point.

In rejoinder, Mr, Mabirizi referred Court to the authority of **Ssemwogerere vs. Attorney General (supra)**, for the proposition that an Act of Parliament which was challenged under Article 137 remained uncertain until the appropriate court had pronounced itself upon it. Therefore, this issue was not moot and moreover in Constitutional Petition No. 49 of 2017, it had been pleaded that even though the assent happened, the law would be a nullity. Once an Act was challenged under Article 137, it did not become absolute as it remained uncertain until court had pronounced itself on it.

Resolution by Court

I agree with the Petitioner that this issue is not moot because this Court has been asked to declare Constitution (Amendment) Act No. 1 of 2018, null and void. Until this Court makes its final determination, the matter remains alive. The unamended Article 102 provides:-

> **102. Qualifications of the President.**
>
> ***A person is not qualified for election as President unless that person is—***
>
> ***(a) a citizen of Uganda by birth;***
> ***(b) not less than thirty-five years and not more than seventy-five years of age; and***

(c) a person qualified to be a member of Parliament.

Clearly the above Article refers to the qualifications for election as President. (Emphasis added). The question of age is only restricted to the time of election. The President could legally be elected when he was 74 years and 11 months, and that would mean ruling till the age of 79 years.

I find no merit in this issue. I declare so.

Issue 14: What remedies are available to the parties?

On remedies, Mr. Byamukama submitted that the matters brought by all the Petitioners in this consolidated petition were matters of law concerning defending the Constitution under Article 3 of the 1995 Constitution. Collectively, the main prayer of the Petitioners was for the national Constitution and Supreme law of the land to be respected and revered by all those empowered under its provisions either to amend it or to enforce its provisions. He prayed that respective petitions be allowed by this Court on the following grounds:-

1. ***"That the Constitutional (Amendment) Act No.1 of 2018 offends the general structure, spirit, and intent of the Constitution which was to restore democratic governance and provide safeguards against dictatorship and misrule.***
2. ***That the process of tabling enactment and assent the impugned law violated various provisions of the Constitution which have been highlighted and will be putting the specific orders or declarations by this Court but as a general ground that the entire process from conception,***

debate, enactment, and even assent to the impugned Act violated provisions of the Constitution.

3. ***That certain provisions in the impugned act are inconsistent with and in contravention of articles of the Constitution***

4. ***And finally that Parliament exceeded its constitutional amendment powers in enacting certain provisions of this Act."***

Counsel listed down the following prayers and asked Court to grant them:-

1. ***That the Act is null and void having been passed in contravention of the Constitution.***
2. ***Then whole process of enacting the new Act contravenes Article 3(2) of the Constitution.***
3. ***That the assent given to the Act by his Excellency the President offended Article 263(2) of the Constitution.***
4. ***That passing provisions of the Act under section 2 and 6 where Parliament extended its term of office to 7 years retroactively violated Articles 1, 8A, 7, 77(3), 77(4), 79(1) and 96.***
5. ***That passing sections 8 and 10 of the Act extending the life of the local government councils from 5-7 years retroactively offended Articles 1.***

Counsel submitted that the doctrine of severance could not be applied in this case because the entire Act was fundamentally defective right from the beginning of the process of its enactment.

In respect of costs Mr. Rwakafuzi submitted that the matter for determination was a public interest matter and it was brought by several parties, to wit; the Uganda Law Society, private citizens and Members of Parliament. He argued that Section 27 of the Civil Procedure Act did not apply to public interest litigations. Further, that the public interest doctrine required that private citizens who

expend resources on enforcement of the Constitution, good governance and democracy should be awarded costs. He also applied for the Certificate for two Counsel in respect of Constitutional Petition No. 5 of 2018.

Learned Counsel Rwakafuzi further submitted that, whether the Petition was successful or not, costs should be awarded to the Petitioners since the Petition was not frivolous. He also asked Court to award costs to Counsel in Constitutional Petitions No.13 of 2018, No. 3 of 2018, No. 10 of 2018 and No. 13 of 2018.

In support of the above proposition, Mr. Byamukama relied on the Supreme Court decision of **Muwanga Kivumbi vs Attorney General, Supreme Court Constitution Appeal No 6 of 2011**.

Mr. Mabirizi, submitted that he had applied for general damages, interest and costs. He referred Court to the case of **Doctors for Life International vs. The Speaker of National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)**, for the proposition that where an applicant had argued issues of great importance, the general rule was that costs should be awarded. He concluded that if the Petition was unsuccessful, each party should bear its own costs. However, that if the Petition were to succeed, Court should award the Petitioners costs for raising matters of general importance as this would be a good contribution to the constitutional development of Uganda.

Mr. Lukwago asked Court to put into consideration, while evaluating the totality of evidence on record, that the Rt. Hon. Speaker, the Deputy Speaker and Hon. Raphael Magyezi, who were key in the process of passing the impugned Bill, had not sworn any affidavit(s).

Regarding the issue of Severance, Mr. Ogalo contended that, the Petitioners had ably addressed Court on how the entire process of enactment vitiated the whole Constitution (Amendment) Act, Act 1 of 2018. Therefore, severance could not be applied in such a matter since the entire Act was null and void.

In respect to Constitutional Petition No. 3 of 2018, Counsel prayed for disbursements only but not costs. He added that the other Petitioners had ably stated reasons as to why the costs should be granted to them and that a Certificate for two Counsel would be in order for Mr. Rwakafuzi and Mr. Lukwago since they were from different chambers.

In respect of Constitutional Petition No. 13 of 2018, Mr. Kaganzi, withdrew the additional prayer for the Certificate for two Counsel which had been made in his pleadings.

Respondents reply

Mr. Francis Atoke, the Solicitor General submitted that the doctrine of severance should be applied in this Petition if this Court found that there were irregularities during the process and the subsequent passing of the Constitution (Amendment) Act, Act No.1 of 2018 as

alleged by the Petitioners. He asked Court to sever the sections that were in contravention of the 1995 Constitution and leave those that were consistent with it. He relied on **Attorney General vs. Salvatori Abuki Supreme Court Constitutional Appeal No. 1 of 1998**, in which the Supreme Court applied the doctrine of severance.

He referred Court to **South African National Defence Union vs. Minister of Defence & Another, Constitutional Court Case No. 27 of 1998**, where their lordships stated that the un offending provisions, however, could be rendered constitutionally valid by the technique of severance applied to both subsection (2) and (4) of section 126B. Further that it was quite possible to sever the various references to "acts of public protest" from section 126B (2) entirely as well as the definition of "act of public protest" contained in section 126B (4). The challenged provisions would then remain only as a prohibition against strike action and the incitement of strike action, something which the applicant did not seek to challenge.

He contended that it was the mandate of this Court to protect the Constitution under Article 2(2) of the Constitution which provides that if any other law or custom was inconsistent with any of the provisions of this Constitution, the Constitution shall prevail and any other law or custom shall to the extent of its inconsistency be void. He further submitted that the doctrine of severance involved reading a law or statute that was partly unconstitutional and in such a manner that

the unconstitutional part was severed from the rest leaving the constitutional part in the Act.

He submitted that this Court had the powers and discretion under Article 137 to grant orders or redress and argued that severance was one of the remedies and as such this court had the power to eliminate the unconstitutional provisions of the Constitution (Amendment) Act No.1 of 2018, if any, by process of subtractions. Counsel asked this Court to take into account the above test and consider the current situation in Uganda. Since the Act had already been passed, it should be upheld by this Court but if it cannot, he prayed that Court severs off the offending provisions.

In respect of costs, Counsel submitted that costs follow the event unless Court orders otherwise for good reason. He referred Court to **Kwizera Eddie vs. Attorney General, Constitutional Appeal No.1 of 2008** specifically the judgement of Ekirikubinza JSC/JCC quoting the decision in **Besigye Kizza vs. Museveni Yoweri Kaguta and Electoral Commission, Presidential Election Petition No. 1 of 2001**in which Odoki CJ stated that it is a well settled that costs follow the event unless the court orders otherwise for good reason. The discretion accorded to the court to deny successful party costs of litigation must be exercised judicially and for good cause. Costs are an indemnity to compensate the successful litigant the expenses incurred during the litigation. Costs are not intended to be punitive

but a successful litigant may be deprived of his costs only in exceptional circumstances.

It was further stated in that case that in several cases of a significant political and constitutional nature, this Court had ordered each party to bear its own costs. This was done in **Prince J. Mpuga-Rukidi vs Prince Solomon Iguru and others – C.A. 18/94 (SC)** where right of the King of Bunyoro to succeed to the throne was unsuccessfully challenged; and in **Attorney General vs. Major Gen. David Tinyefuza, 51. App. No. 1 of 1997 (SC)** where the Court agreed that each party bears their costs.

Counsel asked Court to follow the precedents set by the Supreme Court and this Court on costs since it was a matter of public importance and argued that Mr. Mabirizi's prayer offended the doctrine of equity when he prayed that should the Petitioners succeed, the respondents should pay costs but that if they did not succeed each party should bear its own costs. He added that Mr. Mabirizi had a duty to prove the damages he asked for but he did not.

Mr. Rukutana submitted that the Respondent had ably demonstrated that the Petition did not have any merit whatsoever and that the Members of Parliament acted within the law to enact each and every section of the Constitution (Amendment) Act, 2018. Parliament had followed the right procedures and the enactment was done in good faith and in the interest of the Country. He

reiterated the submissions presented by the respondents and asked Court to disregard each and every prayer contained in the Petitions of the Petitioners, dismiss them, and hold that the Constitution (Amendment) Act, 2018 was validly passed for the positive and democratic development of Uganda. On costs, he argued that Court should consider reimbursements but not legal costs since this was a matter of public interest.

Decision of the Court

It is a well settled principle that costs follow the event unless court orders otherwise for good reason. **See Kwizera Eddy vs. Attorney General, Civil Appeal No.1 of 2018.** Further still in **Major General David Tinyefuza vs. Attorney General, Constitutional Petition No. 001 of 1996**, it was stated that:-

> ***"If a petitioner succeeds in establishing breach of a fundamental right, he is entitled to the relief in exercise of constitutional jurisdiction as a matter of course. However, the court may decline relief if the grant of same, instead of advancing or fostering the cause of justice, would perpetuate injustice or where the court feels that it would not be just and proper for example, if the matter has been overtaken by events. In my opinion, in this regard, there seem to be no distinction between the enforcement of a fundamental right and a legal right under a general law."***

It is not in dispute that the consolidated Petitions were filed as public interest litigation matters where parties who loose should not be condemned to costs in favour of those who are victorious. The Petitions in this case raised issues of great public importance as regards the constitutional relationship between Parliament, the

office of the Attorney general, the Office of the Speaker, and the functioning of the three arms of Government; the Executive, the Legislature and the Judiciary.

I have found that the Petition had merit and succeeded in respect of several provisions of the Act, which I have declared null and void. I further note that it involved extensive research and lengthy submissions. I, however, note that the Respondent also successfully defended portions of the Act which have been held to have been validly passed. I will consequently order that the Petitioners be granted some professional fees and costs to cover disbursements.

I decline to grant general damages and interest to Mr. Mabirizi as prayed for, since he was unable to demonstrate that he suffered special loss as a result of the Constitution (Amendment) Act, Act No. 1 of 2018.

Conclusion

In the result this Petition partially succeeds. I find and declare as follows:-

1. Sections 2, 5, 6, 8, 9 and 10 of the Constitution (Amendment) Act, Act 1 of 2018, are in contravention and/or inconsistent with the 1995 Constitution of Uganda, and should be expunged from the Constitution of Uganda.

2. Sections 1, 3, 4 and 7 of the Constitution (Amendment) Act, Act 1 of 2018 are not inconsistent with and/or in contravention of the 1995 Constitution.
3. As to costs, I too award costs in the terms set out in the Judgment of the Honourable Justice Cheborion Barishaki.

I so order.

Dated at Mbale this 26 day of July 2018.

Hon. Lady Justice Elizabeth Musoke
JUSTICE OF APPEAL/CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT MBALE

CONSOLIDATED CONSTITUTIONAL PETITIONS

6. **NO.49 OF 2017**

MALE MABIRIZI KIWANUKA::::::::::::::::::::::::::::PETITIONER

VERSUS

ATTORNEY GENERAL:::::::::::::::::::::::::::::::: RESPONDENT

AND

7. **NO.3 OF 2018**

UGANDA LAW SOCIETY::::::::::::::::::::::::::::::::PETITIONER

VERSUS

ATTORNEY GENERAL::::::::::::::::::::::::::::::::RESPONDENT

AND

8. **NO.10 OF 2018**

9. PROSPER BUSINGE
10. HERBERT MUGISA } **::::::::::::::::::PETITIONERS**
11. THOMAS MUGARA GUMA
12. PASTOR VINCENT SANDE

VERSUS

ATTORNEY GENERAL::::::::::::::::::::::::::::::::RESPONDENT

AND

9. **NO. 5 OF 2018**

13. HON. GERALD KARUHANGA KAFUREEKA
14. HON. ODUR JONATHAN
15. HON.MUNYAGWA.S.MUBARAK
PETITIONERS
16. HON. SSEWANYANA ALLAN
17. HON. SSEMUJJU IBRAHIM

18. HON. WINNIE KIIZA

VERSUS

ATTORNEY GENERAL:::::::::::::::::::::::::::::::: RESPONDENT

AND

10. NO.13 OF 2018

ABAINE JONATHAN BUREGYEYA:::::::::::::::::::PETITIONER

VERSUS

ATTORNEY GENERAL::::::::::::::::::::::::::::::::::RESPONDENT

CORAM:

HON. MR. JUSTICE ALFONSE OWINY DOLLO, JCC/DCJ

HON. MR. JUSTICE REMMY KASULE, JCC/JA

HON. MR. JUSTICE KENNETH KAKURU, JCC/JA

HON. LADY JUSTICE ELIZABETH MUSOKE, JCC/JA

HON. MR. JUSTICE CHEBORION BARISHAKI, JCC/JA

JUDGMENT OF HON. MR. JUSTICE CHEBORION BARISHAKI, JCC

Introduction

These consolidated Constitutional Petitions were brought under **Article 137 (1), (3) (a)** and **(b)** of the Constitution, Rules 3, 4, 5 and 12 of the Constitution Court (Petitions and References) Rules, SI 91-2005.

The consolidated petitions arose out of different petitions that were filed separately by different parties challenging the passing of the Constitution (Amendment) Act 2018 and Court directed that the same be consolidated under Rule 13 of the Constitutional Court (Petitions and Reference) Rules.

Background

Hon. Raphael Magyezi, Member of Parliament for Igara County West Constituency in Bushenyi District moved a motion and sought for leave to introduce a private Members Bill to amend the Constitution. The motion which was moved on 27/9/2017 was made under **Article 259** of the Constitution.

The Constitution Amendment Bill No.2 of 2017 was to amend **Articles 61, 102(b) and 183(2) (b)** which provide for the time within which to hold Local Council, Parliamentary and Presidential elections, qualifications for District Chairperson and President respectively and **Articles 104 (2) and (3) and 104(b)** of the Constitution to provide for the time when bye elections can be held when a presidential election is annulled by the Supreme Court. The Bill was subsequently passed by Parliament and assented to by the President.

The Petitioners, who include six Members of Parliament, were aggrieved by the manner in which the Constitution (Amendment) Act 2018 was passed into law and they filed different petitions in this Court. They challenged the process by which it was passed and also disputed numerous provisions contained in the Act contending that they were unconstitutional.

The Petitioners submitted inter alia, that because of violence which was rampant at the time when the Bill was passed, the independence of Parliament was undermined which contravened **Articles 1, 3, 8A, 79, 208(2), 209, 211(3) and 259** of the Constitution.

That in the course of passing the bill, Parliament breached Rules 121 and 117 of its Rules of Procedure because the bill was gazetted on 28/9/2017 and yet the order to print it was issued late on 29/9/2017 meaning that there was foul play on the way the bill was processed.

The Petitioners prayed for the following declarations:

a) The Constitution (Amendment) Act No.1 of 2018 be annulled having been passed in contravention of the procedural requirements laid down in the Constitution.

b) In the alternative but without prejudice to paragraph (1), Sections 2, 3, 5, 6, 7, 8, 9 and 10 of the Constitution (Amendment) Act No.1 of 2018 be annulled.

c) The inclusion of the extension of the terms of the 10th Parliament and the current Local Government Councils in the Constitution (Amendment) Act No.1 of 2018 without consultation with the electorate and following due process was unconstitutional and contravened **Articles 1, 8A and 259 (2) (a) of the Constitution.**

d) The invasion and/or heavy deployment at the Parliament by the UPDF and Uganda Police Force and other militia in using violence, arresting, beating up and torturing Members Parliament was unconstitutional and contravened **Articles 1, 8A, 23, 24, 29, 79, 208(2), 209, 211(3) and 212 of the Constitution.**

The Respondent maintained that the consolidated Petitions were frivolous. The Learned Deputy Attorney General, who led the Respondent's team contended that the Constitution Amendment Act 2018 was passed in accordance with the law and that Parliament had the authority to enact the numerous amendments to the Constitution in the manner it did.

At the joint scheduling conference held prior to hearing of the consolidated petitions, the following issues were agreed upon namely;

15. ***Whether sections 2 and 8 of the Act extending or enlarging of the term of life of Parliament from 5 to 7 years is inconsistent with and/or in contravention of Articles 1, 8A, 77(3), 77(4), 79(1), 96, 61(2) & (3), 260(1), 105(1), 289 and 233(2) (b)***

16. And if so, whether applying it retrospectively is inconsistent with and/ or in contravention of Articles 1, 8A, 7, 77(3), 77(4), 79(1), 96 and 233 (2) (b) of the Constitution.

17. Whether sections 6 and 10 of the Act extending the current life of Local Government Councils from 5 to 7 years is

inconsistent with and/ or in contravention of Articles 1, 2, 8A, 176 (3), 181 (4) and 259 (2) (a) of the Constitution.

18. If so, whether applying it retroactively is inconsistent with and/ or in contravention of Articles 1, 2, 8A, 176 (3), 181 (4) and 259 (2) (a) of the Constitution.

19. Whether the alleged violence/ scuffle inside and outside Parliament during the enactment of the Act was inconsistent and in contravention of Articles 1, 2, 3 (2) and 8A of the Constitution.

20. Whether the entire process of conceptualizing, consulting, debating and enacting the Act was inconsistent with and/ or in contravention of Articles of the Constitution as hereunder:-

h) Whether the introduction of the Private Member's Bill that led to the Act was inconsistent with and/ or in contravention of Article 93 of the Constitution.

i) Whether the passing of sections 2, 5, 6, 8 and 10 of the Act are inconsistent with and/ or in contravention of Article 93 of the Constitution.

j) Whether the actions of Uganda Peoples Defense Forces and Uganda Police in entering Parliament, allegedly assaulting Members in the chamber, arresting and allegedly detaining the said Members is inconsistent with and/ or in contravention of Articles 24, 97, 208 (2) and 211 (3) of the Constitution.

k) Whether the consultations carried out were marred with restrictions and violence which were inconsistent with and/ or in contravention of Articles 29 (1) (a), (d), (e) and 29(2) (a) of the Constitution.

l) Whether the alleged failure to consult on sections 2, 5, 6, 8 and 10 is inconsistent with and/ or in contravention of Articles 1 and 8A of the Constitution.

m) Whether the alleged failure to conduct a referendum before assenting to the Bill containing sections 2, 5, 6, 8 and 10 of the Act was inconsistent with, and in contravention of Articles 1, 91 (1) and 259 (2), 260 and 263 (2) (b) of the Constitution.

n) Whether the Constitution (Amendment) Act 2018 was against the spirit and structure of the Constitution under paragraph 12 of the National Objectives of State Policy.

21. Whether the alleged failure by Parliament to observe its own Rules of Procedure during the enactment of the Act was inconsistent with and in contravention of Articles 28, 42, 44, 90 (2), 90 (3) (c) and 94 (1) of the Constitution.

h) Whether the actions of Parliament preventing some members of the public from accessing Parliamentary chambers during the presentation of the Constitutional Amendment Bill No. 2 of 2017 was inconsistent with and in contravention of the provisions of Articles 1, 8A, 79, 208 (2), 209, 211 (3), 212 of the Constitution.

i) Whether the act of tabling Constitutional Bill No. 2 of 2017, in the absence of the Leader of Opposition, Chief whip and other opposition Members of Parliament was in contravention of and/ or inconsistent with Articles 1, 8A, 69 (1), 69 (2) (b), 71, 74, 75, 79, 82A, and 108A of the Constitution.

j) Whether the alleged actions of the Speaker in permitting Ruling Party Members of Parliament to sit on the opposition side of Parliament was inconsistent with Articles 1, 8A, 69 (1),69 (2) (b), 71, 74, 75, 79, 82A, 83 (1) (g), 83 (3) and 108A of the Constitution.

k) Whether the alleged act of the Legal and Parliamentary Affairs Committee of Parliament in allowing some

committee members to sign the Report after the public hearings on Constitutional Amendment Bill No. 2 of 2017, was in contravention of Articles 44 (c), 90 (1) and 90 (2) of the Constitution.

l) Whether the alleged act of the Speaker of Parliament in allowing the Chairperson of the Legal Affairs Committee, on 18th December 2017, in the absence of the Leader of Opposition, Opposition Chief Whip, and other Opposition Members of Parliament, was in contravention of and inconsistent with Articles 1, 8A, 69 (1), 69 (2) (b), 71, 74, 75, 79, 82A and 108A of the Constitution.

m) Whether the actions of the Speaker in suspending the 6 (six) Members of Parliament was in contravention of Articles 28, 42, 44, 79, 91, 94 and 259 of the Constitution.

n) Whether the action of Parliament in:-

v. waiving the requirement of a minimum of three sittings from the tabling of the Report yet it was not seconded.

vi. of closing the debate on Constitutional Amendment Bill No. 2 of 2017 before every member of Parliament could debate on the said Bill.

vii. failing to close all doors during voting.

viii. failing to separate the second and third reading by at least fourteen sitting days are inconsistent with and/ or in contravention of Articles 1, 8A, 44 (c), 79, 94 and 263 of the Constitution.

22. Whether the passage of the Act without observing the 14 sitting days of Parliament between the 2nd and 3rd reading was inconsistent with and/ or in contravention of Articles 262 and 263 (1) of the Constitution.

23. Whether the Presidential assent to the Bill allegedly in the absence of a valid Certificate of Compliance from the Speaker and Certificate of the Electoral Commission that the amendment was approved at a referendum was inconsistent with and in contravention of Article 263 (2) (a) and (b) of the Constitution.

24. Whether section 5 of the Act which reintroduces term limits and entrenches them as subject to referendum is inconsistent with and/ or in contravention of Article 260 (2) (a) of the Constitution.

25. Whether section 9 of the Act, which seeks to harmonize the seven year term of Parliament with Presidential term is inconsistent with and/ or in contravention of Articles 105 (1) and 260 (2) of the Constitution.

26. Whether sections 3 and 7 of the Act, lifting the age limit are inconsistent with and/ or in contravention of Articles 21 (3) and 21 (5) of the Constitution.

27. Whether the continuance in Office by the President elected in 2016 and remains in office upon attaining the age of 75 years contravenes Articles 83 (1) (b) and 105 of the Constitution of the Republic of Uganda.

28. What remedies are available to the parties?

Representation

At the hearing of the Petition, Learned Counsel Wandera Ogalo, represented the Petitioners in Constitutional Petition No. 003 of 2017, Mr. Byamukama James appeared for the Petitioners in Constitutional Petition No. 10 of 2018, Mr. Erias Lukwago, Mr. Ladislaus Rwakafuzi, Mr. Luyimbaazi Nalukoola and Mr. Yusuf Mutembuli represented the Petitioners in Constitutional Petition No. 005 of 2017, Mr. Lester Kaganzi represented the Petitioners in Constitutional Petition No.13 of 2018 and Mr. Male Mabirizi Kiwanuka, the Petitioner in Constitutional Petition No. 49 of 2017, appeared in person.

The Respondent was represented by the Deputy Attorney General, Mr. Mwesigwa Rukutana, the Solicitor General, Mr. Francis Atoke, the Ag.Director of Civil litigation, Ms. Christine Kahwa Commissioner Civil Litigation, Mr. Martin Mwambutsya, Principal State Attorneys, Mr. Henry Oluka, Mr. Elisha Bafirawala and Mr. George Kalemera, Mr. Richard Adrole Senior State Attorney, and Ms. Genevieve Kampiire, Ms. Suzan Apita Akello, Mr. Johnson Kimera Atuhire, Ms. Jackie Amusugut and Ms. Imelda Adong, all State Attorneys.

Jurisdiction of the Constitutional Court

The jurisdiction of this Court to entertain Constitutional Petitions such as the present ones is entirely derived from **Article 137** of the Constitution. The said article establishes a Court having jurisdiction to determine questions as to the interpretation of the Constitution. While determining questions as to interpretation, this Court is only called upon where the meaning of an Article(s) of the Constitution is in dispute.

In Ismail Serugo V Kampala City Council and another, Constitutional Appeal No. 2 of 1998. Mulenga J.S.C held that;

> ***"Although there are a number of issues in that case (Attorney General V Tinyefunza, Constitutional Appeal No.1/99) decided on the basis of majority view, it is evident from the proper reading of the seven judgments in that case, that it was the unanimous holding of the Court that the jurisdiction of the Constitutional Court was exclusively derived from Article 137 of the Constitution."***

Wambuzi C.J further stated that;

> ***"In my view for the Constitutional Court to have jurisdiction, the petition must show on the face of it that the interpretation of the Constitution is required. It is not enough to allege merely that a Constitutional provision has been violated."***

The Court has in ***Alenyo George William V The Attorney General and 2 others, Constitutional Petition No.5 of 2000*** held that the Constitution does not define the word "interpretation". However, **Article 137(3)** gives a clear indication of what the word means. In their view, their Lordships stated that the allegations made to the Constitutional Court, if they are in conformity with **Article 137(3)** of the Constitution, give rise to the interpretation of the Constitution and the Court has jurisdiction to entertain them. For avoidance of doubt, **Article 137(3)** provides that a person who alleges that an Act of Parliament or any other law or anything in or done under the authority of any law or any act or omission by any person or authority is inconsistent with or in contravention of a provision of this Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate.

Principles of Constitutional Interpretation

In view of the various views advanced regarding the proper approach to interpretation of the Constitution evident in the submissions of the parties as shall be highlighted in due course, it is worth restating some of the principles that govern its interpretation and enforcement. These principles were ably restated by both parties in the Consolidated Petitions. The nature of the controversies generated by the present consolidated petition also justify the need to revisit in some detail the principles of Constitutional interpretation.

Firstly, it has been held to be an elementary rule of Constitutional construction that no one provision of the Constitution is to be segregated from the others and considered alone but that all the provisions bearing upon a particular subject are to be brought into view and interpreted jointly so as to effectuate the greater purpose of the instrument. The entire Constitution must be interpreted as one integrated whole. ***See Smith Dakota v. North Carolina, 192 US 268 (1940).***

Secondly, both purpose and effect are relevant in determining Constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realised through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity. ***See The Queen v. Big M. Drug Mart Ltd (1986) LRC 332.***

These two cardinal rules have been unequivocally endorsed and approved by this Court and the Supreme Court in various cases including ***Attorney General vs David Tinyefunza, Constitutional Appeal No.1 of 1997, Constitutional Petition No.16 of 2013 Saleh Kamba and Others v Attorney General*** *and* ***Paul Ssemwogerere & 2 Others vs Attorney General, Constitutional Appeal No.1 of 2002.*** It is therefore safe to hold that these principles of Constitutional interpretation are now fully recognised in our jurisprudence.

Thirdly, it has also been held that words must be given their natural and ordinary meaning where they are not ambiguous. ***See Charles Onyango Obbo & Another vs Attorney General, Constitutional Petition No.15 of 1997.***

The Court is also enjoined to construe the Constitution 'not in a narrow and legalistic way but broadly and purposively so as to give effect to its spirit. ***See Salvatori Abuki vs Attorney General, Constitutional Petition No.2 of 1997.*** The rationale for this is that the Constitution is not an ordinary statute such as any other Act of Parliament and the powers of Parliament in amending the Constitution are significantly curtailed.

The latter principle is pertinent in determination of the questions that have arisen in this matter. The question of the extent to which Parliament can

amend provisions of the Constitution has generated considerable controversy in the context of these consolidated petitions.

The legislative history of a country as ably explained by Justice Remmy Kasule JA in ***Saleh Kamba & Anor vs Theodore Sekikubo & Others, Consolidated Constitutional Petitions Nos.16, 19, 21 & 25 of 2013*** which the Supreme Court upheld is equally important.

I will take into account the above cited principles of constitutional interpretation in resolving this matter and highlight the spirited arguments of all parties, the affidavit evidence and oral clarifications made thereto by the witnesses during cross examination.

Learned counsel for the Parties as well as Mr. Male Mabirizi who appeared personally cited very useful authorities in support of their respective arguments. I commend them for their research and assistance to Court.

Consolidation of Issues

After a careful review of the record, I have found it fitting and more practical to jointly discuss the parties' arguments and make my findings in respect of issues 1, 2, 3 and 4 together because there is a clear overlap in terms of the legal arguments in respect of these issues. The parties also argued them jointly.

I will then address issue 5, 6(c) and (d) jointly in regard to the alleged violence that marred the amendment process and issues 6, 6(a), 6(b), (e) and (f) on invalidating of the process. Lastly, I will separately address issues 7, 8, 9, 10, 11, 12, 13 and 14 even though they also overlap in some respects as I will indicate.

SUBMISSIONS OF COUNSEL FOR PETITIONERS.

Mr. Dan Wandera Ogalo, Counsel for the Petitioner in Petition No. 3 of 2018, led the case for the Petitioners. He referred to the principles of Constitutional

interpretation and cited ***Saleh Kamba and Others v Attorney General, Constitutional Petition No.16 of 2013*** in which they were restated. He also alluded to the Constitutional and political instability which has plagued this country since independence and contended that in interpreting the Constitution, that history of instability should be taken into account and the Constitution should be interpreted in such a way as to promote democratic values.

He stated that **Article 84** of the Constitution imports the Directive Principles of State Policy and makes them part of the Constitution and should be followed.

It was his argument that in enacting and increasing its term from 5 to 7 years, Parliament went against the rule of law.

He observed that the long title of the Magyezi Bill contained only 3 major provisions relating to the timeframe for holding elections, eligibility for election as president and district chairperson as well as matters relating to presidential election petitions and the other additions were extraneous.

He pointed out that the enlargement of tenure of Parliament and Local Council Governments was only introduced during the Committee stage of the whole House after the 2nd reading yet it had no relevance to the subject matter of the original Bill. Counsel further pointed out that whereas Parliament set out to amend **Articles 61, 102, 104** and **183** as is clearly shown in the Memorandum and body of the Bill, it indirectly amended **Article 77 (4).**

He argued that after the year 2021, there will be a Parliament but without the will and consent of the people, because the people were not consulted before on the matter of extension of term.

In his view, Section 8 of the Constitution Amendment Act 2018 contravened **Article 1** and yet the amendment of that Article required a Referendum under **Article 260** of the Constitution. He also noted that Section 8 violated the democratic principles of governance that encourage active participation of all

citizens in their governance and access to leadership positions. He contended that what Parliament had succeeded to do was "ring- fence" the available positions to ensure that no one else could contest for a Parliamentary seat in 2021 as envisaged when the last election was held in 2016.

He submitted that Members of Parliament had to be accountable as stated in the Directive Principle No. 26 (ii) which requires that all people holding leadership positions should be answerable to the people.

On retroactive application, counsel submitted that when Section 8 amended **Article 289** providing that the term of the current Parliament at the time the Article come into force would expire after 7 years of its first sitting after the general election, meant that the term of the current Parliament will be 7 years from 2016.

Counsel conceded that he was not aware of any particular Constitutional provision that forbade retrospective/retroactive application of legislation but added that the section was unconstitutional because it was against the principle of good governance.

Mr. James Byamukama, Counsel for the Petitioners in ***Constitutional Petition No.10 of 2018*** asked Court to take judicial notice of the fact that there was no state of war or emergency in Uganda to justify Parliament's extension of its life not just by six months but by two years from 5 to 7 years.

He noted that the enactment of Sections 2 and 8 violated **Articles 61 (2)** and **289** of the Constitution.

Mr. Erias Lukwago, Counsel for the Petitioners in Constitutional Petition No.5 of 2018 submitted that the amendment to extend the tenure of Parliament and local councils offended **Article 91** on the legislative powers of Parliament because there was no bill on the issue of the extension of the tenure of Parliament.

That Rule 116 of the rules of procedure which states that all the Bills shall be accompanied by an explanatory memorandum setting out the policy and principles of the bill was not complied with.

He contended that in this particular case, the Members of Parliament in inserting a clause in a Constitutional amendment which extended their term actually benefited from this provision directly since it specifically refers to the members in the 10th Parliament without declaring their interest as required under Article 94(2) of the Constitution.

Mr. Lester Kaganzi, Counsel for the Petitioner in Constitutional Petition No.13 of 2018 submitted that the social contract between the people and their leaders was breached because people and the people were never consulted on the issue of extension in contravention of **Article 1** of the Constitution.

Mr. Male Mabirizi the petitioner in Constitutional Petition No. 49 of 2017 who represented himself submitted that, the Bill amended **Articles 77, 181, 29, 291, 105** and ***260*** of the Constitution in disregard of procedure and the Speaker abdicated her Constitutional duty to guide Parliament thereby rendering the entire Bill unconstitutional without the possibility of severance.

Regarding the certificate of financial implications, consultation on sections 2,5,6,8 and 10, and failure to conduct a referendum Mr. Lukwago contended that the Speaker notified Parliament of the importance of the people's participation before the bill could be passed and went ahead and appropriated funds for members purportedly to carry out that duty. Each Member of Parliament was given UGX 29,000,000/= and yet the Members of Parliament had a duty to consult people with or without this money and in so doing Parliament breached the provisions of S. 76 of the Financial Management Act.

The Petitioner's further contended that there was no Certificate by the Electoral Commission required under **Article 263 (2) (b)** of the Constitution which rendered the entire Act null and void.

Mr. Rwakafuzi submitted that in the Hansard of 26th September 2017, the Deputy speaker and several Members of Parliament had pointed out that a member had entered the chambers with a gun which was very serious and had caused tension at Parliament, that this was legislation under gun point.

Mr. Mutembuli Yusuf submitted that there was violence throughout the country during the consultation process. He referred to the circular of AIGP Asuman Mugenyi.

Regarding the applicability of the Basic structure doctrine to the contested amendments Mr Lukwago invited Court to consider the doctrine which limits the amendment power of Parliament and does not include the power to abrogate or change the identity of the Constitution. That Parliament disregarded the basic structure doctrine when it ignored to get consent of the people on who should govern them which amounted to disenfranchisement.
He further submitted that the presidential age limit provision was a fundamental safeguard against leaders who entrench themselves in power and its removal offended a basic features of the Constitution.

On the alleged non-compliance with Parliament's Rules of Procedure in the process of enacting the Constitution (Amendment) Act, 2018, Learned Counsel Erias Lukwago submitted Parliament did not comply with its rules of procedure which was in violation of **Article 94** of the Constitution. He added that Parliament is obliged to comply with these rules once put in place and their non-compliance amounts to violation of Article 94 of the Constitution.
Learned Counsel submitted that the second instance of an outright illegality was the illegal suspension of the Members of Parliament without being given an opportunity to be heard.

According to Counsel, the third instance was the suspension of Rule 201(2) of the Rules of Procedure of Parliament upon presentation of the Committee Report. That the waiving of rule 201(2) which requires a minimum of three

sittings from the tabling of the Committee Report, the failure to close the doors of chambers and drawing the bar during the time of voting on the impugned Constitutional (Amendment) Bill No.2 of 2017 contravened Rule 98(4) of the Rules of Procedure of Parliament of Uganda.

Mr. Mabirizi submitted that as a citizen of Uganda he was prevented from accessing the gallery in Parliament which was contrary to Rule 23 of the Rules of Procedure of Parliament, 2017.

He submitted that during the proceedings in Parliament, Parliament as a body was not properly constituted in a multi- party system on grounds that some members of opposition had been suspended from the house and others had voluntarily moved out in protest which contravened the Constitution.

Mr. Mabirizi further submitted that Committees of Parliament are a creature of the Constitution under Article 90 of the Constitution. He invited Court to look at Rule 183(1) of the Rules of Procedure of Parliament, **2017 and Article 95(4**) of the Constitution and argued that the people who signed the committee report had not participated in its preparation.

He added that the motion to suspend Rule 201 was not seconded by anyone and this contravened Rule 59(1) of the Rules of Procedure of Parliament, 2017.

Mr. Mabirizi faulted the Speaker for denying some Members of Parliament their right to vote.

It was argued for the petitioner' that Parliament amended **Articles 1, 2, and 260** of the Constitution without separating the two sittings with 14 days of Parliament and without referring the matter to a referendum.

Regarding the contested presidential assent in absence of valid Speaker's Certificate and certificate of Electoral Commission certifying results of Referendum Mr Luyimbazi Nalukoola argued that under **Article 263 (2) a and (b) of the Constitution**, the President should not have assented to the Constitution Amendment Bill because it was presented without the Certificate

of Compliance issued by the Speaker and another one by the Electoral Commission.

On the validity of entrenched Section 5 of the Act reintroducing entrenched term limits Mr. Mabirizi submitted that without authority, Parliament amended **Articles 1, 2, and 260** of the Constitution through *'colourable legislation'* and by purporting to entrench **Article 105** Parliament amended **Article 1** by impliedly providing that Parliament would have power to determine who governs the people of Uganda.

He further noted that by entrenching term limits, Parliament amended **Article 260** which provides that for something to be entrenched, it must be subjected to a Referendum.

Regarding the validity of the amendment of the provision for harmony of presidential and Parliamentary terms under Section 9 of the Act it, was the petitioners case that Section 9 relates to Sections 2 and 8 which create the 7 year term of Parliament retrospectively/retrospectively implying that the sitting Parliament will expire in 2023 and automatically increase the term of the presidency to 7 years hence being inconsistent with the Constitution.

On the validity of Sections 3 and 7 of the Constitution (Amendment) Act which removed age restrictions for the President, it was submitted that the two sections contravene **Articles 21(1) and (5)** of the Constitution because Section 3 removes the minimum and maximum age limit of the President which are set in the Constitution.

Further, it was maintained that age restrictions could not be termed as discrimination under **Article 21(5)** of the Constitution and Parliament was wrong to remove to the age limits because it meant that the whole Constitution was overhauled.

It was further the contention of the Petitioners that, the amendment of **Article 102(b)** indirectly amends **Article 1 and 105(1)** of the Constitution yet amendment of these Articles requires a referendum that was never held.

On the continuance in office of the incumbent President upon attaining 75 years of age Mr Male Mabirizi who solely addressed Court on this issue, contended that the continuance in office by the incumbent President elected in 2016 on attaining the age of 75 years, is contrary to **Articles 83(1) (b) and 102(c)** of the Constitution.

Counsel Byamukama submitted that the prayers are envisaged in all the 5 petitions but briefly listed down the following prayers and asked Court to grant them

6. *That the Act is null and void having been passed in contravention of the Constitution.*
7. *Then whole process of enacting the new Act contravenes Article 3(2) of the Constitution.*
8. *That the assent given to the Act by his Excellency the President offended Article 263(2) of the Constitution.*
9. *That in passing provisions of the Act under section 2 and 8 where Parliament extended its term of office to 7 years retroactively that this violated Articles 1, 8A, 7, 77(3), 77(4), 79(1) and 96.*
10. *In passing section 6 and 10 of the act extending the life of the local Government Councils, from 5-7 years retroactively this offended Articles 1.*

In respect of costs, Mr. Rwakafuzi submitted that the matter for determination is a public interest matter and was brought by several parties including the Uganda Law Society, private citizens and Members of Parliament. He argued that Section 27 of the Civil Procedure Act does not apply to Public Interest Litigations as it has continuously been applied by advocates. He prepared that the Petitioners be awarded costs.

RESPONDENT'S SUBMISSIONS

Responding to the issue of extension of the term of Parliament and local councils from 5 to 7 years, Mr. Mwesigwa Rukutana, the Deputy Attorney General submitted that in enacting Constitutional (Amendment) Act No.1 of

2018, the Parliament of Uganda acted within the law pursuant to the mandate and powers bestowed upon it by the Constitution as well as the rules of procedure governing the enactment of Constitutional amendments such, the Constitution was lawfully amended.

He also submitted that the Rt. Hon. Speaker of Parliament and all the Members of Parliament acted within the law during the entire process of conceptualization, presentation, consideration and passing of the Act and that similarly, the Government of Uganda acted legally when it facilitated the process of enacting the said law.

He gave a brief historical background to the effect that after years of turmoil, bloodshed, political and economic retrogression, Ugandans constituted a Constituent Assembly that considered proposals that had been gathered by a Constitutional Commission. After that protracted process, the Assembly promulgated a Constitution on the 8th October 1995. He contended that the history must be taken into account when considering this petition.

The Learned Deputy Attorney General was of the view that the Constituent Assembly stated the National Objectives and Directive Principles of State Policy which are supposed to be the directive ideals to the Constitution should guide the application of Constitution should guide the application of the Constitution.

He contended that through **Article 1 (4)**, the people of Uganda had the power to determine their destiny, either through referendum or through their elected representatives. It was thus his argument that when the elected representatives of the people take a decision, the people had in effect determined their destiny and that could not be deemed usurping the people's power as long as whatever Parliament did was within the confines of the Constitution and all the relevant laws.

He advanced the proposition that the impugned amendments were enacted under the mandate in **Article 259** which is explicit on the power of Parliament to amend the Constitution.

Mr. Francis Atoke, the learned Solicitor General who responded to the Petitioners' arguments on issues 1 to 4 noted that Parliament derives its power to make laws for Uganda from **Article 79** of the Constitution and it exercises those powers by virtue of **Article 91**. It was his contention that Parliament exercised that power in passing the impugned Amendment Act. He noted that the Acts of Parliament Act, CAP 2, defines a 'bill' under S. 1 (c) to include both a private member's bill and a Government bill;" and Court should note the distinction.

On the petitioners' contention that certain Articles of the Constitution had been amended by implication, the learned Solicitor General contended that **Article 77 (4)** had not been amended in any way, by the provisions under Sections 2 and section 6 of the Constitutional (Amendment) Act 2018. He noted that the conditions that exist for extending the terms of Parliament in **Article 77(4)** are still firmly in existence and were not affected by the amendment of **Article 77(3)** as alleged by the Petitioners.

He submitted that retrospective/retroactive application of the law is not inconsistent with or in contravention of **Articles 1** and **8A**, and it is also provided for under S. 14 (4) of the Acts of Parliament.

On the issue of certificate of financial implication**,** Mr. Adrole submitted that there were two certificates of financial implications as required by Section 76 of the Public Finance Management Act. He further submitted that the bill did not make provision for a charge on the Consolidated Fund and did not contain a provision that imposed a charge, taxation and withdrawal of monies from the consolidated fund. Counsel argued that the **UGX 29,000,000/=** that was given to the MPs for facilitation of the bill did not contravene the provisions of Article 93 of the Constitution.

In response, to issue 6(f), it was argued for the Respondent that the Petitioner's contention was legally flawed as the nature of amendment is not one that requires a referendum.

Responding to the issue of violence, Mr. Kalemera referred Court to the evidence of the Clerk to Parliament Ms. Jane Kibirige and the Hansard showing what had transpired in Parliament on the 21/9/2017 and 26/9/2017 and what the Speaker had said about the events of 19/9/2017 and 20/9/2017.

He further submitted that the nature of Uganda's political system is multiparty and the implication of such a democracy is that members of different political persuasions need to be given chance to open the debate and air their views in Parliamentary debate.

He advanced the view that although the Members of Parliament enjoy rights under **Articles 1, 2, 3, 8A and 97** to debate, the enjoyment of these rights is only valid when it is done in a manner that is acceptable and demonstrably justifiable in a free and democratic society as provided under **Articles 43(1) and (2)** of the Constitution.

The Attorney General defended the facilitation extended to the Members of Parliament to carry out consultations on the Bill. It was argued that the facilitation was part of the appropriated Parliamentary budget and did not constitute a charge on the consolidated fund.

Further, it was argued that the Constitution and the Rules of Procedure do not prohibit a private member from initiating an amendment of the Constitution using a Private Member's Bill.

As to whether the Constitution Amendment Act was against the spirit and the basic structure of the Constitution, the Learned Deputy Attorney General contended that the basic structure doctrine is was applicable in Uganda.

On the petitioners' contention that Parliament violated Article 94 (1) which empowers Parliament to make their own rules to regulate their own procedure, the learned Solicitor General argued that at the time the Bill was first brought

to Parliament, the 2012 Rules of Procedure were the rules applicable but by the time of the second reading on 18th of December 2017, it was the new 2017 Rules of Procedure that were applicable that there was therefore no flouting of the Rules.

Mr. Oluka Henry submitted that there was no alleged failure by the Parliament of Uganda to observe its own rules of procedure during the enactment of the Constitution (Amendment) act and to that extent there was no inconsistence or contravention of **Articles 28, 42, 44, 92, 93, and 94(1)** of the Constitution.

He argued that the motion moved by Hon. Raphael Magyezi was given precedence in accordance with the Rules of the House.

Regarding the illegal suspension of the Members of Parliament, counsel submitted that Rule 7 of the Rules of Procedure of Parliament, 2012 provides for the general authority of the Speaker to preserve order and decorum in the House. He added that the rowdy conduct of some Members of Parliament on 18th December, 2017 necessitated the Speaker to preserve order and decorum in the house. Court was invited to look at page 14 of the Hansard of 18th December, 2017.

On the issue of failure by the Speaker to ensure that all doors were closed, he submitted that under Rule 7, the speaker has a discretion to look at the circumstances that are in the house and decide on the manner in which business shall be conducted. Regarding the issue of denying the public from accessing the gallery, counsel submitted that the Speaker had discretion to either allow the public access the gallery or not within the provisions of Section 6 of the Parliament (Powers and Privileges) Act.

State Attorney Imelda Adong submitted that additional committee members who signed the report were designated to this committee and their joining of the committee at the point they did, did not negate their participation in the proceedings of the committee because they were adequately briefed.

On the issue of alleged failure to separate the 2nd and 3rd readings with fourteen sittings days of Parliament, The learned Deputy A.G. clarified that the 14 days' notice is not applicable to a situation when Parliament is amending **Article 259**, but only required when amending the entrenched Articles, that is, **260** and **261**, which to him, were not amended.

In the Attorney General's view, the requirement for a Certificate of the Electoral Commission certifying results of a referendum was superfluous in respect of the amendments in question. In his view, none of the amended provisions required the holding of a referendum.

On reintroduction of term limits, the Attorney General's team maintained that the clause in issue was valid and did not require a referendum for its enactment as contended by the Petitioners. Parliament having promulgated **Article 260** and included therein matters which were entrenched does not preclude it from creating other provisions in other articles which in their wisdom they also entrench. As such there was nothing to bar Parliament from entrenching **Article 105(2)**

Regarding the harmonisation of the presidential term with the 7 year term for Parliament, Ms Christine Kaahwa submitted that the amendment of **Article 105(2)** was to provide for term limits for tenure of the office of the President, therefore there was need for Parliament to pronounce itself on how the new amendment would apply to the sitting President at the time of the amendment. Further that this amendment provides clarity to the tenure of a sitting President.

Mr Oluka submitted that, the Constitutional (Amendment) Act opened up space which had been closed. It gives the people the right to choose under **Article 1(4)** how to be governed. To him the amendment gave people the discretion to gauge and vote the President they wanted regardless of their age and in so doing they would consider capability of the person not his or her age.

Mr. Mwambusya argued that the issue of continuance in office by the President was now moot because **Article 102(b)** as quoted by the petitioner was no longer good law.

On remedies, Mr. Atoke submitted that the doctrine of severance should be applied in case Court found that there were irregularities during the process and the subsequent passing of the Constitutional (Amendment) Act No.1 of 2018 as alleged by the Petitioners.

In respect of costs, he submitted that it was a well settled principle that costs follow the event unless Court orders otherwise for good reason.

COURT'S RESOLUTION OF THE ISSUES

Extension of term of Parliament and local councils from 5 – 7 years.

Issues 1, 2, 3 and 4 relate to the contention by the Petitioners that Sections 2, 6, 8 and 10 of the Constitution (Amendment) Act 2018 violate numerous provisions of the Constitution either directly or indirectly. Further, it is argued that these provisions in the Act were passed in disregard of various provisions of the Constitution and Parliament's own Rules of Procedure.

The Petitioners also contend that the impugned Sections of the Act amended by infection variously other provisions of the Constitution and also amounted to colourable legislation that is forbidden in law.

The key questions for determination in these issues are whether Sections 2, 6, 8 and 10 of the Constitution (Amendment) Act, 2018 providing for increase of the tenure of Parliament and Local Governments from five to seven years respectively contravened the Constitution; and whether the retrospective/retroactive application of the said Constitution (Amendment) Act, 2017 also contravened the Constitution.

It is apparent from the submissions of the parties that the bedrock of the Petitioners' complaints is that, in enacting Sections 2, 6, 8 and 10 of the

Constitutional (Amendment) Act, 2018, whose effect is to extend or enlarge the term of Parliament and that of Local Government Councils from five to seven years effective from the current term of Parliament and the Local Government Councils, Parliament expressly contravened or indirectly infected **Articles 1, 8A, 61 (2) and (3), 77(3), 77(4), 79(1), 96, 105(1), 176(3), 181(4), 233(2)(b), 259(2)(a) and 289** of the Constitution thereby rendering the said impugned sections unconstitutional.

The gist of the Petitioners contention is that in enacting Sections 2, 6, 8 and 10 of the Constitutional (Amendment) Act, 2018, to extend its term and that of the Local Government Councils from a period of five years to seven years, Parliament arrogated to itself the power vested in the people of Uganda under **Article 1** of the Constitution and this violated Articles **1, 8A, 61(2) and (3), 77(3), 77(4), 79(1), 96, 105(1), 233(2)(b), 260(1) and 289** of the Constitution.
The Petitioners further contended that, in passing Sections 2, 6, 8 and 10 of the Act, Parliament exceeded the scope of powers granted to it under the Constitution and acted in breach of **Articles 1, 8A, 61(2) and (3), 77(3), 79(1), 96, 105(1) and 233(2) (b), 260(1) and 289** of the Constitution.
It was further contended for the Petitioners that; in amending **Article 77(3)** of the Constitution, Parliament breached **Article 94(1)** by failing to respect its own Rules of Procedure in the entire amendment process.

For the Respondent, the crux of their response was that the impugned sections are in tandem with the Constitution and do not constitute a violation of any of the cited provisions of the Constitution. It was argued for the Respondent that Parliament derives its power to make laws for Uganda from **Article 79** of the Constitution and that such powers are exercised pursuant to **Article 91** of the Constitution, which enumerates the manner in which Parliament enacts laws.

Further, it was the Respondent's contention that Parliament complied with the provisions of Chapter 18 of the Constitution on the procedure for effecting

Constitutional amendments while carrying out its legislative function in enacting Sections 2, 6, 8 and 10 of the Act.

The Respondent argued that the Rules cited and alluded to by the Petitioners in support of their case were old Rules of Procedure of Parliament of 2012, yet the applicable Rules at the time of the second reading of the Bill, which was on 18th December 2017 were the 2017 Rules of Parliament that became effective on 10th November 2017.

In the premises, the Respondent submitted that Sections 2, 6, 8 and 10 of the Constitution (Amendment) Act 2018 extending or enlarging the term and life of Parliament from five to seven years and removing age restrictions on eligibility in standing for office of president are neither inconsistent with, nor in contravention of Articles **1, 8A, 61(2) and (3), 77(3), 79(1), 96, 105(1), 176(3), 181(4) 233(2)(b), 259(2)(a), 260(1) and 289** of the Constitution as contended by the Petitioners. The Respondent invited this Court to answer Issues 1, 2, 3 and 4 in the negative.

I have carefully considered and reviewed the impugned Sections 2, 6, 8 & 10 of the Constitution (Amendment) Act 2018 and the various Articles of the Constitution alleged by the Petitioners to have been infringed by the said Sections.

Section 2 of the constitutional (Amendment) Act 2018 provides thus;

"Amendment of Article 77 of the Constitution, Article 77 of the Constitution is amended in clause (3) by substituting for the word 'five' appearing immediately before the word 'years' for the word 'seven'."

Section 8 replaced **Article 289** of the Constitution and provides as follows:

"Notwithstanding anything in the Constitution, the term of the Parliament in existence at the time this Article comes into force, shall expire after seven years of its sitting after the general elections."

Article 181 of the Constitution which provides for elections of Local government councils was amended as follows;

"Article 181 of the Constitution is amended in clause (4), by substituting for the word "five" appearing immediately before the word 'years' for the word 'seven'."

It appears from the submissions of all counsel in this matter that it is not disputed that Sections 2 and 8 of the Constitution (Amendment) Act No.1 of 2018 amended **Articles 77(3)** and **289** of the Constitution by extending the tenure of Parliament and local governments from five to seven years. It is also not in dispute that the extensions are designed to commence with the incumbent Parliament and local governments that were elected in the general elections held in the year 2016.

Article 77(3) provides

"(3) Subject to this Constitution, the term of Parliament shall be five years from the date of its first sitting after a general election."

Article 289 (1) provides that;

"***Notwithstanding anything in this constitution, the term of the Parliament in existence at the time this article comes into force, shall expire on the same date as the five year term of the President in office at the time this article comes into force as prescribe by clause (1) of article 105 of this Constitution."***

The Petitioners do not challenge the proposition that Parliament has the Constitutional mandate to enact laws for the peace, order, development and

good governance of Uganda as is succinctly set out in **Article 79 (1) and (2)** of the Constitution.

The main contention between the parties to the Consolidated Petitions appears to be whether, in enacting Sections 2, 6, 8 and 10 of the Act, Parliament arrogated to itself, the power vested in the people under **Article 1** of the Constitution and further whether the amendments conformed to the requirements of the Constitution.

Article 1 of the Constitution states that;

"(1) All the power belongs to the people who shall exercise their sovereignty in accordance with this Constitution.

(2) Without limiting the effect of clause (1) of this article, all authority in the state emanates from the people of Uganda; and the people shall be governed through their will and consent.

(3) All power and authority of Government and its organs derive from this Constitution, which in turn derives its authority from the people who consent to be governed in accordance with this Constitution.

(4) The people shall express their will and consent on who shall govern them and how they should be governed, through regular, free and fair elections of their representatives or through referenda."

The significance of these petitions and the disputed amendments require that I refer to the Constitutional history of this country and particularly, the background to the passing of the Constitution by the Constituent Assembly. Numerous decisions, including those of this Court, have held that legislative history is a very useful guide to Constitutional interpretation. It was ably explained by brother Justice Remmy Kasule JA in ***Saleh Kamba & Anor vs***

Theodore Sekikubo & Others, Consolidated Constitutional Petitions Nos.16, 19, 21 & 25 of 2013. In this context, the history leading to the enactment of the land mark Constitution of this country is worth revisiting.

The affidavit of Professor Frederick Edward Ssempebwa, in respect of the petition by Uganda Law Society, lays out a background to the enactment of the Constitution in 1995 as well as the subsequent developments that led to the first set of amendments in 2005. He states that he was a member of the Uganda Constitutional Commission from 1988 to 1992 and the said body collected views from the entire country, compiled a report and made a draft national Constitution.

These averments are neither disputed nor contradicted and I accept their truth. Besides, they are well corroborated by the contents of the preamble to the Constitution which states *inter alia* that*;*

"... NOTING that a Constituent Assembly was established to represent us and to debate the Draft Constitution prepared by the Uganda Constitutional Commission and to adopt and enact a Constitution for Uganda; ..."

Professor Ssempebwa contends, in his opinion, that the Constitutional amendment increasing the tenure of Parliament and local governments by two years amounts to holding office without the will and consent of the people since the elections conducted prior to this amendment only obtained consent from the people to be ruled for five years. He notes that in enacting the 1995 Constitution, developing a system of Government that ensures people's participation in the governance of their country was a critical requirement.

The report of the Uganda Constitutional Commission, which prefaced the debates by the Constituent Assembly that passed the 1995 Constitution, is

equally pertinent in understanding the background to the Constitution. The said Report is also relied upon by the Petitioners. The report emphasized the need for concrete implementation of the principle of participatory democracy and proposed that the principle that the people must be sovereign and should form the bedrock of our country's political, economic and social life should be part of the constitution.

In regard to the roles of legislators, the Uganda Constitutional Commission report emphasized that, ***"The primary role of the legislature is to represent the people, and all its other functions are aspects of that role."*** It was particularly noted that the people, whose views form the said report, were concerned that past legislatures in Uganda had often not been representative of the people.

In light of this, the report recommended that the new Constitution must take note of the principle of accountability which was emphasized during the collection of views. It was stated as follows;

"The people believe that the legislature as a whole and the individual members must be far more accountable to the people. Thus the Constitution must set strict limits on the possibility of the legislature extending its term. The Courts must have power to check the Constitutionality of laws and other measures passed by the legislature."

Lastly, the said report summed up the people's views on the matter of length of terms of Parliament in paragraph 11.110 at page 310, as follows;

"The people's views expressed great concern about the legislature in Uganda usurping the people's powers by extending its term of office without reference to the voters. It was almost unanimously proposed that Parliament should have a term of five years, with many saying it

should not be possible to extend the term under any circumstances. Others accepted the necessity for some provision for unforeseen circumstances where it is not possible to organize general elections at the time required. Although similar provisions in both the 1962 and 1967 Constitutions have been abused, there is some support for the necessity for inclusion of such provision. In fact the Constitutions of many other countries do so."

As a consequence of this observation that reflects the peoples' views, the Constitutional Commission recommended that Parliament should have a term of five years which could only be extended for a period not exceeding one year when there exists a state of emergency or a state of war but only when the circumstances are such as to prevent a normal election from taking place. The Constituent Assembly adopted this recommendation but reduced the maximum period of extension to 6 months.

In respect of amendment of the Constitution, the Report noted, in paragraphs 28.43 and 28.44 at page 730 as follows;

"The virtues of rigid as opposed to flexible Constitutions were fully debated by the people over the past four years. The vast majority supported the need for strict procedures on Constitutional amendment. The new Constitution, having evolved from people's active participation, it should not be tampered with lightly. Rigid amendment procedures would ensure that Constitutional amendments come only when they are really needed and have been carefully evaluated. In particular, they should also ensure that significant minority opinion is given careful consideration.

Having participated in the making of the new Constitution, people should be fully involved in the consideration of proposals to amend it. At

the very least, there should be wide and extended public debate. In matters of major controversy, it may even be necessary to consult the people's representatives at lower levels (e.g. in district councils) or even to hold national referenda."

I have gone to great lengths to reproduce relevant portions of the report of the Uganda Constitutional Commission to demonstrate the value and relevance of the history behind the enactment of the 1995 Constitution by the Constituent Assembly. As a result of the unanimous views collected from the people, the Commission recommended that provisions for amendment of the Constitution should be more stringent than for ordinary legislation and that since the people participated in the making of the new Constitution, controversial matters should not be changed without consulting them. Certainly, I will take this history into account as I hold for I am obliged to do so.

The Petitioners strongly argued that Sections 2, 6, 8 and 10 of the Constitution Amendment Act, 2018 were passed without any form of public participation and consultation. In view of the process leading to the recommendations of the Uganda Constitutional Commission and the various precedents on this question, I agree with the Petitioners to the extent that public participation and consultation in the law making process, especially in amendment of entrenched articles of the Constitution, are a fundamental requirement that cannot be waived under any circumstances.

Article 25(a) of the International Covenant on Civil and Political Rights provides that every citizen shall have the right and the opportunity without any of the restrictions mentioned in article 2 and without unreasonable restrictions to take part in the conduct of public affairs, directly or through freely chosen representatives.

Although the Constitution envisages public participation and consultation in the legislative process when the Constitution is to be amended, it does set out how the process can be carried out. Recourse is therefore, made to judicial decisions and the following are some of the principles developed by the Courts to be taken into consideration;

1. Consultation must take place while proposals are still at formative stage

2. Those consulted must be provided with information which is accurate and sufficient

3. Those consulted must be given adequate time to make a meaningful response

4. The consulting party must be receptive and give fair consideration to the responses

I find them reasonable and should be followed if any meaningful consultation is to be carried out. The question to be answered in this judgment is whether this was done during the enactment of Sections 2, 6, 8 and 10 of the Constitution (Amendment) Act No 1 of 2018

I am fully in agreement with the authorities cited by the Petitioners holding that the absence of public participation and consultation in the law making process is ground for invalidating subsequent legislation passed in this manner.

In **Law Society of Kenya V Attorney General & 2 others (2013) e KLR**, Court stated that;

"In order to determine whether there has been public participation, the Court is required to interrogate the entire process leading to

the enactment of the legislation; from the formulation of the legislation to the process of enactment of the statute. I am entitled to take judicial notice of the Parliamentary Standing Orders that require that before enactment, any legislation must be published as a bill and to go through the various stages in the National Assembly. I am entitled to take into account that these Standing Orders provide for a modicum of public participation, in the sense that a bill must be advertised and go through various Committees of the National Assembly which admit public hearings and submission of memoranda."

The State is required, by our National Objectives and Directive Principles of State Policy, to be based on democratic principles which encourage active participation of all citizens at all levels in their own governance. **Article 8A** of the Constitution which requires the country to be governed based on our National Objectives and Directive Principles of State Policy states as follows;

8A. National interest.

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

(2) Parliament shall make relevant laws for purposes of giving full effect to clause (1) of this Article.

The decision of the East African Court of Justice in ***Reference No.3 of 2010 The East Africa Law Society & 5 Others vs the Attorney General of the Republic of Kenya & 4 Others*** is of high persuasive value in this matter.

In holding that public participation is mandatory in effecting amendments to the Treaty establishing the East African Community, the Court held as follows;

"We think that construing the Treaty as if it permits sporadic amendments at the whims of officials without any form of consultation with stakeholders would be a recipe for regression to the situation lamented in the preamble of "lack of strong participation of the private sector and civil society" that led to the collapse of the previous Community. In conclusion we find that failure to carry out consultation outside the Summit, Council and the Secretariat was inconsistent with a principle of the Treaty and therefore constituted an infringement of the Treaty..."

Although their Lordships in that case declined to invalidate the amendments on grounds that the infringement of the Treaty was not conscious, they invoked the doctrine of prospective annulment holding that future amendments to the Treaty, passed without public participation and consultation, would be invalid.

It is therefore settled that public participation and consultation are fundamental requirements for the law making process, which necessarily includes amendment of the Constitution, in this country. I will therefore only have to determine whether there was no public participation and consultation on Sections 2, 6, 8 and 10 of the Constitution (Amendment) Act 2018.

In the context of the Act, it is not in dispute that the original Bill presented by the Honorable Raphael Magyezi only contained clauses for removal of age restrictions for eligibility to stand for president and district chairperson as well as adjustment of timelines for filing presidential election petitions and conduct of bye-election in case of successful annulment of a presidential election.

The rest of the clauses i.e. sections 2, 5, 6, 8, 9 and 10 currently in the Act were added as extraneous matters after the Bill had completed the committee stage where various members of the public had been invited to provide views on the same. It therefore follows that all provisions in the Constitution

(Amendment) Act 2018 cannot stand because the same were not the subject of public participation and consultation.

Further, the sections clearly amend by infection **Article 1** of the Constitution on sovereignty of the people. As already discussed, historically, the attempt by a sitting Parliament to extend its term is not a new phenomenon and the Uganda Constitutional Commission which prepared the draft Constitution was alive to the possibility of a repeat of what had happened in the past. In my view, the emphasis on sovereignty of the people and the need for its participation is precisely intended to dissuade bodies such as Parliament from performing roles meant for the people.

Secondly, the provisions in Section 2 of the Constitution Amendment Act, have the effect of creating an exception to **Article 77(4)** thereby amending the latter Article of the Constitution by implication.

Section 2 the amendment Act provides;

2. Amendment of Article 77 of the Constitution

Article 77 of the Constitution is amended in clause 3 by substituting the word "five" appearing immediately before the word "years" for the word "seven"

Article 77(3) provides;

77(3) subject to this constitution, the term of Parliament shall be fve years from the date of its first sitting after a general election

Article 77(4) provides inter alia that in cases where there exists a state of war or emergency, the life of Parliament may be extended for a period not exceeding six months. It states:

77(4) where there exists a state of war or a state of emergency which would prevent a normal general election from being held, Parliament may, by resolution supported by not less than two – thirds of all

members of Parliament extend the life of Parliament for a period not exceeding six months at a time.

The amendment of **Article 77(3)** in Sections 2 and 8 of the Constitution Amendment Act 2018 has the first objective of increasing the life of Parliament by 2 years. This is merely an attempt to circumvent the provisions of **Article 77(4)** on the tenure of Parliament.

Section 8 of provides;

Article 289 Term of current Parliament

Notwithstanding anything in this constitution, the term of the Parliament in existence at the time this Article comes into forc , shall expire after seven years of its first sitting after the general elections.

Sections 2 and 8 were therefore enacted in violation of **Article 77(4)** even though they do not mention this provision. They are simply the unconstitutional colourable legislation as defined in ***Paul K. Ssemogerere and others V Attorney General (supra).*** Sections 2 and 8 therefore infect **Article 77(4)** of the Constitution. They cannot stand without an amending of **Article 77(4)** of the Constitution and give the procedure for amending Article 77 was not followed, the amendment contravened the Constitution. They are therefore unconstitutional.

Sections 6 and 10 of the Constitution (Amendment) Act are intended to extend the tenure of existing local governments by two years. The two sections provide thus;

Section 6 Amendment of Article 181 of the constitution

Article 181 of the constitution is amended in clause (4) by substituting for the word 'five' appearing immediately before the word 'years' for the word 'seven'

Section 10.

Article 181(4)

4 All local government councils shall be elected every five years.

Firstly, **Article 181** of the Constitution does not envisage any circumstances when the tenure of local governments may be extended. This is a direct affront to the people's sovereignty under **Article 1** which was duly exercised in the general elections of 2016 under which existing local governments were elected and given a popular mandate to be in office for five years and no more. As a result, the new provisions infect **Article 1** of the Constitution which was not the subject of amendment.

Article 1 clauses 2 and 4 of the constitution provide as follows;

(2) Without limiting the effect of clause (1) of this article, all authority in the state emanates from the people of Uganda: and the people shall be governed through their will and consent.

(4)The people shall express their will and consent on who shall govern them and how they should be governed , through regular , free and fair elections of their representatives or through referenda

These are very unprecedented amendments on which the people of this country were central and ought to have been consulted. The people went to the polls on the understanding that the elected candidates would serve for a period of 5 years because this was clearly stated in the Constitution. The election was done to meet the requirements of the law.

The completion of the electoral process created a social contract between the voters and the elected MPs. A unilateral decision by the elected Members of Parliament to extend this term from 5 to 7 years in office amounted to a flagrant breach of this social contract.

In order to be accountable to the people it represents, Members of Parliament must face regular elections. The Constitution must set strict limits on the possibility of the legislature extending its term and the Courts must have the

power to check the Constitutionality of laws and other measures passed by the legislature.

One would rightly say that the people of Uganda have been robbed of an opportunity to express their will and consent on who shall govern them and how they should be governed through a regular, free and fair election of their representatives which was expected to take place in the year 2021.

Professor Fredrick Ssempebwa deposed under paras 8 (j)-(o) of his affidavit in support of petition No.3 of 2018 that the extension of the term of the 10th Parliament by an additional two years was also inconsistent with the majority opinion of the people of Uganda as reflected in the Constitutional Review Commission (CRC) report that Presidential and Parliamentary elections should be held on the same day to avoid incurring unreasonable expenses. I agree. The present amendments would mean that Electoral Commission would have to organize two elections, one in 2021 for the President and another in 2023 for Members of Parliament in total disregard of the views of the people of Uganda as reflected in the said report.

On careful consideration of **Articles 77(4) and 96** of the Constitution. **Article 96** provides for dissolution of Parliament upon expiry of its term after 5 years from the date of its first sitting.

The article states;

96 Dissolution of Parliament

Parliament shall stand dissolved upon the expiration of its term as prescribed by article 77 of this constitution.

I am persuaded to accept the Petitioner's argument that the amendment of **Article 77(3)** by Sections 2 and 6 of the Constitution (Amendment) Act 2018

has by infection amended **Article 96**. The evil which **Article 96** seeks to prevent was an arbitrary extension of the tenure of Parliament as is evident in the impugned provisions.

In an attempt to circumvent the provisions of **Article 96**, the Constitution (Amendment) Act 2018 contains other provisions whose sole purpose is to extend the life of the current Parliament to 7 years. I am alive to this legal manoeuvre and I do not find it acceptable. It defeats the provisions of **Article 96** without expressly amending it.

Similarly, the provisions of **Article 1 (2) and (4)** of the Constitution which vest power in the people must also be borne in mind. In my view, the said provisions must be considered together with **Articles 79 (1) and 259, 262 and 94** of the Constitution.

My view is fortified by the principle set out in ***Ssemwogerere Versus the Attorney General*** **(Petition No. 22/2006.** that in interpreting the Constitution, all provisions of the Constitution touching on an issue are considered together and that it is not a question of construing one provision as against another but of giving effect to all the provisions of the Constitution.

This is because each provision is an integral part of the Constitution and must be given meaning or effect in relation to others. Failure to do so will lead to an apparent conflict within the Constitution.

I therefore hold that the impugned sections contravened **Articles 1 and 2** of the Constitution and the same amounted to an attempt by Parliament to override the people's power. The said provisions are null and void on this ground as well.

I already held that public participation and consultation are mandatory Constitutional requirements in the law making process in respect of entrenched provisions and that their absence invalidates subsequent legislation passed without the input of the public. No evidence was provided by the respondent to show that there had been consultation or public

participation in respect of Sections 2, 6, 8, and 10 of the Constitution (Amendment) Act 2018.

Having found that **Article 1** was amended, there ought to have been a referendum before this could be done as required under **Article 260** of the Constitution. No referendum was held and no wonder in her certificate of compliance made under **Article 263** of the Constitution to the President that the provisions of Chapter 18 of the Constitution had been complied with, the Speaker of Parliament did not mention the articles which sections 2, 6, 8 and 10 were intended to amend. This was inconsistent with the said **Articles 260 and 263** of the Constitution.

I therefore find that Parliament did not have authority to extend it term and amended Article 1 of the Constitution without following the right Procedure laid out in the Constitution. For the reasons detailed above, the impugned Sections 2, 6, 8, and 10 of the Constitution (Amendment) Act 2018 are unconstitutional and therefore fall by the way side.

Since there is contention over the retrospective/retroactive application of Sections 2, 6, 8 and 10 of the Constitution (Amendment) Act 2018 which seek to increase the term of office of the incumbent Parliament and Local Governments starting from 2016, I will briefly address the law on retrospective/retroactive legislation as it is directly related to the principle of the rule of law.

Blacks Law dictionary, defines retrospective/retroactive law as a legislative act that looks backward or contemplates the past, affecting acts or facts that existed before the act came into effect. A retroactive/retroactive law is not unconstitutional unless it is in the nature of an *ex post facto* law, if it impairs the obligation of contracts, if it divests vested rights, or if it is constitutionally forbidden.

Upon perusal of the Constitution, I have found only two provisions barring retrospective/retroactive application of the law; first is **Article 28 (7)** but this only relates to criminal liability, which is not the subject matter before us. The second is **Article 92** which bars Parliament from passing any law to alter the decision or judgment of any court as between the parties to the decision or judgment. This is equally inapplicable to the present petition.

Section 14(4) of the Acts of Parliament Act provides that where an Act is made with retrospective/retroactive effect, the commencement of the Act shall be the date from which it is given or deemed to be given to that effect. Subsection 5 provides that subsection (4) shall not apply to an Act until there is notification in the Gazette as to the date of its publication; and until that date is specified, the Act shall be without effect.

The legal position therefore, is that no statute is to be construed as having retrospective/retroactive operation unless the legislature clearly intended the statute to have that effect. So retrospective/retroactive legislation per se does not offend the core principles of the rule of law. However, Courts generally refuse to give effect to retrospective/retroactive legislation unless compelled to do so by clear and imperative language of Parliament.

The rationale is that it is an elementary consideration of fairness that individuals should have an opportunity to know what the law is and to conform their conduct accordingly. However, retrospective/retroactive legislation per se is not irregular or unconstitutional unless it affects rights, criminalises conduct that was previously lawful or is simply irrational and unfair inter alia. See Supreme Court of South Africa decision in ***National Director of Public Prosecutions vs Carolus & Others, 2000 (1) SA 1127,*** the Supreme Court of United States of America in ***Landgraf vs USI Film Products et al 511 US 244 (1994) at 265*** and the House of Lords in ***Garner vs Lucas (1878) 3 App Cas 582*** wherein Lord Blackburn described the general prohibition against retrospective/retroactive legislation as a rule of every civilised nation.

This is the settled position of the law in respect to retrospective/retroactive legislation.

In the context of these petitions, the provision in Section 8 expressly provides for retrospective/retroactive application of the new Article 289 which replaces the existing similar provision. The effect is to extend the tenure of the existing Parliament which I have found to be unconstitutional.

From my reading of the above provisions, Parliament is permitted to make laws with retrospective/retroactive effect. Thus, it is my view that Sections 8 and 10 of the Act cannot be rendered unconstitutional on that account alone. It is my finding that the retrospective/retroactive effect created by Sections 8 and 10 of the Act and application of the law is not inconsistent with and or in contravention of **Articles 1, 8A, 77(3)(4), 79(1), 96 and 223(2)(b)** of the Constitution.

However, in interpreting the Constitution, no one provision is to be segregated from the others and considered alone but all the provisions bearing upon a particular subject should to be brought into view and interpreted jointly so as to effectuate the great purpose of the instrument. The entire Constitution must be interpreted as one integrated whole. **See Smith Dakota v. North Carolina, 192 US 268 (1904)**

Article 8A (1) of the Constitution provides thus;

"(1)) Uganda shall be governed based on principles of

National interest and common good enshrined in

The National objectives and directive principles of

State policy"

No evidence or submission was advanced to show that the extension by Parliament of its term by seven years beginning from 2016 was done either for national interest or for the common good of Ugandans. With the greatest of

respect, I am compelled to say that it was selfish and goes against the principle of good governance for if it had been done in good faith, it would have taken effect when the term of the next Parliament begins.

By extending its term to seven years, Parliament denied the people of Uganda access to leadership positions of Member of Parliament in 2021 in contravention of the constitution.

I therefore, find that although the law does not bar Parliament from enacting legislation with retrospective/retroactive application, this particular amendment contravened **Article 8A (1)** of the constitution.

I therefore answer issues 1, 2, 3 and 4 in the affirmative.

Violence during the amendment process.

The Petitioners contention is that there were acts of violence inside and outside Parliament on the day of the passing of the Bill leading to the enactment of the Constitutional (Amendment) Act, 2018 and in their view, such acts were unconstitutional and contravened **Articles 1, 2, 3(2) and 8A** of the Constitution. It is also argued that there was violence throughout the country during public consultations thereby tainting the entire amendment process.

Mr. Mabirizi prayed to Court to expunge paragraphs 7, 8 and 10 of Gen Muhoozi's affidavit where he explained the circumstance relating to the violence. In para 7, the General deponed that he knew that the Speaker had vacated her seat and exited the chambers by the time the security forces entered Parliament. In para 8, he deponed that he was aware that some of the Uganda Peoples Defence Force (UPDF) soldiers sustained injuries inflicted by rowdy MPs. In para 10 he deponed that he knew that where UPDF is jointly deployed with Uganda Police Force (UPF), UPDF's participation is grounded in the Constitution and the UPDF Act and its participation was solely on invitation by the UPF who remained with overall command and control of the operation.

It is not disputed that Gen Muhoozi was not personally in Parliament during the operation which was under the command and control of the UPF. As such, there is no way he would know anything that transpired in Parliament unless he was informed by the responsible officers. As such paragraphs 7 and 8 of his affidavit are hearsay and are not admissible. I expunge these two paragraphs but the rest of the paragraphs remain.

Our attention was drawn to the Hansard dated 27th September 2017 attached to the affidavit of Jane Kibirige and Ahmed Kagoye the Sergeant at Arms wherein he deponed that disruptive events took place in the House the 21st and 26th September 2017. For fear of a repeat of what happened during the sitting of 27th September 2017, he requested for security back up.

He further stated that in the process of evicting the suspended Members of Parliament some of the members who were not suspended obstructed security from carrying out the eviction of which led to a scuffle. It was unrebutted evidence of the Sergeant at Arms that the scuffle was begun by MPs. He explained the scenario of the scuffle thus;

> ***"...my staff were hit by a chair, the first chair which was thrown at them, the second chair which was going to finish that staff one of them held it in the air and put it down. Then the security detail of the Speaker who sit on the treasury bench they came in to assist them because in that scuffle my Pstaff had already been pulled down"***

Hon. Winnie Kiiza in paragraph q of her affidavit in support of the Petition described the tense situation in the following words;

> ***"that given the fact that I had been arbitrarily shut down by the Speaker of Parliament and aware that the environment surrounding Parliament was hostile, violent and tense, I and other Members of Parliament leaning to the opposition who had not been badly injured in the scuffle moved out of Parliament to protest" That the violent and hostile environment in and outside the***

premise of Parliament would not warrant constructive engagement in as far as the proceedings of Parliament are concerned."

It is evident from the Hansard and the affidavit evidence that repeated calls were made by the Speaker of Parliament to members in the House to maintain order and allow the debate process to proceed. It also appears not to be in dispute that on the 27th September 2017, the Speaker made an order to the Sergeant at Arms to cause the removal of the named 25 MPs who in the opinion of the Speaker had become unruly and had continuously disrupted the proceedings of the House on the 26th September 2017.

The Speaker suspended the House for thirty minutes. From the affidavit evidence on record and in the process of execution of the order from the Speaker, there was a fight arising out of attempts to forcefully evict some Members of Parliament from the House following their suspension by the Speaker.

In light of the aforementioned events, we were invited by the Petitioners to consider and determine the Constitutionality of the actions of the Sergeant at Arms together with the back-up security of Uganda Police and Uganda Peoples Defence Forces in evicting the said Members of Parliament in light of **Articles 1, 2, 3 (2), 8A, 97, 208 (2) and 211(3)** of the 1995 Constitution.

It was argued for the Respondent that the actions of the Uganda Police and UPDF were legal and demonstrably justifiable given the prevailing circumstances at the time whereby the MPs had turned rowdy, disruptive and violent and refused to leave the House despite the order of the Speaker.

It is agreed by all the parties that there was a serious scuffle in Parliament on the day that leave was granted to Honorable Raphael Magyezi to draft a bill amending the Constitution which subsequently led to the Act. It is unfortunate that the Honorable Members of Parliament did not take heed to this Court's counsel in ***Severino Twinobusingye vs Attorney General, Constitutional Petition No.47 of 2011*** regarding the need to observe decorum in Parliament.

I will reproduce those words of wisdom from their Lordships and implore the Honorable Members of Parliament to take them to heart, their Lordships had this to say in that position;

> ***"We hasten to observe in this regard, that although Members of Parliament are independent and have the freedom to say anything on the floor of the House, they are however, obliged to exercise and enjoy their Powers and Privileges with restraint and decorum and in a manner that gives honour and admiration not only to the institution of Parliament but also to those who, inter-alia elected them, those who listen to and watch them debating in the public gallery and on television and read about them in the print media. As the National legislature, Parliament is the fountain of Constitutionalism and therefore the Honorable Members of Parliament are enjoined by virtue of their office to observe and adhere to the basic tenets of the Constitution in their deliberations and actions.***
>
> ***The Speaker, as the head of the House, has a big role to play in guiding Parliamentarians not to use unParliamentary and reckless language that may infringe on other people's rights which are entrenched in the Constitution, by calling them to order. Parliament should avoid acts which are akin to mob justice because such acts undermine the respect and integrity of the National Parliament."***

In my view, if these words had been heeded, the unfortunate and hugely embarrassing spectacle in which Members of Parliament were forcefully dragged out of Parliamentary chambers would not have taken place. The Honorable Members ought to respect the Speaker and heed to her calls for order.

It is evident, from the exhibited proceedings in the Hansard that the majority were in no mood to listen to the wise counsel of the minority and were determined to have their way. For instance, the exhibited Hansard indicates that the Honorable Mathias Mpuuga labored in vain to convince his colleagues that the proposed amendments moved by the Honorable Michael Tusiime were likely to infect other provisions of the Constitution and there was a need for caution and patience.

Sadly, his voice went unheeded and his prophetic words were disregarded with the result that more than half of the clauses passed by Parliament in the Constitution (Amendment) Act 2018 are unconstitutional for the reasons already detailed above.

I find it pertinent to consider the powers conferred upon the Speaker during proceedings in Parliament. I have considered the contents of Part XIII of the Rules of Procedure of Parliament specifically Rules 77 and 80 (6) of the said Rules. I am inclined to accept the Respondent's submissions that the Speaker is mandated and conferred with authority to maintain internal order and discipline in proceedings of Parliament by means which she considers appropriate for that purpose.

This would ordinarily include the power to exclude members from Parliament for temporary periods, where the conduct or actions of such members continuously cause any disruption or obstruction of the proceedings or adversely impact on the conduct of Parliamentary business. I thus find that the Speaker acted within the confines of Rules 77 and 80 (6) of the Rules of Parliament and cannot fault her to that extent.

While I agree with the Petitioner's submission that a Member of Parliament has a right to participate in proceedings of Parliament, to enable him or her express the will of the people he/ she so represents, I do not think that the right is absolute. If the Member of Parliament engages in misconduct that disrupts proceedings, the Speaker may lawfully suspend him/her for purposes of preserving order and decorum in the house.

I also do not condone any conduct of a Member of Parliament, whose effect is to curtail proceedings of Parliament. In my view, the question to be addressed is whether the measures taken by the Sergeant at Arms and the security forces in implementing the order of the Rt. Hon. Speaker fall within those stated to be "acceptable and demonstrably justifiable" in a free and democratic society within the meaning of **Article 43(2)** of the Constitution.

Learned counsel for the Respondent alluded to the interpretation of the phrase in a "free and democratic society" in **Article 43 (2) (c)** of the Constitution, which was explained in **Paul Kafeero & Anor versus the Electoral Commission and Attorney General Constitutional, Petition No. 22/2006.** In that case, Kitumba JCC cited with approval the following dicta from a Canadian case.

> ***"... The Court must be guided by the values and principles essential to a free and democratic society which I believe embody to name but a few, respect for inherent dignity of human rights, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity and faith in social and political institutions which enhance the participation of individual and groups in society. The underlying value and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect to be reasonable and democratically justified".***

I am in agreement with the submissions of the Petitioners that a Member of Parliament is entitled to enjoy the rights enshrined in **Articles 1, 2, 3 (2), 8A and 97** to debate and be accorded the privileges accruing to him or her as such under the 1995 Constitution and the Parliamentary (Powers and Privileges) Act. However, construing the said provisions in isolation of other provisions relating to the legislative work of Parliament or those imposing limitation on exercise of

such rights would offend the cardinal rule of Constitutional interpretation succinctly summarized in ***Hon. Lt. Rtd. Saleh Kamba & Anor –vs- Attorney General & Others, Constitutional Petition No.16 of 2013 viz;***

> ***"The entire Constitution has to be read together as an integral whole and no particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness."***

In my view, where the conduct of a Member of Parliament in the exercise of their aforementioned rights, as is evident from the evidence on record is inimical to the mandate of Parliament to conduct a debate and conclude the process of enacting any law, such right may be curtailed as long as the limitation does not go beyond what is acceptable and demonstrably justifiable in a free and democratic society.

Upon evaluation of the evidence on record, I find that the affected Members of Parliament's right to participate in the debate leading to the enactment of the Constitution (Amendment) Act was curtailed on account of their misconduct. I however , find that the curtailing of such rights did not amount to violation of **Articles 1, 2, 3(2), 8A and 97** of the Constitution as it was necessitated by their rather unprecedented misconduct, which was contemptuous of the Rules of Parliament and the orders of the Speaker of Parliament.

The intervention of Uganda Police and UPDF to secure the precincts of Parliament by causing the eviction of the said Members of Parliament was a necessary avenue to enable Parliament to proceed with its Constitutional mandate. Section 42 of the Uganda Peoples Defence Forces Act allows the UPDF to be called in aid of civilians in situations of riots or disturbance of peace. The Section reads;

"The Defence Forces, any part of the Defence forces, and any officer or militants are liable to be called out for service in aid of the civil power in any case in which a riot or disturbance of the peace likely to be beyond the powers of the civil authority to suppress or prevent."

Article 209(b) of the Constitution enjoins the Uganda Peoples Defence Forces to among others co-operate with civilian authority in emergency situations and in cases of natural disaster. The question to answer is, was the situation in Parliament an emergency? Gen. Muhoozi testified that the conduct of the MPs was an emergency situation which the petitioners strongly reject.

Blacks Law Dictionary 8th Edition defines "**Exigent circumstances"** also termed as **"emergency circumstance"** or special circumstances as a situation that demands unusual or immediate action and may allow people to circumvent usual procedures, such as when a neighbor breaks through a window of a burning house to save someone inside or "a situation in which a police officer must take immediate action to effectively make an arrest, search, or seizure for which probable cause exists, thus may do so without first obtaining a warrant". Usually exigent circumstances may exist if a person's life or safety is threatened, a suspect's escape is imminent, or evidence is about to be removed or destroyed.

It was the unrebutted evidence of the Sergeant at Arms that the Speaker had to exit using the rear door and that MPs had started throwing chairs around and some of his staff were injured. There was also evidence that after the house resumed on the 27th September, 2017, the Speaker indicated that the MPs responsible for the destruction of items in chambers were going to pay for them. There was also evidence that a Member of Parliament had entered the chamber of Parliament with a gun. These events in my view were life threatening and constituted an emergency within the meaning of **Article 209(b)** of the Constitution.

I do not agree with the contention that the involvement of the army was unjustified; The national army is mandated to assist in cases of emergencies.

Given the charged environment that Members of Parliaments were using all items in the chamber to harm each other, I give the Sergeant at Arms and the forces the benefit of doubt and hold that an emergency was averted. The involvement of the army was therefore justified. However, I must add that this finding is not intended to grant a carte blanche to the army and the Sergeant at Arms in Parliament to intervene in matters of Parliament without reasonable cause each incident should always have to be evaluated on its own merits and findings made accordingly.

The petitioners also alleged that **Article 24** which deals with respect for human dignity and protection from inhuman treatment and **Article 97** which provides Parliamentary immunities and privileges, **Article 208** which provides for the mandate of the Uganda Peoples' Defence Forces and **Article 211** which deals with Uganda Police Force were contravened.

Hon. Betty Nambooze deponed in paragraph 16 of her additional affidavit that she was intercepted by security personnel who pounced at her and dragged her towards the southern wing, violently threw her down and she landed on her back where they continued beating and kicking her. She had to undergo spinal surgery for Posterior spinal decompression and fusion L4-L5 for lumbar canal stenosis which was attributed to excessive force inflicted on her. During cross examination, she reiterated that she sustained injuries during the scuffle in Parliament and had to go to India for medical attention. Indeed the clerk to Parliament confirmed that Parliament footed her medical bills when she went to India for treatment though she denied knowledge of Hon. Nambooze being assaulted during the scuffle.

Hon. Munyagwa and Hon. Karuhanga deponed that although they were not among the suspended Members of Parliament, they were pounced on, charged at, grabbed by the neck, dragged out of the chambers of Parliament and thrown on the ground thus subjecting them to inhuman and degrading treatment

Hon. Ssewanyana Allan, in paragraph 16 (b) of his affidavit in support of the Petition deponed to being treated in the same way.

In the Speaker's letter to the President dated 23rd October, 2017, the above allegations were fortified. She wrote;

"I took action to suspend 25 members of Parliament from the service of the House for 3 sittings. However, after I had requested the Sergeant Arms to remove the members from precincts unknown people entered the Chamber beat up the members, including those not suspended and fight ensued for over an hour. I have had the opportunity to view camera footages of what transpired and noticed people in black suits and white shirts who were not part of the Parliamentary police or staff of the Sergeant at Arms beating Members. Additionally footage shows people walking in single file from the office of the President to the Parliament precincts.

I am therefore seeking explanation as to the identity, mission and purpose of the unsolicited forces. I am also seeking an explanation about why they assaulted Members of Parliament".

I am also seeking an explanation why the Members were arrested and transported and confined at police stations. This letter is attached to the affidavit of Hon. Winnie Kiiza as annexure "D."

Although the intervention of security forces was warranted, the treatment of the MPs was inhuman and degrading contrary to **Article 24** of the Constitution. I also find that their arrest and detention was uncalled for because the speaker's order was to have them evicted from the chamber, not detained. However, I do not find **Article 97** on Parliamentary immunity and privileges applicable to the affected MPs.

As to whether these actions of the security forces were justifiable, counsel for the respondent submitted that the security forces used proportional and

reasonable force in evicting MPs on the fateful day. He referred this Court to the affidavits of Jane Kibirige and Mr. Ahmed Kagoye. Counsel also relied on **Paul Kafeero and Kazibwe Vs. EC and AG (supra)**

That although the MPs enjoy rights and privileges under **Articles 1, 2, 3, 8A and 97** of the Constitution, the said rights are not absolute and must be exercised in a manner that is acceptable and demonstrably justifiable in a free and democratic society under **Article 43 (1) and (2)** of the Constitution.

Black's Law Dictionary, 4th Edition defines **"democracy"** as that form of government in which the sovereign power resides in and is exercised by the whole body of free citizens, as distinguished from a monarchy, aristocracy, or oligarchy, according to Abraham Lincoln "democracy" is a '**government of the people, by the people, for the people'.**

Article 43 of the Constitution provides for the general limitation on fundamental and other human rights and freedom. **Article 43(2)** of the Constitution provides that ***"public interest under this Article shall not permit political persecution, detention without trial any limitation of the enjoyment of the rights and freedoms prescribed by this chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution."***

In defining what amounts to acceptable and demonstrably, the Constitutional Court in ***Charles Onyango Obbo and Andrew Mwenda V Attorney General, Constitutional Petition No.15 of 1997*** citing with approval the Canadian Supreme Court case of ***Regina V Oakes, 26 DLR (4th) 201*** stated that;

"To establish that a limit (to right and freedoms) is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective that measures responsible for the limits on a character right or freedom are designed to serve must be of sufficient importance to warrant overriding a Constitutionally protected right and freedom.....

The standard must be high in order to ensure that objectives which are trivial or discordant with the principle integral to a free and democratic protection do not gain S.1 (Our Article 43(2)) protection. It is necessary at a minimum, that an objective related to concern which are pressing and substantial in a free and democratic society before it can be characterised as sufficiently important.

Secondly, once sufficiently significant objective is recognised, then the party invoking S.1 must show that the means chosen are reasonable and demonstrably justified. This involves a form of PROPORTIONALITY TEST….. Although the nature of the proportionality test will vary depending on circumstances, in each case the Court will be required to balance the interest of society with those of individuals and groups. There are in my view three important components of the proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational consideration. In short they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in the first sense, should impair "as little as possible" the right or freedom in question: R V Big M Drug Mart Ltd (supra). Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the character right or freedom and objective which has been identified as of "Sufficient importance."

In the circumstance I find that the intervening forces used excessive force in stopping the scuffle in Parliament.

The treatment of the Members of Parliament was inhuman and contravened **Article 21** of the Constitution. I have already noted that there was tension and disorder as well as actual violence inside and outside Parliament on the 27th September 2017 as a result of the refusal by suspended members to vacate the Parliamentary chambers. After the said scuffle, the sitting of Parliament

resumed and the mover of the motion, Honorable Raphael Magyezi sought leave to bring a Bill.

However, on the 20th December 2017 when the bill came for the 3rd reading, 439 Members of Parliament were present and the house was full. Many gave feedback on their consultations and voted on the Bill, there was no evidence of violence in Parliament and consequently, it cannot be said that the entire amendment process was tainted with violence.

In respect to the scuffle and violence that ensued on 27th September 2017 in Parliament, I am satisfied that this was a result of misconduct by certain Members of Parliament who had earlier on defied an order by the Speaker.

However, as I have labored to explain, the scuffle and violence in Parliament cannot be blamed on the security agencies alone. It originated from events in the House and not outside. The security agencies were invited by the Sergeant at Arms and did not come on their own.

Consequently, it is not correct that Parliament was legislating under duress.

I therefore answer issues 5 and 6(c) in the negative.

Whether consultations were marred with violence

As to whether the consultations were marred with violence, the Petitioners provided evidence that the police, which is mandated to maintain law and order, unduly interfered with consultative meetings in some parts of the country. Counsel Mutembile Yusuf submitted that according to the evidence of A/IGP Asuman Mugenyi, a message from the joint operations committee was passed to all the RPCs and District Police Commanders to restrict the Members of Parliament from going to other constituencies and this contravened **Article 29(1)(d)** of the Constitution on the right to assemble and freedom of Association which includes the freedom to form and join Associations and unions.

It is trite law that the onus lay on the Petitioners to adduce cogent evidence to prove this allegation. This Court has held before that it is a duty of a person who complains that his rights and freedoms have been violated to prove that indeed the state or any other authority has taken action under the authority of a law or that there is an act or omission by the state which has infringed on any of his rights or freedoms enshrined on the Constitution. ***See Charles Onyango Obbo & Another vs Attorney General, Constitutional Petition No.15 of 1997.***

Our attention was also drawn to the decision of the supreme Court of Kenya in ***Raila Odinga versus Uhuru Kenyatta and Anor, Presidential Election Petition No. 1 of 2017*** where it was held that although the legal and evidential burden of establishing facts and contentions which will support a party's case is static and remains constant throughout trial with the plaintiff, however, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the questions as to who would lose if no further evidence were introduced.

I find the principles in the two authorities to constitute a correct statement of the law and adopted them in the evaluation of issues before us. The affidavit evidence adduced, which I find satisfactory, proved that the Assistant Inspector General of Police, Asuman Mugenyi, issued a very arbitrary, unfortunate and unconstitutional directive to District Police Commanders to curtail and restrict the conduct of consultative meetings. I will reproduce the contents of the Directive issued on 16th October, 2017, under ***REF: OPS/234/214/01 CONSULTATIVE MEETINGS BY MPS ON ARTICLE 102(B) OF THE CONSTITUTION OF THE REPUBLIC OF UGANDA***

AS YOU ARE AWARE, THERE IS A PROPOSAL TO AMEND ARTICLE 102(B) OF THE CONSTITUTION OF THE REPUBLIC OF UGANDA TO REMOVE PRESIDENTIAL AGE LIMITS.

MEMBERS OF PARLIAMENT ARE TO CONSULT IN THEIR RESPECTIVE CONSTITUTENCIES TO SEEK THE VIEWS OF THEIR ELECTORATE. DURING THE CONSULTATIVE MEETINGS, ENSURE THE FOLLOWING:-

MEMBERS OF PARLIAMENT SHOULD STRICTLY CONSULT IN THEIR CONSTITUENCIES ONLY.

THOSE MPS MOVING OR INTENDING TO MOVE IN ORDER TO SUPPORT COUNTERPARTS OR CONSULT OUTSIDE THEIR CONSTITUENCIES MUST BE STOPPED.

CONSULTATION MUST NOT INCLUDE THE FOLLOWING:

a) ILLEGAL DEMONSTRATIONS

b) ILLEGAL PROCESSIONS

c) INCITING VIOLENCE

d) USE OF HATE CAMPAIGNS

e) USE OF ABUSIVE LANGUAGE

f) ACTS OF HOOLIGANISM OF ANY SORT

g) INTIMIDATION OF THE PERSONS PERCEIVED TO BE SUPPORTING THE REMOVAL OF AGE LIMIT.

ALL RPCS, DPCS, OC STATIONS ARE THEREFORE DIRECTED (R) TO ENFORCE THIS DIRECTIVE.

ACKNOWLEDGE RECIPT OF THIS MESSAGE ASN ACT AS INSTRUCTED.
SIGNED

AIGP ASSUMAN MUGENYI

I must state here that I find the obnoxious directive issued by AIGP Asumani Mugenyi appalling. It does not make any legal or logical sense. The directive

restricted freedom of association and movement of Members of Parliament without any justification whatsoever.

The directive was intended to prohibit Members of Parliament from holding joint rallies or canvassing support for certain positions outside their constituencies. This is unlawful. Firstly, in the current multiparty dispensation, most Members of Parliament belong to one party or another. They should therefore be expected to offer support for similar minded colleagues in their constituencies. Political parties exist to lobby the public for their causes and positions. Members of Parliament are therefore within their rights to solicit for support for their views and positions or carry out consultations not only from their constituencies but throughout the country.

Secondly, there is absolutely nothing unlawful about Members of Parliament lobbying different individuals beyond their own constituencies.

Thirdly, the directive was clearly ignorant of the fact that some Members of Parliament, such as the National Female Youth Representative, literally represent an electorate spread out all over the country. Other Members of Parliament such as representative for special interest groups also cover wide territories and regions with the possibility that they would hold joint consultative meetings with other Members of Parliament. This should have been foreseen and the directive adjusted accordingly. In my view, the directive was recklessly and wantonly issued without any regard for the law more specifically **Article 29(2)** which guarantees the freedom of every Ugandan to move freely in Uganda. Yet, it was issued, ironically, by a custodian of law enforcement.

During cross examination, AIP Asuman Mugenyi explained that their reason for the restriction was based on security intelligence that some MPs were planning to move people from their areas and cause chaos. He testified thus;

"*My Lords, we had a reason and this was based on intelligence information pertaining at that time. If I am allowed to explain the genesis of the circular, my lords, we got intelligence information that some members of Parliament were planning to move people outside their constituencies to cause chaos and violence*

in other constituencies while consulting and as police we are mandated by the Constitution to detect and prevent crimes." There was no evidence adduced to prove that Members of Parliament were planning to cause chaos in the Country.

The directive in issue was clearly calculated to muzzle public participation and debate on the proposed amendments in the original Bill tabled by the Honorable Raphael Magyezi. However, the evidence presented by the Petitioners fell woefully short of demonstrating that this directive had that chilling effect in actual fact.

In some cases the directive was rightly and roundly ignored while in other isolated cases such as parts of Lango and central region, at least based on the evidence on record, meetings and rallies were dispersed. Hon. Odur averred that on 24th October,2017, he with five other MPs were violently and unlawfully stopped from consulting their people and that police dispersed people who had gathered at Adyel Division in Lira District for consultation by firing live bullets and teargas inflicting severe fear in him ***(para 15(s) of his affidavit in support of the petition)***. Hon. Joy Atim Ongom who was part of the MPs mentioned in Hon. Odur's affidavit report that her consultation in Lira Municipality were interrupted by police with tear gas. She added that Cecilia Ogwal was beaten (***see Hansard page at 5203)***. Though isolated, this was most unfortunate. I find that my position would have been different if there was sufficient evidence to prove that throughout the country, the police unduly restricted consultative meetings thereby rendering the public participation in the Bill nugatory. I would not have hesitated to hold that there was no public consultation and participation thereby rendering the entire Bill a nullity. I do not have such evidence before me.

Therefore, issue 6 (d) is answered in the negative.

Alleged failure to consult on sections 2, 5, 6, 8 and 10

I have already held that consultation and public participation are mandatory requirements of the legislative process especially where amendment of the Constitution is concerned.

The bill was sent to the committee on legal and Parliamentary affairs, it was read for the 2nd time on 19/12/2017 and finally on 20/12/2017. The additions made on 20th December 2017 by Hon. Mafabi and Tusiime and passed on the same day did not go through the entire process because they were amendments made under Rule 60 of the Rules of Parliament.

When the chairperson of the legal and Parliamentary committee was presenting his report to Parliament, it was clear that the committee had never received any views on the issue of extension of term of Parliament. The proposals on this issue were made and passed on the last day just before the third reading without any form of consultation or participation by the people.

I therefore, find that there was no consultation and public participation on sections 2, 5, 6, 8 and 10 of the Amendment Act.

I answer Issue 6(e) in the affirmative.

Alleged failure to conduct a referendum on Sections 2, 5, 6, 8 and 10

I already held that the provisions on extension of the tenure of Parliament and local governments infected **Article 1** on the people's sovereignty. **Article 1** is entrenched under **Article 260** and to amend it a referendum has to be held. Consequently, Sections 2, 6, 8 and 10 could not be validly passed without a referendum required under **Article 260**.

The Petitioners submitted that the alleged failure to conduct a referendum before assenting to the Bill containing Section 2, 5, 6, 8 and 10 was inconsistent with **Articles 1, 91(1), 259(2), 260** and **263(2)(b)** of the Constitution. **Article 260** which is central to this issue provides;

Article 260(1) "A bill for an Act of Parliament seeking to amend any of the provisions specified in clause (2) of this article shall not be taken as passed unless_

a) It is supported at the second and third readings in Parliament by not less than two-thirds of all members of Parliament; and

b) It has been referred to a decision of the people and approved by them in a referendum.

Article 105(1) is an entrenched provision which cannot be amended without a referendum.

It is for that reason that I must answer Issue 6(f) in the affirmative.

The Basic structure doctrine

It has been argued by the Petitioners that the impugned amendments violate the basic structure doctrine that is implicit in the Ugandan Constitution. The Respondent, the Attorney General, contends that the basic structure doctrine does not apply to Uganda and has invited us to reject the attempts to rely on it to challenge the Constitutional amendments in question.

I have found it fitting to review the nature of the basic structure doctrine before determining whether it is applicable to the circumstances of these petitions and our country's Constitutional law. The basic structure doctrine is essentially to the effect that the amendment power of Parliament is not absolute but subject to certain implicit limitations such as provisions that would alter the fundamental character of the Constitution.

It seems to have been pioneered by the German jurist, Professor Dietrich Conrad, who introduced it to Indian scholarship and subsequently Indian jurisprudence in a series of public lectures he delivered in that country. See, ***Prof. Dietrich Conrad, "Implied Limitations of the Amending Power." 1965 Public Lecture.***

Jurists and various judiciaries across both common law and civil law jurisdictions have subsequently posited that Constitutions have certain fundamental features that cannot be altered by Parliament through its legislative powers as amending such fundamental provisions amounts to replacing the Constitution, a role which should be reserved to a body such as a constituent assembly.

It is contended that supremacy of the Constitution, republican and democratic form of government, secular character of the state and the principle of separation of powers are all part of the basic structure of a Constitution. See ***V. R. Jayadevan, "Basic Structure Doctrine and its Widening Horizons" Cochin University Law Review 2003 at 327.***

This principle has been widely applied by the Indian Supreme Court beginning with the landmark decision in ***Kesavanand Bharati vs State of Kerala (A.I.R 1973 SC 1461)***. It was subsequently held that principles of democracy and democratic government are part of the basic structure of the Indian Constitution and incapable of amendment. ***See Indira Gandhi vs Raj Narain 1975 Supp. S.C.C*** It has also been held that judicial review of legislation is part of the basic structure as well and Parliament cannot pass laws to exclude judicial review of elections of Speaker and Prime Minister. ***See Minerva Mills vs Union of India A.I.R. 1980 SC 1789.***

In ***Anwar Hossain Chowdhury v Bangladesh 41 DLR 1989 App.Div.165,*** the Supreme Court of Bangladesh similarly emphasized that the amendment power of the legislature is not an ordinary legislative power but rather a constituent power and that as a consequence, the Constitutional power vested in Parliament to amend the Constitution is derivative because the ultimate power to make a Constitution belongs to the people alone.

The Court emphasized that certain principles are structural pillars of a Constitution and are beyond amendment power of Parliament. They cited the following; peoples' sovereignty, supremacy of the Constitution, democracy, fundamental rights inter alia and held that an amendment power cannot transgress those limits.

In ***Jackson vs Attorney General, 2005 UKHL 56,*** the English House of Lords, particularly in the dicta of Lord Steyn also implicitly posited that notwithstanding the absolute sovereignty of Parliament in law making within their system of governance, the House of Lords may consider whether there do not exist certain fundamentals that even a sovereign Parliament cannot abolish.

Decades earlier, the ***Privy Council in Hinds vs The Queen 1977 AC 195*** held that separation of powers between the judiciary and executive is a fundamental feature and basis of Westminster type of Constitutions which cannot be abolished through legislative action. Various other common law jurisdictions, including Belize, South Africa, Pakistan, Malaysia and Australia have embraced the basic structure doctrine. Similarly, non-common law jurisdictions including Colombia and Turkey among others have also unanimously approved this doctrine in determining validity of Constitutional amendments.

The High Court in Kenya, with a panel of three Judges, in ***Rev. Dr. Timothy Njoya & Others vs Attorney General & Others (2004) AH RLR 157 (KeHC 2004)*** held that although Parliament may amend, repeal and replace as many provisions as desired, the Constitution must retain its character as the existing Constitution and fundamental Constitutional change could solely be made by the exercise of original constituent power.

By contrast, the Court of Appeal of Tanzania, in ***Attorney General vs Rev. Christopher Mtikila, Civil Appeal No.45 of 2009 in 2010 (EA) 13*** rejected application of the doctrine and overruled the High Court of the said country

which had held that the doctrine applies to Tanzania as well. The Justices of the Court of Appeal took the view that the Tanzanian Constitution does not contain any provisions that cannot be amended.

In particular, they seem to have been persuaded by the fact that the doctrine must be expressly legislated since Constitutions of countries such as Algeria, Malawi, Namibia, South Africa, Italy, France and Turkey specifically contain provisions providing that certain clauses of the Constitution are not subject to amendment under any circumstances. A similar provision does not exist in the Tanzanian Constitution.

The Tanzanian Constitution is unique on that account and the unanimous decision of its final appellate Court must be viewed in that regard. The Ugandan Constitution does not contain any clause prohibiting amendment of any provision but it, in my view, differs in major respects from the Tanzanian Constitution. I will enumerate a few unique features which clearly militate against reaching a similar conclusion like the Tanzanian Court of Appeal on applicability of the basic structure doctrine.

Firstly, our Constitution contains elaborate National Objectives and Directive Principles of State Policy that emphasize democratic government, public participation in governance, promotion of unity and stability, respect for fundamental rights and freedoms inter alia. **Article 8A** of the Constitution requires Uganda to be governed based on the principles of national interest and common good.

Secondly, Article 20(1) of the Constitution, touching upon fundamental rights and freedoms provides that;

> ***"Fundamental rights and freedoms of the individual are inherent and not granted by the State."***

In light of the above provision and the Directive Principles of State Policy, can Parliament effect a Constitutional amendment seeking, for instance, to do away

with certain rights by scrapping this provision? I will not speculate but clearly, faithful interpretation of our Constitution given its historical background as earlier detailed and in light of its preamble favour the position that the basic structure doctrine, to a restricted extent, be upheld as applicable in our legal system to govern amendments to the Constitution. We must also take into account our shared values as a country which are alluded to in the Directive Principles of State Policy.

I am not convinced that Parliament, in exercise of its powers under Article 79(1) is free to effect amendments that would in effect replace the Constitution resulting from the consensus of the Constituent Assembly with a new one. Consequently, I hold that the Ugandan Constitution is designed to recognise, to a certain extent, the basic structure doctrine in its preamble, national objectives and Directive Principles of State Policy read together with Article 8(A).

In my view, in the Ugandan context the basic structure doctrine operates to preserve the people's sovereignty under Article 1 of the Constitution.

Amendments to the Constitution should not be introduced or passed in a manner that defeats our country's national objectives and Directive Principles of State Policy without the input of the people in a referendum. Amendments that directly impact on the people's sovereignty enshrined in Article 1 of the Constitution, if passed without a referendum, are deemed to have offended our Constitution's basic structure.

I am persuaded to follow the Kenyan, South African and Indian authorities on this point and respectfully decline to follow the approach of the Court of Appeal of Tanzania. I will therefore determine the extent, if at all, to which the impugned amendments violate the basic structure of our Constitution.

In the context of these petitions, there is no doubt in my mind that Sections 2, 6, 8, 9 and 10 whose effect is to extend the tenure of Members of Parliament and local governments from five to seven years offend a fundamental

democratic principle embedded in the Directive Principles of State Policy of our Constitution. The elected leaders cannot arbitrarily determine on their own, without consent of the people, the duration of their service contrary to the provisions of **Article 1** of the Constitution.

On that ground alone, the amendments creating and facilitating the extension of tenure of Parliament and local governments offended the basic structure of the Constitution as they conflict with a fundamental principle, that the State shall be governed based on democratic principles. The amendments in question are provided for in Sections 2, 6, 8 and 10 of the Constitution (Amendment) Act 2018. These provisions are therefore inconsistent with the Constitution since they offend a fundamental principle that is also safeguarded by **Article 1** on sovereignty of the people. These provisions could not be validly passed without a referendum and it is common ground that no such referendum has ever been held.

Issue 6(g) is answered in the affirmative in respect of sections 2, 5, 6, 8 and 10 of the Constitution amendment Act and in the negative in respect of section 1, 3 and 7 of the same Act.

Use of the Private Member's Bill to amend the Constitution and facilitation of Members of Parliament to consult on the same.

The petitioners' submission as I understood it was that the Constitution (Amendment) Bill which was moved by a private member should not have been entertained by Parliament at all since it had imposed an illegal charge on the consolidated fund. It was their further contention that the decision to facilitate the MPs with UGX 29,000,000/= and extension of the term of Parliament were unconstitutional because they also imposed an illegal charge on the consolidated fund.

On their part, the respondents contend that Parliament acted within the law pursuant to the mandate and powers bestowed upon it by the Constitution as well as the rules of procedure of Parliament. In addition, they argued that two certificates of financial implications were issued in accordance with S.76 of the Public Finance Management Act and no charge whatsoever was imposed on the consolidated fund.

I have carefully considered **Article 93** which deals with restriction on financial matters and **Article 94(4)** which provides for private members bills as well as **Section 76** of The Public Finance Management Act, 2015 which deals with Cost estimates for Bills. The Petitioners claim that the Bill initiated by Hon. Magyezi flouted this particular provision.

With due respect to the Petitioners, I do not agree. They seem to have misconstrued the import of **Article 93**. I do not accept that a Private Member's Bill should not receive any form of support or facilitation from Government or Parliament. Article 93 of the Constitution does not prohibit that form of support or facilitation.

Article 93 of the Constitution states that;

> ***"Parliament shall not, unless the bill or the motion is introduced on behalf of the Government__***
>
> ***(a) Proceed upon a bill, including an amendment bill, that makes provision for any of the following__***
>
> ***(i) the imposition of taxation or the alteration of taxation otherwise than by reduction;***
>
> ***(ii) the imposition of a charge on the Consolidated Fund or other public fund of Uganda or the alteration of any such charge otherwise than by reduction;***
>
> ***(iii) the payment, issue or withdrawal from the Consolidated Fund or other public fund of Uganda of any monies not charged***

on that fund or any increase in the amount of that payment, issue or withdrawal; or

(iv) the composition or remission of any debt due to the Government of Uganda; or

(b) proceed upon a motion, including an amendment to a motion, the effect of which would be to make provision for any of the purposes specified in paragraph (a) of this article."

Article 93 is specifically concerned with Bills which contain clauses that have the effect of causing a charge on the consolidated fund or increasing taxation. It is concerned with the content of a Bill and not the manner in which it is processed through Parliament.

Evidently, a Private Members Bill is not barred by Article 94(4)(b) of the Constitution. Clauses (c) and (d) envisage help towards the mover of the private members Bill by the affected Government department and the Attorney General's Chambers. It is silent on financial help though it mentions "*reasonable assistance".* The wording of Article 94(4) made it mandatory for the above provisions to be included in the rules of procedure of Parliament when they were eventually enacted.

There is no dispute that the bill did not make any express provisions contrary to Article 93(a). The petitioners' bone of contention as I discerned from the arguments of counsel for the petitioners is that the bill an effect as provided in Article 93(b). On the other hand, the counsel for the respondent insist that Article 93(b) is inapplicable because what was introduced was a bill, not a motion.

I find it necessary at this point to distinguish between a bill and a motion. The rules of procedure of Parliament *define "a 'motion' to mean a proposal made by a member that Parliament or a committee of Parliament doing something or there is something to be done or express an opinion concerning some matter while a*

'bill' is defined to mean the draft of an act of Parliament and includes both a private members bill and a government bill."

I do not accept counsel Adrole's submissions that Article 93(b) is not applicable to the petition because it does not concern a bill but rather a motion. In my view the two were inseparable in this matter because the motion to introduce a private member's bill was moved with a draft bill attached. This is also evident from the Speaker of Parliament's guidance to MPs on 26th September, 2017. As can be seen from the Hansard of 26th September ,2017 , She stated thus ***"…. it has to be introduced by way of motion to which shall be attached the proposed draft of the bill, if the motion is carried, the printing and publication of the bill will be done by the clerk and the rest of the process will be the same as that in respect of a Government Bill……preparation of the bill, consultation, getting a certificate of financial implication, gazetting, bringing the bill for first reading, referring the matter to the appropriate committee which will process the bill and report back to Parliament for debate and consideration".***

A reading of **Article 93(a) and (b)** of the Constitution in my view prohibit Parliament from proceeding on a motion or bill that expressly or impliedly provides or has an effect of providing for any charge on the consolidated fund in one way or another, unless it is introduced on behalf of government. It is not in dispute that the Bill was a private member's bill. The original Bill (Magyezi Bill) in my view did not make provision or in any way had the effect of making provision for any of the purposes enumerated in Article 93(a) (i-iv) of the Constitution.

During cross examination, Ms Kibirige testified that MPs already had money to carry out consultation as part of their monthly emoluments.

With specific regard to the UGX 29,000,000/= Ms Kibirige testified that the decision to give it to facilitate MPs was a directive by the Speaker of Parliament and when tasked to show the alleged directive, she indicated that *"not*

everything is written but from what she said that was the indication". She further testified that money for consultation is part of MPs consolidated monthly emoluments.

Regarding the source of the money for consultation, Ms Kibirige testified during cross examination that it was appropriated from the Parliamentary Commission, not the consolidated fund. She stated thus; *"The 29 million was appropriated to Parliamentary commission as budget for this financial year 2017-2018. So we have not asked for any extra monies because these are the activities that the Parliament has to do. There're bills that they have to take care of, their committee reports, petitions that they have to consider and conclude so it was part of the Parliamentary activity so that is why it is not a charge, we had to mobilize from within our budget and that money is provided for the activities that Parliament will carry out including bench marking". (Sic)*

The said position was corroborated by Mr Muhakanizi during cross examination. I am therefore satisfied the UGX 29,000,000/= for consultation did not occasion any charge on the consolidated fund.

However, the additional amendments of **Articles 77, 105 and 260** of the Constitution clearly offended Article 93 because they required a referendum which has a charge on the consolidated fund.

On the issue of certificate of financial implications, Section 76 of the Public Finance Management Act, 2015 provides:

76. Cost estimates for Bill

(1) Every bill introduced in Parliament shall be accompanied by a Certificate of financial implications issued by the Minister responsible.

(2) The Certificate of financial implications issued under subsection (1) shall indicate the estimates of revenue and expenditure over the period of not less than two years after the coming into effect of the Bill when passed.

(3) In addition to requirements under subsection (2) the certificate of financial implications shall indicate the impact of the Bill on the economy

(4) Notwithstanding subsections (1), (2) and (3), a certificate of financial implication shall be deemed to have been issued after 60 days from the date of request for the certificate.

Rule 107 of the 2012 Parliamentary Rules which were in force by the time the Magyezi bill was introduced provides for certificate of financial implications. It states that a certificate of financial implications must set out the specific outputs and outcomes of the Bill; how those outputs and outcomes fit within the overall policies and programs of government; the costs involved and their impact on the budget; the proposed or existing method of financing the costs related to the Bill and its feasibility. In addition, it must be signed by the Minister responsible for finance.

There were two certificates of financial implications availed by the respondent. The first certificate of financial implications in respect of Constitution (Amendment) Bill, No.2 of 2017 (Magyezi Bill) was issued by the Minister of Finance on 28th September, 2017(Exhibit P2) on the request by the Clerk to Parliament. Paragraph (c) highlighted the expected outputs and the impact of the Bill on the economy, para (d) highlighted the planned expenditure by major components over the MTEF period, para (e) highlighted the funding and budgetary implications and (f) highlighted the expected benefits/savings and/or revenue to Government.

During re-examination, the Secretary to the Treasury,

Mr Muhakanizi explained that MTEF means expenditure of this financial year and next financial year and it is rolled over every year. That it is arrived at after assessing financial implications over two years of the expenditure framework in line with the Public Finance Management Act.

The second certificate of financial implications was at the request of Mugoya Kyawa Gaster and was in respect of **Articles 77 and 105** of the Constitution. Ms Jane Kibirige, testified during cross examination that as the Clerk to Parliament, she is responsible for requesting for a certificate of financial implications whenever a private Member's Bill is involved.

I find the request for a certificate of financial implications by Mugoya Kyawa Gaster, who was not a mover of the Constitution (Amendment) Bill, No.2 of 2017 irregular. Section 76 of the Public Finance Management Act in my view envisages one certificate of financial implications in respect of a bill, not two. Be that as it may, I am of the considered view that the second certificate of financial implications was of no consequence since the Articles it referred to contravened other provisions of the Constitution and have been declared null.

The logic of the Petitioners' argument would imply that a Private Member's Bill must literally be funded by the member who initiates it and he/she must receive no form of support from both the executive and Parliament. Certainly, it is odd that the executive should offer support for a private Bill but in respect of the institution of Parliament, I am of the view that it is the proper thing to do. Members of Parliament must be facilitated to carry out legislative duties. I agree with counsel Byamukama that the rational for Article 93 is to enable proper planning and budgeting for Government resources.

The provisions of Article 93 which are mandatory prohibit Parliament from proceeding with a bill whose effect imposes a charge on the consolidated Fund or other public fund of Uganda unless the bill is introduced on behalf of Government. It is trite that Parliament ought to comply with the law it makes.

Evidence on record shows the Minister of Finance issued a certificate in respect to the Magyezi Bill on the 28th September 2017 and a copy was annexed to the affidavit of Ms jane Kibirige. The said certificate states inter alia that there are no additional financial obligations beyond what is in the medium term expenditure framework and the bill was budget neutral. The secretary Mr.

Keith Muhakanizi testified that they were no financial obligation on the consolidated fund.

There is no doubt that the provisions on extension of the life of Parliament and local governments have significant financial implications on the treasury and yet, the provisions of Article 93 prohibit the consideration of Bill that has not been initiated by Government if such Bill, inter alia, may occasion a charge on the consolidated fund. The provisions on extension of the life of Parliament and local governments contained in **Sections 2, 6, 8 and 10** would certainly occasion a charge on the consolidated fund yet they were introduced under a Private Member's bill.

In view of my findings that the sections which second the certificate was issued in respect of were unconstitutional for reasons already stated, I do not find it necessary to delve into the propriety of that certificate.

As a consequence, I find that the Bill which was introduced by Hon. Magyezi in respect of amendment of Article 61,102,104 complied with the requirements of Article 93 of the Constitution and section 76 of the Public Finance and Management Act 2015 while the amendments introduced by Hon. Nandala Mafabi and Hon. Tusiime did not comply.

I therefore find that the Private Member's Bill did not contravene **Article 93** of the Constitution since it did not impose an illegal charge on the consolidated fund. However, the additional amendments of Articles 77, 105 and 260 of the Constitution clearly offended Article 93 because they required a referendum which has a charge on the consolidated fund.

I therefore answer issue 6(a) in the negative and issue 6(b) in the affirmative.

Issue 7

Non-compliance with Parliamentary Rules of Procedure.

The Petitioners contend that Parliament did not comply with the provisions of the Constitution and Parliamentary rules of procedure in amending the Constitution.

I am alive to the fact and accept the uncontroverted evidence of the clerk to Parliament, Ms Jane Kibirige, that at the time of second reading of the Constitution (Amendment) Bill on 18th December 2017, the applicable Rules of Procedure of Parliament were those of 2017 which took effect on 10th November 2017.

Any noncompliance alleged by the Petitioners for actions after 10th November 2017, premised on the Rules of Parliament of 2012, is thus legally and factually untenable. However, noncompliance with the 2017 Rules is not a matter that can be taken lightly.

The legislative powers of Parliament and the procedure prescribed for amendment of provisions of the Constitution are spelt out in **Articles 259 (1)** which empowers Parliament by way of addition, variation or repeal to amend any provision of the Constitution, in accordance with the procedure laid down in the Chapter 18 of the Constitution, **Article 262** which requires that any amendment Act other than those mentioned in **Articles 260 and 261** should be supported by at least two thirds vote of all Members of Parliament and **Article 91** provides for bills.

Article 259(2) specifically provides thus:

"This Constitution shall not be amended except by an Act of Parliament –

(a)Sole purpose of which is to amend this Constitution; and
(b) the Act has been passed in accordance with this Chapter.

Article 262 then provides that:

A bill for an Act of Parliament to amend any provision of the Constitution, other than those referred to in Articles 260 and 261 of this Constitution, shall not be taken as passed unless it is supported at the second and third readings by the votes of not less than two-thirds of all Members of Parliament.

Article 91 (1) of the Constitution, on the other hand, provides as follows:

"91 (1) Subject to the provisions of this Constitution, the power of Parliament to make laws shall be exercised through bills passed by Parliament and assented to by the President."

There is no doubt that, prima facie, the cited provisions confer upon Parliament power and authority to amend any provision of the Constitution. The amendment may be through Bills passed by Parliament. It is thus my finding, at this point, that in passing the Constitution (Amendment) Act 2017, Parliament, acted in exercise of its Constitutional mandate.

In effecting the amendments and while ensuring that it does not pass any amendment which is inconsistent with any provision of the Constitution, Parliament ought to take into consideration the special circumstances in the country.

In a speech delivered to the Tanzanian Parliament in 1965 and quoted in the 3rd Edition of Odunga's Digest On Civil Case Law and Procedure, that country's late President Julius Nyerere said;

"***We refuse to adopt the institutions of other countries even where they have served those countries well because it is our conditions that have to be served by our institutions. We refuse to put ourselves in a strait jacket of Constitutional devises even of our own making. The Constitution of Tanzania must serve the people of Tanzania. We do not intend that the people of Tanzania must serve the Constitution."***

I respectfully agree with this proposition. The Constitution must serve the people and not the other way round. To that extent, I am not convinced that we should adopt, without careful and critical reflection, the judicial precedents from other jurisdictions with their own peculiar circumstances on such contentious matters.

It is the reason I have endeavoured to explain why I have preferred, to a larger extent, the Indian, South African and Kenyan precedents over the Tanzanian one. Those precedents, such as those I have highlighted above, can indeed be very useful guidelines but considerable caution must be exercised in relying on them. Ultimately, the Constitutional Court's duty, is to respect and uphold the will of the people.

However, there is unanimity in various jurisdictions that a Constitution is an instrument *sui generis*. It is one of a kind in each country and consequently, it is one whose interpretation, application and amendment must be done with considerable caution and with fidelity to the manifest intention of its originators.

Consequently, in exercising the Constitutional mandate to pass any amendment to the Constitution, Parliament must do so, first and foremost, in strict adherence to all existing procedural requirements in the Constitution itself and any other laws.

It is now settled law that failure by Parliament to strictly follow laid down procedures in the Constitution and Parliamentary Rules of Procedure will invalidate subsequent legislation even if it be an Act for amending the Constitution. **See *Paul Ssemwogerere & Others vs Attorney General*** and ***Oloka Onyango & Others vs Attorney General (supra).***

In my view, in order to maintain its sanctity, a Constitution should not be amended to meet exigencies of the moment but rather for enduring needs of the people. A good Constitution should be beyond the reach of temporary excitement and popular passion. It must yield to the thought of the people and

not to their whims. Having a majority in Parliament should not be cause for quick routine Constitutional amendments. The view of a vocal and passionate minority should not be disregarded. In fact, some of the safe guards in the Constitution, such as those on fundamental rights and freedoms, are intended to protect the minority against the excesses of the absolute will of the majority. It must be an enduring and binding document because it is a compendium of the country's most enduring values and its legitimacy can only be attained if any Constitutional amendments are made legitimately.

Amendments to the Constitution must not therefore, in the slightest, appear to be the result of "mob action" taking advantage of the tyranny of an absolute Parliamentary majority. It is for this reason that the basic structure doctrine, reflected in the preamble to our Constitution, national objectives and Directive Principles of State Policy, exists in our law as I have already held.

I am invited by the Petitioners to determine whether Parliament contravened the fundamental principle of strict adherence to the rule of law in not following its own Rules of Procedure. There is no doubt, that Parliament is enjoined to respect the rule of law. The United Nations' Secretary General defines the concept of the rule of law as follows;

> ***"a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."*** See **The United Nations, the Rule of Law and Transitional Justice in Conflict**

and Post-Conflict Societies: Report of the Secretary-General 3, UN SC, UN Doc. S/2004/616 at 4

Similarly, the East African Court of Justice, in ***James Katabazi & 21 Others vs Secretary General of East African Community & Attorney General of Uganda, Reference No.1 of 2007,*** the Court of Appeal of Kenya in ***R vs Gachoka & Others, 1999 1 EA 254*** and the Learned author Retired Justice George William Kanyeihamba JSC in his book, **"Kanyeihamba's Commentaries on Law, Politics and Governance" at page 14** all endorse the same proposition regarding the salient components of the rule of law.

Article 21(1) of the Constitution provides that, ***"All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law."*** In light of the above, it is therefore my strong view that all organs of the state, including Parliament, are constitutionally bound to respect and observe the rule of law in the conduct of their affairs and execution of their legal mandate. This is the logical consequence of equality before the law provided for in the Constitution.

The above principles on the rule of law expounded by the cited decisions, learned author and the United Nations' Secretary General are relevant in determining whether fidelity to the rule of law exists in a particular jurisdiction. It is not disputed that the Ugandan Constitution enjoins the State and all organs of government to respect the rule of law. Certainly, Parliament which passes laws must lead by example in respecting the rule of law.

It is not in doubt that the Constitution empowers Parliament to amend any of its provisions, but that Constitutional licence does not empower it to make any law that is inconsistent with any of its provisions. Under **Article 2** of the Constitution, any enactment, which is inconsistent does not amend the Constitution and is void to the extent of the inconsistency. ***See Paul Ssemwogerere & Others vs Attorney General (supra)***

This landmark Supreme Court decision is particularly instructive on the extent and limits of parliamentary powers over amendment of the Constitution. Needless to state, it is binding on this Court. In his lead judgment, Kanyeihamba JSC, emphatically held that in Uganda, it is in the people and the Constitution that sovereignty resides and not Parliament. This is in direct contrast to certain jurisdictions, such as the United Kingdom, where parliamentary sovereignty reigns supreme.

He further held that as a consequence of that principle, Parliament can only successfully claim and protect its powers and internal procedures if it acts in accordance with the constitutional provisions which determine its legislative capacity and the manner in which it performs its functions.

His Lordship further urged the Constitutional Court to remain mindful and conscious of its grave duty to protect the Constitution as follows;

> ***"In Uganda, Courts and especially the Constitutional Court and this Court were established as the bastion in the defence of the rights and freedoms of the individual and against oppressive and unjust laws and acts. Courts must remain constantly vigilant in upholding the provisions of the Constitution."***

Their Lordships also held that an amendment of one provision of the Constitution may have the effect of amending other Articles either by implication or infection and that such amendment would be void unless the Articles amended by implication or infection have also been similarly amended in accordance with Chapter 18 of the Constitution which provides the procedure for effecting amendments.

They unanimously overruled the contention that a certain provision cannot have been amended if it is missing from the amending Bill. As long as an amendment conflicts with an existing provision in the Constitution or constrains its implementation, it is deemed to have amended such provisions by implication or infection.

In his lead judgment, with which the rest of the coram concurred, Kanyeihamba JSC held that Section 5 of the Referendum Act 13 of 2000 which purported to restrict access to Parliamentary records amended **Article 28(1)** of the Constitution on the right to a fair hearing by implication and **Article 44(c)** which prohibits derogation from the right to a fair hearing by infection. It is therefore a settled position of law that an express amendment of one provision of the Constitution may have the effect of indirectly amending another provision either by implication or infection. I am bound by this legal position.

Generally, amending the Constitution by implication or infection is expressly prohibited. Each provision of the Constitution must be specifically amended. The rationale for this is that each provision of the Constitution has a specific procedure for its amendment and this procedure which is embedded in the Constitution cannot be waived under any circumstances.

The procedure for amendment of the Constitution is specifically provided for in **Articles 259, 260, 261, 262 and 264** of the Constitution respectively. Each single provision amending a clause in the Constitution must be strictly followed. Secondly, Parliament, in amending such clauses must also strictly adhere to its own Rules of Procedure.

I find the following Rules of Procedure of Parliament to be relevant to the Petitioners' contention. Rule 114(1) is to the effect that a Bill shall bear at the head a short title and a long title describing the leading provisions of the Bill. Additionally, Rule 115(2) of the said Rules is to the effect that no Bill shall contain anything foreign to what its long title imports.

Rule 131(2) empowers a committee of the whole House and the select committee to propose and accept proposed amendments as it considers fit, if the amendments are relevant to the subject matter of the Bill. The committee of the whole house is also empowered to consider proposed amendments by the committee to which the Bill was referred and may consider proposed amendments, on notice where the amendments were presented but rejected by

the relevant committee or where for reasonable cause, amendments were not presented before the relevant committee. This is the import of Rule 133(4) of the Rules.

I do not accept the submission of the Learned Solicitor General that all the impugned articles were brought to the Committee of the whole House and were debated in accordance with Rule 133(4) of the 2017 Parliamentary Rules. The said rule provides that;

"The Committee of the whole House shall consider proposed amendments by the committee to which the bill was referred and may consider proposed amendments on notice where the amendments were presented but rejected by the relevant committee or where for reasonable cause the amendments were not presented before the relevant committee".

It is evident from the exhibited proceedings in the Hansard that the Chairperson of the Legal Affairs committee informed the house that the issue of parliamentary tenure was not captured in their report. Honourable Medard Ssegona and Honourable Monica Amoding who were part of the committee also informed the house that no one had appeared before the committee stating that they wanted a seven year term extension for Parliament. ***(See Hansard of Tuesday 19th December at pages 5141 and 5143).***

There is no evidence that Honourable Michael Tusiime presented the amendments to the Legal Affairs Committee and it rejected them or that he had reasonable cause for not presenting the amendments before the relevant committee.

The long title of the Constitution (Amendment) (No.2) Bill, 2017 which is attached to the affidavit of Ms. Jane Kibirige the Clerk to Parliament, stated as follows-

> ***"An Act to amend the Constitution of the Republic of Uganda in accordance with articles 259 and 262 of the Constitution; to provide for the time within which to hold presidential,***

Parliamentary and local government council elections; to provide for eligibility requirements for a person to be elected as President or District Chairperson; to increase the number days within which to file and determine a presidential election petition; to increase the number of days within which the Electoral Commission is required to hold a fresh election where a presidential election is annulled; and for related matters."

The provisions of Sections 2, 5, 6, 8, 9 and 10 of the Constitution (Amendment) Act, 2018 are not reflected in the long title stated above. This is because they were extraneous matters that were introduced into the Bill in the last minute.

The memorandum of the Constitution (Amendment) Bill stated that the object of the bill was ***"to provide for time within which to hold presidential, Parliamentary and local government council elections under article 61, provide for eligibility of a person to be elected as President or District chairperson under Articles 102(b) and 183(2)(b), to increase the number of days within which to file and determine a presidential election petition under 104 (2) and (3), to increase the number of days within which the Electoral Commission is required to hold a fresh election where a presidential election is annulled under article 104(6); and for related matters".***

However, the long title of the Act mentions matters to do with the term of Parliament, limits on the tenure of the President and transitional provisions having regard to the amendments made.

These were extraneous matters as rightly observed by the Speaker of Parliament in the exhibited Hansard of Tuesday 19th December, 2017 at page 5137 when she stated thus;

"In the chairperson's report, there were two matters that were not originally part of the Bill; one is the issue of the term limits. We

would like to know under whose instructions that part was addressed. There was also the issue of adjusting the tenure of the President. We would like to know how it was canvassed. There was also the issue of adjusting the term of Parliament. Honourable Members, when we give responsibility to a committee like this with a Bill, we expect them to address the Bill and not to go into extraneous matters. Therefore, I would like to know from the chairperson to whom the recommendations you made were addressed to and how did they come to be part of your report".

The concerns by the Speaker were legitimate even though they were not followed through. Extraneous matters, that have not been the subject of public participation and consultation among other factors, cannot validly form part of a Bill such as one for amending an entrenched provision of the Constitution in this case.

In ***Law Society of Kenya v the Attorney General***, ***Constitutional Petition No.3 of 2016*** while dealing with a similar situation of extraneous matters brought into a Bill, the High Court of Kenya held as follows;

"Therefore by introducing totally new and substantial amendments to the Judicial Service Act 2011 on the floor of the House, Parliament not only set out to circumvent the Constitutional requirements of public participation but, with due respect, mischievously short- circuited and circumvented the letter and spirit of the Constitution. Its actions amounted to violations of Articles 10 and 118 of the Constitution".

I find this decision highly persuasive in our circumstances here. I already held that public participation was mandatory in respect of the amendments to ensure that the will of the people was taken into consideration in accordance with **Article 1** of the Constitution. Unfortunately, this was not done. The attempts by Parliament, in introducing Sections 2, 5, 6, 8, 9 and 10 of the

Constitution (Amendment) Act also amounted to a mischievous attempt at short-circuiting the requirement of public participation and consultation.

The introduction of the extraneous matters contained in these provisions into the Bill without being presented to the relevant committee was in violation of the Rules of Procedure of Parliament.

The provisions in Sections 2, 5, 6, 8, 9 and 10 of the Constitution (Amendment) Act 2018 were clearly belatedly introduced into the Bill originally presented by the Honourable Raphael Magyezi. This was in direct contravention of the Rules of Procedure of Parliament.

According to the uncontested evidence on record, these provisions were added after the Committee stage and were not the subject of any public participation and consultation.

The new provisions, which were included after the Committee stage deal with extension of the tenure of Parliament and local governments on one hand and the introduction of entrenched term limits on the office of the president on the other hand.

I must hasten to add that addition of new provisions in a Bill after the Committee stage is not illegal per se. The Rules of Procedure do envisage addition of new clauses in a Bill. However, such clauses must have been initially presented before the Committee. This is to ensure that the public's views and concerns in respect of such clauses is taken into account thereby fostering public participation.

In the result the enactment of sections 2, 5, 6, 8,9 and 10 breached the Rules of Procedure.

Therefore issue 7 is substantially answered in the affirmative in respect to Sections 2, 5, 6 and 8(a) and 10 of the Constitution (Amendment) Act 2018. The said clauses are invalid as they were passed in violation of the procedural requirements in the Constitution and the Rules of Procedure of Parliament.

Lastly, in reference to the numerous Rules of Procedure of Parliament that the Petitioners claim were infringed upon, I have closely studied the proceedings of Parliament contained in the exhibited Hansard and come to the conclusion that the Speaker fairly exercised her discretion under Rule 6 of the Rules of Procedure of Parliament given the circumstances in which she was operating; a very charged and tense environment. I will proceed to resolve each allegation under issue 7 as below;

Accessing Parliamentary chambers by the public

Regarding access to Parliament, Mr. Mabirizi's argument as I understood it was that he was personally denied access to the Parliamentary gallery yet the sittings of the House or of its Committees are meant to be public.

As a general rule, the Speaker has discretion on whom to admit to Parliament under rule 230 of the Rules of Parliament which provide for admission of the public and the press into the House and Committees

Rule 23 of the 2017 rules of procedure that Mr. Mabirizi submitted was contravened as far as is relevant provides:

23. Sittings of the House to be public

(1) *Subject to these Rules, the sittings of the House or of its Committees shall be public.*

(2) The Speaker may, with the approval of the House and having regard to national security, order the House to move into closed sitting.

(3) When the House is in closed sitting no stranger shall be permitted to be present in the chamber, side lobbies or galleries.

I am of the considered view that the above rule was inapplicable to Mr. Mabirizi and was not contravened because all the sittings of Parliament were public. The applicable rule in my view would be 230 which regulates admission of the

public into Parliament. This is under the rules that the Speaker may make from time to time enforceable by the Clerk.

However, as earlier noted in this judgment, the legal and evidential burden of establishing the facts and contentions which will support a party's case lies on the Petitioner. See ***Section 101 of the Evidence Act and the decision in Raila Odinga versus Uhuru Kenyatta and Anor, Presidential Election Petition No. 1 of 2017.***

I am alive to the law that, though a fact may be proved even by a single witness, in cases of this nature like election petitions, which are quite charged and may be partisan, there is need for other independent evidence. In this case, no other evidence was adduced from any other member of the public who saw Mr. Mabirizi, being chased away or threatened neither was there evidence from other members of the public who were with him or on their own but suffered the same fate. I find that it has not been proved to my satisfaction that there was denial of public access to the gallery of Parliament, and thus no breach of **Articles 1, 8A, 79, 208(2), 209, 211(3) and 212** of the Constitution was occasioned.

Issue 7(a) is answered in the negative.

Tabling of the Bill in the absence of the Leader and some members of the opposition,

The crux of the Petitioners' complaint as I understood it from the evidence and submissions presented before us is that the act of the Speaker of Parliament in allowing the debate of the Bill to continue despite the fact that the Leader of Opposition and some Members of Parliament from the opposition had walked out of Parliament to hold consultations amongst themselves was in contravention of and inconsistent with Articles **1, 8A, 69(2) (b), 71, 74, 75, 79, 82A, and 108A** of the Constitution.

I have already explained the import of **Article 1** of the Constitution on the fact that the people express their will through their representatives in Parliament

and referenda. I am also alive to the provisions of **Article 8A** which provides that Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives and directive principles of state policy and the mandate vested in Parliament to make relevant laws for purposes of giving full effect to clause (1) of this Article. I am also aware that Uganda is currently under a multi-party dispensation as enshrined in **Article 69** of the Constitution. Under the said system, provision is made in **Article 82 A** for the position of Leader of Opposition in Parliament.

I, however note that, it is not in dispute as is evidenced from the Hansard that the Hon. Winnie Kiiza indicated that she needed to move out and hold consultation with Members who had similar concerns as herself regarding the ensuing debate of the Bill. It is also not in dispute that when she moved out, the debate continued and that she in the course returned upon conclusion of her consultations. The question then is whether there is a law that bars Parliamentary debate regarding the said bill from continuing until the Leader of Opposition, who had walked out under such circumstances to return. Unfortunately, in their submissions, the Petitioners cited no such provision, whether in the Constitution nor the Rules of Parliament, and to hold otherwise would tantamount to this Court reading words into the Constitution and the Rules of Procedure.

I thus find no merit in issue 7(b) and answer it in the negative.

Permitting Ruling Party Members of Parliament to sit on the opposition side of Parliament

Mr. Mabirizi argued that by the Speaker ordering ruling party members to occupy the seats on the left hand side, it had the implication on the citizens of the country who watched parliamentary proceedings and could have triggered vacation of office of Parliament. This in his view would be triggered by voters

seeing their MPs on the left yet they voted them to sit on the right thus casting doubt on whether the MP still represented their view. He argued that the Speaker's actions duped the public that was watching the broadcast into thinking that opposition members participated yet they did.

It has not been proved that by inviting Members of Parliament to sit on the seats left vacant by the opposition members of Parliament, who had stormed out of Parliament, the Speaker in essence allowed Members of the Ruling Party to Cross to the Opposition.

As rightly conceded by Mr. Mabirizi in his own submissions, Crossing the Floor is interpreted in the legal sense rather than merely physical movement for purposes of occupying available space. In my view ***"crossing the floor"*** of Parliament must be with the intention of joining the Opposition or otherwise as envisaged in Article 83 of the Constitution. ***See Hon Theodore Ssekikuubo and Ors V. Attorney General, Supreme Court Constitutional Appeal No.01 of 2015.***

I would also like to point out that during the hearing of the petition; we did not get an opportunity to watch the "broadcast" that Mr. Mabirizi was referring to. This in my view would have helped us put the Speaker's statement of **"Honourable Members, there are seats here. Come and sit comfortably"** into context. There is no indication from the Hansard regarding the side that the Speaker was referring to. In the event that she was referring to seats on the opposition side, the Hansard does not reflect whether ruling party members actually occupied the said seats. Be that as it may, I am of the considered view that even if members crossed the floor, that would not render the Act unconstitutional.

Therefore issue 7(c) is answered in the negative

Signing of report by non-members of the committee.

In respect of the contention that certain Members of Parliament who were not originally members of the Committee signed its report as part of the majority, I

am of the view that this was not fatal. **Article 94 (3)** of the Constitution provides that;

> ***"The presence or the participation of a person not entitled to be present or to participate in the proceedings of Parliament shall not, by itself, invalidate those proceedings."***

The participation of the new members that were added to the Committee, even if irregular, cannot invalidate the Committee report because even if their number was deducted, the majority report still had enough signatures to pass it. Rule 187(2) of the 2017 Rules of Parliament sets the quorum of a select committee of Parliament if the committee consists of more than five members to be 1/3 of all the members. In this case, even if the members complained of were not to be considered, still the quorum would be met.

I therefore answer issue 7(d) in the negative

Speaker allowing Chairperson of the Legal Affairs Committee to present a report in absence of the Leader of Opposition and some Members of opposition.

The crux of the Petitioner's complaints as I understood it from the evidence and submissions presented before us is that the act of the Speaker of Parliament in allowing the debate of the Bill to continue despite the fact that the Leader of Opposition and some Members of Parliament from the opposition had walked out of Parliament to hold consultations amongst themselves was in contravention of and inconsistent with Articles **1, 8A, 69(2) (b), 71, 74, 75, 79, 82A, and 108A of the Constitution.**

I am alive to the provisions of **Article 1** regarding the sovereignty of the people of Uganda and **Article 8A** which provides that Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives and directive principles of state policy and the mandate vested in Parliament to make relevant laws for purposes of giving full effect to clause (1) of this Article. We are also aware that Uganda is currently under a multi-party dispensation as enshrined in **Article 69.** Under the said system, provision is made in **Article 82 A** for the position of leader of opposition in Parliament.

I note however, it is not in dispute as is evidenced from the Hansard that the Hon. Winnie Kiiza indicated that she needed to move out and hold consultation with Members who had similar concerns as herself regarding the ensuing debate of the Bill. It is also not in dispute that when she moved out, the debate continued and that she in the course returned upon conclusion of her consultations. The question then is whether there is a law that bars Parliamentary debate regarding the said bill from continuing until the Leader of opposition, who had walked out under such circumstances to return. Unfortunately, in their submissions, the Petitioners cited no such provision, whether in the Constitution nor the Rules of Parliament, and to hold otherwise would tantamount to this court reading words into the Constitution and the Rules of Procedure.

I thus find no merit in the issue and answer it in the negative.

Suspension of the 6 (Six) Members of Parliament

Article 28 of the Constitution essentially provides for a right to a fair hearing. This is one of the non derogable rights under **Article 44** of the Constitution. **Article 42** sets out the right to just and fair treatment for persons appearing before administrative bodies and tribunals and the right to seek legal redress from a court of competent jurisdiction against any unfair decisions.

Article 79 embodies the legislative mandate of Parliament to make laws on any matter for the peace, order development and good governance of Uganda, which mandate is exercisable through passing of bills into law as prescribed under **Article 91** of the Constitution. **Article 94** on the other hand empowers Parliament to make rules to regulate its own procedure, including the procedure of its committees, and **Article 259** regulates the power of Parliament to amend any provision of the Constitution in accordance with the procedure in Chapter 18.

The issue to determine is whether in suspending the 6 Members of Parliament, the Rt. Hon. Speaker contravened any of the afore-cited Constitutional

Provisions. There is no dispute that the Hon. Speaker suspended the 6 Members of Parliament. The circumstances leading to their suspension are evident from the affidavit evidence of the clerk to Parliament. What appears to be in dispute is the legality and constitutionally of the said suspension. This question can only be determined through determination of whether the actions of the Speaker were premised on any law, and, whether the conduct of the said Members of Parliament was such as would warrant their suspension from Parliament.

Counsel for the Parties appear to be in agreement and rightly so that in the exercise of their legislative mandate, Members of Parliament are governed by the Rules of Procedure of Parliament. These rules are made pursuant to **Article 94** of the Constitution. In exercise of its mandate to regulate its own procedure under **Article 94,** Parliament enacted the Rules of Procedure 2017. In doing so, Parliament is not barred from making rules that temporarily exclude disruptive Members from the sittings of Parliament. I find the decision in ***Democratic Alliance Versus the Speaker of the National assembly and 2 others CCT 86/15 (2016) ZACC 8 Constitutional court of South Africa*** quite instructive on this point.

In my view, the rationale is not difficult to appreciate. It is to facilitate and enable the Parliament to maintain internal order and discipline in its proceedings by means which it considers appropriate for this purpose. This would for example, include the power to exclude from Parliament for temporary periods, any member who is disrupting or obstructing its proceedings or impairing unreasonably its ability to conduct business in an orderly or regular manner acceptable in a democratic society. I am persuaded by the reasoning of the Supreme Court of South Africa in the case of ***National Assembly Vs. De Lille and Another 1999(4)SA 863 (SCA) at 869 D the supreme court of Appeal,*** where it was held *inter alia* that without some internal mechanism of control and discipline, the assembly would be impotent to maintain effective discipline and order during debates.

In the matter before us, I think that the import of Rules 7 (1) and (2), 77 and 79, 80, 86 and 88 is to confer upon the Speaker the mandate to ensure orderly proceedings in Parliament and a further mandate to order a Member of Parliament whose conduct has become disorderly and disruptive to withdraw from Parliament. The Speaker is equally empowered to suspend any such member. It has not been suggested that the said Rules are unconstitutional, neither is their purpose contested. What I am able to discern is that once the conduct of a member is disruptive of the proceedings and is deemed to offend the rules and decorum of the House, the Speaker wields the authority to suspend the said Members. The exercise of such powers derives from **Article 94**, under which the Rules invoked by the Speaker were enacted.

I find that the Speaker acted within her mandate to suspend the six members of Parliament for their unparliamentarily conduct.

I answer issue (f) in the negative.

Waiver of three sittings

On the issue of waiver of 3 sittings, there is no dispute that Parliament has the right to suspend its own rules if the motion to do so is seconded under rule 16 of the Rules of Procedure. Although it is true that the motion to suspend rule 201(2) was not seconded, this was not fatal to the subsequent legislative process.

Rule 201(2) provides as follows;

"**Debate on a report of a Committee on a bill, shall take place at least three days after it has been laid on the table by the Chairperson or the Deputy Chairperson or a Member nominated by the Committee or by the Speaker."**

The proceedings in the exhibited Hansard of Parliament indicate that the Speaker pointed out to the members that they had received copies of the report on their ipads four days prior to the sitting in question. Although the electronic transmission of the committee report to the Members of Parliament does not adequately satisfy the requirements of Rule 201(2), I am of the view that the spirit of the rule was complied with.

The purpose of the rule is clearly, to give adequate notice to Members of Parliament as to the contents of the report so that they are prepared to debate the same on the floor of Parliament. The Members of Parliament obtained copies of the Report in issue four days before debating the same. Consequently, the purpose of rule 201(2) was achieved.

Besides, I do not agree with the Petitioners that rule 201(2) strictly requires secondment of such a motion with the result that its absence would invalidate the motion passed. In my view, the requirement for secondment in the said rule is merely directory and not mandatory given the purpose of "secondment" as I will briefly explain.

Black Law Dictionary, 8th Edition defines the word ***"second"*** to mean (in Parliamentary law), ***"a statement by a member other than a motion's maker that the member also wants the assembly to consider the motion".*** The motion moved by the Deputy Attorney General, to suspend the operation of rule 201(2) was carried through since it was never objected to by any one and the house proceeded to act on the same by commencing debate of the Committee Report.

It is interesting to note that during debate Hon. Janepher Egunyu mentioned that she was supporting Hon Rukutana's motion.

The bone of contention is whether the debate could continue without the motion being seconded. The motion was moved when the Parliament was sitting as a committee of the Whole House and under Rule 59(2) of the rules of

Parliament, there is no requirement for secondment of motions moved in committee meetings. The rule provides;

59 (2) In Committee of the whole House or before a committee, a seconder of a motion shall not be required.

Therefore, I answer issue g (i) in the negative.

Closing debate before every member debates

Regarding closing of the debate before all Members of Parliament had contributed, Mr. Mabirizi faulted the Speaker for not giving chance to some Members of Parliament to debate on the bill. He submitted that since the Members of Parliament were representatives of the people, it was not right for the Speaker to prevent them from presenting the views of their people.

My attention was drawn to extracts from the Hansard for the contention that some Members were denied the opportunity to deliberate on the Bill.

I have perused **Article 79 (1) (2)** which empowers Parliament to make laws in Uganda. I have also considered **Article 262** that allows Parliament to amend provisions of the Constitution, as well as the Rules of Procedure of Parliament that regulate debate and proceedings in Parliament. I have not come across any specific provision, and none was cited to us as making it a mandatory requirement that for any constitutional amendment Bill to be enacted into law, deliberations must be received from each and every Member or majority of the Members of Parliament. In my view, the only condition precedent set under **Article 262** is the requirement for the Bill to be supported by 2/3 of all the Members of Parliament.

Be that as it may, from the Hansard, 124 Members of Parliament had contributed before the Speaker closed the debate. The Leader of opposition raised her concern about being denied an opportunity to give the views of her people. In reply, the Speaker blamed her for wasting time that should have been used for more Members to debate. She stated that ***"Honourable***

Members, we wasted the whole of Monday under the command of the Leader of opposition. That is the time we had planned to give more Members time. He who comes under the law comes with clean hands. Your hands are not clean". (See Hansard of 20th December, 2017 pages 5226 and 5228).

I find that the Leader of Opposition equally frustrated the Speaker's effort to have more members contribute to the debate. This however, did not adversely affect the passing of the Act.

I answer issue g (ii) in the negative.

Failing to close doors

As regards closing of doors counsel Lukwago faulted the Speaker for failure to close the doors of chambers and drawing the bar during the time of voting on the impugned Constitutional (Amendment) Bill which contravened Rule 98(4) of the Rules of Procedure of Parliament.

A reading of the Hansard of 20th December, 2017 at page 5234 indicates that the Speaker was aware about her duty to close the doors during voting but she explained to the house why it was not possible. She said ***"Honourable Members, ideally I was supposed to have closed the doors under rule 98(4). However, that exists in a situation where all the Members have got seats, but in this Parliament, 150 Members do not have seats. Therefore it is not possible to lock them out and that is why I did not lock the doors. I hope there is nobody in the lobby. Is there anybody who has not voted? We now close the ballot."***

This is yet another example where the prevailing circumstances in the country have to be taken into consideration while interpreting legislation. The house was full and there were no seats for all Members of Parliament. The rules could not be adhered to the letter.

Page 5269 of the Hansard that counsel Lukwago referred to where 55 members who were in the lobby were called to vote happened on the same day after the Speaker's explanation above. I also note that of the 55 members called from the lobby, 34 were absent. Further, the Members alluded to were not proved to have been strangers. They were Members of Parliament duly entitled to vote and were called and they voted. This Court cannot ignore the challenge of space in the House, with the now expanded number of Members of Parliament.

In my view, in the absence of any evidence that strangers took advantage of the failure to close the doors and voted, the allegation of any breach of Rule 98 of the Rules of Procedure is legally and factually untenable. I re-iterate the position of the law enunciated in the case of ***Nangjibhai Prabhudas & Co. Ltd versus Standard Bank Ltd [1968] E.A*** 670 that the Courts should not treat any incorrect act as a nullity with the consequence that everything founded thereon is itself a nullity, unless the incorrect act is of a most fundamental nature. In my view the alleged noncompliance is a procedural irregularity, which is not of a most fundamental nature, as to render a law null and void.

I am therefore of the considered view that failure to close doors during voting did not render the Amendment Act unconstitutional.

I therefore answer issue g (iii) in the negative.

In conclusion, issue 7 (a), (b), (c), (d), (e), (f), g (i), g (ii) and g (iii) of are answered in the negative for the reasons explained.

I will now resolve issues 7 (g) (iv) and 8 together because they are interrelated.

Observance of 14 sitting days between 2nd and 3rd reading of the Bill

I already held that each clause in the Constitution has a specific amendment procedure that must be complied with. It is therefore not correct to argue, in an omnibus manner, that the entire Constitution (Amendment) Act 2018 could

only be validly amended if the second and third readings of the Bill were separated by 14 days.

Article 263 of the Constitution which makes provisions for separation of sittings provides as follows;

(1) The votes on the second and third readings referred to in articles 260 and 261 of this Constitution shall be separated by at least fourteen sitting days of Parliament.

(2) A bill for the amendment of this Constitution which has been passed in accordance with this Chapter shall be assented to by the President only if—

(a) .....

(b) in the case of a bill to amend a provision to which article 260 or 261 of this Constitution applies, it is accompanied by a certificate of the Electoral Commission that the amendment has been approved at a referendum or, as the case may be, ratified by the district councils in accordance with this Chapter.

The clauses contained in the Constitution (Amendment) Act 2018 did not require separation of the second and third readings but for the fact that Sections 2, 6, 8 and 10 amended by infection or implication other provisions of the Constitution which were not amended. The amendment of those sections would require the 14 sitting day's separation.

The articles which were amended by infection or implication and whose specific amendment procedure required separation of the 2nd and 3rd readings by 14 sitting days of Parliament include **Article 1** on the people's sovereignty. I already explained in some detail the manner in which the cited provisions of the Amendment Act infected or indirectly amended **Article 1 and 77(4)** of the Constitution.

Articles 1 and 77(4) of the Constitution were not expressly amended but by infection and they would have required separation of the 2nd and 3rd readings in Parliament. It follows therefore that all the provisions in the Constitution (Amendment) Act 2018 which amended these articles by infection cannot stand. This is because they cannot be validly passed without amending **Articles 1 and 77(4)** which require separation of the 2nd and 3rd readings by 14 sittings days of Parliament.

Consequently, Sections 2, 6, 8 and 10 are invalid on this ground as well. However, the rest of the provisions in the Constitution (Amendment) Act 2018 which did not require separation of the 2nd and 3rd readings in Parliament are not affected and would remain valid. For this reason, I cannot answer this issue wholly in the affirmative. It succeeds only in part in respect of Sections 2, 6, 8 and 10 that infected **Article 1** by 14 sitting days of Parliament.
Issue 7(g)(iv) and 8 therefore succeed only in one part.

Speaker's Certificate of Compliance

The requirement for the Speaker of Parliament to certify compliance with provisions on amendment of the Constitution prior to grant of presidential assent to a Bill amending the Constitution is provided for under **Article 263** which states as follows;

263. Certificate of compliance.

(2) A bill for the amendment of this Constitution which has been passed in accordance with this Chapter shall be assented to by the President only if—

(a) It is accompanied by a certificate of the Speaker that the provisions of this Chapter have been complied with in relation to it; and

(b) in the case of a bill to amend a provision to which article 260 or

261 of this Constitution applies, it is accompanied by a certificate of the Electoral Commission that the amendment has been approved at a referendum or, as the case may be, ratified by the district councils in accordance with this Chapter.

The Speaker's Certificate of Compliance was exhibited at the hearing of the consolidated petitions. It was dated 22nd December 2018 and it provides as follows;

"I certify that the Constitution (Amendment) (No.2) Bill, 2017 seeking to amend the following articles – (a) article 61 of the Constitution (b) article 102 of the Constitution (c) article 104 of the Constitution; and (d) article 183 of the Constitution; was supported by 317 Members of Parliament at the second reading on the 20th day of December, 2017 and supported by 315 Members of Parliament at the third reading on the 20th day of December 2017, in Parliament, being in each case not less than two thirds of all Members of Parliament, the total membership of Parliament at the time, being 434; and that the provisions of articles 259, 262 and Chapter Eighteen of the Constitution have been complied with in relation to the Bill."

I have taken the liberty to reproduce the contents of the entire Certificate of Compliance which the Speaker of Parliament, Rebecca Alitwala Kadaga, sent to the President accompanying the Constitution (Amendment) (No.2) Bill, 2017 for Presidential assent because the content differs from what the Bill provided.

The Bill, named Constitution (Amendment) Act No.1 of 2018 in actual fact specifically amended **Articles 61, 77, 102, 104, 105, 181, 183, 289 and 291**. Curiously, the Speaker's Certificate only stated **Articles 61,102,104 and 183** of the Constitution as having been amended in compliance with **Articles 259, 262** and Chapter 18 of the Constitution. Where did that leave the omitted amendments in respect of **Articles 77, 105, 181, 289 and 291**?

There is no doubt in my mind that the exclusion by the Speaker, of **Articles 77,105,181,289 and 291,** from the Certificate of Compliance accompanying the Constitution (Amendment) Bill sent for presidential assent is fatal. It is a

mandatory requirement under **Article 263** that must be met in respect of each amended Article of the Constitution and cannot be waived in any circumstance. In ***Paul Semwogerere & Others vs Attorney General (supra),*** Justice Oder held that ***"It is my view that the Constitutional procedural requirements for the enactment of legislation for amendment of the Constitution are mandatory conditions, which cannot be waived by Parliament as mere procedural or administrative requirements. They are conditions to be complied with. Mandatory Constitutional requirements cannot simply be waived by Parliament under its own procedural rules".***

This omission *per se* invalidates Sections 2, 5, 6, 8, 9 and 10 of the Constitution (Amendment) Act 2018 on grounds that the Speaker of Parliament did not certify that **Articles 77, 105, 181, 289 and 291** had been amended in strict compliance with the provisions of the Constitution. As already determined above, the purported amendments in respect of these Articles were fundamentally flawed and invalid for other reasons already highlighted.

I already highlighted, for instance, that the amendments in respect of **Article 77(3)** infected **Articles 1** whose amendment would require a referendum to be held prior to presidential assent of the Bill. Needless to state, no such referendum was held mainly because Parliament did not appreciate that the impugned amendments did not require express amendments of other provisions already detailed which would require a referendum as part of their amendment process.

However, I will hasten to add that the Speaker's Certificate is not invalid as asserted by the Petitioners. The only logical result of the omission of certain clauses in the certificate is that the omitted Articles were not validly amended.

The Speaker's Certificate only applies to the specific Articles that were stated therein.

Consequently, the entire Act is not invalid on account of this omission by the Speaker of Parliament. I therefore answer this issue partly in the affirmative in respect of the clauses which were not mentioned in the Certificate. Those particular clauses were not validly enacted whereas those that were mentioned remain valid.

To that extent this issue only succeeds in part

Reintroduction of Presidential Term Limits

I have had the advantage of reading in draft the judgment prepared by my brother Alphose Owiny-Dollo the Deputy Chief Justice on this issue and I agree with the reasoning and conclusion he makes. I only wish to add the following;

Hon. Nandala Mafabi moved a motion on 20/12/2017 to amend **Article 105** of the Constitution and re-introduce a two term limit for the tenure of the President. He was specific that the amendment should be entrenched under **Article 105 (1) and (2)** of the Constitution**.** The proposal was passed and enacted as section 5 of the Constitution (Amendment) Act No. 1 of 2018. This section in my view is a fairly progressive provision that sought to reintroduce term limits on the tenure of president into the Constitution. It must be recalled that prior to the first set of amendments to the Constitution in 2005, there was a clause restricting a president to serving for two terms.

The effect of Section 5 of the Act was to reintroduce the said clause. I will not hesitate to state that it is an ideal and good clause to have in our Constitution especially given our country's history of political and constitutional instability. I am not convinced by the Petitioners' argument that reintroducing the clause on term limits amounts to usurping the people's sovereignty because the people had previously vouched for this limitation.

The claim that amending the Constitution to introduce an entrenched clause requires a referendum is not backed by any Constitutional provision. I do not see how such a clause would tamper with the people's sovereignty. It is not correct to claim that Parliament cannot introduce an entrenched clause into the Constitution by way of amendment.

As I already held, provided all procedural formalities are complied with and such a clause does not infect any other provision, Parliament is free to introduce an entrenched clause into the Constitution by way of amendment. I therefore reject the Petitioners' arguments in this regard.

Sadly, for the reasons I highlighted at the onset, Section 5 of the Constitution (Amendment) Act, no matter that I consider it to be a progressive and good provision, is invalid for not having complied with the provisions of **Article 263 (2)(a)** of the Constitution.

The Speakers certificate of compliance which I have reproduced above does not mention Article 105 (2) as one of those which was amended.

In ***Ssemwogerere & Others V Attorney General (supra)*** the Supreme Court held that the requirements of chapter 18 of the Constitution were mandatory and Parliament could not waive them. I am bound by this decision and I oblige. Therefore issue 10 is answered in the affirmative.

Harmonizing of presidential and Parliamentary terms

Section 9 of the Constitution (Amendment) Act was enacted on the assumption that Parliament would have a term of 7 years whereas the President would only serve for 5 years and then go for re-election. The provision therefore sought to provide for a referendum to extend the tenure of president to 7 years ostensibly

to maintain the Constitutional objective of having the presidential and Parliamentary elections in the same electoral cycle.

This provision is most surprising for a variety of reasons. Firstly, the Constitution already provides for the duration of the tenure of an incumbent president. For avoidance of doubt, **Article 105(1)** provides for the tenure of president which is five years. It states that ***"a person elected President under this Constitution shall, subject to clause (3) of this article, hold office for a term of five years".***

Secondly, the provision on length of tenure of a president is entrenched and can only be amended after a referendum. **Article 105(1)** of the Constitution is one of the entrenched provisions in the Constitution under **Article 260**. Consequently, its amendment requires first and foremost that its Bill must be passed with two thirds majority at second and third reading. Most importantly, the second and third readings must be separated by 14 sitting days of Parliament.

Lastly, before presidential assent is granted to a Bill amending an entrenched clause such as **Article 105(1),** a referendum must have been held and the Certificate of the Electoral Commission required under **Article 263 (2) (b)** certifying the results must accompany the Bill alongside the Speaker's Certificate.

In view of these express requirements of the Constitution, I have considerable difficulty to appreciate the purpose of Section 9 of the Constitution (Amendment) Act whose aim is to provide for a referendum ostensibly to certify the extension of the presidential term to seven years. It is most ridiculous to state the least.

The manner in which an amendment to the length of tenure of president is effected is specifically provided for as I have stated above. Suffice to note that the Constitution (Amendment) Act 2018, which is already assented to by the President, was passed without separation of the 2nd and 3rd readings by 14 days.

Further, no referendum was held prior to presidential assent and it goes without saying, that there was no certificate from the Electoral Commission. The Speaker of Parliament also omitted this amendment, perhaps wisely, from the Certificate of Compliance that accompanied the Bill for presidential assent.

Consequently, Section 9 of the Act is unconstitutional on this account as well. It was passed in gross disregard of the provisions of **Articles 105(1), 260 and 263** respectively.

Issue 11 is therefore answered in the affirmative.

Presidential Age Limit

It is contended by the Petitioner in Constitutional Petition No.10 of 2018 that Sections 3 and 7 of the Constitution (Amendment) Act 2018 which remove age limits for the President and district Chairperson amended by infection **Article 1** of the Constitution on

The power of the people to determine how they should be governed. The two sections state thus;

3. Replacement of Article 102 of the Constitution

For article 102 of the constitution, there is substituted the following-

(a) is a citizen of Uganda by birth

(b) is a registered voter; and

(c) has completed a minimum formal education of advanced level standard or its equivalent

(3) A person is not qualified for election as president if that person

(a) Is of unsound mind;

(b) Is holding or acting in an office the functions of which involves for or in connection with the conduct of an election;

(c) Is a traditional or cultural leader as defined in Article 246(6) of this Constitution;

(d) Has been adjudged or otherwise declared bankrupt under any law in force in Uganda and has not been discharged;

(e) Is under a sentence of death or a sentence of imprisonment exceeding nine months imposed by any competent court without the option of a fine;

(f) Has, within seven years immediately preceding the election, been convicted by a competent court of an offence involving dishonesty or moral turpitude; or

(g) Has, within seven years immediately preceding the election been convicted by a competent court of an offence under any law relating to elections conducted by Electoral Commission.

7. Amendment of article 183 of the Constitution

Article 183 of the Constitution is amended in clause (2) by repealing paragraph (b)

The Respondent disagrees and presents a contrary argument that the amendments removing the minimum and maximum age restrictions on eligibility to stand for president simply widen the pool of potential leaders for the people to select from.

The Petitioners also fault the Private Members' Bill in this regard for its claim, in the memorandum to the Bill that the minimum and maximum age

restrictions in the Constitution were discriminatory thereby opening up a new discrimination category of age under **Article 21(3)** of the Constitution. In their view, this is not correct since it also has an effect of undermining the original constituent powers exercised by the members of the Constituent Assembly that passed those restrictions.

I have not been able to come across any precedent from any jurisdiction in support of the contention by the Petitioners that removal of minimum and maximum age restrictions from the Constitution amounts to subverting the power of the people whose representatives passed those provisions in the first place. The Petitioners did not avail any such precedent for their novel proposition. It is probable that none exists.

However, there are judicial precedents in support of the Petitioners' arguments to the effect that minimum and maximum age restrictions do not amount to prohibited discrimination categories in law. See ***Wilfong v. State, No. 464,561 (19th Jud. Dist. Ct., La., filed Sept. 14, 1999) and Wurtzel v. Falcey.' 354 A.2d 617, 618 (N.J. 1976)*** where the argument, that minimum age restrictions on eligibility to stand for public office is discriminatory, was summarily rejected by a Trial Court and the New Jersey Supreme Court in the United States of America respectively.

In my view, the question as to whether age restrictions are discriminatory does not assist the Petitioners' case at all. They are simply making the case that the Honorable Raphael Magyezi provided some partially erroneous justification for his Bill in so far as he claimed that minimum and maximum age restrictions are discriminatory. To that extent, I agree with them.

However, the heart of the matter is whether the provisions in the Act that have the effect of scrapping the minimum and maximum age restrictions in the Constitution under grounds for eligibility to stand for the offices of president and District chairperson are unconstitutional. Do they contravene any existing Constitutional provisions?

It is contended that since the people, through their representatives in the Constituent Assembly, placed those restrictions in the Constitution and that Parliament does not have powers to remove them; that in doing so under Sections 3 and 7 of the Act, it has infected **Article 1** on the people's sovereignty. In Counsel for the Petitioners' view, the basic structure doctrine prohibits such an amendment.

With the greatest respect, I am unable to agree with that proposition. If the argument is to hold, then it would logically mean that Parliament has absolutely no powers to amend any provision of the Constitution since the entire Constitution was passed by people's representatives in a Constituent Assembly. This in my view is over stretching the application of the amendment by infection principle which if accepted would in the end render the principle superfluous.

The provisions on amendment of the Constitution were enacted by the people's representatives in the Constituent Assembly. Chapter 18 of the Constitution exists for that sole purpose. The argument by the Petitioners that the original Constituent Assembly did not make a mistake in enacting the age restrictions is misleading and not tenable as it would logically be applied to prohibit all possible amendments to the Constitution. I am therefore unable to agree with the contention that Sections 3 and 7 of the Act indirectly infect **Article 1** of the Constitution.

Further, I am not convinced that minimum and maximum age restrictions on eligibility for the offices of president and district chairperson in the Constitution amount to such fundamental pillars of the Constitution that doing away with them leaves us with a different instrument altogether. That would be a gross misunderstanding of the basic structure doctrine. Age restrictions cannot be described as part of the values which are enshrined in our Constitution alongside a sacrosanct principle such as democratic governance if it were, then they would have been entrenched just like other core values were

entrenched in **Articles 260** and **74(1)** of the Constitution. **Article 74(1)** of the Constitution makes it mandatory for the referendum to be held before the political system in the country is to be changed.

Finally, I have failed to appreciate the relevance of **Article 21** of the Constitution in supporting the Petitioners' case. The Article prohibits discrimination and lists certain categories which do not include age. Sections 3 and 7 of the Act are certainly not inconsistent with **Article 21** in its present form. If anything, the Respondent's argument that Sections 3 and 7 have the effect of widening the pool of individuals eligible to stand for the offices of president and district chairperson sounds more persuasive.

Article 102(b) provides that ***"a person is not qualified for election as president unless that person is not less than 35 years and not more than 75 years of age." And*** **Article 183(2) (b)** states that ***"a person is not qualified to be elected a District chairperson unless he/she is at least 35 years and not more than 75 years of age."***

A reading of **Articles 102 (b) and 183(2) (b)** which before the amendment set age limits shows that the two constitutional provisions are not entrenched anywhere in the Constitution. The assertion by the Petitioners that by amending the two clauses, the will of the people was usurped is not tenable and **Articles 1 and 2** of the Constitution were neither amended by colourable legislation nor infection.

A reading of the Hansard attached to the affidavit of Ms Jane Kibirige the clerk to Parliament shows that members went for consultations from 27/9/2017 after the 1st reading. She stated in paragraph 38 of her affidavit that the august house reconvened on the 18th December 2017 after carrying out consultations. Many members while contributing to the debate on 20/12/2017 stated that they had consulted their constituents and they were giving the views of the people on the Amendment Act. Hon. Robert Kyagulanyi, Member of Parliament, Kyadondo East Constituency when making his contribution on the Amendment

Bill in Parliament stated that he had traversed the whole country from North to South and from East to West and everywhere he went he talked to people and that the majority where saying do not amend the Constitution.

Hon. Ogenga Latigo averred in paragraph 27 of his affidavit that he held consultations after which he attended the Parliamentary session on 18th December 2017 when the Constitution (Amendment) Bill (No. 2) 2017 was presented to the House for the second reading. Clearly there was consultation regarding sections3 and 7 of the Amendment Act.

In enacting sections 3 and 7, Parliament followed all the procedural requirements in the Constitution, Acts of Parliament and its rules of procedure. There was a bill, consultation was carried out, the bill was gazetted, the bill was read for the first time, and it was referred to the appropriate committee, debated and passed. There was a certificate of financial implications by the minister of finance, a certificate of compliance by the speaker of Parliament and the Presidential assent.

I find that in enacting sections 3 and 7 of the amendment Act, Parliament did so within its powers provided in the Constitution

Consequently, I answer this issue in the negative and hold that Sections 3 and 7 of the Constitution (Amendment) Act 2018 are constitutionally valid and not inconsistent with any provision of the Constitution.

Continuance in office of the incumbent President upon attaining 75 years of age

The crux of the argument advanced in respect of this issue is that upon attaining the age of 75 years, the incumbent President would be in violation of the Constitution since only an individual below the said age is eligible to be President.

The Attorney General contends that this argument is rendered moot by the passing of the Constitution (Amendment) Act 2018. Mr. Male Mabirizi disagrees. He rightly relies on the **Ssemwogerere** decision to point out that since the Constitution (Amendment) Act is still subject of legal challenge, the issue is not academic.

In view of my findings in respect of the validity of Sections 3 and 7 of the Constitution (Amendment) Act 2018, I hesitatingly resisted the temptation to agree with the Attorney General that this issue is now moot.

The East African Court of Justice in ***Attorney General of the United Republic of Tanzania Vs African Network for Animal Welfare, Reference No. 3 of 2014***, described legal mootness as follows; ***"...the doctrine of mootness or academic adventure of the Courts of Justice is well known. The raison d'etre of Courts of justice is to give binding decisions on live disputes .... If there is no live dispute for resolution ... a Court of Justice would be wasting the public resources of time, personnel and money by engaging in a futile and vain exposition of the law..."***

The question that I have to answer is whether answering this question is a mere academic exercise owing to my findings on validity of Sections 3 and 7 of the Amendment Act. If the Constitutional Court was the final arbiter on matters of interpretation of the Constitution, I have no doubt in my mind that this issue would be moot and not resolving any live dispute.

However, I have considered the fact that the Petitioners in these consolidated petitions have an automatic right of appeal to the Supreme Court. While I cannot speculate as to whether they will choose to exercise that right, I would be doing them a disservice if I declined to determine this matter and the same is subsequently referred back to this Court by the Supreme Court as it previously happened in the ***Ssemwogerere cases.***

I will therefore, briefly address this point to avoid such a possibility and obtain closure for the Petitioner, Male Mabirizi, at least in this Court.

The Court of Appeal, in ***Ouma Adea vs Oundo Sowedi & Another, EPA No.51 of 2016,*** determined a similar point regarding eligibility of a candidate for election when he is under a criminal conviction under the Anti-Corruption Act that is subsequent to appeal.

The Court considered the import of Section 95 of the Parliamentary Elections Act which preserves a Member of Parliament in Parliament when he/she has been similarly convicted. The question was whether such Member, though eligible to remain in the House, would be validly nominated in a subsequent election while he/she pursues his/her appeal.

Their Lordships held that requirements at the time of nomination are different from the import of Section 95 of the Parliamentary Elections Act which preserves in office a convicted Member of Parliament. In their view, the said Section 95 is only directed to those already in office and is silent about their eligibility for nomination in subsequent elections if they are still pursuing appeals against conviction.

I think the logic of the said decision applies to the question of a candidate who attains the age of 75 while already in office. This particular requirement, of maximum age, only operates at the time of nomination and not subsequently. If the framers of the Constitution had intended it to be otherwise, they would have expressly said so. Surely, they were alive to the fact that candidates close to the age of 75 could potentially offer themselves for nomination.

If they intended that no one should occupy the office of president above the age of 75, they would have expressly said so or simply placed the maximum age for nomination at 70 years instead. They chose not to do so. I therefore do not agree with the Petitioner, Mr Mabirizi, that a sitting president who attains the age of 75 is liable to vacate office. That is to misconstrue the import of the age qualification.

I therefore answer issue 12 in the negative.

What remedies are available to the parties?

I have taken the arguments advanced by both sides into consideration. I already held that Sections 2, 5, 6, 8, 9 and 10 of the Constitution (Amendment) Act 2018 are unconstitutional for the reasons discussed.

On the other hand, I also held that Sections 3 and 7 of the Constitution (Amendment) Act are valid. Additionally, none of the parties had any problem with Sections 1 and 4 of the Act. Consequently, Sections 1, 3, 4 and 7 of the Act remain in place and have not been struck down.

The Learned Solicitor General submitted that in the event that we find certain clauses of the impugned Act to be invalid they should be declared null and leave the rest that are valid. That approach was applied by the Supreme Court in ***Attorney General Vs. Salvatori Abuki Supreme Court Constitutional Appeal No. 1 of 1998*** when Section 7 of the Witchcraft Act was nullified but Sections 2 and 3 were upheld as valid.

Black's Law Dictionary, 9th Edition defines severance as;

> ***"The separation, by the Court, of the claims of multiple parties either to permit separate actions on each claim or to allow certain interlocutory orders to become final."***

Lord Denning MR, in ***Kingsway Investment (Kent) Ltd V Kent County Council (1969) 1 ALL ER 601 at 611*** stated that-

> *"This question of severance has vexed the law for centuries, ever since* ***Pigot's case (1558-1774) ALL ER Rep. 50****. Seeing that in this case the condition is said to be void because it is repugnant to the Act, I am tempted to go back to the old distinction taken by Lord Hobart when he said "the statute is like a tyrant; where he comes he makes all void; but the common*

law is like a nursing father, makes void only that part where the fault is, and preserves the rest."

I prefer to take the principle from the notes in the English Reports in Pigots Case "The general principle is, that if any clause, etc., void by statute or by a common law, be mixed up with good matter which is entirely independent of it, the good part stands, the rest is void..... but if the part which is good depends upon that which is bad, the whole instrument is void."

Similarly, in **South African National Defence Union vs Minister of Defence & another Constitutional Court Case No. 27 of 1998**, the same approach was applied as is evident from this passage,

"The offending provisions, however, can be rendered constitutionally valid by the technique of severance applied to both subsection (2) and (4) of section 126B. It is quite possible to sever the various references to "acts of public protest" from section 126B (2) entirely as well as the definition of "act of public protest" contained in section 126B(4). The challenged provisions would then remain only as a prohibition against strike action and the incitement of strike action, something which the applicant did not seek to challenge."

In my view, that is the proper course of action to take. The provisions of the Act that were either not challenged or challenged unsuccessfully are good law and those amendments to the Constitution that they provide for must be upheld. In the circumstances, I hold that Sections 2, 5, 6, 8, 9 and 10 of the Constitution (Amendment) Act 2018 are hereby struck down and expunged from the Act. Sections 1, 3, 4 and 7 of the Act are upheld since they are constitutionally valid.

Costs

On the question of costs, the Petitioners brought various petitions with considerable merit and have been successful in respect of various provisions of the Act. However, the Attorney General also successfully defended portions of the Act that have been upheld as having been validly passed. Certainly, a prayer for damages by one of the Petitioners is misplaced in matters of this nature. He did not demonstrate that he suffered any special loss by reason of the enactment of the Act.

I have taken into consideration that these petitions touch a matter of great public importance and Constitutional governance of this country that transcend any unique benefit to the Petitioners. However due to the peculiar circumstances of this case including that it was heard in Mbale and the Petitioners had to incur costs beyond what they would have ordinarily incurred, I find it appropriate that costs to be paid to them.

The Hon. Deputy Chief Justice has in his judgement set the amount to be paid. I agree with the reasons and the award he has made.

I therefore make the following orders in respect of the consolidated petitions;

1. A Declaration is hereby issued that Sections 2, 5, 6, 8, 9 and 10 of the Constitution (Amendment) Act, 2018 are unconstitutional as the same are inconsistent with various provisions of the Constitution.

2. An order is hereby issued expunging Sections 2, 5, 6, 8, 9 and 10 from the Constitution (Amendment) Act 2018.

3. A declaration is hereby issued that sections 1, 3, 4 and 7 of the Constitution Amendment Act are valid.

4. Professional fees of UGX 20,000,000/= (Twenty million) awarded in respect of each petition save for constitutional petitions' No. 49 of 2017 and constitutional petition No. 3 of 2018 in addition two thirds of the taxed disbursements are awarded to all petitioners.

Dated at Mbale this 26 day of July 2018

HON. MR. JUSTICE BARISHAKI CHEBORION
JUSTICE OF APPEAL/CONSTITUTIONAL COURT