THE BASIC STRUCTURE DOCTRINE AND CONSTITUTIONAL RESTRAINT IN UGANDA: THE "AGE LIMIT" CASE

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African dictatorships never lose elections because such elections are neither peaceful, free nor fair.

Willy Mutunga[1]

ABSTRACT

This Article discusses the scope and application of the Basic Structure Doctrine, against the background of the judgment of the Constitutional Court and Supreme Court of Uganda in the case of *Male Mabirizi Kiwanuka and Others v. Attorney General*, wherein the two courts found that an amendment to the Constitution of Uganda removing the "age-limit" qualification to stand for president did not violate the Doctrine and was valid. It is argued that given Uganda's political history the clause, which was designed to prevent the sitting president from taking advantage of his incumbency to perpetuate himself in power, was part of the basic structure of the Constitution. As it was, the impugned amendment removed the last measure against a life presidency, and is a recipe for instability. The court decisions were a missed

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[1] Mutunga, Willy, "Constitutions, Law and Civil Society: Discourses on the Legitimacy of Peoples' Power," in Oloka-Onyango, Joe (ed.) *Constitutionalism in Africa: Creating Opportunities, Facing Challenges*, Kampala: Fountain Publishers, 2001, p. 140.

> opportunity to assert the power of the Judiciary as the foremost defender of constitutionalism and the rule of law.

Key words: *Basic Structure, Constitution, Constitutionalism, amendment, age-limit, life-presidency.*

1. INTRODUCTION

The 20th day of December 2017 marked the climax of one of the most dramatic events in the constitutional history of Uganda. On that day an extremely acrimonious Constitution amendment process culminated in the enactment of the Constitution (Amendment) Act, 2018[2] by which Article 102(b) of the 1995 Constitution of Uganda was repealed, removing the "age-limit" qualification to stand for president. The clause had provided:

> A person is not qualified for election as President unless that person is not less than thirty-five years and not more than seventy-five years of age.

A week later, the President assented to the Bill, which thereby became law. Within a short time, several petitions were filed in the Constitutional Court challenging the amendment.[3] The petitions were consolidated and heard by the Court sitting at Mbale in Eastern Uganda. On 26th July, 2018, the Court delivered its judgment, dismissing the petitions by a majority of 4 to 1, Justice Kenneth Kakuru dissenting.

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[2] Act 1 of 2018.

[3] These were Constitutional Petition No. 49 of 2017, *Male Mabirizi Kiwanuka v. Attorney General*; Constitutional Petition No. 3 of 2018, *Uganda Law Society v. Attorney General*; Constitutional Petition No. 5 of 2018, *Gerald Karuhanga v. Attorney General*; Constitutional Petition No. 10 of 2018, *Prosper Businge v. Attorney General*; and Constitutional Petition No. 13 of 2018, *Abaine Jonathan Buregyeya v. Attorney General*.

Three separate appeals were filed in the Supreme Court by Male Mabirizi, Gerald Karuhanga and 5 others, and Uganda Law Society which were later consolidated and heard under Constitutional Appeal No. 2 of 2018. The 112 grounds of appeal the appellants had raised in their Memoranda of Appeal were reduced to eight issues. Seven of these were procedural in nature, relating to whether the amendment was valid, considering the process though which and circumstances under which it was effected. However, the first ground, which is our concern in the present discourse, related to what is known in constitutional theory as the Basic Structure Doctrine (BSD) and was worded as follows:

> Whether the learned justices of the Constitutional Court misdirected themselves on the application of the basic structure doctrine.

On 18th April, 2019 the Supreme Court, by a majority of 4 to 3, upheld the majority decision of the Constitutional Court and, therefore, the amendment. Chief Justice Bart Katureebe and Justices Stella Arach-Amoko, Ruby Opio-Awerei and Jotham Tumwesigye dismissed the appeal, while Justices Lilian Tibatemwa-Ekirikubinza, Eldad Mwangusya and Paul K. Mugamba dissented.

This paper addresses the content of the Basic Structure Doctrine, its scope and limitations. It then comments on the decisions of the two courts in *Male Mabirizi Kiwanuka & Others v. Attorney General.* Finally, it discusses the implications of the decision for constitutional restraint on governmental power, or what is generally known as constitutionalism.

2. THE BASIC STRUCTURE DOCTRINE: A GENERAL OVERVIEW

The Basic Structure Doctrine was enunciated by the Supreme Court of India in one of its most important decisions ever, in the case of *Kesavananda Bharati v. The State of Kerala.*[4] 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. These features constitute the *inviolable core* of the 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. The rationale of the 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 rewriting the Constitution, which parliament has no power to do. The court held that as the Supreme Court of the land, it had a limited power to review and strike down amendments which went to the very heart and core of the Constitution, by seeking to alter its basic structure.[5] The BSD was upheld and relied on in subsequent decisions in India itself, and in many other jurisdictions.[6]

In *Executive Council of Western Cape Legislature v. The President of the Republic of South Africa & Others*,[7] the

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[4] (1973) 4 SCC 225.

[5] For the Author's earlier discussion of the doctrine, published just as the moves to amend the Uganda Constitution were reaching the fever pitch, see Benson Tusasirwe, "Constitution amendment is void as it violates 'Basic Structure Doctrine'" *Daily Monitor* (Kampala, Uganda), 25th October, 2017.

[6] In their judgments in the *Mabirizi* Appeal, the Chief Justice and all the other six Justices of the Supreme Court discuss in detail the decisions from all over the world relating to the BSD, such as *Minerva Mills v. Union of India*, AIR 1980 5C 1789 (Supreme Court of India); *Njoya v. Attorney General* (2004) AHRLR 157 (Court of Appeal of Kenya); *Anwar Hussain Chowdhury v. Bangladesh* 10 40 DLR 1989 App Div. 169 (Supreme Court of Bangladesh) and many others.

[7] CCT/27/95; [1995] ZACC8; 1995 (10) BCLR 1289; 1995(4) SA 877.

Constitutional Court of South Africa explained the doctrine as follows:

> There are certain fundamental features of parliamentary democracy not spelt out in the Constitution but which are inherent in its nature, design and purpose… there are certain features of the constitutional order so fundamental that even if parliament followed the necessary amendment procedures it could not change them.

In their wisdom, the courts have not laid down a list of provisions they consider to constitute the basic structure. Consequently, the claim of any particular feature of the Constitution to be part of the "basic structure" is determined by the courts on a case by case basis. 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. 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 informed the given provision, and the likely consequences of the amendment.

3. THE IMPORTANCE OF THE BASIC STRUCTURE DOCTRINE

The BSD has over the last 45 years assumed a significance way beyond what its proponents may have had in mind. The idea that though parliament has wide powers to amend the Constitution, its powers are not unlimited and do not extend to the power to

tamper or do away with clauses which are basic to the structure or essence of the Constitution is now considered an important safeguard against the possibility of a political party or group having a controlling majority in parliament abusing its majority to erode the essence of the Constitution by doing away with vital clauses which they consider bothersome or inconvenient to their exercise or retention of power, or by introducing provisions that enable them to entrench themselves in power.

Ordinarily, a Constitution contains provisions for its own preservation. For example, most Constitutions prescribe more elaborate procedures for their amendment than are prescribed for ordinary statutes. However, a time comes when these are not enough to protect the Constitution. Such a situation arises when a ruling party has an overwhelming majority of members of parliament and can use its numbers to pass any amendment. In such a situation, the express provisions of the Constitution are not enough to protect it. In *Kesavananda Bharati (Supra)*, Sikri, C.J. explained the importance of the doctrine in guarding against abuse of parliamentary majorities and warned about the likely consequences of such abuse. He stated:

> … a political party with two-thirds majority in parliament for a few years could so amend the Constitution as to debar any other party from functioning, establish totalitarianism, enslave the people, and after having effected these purposes make the Constitution unamendable or extremely rigid. *This would no doubt invite extra-constitutional revolution* (emphasis added).

Sometimes in a situation where a majority intoxicated with power threatens constitutional stability, the Constitution can still be

protected by certain constitutional restraints known as constitutional conventions. These are underlying norms which are not in written law but are nevertheless considered binding and which cannot be easily overridden. In a polity like the United Kingdom, with centuries of a culture of constitutionalism, Constitutional Conventions are almost as sacred as the Mosaic Decalogue - the Ten Commandments that underwrite the Judeo-Christian civilisation, and only the most foolhardy would dare contravene them.

In younger nations, however, that is not the case. Both the express restraints on power enshrined in the Constitution, and implied ones derived from the conventions, are weak. In a country like Uganda express constitutional restraints and those founded on unwritten conventions are easily overridden. Legal revolutions, whereby the existing constitutional order has been overthrown and replaced not in the manner prescribed by the Constitution were experienced in 1966, 1971, 1979, 1985 and 1986.

The 1995 Constitution of Uganda attempted to prevent such legal revolutions by outlawing the operation of the Kelsenian theory,[8] through Article 3 which prohibits extra-constitutional take over or retention of the government; outlaws the unlawful suspension, overthrow, abrogation or amendment of the Constitution; obligates every citizen to defend the Constitution; and confers immunity from prosecution on any person who resists violation of the

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[8] According to the theory advanced by the Austrian Jurist Professor Hans Kelsen in his *magnum opus*, *General Theory of Law and State* (Anders Welberg Translation), Cambridge, MA: Harvard University Press, 1946, a *coup d'etat* is an internationally recognised mode of changing the existing constitutional order, and when such a change successfully occurs, it constitutes a legal revolution, a law-creating phenomenon whose validity is determined not by its legality but by its effectiveness.

Constitution. However, the provision would possibly not prevent subversion of the purpose of the Constitution through a procedurally lawful amendment of the Constitution, even if the amendment had the same result as if the Constitution had been overthrown. Which is where the BSD comes in.

The 1995 Constitution has its own in-built restraints on power. The President may not have his way, against the wishes of Parliament. But what if Parliament and the President contrive a common mischief, to make nonsense of the Constitution? Then the Judiciary is expected to come in. The BSD comes in handy in this regard, as a tool the Judiciary can employ to prevent self–centred adulteration of the Constitution, where the express provisions of the Constitution itself are not usable, for one reason or the other. At that point the BSD provides the last restraint against the erosion of constitutionalism.

It is contended that BSD should have been used as a restraint in in the "Age Limit" Case. Unfortunately, it was not.

4. HOW THE BSD PLAYED OUT IN THE CONSTITUTIONAL COURT AND THE SUPREME COURT

Before the Constitutional Court, the applicability of the BSD was extensively addressed. The Five Justices were all unanimous on two aspects: That the BSD is applicable in Uganda; and that whether or not a given provision of the Constitution is part of the basic structure of the Constitution varies from country to country, and is dependent on the history and political realities of each country, and the character of its Constitution. The Justices, however, were divided on what constitutes the basic structure of Uganda's Constitution. To Deputy Chief Justice Owiny-Dollo, the Head of the Constitutional Court, the provisions constituting the basic structure are those dealing with the sovereignty of the

people;[9] the supremacy of the Constitution;[10] democratic governance and practices; a unitary state; separation of powers; the bill of rights;[11] and independence of the judiciary. That these are part of the basic structure because they are entrenched by Article 260 of the Constitution, which lists Articles that can only be amended through a special procedure requiring support of two-thirds of all members of Parliament, followed by a nationwide referendum.

For Justice Remmy Kasule they are which provide for: sovereignty of the people, supremacy of the Constitution, defence of the Constitution,[12] Non-derogation of certain rights (not all but the ones protected under Article 44), democracy especially the right to vote, prohibition of the one-party state,[13] and independence of the judiciary.[14] Justice Elizabeth Musoke limited herself to sovereignty of the people and the non–derogable clauses in the bill of rights; while for Justice Chaborion Barishaki, emphasis was on popular sovereignty.

Justice Kenneth Kakuru had the most expansive conception of the doctrine, which he construed to cover sovereignty of the people; supremacy of the Constitution; political order through a durable and popular Constitution; constitutional and political stability based on the principles of unity, peace, equality, democracy, freedom, social justice and public participation. He added the rule of law; observance of human rights; regular free and fair elections; separation of powers; accountability of government to the people;

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[9] Article 1.
[10] Article 2.
[11] Chapter 4.
[12] Article 3.
[13] Article 75.
[14] Article 128.

non-derogable rights; the idea that land belongs to the people and cannot be taken away from them by Government without appropriate compensation; the idea that the state holds natural resources in trust for the people; the duty of citizens to defend the Constitution; and prohibition of the one-party state.

Interestingly, most of the aspects Justice Kakuru considers to be part of the basic structure are not actually express provisions in the Constitution itself, but are derived from the Preamble to the Constitution and the National Objectives and Directive Principles of State Policy, or are implicit in the provisions of the Constitution. The position of Justice Kakuru looks more convincing, that to identify the things which constitute the basic structure, one does not just look at express words of the Constitution, but at the spirit of the Constitution, which may not be captured by a slavish commitment to the express words.

The preamble and the national objectives set out at the beginning of the 1995 Constitution cannot be overlooked if one wants to appreciate the character of the 1995 Constitution which, the Justices unanimously agreed, is a key consideration in determining the basic structure of the Constitution. So, for example, there is no express provision in the Constitution that "there shall be political stability." But can it be denied that the quest for stability is at the heart of the Constitution? Can an amendment that is obviously a recipe for instability pass the test, merely because the Article amended is not an entrenched one under Article 260, but is one that can be amended the ordinary way?

It is submitted that the BSD has to be viewed for what it is—a call on the Judiciary to become *activist* and not *constructionist* in defending the Constitution. A doctrinaire approach misses the

point, by insisting that if the framers of the Constitution had wanted to treat certain articles as critical, they would have expressly done so, and that what they did not entrench under Article 260 was not deemed critical. In determining whether a provision constitutes the basic structure of the Constitution, its wording is important. However, the wording is not the end of the story.

Surprisingly, all the five Justices of the Constitutional Court, and all the seven of the Supreme Court were unanimous in their finding that Article 102(b) of the Constitution is not part of the basic structure of the Constitution. Most of them also held that the Articles which constitute the basic structure are those which the Constituent Assembly (CA) chose to entrench in Article 260 of the Constitution, which can only be amended by going back to the people.

There are other points in the judgments of the two courts that one can take issue with: the seeming condonation of the invasion of the chamber of Parliament by the armed forces during the debate on the amendment bill, whereby a number of opposition members were set upon and badly beaten up and forcefully carried out of the chamber; grossing over the intervention of state agents in the consultations by Members of Parliament, when those opposed to the amendment were prevented from addressing rallies and soliciting the views of their constituents; the apparent disregard of the fact that about 50%, of the opposition members were suspended from attending Parliament during the debate and vote on the bill; the use of the infamous “substantially” test to determine whether the wrongful actions influenced the outcome of the process of amending the Constitution; and the refusal to consider

the cumulative effect of this and earlier amendments on the stability of the country.

6. IMPLICATIONS OF THE COURT DECISION: THE PHILOSOPHICAL AND PRACTICAL LIMITATIONS OF THE BASIC STRUCTURE DOCTRINE

The basic structure doctrine is not some magic wand, a cure-all for all the constitutional challenges that afflict a country. After all the doctrine has its own inbuilt limitations.

In the first place, it is not a rule of law, it is merely a philosophical postulate, a guide to assist the Constitutional Court and any court dealing with appeals in constitutional matters, when dealing with an amendment or proposed amendment, to determine whether the amendment goes to the root or core of the Constitution and is therefore a no-go area for parliament.

Secondly, it is prone to the usual vagaries of judicial decision-making. The law is rarely set out in black and white. It is often full of grey areas, of various shades, with the result that one can rarely assert the exact legal position on any matter with the accuracy of geometry. A judge deciding any case depends very much on his or her own judgment, even in situations where the law is couched in mandatory terms. That is why a final decision of court is a “judgment” it is the Judge’s own conclusion on the law and facts/evidence. So, when a judge is called upon to determine whether a given constitutional amendment touches the core of the Constitution and, therefore offends the BSD, his or her answer depends very much on what he/she considers to be basic to the Constitution. After all there is no list of constitutional provisions which, without question, constitute the basic structure of the Constitution.

Above all it should be borne in mind that a decision in a constitutional case, and in public interest litigation generally, is not a merely a legal decision. Such litigation has been referred to as a politics by other means.[15] Whether or not a judge will find a given constitutional provision basic or fundamental to the Constitution is a highly charged legal as well as political question. The answer a judge gives to such a question often depends on what he/she considers to be his/her ultimate responsibility. Consequently, the application of the BSD to actual cases is prone to the vagaries of politics and the personal idiosyncrasies of the judicial officer applying the same.

Looking at the *Mabirizi* case, one immediately notices that right from the Constitutional Court, the Justices could never agree on what aspects of the 1995 Constitution constitute its basic structure. However, in the Supreme Court, Justice Stella Arach Amoko, with whom all the other Justices concurred, correctly stated that to determine what aspects constitute the basic structure of any Constitution, one has to consider the history and also the future aspirations of the society enacting the Constitution. You have to consider, what informed the Constitution, that is to say, what mischief the framers of the Constitution sought to cure, what society did they aspired for.

But that is precisely where the problem begins. Members of any given society are never unanimous on what the history is or means. Neither are they ever unanimous on what the future ought

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[15] See Oloka-Onyango, Joe, *When Courts Do Politics,* Newcastle-upon-Tyne: Cambridge Scholars Publishing, 2017; Griffith, J.A.G., *The Politics of the Judiciary* (4th Edition), London: Fontana Press, 1991; Von Doepp, Peter, *Judicial Politics in New Democracies: Cases From Southern Africa,* London: Lynne Rienner Publishers, 2009; Ellett, Rachel, *Pathways to Judicial Power in Transitional States,* London: Routledge, 2013.

to be. History is never just facts; it is facts as interpreted by the narrator. Historical phenomena are never categorical, even in the most obvious of circumstances. Ugandans are not even unanimous on whether Idi Amin was a hero or a monster.

For our present purposes the question is: how do you frame a basic structure out of a history that is so amorphous, on which there is no unanimity? From their own conception of history, the Justices of both courts drew up their own lists of what in their view were the basic features of the 1995 Constitution. They were unanimous on some but not on others.

That is where they missed the point. It is not helpful to draw up a list of Articles that constitute the basic structure of the national Constitution. What is “basic” is not the wording of the provisions. It is not the letter of the Constitution, but the spirit. Hence democracy and right of participation are a basic feature, but multi-partyism is not, because democracy and multi-partyism are not synonymous. When looking for the basic structure, one does a disservice to look at the actual words, rather than what they were intended to achieve.

A proper understanding of the BSD, therefore is not that there are certain provisions that parliament can never amend. It is that parliament has not the power to amend the Constitution in order to bring about certain results: a fascist State, an autocracy, a theocracy and so on. Every Article is amendable, but not in a manner that erodes the underlying purpose of the Constitution. Even the bill of rights can be amended, but not in a manner that takes away the essence of the rights enshrined therein, but so as to introduce new rights or even to impose limitations on the enjoyment of certain rights, so long as the limitations introduced

are "reasonable" and demonstrably justifiable in a free and democratic society.[16]

By this logic it is debatable whether Chief Justice Katureebe was correct when he stated at p. 13 of his judgment that parliament has no power to change Uganda from a presidential system to a parliamentary system. Technically it can, subject to complying with the prescribed procedure. However, that is not and should not be the point. The point is, and should be, that because of the implications of a given amendment, bearing in mind Uganda's history and aspirations, it is not proper to amend certain Articles, when the likely consequences of doing so are grave. For that reason, Parliament should have considered itself obligated to go back to the people or to leave such changes to a Constituent Assembly, because the effect of the amendment is either to undermine the very purpose for which the Constitution was made, or to in effect create substantially a new constitutional order.

In this, as in other decisions, the Constitutional Court, and a higher court considering an appeal against the decision of the Constitutional Court, is not just a court of law. These things are beyond law. The question, as in many constitutional cases, is never whether the thing is legal. The question is whether it is proper - a question that goes beyond law, right into the arena of philosophy, history and politics.

Which brings the discussion to the question of Article 102(b). A lot of ink and time were wasted by the two courts on whether Parliament had power to amend the Article. The misleading argument which majority Justices of the Supreme Court bought into was that if the framers of the Constitution wanted to entrench

[16] Article 43.

the Article, they would have listed in Article 260 as one of these which require a referendum or other special process in order for it to be amended. It is submitted that this missed the point. What makes a provision part of the basic structure is not the fact that it is listed. It is a question of the consequences of the amendment at the point in time when it is sought to be effected. In *Dow v. Attorney General of Botswana,*[17] Aguda, JA. stated:

> The Constitution is the Supreme Law of the land and it is meant to serve not only this generation but also generations yet unborn. It cannot be allowed to be a lifeless museum piece; on the other hand, the Courts must continue to breathe life into it from time to time as the occasion may arise, to ensure the healthy growth and development of the state through it… I conceive it that the primary duty of the judges is to make the Constitution grow and develop in order to meet the just demands and aspirations of an ever-developing society which is part of the wider and larger human society governed by some acceptable concepts of human dignity.

In numerous decisions Uganda's own superior courts accepted that the Constitution is a living instrument, which should not be interpreted using a doctrinaire approach. That in constructing the Constitution, the court must not look at the state of things at the time it was enacted, but at the present time, and also with an eye to the future.[18]

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[17] (1992) LRC (Const) 623, at 668.

[18] *Attorney General v. Salvatori Abuki & Another*, Constitutional Appeal No. 1 of 1998; and *Attorney General v. Maj. Gen. David Tinyefuza,* Constitutional Appeal No. 1 of 1997.

It could well be that as at 1995, when the Constitution was promulgated, age limits were not the critical issue. After all, as Chief Justice Katureebe pointed out, none of the dictators who did so much damage in the past was an old man, neither were Hitler, Mussolini, and all the other brutes of history.[19] But the court ought to have approached the question in holistic manner.

In the first place, the timing of the amendment left no doubt that it was designed to cater for the stay in power of a specific individual, Yoweri Museveni, who happened to be about to clock the maximum age permitted for one to stand for president. The question then should have been: is it consistent with the spirit of the Constitution to amend it whenever it suits the convenience of an individual? Can a Constitution that is amended in such circumstances ever retain the sanctity it requires for it to operate as a blue-print for a society? Secondly, court should have borne in mind that in 2005, a related amendment was effected, removing Article 105(2) of the Constitution, which had limited an individual to only two five-year presidential terms, again just to accommodate the convenience of the same individual.[20] To now

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[19] For example, when Idi Amin captured power in Uganda in 1971 and proceeded to unleash untold terror and destruction, he was only 46 years old. Likewise, Mengistu Haile Mariam did so in 1977 when he was only 40, while Jean-Bedel Bokassa of Central Africa staged his coup in December 1965 at only 45. Francisco Macias Nguema became Equatorial Guinea's first president in 1968 at only 44, and by the time he was overthrown and executed in 1979 at 55 years of age, he had reduced his country to a gulag. In Europe, Hitler and Mussolini came to power at 44 and 39 years respectively.

[20] The amendment was never contested in court, and has since enabled Yoweri Museveni to get elected as president in 2006, 2011 and 2016, in addition to the two (elected) terms he served in 1996 to 2001 and 2001 to 2006, and the period he served as an unelected president in 1986 to 1996. For an analysis of the implications of the 2005 Constitutional amendment that resulted in the removal of Article 105(2), see Juma Okuku, Anthony, "Beyond 'Third Term' Politics: Constitutional Reform and Democratic Governance in Uganda," Volume 11 No. 2 *East African Journal of Peace and Human Rights,* 2005, pp

repeat the process, with basically the same arguments - that parliament has the power to amend the Constitution, was to actually tell the world that there is nothing special about the Constitution of Uganda.

But the more serious point about this was that because of the earlier (2005) amendment, which removed the presidential term limits, the 2017 amendment in effect removed the very last measure against a life presidency. There is no doubt that the framers of the 1995 Constitution would be shocked if they were to be told that it is okay to have a life presidency, yet that is the effect of the amendment. In a long chain of cases, including *Tinyefuza* (*supra*) the courts all over the commonwealth have held that what should be considered is not the expressed purpose but the effect of the provision.[21] The effect of the amendment is obvious, whatever clever words the sponsors of the amendment may have cooked out of their creative minds. The two Courts therefore should have been worried about the cumulative effect of the repeated amendments, all driven by personal convenience. Surprisingly, the Supreme Court took the easy route, of finding that the 2005 amendment was not being contested before the Court.

182-219; and Tusasirwe, Benson, "Political Succession in Uganda: Threats and Opportunities" in Peter, Chris Maina and Fritz Kopsieker (eds.) *Political Succession in East Africa: In search of a Limited Leadership,* Kampala and Nairobi: Kituo Cha Katiba and Friedrich Ebert Stiftung, 2006, pp. 83-108.

[21] For the application of this principle in Commonwealth courts see, for example, *R. v. Big M Drug Mart Ltd*., [1985] 1 SCR 295, 18 DLR (4th 321 (Supreme Court of Canada, judgment of Justice Dickson); *Attorney General v. Salvatori Abuki & Another (Supra,* Constitutional Court of Uganda); *Attorney General of Gambia v. Momadou Jobe* (1984) AC 689 (Privy Council); and *Re Rizzo & Rizzo Shoes Ltd*. [1998] SCR 27 (Supreme Court of Canada, judgment of Justice Lacobucci).

Thirdly, in *Dow v. Attorney General* (*supra*), whose dictum Uganda's courts have treated with the utmost respect, Amissah, JA expressed a very common-sense position that "the makers of a Constitution do not intend that it be amended as often as other legislation." When challenges arise during the life of a country, they are expected to be addressed in a manner that fits into the existing constitutional frame work, rather than changing the constitutional framework to fit the new challenges. Only in the most compelling circumstances, for example where a constitutional provision has clearly outlived its usefulness or has become a fetter to the advancement of society, should an amendment be pursued. In the instant case those pushing for the amendment simply and arrogantly proclaimed that the law allows them to amend the Constitution. No one can seriously claim that the age-cap had become outdated or a fetter on the growth of democracy. They also argued, tongue in cheek, that the provisions of Article 102(b) were discriminatory against the very young and the very old and that the people, who are sovereign, should be left to determine the personal competence of a candidate during the electoral process rather than artificially restrict their choice. This is, of course a pedantic argument: so why do we limit the voting age? Why do we disqualify those who are suffering from mental disability? Should we remove the retirement age and leave civil servants, judges and members of the armed forced forces to save until they senile and cannot even stand? In a word, why don't we then just leave everything to the people?

It is really simple. The Basic Structure Doctrine is a subjective doctrine. Provisions of the Constitution constitute its basic structure depending on their centrality to the specific constitutional order the given Constitution was meant to provide for. And in

determining what the intended constitutional order was, one looks at the history and the aspirations for the future.

Looking at Uganda's constitutional history, all the past Constitutions had bills of rights. In all the bills, the rights were laid down with limitations or clawbacks all couched in the standard language of the 1948 Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, 1966; the International Covenant on Economic Social and Cultural Rights, 1966; and the African Charter of Human and Peoples' Rights, 1981. Although the bill of rights in Chapter 4 of the 1995 Constitution of Uganda introduced certain novel features, it is not a unique creature of the 1995 Constitutional order. For example, it is considered as novel because it proclaims in Article 20 that "fundamental rights and freedoms of the individual are inherent and not granted by the state," and that the rights set out in the bill shall be respected, upheld and promoted by all organs and agencies of government and by all persons. But even without this provision in the Constitution, that still remains the legal position. Fundamental rights are not fundamental because the Constitution says so. The State and all persons have the obligation to respect, uphold and promote these rights, not because Article 20 says so.

So, clearly the uniqueness of the 1995 Constitution is not because it has a very wordy bill of rights. Even Article 1 which proclaims sovereignty of the people does not create that sovereignty. The people would still be formally sovereign even if the Article had been omitted altogether. The formal sovereignty of the people is a philosophical construct founded on the notional social contract that gives rise to the modern State.

Even the other provisions for a unitary State, a presidential system, the right to vote in presidential elections, independence of

the judiciary, and so on are not unique to the 1995 Constitution. They were also in the 1967 Constitution. However, that did not prevent of a reign of terror from being unleashed under presidents Idi Amin and Milton Obote.

The provisions that were peculiar and therefore basic to the 1995 Constitution are those designed to address the central political problem of Uganda's political history: the problem of an imperial presidency. A lot has been written on the problem of presidentialism and need not be repeated in this discourse.[22] The point is that the 1995 Constitution set out to prevent the emergence of a presidential behemoth. The obvious way was through the president having to renew his mandate by going back to the people after five years. Of course, the presidency was also supposed to be controlled through mechanisms like an independent judiciary, the requirement that presidential appointments be vetted, and the power of parliament to control the purse through appropriations and the exercise of general oversight on behalf of the people.

However, the true genius of the framers of the 1995 Constitution was in realising that in a young and fragile democracy, just emerging out of the clutches of dictatorial regimes and a ruinous civil war, it was possible to subvert democracy through the power of incumbency - the control the sitting president has on the electoral commission which he appoints, the possibility of

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[22] Sekindi, Fredrick, "Another Perpetuation of Incumbency through the Supreme Law: The Conceptualization of the Presidency under the 1995 Constitution," Volume 1 *Africa Journal of Comparative Constitutional Law,* 2016, pp. 90-130; Joe Oloka-Onyango, Joe, "Taming the President: Some Critical Reflections on the Executive and Separation of Powers in Uganda," Volume 2 No. 2 *East Africa Journal of Peace and Human Rights*, 1995, pp. 189-208. Equally interesting and relevant is Ayittey, George B.N., *Defeating Dictators: Fighting Tyranny in Africa and the World*, New York: St. Martin's Griffin, 2011, p. 201.

commercialising elections and then using State resources to obtain undue advantage, the possible abuse of the armed forces and security agencies in elections by the commander-in-chief, and the intimidation of courts, which may limit their capacity to punish electoral excesses. Because of these possibilities, which have all come to be realised, it was not enough to put in place democratic structures. The framers of the Constitution, therefore, made sure that if these weaknesses or limitations of neo-liberal democracy prevented genuine choice, at least at some point the incumbent would have to go, the unfair advantages notwithstanding. The magic bullets designed to achieve this were two: Article 102(b) on age limits and the erstwhile Article 105(2) on term limits. When all else failed, these would be the final insurance against endless tyranny or a life presidency. In 2005, the first guarantee was removed. In 2017, the last was done away with.

In considering the centrality of Article 102, the court had an obligation to consider the fact that with Article 105(2) already amended, the last bulwark was what was now being considered. There is no way it can be said that this last-ditch defence against unlimited power and a life presidency is not core to the spirit of the 1995 Constitution.

It may well be that the framers of the 1995 Constitution did not realize that these safeguards could easily be done away with by a mischievous or even well-meaning but misguided parliament, so they never entrenched them. But that is precisely the point made by Deputy Chief Justice Manyindo (as he then was) in *Tinyefuza v. Attorney General*,[23] that over the years, the weight attached to given provisions may change. The Court was obligated to consider that the presidency that the repeal of Article 102(b) was going to entrench had already been in office for over 30 years,

[23] Constitutional Petition No. 1 of 1997.

through elections that were three times contested in the Supreme Court, with the Court making the unusual finding on all three occasions that the elections were not free and fair but were nevertheless valid![24]

7. THE LIKELY POLITICAL CONSEQUENCES OF THE "AGE-LIMIT" DECISION

What the "Age-Limit" decision means for Uganda can be viewed not just from what the Supreme Court said, but also what it did not say. But they are also to be deduced from the surrounding circumstances.

Historically, bad governance, and even totalitarian rule, rarely come in one huge torrent, overnight. They come in small doses, nibbling away at the system – a bite here, a scratch there, until you have no liberties to talk of. In the case of Uganda, first there were complaints of sham elections, but the courts' answer was that the malpractices did not substantially affect the result. Then in 2006 the High Court was invaded by government troops armed to the teeth, who abducted Dr. Kizza Besigye, an opposition figure, in the full glare of the press. In protest, court operations were

[24] The outcome of the 2001 presidential Election was challenged in *Rtd. Col. Dr. Kizza Besigye v. The Electoral Commission and Yoweri Kaguta Museveni*, Presidential Election Petition No. 1 of 2001, while the 2006 election was contested in *Rtd. Col. Dr. Kizza Besigye v. Electoral Commission and Yoweri Kaguta Museveni*, Presidential Election Petition No. 1 of 2006. Then the 2016 election outcome was contested in *Amama Mbabazi v. Yoweri Kaguta Museveni and The Electoral Commission*, Presidential Election Petition No. 1 of 2016. For a discussion of the petitions, see Kabumba, Busingye "How Do You Solve a Problem Like 'Substantiality'? The Supreme Court and Presidential Elections." In Oloka-Onyango, Joe and Josephine Ahikire (eds.) *Controlling Consent: Uganda's 2016 Elections,* Trenton: Africa World Press, 2017, pp. 477-501.

suspended for a week-or-so, and it was business as usual.[25] When goons armed with sticks and stones invaded Makindye Court in August 2016 to protest the trial of Inspector-General of police General Kale Kayihura, this time people barely noticed, because it had begun to become the normal to rubbish or even invade courts with arms.[26] Then the invasions spread over to another pillars of the State, when the Parliament was invaded. In any other country, if the Parliamentary Sergeant–at-arms was unable to restore order, business would have stopped for as long as it took to do so. In Uganda, we do not take such nonsense - we invade and beat up the MPs. For our present purposes, the interesting point is how the court reacted. The sum of the "Age limit" decision is that it was a bad thing alright, but not too bad to substantially affect the result. That a law passed in those conditions was okay! When will it ever be considered unacceptable for the executive arm to physically attack another arm of the State during the latter's conduct of its business? When a judge dies in court?

The circumstances aside, the decision itself is a missed opportunity to prevent the incremental nibbling away at the Constitution. It was a missed opportunity to assert the power of constitutional restraint, the power of checks and balances. Instead, the courts chose to differ to the older doctrine of separation of powers.

But more importantly, the more the courts are hesitant to be forthright in the defence of the Constitution, the more society risks radical change from elsewhere. To paraphrase Sikri, CJ in the

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[25] For a detailed narration of the events, see Ronald Naluwayiro, *The Trials and Tribulations of Rtd. Col. Dr. Kizza Besigye and 22 Others,* Kampala: HURIPEC Working Paper No. 1, 2006.

[26] See Derrick Kiyonga, "How Pro-Kayihura Crowd Sealed off Makindye Court", *The Observer* (Uganda), 12th August, 2016.

Kesavananda case, if you allow a regime to use its majority in parliament to entrench itself you are inviting the possibility of extra-constitutional revolution. In the instant case, Justice Opio Aweri hinted at this at p. 33 of his Judgment, when he pointed out that the earlier removal of term limits was what was leaving the people "desperately hanging to Article 102(b) as a ray of hope to prevent a repeat of history." Well, the Court dashed their hope of averting a repeat of history. Where will they look next?

8. CONCLUSION

Willy Mutunga noted that in Africa, presidents do not lose elections because the elections are neither free nor fair. Under the 1995 Constitution, there were in-built mechanisms to ensure that the Mutunga reality notwithstanding, the Ugandan president would not become a life-president. In 2005 term limits were removed, meaning that one can be president until one is 75, so long as he or she can win an election. Now the Constitution has been amended to provide that even after 75 he or she can continue in office, until nature intervenes. Has the basic structure of the Constitution really remained the same? Or to put it differently, without these restraints how is the Constitution different from the 1967 Constitution? In the "Age-Limit" case, both the Constitutional Court and the Supreme Court did not address themselves to this. Of course, the legal system Uganda operate requires that justice should be blind. But should it be that blind - to the natural consequences of its own adjudication?