



Critical Analysis of the Entrenched Provisions of the 1995 Constitution of the Republic of Uganda

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ABSTRACT

Ever since the Constituent Assembly 1995 sat and promulgated the constitution, the constitution has been amended many times. However, the said constitution proposes to have entrenched provisions, such entrenched provisions are no longer being fulfilled. Non-fulfillment of the entrenched provisions is what necessitated the present study that examines the entrenchment of the 1995 constitution of the Republic of Uganda. This article recommends that Uganda promulgate a new constitution emerging out of the aspirations of Ugandans to construct democratic institutions and mechanisms for ensuring that persons and institutions that exercise state powers are subjected to effective controls. This may be achieved through casting the new constitution in the mold of the principles of constitutionalism. More so, further studies need to be carried out on how to establish effective constitutional institutions and to ensure that state powers are exercised within acceptable constitutional limits not only in Uganda but also in many other African countries.

Keywords: Aspirations, Constituent Assembly, Constitution making, Constitutional court, Entrenched provisions

INTRODUCTION

In 1988 the National Resistance Council established the Uganda Constitutional Commission and tasked it with reviewing the 1967 constitution and developing a new constitution [1]. The mandate of the Commission was to consult the people and make proposals for a democratic permanent constitution based on national consensus. In its final report of December 1992, the Commission recommended that the new constitution be agreed by a mostly-elected Constituent Assembly. Elections to the Constituent Assembly took place in March 1994 [2]. The output of that process, Uganda's fourth constitution, dated 22 September 1995, was adopted by the Assembly on 27 September and promulgated on 8 October [1]. Much more detailed than the previous constitutions, it sanctions a republican form of government with a powerful president. Compared to the 1967 constitution, however, the 1995 constitution more overtly attempts to achieve a balance of power between the executive, legislature, and other bodies whose independence is guaranteed by the constitution. For example, under the latter, ministerial appointments and government borrowing must be approved by Parliament; and the civil service is appointed by the independent Public Services Commission and Judicial Service Commission. The President no longer has the power to dissolve Parliament and Parliament can override a presidential veto with a two-thirds majority. The 1995 constitution stresses the notion of an independent judiciary, with the Supreme Court as the final court of appeal [1]. On September 27, 1995, the Constituent Assembly adopted the new constitution. The 1995 constitution, establishes a quasi-parliamentary system of government, consisting of a President, Prime Minister, Cabinet, unicameral Parliament, Supreme Court, and Constitutional Court. The preamble states that the constitution shall be based on the "principles of unity, peace, quality, democracy, social justice, and progress" and includes a long chapter on "National Objectives and Directive Principles of State Policy". Moreover, Article One of the constitutions proclaims the sovereignty of the people and according to Article 2, the constitution "shall have binding force on all authorities and persons throughout Uganda". The constitution stresses the importance of the protection of human rights by stating that "fundamental rights and freedoms of the individual are inherent and not granted by the State" and guarantees specific rights and freedoms like, amongst others, the freedom from discrimination, freedom of religion, the prohibition of torture and slavery, the right to privacy, assembly, and association [3]. In opposition to the Constitution of 1967, the current constitution contains a whole range of powers that are shared between the President, Parliament, and other constitutional bodies. Amongst others, the presidential power of appointment regarding the Vice President and Ministers is subject to the approval of the

Parliament and the appointment of Permanent Secretaries and heads of departments have to be made upon recommendation of the Public Service Commission. The Public Service Commission moreover has the power to appoint all other civil services and judicial officers other than Judges of the High Court, Court of Appeal and Supreme Court are appointed by the Judicial Service Commission [4]. Also, in other areas the power of the executive has been cut down extremely: The President no longer has the power to dissolve Parliament and in the area of legislation the Parliament can over-ride the presidential veto by a two-thirds majority. The executive's powers to borrow money are also limited since Parliament now first has to approve borrowing [5]. In 2000 and 2005, important referenda on the system of government took place, the first referendum favored a "no-party" system of government but was invalidated by a court ruling some years after because of procedural shortcomings, whilst the second referendum approved a multiparty system and abolished the two-term limitation on the presidency [6].

Ever since the Constituent Assembly 1995 sat and promulgated the constitution, the constitution has been amended many times. However, the said constitution proposes to have entrenched provisions, such entrenched provisions are no longer being fulfilled. Non-fulfillment of the entrenched provisions is what necessitated the present study that examines the entrenchment of the 1995 constitution of the Republic of Uganda.

Review under the entrenchment of the 1995 constitution of the Republic of Uganda

It is important to outline the designs of fundamental laws from which presidential authority has emerged and which anchored authoritarian governments, since independence and before the 1995 Constitution was adopted. This provides an understanding of how heads of state and governments, by taking charge of processes of creating fundamental laws, have given them excessive powers which allowed them to entrench their rule without the possibility of change through constitutional processes, ravage Uganda, and abuse human rights [7]. Starting with the independence Constitution, fundamental laws in Uganda have molded a president in the images of the Kabaka and a colonial governor who exercised unrestricted powers and who did not require the mandate of the people to hold power. George Kanyeihamba observes as follows:

The Independence Constitution created a president who required no mandate from Uganda as a whole; all he needed was to be a ruler of a Kingdom or District, and also only one Kingdom or District could determine the qualification of this high office [8].

It should be recalled that before the adoption of the Independence Constitution, the authority of the institution of the Kabaka was based on the divine-right theory of kingship which asserts that it is not subject to earthly authority because the Kabaka derives its right to rule from a greater source than their subjects; while that of the colonial governor was founded on constitutional arrangements designed with the aims of granting the governor unlimited powers for the British to exploit Ugandans. The Constitution of the Republic of Uganda 1995 came into force in 1995. The day marked the beginning of what has been described as a 'new democratic dispensation' for Ugandans, following a participatory and consultative constitution-making process. In this regard, the process through which the Constitution was adopted marked a departure from the exclusive constitution-making processes which blighted the defunct Constitutions which were imposed on Ugandans.

In the case of *Ogwal v Uganda* [9], the UPC sought an injunction to stop the government from interfering with its political activities. The petitioners alleged that the ban on political parties violated the constitutional rights to freedom of association and assembly and that the provisions governing campaigning adversely affected the right to free expression. The High Court dismissed the petition because the ban on party activities was a temporary measure that was necessary to prevent a revision of the political chaos of the past. Therefore, during the constitution-making process, Ugandans couldn't engage in political debates on the new constitution that did not conform to the NRM's views. In the case of *Muwanga Kivumbi v Attorney General* [10], the Constitutional Court of Uganda declared provisions of the Police Act [11], Chapter 303 unconstitutional because they offended the right to freedom of assembly as protected by Art. 29 of the Constitution of the Republic of Uganda 1995. With regards to protecting fundamental constitutional rights, the rule of law seems to be on the side of the citizenry; at least to the extent that constitutional law can be invoked by the citizenry against laws and policies of the state [3].

Powers and privileges of the Presidency towards entrenching the Constitution of the Republic of Uganda

Following the entrenchment of the 1995 Constitution of the Republic of Uganda, the jurisprudence on presidential immunity indicates the failure to refer to the drafting history of the Constitution. It also points out that the privilege of presidential immunity serves no justifiable constitutional purpose, but it is aimed at putting the person who is the president above the law. In the case of *Tumukunde v Attorney General & Anor* [12] the petitioner, who was a representative of the armed forces in Parliament, argued, amongst other things, that President Museveni's act of forcing him to resign from Parliament was unconstitutional. The respondent argued that the presidential immunity from legal proceedings under articles 98(4) & (5) of the 1995 Constitution

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prohibits the Court from investigating the matter as a president's actions are unchallengeable before any court. In dismissing the petition, Justice Kavuma opined that:

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

Like the framers of the 1995 Constitution, according to Justice Kavuma, to subject a serving president to court proceedings is to undermine the dignity, and honour and to disrespect the person that is the president. In the later case of Professor Gilbert Prof Gilbert Balibaseka Bukonya v Attorney General [13], the appellant, a former vice-president, was prosecuted for corruption for some of his acts while he was occupying the office. He petitioned the Constitutional Court and argued, among other things, that his prosecution was unconstitutional because the alleged corruption activities were committed in his capacity as vice-president acting on behalf, and on the instructions of President Museveni who is immune from prosecution under the provisions of article 98 (4) & (5) of the 1995 Constitution.

The Constitutional Court held unanimously that: *The Constitution intended the 'immunity' under Article 98 (4) and (5) to be the exclusive preserve of the Head of State, Head of Government, and Commander-in-Chief of the People's Defence Forces and the fountain of honour. The irrefutable presumption here is that the legislature must have intended it that way. It thus emerges very clearly that the Vice Presidency is distinctly inferior to the Presidency. It has no home in the immunity arena.*

Although under articles 94 (4), 108 (3) (a) (b), 113 (3) of the 1995 Constitution a president may assign executive power to ministers and the vice-president, acts or omissions committed during the exercise of such assigned powers attract legal liabilities for the assignees. Still following the case of *Andare v Attorney General* [14] a constitutional petition was brought to challenge the re-appointment of Chief Justice Benjamin Odoki. The petitioner argued that President Museveni sought the advice of the Attorney General in re-appointing the Chief Justice and ignored persons nominated by the Judicial Service Commission contrary to the Constitution. It was also submitted that there are no set procedures for a president to seek and to be granted advice on judicial appointments. Justice Odoki is reported to have reached the constitutionally imposed retirement age of seventy on the 23 of March 2013. The Constitution provides that the Chief Justice, the Deputy Chief Justice, the Justice of the Supreme Court, and the Justice of Appeal shall vacate their offices on attaining the age of seventy years.

In the case of *Hon Sam Kuteesa & 2 Ors v Attorney General* [15], three Cabinet Ministers brought a constitutional petition challenging their prosecution for corruption by the office of the IGG. Section 3 of the Inspector General of Government Act 2002 provides that the inspectorate is headed by the Inspector General and two Deputy Inspectors, while section 4 provides that the Inspector General and the two deputies shall be appointed by the president with the approval of Parliament. At the time of their prosecution in 2011, the second Deputy position was not filled since the office was established by the Constitution in 1995. The existence of a constitutional mechanism for checking and balancing executive excesses, including procedures for impeaching a president for disregarding the Constitution, is ineffective. This denotes a constitution lacks actual constitutionalism; there is a pattern of weak institutionalization and problems with the formal distribution of power between the presidency and other arms of government. It is impossible for a document such as the 1995 Constitution to confer so much authority on the presidency and to confine its powers at the same time.

Outcomes of Entrenching the Constitution

Following the case of *Muwanga Kivumbi v Attorney General* [10], the Constitutional Court of Uganda declared section 32 of the Police Act, Chapter 303 unconstitutional. The provision allowed the Inspector General of Police to prohibit the convening of any assembly. However, the NRM government has enacted the Public Order and Management Act 2013 to restore the powers of the inspector general of police. The Act imposes conditions which are inconsistent with the enjoyment of the freedom of assembly. Moreover, the 1995 Constitution prohibits Parliament from passing laws to alter the decision or judgment of any court. The enactment of such a law symbolizes the authoritarian use of laws to stifle alternative political activities. Most of the proposed changes to the 1995 Constitution, including repealing of the two-term limits on the tenure of the presidency, were passed by Parliament after the third reading of the Bill on 18 August 2005. It is important to state here that when recommending that a person elected as a president should not hold office for more than two terms of five years each. The Constitution Commission noted that:

We have also reflected the view almost unanimously advocated/ by the people that the tenure of office of the President should be constitutionally limited to put an end to the phenomenon of self-styled life presidents. We have recommended a limit of two terms of five years each for any President. Thus, upon adopting the 1995 Constitution, Article 5(2) provided that a person shall not be elected to hold office as president for more than two terms.

Pre-colonial traditions and cultures have been blamed for the bad governance systems in Africa. Some post-colonial despotic rulers have justified dictatorship and violations of their people's rights based on pre-colonial African traditions, cultures, and histories because human rights and democracy were not organically built

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into pre-colonial African systems of governance. In the case of Uganda, the dictatorial constitutional structures for exercising state powers indicate that post-colonial leaders have styled themselves in the images of the institutions of the kabaka³ 18 and that of the colonial governor [16]. The synthesis of these two systems of governance has given rise to the authoritarian presidential system found in fundamental laws. An analysis of the designation of the office of the president as provided for in the Constitution of Benin reveals that the Constitution balances the distribution of powers by moderating executive presidentialism thereby avoiding a 'presidential monarchy' or 'monocracy'. One of its many praiseworthy features of constitutionalism is the creative use of constitutional principles which has prevented the legislators and the executive from extending their tenures without the approval of the citizenry [7].

Reflections on the model of executive president in the 1995 Constitution

The designation of the president established by the 1995 Constitution makes it practically impossible to meaningfully limit the powers of the presidency. This is because all instruments of power and organs of the state are entrusted and subservient to the presidency, which is due to a Constitution that entrenches an authoritarian government through legal means [17]. A constitution is supposed to provide for differing mechanisms of exercising power through the operating cord of constitutionalism, founded on principles that are commonly agreed to, as discussed in chapter three, section 5 of this study. In measuring the model of the executive president, as established by the 1995 Constitution, against universally accepted norms of constitutionalism, it can rightly be stated that it does not abide by the tenets of constitutionalism. This is because there are no effective constitutional constraints on the presidency. The presidency also allows the domination of instruments of power. Thus, while the presidency's powers are sanctioned by the Constitution, it cannot be claimed that they are certified by the norms of constitutionalism because it does not operate or rule within the normative framework of constitutionalism [18]. It is exactly this model of presidency that defines presidents and governments that rule by law and not according to the rule of law. It is also under this model of executive president that previous heads of state used state powers to ravage Uganda before 1995. Constitutionalism mandates limitations on public officers who exercise state power. Norms of constitutionalism allow for limited power. It is quite conspicuous that the powers granted to the presidency by the 1995 Constitution are unlimited serve to promote legal authoritarianism and they are incompatible with establishing a constitutional democracy. In this regard, it can be stated that the framers of the 1995 Constitution achieved their aim of creating an unlimited presidency, a president-for-life, and a consolidated regime [19]. The office of the president is thus, lacking in constitutional reform validity. The concept of constitutional reform validity that one refers to concerns the relationship between the validity and 'efficacy' of the constitutional reforms. The efficacy of constitutional reform is determined by its capability to remedy Uganda's history of one-man rule regimes, self-grants of unlimited state powers and misuse of such powers, manipulation of state institutions, and disregard of constitutions. Thus a constitutional reform is not valid if it is not efficacious in this regard [20]. Presidential authority under 1995 has remained almost the same as it was before 1995. Indeed, the powers and privileges of the head of state are almost as they were exercised and enjoyed by the kings of Buganda, and since the creation of the Uganda Protectorate in 1894, so has the ineptness of the various constitutional bodies to provide sufficient checks and balances on the head of state. The design of the presidency under the 1995 Constitution also emerged out of efforts to design a fundamental law that would provide President Museveni and his NRM government permanent ownership of power [21]. Also, the culture of constitution disparaging that led past heads of state to disregard and to abrogate provisions of the Republic Constitution that limited their powers has re-emerged. It is manifested in the way President Museveni has disregard provision of the constitution that attempt to limit presidential authority. The ascription of excessive powers to the presidency represents a failure to circumscribe the previously un-circumscribed presidential authority. While it may be necessary in some cases to grant a president sufficient powers to be able to act immediately to address urgent problems and to provide effective leadership, given the political culture, institutional traditions, perception by the population, and the leadership styles in Uganda, the allocation of such powers to the presidency is unjustified [19].

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

The process through which the Constitution was adopted marked a departure from the exclusive constitution-making processes that blighted the defunct Constitutions, which were imposed on Ugandans. For this study, the coming into force of the 1995 Constitution also represented three significant factors. First, a new belief was soon that future leaders would be elected through free and fair elections to replace past authoritarian leaders most of whom came to power through violence and unconstitutional means. Second, Ugandans made a concerted effort to create a new constitution to which all leaders would be subordinated, thus departing from previous fundamental laws that endangered the excesses of presidential and governments [22]. Third, the day marked the formal transition of the National Resistance Movement (NRM) from an interim government to the permanent wielder of political power with its leader President Museveni at the apex. The Republic Constitution

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which created the first full executive presidential system with untrammelled powers was adopted by an unlawful government that had no mandate to rule, and to adopt the Constitution. Starting with Amin, whose *coup d'état* overthrew Obote's government, successive heads of state acquired executive powers by overthrowing previous governments. This was followed by the issuances of decrees published as legal notices that purported to amend and suspend the Republic Constitution, allowing the leaders to seize power and legitimize their exercise of state power through means not provided for under the Republic Constitution. The decrees allowed heads of state to exercise executive powers almost without limits. Thus, the exercise of executive powers by successive heads of state has been unlawful [23]. Executive powers have also been founded on fundamental laws created at the initiative of heads of state and governments for their benefit without the involvement of the populace. Nearly every head of state and their government established their legal order which overrode or replaced that which was created by the government before them. This has meant that no fundamental law survived alteration with each change of government. The decrees also became part of the Republic Constitution for as long as the issuing authority remained in power. They legitimized unlawful and unconstrained exercise of executive powers by successive heads of state. The creation of fundamental laws at the initiative of the president and their government in post-independence Uganda began with the model of the semi-executive presidential system in the Independence Constitution, followed by the domineering full-executive presidential system in the Republic Constitution, trailed by Amin's Rule by Military Decree Legal Notice No. 1 of 1971 and ended with Legal Notice No. 1 of 1986 following the seizure of power by President Museveni's NRM. Executive and state power has derived from the 1995 Constitution since its promulgation [24]. Executive powers as tailored for and often by previous heads of state have been employed as a tool for abusing human rights and for impeding the smooth transfer of political power. This was achieved by creating fundamental laws that bestowed on heads of state unlimited state powers, who also did not require the mandate of the people to rule. Almost every head of state and the government could fail to make the fundamental law. They also could abrogate or usurp any fundamental laws at will. Thus from 1966 when Obote seized power, up to 1995 when the present constitution was promulgated, Uganda's heads of state validated their exercise of power by commandeering constitutional orders through military might, rather than subjecting themselves to the pre-existing constitutional order as seen under Article I of the 1995 Constitution of the Republic of Uganda on entrenching and make an amendment on the presidential age limit. Executive power in Uganda has also been exercised by leaders who do not surrender to constitutional limitations. A paradox in Uganda has been that instead of building into fundamental laws mechanisms aimed at minimizing the misuse and abuse of state powers and facilitating a smooth transfer of state power, laws were designed to grant heads of state and governments unlimited powers and to entrench power [25].

Uganda's post-colonial heads of state have also exhibited a culture of disregarding constitutional and other legal orders that limit their tenures. The unbounded exercise of executive authority explains the institutionalization of political violence as an instrument for the sustenance of political power and the disdain for constitutional order by leaders. Institutions of power such as the armed forces were personalized, while institutions of government such as Parliament were subordinated to the presidency by fundamental laws. Also, fundamental laws did not provide sufficient mechanisms that allowed the citizenry and other constitutional organs to restrain the actions of heads of state. Such misallocation and personalization of state power was aimed at retaining power at all costs. As a result, the over-arching need to acquire and retain power whatever the cost took precedence and made the populace victims of military coups, armed conflicts, human rights abuses, and bad governance which was unleashed in 1966 and beyond [26].

It is against this backdrop that Ugandans made a concerted effort through the constitution-making process that yielded the 1995 Constitution, to transform to a first fully-fledged democratic system of government since the attainment of independence. To achieve this aim, the country had to reconstruct the institution of the head of state, amongst other constitutional institutions, to overcome its beleaguered history. Therefore, the constitution-making process became a focal turning point through which the country had to consider the challenges presented by the illegitimate conduct of past leaders to produce a constitution that would embody values and mechanisms that are conducive to Political stability and would ensure the durability of a viable constitutional order which were important for the political stability of the country [27]. The much-needed post-1995 constitutional reforms were an important forum in the country's democratic transition. The 1995 Constitution had to be adopted through a more inclusive and participatory constitution-making process that would yield both legal and popular consensus in order to provide a platform for a stable and plural political life. The violent struggles for political power of the first twenty-four years after independence had to be remedied by introducing constitutional principles that promote peaceful political transition and minimize the risks of abusing state power. The past excessive self-grants of powers by previous leaders through fundamental laws and the subsequent misuse of those powers were to guide the country in its quest for crafting a limited presidency in the new Constitution [17]. The restriction on political activities was compounded by the intimidation of multiparty

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advocates. All meetings and discussions on the new constitution were to be conducted through the organs of the NRM—the Resistance Councils (RCs). It should be noted that the Republic Constitution which was the fundamental law of the land guaranteed freedom of association and freedom of assembly. Human Rights Watch [28] reported that Cecil Ogwal, one of the members of the leadership of the UPC tried to challenge the restrictions on political rallies by attempting to hold a series of rallies in northern Uganda. The police arrested sixteen of her followers and charged them with belonging to an illegal organization. Thus, in the case of Charles Onyango Obbo and Anor v Attorney General [29], the UPC sought an injunction to stop the government from interfering with its political activities. The petitioners alleged that the ban on political parties violated the constitutional rights to freedom of association and assembly and that the provisions governing campaigning adversely affected the right to free expression. The High Court dismissed the petition because the ban on party activities was a temporary measure that was necessary to prevent a revision of the political chaos of the past. Therefore, during the constitution-making process, Ugandans couldn't engage in political debates on the new constitution that did not conform to the NRM's views. It may therefore be stated that the constitution-making environment was inimical to freedom of expression and freedom of association and assembly, which are essential for a meaningful consultative and participatory constitution-making process to bestow popular legitimacy on a constitution [17].

CONCLUSION

Uganda's 1995 constitutional order is characterized by an abiding tension between President Museveni's and his NRM government's permanent ownership of power and a constitutional promise of democracy. The questions of political transition, democracy, exercise of state power, and accountability are best answered through understanding the patrimonial logic and the structural constitutionalism deficit in the 1995 Constitution. In Uganda, the head of state exercises inordinate powers. This is because fundamental laws have been established to entrench in power governments under whose leadership they are written. This article recommends that Uganda promulgate a new constitution emerging out of the aspirations of Ugandans to construct democratic institutions and mechanisms for ensuring that persons and institutions that exercise state powers are subjected to effective controls. This may be achieved through casting the new constitution in the mold of the principles of constitutionalism. More so, further studies need to be carried out on how to establish effective constitutional institutions and to ensure that state powers are exercised within acceptable constitutional limits not only in Uganda but also in many other African countries. For constitutional reforms to acquire the support of the public, Ugandans should be educated through public debates about the motivations behind the fundamental laws under which the country has been ruled since its borders were drawn up. Civil society could take up the role of raising public awareness. Universities and other institutions of education could also provide courses on constitutional law with a specific focus on constitutionalism and constitution-making. Debates and courses on constitutional reforms could include how to develop mechanisms which ensure that holders of public office do not abuse their authority. A constitution should promote liberal democracy through ensuring that its mechanisms intended to protect minority rights are sufficiently fastened. For example, article I of the Constitution of the Republic of Uganda 1995 prohibits amendments to its provision guaranteeing fundamental rights, freedoms, and guarantees to citizens; a state based on the rule of law and party-political pluralism; separation of powers and the independence of courts.

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