

**RIGHTS AND DEMOCRATIC GOVERNANCE
WORKING PAPER SERIES**

NUMBER 2, 2005



**LIBERALIZATION WITHOUT LIBERATION:
UNDERSTANDING THE PARADOXES OF THE OPENING
OF POLITICAL SPACE IN UGANDA**

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Understanding the Paradoxes of Opening Political Space in Uganda

In many respects contemporary Uganda is riddled with paradoxes. On account of strict adherence to IMF and World Bank prescriptions, Uganda was the first country to benefit from the Highly Indebted Poor Countries (HIPC) initiative. Economic policies pioneered in this country have provided the blueprint for much of the Poverty Eradication measures that are in place in a number of underdeveloped countries, specifically the poverty reduction strategy papers (PRSPs). High rates of economic growth and significant success has been registered in areas as varied as the battle against the HIV/AIDS pandemic, and in the provision of Universal Primary Education (UPE). At the same time, Uganda has been a trail-blazer in terms of recognizing the rights of marginalized groups such as women, the youth and persons with disabilities, to such an extent that the 1995 Constitution—the instrument enshrining these innovations—has been used as a template for similar reforms elsewhere.¹

However, the context of political freedoms remains severely (and steadfastly) proscribed. Virtually alone among African countries in the heady waters of the 1990s, Uganda successfully resisted the introduction of a system of governance in which political parties were given free reign to organize and operate.² Neither could parties campaign for political office or exercise the other functions intrinsic to the effective functioning of a pluralist and democratic polity. Instead, political parties were confined to their headquarters, invariably located in Kampala. While the outright declaration of a single party state was carefully avoided, every Ugandan was legally deemed to be a member of the Movement system of governance. Thus, political contestation across the country was organized on the basis of ‘individual merit,’ rather than on the platform of a political collective, accompanied by the proscription of party colours, slogans and symbols.³ Attempts at breaching this conscription were met with legal chicanery, criminal sanction, and sometimes, brute force.⁴

In sum, while Uganda made several strides economically, the ‘political space’ has remained grossly underdeveloped. Moreover it is complicated by a system of governance that while initially fostering considerable grassroots political participation and expression, has grown increasingly more

intolerant even to its own adherents. Put another way, a system that once prided itself on the sufferance of internal criticism of even the most sensitive of topics, and the inclusion of a wide spectrum of diverse political actors and forces, has largely degenerated into a clone of the African single-party states of yesteryear.⁵ Given these developments, the contemporary Ugandan situation can best be described as the paradox of liberalization *without* liberation.

The context of political change in Uganda today has been critically affected by the decision in early 2003 that a move should be made towards the opening of the political space, with a re-introduction of a multi-party system of governance, held in abeyance since 1985. The decision was made by the National Conference—the highest policy-making organ of the Movement—and has considerably influenced the pace and tempo of political debate in the country since that time.⁶ That is primarily because accompanying the political space announcement were several other proposals for constitutional reform, the most important and alarming of which called for the elimination of term limits on the office of the President. By making these proposals, yet another paradox of political life in Uganda has been exposed. That paradox is the considerable influence of President Yoweri Kaguta Museveni on the changes in Uganda’s body politic, even as the reforms introduced under his regime were designed to mark a departure from the scourge of the patrimonial and autocratic rule that so damaged the country. It also exposes the twin legacies of Uganda’s turbulent history—the acute fear of the social fissures produced by erstwhile political party activity coupled with the unbridled abuse of military power, and of the dominance of a dominant all powerful and largely unaccountable Executive.

The broad theme of this paper is the paradox that is Uganda today. It is more narrowly addressed to the specific process of transition from the Movement system to a regime that allows for political party contestation within a context of civic stability, democratic debate and non-conflictual participation. In particular, it considers several questions that relate to the legal and constitutional framework that exists and the implications for its reform. Among those questions are the following:

¹ Tamale, 2001.

² Kasfir, 2001.

³ See, Ssenkumba, 2000.

⁴ Human Rights Watch, 1999, at 71-86.

⁵ Dicklitch, 2002.

⁶ Oloka-Onyango, 2003.

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How should or will the constitutional and legal framework of the country be adjusted in order to pave the way for pluralist politics?

What is the timetable (if any) for Constitutional (and Legal) Reform?

To what extent will the Judiciary have an influence on the process of transition?

What are the broader implications of the transition to the overall objective of poverty eradication, and to what extent will a new regime of governance affect the achievements made in this regard?

In answering these questions, this paper endeavours to throw some light on the varied issues involved in the current political transition. At the same time, it is necessary to point out from the onset that the arena in which the debate on political transition is playing itself out is highly contested. A preliminary caution is thus in order: the legal and constitutional framework of governance will be only one of several sites of contention, although it is among the most important.

The paper begins with an overview of the main issues involved in amending the 1995 Constitution, with a particular focus on the specific provisions of the instrument, before moving on to the referendum on political systems, and the possible timetable for reform. It then considers the broader issue of the role of the Judiciary in the process of transition, with a specific focus on the implications of the recent Supreme Court decision (*Ssemogerere v. Attorney General*), which overturned the 1st Amendment to the Constitution. Part IV of the paper offers some reflections on the linkages between the process of political transition and the achievement of the goals of the PEAP. The conclusion attempts to flesh out some of what I believe to be the preconditions to genuine political reform. The paper has three appendices. The first outlines the possible timetable for constitutional reform, including a synopsis of the current parliamentary session. The second is a digest of transition-related court decisions

made following the adoption of the 1995 Constitution, and the third catalogues the legislation that needs to be reviewed as a pre-condition to the operation of a viable, vibrant and genuinely pluralist political system.

II. AMENDING THE 1995 CONSTITUTION

Uganda's latest constitutional instrument is barely eight years old, having been enacted in October 1995. However, the history of its promulgation is much longer, extending back to the 'bush' days in conceptualization, and to the establishment of the Uganda Constitutional ('Odoki') Commission in 1988, in implementation.⁷ It is thus a paradox that an instrument so long in gestation (7-plus years) was found in need of comprehensive review a mere 6 years later, with the establishment of the Constitutional Review Commission (CRC) under Prof. Frederick Ssempebwa in 2001.⁸ A number of reasons can be given for what was at the time considered a surprising development. Its roots are a complex mix of what the 1995 Constitution said or omitted to say (particularly on political systems, federalism and land); pressure (internal and external) for reform of the Movement system of governance, and the heat generated by the 2001 presidential elections.⁹ Although initially disregarded and ignored by many, over time, the CRC evolved to become a terrain of considerable struggle over how the future power map of Uganda should be designed. It is for this reason that the premature release of a report alleged to be the CRC draft generated considerable acrimony and government anguish, eventually culminating in a court injunction against its publication.

The submission of the official Ssempebwa Commission report on December 10, 2003, set in motion a process that will eventually lead to the amendment of the 1995 Constitution and consequently to the establishment of a new constitutional regime of governance in Uganda. In the interim, a number of related developments are taking place that will most certainly influence the manner in which the instrument is eventually amended. First of all, there are the talks—

⁷ For a background to the Constitutional Commission, see Odoki, 2001.

⁸ Mugwanya, 2001.

⁹ One of the main electoral promises of opposition candidate Kizza Besigye—President Museveni

's most formidable opponent in the 2001 election

—was that he would set up a Commission to review the issue of federalism and the operation of political parties. The appointment of the CRC was thus viewed as an attempt to take the winds out of Besigye

's campaign sails. See Twesime, 2003.

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variously described as ‘consultations’ or a ‘dialogue’—between the government and a variety of political actors, including the mainstream political opposition (the Group of Six, or ‘G6’). Discussions are also underway with splinter political organizations, which have distanced themselves from the mainstream. Wholly new political groups of varied pedigree are waiting on the sidelines. If government is genuinely interested in the reform of the political arena, then it is expected that at least some aspects of these discussions will find their way into the reform of the Constitution, and of the legal regime governing political association and expression.¹⁰ Secondly, both the opposition to and the support for the ‘3rd Term Project’ has stepped up, with various demands being made regarding the mode in which the Constitution should be amended (or not) in order to achieve (or defeat) this objective. Most prominent among these demands has been the call for a referendum on the issue.

2.1 Assessing Possible Scenarios

During the course of debate about the amendment to the Constitution, a number of scenarios have been presented by members of the government, parliamentarians, the opposition, the Media and the general public. It is important to clarify on these scenarios because they have considerably muddied the waters of the debate on this important topic.

Scenario One:

Some discussion has taken place on the holding of a referendum on the issue of term limits.¹¹ Partly to this end, a Bill to activate Article 255 of the Constitution (providing for the holding of referenda on ‘any issue’), and several other provisions relating to referenda has been presented in Parliament¹²—a point I shall return to subsequently.

Scenario Two:

Some observers have made suggestions that if the vote is to remain in Parliament, the Rules of Procedure should be amended in order to provide for an open (as opposed to secret) ballot on the issue.¹³

Scenario Three:

There have even been suggestions for the extension of the life of Parliament for several years, or for the declaration of a state of Emergency in order to prolong the tenure of the incumbent regime.

Scenario Four:

A claim has been made that the general population will reject government’s recommendation for a return to multi-party politics, preferring instead, to retain the Movement in defiance of the leadership.

While none of these scenarios should be discounted, it is important to point out what they reflect: considerable uncertainty about the future, and a high degree of confusion on the possibilities and the limitations of Uganda’s current constitutional and legal regime. It also reflects the significance

¹⁰ Considerable controversy surrounds these talks, related both to their representativeness, as well as to the seriousness with which government will take the deliberations. The G7 (comprising the main opposition groups) have refused to register as required under the Political Parties & Organizations Act. A group of four meeting the government delegation separately is made up of splinters of the mainstream opposition, plus the Action Party (AP), which was the only group that participated in the controversial referendum on political systems in 2000. Over 50 new political groupings have sprung up in the last several months, and claimed a place at the negotiating table.

¹¹ It has been reported that this was also the recommendation of the Ssempebwa Commission, although the Chairperson is himself reported not to have agreed with the proposal. See, John Kakande, *Ssempebwa opposed lifting of two-term limit for president*, New Vision, February 19, 2004, at 1-2

¹² See Bill No.14 of 2003, dated October 15, 2003.

¹³ This is a position being prominently pursued by Semakula Kiwanuka, the Minister in charge of the Luwero Triangle. The current rules of procedure were amended in 2000, following the debacle that led to the first amendment to the 1995 Constitution. Consequently, Rule 75 provides for a secret vote in respect of a Bill amending any provision of the Constitution. Rule 9 allows for the suspension of any of the Rules, but specifically excludes Rule 75. To amend the rule *in toto* or any part of them, under Rule 50, one must give at least 5 days notice, accompanied by the draft of the amendment. If the motion is proposed and seconded, it is then referred to the Committee on Rules, Privileges and Discipline which must, under Rule 135(e) examine and advise the House on the matter, which will then deliberate and vote on the amendment.

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of the 3rd term project, and the extent to which the powers of the day will go in seeking to secure it, as most of the scenarios revolve around the retention of power in the incumbent government. Indeed, President Museveni's silence on the issue of whether or not he will stand for re-election in 2006 speaks much louder than any utterance he could make on the same. Consequently, while it is important to have clarity on what the provisions of the Constitution actually say about these processes, it is equally important to be prepared for attempts to subvert, manipulate or (in the extreme) overturn the established framework for political reform. Furthermore, the struggle over the 3rd term may also have the effect of negating the more fundamental reforms required in relation to the transition from the Movement system to a multiparty arrangement.

2.2 Specific Constitutional Provisions

By most accounts, the CRC has made wide-ranging recommendations for the review of the Constitution. Several provisions of the Constitution relating to the transition from the Movement to a multiparty system need to be given consideration. The following section divides the provisions in question into two broad categories, *viz.*, Repeal and Amendment/modification:

(A) PROVISIONS REQUIRING REPEAL:

Provisions on the Political System

Article 69 (political systems);
Article 70 (Movement political system);
Article 73 (Regulations of political organizations);
Article 74 (Change of political system by referenda or elections);
Article 269 (Regulation of political organizations during the movement period of governance).

Provisions on the Legislature

Article 78(c)(army representation)

(B) PROVISIONS REQUIRING AMENDMENT/ADDITION:

Generally speaking, serious consideration needs to be given to the precise form of multipartism that the new system will assume. Given Uganda's history, some critical thought needs to be given to a system that does let the 'winner-take-all' by emphasizing the principle of first past the post (FPTP).

Coupled with this will be the need to define the role and rights of an opposition in Parliament and to entrench these. The present caucus system will also have to be reformulated, as will the composition and mode of functioning of Parliamentary committees. A clause will also need to be inserted in the Constitution confirming that all persons have the fundamental freedom to make political choices, including the right to:

- (i) form and join political parties;
- (ii) participate in the activities of political parties without fear or hinderance, and
- (iii) campaign for a political party or cause.¹⁴

However, providing for the operation of parties alone is insufficient. Additional provisions will have to be added to the Constitution in order to provide for a functioning multiparty arrangement, including issues such as the funding of parties. Attention will have to be paid to questions such as the role of the leader of the opposition, 'floor crossing' and the operations of parliament in a multiparty context. In addition, the following aspects of the Constitution will also have to be adjusted in order to reflect a multi-party arrangement:

• **Appointments to Constitutional Bodies**

Provisions relating to the vetting, appointment and removal of chairpersons and members of Constitutional bodies, including the Uganda Human Rights Commission; the Electoral Commission; the Public Service Commission, and the Judicial Service Commission, need to be re-formulated in order to reflect a multi-party arrangement. Thus, the committees charged with the responsibility of nominating members of such Constitutional bodies should be proportionally composed of the members of all the parties represented in the National Assembly. With specific reference to the Electoral Commission that will play a crucial role in the transition, the issue of their removal (currently governed by Article 60(8) which gives the President full discretion to sack them) should be reviewed.

• **The System of Local Government**

Considerable attention will have to be paid to the system of Local Government, including in particular the elections to Councils and their framework of operation that has hitherto

¹⁴ The current formulation in Article 29(1)(e) is rather equivocal, while Article 72 is largely formulated in the negative.

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needs reformulation. Attention should also be paid to the appropriate function of Resident District Commissioners (RDCs), District Intelligence Security Officers (DISOs), and Local Defence Units (LDUs) in a multiparty arrangement. The number of RDCs could be reduced, and instead of covering districts, they could cover regions.

◆ **Rules on Affirmative Action**

There is a need to address these provisions in order to ensure, first, that they are applied to political parties so as not to reduce the level of representation below a specified minimum, and secondly, to enhance the participation of marginalized groups in political activity. In other words, a provision needs to be inserted in the Constitution that compels political parties to pursue/promote gender parity, and does not retard the gains made in this respect. A similar review is necessary to consider the situation of other marginalized groups, such as ethnic and racial minorities, and people with disabilities.

◆ **The Uganda Peoples Defence Forces (UPDF)**

The provisions relating to the UPDF need to be amended to specify that the armed forces will not act to the prejudice of a legitimate political party interest, provided it is pursued in conformity with the Constitution. The UPDF must be compelled to commit that it will not further, in a partisan manner, any political party interest. At the same time, it is necessary to de-personalize the UPDF and to create more efficient organs and improve the chain of command.

(C) A NOTE ON THE AMENDMENT PROCESS

Given the recent Supreme Court decision that nullified the 1st Amendment to the Constitution, the provisions of Chapter 18 (Amendment of the Constitution) are crucial with regard to the repeal or amendment of any of the provisions of the Constitution. Because of the decision in the *Ssemogerere* case, these provisions will have to be followed with utmost fidelity. The following are the key issues to bear in mind:

1. Parliament is the principal institution in the amendment of the Constitution, irrespective of the method used. The government must present a bill(s) to parliament that is/are specific on the provision(s) of the Constitution to be amended (Article 258(2)).

2. The Constitution adopts an hierarchical approach to the amendment of its provisions, in that the processes for amendment on some provisions are more involved than others. In other words, some provisions are more entrenched than the rest.
3. Some provisions of the Constitution can only be amended through a referendum, endorsed by two-thirds of Parliament, secured on the 2nd and 3rd readings of the bill. Some of these provisions include Article 1 (sovereignty of the people), 2 (supremacy of the Constitution), and 44 (prohibition of derogation from particular human rights and freedoms). The referendum takes place before the parliamentary action (See, Article 259).
4. Other provisions can be amended through ratification by at least two-thirds of the members of the district council in at least two-thirds of all the districts in the country, endorsed by two-thirds majorities on the 2nd and 3rd readings of the bill in Parliament (Article 260). Among the provisions that can be amended in this way are Article 5(2) (on the districts of Uganda), and Article 152 (on taxation).
5. The remaining provisions of the Constitution can be amended through two-thirds majorities on the 2nd and 3rd readings of the bill in Parliament (Article 261). This includes the provision on presidential term limits (Article 105(2)).
6. A period of fourteen (14) days must separate the 2nd and 3rd readings of any amendment bill (Article 262(1)). According to the judgment in *Ssemogerere's* case, this requirement cannot be suspended via parliamentary rules of procedure.¹⁵
7. There must be a certificate of compliance signed by the Speaker confirming that the above rules have been followed (Article 262(2)(a)), or by the Electoral Commission if the amendment required a referendum or the ratification of District Councils (Article 262(2)(b)).

¹⁵ The Court was responding to the fact that the parliamentary rules of procedure were suspended in order to allow for the Bill to be passed within one day.

8. The President cannot assent to a bill that has not passed through the above steps, and even if he does, it can be challenged and in all probability will be declared invalid.

2.3 *The Referendum on Political Systems: Is it Inevitable?*

There are several different views on the necessity or otherwise for a referendum on political systems. Why hold a referendum when both the parties and the Movement agree that Uganda should move to a multi-party political system, is the question most often asked. Indeed, in light of the registration of the National Resistance Movement Organization (NRM-O) as a political party, it would appear that the matter of a return to a multi-party system is a *fait accompli*. Moreover, given the outcome of the 2000 referendum, is there a need to undergo an exercise that will simply raise political temperatures and is also likely to have no real opposition? Finally, there is the issue of the cost of the exercise, which, even by conservative estimates, will be considerable. In light of the several other pressing demands on resources, as well as the country's over-dependence on external funding, many view the referendum as a waste of both time and money.

However, there is considerable opinion that does support the exercise. First, it is argued that the 1995 Constitution mandates it under Article 74, and it would be a subversion of constitutionalism to avoid holding it. Secondly, according to this viewpoint, the decision to return to a multiparty system of government was made, in the first instance, by the President, and latterly endorsed by the National Executive Committee (NEC), and eventually the National Conference (NC). That decision ignored the views of a committee established to canvass opinions on the issue and which had come to the conclusion that there should be no return to parties in the foreseeable future. Moreover, even though the NC is the highest body in the Movement, the issue is too important to be left only to a representative body "according to this argument the voice of the people"—provided for under Article 1—must be heard. The final argument in

support of the referendum is that in 2000 Ugandans endorsed the continuation of the Movement system. It is therefore necessary to return to them to ask whether they are still of the same mind.¹⁶

What does the Constitution say about this issue? The first referendum on political systems was mandated by Article 271. Clause 3 of this provision stipulated as follows: "During the last month of the fourth year of the term of Parliament ... a referendum *shall* be held to determine the political system the people of Uganda wish to adopt." It is this provision that led to the holding of a referendum in 2000, and unfortunately, it is this provision which is in peoples' minds when they argue that a referendum is mandatory in order to change the political system. In substance, this provision has lapsed, and is thus no longer operative. However, subsequent to 2000, in order to change the political system, reference needs to be made to Article 74 of the Constitution. This provision specifies two modes by which the political system can be changed, viz., (i) By a referendum, or (ii) By a resolution of Parliament and the District Councils. Thus it is quite clear that a referendum to change the political system is not mandatory, neither is it automatic; the system can be changed by way of the Parliament/District Councils resolution. However, opinion seems to be leaning towards the former for the reasons given above. In either case i.e. whether there is a resolution or a petition for a referendum, these can only be taken in the fourth year of the term of any Parliament (Article 74(3)). This means that the resolutions or petitions can only be taken commencing July 2004, which is the point at which the fourth year of the 7th Parliament begins.

Using the Referendum and Other Provisions Bill, 2003 to settle the term-limits issue?

There is a second context in which the possibility of a referendum is being raised—in order to lift the two-term limit on the Presidency. According to Press reports, this seems to be the proposal of the Ssempebwa Commission.¹⁷ The reasons given for lifting the term limits need not engage us here.¹⁸ However, the arguments for holding a referendum on the issue are basically that Article 1 of the Constitution

¹⁶ This is the argument made by Sam F. Owori, a CRC member who issued a minority report.

¹⁷ Two commissioners

—including Prof. Ssempebwa himself

—issued minority reports opposing the suggestion of a referendum on term limits.

¹⁸ For a comprehensive examination of these, see Tusasiirwe, 2003.

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stipulates that “all power belongs to the people.” According to this mode of reasoning, ‘the people’ should therefore be final arbiters on this matter, especially because the issue has become ‘controversial.’¹⁹ This appears to be the intention behind the Referendum bill currently before Parliament, with substantial committee work commencing on February 24, 2004. That bill makes reference to both Article 74 (change of political systems by referenda/elections) and 76 (parliament to enact laws on election), as well as to Articles 255 (right of citizens to demand referenda) and 259 (amendments requiring referenda). In other words, the bill covers all types of referenda: the change-of-system one, others provided by the Constitution, and a third category on ‘any issue.’

The key elements in the bill are the following:

- ★ Providing for the circumstances in which referenda can be held, the framing of the question, and the methodology of canvassing for support;
- ★ Vesting oversight of referenda in the Electoral Commission;
- ★ Determining how referenda are to be assessed, and publication of their results;
- ★ Specifically outlining the procedure for either a referendum or a petition on the change of political systems;
- ★ The functions, treatment and rights and duties of agents of the sides in a referendum, and,
- ★ Procedural challenges to any referendum results.

From a legal standpoint it is rather strange that the Ssempebwa Commission could make a recommendation that the term-limits issue be referred to a referendum because the constitutional provisions on this matter are quite clear.²⁰ Article 105(2)—which is the provision that governs term limits—

can only be amended by Parliament, following two-thirds majorities on the 2nd and 3rd reading of the bill.

Bill No.14 makes reference to Article 255, in order to allow for the activation of a referendum on term limits under the broader framework of ‘any issue.’ There is some contention over this because Article 255 falls in Chapter Seventeen of the Constitution that is concerned with ‘General and Miscellaneous’ issues, and not Chapter Eighteen (on amendment). In other words, it envisages a referendum on ‘any issue’ of a non-constitutional nature. The referenda that touch on constitutional issues are covered by Chapter Eighteen, with the sole exception of Article 74 (to change the political system) which is contained in Chapter Five (representation of the People). Certainly, therefore, any attempt to have a referendum on term limits using Article 255 will be challenged as an attempt to amend the Constitution through a method not provided in the instrument.²¹ Indeed, it has been argued that for a referendum to be held on term limits, then Article 261 would first have to be amended, and this would be very difficult.²²

For the sake of argument, let us suppose that the government pushed through a referendum on the issue of term limits, using Article 255, combined with Article 1 (sovereignty of the people). At the end of the day, such a referendum can only be persuasive, and thus non-binding, because a bill to amend the Constitution would still have to be presented to Parliament to make the necessary amendment in accordance with the provisions of Article 261.²³ Nevertheless, if the referendum results were in favour of a lifting of the limits, individual parliamentarians would be placed under great pressure to make a different decision. Thus, if Parliament were to make a decision different from that made by ‘the people’ in a referendum arguably this could trigger a constitutional crisis. Opposition politicians are prepared to

¹⁹ Interview with Raphael Baku, Deputy Director, Research at the Movement Secretariat; February 16, 2004.

²⁰ See Prof. Ogenga Latigo, *Referendum Cannot Give Museveni Third Term*, The Monitor, December 30, 2003.

²¹ Prof. Ogenga Latigo, *Referendum under Article 255 a fraud*, The Monitor, February 13, 2004, at 9

²² Interview with Salaamu Musumba, MP, February 25, 2004.

²³ This point was made by the Speaker of Parliament, Edward Ssekandi in a recent wide-ranging interview. See, *Referendum will not bind us* —Ssekandi

, Sunday Vision, February 8, 2004, at 3.

²⁴ Interviews with Erias Lukwago and Peter Walubiri, respectively of the Democratic Party (DP) and the Uganda Peoples Congress (UPC) on February 25 and 26, 2004.

challenge the Referendum bill, and any other attempts to divert the 3rd term issue from conclusion by Parliament.²⁴

2.4 Determining the timetable for Constitutional Reform

As of the present time, the government has not yet released a timetable that indicates how the process of reform will be pursued. Furthermore, with the exception of giving an approximation of when the referendum will be held, it has responded vaguely when pressed on the matter.²⁵ It has also rejected the scheduling suggestions made by the Opposition, arguing either that they are not feasible, or that such timetable needs to be collectively arrived at. Any timetable for reform will largely depend on the character of reform that is pursued. Will it be a reform of the minimum required to put in place the outlines of a multiparty system, or shall there be a comprehensive overhaul of the existing constitutional and legal regime affecting all political and civic rights that relate to association and expression? The latter will necessitate a more exhaustive review and overhaul of all legislation that impinges on such rights, while the former would be a minimal or cosmetic reform of the current system to put in place the basics of a multiparty system.

There are several other issues affecting the timetable, principally, *how will the balance be struck between political expedience, and the practicalities involved in undertaking reform?* Thus, will there be a referendum on political systems, or a resolution? Will there be a move to have a referendum on term limits? If so, when will it take place? How will the process of legislative reform evolve? Finally, consideration needs to be made to the forum and methodology of reform: will it involve only the political

class (the government, the parties and parliament), or will it be opened up to other non-state, civic actors?²⁶ Regardless of the scenario of reform adopted, it is likely to be a protracted and involved exercise. What is clear is that the government views the agenda for reform as a critical element in the whole transition process, and it is for this reason that it is keeping its main contours close to its chest.

In the absence of a government schedule, a number of points that can allow us to predict what that calendar will look like are nevertheless clear. At the end point are Presidential and parliamentary elections which must be held no later than July, 2006.²⁷ In between—depending on which of the Constitutional provisions are adopted—there must be either a referendum or a resolution on political systems, the petitions for which can only be taken commencing July 2004. In contrast, the commencement point for the transition in constitutional reform must be the issuance of a government White Paper derived from the Ssempebwa Report. It is also quite likely that the White Paper will be influenced (negatively or positively) by the deliberations between the government and the Opposition, that are scheduled to terminate at the end of April, 2004. Finally, it will also be influenced by the findings of a separate Committee (comprised of lawyers in the Cabinet and chaired by Education Minister, Edward Khiddu-Makubuya) that was specifically tasked with a review of all legislation linked to the processes of political transition.²⁸ At some point in time, government will also have to draft the Bill or Bills specifying the provision(s) of the Constitution that are to be amended, presuming that either a referendum or the petition have resulted in a change of political system.²⁹ A recent interview by the Speaker of Parliament also gives some indication of what the calendar will look like. According to him, the debate on the White Paper cannot possibly

²⁵ Ssemujju Ibrahim Nganda, *Govt sets July for referendum*, The Monitor, February 25, 2004, at 4.

²⁶ Under the Parliamentary Rules of Procedure, bills must be referred to relevant Committees and the hearings on them are open to the public.

²⁷ Previous elections (in 1996 and 2001) have been held separately for the Presidency and Parliament. The reasons for the split elections are varied, but mainly focused on the 'coat-tails

' theory. In 1996, President Museveni had not been tested in a competitive election. There were fears that in a unified election, while Museveni would win on account of incumbency and popularity, the margin of his victory might not be large. Furthermore, many parliamentary aspirants who supported the Movement could also be the victim of this uncertainty. However, a parliamentary election following a Museveni win would greatly boost those close to the President, and also demoralize those who might want to support the opposition. Indeed, proximity to the President in the parliamentary elections was a major campaign tool. There is now broad consensus that the elections should be held on the same day, primarily on the grounds that it would save costs.

²⁸ Baku interview, op.cit.

²⁹ Interview with Lucien Tibaruha, Solicitor General on February 25, 2004.

³⁰ See John Kakande, *Two-term lift not possible before 2005*, Sunday Vision, February 8, 2004, at 1-2.

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commence before passage of the 2004/2005 budget, which must be concluded by August 31, 2004.³⁰

In Appendix I of this paper, I provide a possible/probable timetable of the stages of Constitutional reform. It is impossible to put a precise timeline to these events, except to say that the White Paper (if any) will probably reach Parliament towards the middle of 2004.³¹ In order to allow for a reasonable period of preparation, the formal procedures of reform—including reform of the electoral laws—must be completed by the end of 2005. This will allow for the holding of multiparty elections in mid-2006.³²

2.5 Revisiting the Legal Regime

Constitutional reform alone is inadequate unless accompanied by a comprehensive review of the broader legal regime that operates in Uganda. This is clear from the fact that while the 1995 Constitution appears to outlaw legislation that does not conform to the letter and the spirit of the instrument (Article 2), several offensive laws remain on the statute books. Moreover, these laws are variously invoked by government officers, courts, and the general public to the detriment of democratic rights. Moreover, unlike the situation in Tanzania as it underwent transition, the Odoki Commission did not catalogue the laws which required amendment, repeal or modification in order to bring them into line with the new political order.³³ Instead, Article 273 of the 1995 Constitution generally stipulates that,

... the operation of the existing law after the coming into force of this Constitution shall not be affected by the coming into force of this Constitution but the existing law shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution.

Opinion on this provision is divided. Some courts have applied the black letter of the law as it currently exists, arguing that the task of repeal, modification or amendment rightly belongs to Parliament. Others have applied the constitutional provisions in a progressive manner, but such application has not been carried out across the board. Moreover, the law remains on the statute books with the modification applying only to the specific case before the Court. Consequently, it is possible to have varying applications of the same law by different courts.³⁴ Furthermore, it is only in a few instances where litigants have pursued a matter involving a controversial piece of legislation through the hierarchy of the courts in the system (i.e. the Court of Appeal and the Supreme Court). This is what happened in the recent ‘false news’ case in which journalists from the Monitor newspaper challenged this provision of the Penal Code as unconstitutional.³⁵ By contrast, the same paper chose not to challenge the two recent injunctions issued against it, thus there has been no judicial pronouncement on their constitutionality.³⁶

For the constitutional reform to make sense and lead to a system of genuine multiparty democracy in which there is both a “level playing field” and where political actors can fully exercise their rights, it is essential that there be a comprehensive review of legislation in the following arenas:

- ★ Laws on political organizations (especially formation, registration and operation)
- ★ Laws on elections (including voter registration, constituency demarcation and campaigning)
- ★ Laws on freedom of association (especially for civil society, community and popular groups)
- ★ Laws on information and expression (including Media freedoms and regulation)
- ★ Criminal sanctions for manifestly or colourably political offences, e.g. sedition, criminal defamation, etc.

³¹ Tibaruha interview, op.cit. Some observers have said that there in fact may not be a White Paper, with the Ssempebwa report coupled with draft bills forming the subject of debate.

³² Government ‘reasonableness’ cannot be presumed, especially in as far as previous preparations for election are concerned. Thus, crucial bills for an election have been delayed leading to campaign periods (especially in the presidential election) that are woefully inadequate.

³³ The Justice Nyayali Commission in Tanzania catalogued a total of 40 plus laws that were deemed to offend fundamental rights and freedoms and to impede good governance. See Peter, 15-18.

³⁴ See, Tibatemwa-Ekirikubinza 2002.

³⁵ See *Andrew Mwenda & Charles Onyango Obbo v. AG*, Const. Pet. No.2 of 2004.

³⁶ Injunctions were issued to prevent the Monitor from publishing what they claimed was a draft of the Ssempebwa report, and of the Gen. David Tinyefuza report on ‘ghost’ soldiers in the UPDF.

In Appendix II to this paper, I catalogue the specific laws that need to be revisited, either through wholesale repeal, or through amendment, and provide the reasons why.

III. THE IMPLICATIONS OF JUDICIAL INTERVENTION ON POLITICAL CHANGE

One of the most prominent actors to emerge in the process of constitutional reform in Uganda today has been the Judiciary.³⁷ That prominence is in part the result of a concerted effort by sections of the opposition to continually test the existing parameters of the 1995 Constitution, but it also emerges from the radical reconstruction of judicial power that the instrument brought into existence.³⁸ In reviewing the issue of judicial intervention as a whole and its possible impact on the process of political change, it is important to make a number of preliminary observations, *viz.*: i) in which court is the issue in contention being adjudicated?, and ii) what is the issue in dispute?

3.1 *A Note on the Question of Jurisdiction, Timing and Subject-matter*

All constitutional matters must in the first instance commence in the Court of Appeal, which, under the 1995 Constitution, is the Constitutional Court. The record of this court has in the main not been exemplary, and many of its decisions have upheld the *status quo*, even in instances where it is quite evident that the legislation or action complained of is blatantly unconstitutional.³⁹ In several instances, the Court has only overturned legislation or declared a matter unconstitutional following an appeal to the Supreme Court, and the

subsequent issuance of directions on the appropriate approach to be adopted.⁴⁰ On its part, the Supreme Court has been much more robust on the constitutional issues that reach them, and several cases that the lower Court evaded or avoided have found a more judicious hearing in the higher court.⁴¹ However, given that the Supreme Court is a superior court, all matters must commence in the lower courts. This raises several problems. First of all, to reach the Supreme Court, the issue must be appealed; many cases have remained at the Constitutional Court level and lower. Secondly, there is the question of the timing of the adjudication, because a hearing in the Constitutional Court can take several weeks or even months to conclusion.⁴² The judgment too can be issued after several months, in some instances by which time, the effect of the ruling has been overtaken.⁴³ Moreover, even when the Constitutional Court issues a ruling that seeks to uphold human rights, the state can appeal the decision as a delaying tactic.⁴⁴

The significance of the court and the timing of the matter are important because of the tight timetable for reform. Basically there is a little over two years in which the legislative and constitutional measures required to effect a change to a multiparty system can take place. As already pointed out, it is most likely that the debate on constitutional reform will commence in earnest in the latter half of 2004. If there are disputes over these issues—as there are most likely to be—they must, in the first instance be referred to the Constitutional Court. The time-line for their adjudication thus becomes crucial as the mere reference of an issue to Court (unless in quest of an injunction) does not by itself upset the *status*

³⁷ See Simwogerere Kyazze, *Suddenly the courts of law matter a great deal*, The Monitor, February 18, 2004, at 15.

³⁸ See especially Articles 126 and 137 of the 1995 Constitution.

³⁹ For a good analysis of the operations of the Court, see Mbabazi, 2001.

⁴⁰ See, for example, *Simon Kyamanywa v. Uganda*, Criminal Appeal No. 16 of 1999.

⁴¹ See Sengendo, 2001.

⁴² In the recent Supreme Court judgment (*Mwenda*), the Supreme Court stated that when a reference has been made to the Constitutional Court, it must stay all other matters until it has disposed of the constitutional issue before it. This ruling will have the effect of at least reducing some of the delay that dogged the *Mwenda* and other cases in which there were either criminal or civil matters being heard simultaneously.

⁴³ For example, if the ruling on the Constitutional Amendment had been made in a timely fashion, it would have had implications for the 2000 referendum. As it is, the implications of overturning the referendum are so dire that it is unlikely that any court of law would issue such a ruling.

⁴⁴ This is what has happened, for example, in the case involving the Political Parties & Organizations Act (PPOA), sections of which were ruled unconstitutional. The state appealed the case and it was heard in October 2003. Judgment is yet to be made by the Supreme Court. Walubiri interview, op.cit.

⁴⁵ For example, the government is still applying the provisions of the PPOA even though the matter is still in Court.

quo.⁴⁵ Finally, the subject-matter or issue in contention will also have an influence on the manner in which the Courts respond. While the Supreme Court has made some decisions that could be considered quite revolutionary in the Ugandan context, it has also erred in favour of caution if the matter may have implications of a serious political nature. Thus, in the election petition against President Museveni, while all the judges found that there were serious irregularities in the 2001 contest, only 2 of the 5 were willing to state that those anomalies were so excessive as to impugn the results.⁴⁶

3.2 Nullifying the Constitution (Amendment) Act, No.13 of 2000:

Weighing the Implications

The case of *Paul K. Ssemogerere & Others v. The Attorney General*⁴⁷ was an appeal from the Constitutional Court to the Supreme Court. It concerned the legality of the Constitution (Amendment) Act, No.13 of 2000, which had been debated, passed and referred to the President for his assent during the course of a single day. The appellants argued that the Constitutional Court had mis-directed itself by not nullifying the Act, and by failing to find that the Act amended several provisions of the Constitution by implication and infection. The intention of the amendment was to effectively bar scrutiny of both the parliamentary record and of its internal procedures of debate and operation. In the main, the Supreme Court held that:

- (i) Any Act of Parliament or any law that is inconsistent with or in contravention of the Constitution can be challenged, and it is the duty of the Constitutional Court to provide redress to the applicant;
- (ii) Restricting the citizen from accessing certain information in the possession of the state (as the Act had purported to do) violated Article 41 of the Constitution, which guarantees the right of access to information;
- (iii) By subjecting the provision of information to Parliamentary approval, this denied an applicant the right to a fair, speedy and public hearing before an independent and impartial court;

- (iv) The Act whittled away Article 128(3) which stipulates that all organs and agencies of the State must accord courts such assistance as is necessary to ensure their effectiveness, and also affected court's use of the parliamentary Hansards;
- (v) The procedures outlined in Chapter 18 of the Constitution (on amendment of the Constitution) are mandatory and cannot be altered or waived by Parliament, and
- (vi) The voice voting method (the use of 'Ayes' and 'nays' and the Speaker's assessment of which side has it) is wrong especially on contentious matters such as amendment to the Constitution.

The primary implication of the *Ssemogerere* decision was to re-assert the supremacy of the Constitution, and to emphasize the need for fidelity in dealing with its provisions. It also signaled that the Judiciary would be willing to strike down any legislation that offended the provisions of the Constitution, and to deal with an area that it had hitherto been shy of tackling, *viz.*, harmonizing conflicting provisions in the instrument. However, it is an exaggeration to say that the case nullified all legislation that followed the Constitution (Amendment) Act, particularly those which had been passed using the voice-voting method. The judgment in the case is specific to the facts that it addressed.⁴⁸ This does not mean that such legislation cannot be challenged, but the courts will have to address each case on its specific facts and merits once brought to its attention. Of course, it is also expected that several of the pending cases currently awaiting adjudication before the courts will also receive a favourable hearing. This would have implications for the following: (i) the registration and operation of political parties; (ii) the status and funding of the Movement, and (iii) the registration of the NRM-O as a political party. Appendix III of the paper provides a synopsis of recent cases either pending or decided by the Courts, and their implications for the transition.

3.3 Issues Likely to draw contention

While it is as yet not clear on what methods of reform will be adopted nor of what issues will be put on the table by the government, it is quite clear that there will be a concerted

⁴⁶ See *Kizza Besigye v. Y.K. Museveni & the Electoral Commission*, Election Petition No.1 of 2001.

⁴⁷ Constitutional Appeal No.1 of 2002.

⁴⁸ This point was made clear by the Chief Justice, See, *Justice Odoki dispels crisis fears*, New Vision, February 25, 2004 at 6.

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struggle over several issues. Among them, the following are the most likely to be disputed:

- ★ The elimination of presidential term limits
- ★ Political Party registration and operation
- ★ Electoral Laws and Procedures
- ★ Federalism as an alternative system of governance
- ★ The extent of legislative reform necessary to match the transition to a multiparty system of governance

The outcome of the discussion on these issues is by no means clear-cut. However, the opposition is prepared to challenge the government, including taking them through the Courts of law.

IV. A BROAD CONCLUSION: LINKING POLITICAL TRANSITION TO THE PEAP

Uganda's successes in the poverty eradication arena can principally be ascribed to the significant degree of security and stability that it has enjoyed over the last two decades, albeit at the expense of the considerable curtailment of civic and political rights. Given this essential paradox, it is impossible to predict the manner in which the transition will evolve and conclude. However, it is quite clear that the most important condition for its success is whether it will take place in a context of respect for law, order and the maintenance of political stability on all sides of the political divide. One needs only to contrast the situation in the North to that in the rest of the country to appreciate how fundamental the issue of security is to assuring gains in poverty reduction. However, security and stability alone are not sufficient. A number of additional conditions are necessary in order to guarantee that there is no return to the dislocations of the past. In my opinion, the following are central:

■ **Establishing a genuinely level field for the conduct of electoral politics:**

There is a need to completely de-monopolize the arena of political contest currently dominated by the Movement, in order to allow for opposition parties to operate without undue constraint. Key in this respect

will be the design of a law governing the operations of parties that is fair and even-handed and which keeps state oversight and control to a necessary minimum. However, the manner in which the 3rd term debate is handled will also be critical. The higher the levels of manipulation (especially if recourse is made to a referendum on this issue) the greater the likelihood of disaffection and unrest. Attention also needs to be given to the additional proposals made by Cabinet regarding constitutional reform. If implemented, these would have the effect of reducing the institutional and structural gains made over the last two decades, affecting as they do both legislative power and institutional checks and balances, such as the IGG and the Human Rights Commission. Thus, both political action and institutional consolidation will be key to assuring the realization of genuine and sustainable political change and poverty eradication in Uganda. Serious consideration also needs to be given to the design of the Electoral formula that moves away from the winner-take-all mechanisms that have characterized earlier electoral contests in Uganda. At the same time, the mechanisms of Electoral Administration need to be strengthened and made more autonomous of government in terms of the control over resources and operations. However, even if the 3rd term is secured via the designated constitutional means (i.e. the two-thirds majorities mandated by Article 261), the implications of another term for President Museveni must necessarily be of heightened tension, given its dynastic and dictatorial overtones. This would have medium and long-run implications for the consolidation and sustainability of the poverty eradication programs.

■ **Ending the war in Northern Uganda**

The war in Northern Uganda raises serious questions about the possibilities of comprehensive political reform and poverty eradication in the country. While the conflict has been primarily confined to the North, its psychological and economic impact has the potential to seriously affect both the process and the attainment of poverty eradication goals. Critical attention needs to shift to finding a sustainable resolution to the conflict.

■ Restructuring the Opposition

There is a great need for a comprehensive restructuring of the current opposition, because it suffers not only from a serious credibility gap but also from a democratic deficit. A review of the constitutions of organizations like the Democratic Party (DP) and the Uganda Peoples' Congress (UPC) demonstrates that there is still a great deal of work to be done in liberating the internal space of operation of these parties. Hence, there is a need to de-monopolize the control of the leaders, who are in the main male, of an older generation, and prone to despotic and dictatorial tendencies. Simultaneously, party cadres and members need to be empowered to design new mechanisms of participation and party operation. There is also a need to find ways of supporting the operation of the new parties that have a greater potential to effect progressive change than either the Movement or the traditional parties.

■ Consolidating Civil Society action

It is critical that more support is availed to non-state actors to act as effective barriers to state excess and domination, and in this respect to ensure that the arena of political action is genuinely de-monopolized. The performance of civil society actors in the political arena to date has been abysmal, and while ensuring that they remain non-partisan, a great deal needs to be done in order to compel them to engage more critically with the evolving political situation. This must move beyond just electoral monitoring, but it should ensure that civil society actors commence a critical engagement with all the different aspects of the transition as they are unfolding. Electoral monitoring *per se*, comes to late after the fact.

■ De-militarizing the arena of political contest

Any reform of the political arena will have to deal with the heavy prevalence of military and extra-military power in the mediation of political disputes, and especially in the determination of electoral outcomes. Thus, in a multiparty context it will be essential to tame the Army and the operations of intelligence agencies such as ISO and CMI in order to ensure that they become fully extricated from the arena of political activity. Extra-legal bodies (such as Kakooza Mutale's Kalangala Action Plan—KAP) must be completely outlawed.

■ Enhancing PEAP participation and ownership

It is quite clear that in the main, the PEAP process has not done very well in the inclusion of parliament (and of non-civic political actors) in its evolution and execution. In a multiparty context it should be expected that there will be heightened pressures brought to bear on the PEAP process. Furthermore, there will also be more competition around what should be the areas of priority, implying that mechanisms should be designed for the better inclusion of parliament and of opposition actors, who also need to be primed on the various dimensions of the PEAP and its implications on poverty eradication.