A Case of Retreating Horizons and Worsening Circumstances? Annual State of Constitutionalism in Uganda in 2015

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ABSTRACT

The state of constitutionalism in Uganda in 2015 calls for an analysis of various events and actions across the three arms of government. Twenty years into the promulgation of the 1995 Constitution, this chapter conducts a juxtaposition of some of the events and decisions through the historical lens of what the expectations, aspirations and wishes of the people of Uganda were, and whether these are being met today. It is apparent that although much progress has been made, there is a lot of mileage to cover and in some instances, troubling strides in regression to recover from. There are many notable instances from 2015 in which it became more apparent how intertwined the functions of the three arms of government are in the Ugandan context.

Divided into five other parts, the chapter evaluates each arm of government. The next part discusses the performance of the Executive arm of government and highlights a number of missed opportunities and reflects on some of the key challenges through the year. The next part discusses the performance of the legislature and interrogates the hypothesis that 2015 was largely a year of retreating horizons for this crucial arm of government. In its evaluation of the judiciary, the third part of the paper takes stock of major landmark decisions, highlighting the crucial progress that the courts have made in advancing the much needed culture of constitutionalism, but also pointing to areas in which the courts may need to take a more progressive approach in their adjudication of human rights. The paper also points to some challenges that have become so notorious that they deserve no further elaboration. The discourse on human rights and constitutionalism is advancing on new forms of media is an emerging area to which and more attention will need to be paid. In highlighting how new media forms are providing a new frontier, this chapter evaluates a few key events and hopefully tickles interest into these areas. Key events on the political scene are analyzed in order to evaluate Uganda's progress in furthering good governance and human rights on a politically charged landscape.

Before reaching the conclusion that the developments of 2015 left a trying realization that there is more ground to cover, the chapter highlights the areas in which a lot of work will have to be done in future, so as to foster the progress of constitutionalism in Uganda.

PERFORMANCE OF THE EXECUTIVE IN 2015

The Executive came under scrutiny for a number of reasons in 2015. Firstly, this was the year when the country passed its largest budget so far.[1] Amid concerns of rampant corruption and unchecked government expenditure, the size of the budget is

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[1] See Budget Speech, 2016 Presented on 11th June 2015

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certainly something to be concerned about. This is especially so when one considers the breakdown of resource allocation. Although presented under the theme 'Maintaining Infrastructure Investment and Promoting Public Service Delivery,' the largest allocations were on Defense and security, public debt, roads and energy.[2] This is especially troubling when one notes that measures that were put in place to check government expenditure and increase accountability were watered down as discussed later in this chapter. With the exception of the Uganda Police whose allocation has been on a consistent rise, the areas of service delivery and institutions that are enjoined with fostering improved good governance and human rights such as the judicature remain starved of finances. Other core social economic rights remain unattended in the budget allocation. For instance, allocations to the health sector remain below the threshold in the Maputo Declaration, despite the filing of the *CEHURD* case whose implications are discussed herein. It is not unreasonable therefore, to deduce that from the nature of the budget and the behavior of the Executive towards passing this budget, there was no variation in the callous attitude towards increasing expenditure to the entrenchment of democracy, good governance, the rule of law and the enjoyment of human rights.

A number of the activities of a number of organs under the Executive arm of government are discussed under the different heads of this Chapter. However, a few deserve special mention. In October 2015, British firm Privacy International released a damning report on state surveillance in Uganda.[3] The report discloses the chilling extent to which state intelligence agencies have gone in eroding the privacy of Ugandans. Through a secret operation code-named *Fungua Macho* (Swahili for Open Your Eyes), the state purchased and is believed to be using intelligence software that is known to be in use in countries such as Syria and whose effect and extent violates every known parameter available to the state for intelligence gathering.[4] The report, not surprisingly, links this damning extent of spying that the state is visiting on its citizens to the growth of dissenting voices in Uganda and the need to tame the political opposition.[5] What is most worrying is that even public spaces such as hotels and restaurants seem to have knowingly acquiesced to this erosion of the privacy of their unsuspecting clientele.[6] Operation *Fungua Macho* ought to remain under the keen eye of every person interested in human rights and good governance in Uganda. There is no telling, for instance, how far the government will go in using this information to achieve any means that it may need to stay in power. It may not be an overstatement to observe that this may be the beginning of an extremely more sophisticated return to the dark past of human rights violations that will never be reported or recorded.

The Uganda Police also came under a lot of scrutiny for three more reasons: firstly, was the increased level of police brutality; secondly, the partisan nature in which it conducted its activities during the campaign season; and thirdly, recruitment of crime preventers in a manner that does not pass constitutional or legislative muster.

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[2] Information on the breakdown of budget allocation and accountability can be found at http://budget.go.ug/budget/sector-budget-docs

[3] Privacy International (2015), *For God and My President: State Surveillance in Uganda* accessed at: https://privacyinternational.org/sites/default/files/Uganda_Report.pdf

[4] It is doubtable that Operation *Fungua Macho* is within the parameters of the Computer Misuse Act, 2011 and the Interception of Communications Act, 2010 and the Report recommends that this consideration, among others, be investigated.

[5] See the textbox on page 22 of the Report

[6] See notes on page 25 of the Privacy International Report

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Although mandated under section 4 of the Police Act to protect the life and property of persons in Uganda, the Ugandan people witnessed a spike in incidents of heightened use of brutality in arrest, dispersion of crowds, which actions violated the rights of freedom of assembly and association under the Constitution. Most of these incidents were politically related and almost all of them targeted activities of opposition political parties and candidates.[7] In addition to the manner in which the Uganda Police facilitated the interests of the NRM party in blocking the consultations and other campaign activities of presidential candidate Amama Mbabazi, as the campaign season intensified, the conduct of the Uganda Police in responding to campaign related violence was perceived as being partisan.[8] The move by the Uganda police to massively recruit crime preventers was widely condemned as illegal.[9] Other concerns about this group whose exact total number remained a mystery included the fact that they were in fact a depiction of how bad the problem of youth unemployment is, the cost attributed to the recruitment and the fact that this expenditure reflected a clear misprioritization of resource allocation, given the many sectors critical to the population that are starved of funding, the fact that they were attributed to be partisan in their performance of their roles, as well as the unexplained question of what would happen to this massive radicalized section of the population after the elections.

The run up to the 2016 elections presented an opportunity to re-evaluate the performance of the Electoral Commission. The expectation of both the framers of the Constitution and the legislature when it promulgated the Electoral Commission Act was that the Commission would act independently in performing its mandate as set out in the law.[10] But in 2015, the Electoral Commission's actions when it attempted to retire the voters' register that was used for the 2011 elections were believed to have been outside its mandate. The Commission would also draw a lot of criticism for the partisan way in which it handled a number of campaign related issues including: capitulating to pressure from the ruling NRM party and the Uganda Police to halt candidate Amama Mbabazi's consultations, having previously cleared him to engage in these activities in the first place.

The confusion around what is meant by "consultations" under the Presidential Elections Act, 2005 brought to the fore an even larger point: the framers of this statute did not seem to have contemplated the challenges that would arise with consultations

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[7] For a detailed discussion see: Dorothy Kiconco (2015), *Police Brutality and the Use of Excessive Force During Arrest: Revisiting Uganda's Police Act* Parliament Watch, 2015 accessed at: http://parliamentwatch.ug/police-brutality-and-use-of-excessive-force-during-arrest-revisiting-ugandas-police-act/

[8] See for instance Fredrick Golooba-Mutebi (2015), *Police are Nakedly Partisan: Let's Strip Them of Their Impunity* The East African October 17th 2015 accessed at http://www.theeastafrican.co.ke/OpEd/comment/Uganda-police-partisan-stripping-women-impunity/-/434750/2917482/-/item/0/-/yhovirz/-/index.html see also, The Observer (2015), *Police Must Serve Every Ugandan* The Observer Editorial, December 16th 2015, accessed at: http://observer.ug/viewpoint/editorial/41651-police-must-serve-every-ugandan

[9] Retired Principal Judge and Chairperson of the Judicial Service Commission, James M. Ogoola was one of the many critics of this exercise. See Uganda Radio Network and The Observer (2015) *Justice Ogoola: Crime Preventers Illegal* The Observer, December 24th 2015 accessed at: http://www.observer.ug/news-headlines/41821-justice-ogoola-crime-preventers-illegal see also: The Observer Editorial: *Rethinking 'Electoral Crime Preventers'* The Observer Editorial January 18th 2016 accessed at: http://www.observer.ug/viewpoint/editorial/42126-rethink-election-crime-preventers see also Uganda Radio Network (2015) *MPs Block 37 Billion Request for Crime Preventers* The Observer December 18th 2015 accessed at http://www.observer.ug/news-headlines/41735-mps-block-shs-37bn-request-for-crime-preventers

[10] See Articles 60 to 62 of the 1995 Constitution, as Amended, especially Article 62 thereof, which provides for the Electoral Commission's independence, and Part II of the Electoral Commission Act, particularly section 14 thereof which buttresses the said independence.

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conducted in a multiparty dispensation.[11] Although the Electoral Commission had managed the pre-campaigning process both in the 2005 and 2010, the entrance of Amama Mbabazi, a former Secretary General of the NRM in the race exposed the Commission's inability to withstand the pressure that was obviously being deflected from the NRM. What this suggests is that the country will need to work tirelessly to rebuild confidence in the Electoral Commission's ability to manage a controversial and volatile electoral process, especially where the party in power is under threat from within its ranks. While these may be the birth pains of a budding democracy, it is not unreasonable to argue that more was expected from the Electoral Commission.

It is the duty of the Executive to table bills in parliament for debate. In 2014, the Speaker of parliament complained that the Executive was frustrating Parliament's work by not tabling as many as 54 bills that were pending at the time.[12] But 2015 brought a new challenge. The Executive tabled, and withdrew a number of legislations. Notable among these were proposals for Electoral Reforms and a bill that was intended to amend the Kampala Capital City Act of 2010. Despite the calls having come much earlier, the Executive belatedly tabled a bill to amend the Constitution for purposes of facilitating electoral reforms which suffered much criticism even from representatives within the ruling NRM party. The bill tabled by the Executive ignored all the proposals that had been presented to the relevant parliamentary committee and those that had been contained in a minority report of the committee. Instead, the bill fronted proposals that originated from the NRM caucus and as such, not representative of the aspirations of the people. The bill was later recalled amidst much controversy and for among other reasons, being half baked, rushed, and in the words of Fox Odoi – a long term NRM member – "stupid."[13] In failing to listen to the dissenting voices that had coalesced around these forms in a unique way since 2005 and failing to table the electoral reforms on time, the Executive missed an invaluable opportunity to further the causes of democracy, constitutionalism and good governance in Uganda.[14]

The last minute attempt to table a bill that essentially watered down the position and powers of the Lord Mayor of Kampala was as embarrassing as it was unnecessary. The bill was intended to address the challenges at the Kampala Capital City Authority that have dogged the city since the impeachment of Erias Lukwago from the position of Lord Mayor in 2013.[15] The conduct of the Uganda Police in arresting Erias

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[11] For a brief discussion of this issue see: Daphine Arinda (2015), *The Intricacies of Presidential Consultation Meetings: Dissecting Section 3 of the Presidential Elections Act, 2005* Parliament Watch, 2015 Accessed at: http://parliamentwatch.ug/the-intricacies-of-presidential-consultation-meetings-dissecting-section-3-of-the-presidential-elections-act-2005/

[12] Mercy Nalugo (2014), *Government Crippling Parliament Work* The Daily Monitor December 19 2014 accessed at: http://www.monitor.co.ug/News/National/Govt-crippling--Parliament-work---Kadaga/-/688334/2561458/-/v50hgbz/-/index.html

[13] Agatha Atuhaire (2015), *Electoral Reforms* The Independent August 3rd 2015, accessed at http://www.independent.co.ug/column/insight/10485-electoral-reforms see also Solomon Arinaitwe (2015), *Legislators Reject 2016 Electoral Reforms,* The Daily Monitor May 12 2015, accessed at http://www.monitor.co.ug/News/National/Legislators-reject-government-2016-electoral-reforms/-/688334/2714462/-/1t4xooz/-/index.html

[14] For a brief discussion of some of the efforts and proposals that were contained in the intended reforms championed from a broad spectrum of participants, see Susan Nalunkuuma Mirembe (2015), *A Missed Opportunity For Reform? Querying Uganda's Electoral Amendments* Parliament Watch, 2015 accessed at: http://parliamentwatch.ug/a-missed-opportunity-for-reform-querying-ugandas-electoral-amendments/ see also Isaac Okello (2015), *Constitutional Reforms Should Reflect Our Will and Aspirations* Parliament Watch 2015 accessed at: http://parliamentwatch.ug/constitutional-reforms-reflect-will-aspirations/

[15] For a detailed discussion of the background, events and implications of Erias Lukwago's impeachment see: Phillip Kasaija Apuuli (2013), *The State of Constitutionalism in Uganda, 2013,* in Kituo cha Katiba (2013),

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Lukwago and the reaction of the Electoral Commission to the effect that they would delay nomination until the bill was passed were both unhelpful and regrettable.[16] In addition to calling into question the independence of the Electoral Commission and the Uganda Police, these events depicted despair on the part of the Executive to control Kampala and use both the legislature and the legislation that would have ensued, in ways that would clearly undermine the rule of law and good governance in Uganda.

The performance of the Executive in 2015 demonstrated a focus on winning elections by any means necessary rather than fostering the rule of law and good governance in Uganda. The partisan conduct of government institutions such as the Uganda Police and the Electoral Commission demonstrate that this country is still far from the desired goals of accommodative, people centered leadership. The exposure of the far-reaching *Fungua Macho* surveillance operation is a keen reminder of how fragile Uganda's perceived progress remains. The Executive's failure to seize the opportunities for fostering good governance, human rights and democracy that would have come from a collective process of gathering views and debating much needed electoral reforms that would be representative of the views and aspirations of all sections of the people of Uganda leaves a lot to be desired. It is hoped that in the coming years, the Executive will do better. For now, it suffices to state that rather than celebrate progress in the year 2015; the conduct of the Executive leaves the Ugandan people living under the torment of retreating horizons.

PERFORMANCE OF THE LEGISLATURE IN 2015

Odoki rightly opines that the main function of parliament is to make laws on any matters for the peace, order, development and good governance of Uganda but it has many other functions, including the protection of the Constitution and the promotion of democratic governance of Uganda.[17] Although early in 2015 the legislature suffered absenteeism to the extent that this sometimes paralyzed its work,[18] parliament was able to pass a number of laws and engage in other activities that have a direct impact on the human rights, democracy and good governance in Uganda. As constraints of space and scope do not facilitate a detailed analysis of parliament's performance in its other functions, this paper focuses its review of parliament's performance on the laws that the House debated and passed that have ramifications on the state of constitutionalism and good governance in Uganda.[19] This is also in part

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Annual State of Constitutionalism in East Africa in 2013 pp. 153-196 at pp. 163-168. See also Uganda Radio Network, (2015), *Government bows to Pressure Withdraws KCCA Amendment Bill* The Observer November 16th 2015 accessed at: http://www.observer.ug/news-headlines/41048-govt-bows-to-pressurewithdraws-kcca-amendment-bill

[16] see Steven Kafeero and Yasin Mugerwa (2015) Lukwago Arrested as Government Makes U-Turn on KCCA Bill The Daily Monitor November 17, 2015 accessed at: http://www.monitor.co.ug/News/National/Lukwago-arrested-as-government-makes-U-turn-on-KCCA-Bill/-/688334/2959032/-/xrassz/-/index.html see also Olive Eyaturu (2015) *MPs, EC's Kiggundu Clash Over KCCA Amendments* Uganda Radio Network November 17th 2015 accessed at: http://ugandaradionetwork.com/story/mps-ecs-kiggundu-clash-over-kcca-amendments

[17] BJ Odoki (2004), *The Search for A National Consensus: The Making of the 1995 Constitution* Fountain Publishers, at p. 332.

[18] Jacky Kemigisa (2015) *Absenteeism Handcuffs Parliament's Work and No One Cares* Parliament Watch, 2015 accessed at: http://parliamentwatch.ug/absenteeism-handcuffs-parliaments-work-and-no-one-cares/

[19] Other functions of parliament include the approval of presidential appointments, the approval of a state of emergency and declaration of war, the determination of emoluments of political leaders and specified constitutional offices, the discussion or initiation of bills and the assessment and evaluation of activities of Government and other bodies and the censoring of ministers for misconduct or non performance of their duties.

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because the caliber of laws that will come to the floor of the House ought to be a direct reflection of the proper functioning of some of parliament's other organs (such as its committees).

There were a number of developments within or surrounding the legislature in 2015. In accordance with its constitutional duty to make laws, parliament enacted a number of laws that have a bearing on the enforcement and enjoyment of human rights, good governance and democracy in Uganda. In the Constitution (Amendment) Act, 2015, parliament provided a more rigorous procedure for the removal of a member of the Electoral Commission. Section 1 thereof, provides that removal of a member of the Electoral Commission shall now be by a tribunal appointed by the president. This provision simply buttresses the president's control on the Electoral Commission as he is the appointing authority in the first place. With the performance of the Electoral Commission having been as checkered as is discussed above, this provision is not one that is to be celebrated in the context of fostering meaningful and progressive good governance legislation in Uganda.

Section 4 of the Constitution (Amendment) Act, 2015 now protects members of parliament who either leave one political party to join another or become independent within the last year of their term in parliament. This provision seems to have drawn its historical context from the decision in *Constitutional Petition No.38 of 2010 George Owor v. The Attorney General & Hon. William Okecho*, where the Constitutional Court ruled that a person who had contested and entered parliament as an independent could not remain in the House if they crossed to another party as this would contravene article 83 (1) (g) of the Constitution of Uganda. It is also likely that the provision drew from the more contemporary realization by some members of parliament that they would lose the primaries in the parties from which they hailed and that if they did, they would contemplate running for their seats as independents. In this context, it is apparent that this provision seems to have had no other motive than to keep them in the house for the last year once they lose their party primaries or otherwise fail to secure their party endorsements, as it is during this year that primaries are conducted.

Section 5 of the Constitution (Amendment) Act has now rectified a position that would taint a majority of the Constitutional appeals that have been heard by the Supreme Court especially in the last five years. Over all these years, the Supreme Court has been oblivious to the fact that the proper quorum of the court while sitting as a Constitutional Appeals Court should have comprised all the justices of the Supreme Court. By now providing that the quorum shall be seven, the legislature has cured a grave infraction upon the Constitution that the court itself has occasioned many times.

The Anti-Corruption (Amendment) Act, 2015 was passed to put in place some measures on how best to deal with the property of a person convicted of corruption. The law vests powers in the Director of Public Prosecution and the Inspector General of Police to apply for a valuation or even confiscate property of a person convicted of corruption. These may be considered as welcome measures in the fight against corruption in Uganda. These provisions are a welcome development in filling some of the gaps that had been left by the Anti-Corruption Act, especially as to how to deal

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See BJ Odoki (2004), *The Search for A National Consensus: The Making of the 1995 Constitution* Fountain Publishers, at p. 332.

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with 'tainted' property. However, it has been observed before that the problem with Uganda's fight against corruption is not necessarily the absence of a good legal framework but the lack of political will to fight the vice.[20]

The Registration of Persons Act, 2015 was enacted for the purpose of creating a new authority responsible for and streamlining the registration of persons and deaths. It did not take long for this Act to become the center of controversy. As is discussed later in this paper, the information collected in accordance with the provisions of this Act has been the center of controversy surrounding the Electoral Commission's decision to retire its voters register and compile one using the data from the Registration of Persons Authority. More specifically, some of its provisions are worth mentioning. Section 64 contains a non-exhaustive laundry list of functions for which the information compiled in the course of registration of persons can be used. Section 64 (2) provides that the Electoral Commission may use this information to 'compile, maintain, revise and update the voters register.' It is argued here that this provision was enacted in error. The duty of the Electoral Commission as is enunciated in this section is already contained under the Constitution and the Electoral Commission Act. To purport to allow the Electoral Commission to use this data as is envisaged herein is problematic at best.

Under section 66, a Ministry, department or agency of government has the power to require in a mandatory manner that a person seeking to access government services or facilities produce a national Identity card or identity card number. It is worth mentioning here that a number of people had not got their Identity cards by the close of the 2015. It is not entirely clear how these people are supposed to access such services if they have not obtained their cards. It is also hoped that the unintended consequences will not include either encouraging forgery of these cards or fostering corruption as a means of accessing government services and facilities.

The Registration of Persons Act 2015 has been criticized for having a number of human rights related loopholes. Firstly, the Act does not make provision for registration of persons with disabilities or even recognition of the challenges faced by persons with disabilities as well as those born with disorders of sex development (intersex people).[21] This begs the question of how best government will plan for these sections of the population if they are not uniquely identified at registration.

The Public Finance and Management Act, 2015 was one of the most important legislations passed in 2015. This statute fundamentally altered the financial structure of government in ways that were intended to improve accountability and reduce excessive spending. The law introduces the requirement for a charter of fiscal responsibility being tabled before parliament to indicate government prioritization of expenditure over the three years to follow.[22] The law also requires that the budget shall be passed by Parliament before the end of May of every year.[23] This measure

[20] See for example Inge Amundsen (2006), *Political Corruption and the Role of Donors (in Uganda)* Chr. Michelsen Institute, accessed at: http://www.cmi.no/publications/file/2687-political-corruption-and-the-role-of-donors-in.pdf

[21] Susan Nalunkuma Mirembe (2015), *Glaring Loopholes in the Recently Passed Registration of Persons Bill*, Parliament Watch Uganda accessed at http://parliamentwatch.ug/glaring-loopholes-in-the-recently-passed-registration-of-persons-bill-2014/ Nalunkuma argues that a provision in the Bill to recognize these people was rejected on grounds that it would foster homosexuality.

[22] See section 5 of the Public Finance and Management Act, 2015

[23] see section 14 of the Public Finance and Management Act, 2015

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was, in part aimed at eliminating the previous practice where government had to rely on supplementary budgets to run government functions while parliament debated the budget. In addition to providing for a legislative framework for the management of oil and gas revenues, the statute was intended to tighten accountability measures by requiring that each accounting officer be directly responsible for the budget that is allocated to them. The legislative framework for management of oil and gas resources is especially important in a setting where the president has made public remarks by which he lays personal claim to Uganda's oil resources and has made oil revenues an issue in the campaigns and indicated he would rather go back to the bush than let the opposition 'spoil the oil money.'[24]

In the context of the need to promote good governance, accountability and fostering a human rights culture, one of the most important provisions of the Public Finance and Management Act, 2015 is section 76 (4). This section provides that Certificate of Financial implications will be deemed to have been issued by the Minister responsible for Finance at the end of sixty days from the date the certificate is first requested. This is of great significance because it takes away one of the bottlenecks that a spirited individual or Member of Parliament who wanted to introduce a private members bill would face if the bill were unpopular with the executive. In such circumstances, the minister would either simply deny the certificate or request such a person as wanted to table the bill to offer information on how the bill would affect government revenue and expenditure, a task that only the ministry of finance which is charged with management of the economy could accomplish. While it is recognized that accumulating legislation is not the solution to Uganda's governance deficit, it is argued here that in the struggle to deepen the values of an informed citizenry, an accountable executive and a responsible government, some debates – even if they do not result in the enactment of legislation – are worth the effort. It is hoped therefore, that civil society and other well meaning Ugandans interested in promoting the rule of law and good governance will exploit this provision to push for progressive legislation being introduced to the floor of parliament.

In a strange turn of events, Parliament passed an amendment to the Public Finance and Management Act, 2015, which came into force on November 14th 2015. This amendment eliminated the checks that had been placed upon expenditure by the executive by essentially providing for the same supplementary expenditure that the principal statute had eliminated, and significantly reducing the scope of loans for which government must seek parliamentary approval.[25] Read together with the parent statute, the Amendment depicts the mindset of a parliament that has lost all control over keeping government expenditure in check. The process of amending this law barely six months after it came into force reinforced the fear that the executive has a

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[24]See Stephen Kafeero (2015), *Opposition Fire Back at Museveni Over Oil Control* The Daily Monitor December 23rd 2015, accessed at: http://www.monitor.co.ug/SpecialReports/Elections/Opposition-fire-back-at-Museveni-over-oil-control/-/859108/3006804/-/xcoqc7z/-/index.html see also Uganda Radion Network (2015), *Muslims Walk out on 'Campaigning' Museveni* The Observer, July 18 2015 accessed at http://observer.ug/news-headlines/38816-masaka-muslims-walkout-on-campaigning-museveni see also Sam Wasswa (2015) *Museveni: Opponents are Targeting My Oil* Chimp Reports July 18, 2015 accessed at http://observer.ug/news-headlines/38816-masaka-muslims-walkout-on-campaigning-museveni video footage of the president making this assertion an also be found at https://www.youtube.com/watch?v=g-uhgG3i51U The president's remarks were perhaps an early indication that he will not hand over power peacefully should he lose the impending 2016 presidential election. That remains to be seen. Nevertheless, this is a concern that should not have been as ignored by Ugandans as it was.

[25] See sections 1, 2, 3 and 4 of the Public Finance and Management (Amendment) Act, 2015

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much stronger grip on parliament than is desirable.[26] It is not an exaggeration to state, for instance, that in essence what parliament did was to undermine the same control and scrutiny that it had been empowered with under article 159 (2) of the 1995 Constitution, which requires that all borrowings be authorized by parliament or otherwise excepted by statute.

On November 27th 2015, Parliament passed the Non Governmental Organizations Act, 2015. The law repeals the previous legal framework for the regulation of Non Governmental Organizations (NGOs). According to its long title, the law is also intended to, *inter alia,* provide a 'conducive environment' for NGOs and their partners to operate. While a lot of work went into improving the original draft, the final version of the law is still believed to have serious implications in the shrinking of civic space in Uganda. The Act is criticized for containing ambiguity that may have been purposefully designed to avail government with avenues to clamp down on dissent. Chapter Four, a local NGO that championed much of the work that went into improving earlier versions of the law points to the inclusion of "special obligations" for organizations and the prohibition of engaging in activities "prejudicial to the interests of Uganda or the dignity of the Ugandan people" without defining what these activities are, as some of the troubling aspects of the law.[27] Chapter Four points to instances in which land matters have been categorized as "annoying the president" and at least one NGO has been asked to apologize. Discussions on sexual minorities and prostitution have drawn the wrath of the executive upon NGOs. Left unchecked, these provisions may spell a dark future for actors in this ever shrinking space.[28] It is acknowledged that a lot of work went into improving earlier versions of this law. But it is also noted that Parliament could have perhaps insisted on a complete eradication of some of these ambiguous clauses.

On August 14th 2015, parliament approved the creation of 43 more constituencies and by so doing increased the size of the next house to 418 members, excluding ministers appointed by the president through his executive powers, who are *ex officio* members of the House. Apart from the fact that in so doing, parliament worsened an already heavy financial burden on the taxpayers of this country,[29] the manner in which this was done was described by one member of the Opposition in parliament as a form of rigging and a 'clear-cut gerrymandering of constituencies aimed to give NRM cadres "safe seats."'[30] In this respect, parliament demonstrated a tragic backsliding from what the Odoki Commission expected to be the result of promulgating Article 63 of the Constitution under which, subject to the requirements stipulated therein,

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[26] See for instance Regan Wamaji (2015), *Five Things We Learned From Passing of the Public Finance Management (Amendment) Act, Act* Parliament Watch, 2015 accessed at http://parliamentwatch.ug/five-things-we-learnt-from-the-passing-of-the-public-finance-management-amendment-bill-2015/

[27] See Chapter Four (2015), *Uganda: Reject Vague Crimes in Proposed Law* Chapter Four accessed at: http://chapterfouruganda.com/articles/2015/12/14/uganda-reject-vague-crimes-proposed-law

[28] ibid

[29] Jacky Kemigisa estimates that the tax payer will be spending Uganda Shillings Six Billion, One Hundred and Forty Nine million (Ug Shs. 6,149,000,000/=) in the first month of the next parliament. This figure does not include the cost of a new chamber that now must be constructed, as the old one is too small to accommodate the present membership. See Jacky Kemigisa (2015), *Lets Do The Maths: What 43 MPs Will Cost* Parliament Watch, 2015 accessed at http://parliamentwatch.ug/lets-do-the-maths-what-43-more-mps-will-cost/

[30] Edris Kiggundu (2015) *Why Museveni Wants 36 More Constituencies* The Observer May 18, 2015 accessed at http://observer.ug/news-headlines/37900-why-museveni-wants-36-new-constituencies see also Edris Kiggundu (2015) *NRM Plots 36 New MPs* The Observer April 29 2015 accessed at http://www.observer.ug/news-headlines/37576-nrm-plots-36-new-mp-seats

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constituencies should be determined by population quota.[31] There is no doubt that the focus in creating these constituencies was neither effective representation nor service delivery.[32] This will definitely have the long-term effect of weakening the legislature in the performance of its functions, especially in checking the executive.

Parliament is the highest symbol of the representative government and voice of the people. It is also the supreme legislative organ in a country.[33] The performance of the legislature in 2015 as seen from the foregoing discussion sadly depicts a regression and not a progression in its functionality. Some of the long-standing concerns that Ugandans have had regarding parliament, such as poor quality of representation, lack of accountability by the members to the electorate, manipulation by the executive, and the absence of separation of powers and checks and balances[34] seem to have haunted the House even more this year.[35]

THE PERFORMANCE OF THE JUDICIARY AND LANDMARK DECISIONS IN 2015

The President finally gave in to the nation's demands and appointed Justice Bart Magunda Katurebe as Chief Justice. After such a long time and a protracted *impasse* between the President and a number of stakeholders, this was a much-needed development.[36] The Appointment of Justice Kavuma as substantive Deputy Chief Justice was not as positively welcomed and resulted in a court challenge that was initially blocked in embarrassing ways.[37] Many challenges that have dogged the judiciary for a long time now, including selective handling of matters and case

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[31] In 2004, Benjamin J. Odoki wrote thus: "Gerrymandering, which was in the past used by certain candidates to carve out constituencies in a manner favorable to them has been largely eliminated following local administrative units, thus ensuring equitable representation or various ethnic groups, big or small. In this connection, Article 63 of the Constitution provides that Parliament shall prescribe the number of constituencies, and that each constituency shall be represented by one Member of Parliament, but that in demarcating constituencies, the Commission shall ensure that each county is represented by one Member of parliament. Subject to this requirement, constituencies are determined by the population quota." (Emphasis added) see BJ Odoki (2004), *The Search for A National Consensus: The Making of the 1995 Constitution* Fountain Publishers, at p. 324.

[32] For a detailed explanation of this position see Daniel Ruhweza (2015) *New Counties in Uganda: Gerrymandering or Promoting Service Delivery* Parliament Watch, 2015 http://parliamentwatch.ug/new-counties-in-uganda-gerrymandering-or-promoting-service-delivery/

[33] BJ Odoki (2004), *The Search for A National Consensus: The Making of the 1995 Constitution* Fountain Publishers, at pp. 331- 332. On the concerns that people have with parliament, Odoki wrote: "In Uganda, the main concerns of the people about parliament include the failure of the legislature to be representative of the poor, poor quality of representation, lack of accountability by the members to the electorate, manipulation by the executive, lack of acceptance of the role of the opposition, excessive centralization of legislative powers and the absence of separation of powers and checks and balances."

[34] ibid

[35] see for instance Reagan Wamajji (2015): *Do We Have an Independent Legislative Body in Uganda,* Parliament Watch, 2015 at http://parliamentwatch.ug/do-we-have-an-independent-legislative-body-in-uganda/ and Reagan Wamajji (2015): *Parliament-vs- The Executive: The Battle of the Public Private Partnership Bill,* Parliament Watch, 2015 http://parliamentwatch.ug/parliament-vs-executive-the-battle-of-the-public-private-partnerships-bill/ and Reagan Wamajji (2015): *Parliamentary Oversight in Accountability Affecting Service Delivery,* Parliament Watch, 2015 http://parliamentwatch.ug/parliamentary-oversight-in-accountability-affects-service-delivery-in-public-institutions/ and Reagan Wamajji (2015): *Petitioning Parliament: Is it More Ritualistic than Functional?* Parliament Watch, 2015 http://parliamentwatch.ug/petitioning-parliament-is-it-more-ritualistic-than-functional/

[36] For instance, the Uganda Law Society called on its members to boycott the official opening of the Annual Law Year. See Anthony Wesaka (2016), President Law Society Insists on Boycotting Judiciary Function Over CJ Job The Daily Monitor, January 16, 2015 accessed at: http://www.monitor.co.ug/News/National/President-Law-Society-insists-on-boycotting-Judiciary-function/-/688334/2591160/-/6v8513/-/index.html

[37] See for instance Wandera Ogalo (2015) *Did the Constituent Assembly Err in Creating a Constitutional Court?* The Daily Monitor April 5th 2015 accessed at http://www.monitor.co.ug/News/Insight/Did-Constituent-Assembly-err-in-creating-Constitutional-Court-/-/688338/2676094/-/4lbj3mz/-/index.html

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backlog, did manifest in different ways.[38] These challenges notwithstanding, major achievements were registered for the rule of law, democracy and good governance in some of the decisions that were handed down by the courts.

(a) Major Supreme Court Decisions of 2015

On 8th April 2015, the Supreme Court of Uganda delivered judgment in *Uganda v. Thomas Kwoyelo, Constitutional Appeal No. 01 of 2012.* The appeal arose from a reference to the Constitutional Court on questions framed regarding the constitutionality of the prosecution of Thomas Kwoyelo, a former commander in the Lord's Resistance Army (LRA). Given its technical nature and grave significance, a slightly more detailed summary of the facts and issues is necessary.[39] Thomas Kwoyelo was captured by the Uganda People's Defence Forces (UPDF) in Garamba National Park in the Democratic Republic of Congo (DRC), in 2005, and subsequently detained in Uganda's Luzira Upper Prison. Accordingly, while in detention, he made a declaration of renunciation of rebellion and sought for amnesty in January 2010. Despite this plea being successful at the Amnesty Commission, the Directorate of Public Prosecutions (DPP), nevertheless, went ahead to prefer charges against Kwoyelo. Kwoyelo was committed for trial to the International Crimes Division of the High Court of Uganda on an indictment containing fifty counts.

In a reference to the Constitutional Court, Kwoyelo contended that the offences he was being indicted for, qualified for amnesty under Uganda's Amnesty Act, 2000. He indicated that the refusal by the DPP to certify him for amnesty was discriminatory (*in violation of the equal protection right under Article 21 of Uganda's Constitution*) because other rebels captured under similar circumstances were granted certificates of amnesty. The Constitutional Court agreed with him, ordering the cessation of Kwoyelo's trial while holding that the Amnesty Act was consistent with Uganda's international treaty obligations. The Court also stipulated that the Amnesty Act did not infringe on the prosecutorial powers of the DPP.

Therefore, in the Appeal by the State, against the above decision of the Constitutional Court, to the Uganda Supreme Court, three substantive issues were handled. First, was whether the Amnesty Act impinges on the constitutional prosecutorial powers of the DPP; second, was whether the Amnesty Act is inconsistent with the Constitution and Uganda's international obligations; and third, was whether the respondent was discriminated against, in contravention of his rights guaranteed by the Ugandan Constitution. In a rather lengthy pronouncement, the Supreme Court partially allowed the Appeal, ordering the continuation of the trial of Kwoyelo in the International Crimes Division of the High Court.[40] The Court found that the Amensty Act was not unconstitutional in so far as it did not impinge on the constitutional prosecutorial powers of the DPP. The Court also found that the Amnesty Act was not inconsistent with Uganda's international obligations. But the court found that Kwoyelo had not been discriminated against as he had pleaded.

[38] ibid

[39] For a very good summary of the facts as well as detailed technical analysis of the international law, international humanitarian law and international criminal law issues arising in this case, see: Joshua Niyo (2015), *Thomas Kwoyelo in the Uganda Supreme Court: Problematic Interpretations of International Law and Flaws in Legislative Action Rear their Heads,* April 14, 2015 accessed at: https://joshuajniyo.wordpress.com/2015/04/14/thomas-kwoyelo-in-the-uganda-supreme-court-problematic-interpretations-of-international-law-and-flaws-in-legislative-action-rear-their-heads-2/ some of the facts in this summary are adapted from Niyo's analysis and his contribution is acknowledged.

[40] ibid

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There are many notable landmark positions in this case. The first is that the court underscored a powerful stand on not granting amnesty to all manner of perpetrators of the sort of violations that "shock the conscience of mankind." At page 41 of the lead judgment, the Court made the following finding:

> "Whereas one may understand civilians being killed in cross-fire or when cities are bombed by aircraft or artillery, as being deaths while one is carrying out acts in furtherance of the war, it is difficult to see how acts of genocide against a given population, or the willful killing of innocent civilians in their homes when there is no military necessity, can be regarded as being furtherance of the war or rebellion. These would be acts carried out "unlawfully and wantonly." This court cannot ignore reports, some well documented, of terrible crimes planned and committed by some people in Northern Uganda against innocent civilians who had nothing to do with government. Those acts, in my view, do no qualify for grant of amnesty under the Act. From the definitions of the term "amnesty" discussed above it is clear that personal crimes or crimes committed willfully against individual civilians or communities would not ordinarily be covered by amnesty."

But the significance of this case is incomplete if it is not considered on two additional broad fronts: firstly, the case exhibits a number of systemic flaws with regard to the criminal justice system and where this system meets with constitutionalism and human rights. Secondly, the case raised technical questions on the interplay between international humanitarian laws and public international law in the Ugandan context.

On the systemic front, it is noted that the case arises from Kwoyelo's capture by the UPDF that occurred in 2005. Kwoyelo was in custody for ten years before the trial of his case was finally ordered to proceed at the International Crimes Division of the High Court. The framers of the 1995 Constitution were cautious enough to provide in Articles 28 (1) and 126 (2) (b) that substantive justice would be administered without delay. It seems this was only an illusion that remains far from reality. In the face of such delays to the trial process, the pronouncement by the Supreme Court that Kwoyelo is entitled to the presumption of innocence until proved guilty rings very hollow.[41] There is simply no commitment in Uganda to ensuring speedy dispensation of justice, even in light of Constitutional demands to this effect.[42]

The second systemic issue that must be of serious concern is that it was the Attorney General who vigorously challenged the constitutionality of the Amnesty Act. While the Respondents tried to challenge this conduct as a sign of bad faith on the part of the Attorney General, the Court did not agree. The court held that the Attorney General must have taken the Act to be constitutional until the Respondent's trial caused him to have second thoughts about it. The court went so far as to say: "this is normal and does not indicate bad faith."[43] The court's treatment of this objection was callous and aloof at best. One would have expected the court to look deeper into what the actual role of the Attorney General is in advising government on the legislative process. The crucial and operative question ought to have been whether the Attorney General should not be held to a higher standard in passing legislation especially where such legislation may impact on the enjoyment of fundamental rights and freedoms, such as the delays in administration of justice pointed out above. For the Supreme Court to treat such conduct as "normal" is to sanction incompetence and indolence at the

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[41] See Katurebe CJ at pp. 65-66 of the lead judgment of the Supreme Court.

[42] The same issue arises at the Constitutional Court in *Kasozi Robinson v. The Attoney General, Constitutional Petitions 37, 40 and 48 of 2010* as is discussed later in this paper.

[43] See Katurebe CJ's decision at p. 64.

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Attorney General's office. As chief legal advisor, the Attorney General ought to be held to a higher standard.

The third systemic weakness that the case discloses is with regard to the functioning of public offices and the Supreme Court's scrutiny of these offices. The court seems to have applied double standards in that it assumed facts about the performance of the DPP's duties on the one hand, and then held Kwoyelo to a higher standard in requiring that he could not assume facts that were not pleaded or for which there was no evidence adduced. In this regard, the court shifted goal posts and ought to have held the DPP to a higher standard. At Page 52 of Katurebe CJ's judgment he writes:

> "… That because other commanders were given amnesty, he too should have automatically been given amnesty. He does not state or allege that those commanders also committed the same crimes as he has been charged with. It must be assumed that the Director of Public Prosecutions studied the cases of the people he certified and satisfied himself that whatever offences they may have committed were covered by Section 2 of the Act.

But when it came to considering the submissions of Kwoyelo's counsel, the court stated as follows:

> "One cannot simply assume in the absence of evidence, that Brigadier Banya and Kolo committed the same crimes as the Respondent is charged with."

There was simply no evidence from the DPP that the other 26, 122 people that had been granted amnesty before Kwoyelo's application. There was even no evidence adduced to show that the DPP had actually studied the cases of Banya and Kolo who had been of higher ranking in the LRA and had been granted the amnesty that had been refused Kwoyelo. The court simply stated that "it must be assumed that the Director of Public Prosecutions studied these cases…" With the greatest of respect, given the performance of some of the organs of the executive discussed earlier in this work, nothing ought to be assumed about the state's performance of its functions. With the greatest respect, the DPP should have been held to a similarly higher standard.

On the technical front, Joshua Niyo has argued that there are three main considerations one has to take into account. He argues that firstly, the court applied the Geneva Conventions in a flawed manner. In this respect, Niyo argues that while the court had correctly classified the LRA conflict as one not of an international nature, the conflict acquires international character once it spread to the neighboring countries of Sudan and Democratic Republic of Congo, and that for this reason, the Geneva Convention applies to the conflict. Niyo thus opines that In this respect, it is important to note, that the spill over of a Non-International Armed Conflict into another territory/country does not change the conflict into an international one. It remains a Non-International Armed Conflict for as long as the war continues to take place between the State and the armed group. The conflict can only be internationalized if another (new) state comes to fight alongside the armed group.[44] This misclassification led the court into making a glaring mistake in applying the Geneva Conventions to a non international armed conflict, to which the Conventions and their rules should not apply.

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[44] Joshua Niyo (2015), *Thomas Kwoyelo in the Uganda Supreme Court: Problematic Interpretations of International Law and Flaws in Legislative Action Rear their Heads,* April 14, 2015 accessed at: https://joshuajniyo.wordpress.com/2015/04/14/thomas-kwoyelo-in-the-uganda-supreme-court-problematic-interpretations-of-international-law-and-flaws-in-legislative-action-rear-their-heads-2/

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Secondly, Niyo argues that the court was misled into conducting a misleading interpretation of the Amnesty Act. In this respect, it is Niyo's view that while the court applied the correct principles, the wording of the statute is incurably defective. To quote him:

> In International Humanitarian Law, legitimate acts committed in furtherance of the war effort are not classified as 'crimes'. The word *'crime'* by its very nature denotes unlawful doing and should not have been used in the drafting of those provisions of the Amnesty Act (*Section 2*), in reference to legitimate acts of warfare (*killing justified by military necessity, or killing civilians where they take a direct part in hostilities*). The moment one refers to *crime* either in the *cause* or *course*of war, it denotes unlawfulness from the onset. No amount of interpretive gymnastic can redeem the use of that word. Although it might have not meant to do so, the Legislature can be said to have inadvertently drafted a blanket amnesty for all crimes committed in the subsistence of war. Rather than using the word *'crime',* the Legislature should have used '*legitimate act',* mindful that the regime of International Humanitarian Law properly lays out the rules of warfare that must be adhered to during conflict. For example: the principles of*distinction, proportionality* and *precaution* have to be adhered to in attack; an attack that kills civilians, where these principles have been followed cannot be referred to as a crime. It is a legitimate attack. Therefore, rather than flogging the stipulations into submission, the Court should have clearly pronounced the provisions as problematic for they imply a blanket amnesty for all crime in warfare, and thus, challenge the Legislature to revisit the stipulations and be more responsible and circumspect in their legislative duties. Hence, the conclusion would have been that the Amnesty Act is not aligned with Uganda's international obligations and is inconsistent with the Uganda Constitution (*which protects the right to life – an aspect expounded upon in the next section of this piece*)."[45]

Thirdly, Niyo argues that the court missed a unique opportunity to provide doctrinal clarity on the application of International Humanitarian law and human rights law in armed conflict situations. Niyo argues that In submitting on war crimes (crimes committed in the conduct of war), the Appellant equated these crimes to the violation of: the rights to life, liberty, property; and the right to protection from torture, inhumane and degrading treatment, all of which are provided for in Uganda's Constitution. He further asserts that the Court addressed the violation of the right to life but did not present proper background and legal scholarship on the basis for the discussion of the right to life (or other fundamental rights for matter), in the context of war or armed resistance/rebellion. It is Niyo's view that a proper doctrinal analysis would have also addressed the matter of the basis of human rights obligations for armed groups and other such entities involved in rebellion. According to Niyo, such a discussion is critical when handling matters of purported violations of rights by persons participating in Non-International Armed Conflicts.[46]

In the final analysis, Niyo offers a conscise summary on these technical points thus: given its consideration of the technical issues on the path of reasoning that it took, the court reached the correct finding. Even if the court had pronounced the Amnesty Act to be inconsistent with Uganda's international obligations, Kwoyelo's trial would likely have been ordered. The fault was in the reasoning and not in the result. However, if the reasoning on the three technical grounds above had been as Niyo has suggested, the inevitable result would have been that the charges against Kwoyelo would have been dropped on account that they offend the principle of legality in the

[45] ibid
[46] ibid

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Geneva Conventions.[47] But perhaps the most striking observation that Niyo makes from this decision is in the following words:

> "In general, there is a display of rather unclear and potentially misleading interpretations of the law. The puzzling take-away from a reading of the judgment is just this: *Are the misinterpretations intentional for purposes of flogging certain domestic legal frameworks into submission, or are they evidence of a genuine need for more sensitization on the application of international law rules?"*[48]

On October 30th 2015, the Supreme Court of Uganda handed down a landmark decision in *Centre for Health, Human Rights and Development & 3 Others v. Attorney General,* Constitutional Appeal No. 1 of 2013. In this case, four petitioners—including the Center for Health, Human Rights & Development (CEHURD) and two family members of women who died during childbirth—appealed the Constitutional Court's dismissal of their petition in which they alleged that the government violated the Constitution by failing to provide basic maternal health services and that health workers' negligence led to the death of expectant mothers during childbirth.[49] The Constitutional Court invoked the political question doctrine to dismiss the petition, finding that questions around the state's obligations on maternal health ought to be resolved by the Executive Arm of government and not the Courts. On appeal, the Supreme Court unanimously overruled the Constitutional Court and ordered a retrial of the matter on its merits.

This case is significant for a number of reasons: firstly, the case emphasized the mandatory nature of the jurisdiction of the Constitutional Court. The Supreme Court found in this respect that the gates of the Constitutional Court must remain open to all Ugandans who wish to challenge both statutory provisions and actions of state organs that are in contravention or inconsistent with the Constitution.[50] In the lead judgment, the Supreme Court not only explained the position with respect to enforcement of human rights at the High Court vis-à-vis the mandate of the Constitutional Court, the Supreme Court went ahead to caution the court from abdicating its responsibility.[51] In the broader sense, the court pronounced itself definitively on the scope of the political question doctrine in Ugandan law, finding that the doctrine's scope is limited at best.[52] To quote Katurebe CJ:

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[47] ibid

[48] ibid

[49] This concise summary of facts together with a brief discussion of the substantive content of the case is found at https://www.escr-net.org/node/368257. For an analysis of the Constitutional Court decision in this matter and its constitutional significance both in terms of constitutional law and on the right to maternal health in Uganda, see: Brian Dennison (2014), *The Political Question Doctrine in Uganda: A Reassessment in the wake of CEHURD* accessed at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2441873

[50] This was the position of both Esther Mayambala JSC in the lead Judgment and in the judgment of Katurebe CJ.

[51] Although the same position is taken by Katurebe CJ, a more forceful position was postulated by Mayambala JSC at pp.31-32 when she held that it would be self-defeating for the Constitutional Court to argue that the Petitioners should have gone to the High Court. The Constitutional Court being possessed with powers both to interpret and grant reliefs as the circumstances of the case may require, should not fault a petitioner for seeking redress under Article 137(3) as seeking redress does not make a petition bad in law because the Court has a '*legal and mandatory'* duty to adjudicate on any matters dealing with the interpretation of the Constitution., and a petitioner need not show that he is or is under threat of experiencing any legal grievance, while he would be required to prove such grievance or injury in the High Court.

[52] This is the deduction reached by both Mayambala JSC in the lead judgment and Katurebe CJ in his judgment. This should ultimately stop judges from exercising restraint in matters brought before them or sending matters

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> "From the foregoing I am of the view that there is no matter done by the Executive or by the Legislature which may not be a subject of judicial review if it is not done in accordance with the provisions of the Constitution. It would appear to me therefore that the political question doctrine is of very limited application in Uganda, given the provisions of our Constitution."[53]

This pronouncement and indeed the entire way in which the court dealt with the political question doctrine is very crucial because the doctrine has haunted the Ugandan judiciary since the 1966 decision in the case of *Uganda v. Commissioner of Prisons Ex parte Michael Matovu.*[54] The Supreme Court in examining this doctrine in detail has hopefully finally expunged the 'evil' ghost of *Ex parte Matovu* from the courts and made room for the progressive maximization of public interest litigation and other avenues of seeking constitutional justice in Uganda.[55]

Secondly, the decision clarifies the status of the justiciability of both the right to health and the National Objectives and Directives of State Policy. Prof. Oloka–Onyango had previously pointed out that it is arguable that the Constitutional Court's decision may have been influenced in part by the absence of the right to health in the Bill of Rights.[56] Prof. Oloka-Onyango had also opined that the prevailing view was that economic, social and cultural rights were not justiciable and this is why they had been relegated to the National Objectives and Directives of State Policy, which themselves were considered in the main as non-justiciable. Prof. Oloka-Onyango had observed that the 'Egonda-Ntende view' that the National Objectives ought to be 'our first canon of construction' was not the dominant one.[57] But the Supreme Court has finally departed from this school of thought in the CEHURD decision. Katurebe CJ went so far as to point out, and rightly so, that the right to health was among 'what are called social rights' and that the petition called upon the court to give the right to health a place in the Constitution.[58] The learned Chief Justice brought centre stage the hitherto unpopular 'Egonda-Ntende view' when he held that the Constitutional Court should have been guided by various Objectives in the Constitution, including Objectives Numbers I, XIV, and XX. The Chief Justice called for a broader approach to constitutional interpretation when he held that the Court should have interpreted what is meant by "fundamental" and "other rights" in considering where the right to medical services falls.[59] With this decision, it is opined that the Supreme Court has finally flung wide open that door that only remained ajar from Egonda-Ntende's

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back to the High Court for trial as matters of enforcement of human rights under Article 50 of the Constitution, as was held by Mayambala JSC.

[53] See p. 29 of Katurebe CJ's decision.

[54] [1966] EA 514. For a more comprehensive analysis of the political question doctrine and how it has haunted the Ugandan courts, see J. Oloka-Onyango (2015) *Ghosts and the Law* An Inaugural Lecture, presented at the Makerere University Main Hall on November 12, 2015.

[55] J. Oloka-Onyango (2015), *Ghosts and the Law* An Inaugural Lecture presented at the Makerere University on November 12, 2015 at pp 51-52 suggests that the decision in *Ex parte Matovu* has left a struggle in Ugandan courts between two ghosts: on the one hand, is the ghost of the political question doctrine which enables the governmet to escape all its obligations to ensure that human rights are respected, and on the other is the ghost of public interest litigation which underlines the point that the obligations to respect, protect and fulfill human rights also attaches to the state.

[56] J. Oloka-Onyango (2015), *Ghosts and the Law* An Inaugural Lecture presented at the Makerere University on November 12, 2015

[57] ibid at 45-50. Oloka-Onyango also quotes Egonda-Ntende J. (as he then was) and notes that Justice Egonda-Ntende had held in *Tinyefuza v. The Attorney General Constitutional Petition 1 of 1997* that the principles and objectives outlined in the Constitution, "…ought to be our first canon of construction of this constitution. It provides an immediate break or departure with past rules of constitutional construction." It is this view that Oloka-Onyango opines is not the dominant one.

[58] See pages 16-19 of Katurebe CJ's decision.

[59] ibid

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decision in *Tinyefuza*. The broader implication is that the Court has breathed much needed life in the justiciability of the National Objectives and Directives of State Policy and it is hoped that these will found the basis of more aggressive litigation.

Thirdly, the Supreme Court seemed to have made a call for a more vibrant approach to judicial activism. Katurebe CJ revisited the age-old doctrine of separation of powers and held that:

> 'there does not appear to be such a thing as absolute separation of powers between the executive, the legislature and the judiciary in any democratic society. What is required and provided for is a system of checks and balances…. Coupling separation of powers with a system of checks and balances is the key to a viable democracy. For this reason, the judiciary should be an active participant in the judicial process ready to use law in service of social justice through a proactive goal oriented approach.

Katurebe further cited the South African Constitutional Court in the case of *Ministry of Health v. Treatment Action Campaign (5) SA 721 (CC)* where the court recognized that:

> 'while it is sensitive to and respects the separation of powers among the branches of government, it will not abdicate the primary duty of the courts to the constitution and law. The court further held that to the extent that remedying a violation of individual rights constitutes an intrusion into the domain of the executive that is an intrusion mandated by the constitution itself.'[60]

Although such a bold approach would go a long way in resolving some of the issues that have plagued the performance of the courts in the administration of justice and in being a crucial medium of the enjoyment of human rights and fostering good governance in Uganda, it remains to be seen whether the Chief Justice's call will be heeded.

On the 6th day of August 2015, the Supreme Court of Uganda handed down its decision in *Mifumi (U) Limited v. the Attorney General and Kenneth Kakuru*, Constitutional *Appeal 02 of 2014.* MIFUMI (U) Ltd, a Non-Governmental Organization and a women's rights agency operating in eastern Uganda, and 12 people petitioned the Constitutional Court under Articles 2(1) (2), 137(3) and 93(a) and (d) of the Constitution of Uganda and rule 3 of the Constitutional Court (Petitions and references) Rules (S.1. 91/2005) challenging the constitutionality of the custom of paying bride price as a precondition to contracting a valid customary marriage. They also challenged the constitutionality of demanding refund of bride price as an essential pre-requisite for the valid dissolution of a customary marriage.[61] The Constitutional Court dismissed the petition and the Supreme Court upheld the dismissal in part, finding that the practice of bride price in itself is not

[60] ibid at p. 14.

[61] Mifumi (U) Limited & Ors v. The Attorney General & Kenneth Kakuru Constitutional Appeal 2 of 2014 [2015] UGSC 13 6th August 2015 accessed at http://www.ulii.org/node/25384 The decision also received a lot of both local and international media coverage. See for instance, Alon Mwesigwa (2015) *Uganda Court Rules Against Refund of Bride Price* The Guardian, August 17, 2015 accessed at http://www.theguardian.com/global-development/2015/aug/17/uganda-court-rules-against-refund-bride-price-divorce. And BBC Africa (2015) *Uganda Bride Price Refund Outlawed by Top Judges* BBC Africa August 6th 2015 accessed at http://www.bbc.com/news/world-africa-33800840,; Anthony Wekesa (2015) *Supreme Court Declares Refund of Bride Price Unconstitutional* Daily Monitor August 6th 2015 accessed at http://www.monitor.co.ug/News/National/Supreme-Court-declares-refund-of-bride-price-unconstitutional/-/688334/2822316/-/11wwv9o/-/index.html; see also: http://www.newvision.co.ug/news/671888-bride-price-refund-declared-illegal.html

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unconstitutional if it is not coerced, but that the practice of requiring the return of bride price once a customary marriage breaks down is unconstitutional.

The Supreme Court emphasized some crucial constitutional aspects. The Court in reaching its finding was clearly alive to the provisions of the Constitution with regard to equality of women and the protection of women's rights. However, while recognizing the centrality of these gender issues and not ignoring the evidence adduced, some of it from published literature, on the injustices suffered by women as a result of the traditional (and sometimes patriarchal) perceptions about bride price, the Supreme Court took a guarded approach and avoided generalizing both perception and cultural understandings on women's rights and the role of bride price in marriage. The court conducted an admirable balancing act that helps it avoid the possible extreme of meting an injustice against men on account of evening the scales. In preserving the culture of bride price but only seeking to harmonize its parameters and to caution against its abuse, the Supreme Court also reiterated the role of culture in the Ugandan society and as such, demonstrated that Ugandan courts ought to protect and preserve indigenous cultures even as they foster the protection and promotion of human rights in an ever changing world, but to do so in not only a contemporary but also a constitutionally just manner.[62]

The Supreme Court handed down its decision in *Hon. Theodore Sekikuubo & 4 Others v. The Attorney General & 4 Others Constitutional Appeal No. 1 of 2015 (the 'Rebel MPs' case).* This decision raised several constitutional issues of great public importance relating to the development of parliamentary democracy in Uganda. The issues included the role of political parties in controlling their Members of Parliament and the effect of that control upon the continued membership in Parliament of persons expelled from political parties. The case also dealt with the independence of Parliament and the role of the Speaker in managing Parliament. The questions of which Court has jurisdiction to determine whether a Member of Parliament has ceased to hold his or her seat, the authority and legal status of the advice of the Attorney General to Government and other public institutions, and the scope of the immunity granted to the President from legal process all came to the fore. Given its importance, a summary of the findings of the court on most of the grounds of appeal is warranted.

In its decision, the court held that the unambiguous statutory position is that the High Court has the jurisdiction (or the Constitutional powers) to hear and determine any questions about whether **"**the seat of a Member of Parliament**"** has become vacant and that whoever wanted court to determine the position of vacation of a seat in Parliament had to petition the High Court and not the Constitutional Court. The Supreme Court also held that the Constitution does veil a sitting president with immunity against being compelled to participate in any court proceedings but that there is no provision in the Constitution or any other laws of Uganda that precludes a sitting President from voluntarily giving evidence in court as a witness. In other words, the court found, a sitting President is a competent but not a compellable witness. The Supreme Court also not only found that the decision whether to allow cross-examination of the President is discretionary but also that the Constitutional Court did not in any way defeat the right to a fair hearing when it required that it be availed written questions before determining whether to

[62] For a discussion on the threat of erosion of cultural rights, norms and practices due to the evolving nature of human rights enjoyment in a globalized world, see Oloka-Onyango (2005) *Who's Watching "Big Brother"? Globalization and the Protection of Cultural Rights in Present Day Africa* Human Rights Quarterly, Vol. 27, No. 4, November 2005, pp. 1245-1273 also published as (2005) 1 *AHRLJ* 1-26 available at: http://www.ahrlj.up.ac.za/oloka-onyango-j

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allow the cross-examination. This was a measure intended to safeguard the President from embarrassment and was, as such, a necessary one.

Further, Supreme Court clarified that the Attorney General's advice is only binding with regard to situations where it must as of necessity be consumed by third parties particularly, as envisaged under Article 119 (5) of the Constitution, where government is dealing with third parties, so as to give them confidence. However, while emphasizing the need to protect the principle of separation of powers, the Supreme Court held that in instances where government institutions seek the advice for guidance in decision-making, that advice is not binding.

Perhaps the foremost groundbreaking finding of the Supreme Court in this case was that a Member of Parliament who is expelled from their party does not have to vacate Parliament. The Court held that the position that was envisaged in Article 83 (1) (g) of the Constitution is that a Member of Parliament *voluntarily leaves* the party on whose ticket he contested for Parliament. This was the first time Article 83 (1) (g) was tested and this is a much-needed interpretation. The implications of this decision on this point alone for the independence of parliament and the fostering of good governance are significant. The background to this case justifies this view. Four Members of Parliament had been expelled from the NRM on grounds of alleged indiscipline. It suffices to point out that the allegations of indiscipline were mostly based on the Members of Parliament not voting according to party lines and positions. What this means is that there is now within Uganda's jurisprudential framework, some protection for Members of Parliament who would otherwise live in fear of persecution, should they be torn between their consciences, the national interest and their party's positions.

Given the rising tensions in the state of constitutionalism in Uganda and the challenges on the independence of parliament that are discussed elsewhere in this paper, it is arguable that the immunity offered by the *Rebel MPs'* decision to both the Speaker of Parliament and the individual members is a most welcome development. It is unlikely; however, that this is the end of the contest as to when and in what circumstances the Attorney General's Opinion ought to be binding on government and her institutions. The Supreme Court must however be lauded for its consistency in pushing for the separation of powers and in protecting the Speaker of Parliament as boldly as it did in this case. Read together with the Supreme Court's position on the political question doctrine discussed in the analysis on *CEHURD,* the court's trajectory on independently fostering the rule of law and separation of powers in 2015 is admirable.

(b) Major Constitutional Court Decisions of 2015

There were a number of notable decisions from the Constitutional Court in 2015. These decisions attracted attention for different reasons, albeit all related to the state of constitutionalism in Uganda. For instance, the decision in *Behangana Domaro & Anor v. The Attorney General*, *Constitutional Petition No. 53 of 2010* dealt with the question of improper conduct of members of the Uganda Police who tortured persons they had arrested on suspicion of having committed offences by knocking down a police officer. Although the petition underpins the scope of jurisdiction of the Constitutional Court (a matter that is rightfully regarded as settled now), what stood out in the text of the judgment were two distinct and fairly unique remarks that the court made before taking leave of the matter.

Firstly, court observed that the case revealed significant misconduct of law enforcement officers who ought to be prosecuted in accordance with the Police Act. In order to address this impunity, the court Ordered that the judgment be served upon the Director of Public Prosecutions and the Inspector General of Police (who had both

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not been a party to the matter) with a direction that they investigate the matter and report to the court no later than six months from the date of the judgment.[63] This is perhaps the first time the court issued a structural interdict and invoked residual jurisdiction in a matter so as to ensure that its directives are followed. What is even more striking is the remark that follows. The court stated as follows:

> "Lastly, perhaps the time has come for legal practitioners to consider in cases of this nature adding as parties the perpetrators, and their supervisors, of impugned actions in their personal capacity so that they can face civil consequences of their willful disregard of the fundamental rights and freedoms of the people of this country."[64]

These two dicta bear great significance for the future of constitutional litigation in Uganda. It is hoped that the court will maintain this approach and that when litigants heed its advice, the court's findings will be as bold as its call. It is noted here, however, that an early attempt to hold public officers personally accountable at the High Court's Civil Division was unsuccessful, as the court jettisoned constitutional and human rights considerations through the window of rules of technicality.[65]

The decision in *Bernard Otim v. Uganda, Constitutional Reference 35 of 2010* seems to have departed from the earlier position in which the same court held that once there is a constitutional violation, there cannot be a fair trial. The court distinguished the decision in *Kiiza Besigye v. The Attorney General, Constitutional Petition 7 of 2007* which has previously been the case with the court's boldest position on the question whether pre-trial violations of constitutional rights of an accused person render a subsequent criminal trial a nullity. The court found in *Bernard Otim* that having been detained for 14 days before trial, Otim's right to liberty was violated. But the court also found that his right to a fair trial was not violated, as the trial had not commenced. In distinguishing the facts in *Bernard Otim* from those in *Kiiza Besigye,* the court found that there was no likelihood that the violation of Otim's right to liberty would lead to a violation of his right to a fair hearing once the trial had commenced. The court then pointed out that it was 'mindful of the fact that speedy and fair trials for all accused persons may not always be possible given the financial resource constraints and administrative glitches in our judicial system.'[66]

With all due respect to the Constitutional Court, the reasoning in this decision leaves a lot to be desired. Firstly, the court seems to have traded the consciousness of our history that is contained in the preamble to the Constitution with the conveniences of excusing government indolence. It is arguable that the framers of the 1995 Constitution were very much alive to the checkered history of endless detentions without trial when they wrote the 48-hour rule into Uganda's Constitution. To open the door, as they did, to detentions for more than 48 hours, in this case justifying 14 days of detention without trial, is to pave the steady path to that same past Uganda sought to escape by promulgating the 1995 Constitution. Secondly, the human right to a fair hearing and the right to liberty were traditionally classified as civil and political rights. These rights are not dependent on the availability or lack thereof of government resources. They ought to be enforced as a matter of course and their violation was never intended in human rights discourse to be excused by the lack of

[63] see page 15 of the Judgment of the Court.
[64] ibid
[65] see *Charles Nsubuga v. Eng. Badru Kigundu & Ors Miscellaneous Application* 148 of 2015,, which is discussed elsewhere in this paper.
[66] See p. 17 of the decision.

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resources to enable a progressive realization, as is the case with economic social and cultural rights. The court seemed to have missed this rather fundamental distinction.[67]

Thirdly, while the court called for a 'balance test' [sic] in which the conduct of both the prosecution and defendant are weighed, the court did not offer the yardstick by which this test is to be determined. There is no telling as to how far the state will go in attempting to stretch this test to justify conduct that has been previously condemned as unconstitutional. Fourth, by distinguishing this case from *Kiiza Besigye* only on the facts, the court seems to have left the question of how the infringement of other rights would affect the right to a fair hearing. The only position the court seems to have taken is that the trial ought to have commenced. With respect to the court, this is a very narrow and dangerous interpretation. For instance, that position ignores the fact that a suspect may be tortured while in custody and may in fact be brought to court while they are not in the fittest of conditions to stand trial.

Fifth and perhaps most significant, is the fact that when viewed from the broader spectrums of its mandate and performance, in juxtaposition to its decision in *CEHURD,* the court seems to be evolving a strangely executive minded stance. Sitting in *CEHURD* the court declined to hear the case on political grounds, a position that was overturned by the Supreme Court as discussed above. As pointed out earlier the Supreme Court in *CEHURD* broadened the parametres of constitutional justice by limiting the applicability political question doctrine. In *Bernard Otim,* the Constitutional court seems to endear itself to the executive by justifying clearly unconstitutional behavior. This is a worrying observation. The court seems to have overlooked the fact that it is the state that is charged with 'fixing the glitches' in the criminal justice system, it is also the state that often arrests these persons. A logical way of avoiding these violations is to only arrest persons against whom charges can be preferred timeously. Also, most often than not, the persons who fall victim to these unconstitutional detentions are arrested on politically motivated charges. In justifying this unconstitutional behavior, the court inadvertently justified a constraining of an already narrow space. It is hoped that the court will reverse or in the very least revisit its position in this case, failing in which, the court may have opened a door to one of the darkest rooms in Uganda's constitutional and governance history.

The decision in *Mwesigye Wilson v. The Attorney General and Parliamentary Commission, Constitutional Petition 31 of 2011* related to the powers of Parliament to determine its emoluments, on the grounds enshrined in sections 3 (5), 4 (2) and 5 of the Parliamentary Elections Act. The petition challenged the practice of Parliament passing motions, on its own volition, which adjusted upwards the emoluments of the Members of Parliament. This practice was held to be unconstitional. However, the crucial and operative part of this decision is the emphasis that the court levied on the doctrine of separation of powers, while at the same time, highlighting the fact that parliament is the foremost custodian of the Ugandan purse. The court stated thus:

> 'It is not in dispute that Parliament is in control of the purse so to speak and must authorize all expenditure of public funds, especially from the consolidated fund, the principal repository of all funds of the Government of Uganda. The Constitution has provided for an elaborate system of checks and balances between the separate arms of the state in the management of

[67] It is noted that the human rights discourse has moved more towards indivisibility of rights rather than maintaining that old distinction between civil and political rights on the one hand and economic social and cultural rights on the other.

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public resources without leaving it only to one. Each organ has been given its role to ensure that there is accountability and transparency. No one organ is entirely on its own. However, in order to secure the independence of one organ against the other, checks and balances have been provided.'

The independence of Uganda's parliament has waned over the years. Indeed, a new threat to this independence has been pointed out in this paper. This threat emerged from the divisive primary elections that the NRM had, which resulted in many of its members, some of them being long term serving incumbents, having to run for parliament as independents. In the event that these independent candidates win, it is hoped that they will maintain their neutrality and not default to the NRM positions that they have previously been bound to. The above dictum therefore, is a timely reminder on the role of parliament in ensuring accountability in Uganda's democracy.

There was quite some excitement when the Constitutional Court handed down the decision in the consolidated *Kasozi Robinson v. The Attoney General, Constitutional Petitions 37, 40 and 48 of 2010.*[68] The general substance of these petitions was that they challenged the legality of the election process through which special interest groups were elected into parliament. The court found that the legislature rather than pass the requisite laws to stipulate the criteria for electing these representatives, these powers had been delegated to the line minister. The court stated that the Constitution had delegated these powers to Parliament and that as delegates; the Members of Parliament could not therefore delegate this power to the minister. The reasoning of the court in this case was as simple as it was sound.[69] Indeed, parliament did pass legislation to resolve this situation, even though the Attorney General had indicated he would apply for a stay of the decision and consequently appeal to the Supreme Court.

But two critical observations are worth making. Firstly, the court did not delve into the critical question of whether these special interest groups should still be in the House. Although there have been some views about the army, for instance, having overstayed its presence in parliament, these matters were not up for consideration. It is arguable that after twenty years of enforcing this constitution and having returned the country's politics to partisan lines, the Uganda Peoples' Defense Forces should not be represented or participate in elective politics. The second observation is one that was made by the court of its own volition. The court noted that the petitions were filed in 2010 ahead of the 2011 elections but the Petitions were not heard until much later. The court stated that the 'failure to hear and dispose of these matters in time as required by the Constitution including setting aside every other matter to dispose of pending Constitutional matters is a regrettable lapse which is simply not acceptable.'[70] While this was a good gesture on the part of the court, the court does not seem to be taking any drastic measures to purge itself of this 'unacceptable' lapse.

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[68] Constitutional Petition 37 of 2010 was Kasozi Robinson v. Attorney General, Constitutional Petition 40 of 2010 was Legal Action for Persons with Disability v. Attorney General and 2 Ors, and Constitutional Petition 41 of 2010 was Moses Mauku & Anor v. Attorney General. Although these were different petitions, they were later consolidated and for ease of reference, this analysis is written as though the matters were contained in one petition.

[69] For a more detailed analysis of this decision see also Irene Akurut (2015), *An Analysis of the September 2015 Constitutional Court Decision on Election of Special Interest Groups* Parliament Watch, 2015 accessed at: http://parliamentwatch.ug/the-constitution-of-the-republic-of-uganda-1995-is-the-supreme-law-of-the-land-meaning-that-all-other-laws-of-the-land-constantly-have-to-measure-their-legitimacy-against-it-where-there-is-an-incon/

[70] See pp. 1 and 3 of the decision of the Court.

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One would have thought that matters that have been filed relating to the 2016 elections would have been heard. But this is not the case.[71]

In terms of the administrative functions of the judiciary, many bottlenecks remain. Case backlog and staffing remain major challenges to the administration of justice. With a new Chief Justice and promotion of a number of High Court Judges to the Court of Appeal, it is hoped that the coming years will present a better outlook and have more fruitful results. Having started the year with the embarrassing situation surrounding the court challenges to the appointment of the Deputy Chief Justice,[72] what the judiciary was able to score on the highest in 2015 was the demonstration of a willingness to rekindle the hope that it will not shy away from cases that bear political undertones. It remains to be seen if the positions of the Supreme Court on separation of powers and the political question doctrine will stand the test of time in the years to come, starting with the possible court contests that may arise in 2016.

POLITICS, DEMOCRACY, GOOD GOVERNANCE IN UGANDA IN 2015

In the build up to the 2016 elections, there were new lessons and challenges for the Ugandan society to learn and overcome. In the context of a fast paced world that is constantly changing, new considerations arose, which one must consider in assessing the state of governance and constitutionalism in Uganda in 2015. It was evident that the citizenry was more active and concerned. This part draws from developments on the political scene analyze the state of constitutionalism in Uganda. Starting with the surge in the citizenry's use of new media forms to engage on matters of good governance and constitutionalism, the section goes on to discuss the impact of Amama Mbabazi's presidential bid, the state of political parties and what challenges the country faces, as well as the prospects or illusions of holding free and fair elections in Uganda.

Where New Media forms confront Governance

It is not an exaggeration to state that new media forms, particularly the social media forms of Facebook, Twitter and Whatsapp are contributing significantly to the awakening of the Ugandan citizenry towards constitutionalism, human rights and good governance concerns. Many Ugandans took to social media in 2015 to follow many events and to start or accelerate some of these events. Some key events highlight why this is a crucial issue to watch in the context of constitutionalism and the rule of law.

Tom Voltaire Okwalinga

On the morning of Monday 8th June 2015, the Uganda police arrested one Robert Shaka on the belief that he is the person behind the Facebook identity known as '*Thomas Voltaire Okwalinga*' or 'TVO' as the identity is also loosely referred to.[73]

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[71] Constitutional Petitions 36 and 37 challenging the legality of Regulation 20 (21) of the NRM Regulations discussed elsewhere in this paper remain pending and the parties have not even been invited for a scheduling conference.

[72] See for instance Wandera Ogalo (2015) *Did the Constituent Assembly Err in Creating a Constitutional Court?* The Daily Monitor April 5th 2015 accessed at http://www.monitor.co.ug/News/Insight/Did-Constituent-Assembly-err-in-creating-Constitutional-Court-/-/688338/2676094/-/4lbj3mz/-/index.html

[73] The Observer, *Who is TVO? Accessed* at http://www.observer.ug/news-headlines/38278-who-s-tom-voltaire-okwalinga-tvo

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TVO rose to fame by publishing on his[74] Facebook wall information that was both politically charged and sensitive to intelligence sources. On this suspicion, Robert Shaka was kept at the Police Special Investigations Unit (SIU) for three days before he was produced at the Buganda Road Chief Magistrates Court. Shaka was charged with the offence of engaging in offensive communication contrary to section 25 of the Computer Misuse Act, 2011.[75] The Chief Magistrates Court then sent Shaka to Luzira Prison on Remand.[76] After spending the weekend in jail, Shaka was released on bail on June 15th 2015.

On grounds that his detention beyond the mandatory 48 hours was unlawful, Shaka's lawyers successfully petitioned the Nakawa Chief Magistrates court for his unconditional release.[77] Rather than release Shaka, the Uganda Police elected to produce him before another court. It is is plausible to argue that Shaka would have remained in custody for much longer than three days but for the order for his unconditional release and the mounting pressure from growing social and other forms of media attention, as well as the keen observation of the situation by the donor community. It is troubling that the Uganda Police continues to hold suspects beyond the constitutional 48 hour limit even though both the Uganda Police and the other stakeholders in the Justice Law and Order sector are aware that since 2007 the courts have held and maintained that once any human rights of an accused person are violated, there cannot be a fair trial.[78] The decision in *Bernard Otim* discussed above notwithstanding, this police conduct certainly depicts the Ugandan government as having developed defiance to the right to personal liberty in some cases.

But the new and equally important issue that these events brought to the fore was the role of new media forms in the enforcement and enjoyment of human rights and good governance. Shortly after the arrest of Robert Shaka and during his incarceration, the TVO Facebook page continued to receive updates. It is inconceivable that Shaka would have continued to post from jail. The state tried severally to block the Facebook page in light of how much media attention it had received and the cultic following it was generating on both Facebook and Twitter. This has given rise to the view that TVO is not a specific individual, rather a movement comprised of different individuals dissatisfied with the state of affairs and yet themselves feeling shackled either by their positions in government or by what they perceive to be the grave repercussions of being identified as '*anti-government.*'[79] It is critical to note that

[74] We have only assumed by the style of the names that the person behind the identity is male. This assumption may one day turn out to be wrong if it is discovered that the person was female or that the identity was only a pseudonym for many persons – male and female – who preferred to veil their anonymity as such.

[75] Anthony Wekesa and Ephraim Kasozi (2015) *Museveni Social Media Critic Sent To Luzira*, The Daily Monitor July 12 2015 accessed at: http://www.monitor.co.ug/News/National/Museveni-social-media-critic-sent-to-Luzira//688334/2748626/-/35oekd/-/index.html

[76] ibid

[77] ibid

[78] See *Dr. Kiiza Besigye & Others vs. The A G, Constitutional petition No. 07 of 2007* where the court held that: "This Court cannot sanction any continued prosecution of the petitioners where during the proceedings, the human rights of the petitioners has been violated to the extent described above. No matter how strong the evidence against them may be, no fair trial can be achieved at any subsequent trial would be a waste of time and an abuse of Court process." This was also the position in the High Court case of Uganda v. Robert Sekabira & 10 Ors High Court Criminal Session Case 0085 of 2010, where the suspects had been held for more than 48 hours. However, the recent decision in *Bernard Otim v. Uganda Constutional Reference 35 of 2010* discussed elsewhere in this paper seems to have departed from this position by creating instances in which some human rights violations may not necessarily lead to a nullification of the trial.

[79] The Leader of Opposition in Parliament would, for instance, argue that it is futile to attempt to stop TVO as he is a representation of an idea rather than a person. See: The Observer, *Who is TVO? Accessed* at http://www.observer.ug/news-headlines/38278-who-s-tom-voltaire-okwalinga-tvo

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much of the information that was published on the TVO page was linked directly to state organs, thus fuelling concerns about leaks from within.

The Undressing of Zaina Fatuma (the FDC Lady)

On Sunday October 11th 2015, a convoy of members of the Forum for Democratic Change (FDC) was making its way along the Masaka – Mbarara high way to an event that they had arranged earlier. After a nearly fatal accident to which the Uganda Police seemed to pay no attention, the Uganda Police threw spikes in the road, damaging the car in which FDC's Kiiza Besigye was travelling and bringing the convoy's journey to an end. In the fracas that ensued, Police Officers – both male and female, were captured on footage that showed the most embarrassing manhandling of a woman that Uganda had seen in a while.[80] This event was widely covered by the traditional media outlets but also went viral on social media. Video footage of the event would be posted and remain available on Youtube, and was soon shared and debated on other platforms such as Whatsapp.[81] This event was just one of the many events that highlight how bad police brutality was in 2015. It is critical to note that the Ugandan people quickly took to social media to hold the Uganda Police accountable. The gender concerns here must also not be missed. Social media platforms provide a great opportunity for human rights stakeholders to call out state organs on their failure to enhance gender concerns.

Amama Mbabazi Announcement of Bid for Presidency

On the morning of June 15th 2015, a video in which former Prime Minister John Patrick Amama Mbabazi declared his bid to run for the presidency went viral in the Ugandan community.[82] Traditionally, such an announcement would be made at a press conference and in full view of the mainstream media houses. Mbabazi did not offer any information on why he chose this unconventional route. In the days that followed, Mbabazi would take to social media to communicate his message and plans. In the result, all the presidential campaign teams would harness social media platforms as a means of capturing and disseminating information. In the later part of the year, critical information such as a report on campaign financing would be widely debated on social media.[83]

The emergence of social media, among other media forms, as a form of disseminating information and reporting and condemning human rights violations is on the rise. Several other events such as the row over who manages the President's social media

[80] This event was covered and debated broadly in the media. See for instance: Semujju Nganda, Police Undressing FDC Lady is the Limit accessed at http://www.observer.ug/viewpoint/40432-police-s-stripping-of-fdc-lady-is-the-limit see also John Kazooba: Public Outrage as Police Strips Woman Naked, accessed at: http://watchdog.co.ug/detail.php?id=303 http://mobile.monitor.co.ug/News/Police-block-Dr-Besigye-rally--arrest-FDC-leaders/-/2466686/2907500/-/format/xhtml/-/lsfmsez/-/index.html

[81] At the time of writing, footage of the event was still available at the youtube link: https://www.youtube.com/watch?v=gdSlLVnBIAA

[82] See a detailed analysis at: Ivan Okuda, *Mbabazi Declares 2016 Presidential Bid at Dawn,* available at http://www.monitor.co.ug/News/National/Mbabazi-declares-2016-bid-at-dawn/-/688334/2753236/-/o8n8duz/-/index.html

[83] The Report mentioned here is the Alliance for Campaign Finance Monitoring, Monitoring Campaign Financing During Pre-Election Period During the Period of November to December. This report was publicized mostly when Sheila Nduhukire tweeted a snapshot of what NRM's expenditure was during the months of November to December. Going by the Tweets that followed even the head of the Media Centre, Ofwono Opondo had not seen the report by the time it was presented.

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presence would demonstrate that there is a need to pay critical attention to the intersection between new media forms and good governance, especially in light of the continued sustained attack on media freedoms in Uganda.[84] A number of legal and constitutional issues are set to rise to the fore. Some of these include questions of privacy, the access to information in light of the state's threats to curtail the use of certain media forms,[85] and the constitutionality of section 25 of the Computer Misuse Act in the context of the landmark decision in *Charles Onyango Obbo & Andrew Mwenda v. The Attorney General Constitutional Appeal No. 2 of 2002.* In a sense therefore, 2015 was the year that added this issue to Uganda's constitutionalism and governance agenda.

Go Forward and The Democratic Alliance: Is Uganda Haunted by Ghosts from the Past?

Following his announcement that he would run for the office of President as an independent candidate, Amama Mbabazi unveiled his campaign symbol and named his unregistered campaign vehicle as Go Forward. Leaving the country reminiscent of Kiiza Besigye's Reform Agenda pressure group that existed and remained unregistered until it metamorphosed into present day FDC, Mbabazi went on to prepare for and get nominated as the Go Forward candidate, all the while maintaining that he had not left the NRM, a party he had co-founded with President Museveni.

A number of political parties and key figures in opposition politics came together in 2015 to attempt to forge a coalition through which to realize a number of changes that they had independently sought, and for this purpose, executed a Protocol that stipulated their respective goals and intentions.[86]. Foremost on the agenda of the umbrella organization dubbed The Democratic Alliance, these stakeholders would rally around the foremost goal of fielding a joint candidate to run against the incumbent President Museveni of the NRM and as many incumbent members of parliament as they possibly could manage, and to build a Uganda with equal opportunity and shared prosperity for all.[87] The stakeholders narrowed the race to four major contenders from whom a joint candidate would be chosen. These were: FDC's Kiiza Besigye, Gilbert Bukenya who had defected from the NRM amidst much media attention, and Go Forward's Amama Mbabazi. Although DP's Norbert Mao had made it clear he was not to run for the presidency, he was invited into the caucus of candidates as a representative of the other stakeholders and factions that were not fielding candidates. On September 25th 2015, after weeks of protracted negotiations and a fair share of drama and disagreement, TDA announced that they had reached a stalemate in choosing between Kiiza Besigye and Amama Mbabazi and that each

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[84] For more on the troubling story of statehouse aides fighting over who controls the President's media accounts, see Sadab Kitatta Kaaya, *State House Social Media Fight Deepens* at http://observer.ug/news-headlines/34479--state-house-social-media-fight-deepens and Sadab Kitatta Kaaya, *State House Row Errupts over Jobs* http://observer.ug/index.php?option=com_content&view=article&id=33614:-state-house-row-erupts-over-jobs&catid=78:topstories&Itemid=116 for a comprehensive contemporary discussion on media freedoms see Fred W. Jjuuko (2015), *The 4th Estate: Media Freedoms and Rights in Uganda* Fountain Publishers.

[85] See for instance: http://www.monitor.co.ug/News/National/UCC-social-media-platforms-abuse/-/688334/2619032/-/151o4ktz/-/index.html

[86] The Protocol of The Democratic Alliance, at page 10.Available at https://webcache.googleusercontent.com/search?q=cache:zd21oOieb3kJ:https://kaviriali.files.wordpress.com/2015/07/tda-protocol.pdf+&cd=1&hl=en&ct=clnk.

[87] Article III(4) of the TDA Protocol. For a discussion on TDA, see also Michael Mugisha, et al, Pre-Electoral Coalitions and the Political Economy of Democratic Consolidation in Multi-Ethnic Societies: Some Critical Reflections for The Democratic Alliance (TDA), Journal on Perspectives of African Democracy & Development, Volume 1, Issue 1, January 2016, page 9,

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candidate would proceed to run for office under the auspices of their different organizations.[88] Subsequent meetings held in London to try and resolve the impasse did not yield the desired result of a joint opposition candidate. In a shocking twist of events, Gilbert Bukenya would return to the NRM almost immediately upon TDA's failure to pick a joint candidate.

A number of observations can be made about these events. Firstly, both Go Forward and TDA were unregistered and remained as such going into the campaigns. Both entities remained some form of pressure group. There may be need for a more critical study on whether the lack of registration of any of these two entities had any impact on the failure of these stakeholders to agree on a joint candidate. It is not entirely implausible to argue, however, that the fact that there was no commitment to a unified set of rules beyond a hastily drafted protocol may have in itself left some members of the alliance questioning the resolve of others, and thereby undermined the alliance before the negotiations came to an end. It may also be argued that having witnessed the rise and mutation of Reform Agenda into FDC in 2000 and 2003 respectively, an unregistered pressure group is not the most viable vehicle for the race for president.

Secondly, drew together a mixed crowd of followers. Key figures such as Bishop Zac Nyiringiye who had spearheaded the Black Monday movement against corruption and had often criticized Mbabazi as a corrupt figure while in cabinet were seen visibly supporting his presidential bid. Indeed, Bishop Nyiringiye, who was one of the officials charged with receiving bids for those who wanted to be considered for flag bearer, was accused of bending the rules on time for returning forms so as to favor Mbabazi.[89] This poses questions of the objectivity of some civil society oriented work in the struggle for accountability and good governance in Uganda.

Thirdly, while the participants of the process did not offer a detailed account on why the negotiations broke down, the failure of the stakeholders to agree on a single joint candidate offered NRM and other skeptics the fodder they needed to liken the alliance to the failed UPC/*Kabaka Yekka* post independence alliance. But Kalyegira argued that it presented the most solid joint venture of the opposition since 1986 and that despite its failure to agree on a candidate, the alliance should not be discounted completely and that it would offer a unique perspective to unifying the country.[90]

Fourth, there was an apparent absence of women from the activities of this alliance. A photograph of key figures including Amama Mbabazi, Kiiza Besigye, FDC's Nathan Nandala Mafabi, UPC's Olara Otunu with former International Criminal Court Chief Prosecutor Louis Moreno Ocampo and former United Nations Secretary General Kofi Annan in London would spark a reaction from Winnie Byanyima, one time key opposition figure. Winnie Byanyima who tweeted: '"See the men plotting 2 lead Uganda. Embarrassing! **#NoAllMalePanels**."[91] This tweet highlighted a gender gap in the plotting of Uganda's future. Although there is a woman in the 2016 race,

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[88] The Observer, TDA fails to agree on joint opposition candidate,http://www.observer.ug/news-headlines/40061-2016-tda-fails-to-agree-on-joint-opposition-candidate.

[89] Kenneth Kazibwe (2015) TDA Speaks Out on Bending Rules To Accommodate Mbabazi Chimp Reports September 11, 2015 accessed at: http://www.chimpreports.com/tda-speaks-out-on-bending-rules-to-accommodate-mbabazi/

[90] Timothy Kalyegira (2015) *Why TDA is Not Yet Finished* The Daily Monitor September 27th 2015 accessed at: http://www.monitor.co.ug/Magazines/PeoplePower/Why-TDA-is-not-yet-finished/-/689844/2887172/-/am6hvs/-/index.html

[91] See The Insider (2015) *Winnie Byanyima Calls Mbabazi, Besigye An Embarrassment* accessed at: http://www.theinsider.ug/winnie-byanyima-calls-besigye-mbabazi-an-embarrassment/

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the absence of women in the TDA activities depicts a deficit of women leadership in opposition politics in Uganda. Much has been achieved under the prerogative of affirmative action for women, but instances like this call for a more critical analysis of how far Uganda has come on gender mainstreaming and fostering the role of women in leadership across the political divide.

Fifth, another school of thought was that the outcome of both Mbabazi and Besigye both running for the presidency was not the worst. This view posits a number of fears that lingered over the alliance such as Mbabazi's pulling out of the race mid way, the difference in approaches of both Mbabazi and Besigye, as well as the view that while there is merit in the consideration that Besigye may not be able to increase his support from what it has been in the last three elections, it was necessary to have Mbabazi test the strength and resolve of both the NRM members and the party's structures. Indeed, the fall out that hit the NRM after its party primaries may be considered a signal of the trouble that lies within, as is discussed later in this chapter.[92]

Regardless of the outcome of the 2016 polls, a holistic analysis of the effects of both the formation of Go Forward and TDA will shape the future of Uganda's politics in ways that remain to be seen. Regardless of its failure to field a joint candidate, having drawn stakeholders such as civil society organizations and eminent persons leaves hope that the day may well come when Uganda's governance struggles will transcend party lines and the sometimes trivial divisions that have left the opposition sometimes incapacitated.

Campaigns and Related Developments ahead of the 2016 Elections

With the next round of presidential, parliamentary and local government elections set for February 2016, 2015 was a crucial year for Uganda's executive and legislative spaces. The year revealed many areas of weakness in the state of Uganda's institutions, both within and outside of government. Political parties had to start to garner support right from the grassroots and the Electoral Commission had to intensify its preparations for the general elections. The legislature's composition and performance were under critical scrutiny as well. The courts, as vanguards of constitutionalism were equally under the pressure of the season.

The State of Political Parties ahead of Impending General Elections

Pippa Noris has summarized the crucial role of political parties in a democracy thus:

> "Political parties can serve multiple functions. They are necessary to build and aggregate support among broad coalitions of citizens' organizations and interest groups; to integrate multiple conflicting demands into coherent policy programs; to select and train legislative candidates and political leaders; to provide voters with choices among governing teams and policies; and, if elected to office, to organize the process of government and stand collectively accountable for their actions in subsequent contests. Representative democracy is impossible without multiparty competition. Political parties accordingly function uniquely and constitute a cornerstone of democratic society. The long list of their potential functions can be summarized under five key headings: 1) the integration and mobilization of citizens; 2) the articulation and aggregation of interests; 3) the formulation of public policy; 4) the recruitment of political leaders; and 5) the organization of parliament and government."

[92] For a more detailed analysis of these fears, see Agatha Atuhaire (2015) *TDA's Dilemma* The Independent, September 20th 2015 accessed at: http://www.independent.co.ug/cover-story/10627-tdas-dilemma

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Uganda's political parties are most active and contribute the most to Uganda's governance discourse during election years. Various political parties and actors indicated early where they stood on the impending races for various positions. FDC's Kiiza Besigye had indicated in 2013 that he would not run against President Museveni again and that he would not participate in an election organized by the "dictatorship."[93] On June 10 2015, Kiiza Besigye reversed this decision and announced he would run for President.[94] The announcement, which came on the same day as the announcement of the formation of The Democratic Alliance, whose main goal was to front a joint opposition candidate to oust President Museveni, would see Kiiza Besigye contest against Mugisha Muntu for the position of flag bearer. Besigye would emerge the winner and be declared party flag bearer after a heated contest that saw the candidates traverse the nation and engage in a televised debate.[95] The race had mixed effects: on one hand, it split party officials and rekindling the divisions that arose in 2010 when the two party officials faced off ahead of the 2011 elections and highlighting discomfort that Besigye had succumbed to a 'savior complex' in believing that he is the only person suited to lead the party.[96] On the other hand, it gave FDC the opportunity to posture itself as having more credible internal governance structures than the NRM and all the other political parties, each under the threat of its own internal wrangles. At least one other analysis attributed Kiiza Besigye's decision to contest to Mbabazi's entry into the race.[97] In all circumstances, Besigye's decision to run again contrary to his earlier public statements presented a lingering difficulty and raises the question as to whether the same challenges and criticisms raised against President Museveni have arisen in the opposition as well.

The other traditional political parties remained internally divided throughout the initial stages of the campaign season. The Democratic Party indicated earlier on that it would join The Democratic Alliance (TDA) and was represented there by its President General, Norbert Mao. However, internal differences between one camp led by Norbert Mao and another led by Elias Lukwago, dubbed '*DP Suubi'* ensued and would continue to plague the party throughout a significant part of 2015. The wrangles would end in Lukwago's failed attempt to call for a boycott of the Party's delegates conference.[98] The Party's primaries were marred by irregularities and attempts at reconciliation failed. These wrangles and internal weaknesses concerned

[93] See Herbert Ziwa, *Besigye: I won't Contest in 2016* The Daily Monitor, Published November 12 2013 available at: http://www.monitor.co.ug/News/National/Besigye--I-won-t-contest-in-2016/-/688334/2069572/-/horhr4/-/index.html

[94] See Sam Wasswa, *Besigye Finally Announces 2016 Bid, Says Mbabazi not Fit Yet* available at: http://www.chimpreports.com/besigye-finally-announces-2016-bid-says-mbabazi-not-fit-yet/

[95] See Andrew Mwenda, *On the FDC Presidential Debate* The Independent, September 6th 2015, accessed at: http://www.independent.co.ug/the-last-word/the-last-word/10582-on-the-fdc-presidential-debate. See also New Vision, *Besigye Returns as FDC Flag Bearer*, Added September 3rd 2015 available at: http://www.newvision.co.ug/new_vision/news/1408949/besigye-returns-fdc-flagbearer

[96] See for instance: Edris Kiggundu, *Besigye Muntu Race Splits Party Officials* The Observer, August 12, 2015 available at: http://www.observer.ug/news-headlines/39203-besigye-muntu-race-splits-party-officials see also Deo Walusimbi, *Mushega Attacks Besigye U – Turn* The Observer10 August 2015 accessed at http://observer.ug/news-headlines/39175-mushega-attacks-besigye-u-turn see also Sadab Kitatta Kaaya *Besigye Supporters Attack Mushega* The Observer, August 15 2015 accessed at: http://observer.ug/news-headlines/39202-besigye-supporters-attack-mushega and Amanya Mushega, *Mushega's Answer to Besigye* The Daily Monitor August 31 2015 accessed at http://www.monitor.co.ug/SpecialReports/Elections/Mushega-s-answer-to-Besigye/-/859108/2853060/-/vytlkwz/-/index.html

[97] See Edgar Tushabe Muhairew, *Mbabazi Made Besigye Run Against Muntu* The Independent, Sunday July 26 2015 available at http://www.independent.co.ug/cover-story/10457-mbabazi-made-besigye-contest-against-muntu

[98] Flavia Nassaka, *Mao Burries Lukwago's Hopes in DP,* The Independent, August 3rd 2015 accessed at: http://www.independent.co.ug/column/insight/10486-mao-buries-lukwago-hopes-in-dp

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the Party's top leadership but had now spread to the lower ranks of the party. It must be viewed as troubling to note that the wrangles only got worse over the ten years leading to the 2015 party elections.[99]

The Uganda Peoples Congress was also dogged by its own bitter internal struggles. The wrangles which arise from various accusations including financial impropriety, allowing infiltration by the NRM, ascension to power through inappropriate and unconstitutional means, among other factors, have pitted Olara Otunnu against Jimmy Akena. These wrangles are not new. They only got worse in 2015.[100] The warring factions would resort to court and the battles were far from over by the end of 2015.

Political parties in Uganda have a long history and have assailed many challenges.[101] The internal challenges faced by these two oldest political parties in Uganda have serious governance implications. Firstly, the wrangles crippled the parties and frustrated any attempts at seriously mobilizing at grassroots levels in order to contend with the NRM both in the Presidential and parliamentary elections, as the NRM bears a stronger grassroots system. Secondly, the challenges cast a very dark shadow as to whether the parties having failed to organize internally and to surmount largely personal differences can hold the country together if they were to take power. This credibility crisis deeply undermines the confidence of the Ugandan electorate and quickly turns into a struggle for relevance. Indeed, by one account, the parties are under threat of extinction.[102] These power and credibility crises would later significantly undermine efforts by various players to press for a single joint opposition candidate.[103] It is unlikely that these parties will overcome these internal challenges any time soon. This compels two deductions: firstly, that Uganda's political opposition is significantly weakened and unable to champion an issues based challenge against the ruling NRM. This is important because without a vibrant opposition and in the face of an ever weakening legislature, a troubled media, an ever shrinking civic space and an internally fractured ruling party, Uganda will soon struggle to find a logical approach to hold the ruling party accountable.

The second and broader deduction relates to the future of political parties and their relevance in tackling Uganda's governance issues. Indeed, one of the central purposes of political parties in a representative democracy is to organize accountable

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[99] See Steven Kafeero, *Ten Years On, DP Wounds Fail to Heal, Turn Septic* The Daily Monitor July 26 2015 accessed at: http://www.monitor.co.ug/Magazines/PeoplePower/10-years-on--DP-wounds--fail-to-heal--turn-septic/-/689844/2807984/-/139gi1sz/-/index.html

[100] See Richard Wanambwa, *A Peek into UPC's Internal Wrangles* The Daily Monitor August 21 2011, accessed at http://www.monitor.co.ug/News/National/-/688334/1222532/-/bjwv6mz/-/index.html see also Sulaiman Kakaire, *Akena 'Election' Deepens UPC Wrangles* The Observer July 6th 2015 accessed at http://www.observer.ug/news-headlines/38607-akena-election-deepens-upc-leadership-wrangle

[101] For a thorough historical analysis of the challenges that dogged Uganda's political parties in the period leading up to and most immediately preceding independence, see Grace Ibingira (1973), *The Forging of An African Nation,* Vikings Press at pp. 76 – 88. A more contemporary analysis of the historical, legal and present day challenges that Political parties in Uganda have faced and continue to face has been penned by Christopher Mbazira (2012), *From Military Rule to No Party State to Multi Party Politics in Uganda* found in Morris Mbondenyi and Tom Ojienda (2013), *Constitutionalism and Democratic Governance in Africa*: *Contemporary Perspectives from Sub Saharan Africa* Pretoria University Law Press, pp. 291 to 313. It may even be argued that with Norbert Mao, a non muganda catholic being President General of DP and the most aggressive rival faction being led by Erias Lukwago, a Muganda moslem, DP seems to have made progress in dealing with the tribalistic history of having only been led by a Muganda catholic. It is sad, however, to note that tribal and religious (rather than ideological) undertones have kept the party stuck in internal strife.

[102] Sulaiman Kakaire, *UPC, DP Coups Threaten Coalition* The Observer July 24 2015 accessed at http://www.observer.ug/news-headlines/38918-dp-upc-coups-threaten-coalition

[103] ibid

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and effective governance.[104] As is noted elsewhere, "a democracy needs strong and sustainable political parties with the capacity to represent citizens and provide policy choices that demonstrate their ability to govern for the public good. With an increasing disconnect between citizens and their elected leaders, decline in political activism, and growing sophistication of anti-democratic forces, democratic political parties are continually challenged."[105]

The fact that these parties do not seem to be able to overcome their internal wrangles, which are almost universally based on personality and perception (personality cults, perceptions of greed and selfish ambition, suspicion of infiltration by the ruling party and in some cases – such as DP, tribe and religion) rather than issues and ideology raises serious concern as to whether the political party model as a means of political mobilization, organization, association and assembly is still viable in Uganda today. Fifty-three years after independence, no single party seems to have risen beyond these challenges.[106] FDC, which is presently the strongest opposition party, was itself a pressure group of ex NRM officials and built itself up with prominent figures from DP. Like the traditional parties it found in this space, FDC continues to struggle with internal wrangles – some of which have been highlighted above. No other party seems to have emerged on its own and risen to the national scene so as to meaningfully engage on governance issues or ideology, and the fate of all the traditional political parties does not predict a possibility of another party successfully evolving in the current political space.[107] Indeed, it is worth noting that out of the eight candidates nominated for the 2016 presidential elections, four of them have no registered political party and did not have active political organization structures before the nominations.[108] It is doubtable therefore, that any single party in this country can safely be trusted with the fundamental responsibility of safeguarding Uganda's constitution and guaranteeing her citizens the proper enjoyment of human

[104] Paul Webb (2007), *Democracy and Political Parties* Hansard Society, ISBN ISBN 978 0 900432 68 3 accessed at http://www.hansardsociety.org.uk/wp-content/uploads/2012/10/Democracy-And-Political-Parties-2007.pdf at P. 6

[105] Pippa Noris, (2005), *Political Parties And Democracy In Theoretical And Practical Perspectives: Developments In Party Communications* Natioanal Democratic Institute for International Affairs, 2005, accessed at: http://www.hks.harvard.edu/fs/pnorris/Acrobat/NDI%20Final%20booklet%20-%20Communications.pdf

[106] It is important to note that political parties face more challenges than space and scope can allow here. A good number of these challenges have been discussed by Christopher Mbazira (2013), *From Military Rule to No Party State to Multi Party Politics in Uganda* found in Morris Mbondenyi and Tom Ojienda (2013), *Constitutionalism and Democratic Governance in Africa*: *Contemporary Perspectives from Sub Saharan Africa* Pretoria University Law Press, pp. 291 to 313. Oloka Onyango has also argued that: Uganda does not as a matter of reality have opposition political parties; rather there are only opposition personalities. Oloka-Onyango adds that these leaders 'have constructed around themselves weak or non-existing party structures that only come to life in the run up to elections'. See J Oloka-Onyango (2006), *Dictatorship and presidential power in post Kyankwanzi Uganda: Out of the pot into the fire* Human Rights & Peace Centre, Democratic Governance Working Paper Series No 3 (2006) 2.

[107] While according to the Electoral Commission website there are 29 registered political parties at the time of writing, (EC Website as of December 2015, accessed at: http://www.ec.or.ug/?q=political-parties) only FDC, UPC, DP, JEMA and CP seem to be actively engaging on any issues at all and none of them went through 2015 without leadership related scandals. All the other parties, regardless of how old they are, remain dormant and virtually non existent on ground.

[108] The nominated candidates are: Abed Bwanika, Amama Mbabazi, Benon Biraro, Joseph Mabirizi, Kiiza Besigye, Maureen Kyalya, Venacious Baryamureba, Yoweri Museveni. Of these, Mbabazi, Mabirizi, Kyalya and Baryamureba have no known political party. Mbabazi has even repeatedly said he still belongs to the NRM, despite having elected to run for president out of the party structures.

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rights, the rule of law, good governance and accountability values, whose desperate need is well espoused in the preamble to the 1995 Constitution.[109]

NRM Internal Politics and the Fusion of the Party with the State

Like all the other political parties, the NRM suffered its greatest internal challenges in 2015. With the party still suffering the consequences of having passed a motion at Kyankwanzi to field Mr. Yoweri Museveni as its sole candidate for the 2016 presidential race, internal strife seems to have been at its highest.[110] The party fielded a new team of officials to manage the roadmap towards the campaigns for the General Elections, with Justin Kasule Lumumba as Secretary General and historian and academic Dr. Tanga Odoi as chairperson of the party's electoral commission.[111] The NRM would go on to hold nationwide primaries for each level of elective leadership, right from the councilors at the Local Council level. These primaries were conducted under the auspices of a new set of regulations that were only promulgated by the party in 2015.[112] It is troubling to note that the party's primary elections ahead of the 2011 general elections were conducted without regulations.

The NRM primaries were marred by nationwide incidents of malpractice and violence, and gave rise to an unprecedented number of election petitions both at the party's electoral commission and in the courts.[113] The regulations themselves are now a subject of two petitions at the Constitutional court, which seek to challenge Regulation 20 (21), which empowers the NRM Electoral Commission to hear all complaints from any primary elections. The petitions contend, *inter alia,* inconsistent with and contravenes articles 28 (1) and 44 (c) of the 1995 Constitution as it denies an aggrieved party the non-derogable right to a fair hearing.[114] Some challenges against the primaries were lodged in the courts with parties seeking injunctions against the presentation of some candidates as flag bearers. In a good number of these cases, the courts declined to grant these injunctions. Once the parties got nominated, the main petitions were no longer pursued as a matter of urgency. In stead, some of the people

[109] The intention of the author here is not to advocate for a return to a no party or one party system. It is to compel a more careful consideration of whether it is time to revisit the discussion on which vehicles are best suited for political mobilization in Africa.

[110] The motion for the NRM to present Mr. Museveni as its sole candidate was first moved at a retreat for members of parliament and attended by a few key government officials at the National Leadership Institute in Kyankwanzi on February 9th 2014. The motion would later come to be known as the *Anite motion,* after its little known mover, Evelyn Anite, who had hitherto been Youth Member of Parliament for Northern Uganda but would be 'rewarded' for her efforts with a ministerial position. For some context behind this motion and its mover, see The Daily Monitor, MP Anite: Loyal Cadre or Opportunistic Politician? Accessed at: http://www.monitor.co.ug/Magazines/PeoplePower/MP-Anite--Loyal-cadre-or-opportunisticpolitician-/-/689844/2207914/-/10vhgyw/-/index.html

[111] Dr. Odoi would later try to deny that the party's EC was complicit in the sole candidacy project. But this was a difficult position to maintain. See for instance Yasin Mugerwa and Paul Tajuba, *NRM EC Disowns Sole Candidacy Project* The Daily Monitor July 15, 2015 accessed at http://www.monitor.co.ug/News/National/NRM-EC-disowns-sole-candidate-project/-/688334/2789934/-/11adxpez/-/index.html

[112] National Resistance Movement (Primary Elections) Regulations, 2015.

[113] For a discussion of how chaotic the NRM primaries were, see for instance: Agather Atuhaire (2015), *NRM Primaries were Bloody* The Independent, Monday November 2nd 2015 accessed at: http://www.independent.co.ug/cover-story/10748-why-nrm-primaries-were-bloody Another matter that raised a lot of concern was the imposition of nomination fees on candidates. This was seen as a means of monetizing politics

[114] The two petitions are *Jude Okello v. The Attorney General and the National Resistance Movement, Constitutional Petition 36 of 2015* and *Fox Odoi Oywelowo v. The Attorney General and the National Resistence Movement, Constitutional Petition 37 of 2015*. The Petitions were not heard in 2015 and it is suspected that they will only be heard much later into the next presidency.

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that had contested the elections ran as independents. This lends credence to the view that the major reason behind these petitions was simply to secure the party's endorsement as that came with financing for campaigns.

Many of the people that were aggrieved with the internal electoral process, some of them being historical members of the party, are running as independents. The president was compelled to let them run as such. This development leads to an interesting turn in Uganda's politics and constitutional governance. In *George Owor v. The Attorney General & Hon. William Okecho*, *Constitutional Petition No.38 of 2010* the Constitutional Court ruled that a person who had contested and entered parliament as an independent could not remain in the House if they crossed to another party as this would contravene Article 83 (1) (g) of the Constitution of Uganda. As has been observed elsewhere in this paper, the position has now been changed by amendment of the law to indicate that one only loses their seat if they change positions in the last year of their term in parliament. The broader issue that arises from the 2015 NRM primaries in this context is whether the party will still expect any of the independents to lean towards its positions if they defeat NRM sponsored parliamentary candidates. The shape and form of the NRM caucus after the 2016 general election remains to be seen. Indeed, it is to be expected that, while largely initially unexpected, there will be more independent members of parliament after the 2016 elections than before. How this will affect the NRM's majority, the independence of parliament and the performance of parliament's core function in the context of separation of powers remain to be seen.

Other concerns and perspectives that arose from the NRM primaries were imposition of nomination fees in a short time towards elections, the consequences of Amama Mbabazi's candidacy, and the unexplained sources of NRM's finances. The NRM primaries were undoubtedly more expensive than any party's primaries in Uganda's history.[115] In the absence of any other official explanation despite the many calls for the party to offer one, the only logical deduction is that the NRM was utilizing state resources. In addition to the questionable use of state resources, the manner in which the Uganda Police and the Electoral Commission handled the question of Mbabazi's initial activities displayed a clear fusion between the state and the NRM party. Having initially cleared him to engage in consultations as provided by section 4 of the Presidential Elections Act, 2005, the Electoral Commission later capitulated when it received letters from the Uganda Police and the NRM Secretary General, in which the latter argued that Mbabazi could not be allowed to engage in consultations because he had not been cleared by the NRM party organs.[116] The lacuna as to what amounts to consultations under the Presidential Elections Act (the same not having been defined under the statute) will need to be resolved by statutory amendment. But the conduct of the Electoral Commission and the Uganda Police in these instances left a lot to be desired. As institutions of government, they should have acted impartially but rather displayed an unmistakable bias, one that demonstrates that Uganda is still a long way from properly functioning as the multiparty democracy that was envisaged by the

[115] Dr. Tanga Odoi, the Chairperson of the NRM Electoral Commission confirmed on Spectrum, a local Radio show, that the party had spent about Uganda Shillings Twenty Seven Billion on these primaries.

[116] A good amount of this information was shared on social media platforms with the letters themselves being disseminated as proof of the decisions that were being taken. This goes to further highlight the growing role of social media in promoting governance as discussed earlier in this paper.

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2005 Constitutional and legislative amendments that restored political party democracy in Uganda.[117]

The Electoral Commission and the Illusion of Free and Fair Elections

In addition to the conduct mentioned above by which the Electoral Commission demonstrated bias in the way the Commission handled the Mbabazi consultations, the Commission fell below par on other occasions, raising serious questions with both only its independence and its ability to facilitate the organization of free and fair elections. Firstly, the Electoral Commission illegally retired a Voters Register. The constitutional mandate of the Commission is to compile, maintain and update the Voters Register.[118] In stead, the Electoral Commission issued a Gazette notice in which it purported to retire the Register used for the 2011 elections and to compile a fresh one using the data collected by Ministry of Internal Affairs for the issuance of the National Identity Cards. In various press statements, the Electoral Commission would go on to say that it had conducted a voter update exercise, during which it had cleaned up the Register and had corrected any anomalies.

In the course of all these actions by the Electoral Commission, persons who had previously been registered for voting purposes were deleted from the Register, notably Member of Parliament, Odonga Otto and former presidential aspirant and former Gulu Municipality and District Chairperson, Norbert Mao. Both of these persons were compelled to turn to court to resolve their matters. While Odonga Otto was successful in so doing vide *Hon Odonga Otto v. Electoral Commission Miscellaneous Cause No. 102 of 2015* Norbert Mao was not as successful. The Electoral Commission maintains that Norbert Mao is not a registered voter because he did not register for a National Identity Card and yet this is the data that has been used to compile a voters register. Mao on the other hand argues that his name having been on the voters register in the first place should never have been removed without his consent, knowledge or according him a fair hearing, which would have been the case if the procedure for removal had been complied with. His complaint to the Electoral Commission was declined. It is the author's view that the Electoral Commission's position is untenable. At the time of writing, Norbert Mao had elected to file a Constitutional Petition against the Electoral Commission and the Attorney General.

These cases necessitate further comment. The conduct of the Electoral Commission has come under serious scrutiny by both the masses and the courts. But the courts also deserve to come under more careful scrutiny. In *Hon. Odonga Otto v. Electoral Commission,* the High Court decided to 'jettison formalism to the minds' and hear the matter on its merits as it involved questions concerning fundamental rights and freedoms. Indeed, Yasin Nyanzi J. held that once the Applicant had given them the information about his being off the Register, the EC should have updated his details, and in so doing, would have complied with their mandate, and that 'except where it is practically not possible, the EC should try as much as possible to execute its mandate other than finding reasons to fail it.'[119] But in the later decision of *Charles Nsubuga v. Eng. Badru Kigundu & Ors*, *Miscellaneous Application* 148 of 2015, Stephen Musota

[117] Concerns of bias in the way the Electoral Commission has managed the 2016 campaign process arose with respect to how the Commission managed complaints of campaign violence and the Electoral Commission Chairperson's direct attacks against Kiiza Besigye.
[118] See Article 61(e) of the Constitution.
[119] *Hon Odonga Otto v. Electoral Commission Miscellaneous Cuse No. 102 of 2015* pp. 12-14.

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J. stuck to rules of procedure to decline hearing a matter in which the conduct of the Electoral Commission in dealing with Amama Mbabazi's candidature as discussed above was challenged.[120] Although human rights concerns had been pleaded in this case, Musota J. upheld a preliminary objection and held that under section 15 of the Electoral Commission Act, the matter should have first been referred to the Electoral Commission for adjudication before it was brought to the High Court by way of appeal.

There are obvious questions of fundamental human rights and constitutionality that arise in all these cases. Firstly, under section 15 of the Electoral Commissions Act, it is the same Electoral Commission whose conduct is complained of that is enjoined with resolving disputes relating to the electoral process. This presents challenges as to the right to a fair hearing as is safeguarded under Articles 28 and 44 of Uganda's Constitution. Almost inevitably, all these matters will end up at the High Court on appeal. In that context, it may be more logical in the future, to seek the Constitutional Court's position on whether it does not make more sense to pursue relief at the High Court in the first place. It is not entirely implausible to argue that by avoiding to hear the merits in *Charles Nsubuga v. Eng. Badru Kigundu & Ors* the High Court abdicated its constitutional duty as a court of original unlimited jurisdiction in all matters, especially, as human rights concerns had been pleaded.

Secondly, the questions around the illegality of the Electoral Commission's purported retirement of the Voters Register remain to be determined. Declining to nominate Norbert Mao for the Gulu Municipality parliamentary race as the Electoral Commission did, on account of his not being on the voters register has exposed the Electoral Commission to challenge for having violated a number of constitutional provisions. Firstly, it is an infraction on his rights under articles 59 and 80 of the Constitution, which protects every citizen's right to vote, to contest for the position of Member of Parliament and to participate in the electoral process. Secondly, having participated in the electoral process at different levels before, that his name is removed from the Register without following the procedure stipulated in the Electoral Commission Act which guarantees that he is heard before such removal is a violation of his rights under articles 28, 42 and 44 of the Constitution. Thirdly, by conducting itself in the manner that it did, the Electoral Commission offended articles 61 and 62 of the Constitution in that it has no mandate to retire a register but can only maintain the same. Also, in purporting to adopt data compiled by Ministry of Internal Affairs, the Commission would have delegated the duty to compile data for purposes of the Register and in so doing compromised both the integrity of the Register and its independence.

As Benjamin Odoki has written,

> "Elections are the highest form of expression of the general will of the people. They symbolize the right o the people to be governed only with their consent… An election should therefore be a mechanism whereby the choices of a political culture are made known… An electoral process, which fails to ensure the fundamental rights of citizens before and after election, is fundamentally flawed…. The Electoral Commission has so far not been able to compile an accurate and efficient national voters' register and this has led to problems of ghost voters, underage voting, multiple voting, prior ticking and denying of the right to vote for those whose names do not appear n the register. These have now become usual grounds

[120] Charles Nsubuga v. Eng. Badru Kigundu, Jotham Taremwa, Sam Rwakoojo and Bukenya Paul Misc. Cause 148 of 2015

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for challenging election results in courts of law and many of these petitions have succeeded"[121]

The centrality of compiling an accurate voters register cannot be overstated.[122] That Odoki's words written in 2004 still surface in the events of 2015 is telling of the quality of elections that Uganda is likely to see in 2016. Previous attempts to compel the Constitutional Court to halt the 2011 election and pronounce itself on the quality of the voters register were futile.[123] These concerns are likely to haunt Uganda for a long time. The broader concerns as to the Electoral Commission's integrity and the manner in which it handles election procedures will remain a frontier of litigation, which it can only be hoped, will facilitate the slow process of improving the enjoyment of civil and political rights and good governance in Uganda. What the events of 2015 show is that the country has a long way to go.

Conclusion

The year 2015 will go down as a year of many achievements on Uganda's constitutionalism and governance continuums. These achievements were perhaps most notable in the outcome of some of the landmark decisions discussed in this paper. And yet the judiciary has many challenges to overcome, least of which are resolving the emerging jurisprudential contradiction around civil liberties that is discussed in this paper and addressing the rampant bottlenecks (such as backlog at the courts and understaffing) that have become so notorious that they were not offered special attention in this chapter. But the year will also be remembered for its subtle reminders of how far Uganda has to go to realize certain tenets of good governance, democracy, constitutionalism and the enjoyment of human rights. The Executive left much to be desired in its conduct of many affairs discussed in this paper, and one is left wondering if things will get better or worse after the next election. The need for electoral reform and other legislation crucial to the furtherance of constitutionalism has never been more critical. The legislature on its part ceded much ground and succumbed to a lot of pressure. In light of the impending changes in the structure of the legislature that are likely to arise from an increased number of independents who will change the nature of the NRM caucus on the one hand, and the increased number of Members of Parliament resulting from the gerrymandering discussed in this paper, it will be critical to observe how the legislature performs.

This chapter has attempted to point out a number of areas in which the state of constitutionalism is severely challenged. The paper has also taken the unique approach of analyzing the places where politics and governance meet constitutionalism. Much of this work has been expository and deeper analyses are necessary. If the reader's attention is drawn to areas that seem new to the consideration of the country's performance on constitutionalism, then this work has achieved one of its goals. The almost cursory discussion of issues such as gender mainstreaming in the work is not an oversight on the work itself but evidence of the

[121] Benjamin J. Odoki (2004), *The Search for a National Consensus: The Making of the 1995 Constitution* Fountain Publishers pp.322 – 323 and 326 -327.

[122] See also *Raila Odinga v. The Independent and Electoral Boundaries Commission & Ors Consolidated Petion 5 of 2013* at pp. 17-18 where a number of decisions are cited with respect to how central the integrity of a voters register is to holding a free and fair election.

[123] See *Joseph Bossa & Anor v. Attorney General & Anor Constitutional Application 6 of 2011.* Constitutional Petition 7 of 2011 from which this Application for an injunction arose remains pending at the Constitutional Court even as the country goes into its next election.

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fact that gender concerns can be drawn closer to the center of Uganda's continued struggle for progress on constitutionalism, good governance and the rule of law. On the whole, the chapter demonstrates that the journey through 2015 was one that left Uganda as a country struggling between the challenges of retreating horizons and the horrifying fear of the fact that not only are the dangers of her troubled past not too far away from returning, in some cases what appeared to have been progressive momentum is in fact, when considered more closely, a reflection of just how worse some things are.

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