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CONSTITUTIONAL DIALOGUE IN UGANDA

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Introduction

Uganda has a checkered constitutional past. In 1962, the newly independent Republic of Uganda established its first constitution, and several other constitutions were developed in the years that followed. However, as the regime of Milton Obote was replaced by the dictatorship of Idi Amin, and Amin overturned, leading to another Obote reign of terror, the constitution was used as a tool to further the political ends of the leader in power at the time, and in cases in which it was seen as an impediment, it was amended or suspended. When Yoweri Museveni came to power in 1986, many believed that a new era had dawned. A Constitutional Commission was appointed in 1988, and an extensive process of consultation led to the establishment of the Constitution of 1995, which provided greater protection for human rights, and incorporated several checks on the government's power. However, while Museveni's regime has led to economic development for the country, his time in power has also been politically repressive, as he has entrenched the Movement System, which has become a *de facto* political party, in power for the last 18 years, and has engaged in the suppression of opposition party activity, resisting a move to the multi-partyism that he had originally promised. He now seems poised to amend the constitution to allow him to remain in power for a controversial third term.

However, in the last few years, there have been promising developments on the constitutional front which have significant political implications. In March 2003, the court in *Ssemogerere and Others* v. *Attorney-General* (Constitutional Petition No. 5 of 2003)[1] struck down two of the sections of the Political Parties and Organisations Act aimed at suppressing the activities of opposition political parties, and in *Ssemogerere and Others* v. *Attorney-General* (Constitutional Appeal No. 1 of 2000),[2] the court held that the way in which the Referendum Act, 1999 had been passed was unconstitutional. More recently, in *Ssemogerere and Olum* v. *Attorney-General* (Constitutional Petition No. 3 of 2000),[3] the Constitutional Court held that the Referendum Act, 2000, which

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[1] *Ssemogerere and Others* v. *Attorney-General*, Constitutional Petition No. 5 of 2003 (Constitutional Court), decided 21 March, 2003 (unreported) [hereinafter *PPOA Case*].

[2] Constitutional Petition No. 3 of 1999, [2000] UGA J. No. 1 (Constitutional Court), online: QL (UGAJ), appealed to Supreme Court in Constitutional Appeal No. 1 of 2000, [2000] UGA J. No. 80, online: QL [hereinafter *Referendum Act, 1999 Case*].

[3] Constitutional Petition No. 3 of 2000 (Constitutional Court), decided 25 June, 2004, online: http://www.judicature.go.ug/judgements.php. Appealed to Supreme Court, appeal decided 2 September, 2004 (unreported) [hereinafter *Referendum Act, 2000 Case*].

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had been passed in order to replace the previous Referendum Act, was unconstitutional and declared that the 2000 referendum which had endorsed the continuation of the Movement system was invalid. This decision was appealed to the Supreme Court which, while still holding that the Referendum Act itself was unconstitutional, upheld the results of the referendum. There have also been other cases in which the courts have struck down legislation that has been held to unjustifiably violate rights, including striking down the false news provision in the Penal Code.

These cases, while holding out promise for a more democratic political process, also indicate the beginning of a process of dialogue between the courts and the legislature in Uganda. In the *Referendum Act Cases*, for example, the court declared that the original Referendum Act was unconstitutional, and the legislature responded by amending the constitution in order to pass another Referendum Act. The court then struck down this amendment as unconstitutional. While the legislative response to the court's decision might be seen as an "in-your-face" reply, the court's subsequent response to the government's action represents a significant step forward in dialogue between the courts and the legislature, given a past where the court's response has typically been one of extreme deference. In this decision, the court also laid down the ground rules about what would count as acceptable forms of dialogic response from the legislature. Dialogue has also occurred between the courts and the legislature in cases involving rights violations, such as the *PPOA Case*, since the legislature has been forced to justify its limitations on rights under article 43 of the Constitution, and has had the opportunity of responding to unfavourable decisions with legislation that is more respectful of the rights at stake, although it has so far chosen not to do so.

While this type of dialogue may seem unsophisticated compared to the nuanced dialogue occurring between the courts and legislatures in countries such as Canada and South Africa, the mere fact that there is any respectful discussion about rights between the courts and the legislature marks a dramatic departure from past constitutionalism in Uganda. Moreover, the fact that there is no real dialogue in the political sphere has made the dialogue between the courts and the legislature all the more important, for it is where fundamental political issues are debated. Many of the constitutional cases challenging government action have been launched by opposition parties, which have no official standing, and little voice in Parliament. The political debate that would normally occur in Parliament has therefore been shifted to the courts. As a consequence, dialogue between the courts and the legislature has become a crucial component of the process of democratization in Uganda. However, recent developments, such as Museveni's reaction to the *Referendum Act, 2000 Case* and the subsequent Supreme Court decision overturning the Constitutional Court's ruling, indicate that the future of dialogue in Uganda is uncertain.

History of Constitutionalism in Uganda

In 1962, the Republic of Uganda achieved its independence, and the Lancaster House constitution, drafted by the British, which granted federal status and several special privileges to the Buganda and three other tribal

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kingdoms, was put into place.[4] The first government in power was an unstable alliance between the Uganda People's Congress (UPC), headed by Milton Obote, and composed primarily of Northerners, and the Kabaka Yekka party, a party created for the furtherance of the monarchy of the Kabaka, the head of the Buganda tribe dominant in southern Uganda. The power struggle between the Kabaka and the UPC led to the first suspension of the constitution in 1964, when Obote deposed the Kabaka, who fled into exile.[5] In 1966, Obote adopted an interim constitution, dubbed the "Pigeonhole" Constitution because it was approved after no debate when the MPs found the draft of the Constitution in their pigeonholes.[6] He then introduced a new constitution in order to reduce the power of the Kabaka and the other traditional monarchies, which was passed by Parliament in 1967. This constitution was in place for the next 28 years.[7] In 1971, General Idi Amin Dada, the head of the army, staged a coup d'état, overthrowing Milton Obote, and establishing a dictatorship infamous for its brutality and lack of respect for the rule of law. Amin was ousted in 1979 after the intervention of Tanzanian troops sent by Julius Nyerere. The short-lived governments of Lule and Binaisa followed, and an election (widely held to be rigged) was held in 1980 which brought Milton Obote and the UPC to power for the second time. Obote was deposed by Okello in 1985, but shortly thereafter, Okello was himself deposed by Museveni's National Resistance army in 1986.[8]

Museveni, widely hailed as the future of a more democratic Uganda, came to power with a great deal of political support, and has remained in power for the last 18 years. Museveni believed that the problems in Uganda's past had been caused by political parties split along tribal and religious lines, a view shared by many in Uganda. He therefore believed that multi-partyism would again lead to tribal factionalism and endorsed a broad-based, participatory Movement system of government, where people were to be elected based on individual merit, not their allegiances with political parties. Museveni initially held that the Movement system was transitional, and would only be in place until Uganda was again ready for multi-party politics, but he soon began to justify the Movement as a more permanent system. Over the years, the Movement began increasingly to resemble a traditional political party, and the Movement Act (1997) created structures and organs of the Movement which were identical to those of a political organization.

However, as Ssekandi indicates, when Museveni first came to power, his regime "seem[ed] determined to end the one-man rule which characterized [previous] regimes, by subjecting its leader to formal appointment and separating the executive functions of the presidency from the legislative powers of Parliament".[9] Upon coming to power, Museveni also ratified

[4] Human Rights Watch, *Hostile to Democracy: The Movement System and Political Repression in Uganda*, New York, 1999, 30 [hereinafter "Hostile to Democracy"].

[5] J. Katorobo, "Electoral choices in the Constituent Assembly elections" in H.B. Hansen and M. Twaddle (eds.), *From Chaos to Order: The Politics of Constitution-Making in Uganda,* Kampala, 1995, 114 at 115.

[6] J. Oloka-Onyango, "Constitutional transition in Museveni's Uganda: new horizons or another false start?", [1995] 39 *J.A.L.* 156 at 158.

[7] "Hostile to Democracy", above, n. 4, at 31.

[8] Ibid. at 33–36.

[9] F.M. Ssekandi and C. Gitta, "Protection of fundamental rights in the Ugandan Constitution", (1994) 26 *Colum. Hum. Rts. L.R.* 191 at 197.

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several international human rights treaties, and began to put systems in place to deal with domestic human rights abuses, setting up a Commission of Inquiry to investigate human rights violations that had occurred under previous regimes, and establishing the office of the Inspector-General of Government to investigate future human rights violations.[10]

The 1967 constitution provided for the separation of powers, judicial review and a commitment to human rights and due process. It also substantially reduced the powers of the traditional leaders by abolishing four tribal kingdoms. However, it concentrated power in the hands of the president, who under article 21, could suspend the constitution during periods of emergency. In addition, articles 61 and 62 authorized the president to dissolve Parliament during states of emergency. All of the governments that came to power after 1962 used the constitution in order to crack down on political opposition and to maintain themselves in power. In 1969, for example, after an assassination attempt, Obote banned all political parties.[11] In 1971, with Legal Notice 1, Amin amended and suspended parts of the 1967 constitution in ways that were not provided for in the constitution. This proclamation also conferred all executive powers on Amin, and established a system of rule by decree.[12]

After assuming power for the second time, Obote declared a state of emergency under article 21, and made use of articles 61 and 62 to dissolve the Parliament. He then suspended the part of article 61 requiring a new general election within 60 days.[13] Museveni, upon coming to power, suspended several provisions of the constitution with Legal Notice 1 of 1986, including banning political party activity for the first four transitional years.[14] Therefore, as Oloka-Onyango argues, the various governments took:

> "what they felt was beneficial to their extra-constitutional usurpation and exercise of power, and suspend[ed] or simply ignor[ed] what they felt was a hindrance. Needless to say, despite lip-service to the 1967 Constitution, neither the practice nor the law that was promulgated under it actually paid any homage to accepted notions of constitutionalism or democratic rule. The Constitution was at best an expeditious instrument for the consolidation of personal power and at worst was simply ignored."[15]

During the period in which the 1967 Constitution was in place, the role played by the judiciary was one of deference to the president. Article 85 of the constitution held that the tenure of the Chief Justice was dependent on the will of the president, thus compromising judicial independence. Since much of the constitution was often under suspension because of apparent states of emergency, the judiciary was limited in the role it could play from the outset. Also, Chapter Three of the Constitution provided limitations on the protection of human rights when they conflicted with the public interest, which as

[10] F.N. Baldwin, Jr., "Freedom and constitutionalism in emerging African States: a special look at Uganda with possible lessons for a united South Africa", (1991) 9 *Wisconsin Int'l L.J.* 301 at 341–342.
[11] "Hostile to Democracy", above, n. 4, at 31.
[12] Oloka-Onyango, above, n. 6, at 159.
[13] Baldwin, above, n. 10, at 324.
[14] "Hostile to Democracy", above, n. 4, at 36 and Ssekandi, above, n. 9, at 196.
[15] Oloka-Onyango, above, n. 6, at 159.

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Baldwin says, provided "an all too convenient basis for judicial deference to presidential influence".[16] This deference was no doubt compounded by the vulnerable position of the judiciary, who faced harassment if they handed down decisions that were critical of the government. However, there were some cases in which the judiciary defied the strong presidential influence, and made rulings against the government's abuse of human rights. In particular, Benedicto Kiwanuka, C.J., made several rulings holding the Amin government's actions to be unconstitutional, particularly in its use of detentions. However, there was a price to be paid for such a judicial role. In 1972, Kiwanuka was arrested by the army in his chambers and reportedly executed.[17]

Despite the improvement in the human rights situation after Museveni came to power, judicial deference in acceding to government interests in overriding the rights protected in the constitution continued during the early years of the regime while the 1967 constitution remained in place. In 1994, for example, the UPC challenged the rules governing the Constituent Assembly elections which prevented opposition parties from fielding candidates, claiming that these rules violated its right to freedom of assembly, association and speech. The Constitutional Court held that the rules did not violate the constitution, claiming that the rights to freedom of expression and association were not absolute and could be overridden by the higher need to achieve a national consensus. The court held that since the rules did not discriminate between parties, but excluded them all from fielding candidates, the rules were constitutional.[18]

Ssekandi argues that this case was problematic because the court did not consider any evidence showing that political party activity might impede national unity, but instead based its conclusions on impressionistic views about the effect of the operation of political parties. He claims that "the need to achieve a national consensus is undoubtedly a fundamental state interest, but so are the rights protected under the constitution. What was needed was for the court to demonstrate, based on empirical evidence, that the participation of political parties in the election would disrupt civil society".[19] Despite the continuation both of violations of civil and political rights, and of judicial deference under the Museveni regime, many held high hopes that the new constitution of 1995 would entrench protection for human rights and the rule of law, and would establish a new framework for the interaction between the courts and the legislature.

The 1995 Constitution

In 1988, Museveni established a Constitutional Commission headed by Justice Benjamin Odoki to prepare a new constitution, and the constitution was finally established in 1995. The Commission engaged in a process of widespread consultation across Uganda. Even those critical of the Commission and the eventual draft Constitution have lauded the Commission's attempt to canvass the opinions of many sectors of Ugandan society, and to

[16] Baldwin, above, n. 10, at 324.
[17] Ibid. at 331.
[18] Ssekandi, above, n. 9, at 199.
[19] Ibid.

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educate the population about constitutionalism.[20] In the end, the Commission received over 25,000 submissions, including 800 from religious, political and other civil society groups.[21] However, the Commission was criticized by some as being composed primarily of Movement supporters, since the Chairman and the members were appointed by Museveni, and because it attempted to assume control of all deliberations surrounding the constitution, and was unsupportive of attempts by the media and other parties to enter into the debate.[22]

The 1995 Constitution that was the result of the Commission's deliberation included strong protection for human rights, and several measures designed to make it difficult to amend or suspend. Article 2 of the Constitution establishes it as the supreme law of the land, and states that any law or custom that is inconsistent with the constitution shall be void to the extent of the inconsistency. This provision is therefore analogous to section 52 of the Canadian Charter of Rights and Freedoms.[23] Article 137 provides for judicial review of violations of the constitution, holding that any person who alleges that a law, action or omission of the government violates the constitution may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate. There is therefore broad standing for anyone to petition the court for a declaration of invalidity, regardless of whether or not their rights have been affected. This has been used effectively, especially by opposition parties and their leaders, in particular the Democratic Party and the UPC to challenge the constitutionality of actions of the government. In the context of judicial review of violations of the fundamental rights and freedoms, article 50 authorizes the person whose rights have been violated to apply to a competent court for redress, but also allows any person or organization to challenge the violation of another person or group's rights. Moreover, Chapter 8 of the constitution provides for judicial independence, establishing that there can be no interference with the courts in their exercise of the judicial function, and establishing security of tenure and salary for the judiciary.

The Constitution provides protection for human rights, including the rights to liberty, equality, privacy, freedom of speech, association and the press.[24] There are several ways, however, that these rights can be limited. Article 46 holds that "an Act of Parliament shall not be taken to contravene the rights and freedoms guaranteed in this Chapter, if that Act authorizes the taking of

[20] Oloka-Onyango, who is generally critical of the Constitutional Commission, claims that "there were several positive aspects to the operation of the Commission. It sought, both through its seminars and in calling for public memoranda, to involve as wide an ambit of the population as was possible" (Oloka-Onyango, above, n. 6, at 163). Human Rights Watch also called the efforts of the Odoki Commission "an impressive campaign to reach out to the Ugandan public and get their views on a new constitutional order" ("Hostile to Democracy", above, n. 4, at 38).

[21] J.M. Waliggo, "Constitution-making and the politics of democratisation in Uganda" in Hansen and Twaddle (eds.), above, n. 5, 18 at 27–28.

[22] Oloka-Onyango, above, n. 6, at 162.

[23] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982 c. 11 [hereinafter Charter].

[24] The Constitution also protects many other rights, including social and economic rights, and environmental rights. However, it is questionable whether these rights are justiciable, although they appear to be enforceable under article 50. Ssekandi, commenting on a draft of the Constitution, argues that they might be viewed as national objectives to direct state policy, rather than enforceable rights (Ssekandi, above, n. 9, at 201). As far as I can determine, there have been no constitutional cases challenging violations of these rights.

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measures that are reasonably justifiable for dealing with a state of emergency".[25] There are also several rights which have internal limitations built into them, such as the rights of life, liberty and equality. Moreover, under the general limitation clause in article 43, the rights in the constitution can be limited in the public interest, as long as these limitations are "acceptable and demonstrably justifiable in a free and democratic society".[26] This limitation clause seems to be worded similarly to section 1 of the Canadian Charter, and to limitation clauses in other constitutions such as that of South Africa.[27] However, Oloka-Onyango points out that these types of limitations on rights do not represent a fundamental departure from the limitations on rights provided for in the 1967 Constitution, which were used overwhelmingly to restrict human rights and led to some of the worst abuses of the previous regimes. Commenting on a draft of the constitution that contained such limitations on rights, he claimed that:

> "Although [the limitation clauses] (known colloquially as "claw-back" clauses) are traditionally used in many constitutions the world over, the Ugandan experience demonstrated that it was the exceptions rather than the rule that applied. History thus demanded a strengthening of the rule on exceptions. The problem was compounded by the generally lackluster performance of the Ugandan judiciary which has historically been constrained by the doctrine of judicial restraint rather than judicial activism."[28]

However, although the general limitation clause in article 43 and the power to declare a state of emergency and override rights are still present in the final version of the 1995 Constitution, article 44 also provides that notwithstanding anything else in the constitution, there shall be no derogation from certain rights, including torture, cruel, inhuman or degrading treatment, freedom from slavery or servitude, the right to a fair hearing and the right of habeas corpus. While this clause does appear to respond in part to some of the fears expressed by Oloka-Onyango, very few rights are actually protected by it.

The most controversial provisions involve the political system mandated by the Constitution. Article 69 provides that the people of Uganda can adopt the political system of their choice through free and fair elections or referenda, and sets out the three choices of the Movement political system, the multiparty political system, or any other democratic and representative political system. However, article 271 stipulates that notwithstanding article 69, the first elections would be held under the Movement system. Article 271(3) requires that a referendum be held in the fourth year after the first elections so that the people could choose the political system of their choice. After this, referenda could be held to change the political system if certain conditions were met.

The entrenchment of the Movement system was accompanied by provisions which allowed political parties to exist in name, but curtailed their activities severely. Article 269 prohibits political parties and organizations from

[25] Constitution of the Republic of Uganda, 1995.
[26] Ibid.
[27] S. 36, Constitution of the Republic of South Africa, 1996.
[28] Oloka-Onyango, above, n. 6, at 166. Ssekandi and Cos express similar fears about these clauses, claiming that "it is doubtful that the conditional statement 'in a free and democratic society' provides an adequate standard to limit unacceptable restrictions on such rights" (Ssekandi, above, n. 9, at 200).

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opening and operating branch offices, holding delegates conferences, holding public rallies, campaigning for a candidate in a public election, or carrying on any activities that might interfere with the Movement political system, thus including within the constitution itself a substantial limitation on the right to free speech, assembly and association in article 29(e). The Movement itself was to be exempt from such restrictions, since it was not a party but a political "system", as described in article 70 of the constitution, which established the Movement as a broad-based, participatory system where elections to office were to be made on the basis of individual merit.

In accordance with article 271, elections were held in 1996, and Museveni was elected in what was generally seen as an unfair competition, given that opposition parties were restricted from campaigning under the provisions of article 269. Moreover, there was also a great deal of harassment of the opposition.[29] As required by article 271(3), a referendum was held in 2000 to decide the political future of Uganda, and the movement system was chosen. The referendum was boycotted by the opposition political parties, who argued that the referendum could not possibly be free and fair given the Movement control over government structures at all levels, and the continuing restrictions on political parties.[30] Presidential and parliamentary elections were then held in 2001, and Museveni was elected for a second term, again amidst assertions that the elections were unfair given the restrictions on political parties, and the harassment of other candidates and their supporters, particularly Kizza Besigye, who went into exile after the election.[31] Museveni is now contemplating an amendment to the two-term limit in Article 105(2) of the Constitution that will allow him to remain in power for a controversial third term.[32]

Recent Constitutional Cases

Although there has been considerable economic growth in the country since Museveni came to power, and his regime has been marked by a much better human rights record than previous regimes,[33] the continued restrictions on political parties and entrenchment of the Movement system has meant that a truly democratic system has not yet been established in Uganda.[34] However,

[29] "Hostile to Democracy", above, n. 4, at 55–57.

[30] Ibid. at 95–101, J-J. Barya, "Political parties, the Movement and the Referendum on Political Systems in Uganda: one step forward, two steps back" in J. Mugaju and J. Oloka-Onyango (eds.), *No-Party Democracy in Uganda: Myths and Realities*, Kampala, 2000, 24 at 34–36.

[31] Human Rights Watch, *State of Pain: Torture in Uganda*, New York, 2004, and Foundation for Human Rights Initiative, *Human Rights Reporter 2001–2002*, Kampala, 2003.

[32] J. Kato, "Museveni on third term: what do the people say?", *The New Vision*, 15 October, 2003.

[33] Although the human rights record of the Museveni regime marks a vast improvement over that of previous regimes, there have been a number of serious human rights violations, particularly in recent years, including many cases of torture, as well as suppression of political and civil rights. A Human Rights Watch report on torture and illegal detention was released in March 2004, documenting detentions and torture at the hands of many state security operatives ("State of Pain", above, n. 31). For other reports on human rights abuses in Uganda, see the Ugandan Human Rights Commission, *Annual Report 2001–2002*, Kampala, 2002, and Foundation for Human Rights Initiative, *Human Rights Reporter 2001–2002* and *Human Rights Reporter 2003*, Kampala, 2003.

[34] See "Hostile to Democracy", above, n. 4. However, Museveni has made just enough concessions to democracy that countries such as the U.K. and U.S. have, for the most part, remained quiet about abuses of civil and political rights in Uganda, and have been supportive of Museveni's regime. This support is due in part to Uganda's economic success and in part to the

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in recent years, there are signs that the courts are becoming more judicially active, and have been willing to declare legislation and government action unconstitutional. One of the more prominent examples of this new judicial role is *Obbo and Another* v. *Attorney General*,[35] a case in which the managing editor of *The Monitor*, Uganda's only independent newspaper, challenged the constitutionality of section 50 of the Penal Code that criminalized the publication of false news, after he was charged under this provision.[36] While the case was underway, the issue of government restriction on freedom of the press became more acute when, after *The Monitor* printed an unfavourable story about the government's conduct of the war in the North, the newspaper was shut down for seven days, their computers were seized and they were required to print an apology for the story.[37] Obbo and the author of the story, Frank Nyakairu, were also charged with the publication of false news.

Although Obbo lost at the Constitutional Court, his appeal to the Supreme Court was successful, and on 11 February, 2004 the court held that the offence under section 50 of the Penal Code was too "vague, wide and conjectural to provide the necessary certainty required to impose an acceptable limitation on freedom of expression".[38] The charges against Nyakairu and Obbo with respect to the story about the government's conduct of the war in the North were then withdrawn. The government has not tried to re-enact any similar legislation in response to the court's decision.

There have also been several recent cases in which political opposition parties have used the Constitution to challenge the Movement's stranglehold on power and its continued repression of political party activity. Article 269 of the Constitution, which restricted political party activity, was meant to be a transitional provision, which was to be replaced (under article 72) by legislation governing the operation of political parties. The government therefore passed the Political Parties and Organizations Act (PPOA) in 2000, which contained similar restrictions on political party activity. In particular, sections 18 and 19 restricted political party activity to the national level, and prevented political parties from holding public rallies, from sponsoring candidates for elections to office, and from holding meetings. Moreover, the Act contained provisions making it difficult for political parties to register, since parties had to show that they had founding members in at least one-third of districts in Uganda and to pay a substantial fee.[39] Under the PPOA, the

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fact that despite his restrictions on political opposition, Museveni is not committing human rights atrocities to the same extent as his predecessors and to the extent of some other African leaders. However, as Human Rights Watch says, "the virtual silence of the international community, while pouring millions of dollar of aid into Uganda, has served as an endorsement of the restrictive movement political system" ("Hostile to Democracy", above, n. 4, at 7).

[35] Constitutional Petition No. 15 of 1997, appealed to the Supreme Court in Constitutional Appeal No. 2 of 2002, decided 11 February, 2004 (unreported) [hereinafter *Obbo*].

[36] H. Abdallah, "Monitor Case in Supreme Court", *The Monitor*, 5 August, 2003.

[37] M. Okore, "Monitor Case dropped", *The New Vision*, 23 February, 2004, *Amnesty International*, "Independent journalist and media at risk", AI Report AFR 59/005/2002, 16 October, 2002.

[38] Okore, ibid. It is difficult to access Ugandan judgments from any level of court, since none of the decisions are reported. I have therefore relied on newspaper reports of several of the cases I am discussing, which often reproduce excerpts of the judgments. The courts have recently begun to put judgments on their website: www.judicature.go.ug/judgements.php.

[39] Human Rights Watch has claimed that the requirement for each party to have founding members in one-third of the districts "establishes a high threshold, given Uganda's rudimentary communications and infrastructure system. The requirement would severely limit the formation of new democratic institutions in Uganda. In effect, these requirements will stifle the emergence of

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Movement political system referred to in article 70 of the Constitution was held to be exempt from its provisions.

In *Ssemogerere and Others* v. *Attorney-General*,[40] Paul Ssemogerere (the leader of the opposition Democratic Party) challenged sections 18 and 19 of the PPOA, claiming that these provisions violated the rights of freedom of assembly and association under section 29(d) and (e) of the Constitution, and that they resulted in a *de facto* one-party state in violation of article 75 of the Constitution. On 21 March, 2003, the Constitutional Court held that these provisions were inconsistent with section 29(d) and (e) of the constitution and were not limitations that were justifiable in a free and democratic society. The court therefore declared them null and void. The court also held that the Movement as it existed currently did not constitute a political "system", as contemplated in article 70 of the Constitution, but that it had all of the attributes of a political organization. The court therefore held that the Movement was a political organization within the meaning of section 2 of the Act, and thus was subject to the various provisions of the Act, including the requirement of registration.[41] Moreover, the court ruled that sections 18 and 19 of the Act rendered political parties non-functional and inoperative, thereby creating "a one-party state in favour of the Movement political system contrary to s. 75 of the Constitution".[42]

The legislature did not attempt to enact reply legislation, but in the immediate aftermath of the ruling, attempted to minimize its effects, with the Attorney-General claiming that political parties still could not hold rallies because none had registered under the Act.[43] However, the Movement has since accepted the court's characterization of it as a political party and after Museveni withdrew from the army in order for the Movement to comply with section 16 of the Act, the Movement registered as a political party under the Act. Moreover, although the government initially appealed this decision, it withdrew its appeal in June 2004, no doubt in recognition of the changed political landscape.[44]

The UPC and other opposition parties then challenged several other provisions of the Act in Constitutional Petition No. 7 of 2002.[45] This case was recently decided by the Constitutional Court, which held several provisions of

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new political parties which tend to start with a small regional or urban base" ("Hostile to Democracy", above, n. 4, at 90).

[40] Above, n. 1.

[41] This requirement was problematic for the Movement, because s. 16 of the Act held that members of the army could not be founding members of registered political parties. The Movement could therefore not register as a political party as long as Museveni remained Commander in Chief of the army. As the Movement prepared to register, many objected that its registration would be illegal for this reason (R. Mutumba and G. Musumali, "Movement talks illegal", *The New Vision*, 22 May, 2003). However, Museveni later retired from the army and the Movement has since registered as a political party.

[42] E. Lukwago, "Has Ssemogerere case ruling caused new crisis?", *The Monitor*, 30 March, 2003.

[43] H.H. Ssali, "There are no parties in Uganda—Ayume", *The Monitor*, 9 April, 2003, citing the Attorney-General, Francis Ayume, as stating that "according to the Constitution, all parties whether old or new can only operate after registering and paying the necessary fees. I have no information on any party having registered. If they hold a rally, they risk being dispersed by police as they will be categorized as an unlawful assembly".

[44] J. Kakande, "Party restriction not legal", *The New Vision*, 30 June, 2004.

[45] *Rwanyarare and Others* v. *Uganda* (*Attorney-General*), Constitutional Petition No. 7 of 2002 (Constitutional Court), decided 17 November, 2004 (unreported).

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the Act to be unconstitutional, including a section barring Ugandan citizens residing outside of the country from heading political parties, claiming that such provisions were unjustifiable in a free and democratic society.[46] However, the court upheld the requirement that parties must register, claiming that this was justifiable because it would limit the number of "trifling parties" formed purely for financial reasons, and reduce the proliferation of political parties, which, the court claimed, might lead to political instability.[47] Several parties, including the Democratic Party, the Forum for Democratic Change and the UPC, have now begun the registration process.

The most significant decisions, both in terms of their political implications and their importance for an emerging dialogue between the courts and the legislatures, involve several challenges, again by Ssemogerere, against the procedures by which the Referendum Acts authorizing the Referendum of 2000 were passed. Article 271(3) of the Constitution requires that a referendum be held four years after the first elections under the constitution. The Referendum and Other Provisions Act No. 2 of 1999 was adopted on 2 July, 1999, the constitutional deadline for the adoption of the legislation. In the *Referendum Act, 1999 Case*,[48] Ssemogerere challenged the constitutionality of the Act, claiming that it was void because it was not passed in accordance with the rules laid down in the constitution. The Constitutional Court originally ruled that it did not have jurisdiction to deal with these questions, but this was appealed to the Supreme Court, who declared that the Constitutional Court did have jurisdiction and sent it back to the court to determine on its merits. While the case was still in the courts, the government passed another Referendum Act—the Referendum Act of 2000—under which the referendum on 29 June, 2000 was held.

On 10 August, 2000, the Constitutional Court ruled in favour of Ssemogerere, claiming that the conduct of the Speaker of the House during the adoption of the first Referendum Act of 1999 had violated Articles 88 and 89 of the Constitution, which set out the procedural rules for determining whether there was a quorum in Parliament. The court also held that because there was no quorum in Parliament on the day in which the Act was passed "what was enacted on that day therefore was not an Act of Parliament of Uganda and never had any force of law in Uganda".[49] In response to this judgment, Parliament passed the first amendment to the 1995 Constitution—the Constitution (Amendment) Act 13 of 2000, which amended the process by which a bill could be passed into law. The amendment was introduced in Parliament, debated, passed and received the Presidential Assent on the same day, and was then used to give retrospective effect to the Referendum Act of 2000 which enabled the referendum of 2000. In Constitutional Petition No. 7 of 2000, Ssemogerere argued that the Constitutional Amendment Act was null and void because it was not passed in conformity with the requirements for amendment set out in the Constitution. The Constitutional Court held that

[46] S. Muyita, "Political parties win freedom in groundbreaking court ruling", *The Monitor*, 17 November, 2004.
[47] C. wa Duallo, "Parties must register in 6 months", *The New Vision*, 25 November, 2004.
[48] Above, n. 2.
[49] Ibid., Constitutional Appeal No. 1 of 2000 at para. 48.

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the procedures for amending the constitution could be waived and were not essential to validating a constitutional amendment.[50]

This decision was appealed to the Supreme Court in Constitutional Appeal No. 1 of 2002, and the court ruled on 29 January, 2004 that the Constitutional (Amendment) Act was null and void because the procedures for amending the stated provisions of the Constitution had not been followed, since the bill effecting the amendment was not accompanied by a certification of the Speaker indicating that the bill had complied with the constitution before Presidential Assent. The court also held that the Amendment Act was colourable legislation which had amended other provisions of the constitution by implication, and that the requirements for amending these provisions had also not been followed, since some of these provisions could only be amended by holding a referendum.

The main judgment of KANYEIHAMBA, J.S.C., was highly critical of the Constitutional Court's decision, arguing that to view the procedural rules for amending the constitution as unessential to an amendment, and therefore waivable, reflected a fundamental lack of understanding of the role of the Constitution in putting checks on the actions of the legislature. He also argued forcefully for the importance of the courts in judicially reviewing legislative activity, claiming that "in Uganda, the courts and especially the Constitutional Court and this Court were established as the bastion in the defence of the rights and freedoms of the individual and against oppressive and unjust laws and acts. Courts must remain constantly vigilant in upholding the provisions of the Constitution."[51]

The court did not explicitly make any ruling on the status of the Referendum Act of 2000 which was given legal effect by the Amendment Act. After the ruling, there was a great deal of debate in Uganda about the implications of this decision on the validity of the Referendum Act and the referendum that followed. These issues were finally decided by the Constitutional Court in Constitutional Petition No. 3 of 2000,[52] where the court held that the Referendum Act of 2000 was unconstitutional. The court held, among other reasons, that the Act had not been passed in conformity with the procedures set out in the constitution as the voting procedure in article 89 had not been followed and the Bill had not been referred to the relevant Standing Committee of Parliament. In its judgment, the Constitutional Court reiterated the position taken by Supreme Court in the Constitutional Amendment Act Case that the procedures mandated by the constitution cannot be waived. The court held that the result of its decision was that the referendum of 2000 was null and void.

Once again, there was a great deal of debate about the implications of this ruling on the status of the Movement system and on the laws passed since the referendum, with many claiming that the country was in a constitutional crisis.[53] Museveni reacted strongly to the decision by condemning the

[50] *Ssemogerere and Others* v. *Attorney-General*, Constitutional Petition No. 7 of 2000 (Constitutional Court), appealed to Supreme Court in Constitutional Appeal No. 1 of 2002, decided 29 January, 2004, online: www.judicature.go.ug/judgements.php [hereinafter *Constitutional Amendment Act Case*].

[51] Ibid., judgment of KANYEIHAMBA, J.S.C., at 25.

[52] Above, n. 3.

[53] A. Mugisa and H. Kaheru, "Govt not illegal, say law experts", *The New Vision*, 8 July, 2004; J. Etyang, "No constitutional crisis, says Law Society", *The New Vision*, 29 June, 2004; Kalumba-Kiini, "If Referendum is null and void, what now?", *The New Vision*, 7 July, 2004.

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judiciary on television, claiming that the judges had usurped the role of the legislature by making their own laws and stating that he would not accept the ruling.[54] Museveni's reaction was heavily criticized, both by political opposition and civil society within the country, and by the international community, as a threat to judicial independence, and as reminiscent of the actions of leaders in the past.

The Ugandan Law Society stated that "it was gravely concerned about the unwarranted attack by the Executive on the Judiciary in the performance of their constitutional duties",[55] while the G7, a group of seven mainstream political organizations, and the Parliamentary Advocacy Forum stated "what is left is for the President to declare which Articles of the Constitution he intends to suspend".[56] The International Commission of Jurists also condemned Museveni's actions, holding that "the independence of the judiciary and the separation of powers is enshrined in the Ugandan Constitution and international standards. The courts must be allowed to carry out their duties without fear of veiled threats if the executive does not approve of their decisions".[57]

However, in the end, Museveni did not take any drastic action, instead deciding to appeal the decision to the Supreme Court. This move was greeted with relief by many, including the International Commission of Jurists which held that "we welcome the Government's willingness to test the legal merits of the decision through the normal course of an appeal to the highest court".[58] On 2 September, 2004, the Supreme Court overturned the decision of the Constitutional Court, holding that while the Referendum Act had been passed unconstitutionally, the results of the referendum were valid. Some viewed this decision as a sign that the Supreme Court had bowed to pressure from Museveni, and thus as a blow to judicial independence. However, the decision was seen by others as simply a recognition by the Supreme Court of the reality that although the Referendum Act was passed unconstitutionally, nullifying the referendum itself and everything that flowed from it would lead to significant instability and uncertainty in the country.[59]

Constitutional Dialogue in Uganda

It is clear that these cases have tremendous political implications. However, do they mark the beginning of a dialogue between the courts and the legislature in Uganda? Discussions about dialogue between the legislature and the courts have emerged in the context of the debate about the legitimacy of judicial review in countries such as Canada, the U.S. and South Africa. Those who advocate theories of dialogue, such as Roach and Hogg & Bushell, argue that democracy is enhanced when there is a meaningful dialogue between the courts and the legislature about constitutionally-protected rights and their

[54] "Museveni mad with judges over nullifying 2000 Referendum Act", *The New Vision*, 30 June, 2004.
[55] J. Etyang, "No constitutional crisis, says Law Society", *The New Vision*, 29 June, 2004.
[56] H. Kaheru, "Respect ruling—G7", *The New Vision*, 29 June, 2004.
[57] "Uganda—President Threatens Constitutional Court" http://www.icj.org/news.php3?id_article=3407&lang=en (5 July, 2004).
[58] Ibid.
[59] S.I. Nganda, "Referendum judgment was politics", *Uganda Observer*, 9 September, 2004.

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limitations, and where neither body has the final say. Constitutions such as the Canadian Charter contain tools, such as limitation clauses, that ensure that governments, if they are going to limit rights, must prove to the court why such limitations are justified in a free and democratic society. The legislature must therefore be candid about its reasons for limiting rights, and cannot simply override them without saying why it has done so. Constitutions such as the Charter also provide the means by which the government can respond to court decisions which strike down laws as unconstitutional. Under the Charter, for example, legislatures can respond to such decisions by enacting new legislation that meets the same objective but does so in a way that impairs the right less, so is justifiable in a free and democratic society, or by using the override clause to enact legislation notwithstanding the court's decision. The court is also able to respond to these legislative replies by reconsidering the new legislation in order to determine whether it is actually justifiable in a free and democratic society. Dialogue between the courts and the legislatures is thus a means of placing checks on both the power of the legislature and the power of the courts, while ensuring that discussions about rights and their limitations are held openly.[60]

Discussion about dialogue generally assumes that there is a democratic framework for the debate. The expectation under such a framework is that there will be judicial independence, and that the courts will exercise this independence in declaring at least some legislation and government action unconstitutional. Moreover, there is an expectation that the legislature will respect the decisions made by the courts, although it may respond to these decisions in certain constitutionally acceptable ways. In Canada, for example, the legislature can respond to the court's decisions by enacting legislation that accomplishes the same purposes but achieves them in ways that are justifiable under section 1, or in extreme cases, by using the override provision in section 33, but it cannot simply ignore the court's ruling, suspend the constitution, or amend it without following certain procedures.

However, for most of Uganda's post-independence history, neither of these preconditions obtained. The judiciary was not independent, since the tenure of the justices was dependent on the will of the President, and judges were justifiably concerned about the consequences of making decisions unfavourable to the government. Therefore, most of Uganda's history was marked by extreme judicial deference. Moreover, during this period, the legislature (or more likely, the executive, as several presidents ruled with a suspended Parliament) did not respect the decisions of the courts, ignoring unfavourable decisions, suspending the constitution, or in the extreme case of Kiwanuka, arresting the judge. There can be no dialogue when the courts defer to all legislative decisions, because the court and the legislature are then speaking with one voice, and there can be no dialogue if the legislature disregards the court's rulings, since this indicates an unwillingness to even begin to engage in discussion with the courts.

It is only recently, therefore, that Uganda has satisfied the two preconditions for constitutional dialogue to take place. The cases discussed above

[60] See K. Roach. *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*, Toronto, 2001, and P.W. Hogg & A.A. Bushell, "The Charter dialogue between courts and legislatures (or perhaps the Charter of Rights isn't such a bad thing after all", (1997) 35 *Osgoode Hall L.J.* 75.

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indicate both a willingness on the part of the courts to strike down legislation or government action as unconstitutional, and a willingness on the part of the legislature to respect the court's decisions. While Museveni might wish to ignore the court's rulings, he is aware of the necessity of at least giving the appearance of respecting democratic procedures and the rule of law, since it is only by doing so that he can maintain the support of Uganda's donor countries. Even after the *Referendum Act, 2000 Case*, while Museveni at first spoke out strongly against the ruling, he ultimately chose to respect the decision and pursue the legal path of appeal after being widely criticized for his initial response. The true test of Museveni's willingness to abide by the court's decisions would have come, of course, if the government had been unsuccessful in this appeal.

It might be argued that dialogue is only possible within a democracy. In many cases of non-democratic regimes, either or both of the two conditions for dialogue identified above will likely not be met. However, in a country such as Uganda, where there is enough of a desire on the part of the government to appear to be respecting the rule of law, and a system in which the judges are willing and able to strike down legislation as unconstitutional without reprisal, the cases above indicate that not only can there be dialogue, but that this dialogue may in fact be more important in some senses than it is within the democratic framework, since given the lack of open debate in Parliament and other fora, the dialogue between the courts and the legislatures is often the only place in which important issues can be debated.

Discussions about dialogue also often emerge as a response to concerns about judicial activism. The emphasis of the discussion is therefore often on the ways in which the constitutional framework is structured so that the courts do not have the final say, and thus focuses on the merits of the various means by which legislatures can respond to judicial decisions. However, in the Ugandan context, the concern is not with excessive judicial activism, but if anything, with executive or legislative supremacy which has historically prevailed as a consequence of extreme judicial deference. Although in Canada, the focus of those who endorse a theory of dialogue has been to counter charges that the Charter has spawned judicial supremacy by pointing to the various means available to the government within the constitutional framework to "have the last word", Roach points out that dialogue is equally valuable as a means of providing checks on legislative supremacy. He says that "the democratic dialogue between courts and legislatures under a modern bill of rights such as the Charter can avoid the monologues and unchecked power that may be produced by either unfettered legislative supremacy or unfettered judicial supremacy".[61] However, the difference of the context in which dialogue takes place in Uganda compared to Canada and the U.S. may make a difference to the focus of the evaluation of such dialogue. Rather than focusing on the means available to the legislature in responding to the court's decisions, such an evaluation might more properly be focused on the court's response to "second-look" cases in which the court examines legislation that responds to its previous decisions.

With these preliminary observations in mind, it is useful to consider the types of dialogue that are available within the Ugandan constitutional

[61] Roach, ibid. at 295.

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framework. Article 43 of the Ugandan constitution is a limitation clause similar to section 1 of the Charter and section 36 of the South African Bill of Rights,[62] which allows the government to justify infringements on rights as long as it can show that these limitations are demonstrably justifiable in a free and democratic society. Therefore, the legislature is given an opportunity to prove that its limitations on rights are justifiable. Moreover, if the court does not accept that the legislature's limitations on rights are justifiable and strikes down the legislation, the legislature can respond by enacting legislation that accomplishes the same goals but in a way that is more respectful of the constitution. Hogg & Bushell and Roach have all argued that limitation clauses such as section 1 are important dialogic tools, and can be democracy-enhancing. Roach claims that section 1 of the Charter

> "promotes a constructive and respectful dialogue [. . .] It allows courts to bring concerns about respecting rights to the attention of governments who might otherwise be inclined to ignore them and not be candid about limits placed on them. In turn, section 1 allows governments to explain to the courts and the people their regulatory ambitions, the alternatives considered and the tradeoffs made."[63]

The justificatory function of such limitation clauses is even more important in countries such as Uganda, where the state has been able for so long to override rights without providing any justification for such limitations. Article 43 requires that the government, in cases such as the *PPOA Case*, explains in court why restrictions on political parties are necessary, rather than, as Obote and Amin did in the past, simply suspending the activities of opposition political parties without giving any justifications. In Uganda, the courts have not yet developed a test for article 43 that is as fully worked out as the Oakes test in Canada, or the test laid out explicitly in section 36 of the South African Bill of Rights. However, the limitation clause still performs the same role in the constitutional framework. Whether the court chooses to accept the government's reasons for limiting the activities of political parties (as it did in the 1994 UPC case because it held that such limitations were justified in order to achieve a national consensus) or whether the court decides that the government has not demonstrated that the limitations are justifiable (as the court did in the *PPOA Case*), the government is forced to be candid about its reasons for limiting such rights. Therefore, despite Ssekandi and Oloka-Onyango's reservations about the inclusion of the limitation clause in the 1995 Constitution, it appears that the courts are now using it in a way that holds the government accountable for its limitations on rights.

Moreover, as in Canada, the legislature is then provided with the opportunity of responding to the court's ruling by enacting a law which accomplishes the same objective in a manner which is more respectful of the rights protected. After the false news provision in the Penal Code was struck down as vague and overbroad, for example, the Ugandan Parliament had the option of enacting a law which had the same objective but was less vague, which might be considered an acceptable limit on freedom of speech. An editorial in the Ugandan newspaper *The New Vision*, in fact suggested that the

[62] Similar provisions are also found in the 1990 New Zealand Bill of Rights and Israel's 1992 Basic Law on Human Dignity and Liberty (ibid. at 61).
[63] Ibid. at 13.

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government pursue this option, arguing that "the Attorney General needs to create a new framework protecting the interests of persons aggrieved by misreporting, but without contravening the constitution".[64]

The Ugandan Constitution also provides for several internal limitations on rights, including a list of situations in which it is acceptable for a person to be deprived of personal liberty under article 23 (e.g. in execution of a sentence or order of the court). Moreover, the equality provisions in article 21 do not preclude Parliament from implementing programs for addressing social imbalances (article 21(4)(a)), or for providing for any matter acceptable and demonstrably justified in a free and democratic society (article 21(4)(c)). The constitution also provides for a limitation on the right to life if such a limitation is made in accordance with a sentence passed by a court of competent jurisdiction, thus allowing for the death penalty.[65] Such internal limitations on rights have also been held to be a valuable dialogic tool by Roach and Hogg & Bushell, because they again force the government to justify its restrictions on such rights within the limitations set out in these sections. Moreover, Hogg & Bushell claim that such sections "admit of the possibility of corrective legislative action after a judicial decision has struck down a law for breach of one of these rights".[66]

Unlike the Charter, the Ugandan constitution does not have an override provision allowing Parliament to enact legislation notwithstanding the rights protected in the constitution. South Africa also did not follow Canada's lead in placing such a provision in its constitution, because given a past characterized by the abuse of human rights, the concept of a provision allowing the government to override rights was not popular. Similarly, given Uganda's history of authoritarianism, there might well be fears that such a provision would be abused. Given Ssekandi and Oloka-Onyango's concerns about the inclusion of even section 1-type limitation clauses, concerns about the inclusion of an override clause similar to section 33 are surely understandable. Although Roach and Hogg & Bushell have argued that section 33 provides a valuable dialogic tool in Canada, this discussion again takes place in a context in which the aim is to assuage fears of judicial supremacy. Given Uganda's past, the possibility for abuse of such a provision might make it necessary for Uganda to forgo this more extreme form of dialogue for fear that it would lead to a legislative monologue. Moreover, even in the Canadian context, Roach indicates that since section 33 is used so rarely, section 1 has become a much more crucial dialogic tool.[67]

The final method available for the legislature to respond to a court's decision in Uganda is an amendment to the Constitution. Given Uganda's history of constitutional amendments abrogating rights, the drafters of the 1995 Constitution sought to make amendment of the constitution much more difficult. However, amendment of the Constitution is not the

[64] "Review media statutes", *The New Vision*, 13 February, 2004.

[65] The death penalty in Uganda, however, is currently being challenged in *Susan Kigula and others* v. *Attorney-General*. The argument of the petitioners is that the death penalty as administered in Uganda represents cruel, inhuman and degrading punishment, and that freedom from this type of punishment is one of the non-derogable rights in article 44. The case was due to be heard in November, 2004, but has been adjourned until 17 January, 2005.

[66] Hogg & Bushell, above, n. 60, at 88.

[67] Roach, above, n. 60, at 58.

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near-impossibility that it is in Canada. In Uganda, the process for amending different provisions of the Constitution varies—while some provisions can be amended if the Act amending them is voted for by two-thirds of Parliament at a second and third reading, amending others also requires the approval of two-thirds of the members of two-thirds of the district councils, or a referendum. However, while amendment is possible, it is still difficult, and the court in the *Constitutional Amendment Act Case* has made it clear that any attempts to amend the constitution that do not conform to these procedures will not be acceptable. Moreover, the Supreme Court in the *Constitutional Amendment Act Case* has indicated that it will not look favourably upon colourable legislation claiming to amend some provisions of the constitution (requiring less onerous amendment procedures) while amending other provisions by implication (which require the approval of the district councils or a referendum). Therefore, unlike in the past, constitutional amendment is difficult to accomplish, and should be seen as a last resort of the legislature. As ODOKI, J.C., states in his concurring opinion in the *Constitutional Amendment Act Case*, "the Ugandan Constitution is therefore a rigid one as it cannot be amended easily. Although it is not cast in stone, it is intended to serve not only the present generation but the generations yet to come".[68]

The Ugandan Constitution therefore provides for several forms of dialogue, although the legislative replies it allows are less expansive than those provided for in the Canadian Charter. The cases that have recently emerged demonstrate that these tools have been used by the courts and the legislature in what appears to be the beginning of a process of dialogue. In *Obbo* and the *PPOA Case*, cases in which the issue at stake was the violation of freedom of expression, assembly and association, the government was given the opportunity to justify these limitations on rights, although in both cases, the court held that the legislation was not justifiable under article 43. The legislative response in both instances was not to enact other legislation, but to accept the court's ruling. The government's failure to enact other legislation in response to the article 43 concerns identified by the court might seem *prima facie* to represent a lack of dialogue, rather than an instance of it. Manfredi and Kelly, for example, have argued that there is no dialogue when a legislature simply implements the court's decision, claiming that this type of response reinforces the "hierarchical relationship between judges and legislators" by allowing "the legislature's interpretation of the Charter to go unchallenged",[69] a view shared by Morton.[70]

However, Hogg & Bushell characterize as dialogue all legislative replies to the court's action, even if such a reply is to accept the court's ruling and repeal the legislation,[71] claiming that "remembering that the legislature nearly always has a range of choice, it is difficult to maintain that the legislature is not exercising any of that choice when it implements the court's decision. After all, in common experience, dialogue does sometimes lead to agreement".[72]

[68] *Constitutional Amendment Act Case*, above, n. 50, judgment of ODOKI, C.J., at 13.
[69] C.P. Manfredi and J.B. Kelly, "Six degrees of dialogue: a response to Hogg and Bushell", (1999), 37 *Osgoode Hall L.J.* 513 at 520–521.
[70] F.L. Morton "Dialogue or monologue?", (April 1999) *Policy Options*.
[71] Hogg & Bushell, above, n. 60, at 98.
[72] P.W. Hogg and A.A. Thornton, "Reply to 'six degrees of dialogue'", (1999) 37 *Osgoode Hall L.J.* 529 at 536.

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Hogg & Bushell are right to think that such responses constitute dialogue, and this is even more the case in the Ugandan context. In both of the cases discussed above, the government had the option of enacting new legislation or amending the old legislation to comply with the constitution and clearly considered and rejected this option. Moreover, given that Uganda's constitutional history has been marked by many cases of legislative non-compliance, the legislature's decision to comply with the court's decision in these cases rather than ignoring the decision, or attempting to work around it by manipulating the law, can itself be seen as a statement that the legislature is willing to break with the past.

The government's response to the *Referendum Act, 1999 Case* suggests that there need be little concern that the legislature will acquiesce to all of the court's decisions. However, the legislature in Uganda has been used to thinking of possible responses to the court's rulings in all-or-nothing terms—i.e. that their choice is either to accept the ruling, or take a more drastic measure such as amending the constitution. It might take time, therefore, for the legislature to begin enacting reply legislation that accomplishes the same objectives as the impugned legislation but is justifiable under article 43. The legislature will hopefully come to learn that it can more successfully accomplish its goals by responding to the court's decisions in this way, since such responses may be upheld by the courts, whereas unconstitutional amendments of the Constitution will not.

The *Referendum Act* and *Constitutional Amendment Act Cases* also represent a constitutional dialogue between the courts and the legislature, where the legislature has attempted to respond to an unfavourable court ruling, *albeit* by attempting to amend the constitution. These cases are therefore similar to what Roach terms "second-look" cases occurring in the context of rights violations, where the legislature responds to a court's ruling against it by enacting legislation it believes to be justifiable under section 1 and the court evaluates the legislature's second attempt at achieving a constitutional law. In the *Constitutional Amendment Act Case*, rather than attempting to listen and respond to what the court had said, the legislature chose to amend the constitution precisely in order to be able to ignore those procedural rules that it had thwarted the first time it had passed the Referendum Act. This dialogue is more akin to a shouting match with the courts than an attempt to work within the framework set out in the court's decision. This legislative response therefore does not represent an optimal form of dialogue, since as Roach says, "dialogue works best when there is no shouting and when people are prepared to learn from each other".[73] The legislature's response in this case was particularly worrying given that amending the constitution by unconstitutional means has been a staple of Uganda's constitutional history. This was a case, however, in which the legislature had no dialogic tools to respond to the court's ruling other than a constitutional amendment, since article 43 is only applicable in the context of the violation of fundamental rights and freedoms.

However, perhaps what is important to take from this case in an evaluation of dialogue is not the legislature's response to the court's initial decision, but

[73] Roach, above, n. 60, at 13.

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the court's firm reply to the government's attempts to amend the Constitution. The court in this case made it clear that it was not going to be deferential simply because it was evaluating the legislature's response to a previous decision. In Canada, some, including some courts, have held that dialogue requires increased deference to a legislative reply to a previous court decision in which the legislature has attempted to take the court's ruling into account. In *Sauvé* v. *Canada* (*Chief Electoral Officer*), for example, the Federal Court of Appeal held that dialogue theory required deference to the legislature's attempts to come up with a less restrictive limitation on prisoners' voting rights.[74] Moreover, in *R.* v. *Mills*,[75] and *R.* v. *Hall*,[76] the Supreme Court has also suggested that it will approach legislative replies to its decisions with deference.

However, McLachlin, C.J., writing for the majority of the Supreme Court in *Sauvé,* held that while dialogue was important in the context of the case, it did not require increased deference, claiming that "the healthy and important promotion of a dialogue between the legislature and the courts should not be debased to a rule of 'if at first you don't succeed, try, try again' ".[77] This view was echoed by Iacobucci, J., in his dissent in *Hall*, where he argued that if the court were to uphold a legislative reply to the court's decision striking down a bail provision in the Criminal Code, this "would transform dialogue into abdication".[78] Roach has argued, in the context of *Mills,* that upholding laws as constitutional simply because they are legislative replies may in fact inhibit dialogue, claiming that "upholding legislation as constitutional sends a message to the legislature and society as a whole that all is well, and it may actually discourage continued legislative debate and reform of this controversial and possibly unconstitutional law".[79] In the *Constitutional Amendment Act Case,* a democratic dialogue between the courts and the legislatures would not appear to be fostered by judicial deference to a legislative reply that involved a drastic and illegal alteration of the Constitution.

The *Constitutional Amendment Act Case* is also significant because the court made it clear that certain types of legislative replies (such as those that are unconstitutional) are not acceptable. The *Referendum Act Cases* therefore support the position that there is dialogue in Uganda not only because they represent an interplay between the courts and the legislature where the legislature attempts to respond to the court's initial ruling and the court evaluates its response, but also because the court in the *Constitutional Amendment Act Case* set down the ground rules for the kinds of dialogue that are acceptable within the constitutional framework.

Museveni's response to the *Referendum Act, 2000 Case* may look like a worrying development from the perspective of dialogue, as it suggests that one of the preconditions of dialogue—a legislature (or executive) that is willing to listen to and respond in a constitutionally acceptable way—is now lacking in Uganda. In the *Constitutional Amendment Act Case,* while the government did not follow the correct procedure for amending the constitution, it at least

[74] (1999), 180 D.L.R. (4th) 385 (F.C.A.) at para. 56 , rev'd. [2002] 3 S.C.R. 519.
[75] [1999] 3 S.C.R. 668 at 56–59. [hereinafter *Mills*].
[76] [2002] 3 S.C.R. 309 at para. 43 [hereinafter *Hall*].
[77] [2002] 3 S.C.R. 519 at para. 17 [hereinafter *Sauvé*].
[78] *Hall*, above, n. 76, at para. 127.
[79] Roach, above, n. 60, at 281.

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recognized that it could not simply ignore the court's ruling on the Referendum Act, 1999, but had to respond in some way, even if its response was more akin to a shouting match than a true dialogue. Museveni's initial reaction to the *Referendum Act, 2000 Case* went much further, as he suggested that he would simply ignore the court's ruling. However, in the end, Museveni did respond to the decision in a constitutionally acceptable way, appealing it to the Supreme Court. This indicates an awareness on Museveni's part that it would not be acceptable either to the people of Uganda or to the international community simply to ignore what the court had decided. The true test of Museveni's willingness to engage in at least a limited form of dialogue with the courts would, of course, have come if the Constitutional Court's decision had been upheld by the Supreme Court.

Moreover, the case is worrying from the perspective of dialogue because of the potential that the decision of the Supreme Court was influenced by the veiled threats to the judiciary made by Museveni. This would indicate a lack of the very judicial independence that is the other precondition to dialogue. However, perhaps what is important to take away from the Supreme Court's decision is that, regardless of the fact that it held that the results of the referendum were valid, it affirmed the holding of the Constitutional Court that laws cannot be passed without following the procedures mandated by the Constitution. This indicates that there is still judicial willingness to make constitutional decisions that constrain the powers of the legislature.

The cases suggest the beginnings of a process of dialogue between the courts and the legislature in Uganda, although the form of the dialogue has not been very fully developed, as the legislature has yet to move away from the all-or-nothing replies of accepting the court's decision or amending the Constitution. However, the fact that the courts and the legislature are willing to interact in even the limited ways identified above indicates that there is hope that dialogue will continue and take shape in the country, especially given the court's willingness to establish the ground rules for what are considered to be acceptable forms of dialogue. As Hogg & Bushell and Roach indicate, dialogue between the courts and the legislature enhances and promotes democracy because it both provides a check on the government's actions, and because it requires the government to more openly account for and justify its limitations on rights protected under the constitution.[80] The dialogue that has developed so far in Uganda has meant that the legislature has been required to make clear statements both when it is amending the constitution and when it overrides rights, and then is called upon to justify these restrictions in court, thus ensuring that there is accountability for government action. Dialogue is therefore playing a valuable role in the process of democratization.

Weiler argues that judicial review is more important in countries with a Parliamentary system than in those with a congressional system because, in a Parliamentary system, it is often the only check on the power of the legislature.[81] Roach also believes that democratic dialogue "is especially necessary to diffuse power in countries where the parliamentary system gives

[80] Ibid. at 294.

[81] P. Weiler, 'Rights and judges in a democracy: a new Canadian version", (1984) 18 *J. of L. Reform* 51 at 68–69.

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governments more or less absolute power between elections".[82] This role of dialogue is surely even more important in countries such as Uganda, where there is even less accountability for the legislature within the political system.

Moreover, the importance of dialogue between the courts and the legislature, rather than being diminished in a non-democratic framework such as Uganda's, is in fact greater because the courts are often the only place in which there can be debate about issues of national importance. The political system in Uganda is structured in such a way that there is little opportunity for full and free debate about any controversial political issue. All MPs are elected to Parliament on the basis of individual merit, rather than as Movement candidates or candidates of opposition parties, and in theory, all MPs become part of the Movement once elected. In actuality, while the majority of MPs are allied with the Movement system, about a third are allied with one of the opposition parties. However, the opposition parties have no official status in Parliament, and therefore, while some opposition voices are heard in Parliament on these issues, the opposition parties cannot speak with one voice on any issue.

Museveni also can, and has, asserted a great deal of influence over MPs to support Movement policies. Opposition MPs face subtle coercion in a number of different ways to support, or at least not be outspoken against Movement policies. Since there is no national funding for political parties, candidates must finance their own campaigns, and therefore are often in a position of financial vulnerability, whereas Movement candidates are provided with full funding. Moreover, MPs, who are often businessmen or professionals, will be denied government contracts if they do not support Movement politics, which places them in a precarious position in a country where many of the contracts are government-related. Therefore, the system ensures that given the small number of opposition MPs and the subtle pressure exerted on them not to stand up against Movement policies, issues are not subject to free and full debate in Parliament.[83] Moreover, given the limitations on political association and freedom of expression, as well as freedom of the press, full discussion of these issues is also restricted in other fora. Dialogue between the courts and the legislatures has therefore been not only a means for confronting the legislature with issues that it would otherwise not address, it has also been one of the only ways in which these issues can be fully and freely debated. The importance of this dialogue is underscored by the fact that many, if not most, constitutional petitions are brought by opposition parties such as the Democratic Party and the UPC, who see the courts as the only means by which they can challenge government policy.[84]

Conclusion

While Uganda's past has been marred with failed constitutional experiments, recent cases indicate that the 1995 Constitution may in fact prove

[82] Roach, above, n. 60, at 295.

[83] I want to thank Henry Ojambo for these observations about the operation of the political system in Uganda.

[84] Interview with Paul Ssemogerere, Democratic Party Headquarters, Kampala, Uganda, 7 June, 2003. Also, see R.M. Lavuma, "How long will parties rely on court?", *The Monitor*, 30 March, 2003.

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successful in putting checks on the government's power and in protecting human rights. Moreover, the cases demonstrate that a process of dialogue between the courts and the legislatures is emerging, and that despite Museveni's attempts to curb debate on issues both in Parliament and in the media, this debate has been shifted to the courts, where the Movement is being called upon to justify its limitations on rights and on the political process.

The Ugandan Constitution provides for several dialogic tools that ensure that the courts will not have the final say, and that the legislature has means available to it to reply to the court's decisions. While the legislature has yet to make full use of the responses available to it, it is at least showing a willingness to engage in a discussion with the courts. However, Museveni's reaction to the *Referendum Act, 2000 Case* and the subsequent Supreme Court decision indicate how fragile the basis for this dialogue may be. It remains to be seen how the process of dialogue will unfold in Uganda, but future cases challenging the fundamental human rights and freedoms protected in Chapter 4 of the Constitution will prove to be the test of whether dialogue will develop more fully, and of the legislature's willingness to enact reply legislation in conformity with the reasonable limits prescribed in article 43 if the legislation is struck down.

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