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***191PROTECTIONOFFUNDAMENTALRIGHTSIN** THE **UGANDACONSTITUTION**[FNa]

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I. INTRODUCTION

In its relatively brief history of thirty-two years as an independent state, **Uganda** has gone through a number of **constitutional** changes **and** is now embarked on the daunting task of establishing what many Ugandans hope will be an enduring **constitution**, representative of its diverse peoples **and** accepted by all its citizens. [FN1] In 1988, two years after coming to power, the National Resistance Movement (NRM), led by Yoweri Museveni, appointed a **Constitutional** Commission **and** charged it with the task of preparing a new national **constitution** for **Uganda**. [FN2] By establishing a new **constitution**, the NRM hoped to end the period of political **andconstitutional** instability **and** give the people of **Uganda** the opportunity to participate freely in the determination **and** promulgation of their national **constitution**. [FN3] In December of 1992, after four years of extensive consultation within **Ugandaand** abroad, the Commission published a draft **constitution**. It will be debated by a popularly elected Constituent Assembly before promulgation by the legislature.

***192Uganda** became a member of the international community on October 9, 1962. Before attaining independence, it had been ruled by Great Britain as a protectorate, on the basis of a 1900 agreement concluded between Her Majesty's Government **and** the king of Buganda, [FN4] who governed the most powerful **and** populous ethnic group, the Baganda. Consequently, the Kingdom of Buganda became the colonial administrative base from which the British, assisted by the Baganda, proceeded to persuade, coerce, conquer **and** annex the rest of the territory comprising modern **Uganda**. [FN5] The Independence **Constitution** of 1962 preserved the status of Buganda as an autonomous political unit under the king of Buganda **and** his government.

Constitutional instability in **Uganda** began in 1966, emanating from the tensions **and** conflicts generated by the political leadership which had assumed power upon independence.

This leadership endeavored to convert **Uganda** into a republic, under a unitary form of government. However, certain parts of the country, such as Buganda, resisted these attempts. Rather, they were determined to preserve their traditions **and** cultural institutions **and** therefore opposed the conversion of **Uganda** into a unitary state. The inevitable clash between the so-called republicans **and** monarchists caused a coup d'état in 1966, which resulted in Prime Minister A. Milton Obote dethroning the king of Buganda **and** seizing the presidency. Obote declared a state of emergency in Buganda, which lasted until 1986 when a government more favorable to Buganda was installed by Yoweri Museveni's National Resistance Movement.

The declaration of a state of emergency **and** the abrogation of the 1962 **Constitution** ushered in a perpetual state of political instability. It also marked the beginning of a spate of **constitutional** making **and** unmaking, which various regimes used as an excuse to commit massive **humanrights** abuses on a scale never before experienced in the country. These abuses were committed under the guise of national security, but only served to perpetuate dictatorial rule for the benefit of a few.

***193** This Article examines the extent to which the proposed constitution addresses the constitutional chaos caused by the numerous, and at times violent, changes of government. The Article also analyzes the human rights provisions in the draft constitution and the extent to which they meet international human rights standards.

II. HISTORICAL BACKGROUND

As a result of the aforementioned 1900 agreement, the Kingdom of Buganda (then referred to as Uganda) was annexed to the crown as a British protectorate. [FN6] The status of Buganda under the British allowed the *kabaka*, or king, to govern his kingdom with a measure of internal autonomy which preserved his executive, legislative and judicial powers over land, succession and internal security. The British signed similar agreements, with varying degrees of autonomy, with the rulers of three other kingdoms, namely, Ankole, Bunyoro and Toro. [FN7]

The Baganda prided themselves on possessing a sophisticated model of political organization, which they were willing to modernize and replicate throughout the country. However, they were reluctant to dismantle or abandon their traditional political institutions for the sake of building a modern constitutional order for the wider Uganda. [FN8] There are historical reasons for their unyielding attachment to their cultural heritage. Dating back to the fourteenth century, hereditary kings ruled Buganda through a hierarchical system of chiefs. [FN9] The Baganda were organized into highly powerful clans, the leaders of which controlled the land tenure system and supervised the observance of the customs concerning marriage, succession and other social relationships. Known as *abataka*, these clan leaders were represented in the Great Lukiiko (Parliament), which advised the king and made ***194** laws implemented by the king's chiefs. [FN10] The three other kingdoms in the region, Bunyoro, Toro and Ankole, were, like Buganda, long-established monarchies. The rest of the country, however, did not possess such centralized models of governance. This diversity of indigenous political culture

provides Ugandan society with a wide range of political perspectives and may help explain the complexity of constitution-making in Uganda.

The special status enjoyed by Buganda thrust the kingdom to the very center of Uganda's constitutional crises. As the British prepared to grant independence to Uganda, an issue arose over the need to set terms under which the different peoples in Uganda (who had been governed by the protectorate government) would agree to remain a single country under one government. Like many other African countries, Uganda faced the problem of reconciling indigenous political institutions and values with modern constitutional arrangements. The resulting conflicts between the modernizing elite and the traditionalists epitomized a struggle between the forces of change and the forces of the status quo. Reconciling these two forces became a major constitutional concern as the British prepared to hand over the reigns of power to Ugandans.

This historical background partly explains the constitutional development of Uganda and provides the origin of many of the proposals in the new constitution. These proposals grew out of the urgent need and ardent desire of Ugandans to correct past constitutional anomalies and establish a democratic government under a constitution accepted by all the people of Uganda. It is, in effect, an attempt at forming a new social compact. [FN11]

III. CONSTITUTIONAL EVOLUTION

As Uganda advanced towards independence, the British colonial secretary established the Wild Constitutional Committee (1959) and the Muster Constitutional Committee (1960) to study and make recommendations on the country's future government. In its final report, the Muster Committee suggested that, while Uganda should be ***195** a single democratic state with a strong central government, the relationship between the central government and Buganda should be of a federal nature. [FN12] At the Constitution Conference, convened by the colonial government in London during September 1961, Buganda's delegates defended the right of their kingdom to enjoy autonomous federal status within Uganda. [FN13]

The Independence Constitution of 1962 included many of the recommendations made by the Muster Committee. As a result, attempts were made to accommodate pre-colonial political structures within the new Uganda by granting federal status and other special privileges to Buganda and its monarchy. The three other kingdoms also received semi-federal status and special privileges, albeit to a lesser degree.

The first constitutional crisis occurred in 1966, triggered in large part by the souring of the relationship between the king of Buganda, Edward Mutesa II, who became president of Uganda in 1964, and A. Milton Obote, the elected prime minister. This resulted in the abrogation of the 1962 Constitution, which was replaced by the document generally referred to as the 1967 Constitution, which remains in force. The new constitution would replace the documents generally referred to as the 1967 Constitution, which constituted the basic law of Uganda. [FN14] Parliament enacted this constitution on September 8, 1967, upon becoming the

Constituent Assembly, as provided in Article 145 of the 1966 Interim Constitution. Various proclamations and decrees resulted in major revision of the 1967 Constitution. Major-General Idi Amin Dada began this process on February 2, 1971, with Legal Notice No. 1 of 1971 (Amin Proclamation). It amended and suspended parts of the 1967 Constitution but in a manner not provided for under that constitution. [FN15]

***196** Not only did the Amin Proclamation suspend Chapter IV, which enumerated the executive powers, and Chapter V, which set forth the authority of Parliament, but it conferred all executive powers and functions as well as legislative authority on Major-General Amin. These powers were to be exercised by him through the promulgation of decrees in his handwriting and sealed with the public seal. Furthermore, upon the defeat of Amin in 1979, similar proclamations were pronounced by successive regimes preceding the election of the last civilian administration in 1980. Obote, who was declared the winner of an election that was highly contested but believed to have been rigged by Paul Muwanga, who was in power at the time, proceeded to rule on the basis of the 1967 Constitution. Obote's second rule, from 1980 to 1985, was characterized by widespread civil unrest and gross human rights violations. Obote was overthrown by Tito Okello, a commander of the armed forces, [FN16] who in turn was ejected from office by the popular forces of the National Resistance Movement (NRM), led by Yoweri Museveni, on January 26, 1986 - fifteen years after the Amin takeover on January 25, 1971.

The popular administration established by the NRM, by almost identical measures as those taken by past military regimes, also issued a proclamation of its own. Legal Notice 1 of 1986 (NRM Proclamation) suspended Chapter IV, except Article 24, which provided for a President, [FN17] and Chapter V of the constitution. Unlike previous regimes, the NRM also suspended Article 3, which provided for amendment of the constitution, and Articles 63 and 64. In addition, it added an omnibus provision in paragraph 13, stating, “These provisions of the constitution including Article 64 thereof, which are inconsistent with this Proclamation shall, to the extent of such inconsistency, be void.” [FN18]

It is not clear why the drafters of the NRM Proclamation decided to suspend Articles 3, 63 and 64, which had not been suspended by earlier regimes. One possibility may be that they decided ***197** to designate the National Resistance Council, and not the chairman of the NRM, as possessing supreme authority of the government. The Council also was to exercise all legislative authority under the constitution. Since the Council has functioned more as a sort of national assembly since its inception, there appears to be a certain ambiguity as to whether the grant of supreme authority could have been intended to include some of the executive powers conferred on the president under Article 24, which was specifically saved from suspension. The president, under the Proclamation, is appointed by the Council. [FN19] Thus, by suspending Articles 3 and 63, it was at least theoretically envisioned that such powers could also be exercised by an authority other than the NRC. This lacuna was later corrected by Statute 1 of 1989, which amended Legal Notice 1 of 1986. This statute was enacted by the president and the National Resistance Council, and provided that the National Resistance Council and the National Resistance Army Council shall assemble and jointly, *inter alia*, elect the president, approve

declarations of states of emergency, authorize the president to declare war and determine any other matter both councils decide require their decision. The administration ushered in by the 1986 uprising against past oppressive regimes seems determined to end the one-man rule which characterized those regimes, by subjecting its leader to formal appointment and separating the executive functions of the president from the legislative powers of Parliament, which were conferred on the National Resistance Council. Since the National Resistance Council was later expanded to include different political groups and elected representatives from different local administrative units, the process of governance introduced a measure of democracy which Ugandans had not enjoyed for decades. [FN20]

However, the method of adoption of Statute 1 of 1989 suggests that further amendments to the **constitution** could also be effected by statute. This is possible notwithstanding the fact that Article 3 of the **constitution** , which specifies the manner in which Parliament may alter the **constitution**, was suspended in 1986. It is, therefore, lamentable that the government should treat the **constitution**, which ***198** is the supreme **law** of the land, like any other **lawand** subject it to alteration by ordinary statute.

IV. HUMAN RIGHTS IN THE UGANDA CONSTITUTION

A. **Protection** of **FundamentalRights** Under the 1967 **Constitution**

The 1967 **Constitution** has a section in Chapter III, styled as the Bill of **Rights**, purporting to establish **fundamentalhumanrights**. However, these **rights** are subordinated to overriding state interests, which authorize: the imposition of a state of emergency without limitation; the arrest **and** detention of people without trial; deprivation of individual property without adequate compensation; **and** unreasonable searches **and** seizure in the interest of state security. In essence, therefore, the conditions imposed on the **constitutional** safeguards erode the very substance of international **humanrightsand** the **human** freedoms **protected** by the International Bill of **HumanRights**. [FN21]

In a very recent **constitutional** case, decided in February 1994, the plaintiff, the **Uganda** People's Congress (UPC), made an unsuccessful challenge to the rules promulgated to regulate the conduct of the Constituent Assembly elections held in May this year. Under government directive, the UPC (one of **Uganda's** major political parties) **and** other parties were prevented from fielding candidates for the Constituent Assembly. The rules were challenged on the ground that they denied members of the UPC **and** the other parties the **rights** of assembly, association **and** expression **and** were therefore contrary to the Bill of **Rights** in the 1967 **Constitution**. A three-judge panel of the High Court, constituting the **Constitutional** Court, argued that the rules did not violate the **constitution**. The judges reasoned that the **rights** mentioned were not absolute but relative **and** subject to the higher need to achieve national consensus. They added that the purpose of the rules was to assess individual merit **and** not political parties or other organizations, which were undesirable due to the instability they had caused in the past. The judges concluded that, ***199** since the rules were not discriminatory, they were consistent with

the 1967 **Constitution**. [FN22] The need to achieve a national consensus is undoubtedly a **fundamental** state interest, but so are the **rightsprotected** 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, which the **constitution** of course aims to preserve.

Moreover, it must be recognized that **humanrights** are inalienable **and** that **constitutions** do not grant but merely define **and** provide **protection** to these **rights**, which are inherent in the very nature of being **human**. From their early origins in theories of natural **lawand** the revolutionary ideas of eighteenth-century Europe, **humanrights** have evolved into a definite catalogue of high-priority norms that are mandatory in order to promote **andprotect** the dignity **and** worth of **human** beings, as well as the requirements of domestic **and** international peace **and** security. [FN23] We can now say without much dissent that **humanrights** constitute an internationally **protected** body of **law** to be observed by states, as members of the United Nations. [FN24] Article 56 of the U.N. Charter provides: "All members pledge themselves to take joint **and** separate action in cooperation with the [United Nations] Organization for the achievement of the purposes set forth in Article 55." Among the purposes set out in Article 55 is the promotion of "universal respect of, **and** observance of, **humanrightsandfundamental** freedoms for all without distinction as to race, sex, language or religion." The **humanrightsandfundamental** freedoms referred to in the Charter are now contained, at a minimum, in the 1948 Declaration of **HumanRights**, the Covenant on Economic, Social **and** Cultural **Rightsand** the International Covenant on Civil **and** Political **Rights**.

B. Body Of **Rights** Under The Proposed **Constitution**

In order to understand more clearly the mechanisms which have been fashioned in the proposed **constitution** for the **protection** of **humanrights**, it is important to **review** briefly the body of **rights** which the **constitution** identifies for **protection**. One must recall that the basic premise used by the drafters is that **humanrights** are inherent in the ***200** people of **Uganda** by virtue of their being **humanand** are not granted by the State. [FN25] Thus, the enumeration of **rights** in the **constitution** must not be regarded as excluding any other categories of **humanrights** not specifically mentioned, which are "considered to be inherent in a democratic society, **and** intended to secure the freedom **and** dignity of a **human** being." [FN26]

The **fundamentalrights** contained in Chapter 5 of the **constitution** do not depart in any significant fashion from the body of **rightsand** freedoms spelled out in the Universal Declaration of **HumanRights**. In brief, the **constitution** recognizes the **rights** to equal **protection** of the **law**, the **right** to life, liberty, assembly, privacy **and** expression, to mention a few. It also recognizes additional **rights**, such as the **rights** to education **and** culture.

There are, however, certain disturbing provisions in Article 57, Section 3, **and** Article 59, Section 3, which provide that the enjoyment of **rightsand** freedoms under those articles, i.e. the **right** to privacy, the **right** to be safe from unlawful searches, **and** the freedoms of speech,

assembly, association **and** religion, "shall be subject to any **laws** made by Parliament in the public interest to the extent acceptable in a free **and** democratic society." [FN27] It is doubtful that the conditional statement "in a free **and** democratic society" provides an adequate standard to limit unacceptable restrictions on such **rights**.

Furthermore, regarding the other very important **rights** to life **and** liberty contained in Article 51, Section 1, the draft incorporates dangerous conditions which could result in abuses. While it is acceptable to provide that the enjoyment of these **rights** by one person shall not prejudice the **rights** of others, the addition of the "public interest" in Article 51, Section 2, without qualification, could render these **rights** meaningless.

In this respect, it is worth noting with some relief that the **protection** of individual property from state expropriation without "prompt payment of fair **and** adequate compensation *prior* to the taking of possession or acquisition of property in the 1962 **Constitution** is being restored." [FN28] This should provide security to citizens **and*201** foreign investors alike, restoring the people's confidence in the prospects of investing in **Ugandaand** thereby accelerating economic development.

On a realistic note, the **constitution** also refers to a number of "**rights**" other than the **fundamentalrightsand** freedoms which are identified for **protection** by the State. These broad categories of **rights**, found in Chapter 3 as stated objectives, are as follows: the **Rights** of Women, Family **and** the Disabled (Articles 13-17); Culture of **Constitutionalismand** Accountability (Articles 18-19); Economic Objectives (Articles 20-25); Social Objectives (Articles **26**-33); Cultural Objectives (Articles 34-35); the Environment (Articles 36-37); **and** Foreign Policy Objectives (Article 38). Among the **rights** enumerated are the **rights** of women as mothers, the **rights** of widows, the freedom to pursue any legal economic activity **and** the entitlement to clean **and** safe water. It is not clear from the placement of these **rights** under Chapter 3 rather than Chapter 5 whether they are to be viewed as the national objectives to direct state policy, as the chapter is entitled, or whether they are to be considered part of the **fundamentalrightsand** freedoms. In any event, an argument can be made that their **protection** is at a different level in the order of priority from those **fundamentalrights** referred to in Chapter 5.

The **constitution** recognizes that there are no **rights** without obligations. Thus, it spells out certain "Duties of the Citizen" in Article 39. This article provides that "the exercise **and** enjoyment of **rightsand** freedoms is inseparable from the performance of duties **and** obligations," **and** that therefore every citizen has the duty, *inter alia*, to be loyal to the country, to uphold **and** defend the **constitutionand** to promote democracy **and** the rule of **law**. Unfortunately, Article 39 lacks provisions that would prevent the government's violation of **fundamentalrights** under the pretext of enforcing civic duties.

C. **Protection** Of **Rights** Under The Independence **Constitution**

Like all other independence **constitutions** in Africa, the 1962 **UgandaConstitution** contained a Bill of **Rights** modeled after the Universal Declaration of **HumanRights**. The fate of this Bill of **Rights** in **Uganda** was similar to that in other former colonies in Asia **and** Africa. **Uganda's** landmark court cases were instituted by political detainees who argued that their incarceration was in violation of their ***202** basic **rights** under the **constitution**. [FN29] The **Uganda** cases instituted by Matovu **and** Grace Ibingira were also challenges to the authority of the Obote government, which had come to power by abrogating the 1962 **Constitution**. These challenges suffered defeat on the basis of the classic Kelsenite argument that a revolution is capable of rendering legitimacy to a new order. [FN30] Based on this theory, Obote's government was accorded legitimate powers to promulgate the 1967 Constitution without reference to the 1962 constitutional requirements. Thus, Obote replaced the 1962 Bill of Rights with the watered-down 1967 version. Judicial endorsement of the desecration of Uganda's constitution resulted in a long period of instability and suffering that led some observers to refer to the country as the "killing fields of Africa." [FN31]

D. Structural Safeguards for Rights Under the New Constitution

Because of Uganda's past experience with arbitrary rule, Article 1 of the proposed constitution emphasizes popular sovereignty by proclaiming, "[A]ll power belongs to the people who shall exercise their sovereignty through the democratic institutions of the State in accordance with this Constitution." Article 12, Section 1, provides that "fundamental rights and freedoms of individuals and groups are inherent and not granted by the state, and all organs and institutions of Government shall regard the defence and promotion of human rights and freedoms as their primary responsibility." [FN32]

These bold statements are a clear departure from the past practice of according first priority to state interests before individual human rights. The emphasis on popular sovereignty is a reflection of the fact that the drafters of the new constitution wished to ensure that the enjoyment of rights and freedoms not depend on their embodiment in a constitutional document which a dictator bent on violating people's rights might amend or abrogate at will. Article 1 ensures that even if ***203** courts rulings place limits on these provisions, and even if the constitution is overthrown, these rights remain and are enforceable, time and place permitting. [FN33]

The second distinctive feature of the constitution, emerging also from Uganda's history, is a unique set of provisions in Article 3: making the overthrow of the constitution treason punishable at any time once constitutional order is re-established (Sections 2 and 3); penalizing any resistance to its overthrow as an offense (Section 5); and entrusting the defense of the constitution to all the citizens of Uganda, as a right and duty (Section 4). The constitution further provides, in Article 8, Section 4, that the "security organs shall at all times remain subordinate and answerable to the supreme political authority." This statement may appear obvious, but on a continent which has suffered the scourge of scores of military coups d'état, it assumes major significance in terms of providing the elements for maintaining constitutional rule. Another longstanding provision in Western constitutional tradition that requires restatement in our

context is the provision that "the people shall express their will and consent on who should govern them and how they should be governed through regular, free and fair elections of their representatives." [FN34]

These provisions, if enacted, will attempt to secure the continuation in force and effect of the constitution even after a coup d'état. [FN35] In the face of armed rebellion, these provisions may have no actual deterrent effect. However, the intention of the drafters is to establish a legal basis for challenging the legitimacy of any government that may come to power through violation of the constitution. These provisions are akin to an insurance policy, the inclusion of which in the constitution would motivate the citizens to fight for their rights through the courts, without fear of their challenges being defeated on the basis of current legal theories which legitimize insurrection as a valid means of establishing new constitutional orders.

***204** E. Protection of Rights Under the Proposed Constitution

In a unique departure from past practice, the constitution declares that "all authority in the State emanates from the people of Uganda" [FN36] and "all power and authority of the Government and its organs derive from the Constitution." [FN37] It is thus logical that the constitution goes on to provide that "all organs and institutions of Government shall regard the defense and promotion of human rights and freedom as their primary responsibility." [FN38] Since the violation of rights and freedoms is carried out primarily by state organs and especially those entrusted with the maintenance of internal security, it is refreshing to see a specific provision requiring the security organs to "observe and respect human rights and freedoms in the performance of their functions." [FN39] It is, however, disconcerting to note that the drafters of the constitution acceded to the temptation to legalize the declaration of a state of emergency in situations other than a state of war or under threat of external aggression against the State. [FN40] Article 129 authorizes the president to declare a state of emergency for a variety of reasons, including "the maintenance of public order and supplies and services essential to the life of the community," and paragraph 8 grants authority to Parliament to enact laws that permit the suspension of fundamental rights during this period of emergency. Lessons from Uganda's past should provide ample warning of the dangers of this provision.

In the period 1966 to 1971, Uganda was under a state of emergency, during which all political party activities were banned, except those of the ruling party, the Uganda People's Congress. Many ***205** atrocities were committed in the name of maintaining public order. [FN41] While the new constitution attempts to limit this particular circumstance by imposing limits on states of emergency declared by executive order (to a limit of ninety days unless extended by Parliament), we believe that in light of the possibility of Parliament itself being under the control of the ruling party, more safeguards against human rights abuses should be devised. [FN42]

It should be noted that international law recognizes the principle of nonderogable rights. In general, almost all treaties on human rights recognize as nonderogable the right to life, the right

to be free from torture and other inhuman or degrading treatment or punishment, the right to be free from slavery or servitude, and the principle of non-retroactivity of penal laws. [FN43] In the proposed constitution, Parliament is authorized to take measures that are "reasonably justifiable for dealing with states of emergency," but such measures are not to be taken that contravene the rights and freedoms under the constitution. [FN44] Yet, Parliament may also authorize the suspension of any fundamental human rights or freedoms during a state of emergency declared by the president. [FN45]

The only provision on nonderogation is Article 72, which provides that "the existence of a state of emergency shall not affect the enjoyment of the right to human dignity, life or fair trial as guaranteed by this Constitution." Clearly, this provision falls far short of the minimum rights guaranteed under international law in a state of emergency, and in particular, the nonderogable rights provided in Article 4(2) of the International Covenant on Civil and Political Rights. [FN46] While Uganda is not a party to this Convention, it would be safe to say that the nonderogation clause of the Convention constitutes a norm of *jus cogens* binding on all states. [FN47]

***206** V. ENFORCEMENT OF RIGHTS

A. Enforcement Mechanisms

The constitution sets forth several expansive provisions [FN48] for the effective enforcement of the rights of all persons. Just as in the cases of government overthrow discussed above, the enforcement mechanisms established by these provisions naturally remain subject to the continued legitimacy of the legal order itself. Thus, the constitution specifically provides that " a ny person who violates the constitutional order shall be liable to punishment at any time that the people are in a position to punish him." [FN49] As a mechanism for protection of the constitution, this is a tall order, and its deterrent effect cannot be minimized. This is so especially in view of Article 18, Section 4, which provides that "[i]t shall be the duty of every citizen and institution to resist dictatorship in all its manifestations."

Those mechanisms in the draft constitution which are in the nature of ideals and those which are intended to achieve practical results must be distinguished. We may classify some of the provisions dealing with the preservation of the constitutional order through appeal to patriotism as being in the order of an ideal. In this class, we could also include some of the declarations calling for the state to promote certain objectives, such as the educational objective of compulsory free education. This obviously cannot be attained unless Parliament appropriates adequate funds and in any event not without much sacrifice of other equally desirable objectives, such as free health care for all.

Regarding the mechanisms established to achieve practical protection of rights and freedoms, the constitution differentiates between obligations imposed on the State acting through the three branches of government, and objectives to be aspired to and for which presumably no

enforcement action is possible, except where further legislation has been provided. Unfortunately, the language used sometimes does not always clearly delineate that difference. For example, under social objectives, it is stated that "all persons and in particular children, shall be entitled to protection against preventable ***207** diseases," [FN50] and that "every person is entitled to clean and safe water." [FN51] It is doubtful whether any person deprived of these entitlements could seek to enforce them through the courts, which under Article 7 are also to be guided by the stated objectives, or claim damages from the State for failure to provide them. The ambiguities outlined above have generated considerable criticism and suggestions that aspirational objectives be eliminated from the constitution and left to the discretion of policy makers.

B. Institutional Mechanisms For Protection Of Rights

Chapter 3 of the constitution, entitled "National Objectives and Directive Principles of State Policy," contains an example of the document's commitment to the enforceability of human rights: "All persons who complain of human rights abuses shall have easy access to legal institutions charged with the protection and enforcement of human rights and freedoms." [FN52] However, the restriction of the word "institution" by the word "legal," when it was not intended to limit remedies to judicial means alone, may be misleading. Would, for example, a committee or commission of inquiry be regarded as a "legal" institution in this context? It might have been better to have used "established institutions," which would encompass not only judicial but all administrative **and** other institutions charged with handling **humanrights** complaints. Indeed, Article 50, Section 1, provides that " t he **fundamentalrightsand** freedoms of the individual enshrined in this Chapter shall be respected, upheld **and** promoted by the Executive, the Legislature **and** the Judiciary **and** also by all organs **and** agencies of Government **and** by all persons in **Uganda**." [FN53]

In order to emphasize the importance of the above provision, the draft **constitution** introduces the concept of judicial **review** of administrative actions. This concept has always been available at common **law** but had not to our knowledge received **constitutional*208** recognition in **Uganda**. Article 68 provides: "Any person appearing before any administrative official or body has a **right** to appeal to a court of **law** in respect of any administrative decision taken against him." If enacted, this provision alone would have a profound effect on the way Government functions so long as independence of the judiciary is maintained. Judicial **review** of administrative decisions would introduce a measure of transparency seriously lacking in many developing countries. In such areas as licensing by governmental entities, it could have the effect of rooting out corruption **and** abuse of power, which most Ugandans, especially the business community, would welcome.

C. Judicial Remedies

Article 75 of Chapter 5 specifically addresses the judicial enforcement of **rights** by the courts. Entitled "Enforcement of **Rightsand** Freedoms by Courts," the article explicitly

establishes the doctrine of judicial **review** for alleged violations of **fundamentalrightsand** freedoms. [FN54] At least two aspects of this provision are worth noting: the first deals with the provision on "standing," [FN55] while the second deals with the very issue of whether the **constitution** guarantees the enforcement of **rights**. [FN56]

Article 75, Section 3, extends the status of "standing" meaning the **right** to apply to a competent court for redress, to "*[a]ny* person or organization" who wishes to "bring an action against the violation of ***209***another* person's or group's **humanrights**." [FN57] The extension of the **right** of action to groups rather than just the individual whose **rights** are violated is novel in that **rights** are normally viewed as individual in nature. It can, however, be justified on the basis that the **constitution** recognizes "group" **rights**. However, the **constitution** does not limit the **rights** of groups to cases where group **rights** are violated. The **constitution** expressly provides in Article 75, Section 3, that " a ny person or organization may bring an action against the violation of another person's or group's **humanrights**." Thus, a **humanrights** group can institute an action to **protect** the **rights** of a detainee without necessarily resorting to the equitable remedy of habeas corpus. Furthermore, the **constitution** itself empowers a **HumanRights** Commission, to be established in accordance with Article 76, to "bring proceedings in a court of competent jurisdiction on behalf of the person whose **humanrights** or freedom has been infringed, seeking an appropriate remedy for the infringement." [FN58] Chapter 10, which contains further remedies, states in Article 168, Section 2:

> A person who alleges that-
> (a) an Act of Parliament or anything in or done under the authority of law; or
>
> (b) any act or omission of any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the High Court for a declaration to that effect and for redress where appropriate. [FN59]

The constitution further guarantees that alleged human rights violations will be heard in court. Questions of constitutional interpretation, which include those of the fundamental human rights guaranteed therein, should and will be heard by the High Court of Uganda. [FN60]

***210** D. Human Rights Commission

As mentioned above, another enforcement mechanism provided in the constitution is the Uganda Human Rights Commission, [FN61] which is be composed of a chairman, most likely a judge of the Supreme Court, and not less than three other persons appointed by the president with the approval of the National Council of State. [FN62] The Commission is to be independent, "not subject to the direction or control of any person or authority," [FN63] and self-accounting. It is to have subpoena powers. While its functions are to be essentially to educate the public with regard to their rights and to investigate rights abuses, it will have, as stated above, broad powers to enforce rights by "bring ing proceedings in a court of competent jurisdiction on behalf of the person whose human right or freedom has been infringed, seeking an appropriate

remedy for infringement." [FN64] Although it lacks the power to provide the remedy itself, the Commission has been hailed by at least one author as a significant step on the road to effective enforcement of **rights**. [FN65]

VI. CONCLUSION

This Article has examined provisions for the **protection** of **humanrights** in **Uganda's** draft **constitution** against the general background of the political crisis in 1966 when the country's **constitutional** institutions began to disintegrate. Following that event, there was a spate of political instability aggravated by a progressive breakdown in the rule of **law**, suppression of political pluralism, economic decadence **and** sporadic violence in the transfer of political power. These political **and** economic upheavals undermined **Uganda'sconstitutional** institutions **and** safeguards **and** led to pervasive **humanrights** violations over the past three decades.

***211** As can be observed from the foregoing analysis, **Uganda'sconstitutional** history from 1966 to the middle of the 1980s regressed from a parliamentary-style democracy to variants of arbitrary rule characterized by the abrogation of the 1962 **Constitution**, multiple amendments to the 1967 **Constitution**, **and** the abolition of kingdoms **and** other traditional institutions. The overall effect of these undemocratic practices was to concentrate power in the executive branch of government. With reduced checks on the executive, successive regimes used the coercive arm of government - the police **and** the military - to suppress opposition **and** to sustain themselves in power without a clear mandate from the citizenry. Violence became the predominant means of changing government.

The drafters of the proposed **constitution** have attempted to reverse this trend by seeking to provide **Uganda** with an enduring **constitutional** framework based upon a bill of **rights** that is in large part quite consistent with international **humanrights** standards. If the main thrust of the **constitution** is sustained, it could place **Uganda** on an equal footing with other democratic societies, in regards to upholding the core of **fundamentalconstitutional** principles.

One of the noteworthy features of this **constitution** is the set of provisions designed to ensure a stable **and** permanent **constitutional** order in **Uganda**. The drafters considered securing the **constitutional** order in itself as the very basis for **protectinghumanrights**. For that reason, the proposed **constitution** embodies provisions which proscribe arbitrary abrogation of the **constitution**. To this end, the document denies legitimacy to any government which may acquire power in **Uganda** outside the specific provisions of the **constitution**.

In support of these innovative provisions, we have argued that the current initiatives to sustain the rule of **lawand** the respect for **humanrights** in emerging democracies call for an appraisal of Kelsen's theory which purports to accord legitimacy to regimes established through violent overthrow of **constitutionally**-established governments. Our position is that any government coming to power through a revolution, even by overthrowing an unpopular regime, requires legitimation from the people through general elections or equally acceptable means of

determining the people's will in a reasonably short period of time not exceeding six months from the time of the coup d'état.

Notwithstanding all its commendable features, Uganda's proposed constitution embodies some troubling contradictions. Considering that human rights are more likely to be violated during ***212** emergency situations, the drafters should have stressed nonderogable rights during a state of emergency.

On the important subject of the system of government to be adopted in Uganda, the constitution is manifestly ambivalent. While recognizing as fundamental the rights of association and assembly, as well as the freedom of speech, the constitution nevertheless allows for a "non-party" [FN66] system of government, which negates the very rights that are recognized internationally as fundamental human rights. We are of the opinion that it would be detrimental to Uganda's democratic aspirations to enact a constitution that embraces the fundamental freedoms of assembly, association and speech only to negate political activities elsewhere.

Nevertheless, we understand the special circumstances which have made a non-party political system politically expedient in Uganda over the last eight years. Just as South Africa has devised a consociational system of government, inclusive of various political groups to suit its transition period from apartheid to pluralistic democracy, so could Uganda devise temporary political arrangements suited to current circumstances that require correction of a long history of gross human rights abuses, political instability and economic decadence. These provisional arrangements should not, however, be accorded a permanent place in the constitution, which is intended to serve as an enduring social compact.

In our view, the system of government adopted by Uganda's Constituent Assembly, should include the principle of "proportionate governance," a system that allocates cabinet positions to members of different political parties in proportion to the number of seats won by each party in the National Assembly. Arguably, the central constitutional challenge Ugandans (and the citizens of many African countries) face is to devise a political system suited to its social, political and economic conditions - a system which minimizes violent conflicts among ethnic groups and among other competing interest groups. The second major concern is to establish a legal framework for social cooperation and economic development. In Uganda, it is evident that "winner-take-all" political arrangements, whereby the winning ***213** political party formed the government while the losing parties formed the opposition, proved disastrous during the 1960s and the 1970s and led to the gradual breakdown of the country's constitutional order.

The non-party movement system established by President Yoweri Museveni has been hailed by his supporters for minimizing inter-group conflicts through inclusion of various social groups in his government. [FN67] However, critics denounce the movement's suppression of political party activity in Uganda since 1986 as an unacceptable denial of citizens' fundamental freedoms of association and assembly. [FN68] Considering the problems outlined above, the Constituent Assembly has the responsibility of providing Ugandans with a better alternative, to both the

movement political system and the winner-take-all political systems of the past. Prolonging the movement system of government, as suggested by supporters of the National Resistance Movement, or merely resuming political party activity, as advocated by some political party leaders, is not the solution to Uganda's problems.

If adopted, the principle of proportionate governance will provide the basis for an alternative political system which preserves the uniting characteristics of the movement system without negating the citizen's right to engage in political party activities. This principle enables diverse socio-political groups in the country to design and articulate different programs in a joint cabinet. In this way, proportionate governance would minimize inter-group conflicts by preventing any one group from monopolizing power and encourage inter-party cooperation through power sharing.

[FNa] The views expressed in this Article are those of the authors and not of the United Nations nor the Uganda Judiciary.

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[FN1]. Upon obtaining political independence from Great Britain, Uganda promulgated the Independence Constitution of 1962, which was abrogated in 1966. An interim constitution was subsequently adopted. It remained in place until 1967, when a new constitution came into force. This constitution has been upheld, though heavily amended, by successive regimes. Unless noted, all citations to the Uganda constitution are to the 1967 Constitution, which remains in force.

[FN2]. *See* Uganda Constitutional Commission, Guidelines on Constitutional Issues 10 (1991).

[FN3]. *See* Uganda Constitutional Commission Statute, No. 5 (1988) (Uganda).

[FN4]. The term “Buganda” refers to one of the four kingdoms in Uganda. “Muganda” means a citizen of “Buganda” and “Baganda” is the plural of “Muganda.” Uganda takes its name from Buganda, the largest and most populous geographical territory of the country's four main regions.

[FN5]. G.W. Kanyeihamba, Constitutional Law and Government in Uganda (1975).

[FN6]. For the difference between a protectorate and a colony, see Sobhuza II v. Miller, [1926] App. Cas. 518, 522-23 (P.C. 1926) (appeal taken from Swaz. Special Ct.); Nyali, Ltd. v.

Attorney-General, [1955] 1 All E.R. 646, 651-52 (C.A.) (Denning, L.J.), *appeal dismissed*, [1956] 2 All E.R. 689 (H.L.).

[FN7]. For the various agreements, see The **Laws** of the **Uganda** Protectorate, 1951 (1951); The **Laws** of **Uganda**, 1964 (1965); **Constitutions** of the Countries of the World: **Uganda** 1 (Albert P. Blaustein & Gilbert H. Planz eds., 1986).

[FN8]. For a general discussion, see David Apter, The Political Kingdom in **Uganda** 9-28 (1967).

[FN9]. John Roscoe, The Baganda 232-270 (1965).

[FN10]. *Id*.

[FN11]. *See* John Locke, An Essay Concerning the True Origin, Extent **and** End of Civil Government (1690), *reprinted in* Social Contract 1 (Oxford Univ. Press ed., 1960). The idea derives from the writings of John Locke, who argued that sovereignty resides in the people **and** not the king, who acts only as a trustee. But see Thomas Hobbes, Leviathan (C.B. Macpherson ed., Penguin Books 1968) (1651) for a contrasting view.

[FN12]. H. F. Morris & James S. Read, **Uganda**: The Development of its **LawsandConstitution** 70 (1966).

[FN13]. Kanyeihamba, *supra* note 5, at 55-59.

[FN14]. *See***Constitutions** of the Countries of the World: **Uganda**, *supra* note 7, at 332. This is a result of the fact that the **constitution** adopted on September 8, 1967, was amended not only by the Proclamation of 1971 (Legal Notice No.1) (**Uganda**) but also by subsequent decrees promulgated by Amin. The present status of the Amin decrees is not clear; subsequent regimes have similarly amended **and** revised the 1967 **Constitution**.

[FN15]. Article 3 of the 1967 **Constitution** provided for amendments to the **constitution** by an act of Parliament. **Uganda** Const. art. 3.

[FN16]. Okello also issued proclamations suspending the **constitution**, namely Legal Notices 4 **and** 5 of 1985 (**Uganda**). *See***Constitutions** of the Countries of the World: **Uganda**, *supra* note 7, at 15.

[FN17]. Article 32, providing for the post of vice president, was also suspended only to be later restored after complaints that the vice president was serving without authority. **Uganda** Const. art. 32.

[FN18]. Article 64 grants the president powers to enact **laws** when Parliament is not sitting, on

the advice of the Cabinet of Ministers that exceptional circumstances require immediate action. **Uganda** Const. art. 64.

[FN19]. Legal Notice No. 1 of 1986 (**Uganda**) was amended in 1989 to provide that the President shall be elected by both the National Resistance Council **and** the National Resistance Army Council. Legal Notice No. 1 of 1986 (Amendment) Statute, 1989, § 1(c) (**Uganda**).

[FN20]. *Id*.

[FN21]. The International Bill of **HumanRights** refers to three documents: the Universal Declaration of **HumanRights**, G.A. Res. 217A(III), U.N. GAOR, 3rd Sess., U.N. Doc. A/810 (1948); the International Covenant on Civil **and** Political **Rights**, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) [hereinafter ICCPR]; **and** the International Covenant on Economic, Social **and** Cultural **Rights**, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 (*entered into force* Jan. 3, 1976).

[FN22]. New Vision (Kampala), February 19, 1994.

[FN23]. James W. Nickel, Making Sense of **HumanRights** 3-4 (1987).

[FN24]. Louis Henkin, The **Rights** of Man Today 22-23 (1978).

[FN25]. **Uganda**Const. art. 12, § 1 (Draft 1992).

[FN26]. *Id*. art. 69.

[FN27]. *Id*. art. 57, § 3; art. 59, § 3.

[FN28]. *See generally* T.O. Elias, New Horizons in International **Law** 201 (Francis M. **Ssekandi** ed., 2d ed. 1992) (discussing the unresolved debate on the international level as to the conditions under which a state may exercise the **right** to nationalize private property).

[FN29]. Matovu v. Commissioner of Prisons, 1966 E. Afr. L. Rep. 514 (**Uganda**).

[FN30]. *See generally* Hans Kelsen, General Theory of **Lawand** State 124 (Andern Wedberg, trans., Russell & Russell 1961) (1945).

[FN31]. The Killing Fields of Africa (PBS television broadcast, 1988).

[FN32]. **Uganda**Const. art. 12, §§ 1, 3 (Draft 1992). The introduction of "group" **rights** is a recognition of the customary institutions which are held as sacred **and** within the province of clans **and** traditional rulers. These are all guaranteed under the **constitution** by Article 279(1): "Subject to the provisions of this **constitution** the institution of traditional leadership may exist

according to the culture, customs, wishes **and** aspirations of the people to whom it applies." *Id*. art. 279, § 1.

[FN33]. This provision is reminiscent of a case decided in the Eastern District Court of New York on the petition of a Paraguayan exile who sued a former police inspector general who was visiting New York for damages resulting from the plaintiff's illegal arrest, detention and torture in Paraguay. Filartiga v. Peña-Irala, 577 F. Supp. 860 E.D.N.Y. 1984).

[FN34]. Uganda Const. art. 9, § 2 (Draft 1992).

[FN35]. The spirit of the draft constitution is to nullify all claims of legitimacy by governments that attain power in Uganda by violent means.

[FN36]. Uganda Const. art. 8, § 1 (Draft 1992).

[FN37]. *Id*. art. 8, § 2.

[FN38]. *Id*. art. 12, § 2.

[FN39]. *Id*. art. 255.

[FN40]. Article 4(1) of the International Covenant on Civil and Political Rights limits the power to declare a state of emergency to circumstances in which the life of the nation is threatened, such as in a state of war, and requires states which are parties to the covenant officially to proclaim the state of emergency and observe their obligations in international law, including non-discrimination on the basis of race, color, sex, language, religion or social origin. ICCPR, *supra* note 21, art. 4(1). Paragraph 3 requires states members to notify the Secretary General of the United Nations of the circumstances which led to the state of emergency and the specific provisions of the covenant from which the State has derogated. *Id*. art. 4(3).

[FN41]. Amnesty International, Uganda: The Human Rights Record 1986-1989, at 5 (1989).

[FN42]. Jaime Oraa, Human Rights in States of Emergency in International Law 96 (1992).

[FN43]. *Id*.

[FN44]. Uganda Const. art. 70, § 1 (Draft 1992).

[FN45]. *Id*. art. 129, §§ 1, 8.

[FN46]. *See* ICCPR, *supra* note 21, art. 4(2).

[FN47]. Article 4(2) of the International Covenant on Civil and Political Rights prohibits

violation of articles: 6 (right to life), 7 (freedom from torture or cruel, inhuman or degrading treatment or punishment), 8 (freedom from slavery and servitude), 11 (no imprisonment for contractual breach), 15 (non-retroactivity of penal laws), 16 (right to human dignity), and 18 (freedom of thought, conscience and religion). ICCPR, *supra* note 21, arts. 6, 7, 8, 11, 15, 16, 18.

[FN48]. *See, e.g.*, Uganda Const. art. 12, § 6; art. 50, § 1; art. 75, §§ 1-4; art. 168, §§ 2, 4, 5 (Draft 1992).

[FN49]. *Id*. art. 18, § 3.

[FN50]. *Id*. art. 28, § 2.

[FN51]. *Id*. art. 29.

[FN52]. *Id*. art. 12, § 6. This provision appears under the heading "Protection and Promotion of Fundamental Rights and Freedoms." Article 12(7) extends the scope of this provision with the following language: "All individuals, groups and communities shall be free to have access to all regional, continental or international institutions dealing with breaches of human rights and freedoms." *Id*. art. 12, § 7.

[FN53]. *Id*. art. 50, § 1.

[FN54]. Article 75, §§ 1-4, reads:

> (1) Any person who claims that a fundamental right or freedom guaranteed under this Constitution has been infringed or threatened, shall be entitled to apply to a competent court for redress which shall include compensation.
>
> (2) Any person aggrieved by any decision of the court may appeal to the appropriate court.
>
> (3) Any person or organization may bring an action against the violation of another person's or group's human rights.
>
> (4) Parliament shall make laws for the enforcement of the rights and freedoms under this Chapter.

Id. art. 75, §§ 1-4.

[FN55]. *Id*. art. 75, § 3.

[FN56]. *Id*. art. 75, § 4.

[FN57]. *Id*. art. 75, § 3 (emphasis added).

[FN58]. *Id*. art. 78, § 1(b).

[FN59]. *Id*. art. 168, § 2.

[FN60]. The High Court of Uganda is a court of both original and appellate jurisdiction. *Id*. art. 167(1). The Supreme Court is the highest court in Uganda. *Id*. art. 161, § 1.

[FN61]. *Id*. art. 76.

[FN62]. *Id*. art. 76, § 2.

[FN63]. *Id*. art. 79.

[FN64]. *Id*. art. 78, § 2(b).

[FN65]. "Establishment of an institution which can effectively investigate violations of human rights and enforce remedies when violations occur would go a long way to ensure the administration of justice, and the enjoyment of the fundamental rights and freedoms of individual and groups." Mubiru Musoke, *Human Rights, Politics, War and the New Constitution of Uganda*, 2 Uganda L.Q. 49, 103 (1993).

[FN66]. The constitution provides for a "movement" system of government. This system is in essence a mass organization consisting of diverse socio-political groups which join to form a government on the basis of shared objectives. The current government in Uganda is a salient example of the movement system of governance, which wields power as a grand coalition of individuals and different social groups in the country.

[FN67]. James Kigozi, *CAD's Support Movement*, New Vision (Kampala), July 5, 1994.

[FN68]. Peter A.G. Mwesige, *We can have 100 parties but first...*, Monitor (Kampala), July 5, 1994.

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