THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: KATUREEBE, CJ; ARACH-AMOKO; MWANGUSYA; OPIO-AWERI; TIBATEMWA-EKIRIKUBINZA; & MUGAMBA, JJ.SC; TUMWESIGYE; AG.JSC]

CONSTITUTIONAL APPEAL NO 02 OF 2018

BETWEEN

MALE H. MABIRIZI K. KIWANUKA ::::::::::::::::::::::::::::] APPELLANT

AND

THE ATTORNEY GENERAL ::::::::::::::::::::::::::::::::::::] RESPONDENT

CONSOLIDATED WITH

CONSTITUTIONAL APPEAL NO. 03 OF 2018

BETWEEN

1. KARUHANGA KAFUREEKA GERALD

2. ODUR JONATHAN

3. MUNYAGWA S. MUBARAK

4. SSEWANYANA ALLAN

5. SSEMUJJU IBRAHIM

6. WINFRED KIIZA ::] APPELLANTS

AND

ATTORNEY GENERAL ::::::::::::::::::::::::::::::::::::] RESPONDENT

AND

CONSTITUTIONAL APPEAL NO. 04 OF 2018

BETWEEN

UGANDA LAW SOCIETY::] APPELLANT

AND

THE ATTORNEY GENERAL::::::::::::::::::::::::::::::::::::] RESPONDENT

[Appeal from the Judgment of Justices of the Constitutional Court (Owiny-Dollo, DCJ; Kasule; Kakuru; Musoke & Cheborion, JJCC) dated 26th July 2018 in Consolidated Constitutional Petitions No. 49 of 2017; 03 of 2018; 05 of 2018; 10 of 2018 & 13 of 2018]

JUDGMENT OF KATUREEBE, CJ

I agree with the Judgment of my learned Sister, Stella Arach-Amoko, JSC which has been read. I agree that the appeal should fail and that each party should bear their own costs. I also agree that the preliminary objections do fail for the reasons she has given.

I however wish by way of emphasis, to add my own thoughts to some of the issues raised in the appeal. The background to the appeal as well as the representation has been given in the said learned Justice's Judgment and I will not reproduce them here. I will go straight to the issues I want to discuss namely, issues 1, 2, 3, 4 and 5.

ISSUE 1: **Whether the learned Justices of the Constitutional Court misdirected themselves on the application of the basic structure doctrine.**

The Constitutional Court by majority decision declared that sections 1, 3, 4 and 7 of the Constitutional (Amendment) Act No. 1 of 2018 which, among others, removed age limit for the President and Local Council V Chairpersons were passed in full compliance with the Constitution and thus remain lawful and valid provisions of the Constitution (Amendment) Act No. 1 of 2018.

The appellants were dissatisfied with this finding and contended, among others, that the said provisions offended the basic structure of the Constitution of the Republic of Uganda. At the hearing, this issue was argued by counsel for the appellants in Constitutional Appeal No. 03 0f 2018, as well as Mr. Mabirizi, the appellant in Constitutional Appeal No. 02, who represented himself.

Before I proceed to resolve this issue, I wish to break down what is understood by the basic structure doctrine in different jurisdictions.

The basic structure doctrine is a judge-made Indian principle stating that a country's Constitution has certain basic features that cannot be amended by its legislative body. The amendment of such features would result in drastic changes to the Constitution thus rendering it unrecognizable. This doctrine was first affirmed by a German jurist known as Professor Conrad Dietrich. The doctrine was then entrenched in the constitutional jurisprudence of India in the 1960s and 1970s which has since fundamentally influenced the development of

constitutionalism and rule of law in a number of democracies across the world.

The parameters of the doctrine have been laid out in a number of decided cases.

In the case of **Kesavananda Bharati Versus State of Kerala, AIR 1973 SC,** the Supreme Court of India stated that:

"According to the doctrine, the amendment power of Parliament is not unlimited; it does not include the power to abrogate or change the identity of the constitution or its basic features."

The Court went on to rule that while Parliament has wide powers to amend the Constitution, it did not have the power to destroy or emasculate the basic elements or fundamental features of the Constitution. The Supreme Court declared that the basic structure or features of the Constitution rest on the basic foundation of the Constitution. The basic foundation of the Constitution is the dignity and the freedom of its citizens which is of supreme importance and cannot be destroyed by any legislation made by the Parliament. **(See** paragraphs 316 and 317 of the decision in **Kesavananda Bharati).**

The Supreme Court of India further elucidated on the said doctrine in the case of **Minerva Mills v. Union of India, AIR 1980 SC 1789**, where court held that Parliament has no power to repeal, abrogate or destroy basic or essential features of a constitution. The Court went further to hold that the claim of any particular feature of the Constitution to be a "basic" feature would be determined by the Court in each case that comes before it.

This doctrine has also been instrumental in shaping the constitutional jurisprudence of different countries across the world such as Bangladesh, South Africa, Kenya, Taiwan, Thailand, Argentina, Belize, Colombia; etc.

In Kenya, the court of Appeal in the case of **Njoya vs Attorney General and Others (2004) AHRLR 157** held that:

"Parliament may amend, repeal and replace as many provisions as it desired provided that the document retains its character as the existing Constitution and that alternation of the Constitution does not involve the substitution there of a new one or the destruction of the identity or the existence of the Constitution ..."

The Supreme Court of Bangladesh, in **Anwar Hossain Chowdhury vs Bangladesh 10 41 DLR 1989 App Div 169**, while adopting the basic structure doctrine held:

"Call it by any name, basic structure or whatever, but that is the fabric of the Constitution which cannot be dismantled by an authority created by the Constitution itself namely the Parliament... Because the amending power is power given by the Constitution to Parliament and nevertheless it is a power within and not outside the Constitution".

Justice Albie Sachs of the South African Constitutional Court in the case of **Executive Council of Western Cape Legislature Vs The President of the Republic of South Africa and Others (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995)** while discussing the applicability of the basic structure doctrine noted as follows:

"There are certain fundamental features of Parliamentary democracy which are not spelt out in the Constitution but which are inherent in its very nature, design and purpose. Thus, the question has arisen in other countries as to whether there are certain features of the constitutional order so fundamental that even if Parliament followed the necessary amendment procedures, it could not change them. I doubt very much if Parliament could abolish itself, even if it followed all the framework principles mentioned above. Nor, to mention another extreme case, could it give itself eternal life - the constant renewal of its membership is fundamental to the whole democratic constitutional order. Similarly, it could neither declare a perpetual holiday nor, to give a far less extreme example, could it in my view, shuffle off the basic legislative responsibilities entrusted to it by the Constitution."

From the above decided cases, it comes out clearly that in interpreting a constitution, the history of and the prevailing circumstances in a given country ought to be taken into account. As such, it is true that the question of whether or not the doctrine of basic structure applies, depends on the constitutional history and the constitutional structure of each country. As was underscored by the Justices in the Constitutional Court, each Constitution is a product of historical events that brought about its existence.

In an earlier case decided by the Constitutional Court of Uganda: **Saleh Kamba & others Vs. Attorney General & others, Constitutional Petition No. 16 of 2013;** Kasule JCC stated as follows:

"Therefore from the historical perspective, the Constitution is to be interpreted in such a way that promotes the growth of democratic values and practices, while at the same time doing away or restricting those aspects of governance that are likely to return Uganda to a one party state and/ or make in-roads in the enjoyment of the basic human rights and freedoms of conscience, expression, assembly and association..."

In Uganda, I am of the view that the basic structure does find its roots in the 1995 Constitution. I am in agreement with the finding by the Constitutional Court that the principal character of the 1995 Constitution, which constitutes its structural pillars, includes such constitutional principles as the sovereignty of the people, the Constitution as the supreme legal instrument, democratic governance and practices, a unitary state, separation of powers between the Executive, Parliament and the Judiciary, Bill of Rights ensuring respect for and observance of fundamental rights and judicial independence.

The pillars of the 1995 Constitution are rooted in the preamble to the Constitution. The Preamble of the 1995 Constitution captures the basis for the provisions of the Constitution in so far as it gives a historical context in which the Constitution was being promulgated. One has to visualize what the framers of the Constitution had in mind when they wrote:

"WE THE PEOPLE OF UGANDA:

RECALLING our history which has been characterized by political and constitutional instability;

RECOGNISING our struggles against the forces of tyranny, oppression and exploitation;

COMMITTED to building a better future by establishing a social-economic and political order through a popular and durable national Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress;

EXERCISING our sovereign and inalienable right to determine the form of governance for our Country and having fully participated in the Constitution-making process;

NOTING that a Constituent Assembly was established to represent us to debate the Draft Constitution prepared by the Uganda Constitutional Commission and to adopt and enact a Constitution of Uganda;

DO HEREBY, in and through this Constituent Assembly solemnly adopt, enact and give to ourselves and our posterity, this Constitution of the Republic of Uganda."

The learned Justices of the Constitutional Court, each, gave an elaborate political history of Uganda which was characterized by political treachery, military coups, gross violation of human rights, emasculation of institutions such as Parliament, the Judiciary and the marginalization of the people etc.

This, in my view, is what the framers of the Constitution must have had in mind when they wrote the Constitution. It is the reason Article 1 of the Constitution was written the way it was – putting the people at the centre of everything and giving all political power to the people. But it is also important to note that the same article 1(1) states that the people will exercise their power in accordance with the Constitution. This means that the Constitution reigns supreme over all people and all organs of the State. All must act in accordance with the Constitution.

In article 1(2) is the cardinal principle that the people **"shall be governed through their will and consent."** This is to answer the part of history where a radio announcement could inform the country of a new President and new government as a result of Military Takeover – without the knowledge let alone consent of the people.

Article 1(3) emphasizes the Constitution as the source of **"all power and authority of Government and its organs"**. At the same time, the clause emphasizes that the Constitution itself derives its authority from the people. It is important to note that, even here, the emphasis is that by this Constitution, the people consent to be governed in accordance with the Constitution. Clause 4 spells out how the people will be governed. It states:

> *"The people shall express their will and consent on who shall govern them and how they should be governed, through regular, free and fair elections of their representatives or through referenda."*

In my view, this article goes a very long way to lay the foundation for the Constitutional governance of the Country by the people on the basis of free and fair elections or referenda. To me this is the first pillar on the basic structure of our Constitution, based on the concerns in the Preamble. So the people have a right to choose their representatives to whom certain powers have been delegated under the Constitution. But a power has been reserved to demand for referenda.

This is more clearly brought out by looking at article 255 of the Constitution as amended by the Constitution (Amendment) Act No. 2 of 2005. It states as follows –

255. Referenda generally

(1) Parliament shall by law make provision for the right of citizens to demand the holding by the Electoral Commission of a referendum, whether national or in any particular part of Uganda, on any issue.

(2) Parliament shall also make laws to provide for the holding of a referendum by the Electoral Commission upon a reference by the Government of any contentious matter to a referendum.

(3) Where a referendum is held under this article, the result of the referendum shall be binding on all organs and agencies of the state and on all persons and organizations in Uganda.

(4) A referendum to which clause (3) applies, shall not affect –

(a) the fundamental and other human rights and freedoms guaranteed under Chapter Four of this Constitution;

(b) the power of the courts to question the validity of the referendum.

Clearly, what this means is that the Constitution is amendable; one, by the representatives of the people (Parliament) as per article 258 thereof; two, by representatives together with the population in a referendum as per article 259 thereof; three, by representatives together with district councils as per article 260 thereof; and four, by referenda on any question as demanded either by any person or by Government as per article 255 thereof. It is important to note that article 255 (4) makes it crystal clear that the only matter that cannot be subjected to a referendum is the issue of fundamental and other rights and freedoms as guaranteed under chapter 4 of the Constitution and the power of the courts to question the validity of the referendum.

The basis for the above position must be article 20 (1) of the Constitution which states:

> *"Fundamental rights and freedoms of the individual are inherent and not granted by the state."*

The next pillar of the basic structure of our Constitution is Article 2 which provides for the Supremacy of the Constitution. I have decided to emphasize Article 1 of the Constitution because it is relevant to this Constitutional Appeal in so far as the appellants have raised the issue of the Basic Structure of the Constitution and averred that the Constitution (Amendment) Act violates that Basic Structure. Indeed even the Speaker, when she was sending out the Members of Parliament to go for consultations, she did state that the Bill touched on Article 1 of the Constitution.

There are other fundamental Pillars of the Uganda Constitution as found by the learned Justices of the Constitutional Court. All the Justices agreed that the basic structure doctrine applied to Uganda. The only point of departure seems to be where they point to those doubly entrenched provisions, i.e. those requiring referendum or District Council resolutions as the only ones that form the basic structure, and the rest which Parliament may amend on its own as not being part of the basic structure.

I am of the view that a provision may not have been given double entrenchment under article 260 or 261, but it is still a fundamental part of the structure of the Constitution. For example Article 260 of the Constitution provides for those parts of the Constitution that are doubly entrenched and would require a referendum to amend. One of those is

Article 44 in Chapter 4 of the Constitution. That article is on the non-derogable nature of certain rights. Parliament could amend this article provided a referendum is held. But, as already pointed out above, the whole Chapter 4 on the Protection and Promotion of Fundamental and other Human Rights and Freedoms is such an essential pillar of the Constitution that the results of a referendum may not touch it [as per article 255 (4) supra].

To my understanding, the Basic Structure doctrine may be equated to a family house. It must have a strong foundation, strong pillars, strong weight-bearing walls, strong trusses to support the roof. The roof could be grass thatch, as happens in many of our homesteads. The roof could be iron sheets of particular gauge. The iron sheets could be of different colours. If the wind blew away part or all of the roof, the basic structure should remain and the next day the family can put the roof back. But if the weight bearing pillars were undermined or removed, the whole structure would collapse. It would not be a dwelling house any more.

I agree with the view expressed by Justice Albie Sachs in the case of Executive Council of Western Cape Legislature (supra) that

"There are certain fundamental features of Parliamentary democracy which are not spelt out in the Constitution but which are inherent in its nature, design and purpose. Thus, the question has arisen in other countries as to whether there are certain features of the Constitutional order so fundamental that even if Parliament followed the necessary amendment procedures, it could not change them."

The question then is which provisions of the Constitution can be equated to a pillar in a House Structure and which can be equated to iron sheets or doors which can be removed and replaced with relative ease but without affecting the basic structure.

With regard to the Leadership of the Country, I am of the view that the other fundamental pillars, apart from Article 1, are Article 5 and 98.

Article 5(1) states that "Uganda is one Sovereign State and a Republic." Although this is not doubly entrenched under Article 260, Parliament would not change this without changing the character of the Constitution. But does that mean that the people themselves would not change this if they so wished? This is where article 255 may come in i.e. demand for a referendum.

Article 98 states that there shall be a President of Uganda. Article 103(1) states that the President shall be elected by universal adult suffrage through a secret ballot. If Parliament were to amend this and provide, for example, for a Prime Minister, or even a President appointed by Parliament, it would be a departure from the basic structure of the Constitution. It would shake the pillar of Uganda as a Republic, headed by a President elected by universal suffrage. This is a pillar of the Constitution. Again, the people themselves could demand to change it. But whether the President is 40 years or 75 years, in my view, is not part of the fundamental pillars.

Does that mean therefore that those identified pillars are cast in stone and can never be amended? My answer is no. In light of article 255, those articles can be amended if the people so desire and call for a

referendum; only with the exception of matters set out under article 255 (4) thereof. This would be in line with article 1 of the constitution.

Now coming to the case before the Court, the question is whether the amendment to remove the age limit for the President and the Local Council V Chairpersons from the Constitution affected the basic structure of the 1995 Constitution of Uganda? To answer this question, and using my above analogy, I need to determine whether the effect of the above said amendment was to the strong pillars, to the weight-bearing walls, or to the roof in as far as the 1995 Constitutional structure was concerned?

Mr. Lukwago for the appellants in appeal No. 03 of 2018 submitted that the learned Justices of the Constitutional Court misconstrued the application of the basic structure doctrine in their finding that the qualifications of the President or Chairpersons of the District Local Government do not form part of the basic structure doctrine and, as such, Ss. 3 and 7 of the Constitution (Amendment) Act 2018 were not in contravention of Articles 1, 3, 8A, 79, 90 and 94 of the Constitution. Counsel faulted the learned Justices for according the basic structure doctrine a narrow and restrictive application when they held that it only applied to amendments which required a referendum and specifically to the extension of the term of Parliament and not to the age limit.

Counsel further argued that the key pillars of the 1995 Constitution are reflected and embodied in the preamble to the Constitution yet the majority Justices of the Constitutional Court overlooked the significance and importance of the preamble. Counsel relied on the authority in **British Caribbean Bank v The Attorney of Belize Claim**

No. 597/2011; Kesavananda case (supra) and **Minerva Mills case (supra)** in emphasizing the essence of the preamble when determining the basic structure of a given constitution.

Counsel therefore invited the Court to take cognizance of the fact that the framers of the 1995 Constitution deemed it absolutely necessary to enshrine within the text of the Constitution such provision as would be necessary to give effect and operationalize the ideals encapsulated in the preamble as well the National Objectives and Directive Principles of State Policy; which included the two term presidential cap, presidential age limit and abolition of the Kelsenian theory under Article 3 of the Constitution. All these provisions, counsel submitted, were designed and intended to guarantee orderly succession to power and political stability which, to date, remains a mirage for Uganda. Counsel argued that by amending Article 102 (b) to remove the presidential age limit, after the earlier scrapping of term limits, Parliament not only emasculated the preamble to the Constitution but also destroyed the basic features of the 1995 Constitution thereby rendering it hollow and a mere paper tiger. Counsel prayed that issue 1 be answered in the affirmative.

In reply by the respondent, the learned Attorney General submitted that the learned Justices of the Constitutional Court correctly applied the basic structure doctrine when they found that sections 3 and 7 of the impugned Act do not derogate from the basic structure of the 1995 Constitution. The respondent argued that the articles that were found by the framers of the Constitution to be fundamental and to form part of the basic structure were carefully entrenched as a safeguard against the risk of abuse of the Constitution through irresponsible amendment

of those provisions. The respondent argued that the entrenched articles of the Constitution cannot be amended by Parliament under the general powers conferred on it to make law as envisaged under the provisions of Articles 79 and 259 of the Constitution. Only the people can amend these Articles pursuant to the provision of Article 1(4) of the Constitution.

The respondent concluded that the framers of the Constitution were alive to the fact that our society is not static but dynamic and that over the years, there would arise a need to amend the Constitution to reflect the changing times. As such, Parliament having complied with the provision under Article 259 of the Constitution, it was within their powers to enact sections 3 and 7 of the Constitution (Amendment) Act 2018 into law and this did not in any way contravene the basic structure of the Constitution and neither was it inconsistent with or in contravention of Articles 1, 3, 8A, 79, 90 and 94 of the Constitution.

In further examining what constitutes the basic structure of the Uganda Constitution, let me first consider the findings by the learned Justices of the Constitutional Court on this matter.

Owiny-Dollo, DCJ held that what constitutes the basic structure of the Constitution has not been conclusively settled; hence, whether or not any particular feature of the Constitution amounts to a "basic" feature, is left to Court to determine. In doing so, Court must ascertain and be guided by the character of the Constitution in issue. He stated that the principal character of the 1995 Constitution, which constitutes its structural pillars, includes such constitutional principles as the sovereignty of the people, the Constitution as the supreme legal

instrument, democratic governance and practices, a unitary state, separation of powers between the Executive, Parliament, and the Judiciary, Bill of Rights ensuring respect for and observance of fundamental rights, and judicial independence.

The Hon. DCJ went ahead to rule that in the fullness of their wisdom, the framers of the 1995 Constitution went a step further in clearly identifying provisions of the Constitution considered to be fundamental features of the Constitution. They carefully entrenched these provisions with various safeguards and protection against the risk of abuse of the Constitution by irresponsible amendment of those provisions. The safeguards contained in the provisions entrenched in the Constitution either put the respective provisions completely and safely beyond the reach of Parliament to amend them, or fettered Parliament's powers to do so and thereby denied it the freedom to treat the Constitution with reckless abandon. The Hon. DCJ laid out provisions in the Constitution that require the people to exercise their original constituent power in the amendment of the Constitution, which he said were a clear manifestation of the safeguards in-built within the Constitution to secure the provision of Article 1 of the Constitution; which recognises that the ultimate power is vested in the people.

In the view of the Hon. DCJ, the entrenched clauses and the non-derogable rights as stated under Article 44 of the Constitution constitute the basic structure of the 1995 Constitution of Uganda.

Kasule, JCC was of the view that by application of the doctrine of basic structure, the Parliament of Uganda cannot amend the Constitution to do away or to reduce those basic structures such as sovereignty of the

people (Article 1); the supremacy of the Constitution (Article 2); defence of the Constitution (Article 3); non-derogation of particular basic rights and freedoms (Article 44); democracy including the right to vote (Article 59); participating and changing leadership periodically (Article 61); non-establishment of a one-party State (Article 75); separation of powers amongst the legislature (Article 77), the Executive (Article 98), and the Judiciary (Article 126); and Independence of the Judiciary (Article 128); without the approval of the people through a referendum as provided for under Article 260 of the Constitution.

Musoke, JCC held that whether or not a provision is part of the basic structure varies from country to country, depending on each country's peculiar circumstances, including its history, political challenges and national vision. More importantly, courts will consider factors such as the Preamble to the Constitution, National Objectives and Directive Principles of State Policy, the Bill of rights, the history of the Constitution that led to the given provision, and the likely consequences of the amendment.

Justice Musoke found that, in Uganda, the Preamble to the Constitution captures the spirit behind the Constitution clearly bringing it out that the Constitution was made to address a history characterized by political and constitutional instability. Another critical aspect of the basic structure of the Constitution of Uganda was the empowerment and encouragement of active participation of all citizens at all levels of governance, among other aspects as laid out in the National Objectives and Directive Principles of State Policy. The other aspects constituting fundamental pillars of our Constitution according to the Hon. Justice were sovereignty of the people as guaranteed under

Article 1 of the Constitution and the Bill of Rights to be found in Chapter Four of the Constitution, particularly the non-derogable rights under article 44 thereof.

Cheborion, JCC held that the Ugandan Constitution was designed to recognize, to a certain extent, the basic structure doctrine in its Preamble, National Objectives and Directive Principles of State Policy as read together with Article 8(A). The Hon. Justice was of the view that, in the Ugandan context, the basic structure doctrine operates to preserve the people's sovereignty under Article 1 of the Constitution.

Kakuru JCC, (in his dissenting judgment), held that whether or not the doctrine of basic structure applies, depends on the constitutional history and the constitutional structure of each country. Every Constitution is a product of historical events that brought about its existence. Uganda's constitutional history is unique and differs in many aspects from that of Kenya and Tanzania, its neighbouring countries. In that regard therefore, the question as to whether in this Country's Constitution, there are indeed express or implied conditions that limit the amending power of Parliament can only be answered by looking at our unique constitutional history.

According to Kakuru JCC, as far as he could discern, the basic structure of the 1995 Constitution was made of the following pillars:

a) *The sovereignty of the people of Uganda and their inalienable right to determine the form of governance for the Country.*

b) *The Supremacy of the Constitution as an embodiment of the sovereign will of the people, through regular free and fair elections at all levels of political leadership.*

c) *Political order through adherence to a popular and durable Constitution.*

d) *Political and constitutional stability based on principles of unity, peace, equality, democracy, freedom, social justice and public participation.*

e) *Arising from 4 above, Rule of law, observance of human rights, regular free and fair elections, public participation in decision making at all levels, separation of powers and accountability of the government to the people.*

f) *Non-derogable rights and freedoms and other rights set out in the extended and expanded Bill of Rights and the recognition of the fact that fundamental Rights and Freedoms are inherent and not granted by the State.*

g) *Land belongs to the people and not to the government and as such government cannot deprive people of their land without their consent.*

h) *Natural Resources are held by government in trust for the people and do not belong to government.*

i) *Duty of every citizen to defend the Constitution from being suspended, overthrown, abrogated or amended contrary to its provisions.*

j) *Parliament cannot make a law legalizing a one-party state or reversing a decision of a Court of law as to deprive a party.*

Justice Kakuru concluded that Parliament, in his view, has no power to amend, alter or in any way abridge or remove any of the above pillars or

structures of the Constitution, as doing so would amount to its abrogation as stipulated under *Article 3 (4).* This is so, even if Parliament was to follow all the set procedures for amendment of the Constitution as provided. He therefore found that the basic structure doctrine applies to Uganda's Constitutional order having been deliberately enshrined in the Constitution by the people themselves.

I find that the Justices of the Constitutional Court aptly brought out what constitutes the basic structure of the Constitution of Uganda. Counsel for the appellants in Constitutional Appeal No. 03 of 2018 agrees with the features that the Justices pointed out as being basic but contends that one aspect was left out of that list, that is, the matter of age limit of the President or the Local Council V Chairpersons. This Court therefore needs to examine whether this matter forms part of the basic structure of our Constitution, contrary to what all the Justices of the Constitutional Court found. Mr. Lukwago for the appellants have advanced a number of reasons as to why the appellants believe that the age of the President or Local Council V Chairperson form part of the basic structure.

The main reason advanced by Mr. Lukwago was the failure by the Constitutional Court to take into account the constitutional history of Uganda, the Preamble and the National Objectives and Directive Principles of State Policy embedded in the Constitution of Uganda, as has already been set out in this judgment.

I have taken into consideration the submissions of counsel, the evidence and all materials that were laid before the Constitutional Court and this Court. I have in extenso set out the Preamble. I have

seen nothing to suggest that in the constitutional history of Uganda, one of the problems has been either a very young or a very aged President. There is also nothing to suggest that the ideals espoused both in the preamble and in the National Objectives and Directive Principles of State Policy were directed at the age of a person seeking the office of President or Local Council V Chairperson. What is clear is that those ideals were directed against over stay in power without the free will and consent of the people. That is the essence of Article 1; but not when and at what age one gets into power.

Mr. Lukwago, in his submissions, tried to link the issue of age limit with that of the removal of term limits. In my view this argument is not tenable for two reasons. First the age limit provision is about the qualifications of a person's eligibility to stand for election for President, irrespective of whether that person has ever been elected or not. It may well be the first time that person is presenting him or herself for election. As such it has nothing to do with longevity in office. This provision simply means that a citizen of Uganda who may have distinguished himself/herself in Public Service, Private Sector or any field, is not eligible for election as President because he or she is 75 years of age even when that person has never served as President. On the other hand, term limits were meant to check persons who have already served as President but limit them to two terms, irrespective of age. A person elected President when he or she is 40 years of age would have had to quit at 50 years. There was no question of waiting for 75 years.

I must quickly point out that the issue of term limits is not before this Court nor was it an issue in the Constitutional Court. Term Limits

were removed and that removal was never challenged in court. As the Constitution stands today, it has no provision for term limits.

The question remains how does removal of age limits violate the basic structure of the Constitution? Mr. Lukwago argued further that the provision for age limit was meant to stop leaders who are either too young or senile (as he puts it). No evidence was adduced whatsoever to show that a person below 35 years of age, as long as they are adults, or a person of 75 years has an inherent inability to be President.

No examples were cited to us from those countries that have applied the basic structure doctrine whether they have provisions for age limits of their leaders.

On the contrary at this very moment across the world, we have countries that have defied that school of thought. In Malaysia, in May 2018, Prime Minister Mahathir Mohamad was popularly elected at the age of 92, becoming the oldest political leader in the World. And of greater interest to know is the fact that he is a person who had before led that country, retired and left others to take over. The people felt he should return to power and they indeed re-elected him. In Austria, Sebastian Kurz, the current Chancellor was elected in December 2017 at a very young age of 31 years. In British history, William Pitt the Younger, became the youngest British Prime Minister in 1783 at the age of 24 years. He left office in 1801 but was re-elected in 1804 and served up to 1806. On the negative side, neither Hitler nor Idi Amin who committed such heinous atrocities were 75 years or above, or below 35 years.

All the above examples suggest that the problem is not the age of the leader. None of the people who terrorized Uganda and the subject of the Preamble were anywhere near 75 years of age. On the other hand the Preamble does express the desire to promote equality. The National Objective II (1) provide for the empowerment and encouragement of all citizens to actively participate in the governance of the Country at all levels. To deny a person a chance to participate in vying for leadership of the Country because of age would affect the people's sovereignty and power to choose a leader of their choice. In other words, rather than empowering the people, the age restriction will constrain the people's discretion in choosing a leader of their choice. Age should be a factor that the people will consider in making their choice, as candidates canvass for the people's support during campaigns. Depending on the issues in the country at the time, the people may choose an older person or a young person. It is their sovereign right to do so.

In my considered view therefore, the Justices of the Constitutional Court were correct to find that the restriction on the age of a President or the Chairperson Local Council V was not a basic pillar of the Constitution of Uganda and was therefore not part of the basic structure. In terms of the analogy set out herein above, the restriction on age may be a roof or shutter on a house; very important on the house but capable of being altered without changing the basic structure of the particular house. It is not a foundation or a strong pillar on the house which, if changed, would lead to the collapse of the house. I have therefore found no reason to interfere with the findings of the learned Justices of the Constitutional Court on this point and I uphold the same accordingly.

Much of the above findings cater for the arguments raised under issue 5. The only additional argument was that the Constitutional Court failed to consider the appellants' assertion that the provisions of sections 3 and 7 of the impugned Act were in contravention of Articles 1, 8A and 38. In my opinion, the allegations by the appellants to the effect that the Constitutional Court did not give due consideration to the alleged infringement of articles 1 and 8A are not correct. The learned Justices of the Constitutional Court are on record as having considered and made findings on the relationship between sections 3 and 7 of the impugned provisions on the one hand and articles 1 and 8A of the Constitution on the other.

The Constitutional Court found that the removal of age limit for the President and Local Council V Chairperson did not affect or infect article 1 of the Constitution. The removal did not in any way negate the people's power to choose a leader of their choice. If anything it just increased the spectrum of the people's choice. The impact of the age limit removal on article 8A was aptly discussed under the basic structure doctrine. None of the aspirations espoused in the National Objectives and Directive Principles of State Policies point to the desire to have a limit on the age of either the President or the Local Council V Chairperson.

Regarding the allegation touching on article 38 of the Constitution, the said article provides as follows:

38. Civic rights and activities

1. Every Uganda citizen has the right to participate in the affairs of government, individually or through his or her representatives in accordance with law.

2. Every Ugandan has a right to participate in peaceful activities to influence the policies of government through civic organizations.

With due respect to learned counsel for the appellants, I do not see how the above provision is infringed by the removal of age limit. I am instead persuaded by the argument that rather than restricting the participation of Ugandans in the affairs of government, the removal of the restriction on age enhances such participation. I am therefore unable to fault the Constitutional Court in their findings on this point.

Before I take leave of this ground, I wish to make this observation:

The core of the Preamble, in my view, is the empowerment of the people of Uganda to freely and fairly elect their political leaders. The people must be empowered to decide how they should be governed through deciding on issues by way of referendum when and where necessary. To achieve this, it is the duty of the State to put in place the requisite legal framework and create the requisite peaceful environment by which the people can have genuine free and fair elections or referenda. Once people feel that they are empowered to freely elect their leaders and the elected leaders have the confidence that they were genuinely elected, there will be no question of people going to the bush to fight over rigged elections, nor will there be need for elected leaders to legislate themselves into power by unilaterally extending their term of office beyond that which was constitutionally given to them and without recourse to the people. These were the acts that contributed to the

history of "political and constitutional instability" and led to forces of tyranny, oppression and exploitation that is the core concern of the preamble.

In my view, it was not and could not be the core concern of the Preamble that citizens should legislatively be barred from offering themselves for election. Even if a person were to be legislatively barred from standing for election on account of age, if the subsequent election is not free and fair, the concerns of the Preamble to the Constitution will not have been met. Therefore, it is my considered opinion that article 1 of the Constitution constitutes the basic structure of our Constitution. Age limit on leaders is not part of the basic structure and, therefore, the people's representatives in Parliament can amend that particular provision.

The **first** and **fifth** issues are therefore answered in the negative.

ISSUE No. 2: Whether the learned majority Justices of the Constitutional Court erred in law and fact in holding that the entire process of conceptualizing, consulting, debating and enactment of Constitutional (Amendment) Act No. 1 of 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda and the Rules of Procedure of Parliament.

The appellants in their grounds of appeal and submissions made several allegations regarding non-compliance by Parliament with the procedure set out in the Constitution and in the Rules of Procedure of

Parliament. I have classified these allegations and I intend to handle them under the following sub-headings:

1. Violation of Article 93 of the Constitution regarding imposing a charge on the Consolidated Fund.
2. Lack of requisite consultation and/or public participation.
3. Breach of Order of Business of the House.
4. Denying Members adequate time to consider and debate the Bill, Non-observance of Rule 201 relating to tabling of the Bill, the three days rule and lack of secondment of the motion to suspend Rule 201 (1) of the Rules.
5. Suspension of some Members of Parliament.
6. Failure to close doors to the Chamber at the time of voting.
7. Denying members of the public access to Parliament.
8. Signing of the Committee Report by members who had not participated in the committee proceedings.
9. Proceeding on the Bill in absence of the Leader of Opposition and other Opposition MPs.
10. 'Crossing' of the Floor by ruling party Members to the Opposition Side.
11. Failure to comply with the 45 days Rule by the Legal and Parliamentary Affairs Committee – Rules 128 (2) and 215 (1).
12. Non observance of the 14 days Rule between the 2nd and 3rd Reading of the Bill, Discrepancies in the Speaker's Certificate of Compliance and illegal assent to the Bill by the President.

1. Violation of Article 93 of the Constitution regarding imposing a Charge on the Consolidated Fund

The relevant part of article 93 of the Constitution provides as follows –

93. Restriction on financial matters.

Parliament shall not, unless the bill or the motion is introduced on behalf of the Government—

(a) proceed upon a bill, including an amendment bill, that makes provision for any of the following—

(i) ……..

(ii) the imposition of a charge on the Consolidated Fund or other public fund of Uganda or the alteration of any such charge otherwise than by reduction;

(iii) the payment, issue or withdrawal from the Consolidated Fund or other public fund of Uganda of any monies not charged on that fund or any increase in the amount of that payment, issue or withdrawal; or

(iv) ……; or

(b) proceed upon a motion, including an amendment to a motion, the effect of which would be to make provision for any of the purposes specified in paragraph (a) of this article.

Counsel for the appellants in Constitutional Appeal No. 03 of 2018 faulted the Constitutional Court for making a finding that the impugned Act violated the provisions of Article 93 of the constitution but declined to nullify the entire Act holding that non-compliance only affected Sections 2, 6, 8 and 10 of the impugned Act that was extending the term of Parliament and local government councils from five to seven

years since they were introduced by way of amendments that imposed a charge on the consolidated fund. The Court accordingly applied the doctrine of severance to strike out the said provisions.

Counsel submitted that the entire Act ought to have been struck out because Article 93 (a) (ii) and (b) of the Constitution in 'absolute' terms prohibits Parliament from proceeding on a private member's bill or a motion including amendments thereto which have the effect of creating a charge on the consolidated fund. Counsel reasoned that Parliament therefore flagrantly violated Article 93 of the Constitution when they proceeded to consider and enact into law the impugned Bill with its amendments which had the effect of imposing a charge on the consolidated fund as found by the constitutional court. It was therefore erroneous to apply the doctrine of severance in a Bill that was considered and passed as an integral legislation in the same process.

On the issue of the UGX 29,000,000/=, counsel submitted that the constitutional Court erred in law and in fact in holding that the facilitation of UGX 29,000,000/= to Members of Parliament did not make the enactment of the Constitution (Amendment) Act, 2018 to be contrary to Article 93 of the Constitution. Counsel submitted that the Appellants had before the constitutional court shown that Article 93 was contravened when a charge was made on the Consolidated Fund by paying each Member of Parliament UGX 29 million as facilitation to each Member of Parliament including ex-officio members to carry out consultations with the public regarding the Bill. Counsel invited this Court to make a finding that this ex-gratia payment imposed a charge on the consolidated fund and therefore violated Article 93 (a) (ii) (iii) and (b) of the constitution.

For the appellants in Constitutional Appeal No. 04 of 2018, Counsel submitted that the Constitutional Court having found that some of the provisions in the challenged Act contravened Article 93 of the Constitution, the Court would have come to no other conclusion other than nullifying the whole Act. Counsel submitted that according to the wording in article 93 of the Constitution, Parliament was prohibited from proceeding with the bill or a motion with the effect of imposing a charge on the consolidated fund. Counsel therefore submitted that the fact that the offending provisions were later found to be unconstitutional did not change the fact that Parliament proceeded with the Bill and motion in contravention of the Constitution. The provisions of the Constitution deal with a Bill. It is the Bill which was in issue and the Court ought to have made a decision on the constitutionality as at the time of considering the Bill and not after the Bill became law.

Counsel further challenged the finding by the Constitutional Court to the effect that the shillings 29 million paid to Members of Parliament to carry out the consultations was not a charge on the Consolidated Fund because it came out of the budget of the Parliamentary Commission. Counsel submitted that even if the money came through the Parliamentary Commission it still was charged on the Consolidated Fund since the respondent did not prove that it was contained in the budget estimates for Parliament for the financial year 2016/2017 and in the Appropriation Act.

It was argued by Mr. Mabirizi that the amendments had impact on electoral and court processes. The budget for the Electoral Commission and the Judiciary were charged on the consolidated fund. As such, the

added activities to the Electoral Commission and the Courts translated into increased charge on the consolidated fund.

In reply, the Attorney General submitted that Article 93 of the Constitution provided for restrictions on financial matters and specifically prohibited Parliament from proceeding with a bill or motion that had financial implications as provided therein except when introduced on behalf of the Government. The Attorney General continued that the above notwithstanding, Article 94 of the Constitution guaranteed the right of a Member of Parliament to move a private member's bill. Relying on the decision of this Court in **P.K. Ssemwogerere & Anor Vs Attorney General, Constitutional Appeal No. 1 of 2002**, the Attorney General submitted that the above two provisions of the Constitution had to be construed harmoniously with each sustaining the other and not destroying the other.

The Attorney General further submitted that pursuant to Article 94 of the Constitution, Parliament made Rules of Procedure governing the way it conducted business. Referring this Court to Rule 117 of the Parliamentary Rules of Procedure, the Attorney General contended that it was a requirement for every bill introduced in Parliament to be accompanied by a Certificate of Financial Implications. In the Attorney General's view, this served as a guarantee to the Speaker and/or Parliament that the Bill did not have financial implication and did not contravene Article 93 of the Constitution.

The Attorney General further contended that Rule 117 of the Rules of Procedure of Parliament was in *pari materia* with Section 76 of the Public Finance Management Act of 2015. The Attorney General

submitted that there was ample evidence before the Court to establish that Parliament only proceeded with the bill presented by the Hon. Raphael Magyezi after the Rt. Hon. Speaker and the House were satisfied that the bill did not create a charge on the consolidated fund. He further argued that this position was confirmed by the Constitutional Court.

The Attorney General concluded that the Justices of the Constitutional Court were right to strike out the provisions of the impugned Act that did not comply with the Article 93 and maintain the provisions of the Act that complied with the Article by applying the principle of severance. He thus invited this Court to uphold the decision of the Constitutional Court to the effect that the bill as presented by Hon. Magyezi did not contravene Article 93 of the Constitution.

Regarding the UGX 29,000,000/= given to Members of Parliament, the Attorney General submitted that the Clerk to Parliament had ably pointed out in her evidence that the above sum was appropriated for use by the Parliamentary Commission and not drawn from the consolidated fund.

The Attorney General further observed that the majority Justices of the Constitutional Court found that the said facilitation to Members of Parliament did not make the enactment of the impugned Act inconsistent with Article 93 of the Constitution. The Attorney General argued that Article 93 of the Constitution only prohibited Parliament from proceeding with a bill, unless introduced on behalf of Government, that made provision for financial implications; the Article did not concern itself with the money used in processing the bill, allowances or facilitation that was paid out to the Members of Parliament to process the Bills.

The Attorney General invited this Court to uphold the learned majority Justices' decision that the money given to members of Parliament as facilitation did not contravene Article 93 of the Constitution.

The finding of the Constitutional Court was that the Magyezi Bill in the form it was first presented had no provision for imposition of a charge on the Consolidated Fund. It was the amendments that were brought in the course of debating the original bill that had the effect of imposing a charge on the Consolidated Fund. Parliament went ahead to debate and pass the bill into law. The Constitutional Court was of the view that addition of prohibited matters in a bill that was properly before Parliament could not vitiate the entire bill and applied the principle of severance.

It is important to point out that the import of article 93 is directed to the content and not the process of the bill; i.e. the bill, if moved by a private member, must not contain a provision that imposes a charge on the Consolidated Fund. It is not that no funds should be incurred in the course of processing the bill. As such, the provisions in the bill have to be looked at to ascertain whether any of them had that effect. Sections 1, 3, 4 and 7 of the Bill did not contain a provision that created a charge, and had no effect of imposing a charge on the consolidated fund beyond that already budgeted for by the institutions responsible to enforce them. They were therefore not provisions that were a target for article 93 of the Constitution. The import of the certificate of financial implications was that the Minister was satisfied that those provisions could be accommodated within the medium term framework without imposing any extra expenditure beyond that budgeted for within that period.

On the other hand, the provisions in sections 2, 5, 6, 8, 9 and 10 had the effect of imposing a charge on the consolidated fund beyond what could be accommodated in the medium term framework. These provisions called for expenditure say on a referendum which was necessary to bring them into operation. The latter provisions were therefore passed in contravention of article 93 of the Constitution.

The issue therefore raised by the appellants is whether the Constitutional Court was in order and was capable of severing the latter provisions from the original provisions of the bill. My opinion is that if the bill at the time it was brought was in compliance with the law, there is no reason it becomes void by reason of an illegal addition. It would be different if the original bill as presented contained improper provisions. It would equally be different if the provisions contained in the original bill were the improper ones and those added were the proper ones. In those two latter cases, one could successfully argue against severance because you cannot amend what is already a nullity. But in a situation where the original content was within the provisions of the law, I do not see how addition of illegal provisions contaminate the bill to the extent that the two cannot be separated.

I think it is important at this stage to elucidate on the procedure of presenting, amending and passing of bills.

Hon. Magyezi sought and obtained permission from Parliament to move a Private Member's Bill in accordance with the Constitution and the Rules of Procedure of Parliament. The Bill was given a first reading and committed to the relevant Committee of Parliament for further scrutiny. During the proceedings of the Committee, some members indicated

they wanted to move some amendments to the Bill. The Committee made its report to Parliament and the Bill was given a second reading and its principles debated. At the conclusion of the debate, the Bill was committed to the Committee of the whole House for further scrutiny, clause by clause. It is at this stage of the Committee of the Whole House that amendments to the Bill may be made, debated and accepted or rejected. This is done by each and every clause and every amendment thereto being subjected to a vote. The wording of the question put is: *"That clause … as amended do stand part of the bill."* Clearly, at this stage, there is a bill that is properly before the Committee of the Whole House as committed to it by the Parliament. Where the amendment is accepted and passed, it becomes part of the Bill. If it is rejected for any reason, then it does not become part of the Bill. The question that now arises is this: Doesn't an amendment proposed at the Committee stage have to comply with the Constitutional provisions?

In my view, any amendment to the Bill that is proposed must be examined as to whether it complies with the requirements of the Constitution. If the provisions proposed in the amendment contain or make provision for a charge on the Consolidated Fund, other than by reduction, then it is barred by Article 93 of the Constitution and Parliament must not proceed with it. If Parliament proceeds with it and passes it, it is passing a nullity. Parliament might as well have rejected it right at the beginning. If it is left to the Court to discover that nullity, then that provision that should never have been part of the Bill must be severed from the rest of the Bill that is sought to be amended. It would be wrong to hold that because an amendment to the Bill was wrongly

passed, then the whole Bill is vitiated. It is my considered view that, that which was moved and passed in accordance with the law should be saved, and that which was wrongly made part of the proper Bill should be severed from it.

It is therefore my considered view that the principle of severance was applicable in this situation and the Constitutional Court rightly applied the same. I shall return to the principle of severance in relation to the impugned bill later in this judgment.

On the question of the UGX 29,000,000/=, this does not constitute making provision for imposition of a charge on the consolidated fund. As I have already stated, article 93 is directed to the content and not the process of the Bill. The expenses incurred during the processing of a bill are already catered for in the budget of Parliament. Matters like consultation during the process of legislation are provided for in the budget of Parliament. The evidence of the Clerk to Parliament affirmed this position. Such an expenditure is therefore not captured under the provision in article 93 of the Constitution. I have therefore found no reason to interfere with the majority judgment of the Constitutional Court on this matter.

2. Lack of requisite consultation and/or public participation

The basis for the requirement for consultation of and participation of the public in the conduct of legislation is based on recognition of the sovereignty of the people as enshrined in article 1 of the Constitution. The people have the sovereign right to choose who governs them and

how they should be governed. For emphasis, I will lay out the said article in full. It provides –

1. Sovereignty of the people.

(1) All power belongs to the people who shall exercise their sovereignty in accordance with this Constitution.

(2) Without limiting the effect of clause (1) of this article, all authority in the State emanates from the people of Uganda; and the people shall be governed through their will and consent.

(3) All power and authority of Government and its organs derive from this Constitution, which in turn derives its authority from the people who consent to be governed in accordance with this Constitution.

(4) The people shall express their will and consent on who shall govern them and how they should be governed, through regular, free and fair elections of their representatives or through referenda.

It can be discerned from the above provision that there are instances when the people expect to exercise their sovereignty directly and at other times through their elected representatives. Elected representatives like Members of Parliament have delegated authority and, as such, it is expected that when making a law that is so fundamental to the people's existence and well-being, they must consult their electorate. It is however important to note that, in Uganda, the manner and form of public consultation is not set out either under the Constitution or any enabling law.

I have taken into consideration the view expressed by the Kenyan Constitutional Court in the case of **Law Society of Kenya Vs.**

Attorney General, Constitutional Petition No. 3 of 2016 which was relied upon by Mr. Lukwago for the appellants herein. The Kenyan Constitutional Court had this to say:

"... public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purpose of fulfilment of the constitutional dictates. It behoves Parliament in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not enough to simply "tweet" messages as it were and leave it to those who care to scavenge for it. Parliament ought to do whatever is reasonable to ensure that as many Kenyans are aware of the intention to pass legislation. It is the duty of Parliament in such circumstances to exhort the people to participate in the process of enactment of legislation by making use of as many fora as possible such as churches, mosques, public "barazas", national and vernacular radio broadcasting stations and other avenues where the public are known to converge and disseminate information with respect to the intended action..."

In my considered opinion, I am not persuaded by the view that consultation has to be a fully quantitative exercise. One should avoid the temptation of taking public consultation or participation in a legislative process as though it were a referendum exercise. It has to be borne in mind that in a situation that does not call for a referendum, the elected representatives hold the mantle to do such as they perceive their electorates' views. I am persuaded to agree with the submission of the Attorney General that the above holding by the Kenyan Constitutional Court had more to do with the specific provisions that

are in the Kenyan Constitution and the County Governments Act of Kenya. As such, the same standard or parameter is neither universally applicable nor can it apply with equal force in Uganda. That notwithstanding, evidence herein shows that Members of Parliament held public meetings in their constituencies over the matters at hand.

The issue of representation of the people is very important. The Preamble to the Constitution of Uganda itself recognizes this Principle. Although the Preamble states **"WE THE PEOPLE OF UGANDA,"** it is clear that not all the people of Uganda were in that room to write the Constitution that is why the Preamble further states:

"NOTING that a Constituent Assembly was established <u>to represent us</u> and to debate the Draft Constitution prepared by the Uganda Constitutional Commission and to adopt and enact a Constitution for Uganda;

"DO HEREBY, in and through this Constituent Assembly solemnly adopt, enact and give to ourselves and our posterity, this Constitution……" (emphasis added)

Clearly the people were speaking and acting through their elected representatives in the Constituent Assembly. This principle is carried through to Article 1(4), Article 38, Article 63(1) and Article 78.

So when the Constitution gives Parliament the power to make law or to amend the Constitution, that power is being given to the representatives of the people. To me therefore, the primary responsibility to consult the people of Uganda on any proposed legislation, and more particularly on a Constitutional amendment, must

fall squarely first and foremost on the elected representatives of the people. There is nobody in Uganda who does not belong to a Constituency, including the Special Constituencies, so as to be able to access a Member of Parliament to give them their views. The facilitation of Shs. 29 million given to each of the Members of Parliament must be seen in this context: to enable them perform their Constitutional duty of consulting the people of Uganda on an important Constitutional amendment. It is in that regard that the Speaker addressed Parliament thus at the time the Bill was being sent to the Committee: "**Honourable Members, the Bill is sent to the Committee on Legal and Parliament Affairs. However, I would like to remind you, Honourable Members, that this matter touches Article 1 and 2 of the Constitution: people must be involved in this deliberation. Thank you." (Hansard, Tuesday 3 October 2017 page 4791)**

In my considered view, for Members of Parliament to discern the views of their electorate, they are not bound to go through a quantitative let alone a mathematical exercise. The Members of Parliament remain with some discretion to discern the views of their electorate and have authority to bind them. Likewise, even during the Constituent Assembly not all the provisions of the Constitution came from the people. Some were proposed and passed by the Constituent Assembly delegates themselves, some even without regard to the Odoki Commission recommendations.

The only point of concern was the interference with the consultation process of particularly opposition Members of Parliament. There is evidence that AIP Asuman Mugenyi issued a directive which by its terms and on the face of it was meant to thwart consultation by a

section of legislators. The directive was simply illegal and ought to be condemned. Evidence shows that, in fact, it was largely ignored and most of the Members of Parliament were able to conduct their rallies.

The question however is whether such an interference vitiated the entire consultation process. As I have pointed out above, the consultation is not equated to a voting or referendum process. The substance of the matter is whether the particular legislators were able to discern and collect the views of their respective constituencies over the matter in issue. The Hansard indicates that on the floor of the house, various Members of Parliament including from the opposition communicated what they gathered as the views of their people. There is no indication that any member had failed to discern or collect the view of their electorate particularly as a result of insufficient time, resources or interference by the state actors. It would appear that even where state actors tried to disrupt some Member's consultation, the Members of Parliament felt they had achieved the consultation and got views of their people enough for them to contribute to the debate and decide. One example is **Honourable JOY ATIM ONGOM (UPC, Woman Representative, Lira)** who stated thus on the Floor:

"Thank you so much Madam Speaker for giving me this opportunity. Thank you also for giving us the opportunity to go and consult our Constituencies. I consulted with my people – Lira District has got three Constituencies: Erute South, Erute North and Lira Municipality. In Lira Municipality alone, I had over 6,000 people in one gathering but it was unfortunate that were dispersed with teargas ..... The Voters gave me their information and my people said, "NO" to the amendment of Aricle 102(b). They said I

should not touch it....” ***(Hansard, Wednesday 20 December 2017 page 5203)***

In my view it would be wrong and unrealistic to say this MP did not consult her people despite the interference.

Another MP was the **Honourable MICHAEL KABAZIGURUKA (FDC, Nakawa Division, Kampala)** who stated thus:

“Madam Speaker, you sent us out to consult our Constituencies and indeed, I managed to consult my people despite my current condition. I consulted the people of Nakawa, largely in all the Parishes. We have 23 Parishes and the majority of the people of Nakawa asked me not to support the amendment of Article 102(b).” ***(Hansard Wednesday 20 December 2017 page 5202)***

Honourable THEODORE SSEKIKUBO (NRM, Lwemiyaga County, Sembabule) stated:

“I would like to put it on record that the people of Lwemiyaga and indeed the people of Uganda, once you are a Member of Parliament you speak for Ugandans. They have an emphatic sentiment that the President must retire and that there should be no amendment of Article 102 of the Constitution.” ***(Hansard, Wednesday 20 December 2017 page 5202)***

Honourable FRANCIS MWIJUKYE (FDC, Buhweju County, Buhwenju) had this to say:

"Madam Speaker, I carried out consultations and addressed 14 rallies in my Constituency in Buhweju County, Buhweju District, Ankole Sub-region. While there, the people of Buhweju told me to come to the Parliament of Uganda, and tell you that they are interested in peace and development and therefore we should not amend the Constitution." ***(Hansard, Wednesday 20 December page 5204)***

The **Honourable ANGELLINE OSEGGE (FDC, Woman Representative Soroti)** stated thus:

"In Soroti District where there are 10 sub-counties and three Constituencies including Dakabela, Soroti and the Municipality, in no meeting that I called did anybody rise up to say that they support the amendment of Article 102(b) of the Constitution.

Madam Speaker, there are women in Soroti District that earn a living by cracking Katine Rock. When I went to have a meeting with them, they told me to come and tell you that if you think they have forgotten what they did some years ago, they have not. They said that they are going to abandon producing children and focus on Uganda. That is a very deep sentiment from a village women that you cannot take for granted. What does it show? They take it as unfair. There is no amount of washing or laundering that will make this amendment look clean." ***(Hansard, Wednesday 20 December page 5205)***

The Honourable MP demonstrates how far down to the ordinary person she went in her consultations. On what basis would this court tell her that there were no consultations of her people?

Honourable JULIUS OCHEN (INDEPENDENT, Kapelebyong County, Amuria) stated:

"Madam Speaker, I rise on the Floor of this Parliament to raise issues that my people have told me to raise. When you sent us for consultations, I conducted consultations in Kapelebyong County and I received people from other Constituencies in Teso who are resettling there. I was able to consult 8,073 people in five sub-counties and the people of Kapelebyong told me, "Go and tell the People of Uganda never to touch and tamper with the Constitution of the Republic of Uganda. Only 15 people associated with that move." *(Hansard, Wednesday 20 December 2017 page 5206)*

On the other hand**, Honourable ALEX BYARUGABA (NRM, Isingiro County South, Isingiro)** had this to say:

"Madam Speaker, I would like to thank you for giving each one of us an opportunity to express the views of our Constituents. I take the honour and opportunity to share with you the views of the People of Isingiro South..."

The Honourable MP goes on to tell of his having been a Member of the Constituent Assembly and the importance of Article 1 of the Constitution. He goes on to state:

"It was on this basis that I took my consultative meetings with a population of about 220,000 people. I traversed all the sub-counties and collected the following: Yes, sometime in the Parliament, term limits were removed. My people instructed me to come back and share with you that we must keep this Country

together and that term limits must be re-instated and entrenched. Secondly, they said that we should go ahead, reconstruct and amend Article 102(b) and they gave me their reasons..." ***(Hansard, Wednesday 20 December 2017 page 5199)***

I have endeavored to reproduce these Speeches from the Hansard to show how the duly elected representatives of the people from different corners of the Country and different Political persuasions confirmed that they had consulted their people. So did almost every Member who contributed to the debate.

Furthermore I must note that the above was in addition to the public participation and consultation that was done by the Committee on Legal and Parliamentary Affairs over which ample evidence was adduced before the Constitutional Court. There is also the fact that this was a matter that was debated in the media, on Radio and Television shows throughout the Country.

In my view, public consultation or participation was, on the whole, achieved notwithstanding the unconstitutional interference by some State actors. The impugned Act cannot be vitiated by that unconstitutional conduct alone, where clearly the people ignored it. The Members of Parliament as representatives of the people did their job of consulting the people.

3. Breach of Order of Business of the House.

It was alleged by the appellants that the motion to introduce the impugned Bill was smuggled onto the order paper. Counsel for the appellants in Appeal No. 3 of 2018 submitted that the Bill leading to the

enactment of the impugned Act was presented in contravention of Article 94 of the Constitution and Rules 8, 17, 25, 27, 29 and 174 of the Rules of Procedure by virtue of the fact that the same was smuggled onto the order paper. Counsel contended that Rule 174 vests power to arrange the business of Parliament and the order of the same in the Business Committee. In the proviso to the said rule, counsel submitted, the Speaker is only given a prerogative to determine the order of business in Parliament.

Counsel for the appellants further submitted that under Rule 27 of the Rules of Procedure of Parliament, the Speaker and Clerk to Parliament were enjoined to give the order paper in case of the first sitting at least 2 days before the sitting and in any other case, at least 3 hours before the sitting without fail. In Rule 29, there must be a weekly order paper including relevant documents that shall be distributed to every Member through his/her pigeon hole and where possible, electronically. Counsel submitted that all these Rules were flagrantly violated.

In reply, the Attorney General refuted the appellants' contention that the Bill from which the impugned Act emerged was smuggled into the House. He submitted that in the exercise of its legislative powers set out in Article 91, Parliament has power to make law. Further that under Article 94(1), Parliament had powers to make rules to regulate its own procedure, including the procedure of its committees.

The Attorney General further pointed out that under Article 94(4), the Speaker has powers to determine the order of business in parliament; and that a Member of Parliament had a right to move a private members Bill.

The Attorney General contended further that on 27th September 2017, in exercising his powers under Article 94(4), the Hon. Raphael Magyezi tabled in Parliament a motion for leave to introduce a private Members' Bill entitled 'The Constitution (Amendment) (No. 2) Bill, 2017'. The Attorney General submitted that the inception, notice of motion and tabling of the motion was undertaken well within the Rules. In the Attorney General's view, there was no smuggling of the Bill as alleged by the appellant.

The Attorney General also argued that there was an amendment of the Order Paper by the Speaker as authorized in Article 94 (4) and Rule 25 of the Rules of Parliament wherein she had power to set the order of business; and under Rule 7, the Speaker presides at any sitting of the house and decides on questions of order and practice. He further submitted that while doing this, the Speaker made a ruling on the various motions before her including the motion by Hon. Nsamba.

The Attorney General concluded that the appellants' contention that the Magyezi Bill was smuggled into proceedings of the House was therefore unfounded. He called on this Court to uphold the Constitutional Court finding that the Bill was properly brought before the floor of Parliament.

In his judgment, **Owiny-Dollo, DCJ** held that it was clear that under the Rules, the Speaker enjoyed wide, and almost unfettered, discretionary power to determine the Order of Business in the House. He held that from the Hansard, the record showed that the Speaker expressed satisfaction with the Magyezi motion for leave to introduce a private Member's Bill; which had met the test laid down under Rule 47, and so, could be included in the day's Order Paper. The Hon. DCJ concluded that the rules of procedure do not require the Speaker to

seek permission from the Members of Parliament, or any other person, to include the motion on the Order paper; which, if she failed to do, would have justified her being accused of smuggling the motion onto the Order paper. **Kasule JCC** was in agreement with the learned DCJ on this aspect.

Musoke JCC held that putting Hon. Magyezi's Bill onto the Order Paper ahead of the earlier one went against the Rules of Procedure of Parliament. She went on that nonetheless, it was only Hon. Raphael Magyezi's motion that had a proposed draft of the Bill attached to it. Hon. Nsamba's Bill which was filed prior did not have a proposed draft Bill attached to it contrary of Rule 121 of the Rules of Procedure of Parliament. She accordingly held the view that failure to abide to the particular rule did not in any way affect the process or the eventual outcome which is the Constitution (Amendment) Act No. 1 of 2018, since the Members of Parliament went ahead to debate and pass the Bill with amendments.

Kakuru JCC held that it was evident that the Rt. Hon Speaker of Parliament erred when she proceeded with the motion of Mr. Magyezi, on 27th September 2018 instead of proceeding with the motion of Mr. Nsamba which had been received earlier as required by the Rules of Parliament. The Speaker also erred when she amended the order paper to specifically introduce therein and include the motion of Mr. Raphael Magyezi without sending the same to Members of Parliament at least three hours before the sitting. Rule 26(1) clearly stipulates that, this requirement must be fulfilled "at least three hours before the sitting without fail". He found that this was a mandatory requirement which was not complied with.

Article 94(1) of the Constitution provides –

> *Subject to the provisions of this Constitution, Parliament may make rules to regulate its own procedure, including the procedure of its committees.*

Under article 94 (4) of the Constitution, *"the rules of procedure of Parliament shall include the following provisions –*

> *a) the Speaker shall determine the order of business in Parliament and shall give priority to Government business;*
>
> *(b) a member of Parliament has the right to move a private member's Bill;*
>
> *(c) ……..*
>
> *(d) ……."*

It is clear from the above provision that under the rules envisaged to be made by Parliament to regulate its own procedure, the general rule in that regard is that the Speaker shall determine the order of business in Parliament.

Rule 25 (1) and (2) of the Rules of Procedure of Parliament 2017 provides –

> ***25. Order of business***
>
> *(1) The Speaker shall determine the order of business of the House and shall give priority to Government business.*

(2) Subject to sub rule (1), the business for each sitting as arranged by the Business Committee in consultation with the Speaker shall be set out in the Order Paper for each sitting …

It was argued by the appellants that the Speaker smuggled the Magyezi Bill on the Order Paper ahead of the Nsamba and Lyomoki Bills which were listed first on the Order Paper. From the above provisions, the Speaker of Parliament has the primary power to determine the order of business in the house. Through the rules of procedure of Parliament, power to arrange business is delegated to the Business Committee which, in consultation with the Speaker, sets out the house business in the Order Paper. It cannot be said that this internal arrangement was meant to take away the power of the Speaker that is bestowed on her by the Constitution. In my view, the Business Committee is delegated by the House to sort out business for the House. It is an internal management tool.

In line with the doctrine of separation of powers, the courts are and should be wary of interfering with the internal workings of Parliament. As long as Parliament has acted within the provisions of the Constitution and the set rules of procedure, the court cannot and should not dictate how the Speaker and the House run its business; of course, with the exception of where there is abuse of power and/or where Parliament does not act within the confines of the law. This view was echoed in the case of **Attorney General vs Major General David Tinyenfunza, Constitutional Appeal No. 1 of 1997 (SC)** where Kanyeihamba, JSC had this to say –

"The doctrine of separation of powers demands and ought to require that unless there is the clearest of cases calling for intervention for the purposes of determining constitutionality and legality of action or the protection of the liberty of the individual which is presently denied or imminently threatened, the courts must refrain from entering arenas not assigned to them either by the constitution or laws of Uganda. It cannot be over-emphasized that it is necessary in a democracy that courts refrain from entering into areas of disputes best suited for resolution by other government agents. The courts should only intervene when those agents have exceeded their powers or acted unjustly, causing injury thereby".

The above view brings to mind the principle of exhaustion of local remedies within institutions and public bodies. The Rules of Procedure of Parliament allow a member to move a motion challenging the decision of a Speaker of which a member is dissatisfied with. Where a member does not take up that option, which the law provides to him or her, it is not open in my view to call in the court to determine how the Speaker should conduct the business of the House. As I already indicated above, this is, provided the Speaker has acted within the provisions of the constitution and the rules of procedure.

In this case I note that the Speaker took time to explain to the House the procedure that has to be followed for Private Members Bills. The Speaker went into detail to explain which of the motions received had complied with the Rules and which would then get on the Order Paper. Thereafter she determined the Order of Business as she is allowed by the Rules to do so.

I am therefore in agreement with the learned DCJ and Kasule JCC in their findings on this matter. I do not agree that the procedure adopted by the Speaker was in breach of the Constitution or the Rules of Procedure of Parliament. The Speaker acted within the confines of her power and discretion.

4. Denying Members adequate time to consider and debate the bill, non-observance of rule 201 relating to tabling of the bill, and lack of secondment of the motion to suspend rule 201 (1) of the Rules

It was argued by Mr. Mabirizi that the bill was not laid on table in accordance with rule 201 and that the three days required under sub-rule 2 of rule 201 were not observed in flagrant breach of that provision. He submitted that the motion to suspend rule 201 (2) of the Rules of Procedure of Parliament was not seconded. The appellant further submitted that opportunity was not given to all the members to debate the bill and those who did so were not allocated sufficient time to debate the bill which was contrary to the provisions of rule 133 (3) of the rules of procedure. He argued that this adversely affected the whole process of enacting the impugned Act.

In reply, the Attorney General submitted that evidence had shown that the Right Hon. Speaker had, in time, directed the Clerk to upload the bill on the iPads of all Members of Parliament and, as such, Rule 201 (2) did not apply. The Attorney General further submitted that when the motion to suspend Rule 201 (2) was moved and debated, the same was supported by Hon. Janepher Egunyu and other members who rose up to debate and support the motion.

Owiny-Dollo, DCJ held that it was permissible for Parliament to suspend its own rule under rule 16 of the rules of procedure; provided the motion thereby is seconded. However, Rule 59 (2) of the Rules of Procedure of Parliament provides that in the Committee of the Whole House, a seconder of a motion shall not be required. The learned DCJ held that in the instant matter, Parliament was proceeding as a Committee of the Whole House and, as such, the rule 59 (2) was applicable. Accordingly, although the motion by Hon. Mwesigwa Rukutana was not seconded, it offended no rule at all.

The above finding was supported by the other Justices of the Court except **Kakuru JCC.** On his part, Kakuru JCC held that the Speaker of Parliament failed to apply Rule 201(2) which is mandatory. He held the view that "laying on the table" means physically presenting the bill on the table of Parliament and does not include sending an electronic copy to members. He noted that Parliament had amended and adopted new rules as recently as October 2017. Had Parliament intended to amend Rule 201 to take into account "electronic notice", or "electronic laying on the table" it would have done so, since according to the Hon. Speaker, the practice was already in place. The fact that the Rule remained unchanged following the 2017 amendment meant that there was no intention to adopt a new procedure or turn the existing practice into law. He disagreed with the submissions of the Hon. Deputy Attorney General on the floor Parliament to the effect that when the Members of Parliament were availed with iPads, Rule 201 no longer served any useful purpose. The learned Justice therefore found that Parliament, while passing the impugned Act, failed to comply with Rule 201(2) of its Rules of Procedure, which is mandatory. Such failure

contravened Article 94(1) of the Constitution and as such vitiated the whole process of enactment of Act 1 of 2018.

Rule 16 (1) of the Rules of Procedure of Parliament provides –

> *Any Member may, with the consent of the Speaker, move that any rule be suspended in its application to a particular motion before the House and if the motion is carried, the rule in question shall be suspended.*

Rule 59 of the Rules of Procedure provides –

> *(1) In the House, the question upon a motion or amendment shall not be proposed by the Speaker nor shall the debate on the same commence unless the motion or amendment has been seconded.*
> *(2) In Committee of the Whole House or before a Committee, a seconder of a motion shall not be required.*

Rule 201 (2) of the Rules of Procedure provides –

> *Debate on a report of a Committee on a bill, shall take place at least three days after it has been laid on the Table by the Chairperson or the Deputy Chairperson or a Member nominated by the Committee or by the Speaker.*

The relevant provisions of rule 133 of the Rules of Procedure of Parliament provide as follows –

> ***133. Procedure in Committee of the Whole House on a Bill***
>
> *(1) When the House resolves itself into a Committee of the Whole House, the Clerk shall call the number of each clause or sub clause if*

any, of the Bill in succession for consideration of the Committee of the whole House.

(2) If no amendment is proposed on the clause, or all proposed amendments have been disposed of, the Chairperson shall propose the question "That the clause (or the clause as amended) do stand part of the Bill".

(3) Where in case of a clause called—

(a) the Chairperson is satisfied that there has been sufficient debate on it; or

(b) all Members who wish to speak on it have spoken;

the Chairperson shall put the question to the Committee for its decision.

In regard to the laying of the bill on the table, the question that arises is: What is the purpose of that provision? In my view, it is to formally convey the bill before Parliament and the space of three days is to give time and opportunity to members to study the bill in readiness for its debate.

In the instant case, the evidence shows that the bill was conveyed to the members through their iPads four days before the date it was formally laid before Parliament. There is ample material to establish that the Members of Parliament were issued with iPads to facilitate the work of Parliament. We also have in place the Electronic Transactions Act which paves way for use of electronic means of communication when conducting Government business. In that regard therefore, the non-laying of the bill physically on the table, the same having been

conveyed to the members through an acceptable medium, remains a technicality. In substance the Members of Parliament had received sufficient notice of the bill and were not prejudiced by the suspension of the three days rule. I think this is one instance where the substance of the matter should not be defeated by a technicality. I therefore differ from the finding of Kakuru JCC in that regard. I agree with the decision of the majority Justices on this point and on the finding that it was not required for the motion to suspend rule 201 (2) of the rules since the matter arose at the committee of the Whole House.

On the issue of the time and opportunity given to members to debate the bill, I notice that rule 133 (3) (a) and (b) are in the alternative; that is, either the Chairperson (of the Committee of the whole House) is satisfied that there has been sufficient debate on it; or all Members who wish to speak on it have spoken; the Chairperson shall put the question to the Committee for its decision.

According to the above provision, once the Speaker is satisfied that there has been sufficient debate on the bill, she has the power and discretion to put the question to the Committee for its decision. This, in my view, means that all members do not have to have debated the bill before the Speaker can put the question. It is therefore a question of discretion and depends on the circumstances of each particular case. The only question is whether in the instant case, the Speaker exercised her discretion judiciously.

The Hansard shows that numerous members debated the bill before the Speaker put the question to the Committee for its decision. The Speaker did not exercise her powers arbitrarily. I have found no reason to fault

her exercise of discretion. I therefore uphold the decision of the majority Justices on this aspect.

5. Suspension of some Members of Parliament

It was argued for the appellants that the Speaker grossly violated the Rules of Procedure of Parliament when she arbitrarily suspended 6 Members of Parliament from the House. Counsel submitted that she did not accord the said MPs a fair hearing before suspending them, she did not assign any reason for their said suspension, and that she acted ultra vires since she was functus officio at the time she pronounced her arbitrary decision suspending the said MPs. Counsel further submitted that by virtue of the illegal suspension of the MPs, the Speaker denied them a right to effectively represent their respective Constituencies in the law making process and as such the same vitiated the entire process.

Rule 82(1)(c) of the Rules of Procedure of Parliament provides that **"while a Member is speaking, all other Members shall be silent and shall not make unseemly interruptions".**

Rule 84 provides that in all other matters, the behavior of members shall be guided by the code of conduct of members of parliament prescribed in Appendix F.

Item 5 in the Code of Conduct of Members of Parliament provides as follows –

> *Members shall at all times conduct themselves in a manner which will maintain and strengthen the public's trust and confidence in the*

integrity of Parliament and never undertake any action which may bring the House or its Members generally, into disrepute.

Rules 87, 88 and 89 make provision for the circumstances under which a member may be suspended from the House and the procedure to be adopted by the Speaker.

From the above provisions, there is no doubt that the Speaker has power to suspend Members of Parliament from the House if a member is in breach of the House Rules and the Code of Conduct.

According to the Hansard, there is a background of what happened in the House before the Speaker suspended the 25 Members of Parliament on 27th September 2017. But the Hansard is silent on what transpired in the House before the suspension of the six members of Parliament on 18th December 2017. The Speaker simply announced the suspension. She assigned no reasons. Counsel for the appellant is therefore right that the Speaker acted arbitrarily and suspended the said Members of Parliament illegally.

The Path open to the Members was to challenge the decision of the Speaker as provided for in the Rules of Parliament. Their suspension by itself cannot stop the business of the House provided there is quorum to conduct business.

6. Failure to close doors to the Chamber at the time of voting

Rule 98 provides for the procedure for making of a roll call and tally by the Speaker. The present bill that was being debated is one of the kind of bills that called for that procedure. Under sub-rule 3 thereof, **"the Speaker shall then direct the doors to be locked and the bar drawn**

and no Member shall thereafter enter or leave the House until after the roll call vote has been taken".

It is true that the above rule is mandatory and that it was breached. But there is an explanation in evidence as to why the rule could not be complied with by the Speaker in the circumstances that prevailed at the time. It was indicated that the house was full and there were no seats for all Members of Parliament. There was no evidence that any strangers took advantage of this situation and participated in the voting.

I agree that rules must be obeyed. I however also emphasize that the substance and purpose of the rules is equally or even more important. In absence of evidence to the contrary, I do not see how that procedural breach by the Speaker vitiates the entire process. In my view, the said breach could not render the entire amendment process unconstitutional.

The Parliamentary Chamber as currently in existence may be too small for the numbers of members of Parliament which was not envisaged before. Under article 95 (2) of the Constitution, it is conceivable that the Speaker can constitute Parliament at any place of sitting upon a proclamation to that effect. If that is possible, what if such a place is a building without doors? Or it has doors but people are not fitting. In my opinion, it is the substance of the matter that is important in the prevailing circumstances. As long as no body is proved to have taken advantage of the non-closure of the doors, the omission to do so only remains a matter of form.

7. Denying members of the public access to Parliament

The third appellant, Mr. Mabirizi, complained that he was denied access to the gallery during the passing of the Constitution (Amendment) Act 2018. There was no evidence of any other member of the public who suffered a similar fate.

Musoke JCC in her judgment made reference to Section 5 of the Parliament (Powers and Privileges) Act, 1955 which provides that no stranger shall be entitled as of right to enter or to remain within the precincts of Parliament. She held that considering the incidents that had taken place within the precincts of the House at that time, entry into the House was reasonably subjected to limitations. The Speaker had discretion to either allow the public access to the gallery or not, under the provisions of Section 6 of the Parliament (Powers and Privileges) Act, 1955. The learned Justice thus found that restricting entry to the gallery, inconveniencing as it may have been to the members of the public, did not negatively impact the process leading to the passing of the impugned Act.

I am persuaded to agree with the learned Justice on this matter. I have also taken into consideration the provision of rule 230(3) of the Rules of Procedure of Parliament which vest in the Speaker the power to control admission of the public to the Parliament premises so as to ensure law and order as well as the decorum and dignity of Parliament. I find that in the circumstances that prevailed, the Speaker acted within her powers and had reason to do so. The inconvenience suffered by the appellant (Mr. Mabirizi) cannot be reason to render the entire process unconstitutional or irregular.

8. Signing of the Committee Report by members who had not participated in the committee proceedings

The appellant, Mr Mabirizi, alleged that members who did not participate in the committee proceedings signed the report. In another breath, the appellant referred to them as non-members of the Committee. However, looking at the Hansard, there is evidence that these members had been assigned to the Legal and Parliamentary Affairs Committee only that at the time they were assigned, the Committee had completed consideration of the Bill and was preparing the report. The correct position therefore was that these were members of the Committee who had not participated in proceedings of the Committee.

The questions that arise are; one, whether the signing by those members was wrong in law; and two, whether such signature by those members invalidated the Committee report.

It is clear to me that the signing of the report by the said members did not add to or subtract anything from the report. It was therefore a superfluous act that has no legal consequence. If that act was used to attain the quorum for the Committee, for example, that would have been a substantive defect that would negatively affect the report. According to **Rule 201(1) of the Rules of Procedure of Parliament,** the report of the committee shall be signed and initialed by at least one third of the members of the committee. The Constitutional Court rightly found that even if the signatures of the impugned members were removed, the quorum would still have been realized. I therefore do not see how the superfluous act of the said members signing the report would vitiate the Committee Report.

9. Proceeding on the Bill in absence of the Leader of Opposition and other Opposition MPs

It was argued by Mr. Mabirizi that in absence of the Leader of Opposition, the Chief Whip and other members from the Opposition, the Parliament was not fully constituted. I have not found the legal basis for this argument. Article 88 provides for the quorum in Parliament as follows:

(1)*The quorum of Parliament shall be one-third of all members of Parliament entitled to vote.*

(2) The quorum prescribed by clause (1) of this article shall only be required at a time when Parliament is voting on any question.

(3) Rules of procedure of Parliament shall prescribe the quorum of Parliament for the conduct of business of Parliament other than for voting.

Rule 24 of the Rules of Procedure of Parliament makes provisions that are in line with the above constitutional provision.

In the instant case, there is no allegation that the House did not have quorum when the proceedings were taken on the bill, let alone at the time of voting. The argument by Mr. Mabirizi appears to be that because Parliament operates under a multi-party arrangement, absence of the Leader of Opposition, Chief Whip or some members of Opposition invalidates the proceedings of Parliament. This argument is however not grounded on any law. In any case, the Constitutional Court rightly found that the Leader of Opposition had voluntarily walked out of Parliament; the Chief Whip and the other Opposition Members had

been suspended by the Speaker under her powers. There was no legal basis for Parliament not to proceed under such circumstances. There is therefore no merit in this ground.

10. 'Crossing' of the Floor by ruling party Members to the Opposition Side

"Crossing the floor" is a terminology used when a politician changes their allegiance or votes against their party in Parliament. It does not refer to physical movement from one side to the other. The argument by Mr. Mabirizi in this respect misapplied the term.

According to the Hansard, it is true that the Speaker did tell the Members of Parliament to fill up the empty seats during the proceedings since the opposition members had walked out and there was free space on that side. This was not an act of "crossing the floor" within the legal or political meaning of the term. Under **Rule 9 (4) of the Rules of Procedure of Parliament** the Speaker has a duty to ensure that each member has a comfortable seat in parliament. I find that this act did not in any way contravene either the Constitution or the Rules of Procedure of Parliament.

11. Failure to comply with the 45 days Rule by the Legal and Parliamentary Affairs Committee

This matter was not considered by the Constitutional Court. Nevertheless, I shall proceed to consider the same.

It was submitted by Mr. Mabirizi that the report of the Committee was not valid since it delayed beyond 45 days contrary to Rule 128 (2) and 140 of the Rules of Parliament.

The practice is that whenever a bill is read for the first time in the house, it is referred to the appropriate committee for consideration. This committee is obliged to report back to the House within 45 days as provided for in Rule 215(1) of the Rules of Procedure of Parliament.

The Attorney General in his reply submitted that the Committee acted well within the provisions of Rules 128 and 140 of the Rules of Procedure of Parliament in that whereas the Bill was referred to the Committee on 3rd October 2017, the House was sent on recess on 4th October 2017. Further that during recess, no parliamentary business is transacted without leave of the Speaker and, therefore, the days could not start running until the leave was obtained.

The Attorney General further pointed out that by a letter dated 29th October 2017 the Chairperson duly applied for leave, which leave was granted by the Rt. Hon Speaker on the 3rd November 2017. That both letters were on record. The Attorney General further stated that the 45 days therefore started running from the 3rd November 2017. In the Attorney General's view, the days would expire on 16th December 2017. The Committee reported on the 14th December 2017 two days before the expiry of the 45 days period.

The submission by the learned Attorney General settles this point. The Committee could not commence with business until they secured leave of the Speaker. The days therefore started running from 3rd November 2017 when the said leave was secured. There was therefore no breach of the 45 days rule.

12. Non observance of the 14 days Rule between the 2nd and 3rd Reading of the Bill, Discrepancies in the Speaker's Certificate of Compliance and illegal assent to the Bill by the President.

The issue has arisen as to whether the assent of the President to the Constitution (Amendment) Bill was valid and constitutional given that there were some provisions therein that were not certified by the Speaker as having been passed in compliance with the Constitution. Issue has also been raised of the non-compliance of the bill with article 260 in regard to the separation of the second and 3rd readings by 14 days.

In addressing these issues, I am of the view that it is necessary to review the provisions of the Constitution relating to the passing of Bills and the assent of the President.

I will start with Article 91 of the Constitution on the exercise of Legislative powers. This article states as follows:-

91. (1) "Subject to the provisions of this Constitution, the power of Parliament to make laws shall be exercised through bills passed by Parliament and assented to by the President."

(2) A bill passed by Parliament shall, as soon as possible, be presented to the President for assent.

(3) The President shall, within thirty days after a bill is presented to him or her –

(a) assent to the bill;

(b) return the bill to Parliament with a request that the bill or a particular provision of it be reconsidered by Parliament; or

(c) notify the Speaker in writing that he or she refuses to assent to the bill.

(4) Where a bill has been returned to Parliament under clause (3)(b) of this article, Parliament shall reconsider it and if passed again, it shall be presented for a second time to the President for assent.

(5) Where the President returns the same bill twice under clause (3)(b) of this article and the bill is passed for the third time, with the support of at least two-thirds of all members of Parliament, the Speaker shall cause a copy of the bill to be laid before Parliament, and the bill shall become law without the assent of the President.

(6) Where the President –

(a) refuses to assent to a bill under clause (3)(c) of this article, Parliament may reconsider the bill and if passed, the bill shall be presented to the President for assent;

(b) refuses to assent to a bill which has been reconsidered and passed under paragraph (a) or clause (4) of this article, the Speaker shall, upon the refusal, if the bill was so passed with the support of at least two-thirds of all members of Parliament, cause a copy of the bill to be laid before Parliament, and the bill shall become law without the assent of the Present.

(7) Where the President fails to do any of the acts specified in clause (3) of this article within the period prescribed in that clause, the President shall be taken to have assented to the bill and at the expiration of that period, the Speaker shall cause a copy of the bill to be laid before Parliament and the bill shall become law without the assent of the President.

(8) A bill passed by Parliament and assented to by the President or which has otherwise become law under this article shall be an Act of Parliament and shall be published in the Gazette.

The first operative words of Article 91(1) are very important. Whatever has to be done in the passing of bills by Parliament and the assent thereto by the President is subjected to the provisions of the Constitution. It therefore becomes necessary to consider which other provisions of the Constitution are relevant. If the Constitution itself has declared that certain matters must not be legislated on, then even if Parliament passed such a bill and it got the assent of the President, such a bill would be a nullity *ab initio*. For example Article 92 prohibits the passing of retrospective legislation to alter the decision of a Court. It states:

"Parliament shall not pass any law to alter the decision or judgment of any Court as between the Parties to the decision or judgment."

Likewise, Article 75 states as follows:

"Parliament shall have no power to enact a law establishing a one-party state."

To my mind, if Parliament were, for any reason, to pass such laws as above, those laws would be null and void *ab initio* notwithstanding that they may have been assented to by the President.

Apart from where the Constitution has expressly prohibited the passing of any law on a given subject, there are provisions of the Constitution which govern how certain bills must be passed through Parliament before the Constitution can recognize them as duly passed. Such provisions are those governing the amendment of the Constitution which is the subject of this appeal.

Article 259 allows the amendment of the Constitution but also subjects such amendment **"to the provisions of this Constitution."** It states as follows:

259. (1) Subject to the provisions of this Constitution, Parliament may amend by way of addition, variation or repeal, any provision of this Constitution in accordance with the procedure laid down in this Chapter.

(2) This Constitution shall not be amended except by an Act of Parliament –

(a) the sole purpose of which is to amend this Constitution; and

(b) the Act has been passed in accordance with this Chapter.

Following on that is Article 260 on amendments requiring a referendum. It states as follows:

260. (1) "A bill for an Act of Parliament seeking to amend any of the provisions specified in clause (2) of this Article <u>shall not be taken as passed unless</u> –

(a) it is supported at the second and third readings in Parliament by not less than two-thirds of all members of Parliament; and

(b) it has been referred to a decision of the people and approved by them in a referendum.

(2) The provisions referred to in clause (1) of this article are -

(a) this article;

(b) Chapter One – articles 1 and 2;

(c) Chapter Four – article 44;

(d) Chapter Five – articles 69, 74 and 75;

(e) Chapter Six – articles 79(2);

(f) Chapter Seven – article 105(1);

(g) Chapter Eight – article 128(1); and

(h) Chapter Sixteen.

Likewise, Article 261 governing amendments requiring approval by district councils provides as follows:-

261. (1) "A bill for an Act of Parliament seeking to amend any of the provisions specified in clause (2) of this article shall not be taken as passed unless –

(a) it is supported at the second and third readings in Parliament by not less than two-thirds of all members of Parliament; and

(b) it has been ratified by at least two-thirds of the members of the district council in each of at least two-thirds of all the districts of Uganda.

(2) The provisions referred to in clause (1) of this article are –

(a) this article;

(b) Chapter Two – article 5(2);

(c) Chapter Nine – article 152;

(d) Chapter Eleven – articles 176(1), 178, 189 and 197."

Then Article 262 on amendments by Parliament states as follows –

262 (1) "A bill for an Act of Parliament to amend any provision of the Constitution, other than those referred to in articles 260 and 261 of this Constitution, shall not be taken as passed unless it is supported at the second and third readings by the votes of not less than two-thirds of all members of Parliament."

It is crucially important to take note the language of the Constitution that runs through the above provisions. The Constitution stipulates specific conditions which must be met. If they are not met then **the bill "shall not be taken as passed."**

It does not matter whether the Parliament passes the bills with even a 100% majority. If the conditions precedent have not been met, that bill just did not pass as far as the Constitution is concerned. So even if such a bill were sent to the President for assent and he purported to

assent to the bill, such assent would be meaningless and of no constitutional effect.

The Constitution has itself decreed that there was no bill passed for assent. It would make no difference, in my view, that the Speaker would have certified under Article 263 that there was compliance with the Constitution when in fact there was no such compliance.

This now brings me to consider the situation where, in the passing of a bill, some specific provisions brought in as amendments to the Bill touch on matters that require compliance with the conditions precedent set by the Constitution which are not met, and yet other provisions of the bill that do not require to meet those conditions precedent and are passed within the provisions of the Constitution.

In my view, when the Constitution provides for the bringing of a bill to amend the Constitution, that provision must, *mutatis mutandis,* include reference to amendments moved to a bill already on the floor of the House. If a Members moves an amendment at the Committee stage, that amendment must be scrutinized as to whether it complies with the Constitutional requirements. If it does not, then it cannot be deemed passed even if Parliament were to pass it. It can only validly become part of the bill it seeks to amend if it complies with the Constitution.

This appears to be the situation before us. The original bill as moved by Hon. Magyezi did not contain matters that required compliance with the provisions of article 260 or 261. The impugned amendments were introduced during the Committee stage in Parliament. As the procedure is at Committee stage, amendments are moved, voted on and passed one by one. The Speaker and the entire House ought to have

realised at that stage that those amendments could not possibly pass since they had not complied with the conditions precedent stipulated in articles 260 and 261. So when the Committee of the whole House rose to report to the House, Hon. Magyezi as mover of the Bill stated that the Bill entitled the Constitution (Amendment) Bill had been passed with some amendments. But he also reported that some other amendments touching on a number of Articles had been moved and passed. He therefore moved that the Bill and all the amendments do pass. The Speaker put the question and the whole Bill was passed.

Subsequently a bill was prepared containing all the amendments that were passed, including those that touched on articles 260 and 261, even when there had been no referendum and no ratification of district councils. The Bill was sent to the President for assent. Article 263 (2) states as follows:

> *"A Bill for the amendment of this Constitution <u>which has been passed in accordance with this Chapter</u> shall be assented to by the President <u>only if</u>:*
>
> *(a) it is accompanied by a Certificate of the Speaker that the provisions of this Chapter have been complied with in relation to it."*

The Bill was indeed accompanied by a Certificate of Compliance by the Speaker. But by that Certificate, the Speaker only certified those clauses which had been in the original Bill and left out the rest of the clauses in the Bill. It would appear that the Speaker woke up from some deep slumber and realized that the House had passed some

clauses which according to the Constitution itself **"SHALL NOT BE TAKEN AS PASSED..."**

It is not clear to me whether the President considered the terms of the Certificate of Compliance before he assented to the Bill. But in my view, as argued above, those clauses in the Bill which clearly offended the conditions stipulated in the Constitution were never passed. They were void *ab initio.* With or without the assent of the President, they were a nullity which could not be cured by the assent. But on the other hand, the Bill had clauses that had been passed in accordance with the Constitution and certified so by the Speaker. The assent of the President could only bring into law those provisions that had complied with the Constitution.

In my view, this is a matter that calls for the application of the principle of severance. It is a matter of command of the Constitution that if a provision did not meet the conditions stipulated by the Constitution, it would not pass. Those amendments that were added to the Bill which had been duly introduced in the House in accordance with procedure, and which did not comply with the Constitution were never passed. That should save the original Bill.

The question that vexes us is, if you have a law that contains matters that are lawful and those that are not so lawful, do you declare the whole law to be unlawful? In the case of ***KINGSWAY INVESTMENTS LTD –VS- KENT CC [1969] ALLER 601 at 611 and 612,*** **(**also quoted in ***John B Saunders' Words and Phrases Legally Defined, 3rd Edition at page 174*****), *Lord Denning MR,*** stated thus**:**

"This question of severance has vexed the law for centuries, ever since PIGOT''s case (18). Seeing that in this case the condition is said to be void because it is repugnant to the Act, I am tempted to go back to the old distinction taken by Lord Hobart when he said:

> **"The statute is like a tyrant; where he comes he makes all void; but the common law is like a nursing father, makes void only that part where the fault is, and preserves the rest."**
>
> **..... But I think that the distinction between the Act and Common Law no longer exists. I prefer to take the Principle from the notes in the English Reports in PIGOT's case (21) :"**
>
> **"The general principle is, that if any clause, etc, void by Statute or by the Common Law, be mixed up with good matter which is entirely independent of it, the good part stands, the rest is void --- but if the part which is good depends upon that which is bad, the whole instrument is void."**

I am persuaded by this statement of principle. Here, of course we are dealing with the Constitution. But by analogy, that which is declared void by the Constitution can be and should be separated from that which is good. This principle is captured in Article 2(2) of the Constitution which states thus:

> *"If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to <u>the extent of the inconsistency, be void</u>."* (emphasis added)

In my view, the prudent thing for the President to have done would have been to send the Bill back to Parliament so that it would have been cleaned up to conform to what the Speaker was certifying as having been passed in compliance with the Constitution. But it is not fatal to the whole bill that the President simply assented to it. My view is that in those circumstances, only those provisions that complied with the Constitution could be brought into Law. The rest that were, according to the Constitution, not taken as passed, were void ab initio and could not be saved either by the certificate of the Speaker or the assent by the President.

In general therefore, the second issue is answered in the negative.

ISSUE 3: Whether the learned justices of the Constitutional Court erred in law and fact when they held that the violence/ scuffle inside and outside Parliament during the enactment of the Constitutional (Amendment) Act No. 1 of 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda.

Counsel for the appellants in Appeal No. 03 of 2018 submitted that the bill was passed amidst violence within and outside Parliament, and also in the whole Country during public consultations; thereby vitiating the entire process, and thus making it unconstitutional. Counsel submitted further that the unlawful invasion and/or heavy deployment at the Parliament by combined forces of the Uganda People's Defence Forces, the Uganda Police Force and other militia before and on the day the impugned bill was tabled before Parliament amounted to amending the

Constitution using violent means, undermined Parliamentary independence and as such was inconsistent with and contravened the Constitution.

Counsel for the appellants in Appeal No. 04 of 2018 submitted that the violence inside Parliament included the arrest, assault and detention of Members of Parliament and their forceful exclusion from representing the Constituents. Counsel submitted that the actions complained of violated several provisions of the Constitution and the Constitutional Court erred in failing to come to definite conclusions that Article 23, 24 and 29 were contravened. As a result the Court neither made any declarations nor granted redress as required by Article 137 of the Constitution for those contraventions.

Counsel went further to submit that the circumstances under which a person can be deprived of personal liberty are spelt out in Article 23 of the Constitution. The entry into Parliament by security forces arresting, assaulting and detaining members does not fall in any of these exceptions. It was not challenged that some Members of Parliament were not only evicted but held without charge in places of detention. The Court was required to examine whether the limitations placed on the fundamental right of liberty of the Members of Parliament fell within the ambit of Article 43 as outlined by this Court in the case of **Onyango Obbo and Anor vs. Attorney General.**

Counsel went further that the onus was upon the respondent to show that the limitation to liberty was necessary in order to protect the fundamental rights of others or in public interest and that the limitations met the standard of being demonstrably justifiable in a free

and democratic society. The respondent clearly did not execute this burden. There was no attempt whatsoever to bring the actions of the security forces within the defenses stipulated in Article 43. The Court instead embarked on rationalizing the limitations on the member's right to liberty. There was no evidence whatsoever for misconduct being a basis for the constitutional limitations on their liberty. On the contrary it was the Speaker's Orders which ought to have been faulted as the events of 26th and 27th September showed.

Mr. Mabirizi, the appellant in Appeal No. 02 of 2018, submitted that the decision of the Justices of the Constitutional Court on the question of violence had the effect of promoting impunity and threatening future rule of law and democratic governance. He submitted that the amendment of the Constitution through violence was foreseen by the framers of the Constitution who made a strong prescription against violence of any kind in the constitutional amendment process and invalidated each and every thing arising out of violence and created an offence of treason. As such the perpetrators of violence in the Constitutional amendment process committed the offence of treason as envisaged under article 3 of the Constitution.

In reply, it was submitted by the respondent that from the available authorities, it was apparent that the Rt. Hon. Speaker was legally mandated to ensure that order and decorum was maintained in the House and she clearly had the powers as derived from the 1995 Constitution to suspend the MPs who perpetuated violence in the Parliamentary chambers. The respondent submitted that rule 88 (6) of the Rules of Procedure of Parliament sets out the procedure of ensuring the eviction of a Member of Parliament who refuses to leave after

he/she has been suspended from the House and it provides for recourse to use of force.

On the appellants' submission that the forceful removal of the MPs on the 27th September 2017 amounted to a treasonous act under article 3(2) of the 1995 Constitution, the respondent submitted that the appellants had severely misconstrued article 3 (2) of the Constitution as this was a singular event that came about due to the misconduct of the MPs whereas the debate, passing and eventual enactment of the Constitutional Amendment Act No. 1 of 2018 was carried out strictly in accordance with the Constitution. The respondent prayed to Court to uphold the decision of the majority Justices of the Constitutional Court on the question of violence in and outside Parliament.

I believe there is need to get the facts clearly and in the proper perspective on this matter. From the submissions of Counsel for the appellants, their case appears tto be as if there was a plot on the part of the state to attack parliament to interfere with theier legislative process. But I think it is necessary to go through the Hansard to esatbish exactly what happened.

The record is clear that Parliament was not simply invaded out of the blue as the appellants attempted to paint the impression. There was a background, and quite a lengthy one, to what happened in Parliament on the days in issue, particularly, 21st, 26th and 27th September, 2017. The Hansard clearly reflects this.

During the proceedings of ***Wednesday, 20 September 2017***, the Deputy Speaker expressed concern over the growing anxiety that was apparent amongst the Members of Parliament and the general

population which needed to be contained by reassuring the public that the parliamentary process would be carried out transparently. In the Hansard as contained in Volume 1 of the record of Appeal for Appeal No. 03 of 2018, at page 115, the Deputy Speaker is quoted thus –

> **"Honourable members, like I communicated yesterday, there seems to be some anxiety and I do not know where it is coming from but it is there even in the public ... The public should have trust in their representatives that they brought here and let them handle what happens here. The public should go on with its business out there and whatever Parliament will decide, they will decide when the time for that decision comes ... If you go around Parliament or the streets, you can see that there is a sign of anxiety – a lot of it. Yesterday, there were no cars in town. Even where jam used to be, I could not see cars ... Yesterday, a member here rose to complain about Police deployment, we invited them to come. I would have been surprised if there was no deployment around Parliament because from some statements that I saw, they were saying that there is going to be war in this place. When you alert security people that there is going to be war somewhere, they will want to see how the war will be carried out. We have actually invited them. Therefore, to be surprised that they are around, I think it is not to be acting fair ..."**

At page 153 of the same record of appeal, in the proceedings of ***Thursday, 21 September 2017***, the Deputy Speaker is quoted as saying:

"... What we have seen today is exceptional and I do not know what necessitated the blockade. In my opinion, it has gone way beyond what should have been ... We need to demonstrate that what they fear is not in this House. We need to demonstrate to all that whatever everybody else fears is not in this House. It cannot be the Members of this House to create chaos. Are we together on this? We need to demonstrate that it cannot be the Members of this House to light fire, throw stones and probably begin removing shoes from their feet and tossing them around. That it cannot also be the presiding officer of this House to smuggle in things that have not gone through processes; so that the whole House can predict and prepare to engage in a debate on any matter ... we should be given ample time to sufficiently prepare to debate but not the kind of preparations I have seen whereupon some Members were talking about on television – going to the gym ... If you declare that we are coming to fight here, it means all Members are allowed to come with whatever can be used to fight ... if we make statements that make it look like this House is going to be a warfare place, then we attract people who should not be here ..."

At page 155, the Leader of Opposition, Hon. Winifred Kiiza, had this to say –

"[Mr. Speaker] Today we want to continue thanking you for steering this House amidst the circumstances. What happened today is something we should condemn in the strongest terms possible ... to find [Parliament] occupied by the military to the extent that members of Parliament cannot even have free

access to come and represent their people is something that must be condemned in the strongest terms possible and never again should it happen. ... I would, therefore, like to ask that Government comes up with an explanation as to why there was a siege and a coup in Parliament ..."

At page 157, the Prime Minister and Leader of Government Business stated thus –

"Mr Speaker, colleagues are aware that there has been some degree of tension and excitement in Kampala and some areas of the country because of the political exchanges that are taking place. Secondly, this has caused some violence and tension in some areas ..."

At page 159, the Prime Minister continues thus –

"... because of the environment that has created some bit of political excitement, which could easily get out of hand, it is absolutely necessary that the security organs and forces be on alert ... Mr Speaker, because of the security environment that has been created, it is absolutely necessary for security organs, in particular the police, to ensure that the necessary and effective preventive measures are taken so that the security of Parliament and the country is under control. By the way, the police have more information. Incidents have been reported by colleagues like Hon. Karuhanga and others and they are going to be investigated and necessary measures will be taken in case the findings illustrate that something wrong has been done ..."

At page 160, Hon. Odonga-Otto stated –

"... Mr Speaker ... thank you for the manner in which you are calling for calm in this House. Of course, we came charged and we are still monitoring what is going on ..."

On the sitting of Thursday, 26 September 2017, the build up to the tension within the House continued. At page 166 of the record of appeal, Hon. Nzoghu stated:

"Thank you, Madam Speaker. As you can see, today the house is full to capacity but some Members here are not safe because guns have been sneaked into the House. The procedural point I would like to raise is that for the safety of Members, I would like to seek your indulgence to let us get out and be checked, one by one, as we enter."

Then Hon. Ssemujju, at page 167, stated:

"Madam Speaker, when I entered this Parliament at 2.00 pm, Hon. Kibuule – and the cameras in this Chamber can show that – crossed from the other side to this side and warned me that today, I am going to face death ..."

The Hansard indicates on pages 167 and 168 that some Members refused to go on with the proceedings in the House until a search for the gun was done. The alleged gun was not found but some Members alleged that it had been sneaked out in due course. Indeed in the proceedings of Wednesday, 27 September 2017, the Speaker confimed to the House that she had confirmed that Hon. Kibuule, MP for Mukono County North, had endangered the safety of Members by bringing a firearm into the Chamber of Parliament contrary to the House Rules.

The proceedings of ***Wednesday, 27 September 2017*** were the culmination of all this tension into actual scenes of chaos and violence. Following the incident of Tuesday 26, September 2017, the Speaker named and suspended 25 Members of Parliament and directed them to exit the Chambers immediately in accordance with Rules 77, 79 (2) and 80 (2) of the Rules of Procedure of Parliament. When the Members did not oblige, the Speaker invited the sergeants to remove the named members. The Speaker then decided to suspend the House proceedings for 30 minutes for the sergeants to effect the removal of the Members. At page 315 of Volume 1 of the record of appeal for Appeal No. 4 of 2018, the Hansard shows what happened. After naming the Members, the Speaker stated:

> **"I invite you to exit the Chamber. Exit the Chamber. Can I invite the sergeants to remove the Members who have been named. Exit the Chamber, honourable Members. I will suspend the House for 30 minutes and when I return, you should be away. We shall resume in 30 minutes and you must be out of this House."**

It is during that break that the scuffle and actual fighting occurred in Parliament when the security forces were called in to forcefully remove the Members who had been named and suspended by the Speaker. Evidence of what happened in the House that led to the intervention of the security forces is contained in the affidavit of Mr. Ahmed Kagoye, the Sergeant-At-Arms dated 29th March 2018. I reproduce the relevant paragraphs here below:

"5. That I know that my duties as Sergeant-At-Arms, include, supporting the delivery of effective security to Parliament, to execute all orders of the House and Committees and to perform chamber duties among others.

6. That I was in attendance of some of the Parliamentary proceedings leading up to the debate on the Constitution (Amendment) (No. 2) Bill 2017 and the enactment of the Constitution (Amendment) Act, 2018.

7. That I know that during the sitting of Parliament 21st, 26th and 27th September 2017, some Members of Parliament conducted themselves in a manner contrary to the Rules of Procedure and severally prevented Parliament from conducting the Business of the day ...

8. That I know that owing to the gross misconduct by some Honourable Members of the Parliament, the Rt. Hon. Speaker of Parliament was compelled to adjourn Parliament prematurely on 26th September 2017 and exited the chamber through a back/ side entrance not ordinarily meant for the Rt. Hon. Speaker's procession.

9. That as the responsible person being deeply concerned and alarmed by the events of 21st and 26th September 2017, I determined that there was a real likelihood that the same situation or worse might arise in the next day's sitting of 27th September 2017.

10. That I also know that under Section 18(f) of the Parliament (Powers and Privileges) Act, Cap 258, it is criminal for any

person to create or join in any disturbance which interrupts or is likely to interrupt the proceedings of Parliament or a Committee while Parliament or the Committee is sitting.

11. That as a result of the disruptive events that took place in the House on the stated days, I found it necessary to request and indeed requested the Commandant of the Parliamentary Police Directorate, to stand ready to provide security backup to my security staff of the Chamber in the event that the sitting of 27th September 2017 prevent the recurrence of the events of 21st and 26th September 2017 ...

12. That I know that during the sitting of 27th September 2017, the Rt. Hon. Speaker of Parliament named and suspended 25 Honorable Members of Parliament that had disrupted Parliamentary business on 26th September 2017 and that had forced the House to adjourn prematurely and in disarray.

13. That I know that on the naming and suspension of the 25 Honourable Members of Parliament, the suspended Members of Parliament refused to vacate the House despite repeated calls by the Rt. Hon. Speaker of Parliament to these Members to leave the House.

14. That I know that the Rt. Hon. Speaker suspended the House at 3.16 pm on 27th September 2017, and in accordance with Rule 88 (6) of the Rules of Procedure of Parliament applicable at the time, directed me to evict or remove the 25 Honourable Members that she had named.

15. That ... I know that when Parliament was suspended, I called the backup security into the House Chamber to assist me evict or remove the named and some violent Members from the House.

16. That ... I know that in the process of evicting or removing the named Members of Parliament, some of their colleagues obstructed and prevented security from evicting or removing the named Members from the House and this led to a scuffle between these Members and the security backup.

17. That I know that with the back-up of police under my command, the security forces used proportionate force commensurate to the force or resistance and violent conduct employed by the named and other rowdy Members of Parliament that had grossly misconducted themselves by refusing to leave Parliament or shielding those required to leave the Chamber of Parliament and damaging Parliament property.

18. That I know that in the process of removing the suspended Hon. Members from the House, some Honourable Members of Parliament tried to resist and defy the removal of the suspended Members of Parliament and as a result security officers were injured ...”

In analyzing this evidence, the Constitutional Court by majority found that the Members of Parliament had contributed to chaos and violence that occurred in Parliament. The Court however further found that the amount and manner of force used by the security forces that were

brought in to intervene was excessive and beyond that which was necessary. The majority Justices of the Court concluded that despite the said use of excessive force, calm was restored in the House and the legislative process proceeded and the Constitutional (Amendment) Act was validly passed.

OWINY-DOLLO, DCJ stated as follows:

> **"It is important to take note of the fact that the commencement and execution of the two incidents of violence by the Parliamentarians preceded any deliberations on the Magyezi Bill. Furthermore, it is quite unfortunate that all this happened in defiance of the Speaker who spent tireless efforts to restore order in and decorum of Parliament; constraining the Speaker to order for the ejection of 25 Members whom she considered were unruly and disruptive. It is against this backdrop that the members of the UPDF intervened. Admittedly, the UPDF can intervene in matters of violence that are civil. The question is when the UPDF can justifiably and thus lawfully intervene in a situation that requires intervention by someone who has the superior force to do so.**
>
> **The evidence adduced in Court shows that what was happening in Parliament was akin to the type of brawls and fracas one would expect to happen in a bar ... For this, the Sergeant at Arms did not consider it such a security threat as would require outside intervention. It was when certain members of the House had shown defiance to the orders of the Speaker that he sought Police reinforcement. There was absolutely no**

reason for the intervention of the UPDF. Proof of this is in the fact that the members of the UPDF who intervened went barehanded in civilian attire; something they would not have done had the situation been such as to warrant their intervention."

Musoke, JCC had this to say –

"**It is evident from the Hansard and the affidavit evidence that repeated calls were made by the Rt. Hon. Speaker of Parliament to maintain order and decorum and allow the debate process to proceed.**

The Speaker then proceeded under Rule 7(2) of the Rules of Procedure of Parliament which enjoins her to preserve order and decorum in the House, and Rules 77, 79(2) and 80 to name and order the immediate withdrawal from the House of any member whose conduct is grossly disorderly, and to suspend any misbehaving member. She named 25 Members of Parliament and invited them to exit the House. She invited the Sergeant at Arms to remove them and suspended the House for 30 minutes for the Sergeant at Arms to do his work.

... What I am able to discern from the affidavit evidence on record is that in the process of execution of the order of the Rt. Hon. Speaker, there was a scuffle arising out of failure by the named Members of Parliament to exit the House, which could have caused their forceful eviction by the staff of the Sergeant at Arms and security officers, who caused the Members of Parliament subsequent arrest and detention.

I am inclined to accept the Respondent's submissions that the Speaker is mandated and conferred with authority to maintain internal order and discipline in proceedings of Parliament by means which she considers appropriate for that purpose. This would ordinarily include the power to exclude any member from Parliament for temporary periods, where the conduct or actions of such a member continuously cause any disruption or obstruction of proceedings or adversary impact on the conduct of Parliamentary business. I find that the Speaker acted within the confines of Rule 77 and 80(6) of the Rules of Parliament when she ordered for the suspension in issue.

... my view is that the forces sent by the IGP could have been enough to contain the situation under the circumstances. There was no indication that the Members of Parliament causing the tumult were armed. Any fight without fire having been discharged could be contained by the Police alone. The deployment of the army, albeit from the permanent establishment at Parliament/President's office, was in my view not justified.

The fact that the UPDF came in did not in any way negate the justifiable nature of the back-up intervention in the first place, which was necessitated by the rowdiness and violence that engulfed the House that day; and the unruly conduct of the previous sittings of Parliament. I am more fortified in my finding that the process leading to the enactment of the impugned Act was not negatively impacted because from the

Hansard reports, business went back to normal after the eviction of the offending Members of Parliament."

Kasule, JCC and **Kakuru, JCC** were in agreement with the above reasoning and findings.

Cheborion, JCC partly agreed to the effect that the violence in the House was contributed to by the violent and disorderly conduct of the Members of Parliament and that it was condemnable. The learned justice however did not agree that there was no need to call in the UPDF given the charged and volatile environment that prevailed at the time. In his view, the involvement of the UPDF was justifiable in the circumstances. He however found that despite their involvement being justified, the members of the UPDF used excessive force in stopping the scuffle in Parliament. He concluded that it was not true that Parliament was thereby made to legislate under duress or that the result of the said violence affected the validity of the resultant Act since normalcy was restored in the House.

I agree with the analysis of the evidence by the majority Justices of the Constitutional Court. I am also in agreement with their findings on this point. I however do not agree with the justification of the involvement of the UPDF as per the finding of learned Justice Cheborion, JCC. I am in agreement with the majority learned Justices that much as the situation in the House was volatile, there was no evidence that the situation was beyond what the Police Force would handle.

I must emphasize that from the material that was laid before the Constitutional Court, there was sufficient evidence to satisfy the Court that security personnel did not invade Parliament out of the blue.

Neither was there an organized plot by the state to attack Parliament and/or overthrow the constitution. To the contrary, it was clear that there was a group of members who were determined to prevent debate of the bill at all costs. There was another camp that wanted the debate to proceed. Both camps incited their supporters leading to the tension. What happened, and which was highly regrettable, was therefore due to contribution of the Members of Parliament. Given the circumstances, it is easy to understand why and how the security forces got involved in the whole process. But evidence indicates, and the Constitutional Court accordingly found, that order was restored and debate of the bill continued normally until the impugned Act was passed.

The other question is in regard to the degree and manner of force that was used.

Evidence was adduced before the Constitutional Court that the security forces that were brought into Parliament were not merely from the Parliamentary Police Directorate but included forces from the UPDF. The forces from the UPDF were neither uniformed nor conspicuously armed. The Constitutional Court fully evaluated this evidence and came to the conclusion that forces from the UPDF were deployed and participated in this exercise.

In my view therefore, though I agree that there was need to use reasonable force to effect the orders of the Speaker, the evidence and circumstances did not warrant the involvement of UPDF personnel, which involvement led to the use of brutal and unnecessary force and violence, occasioning injury and degrading treatment to some Members of Parliament. This has to be condemned; the same way the behavior by

some Members of Parliament that occasioned these incidents should be condemned.

I also agree that the said incidents of violence and use of force did not make the entire process of enacting the impugned Act unconstitutional or that it vitiated the resultant Act. The episodes occurred at particular days and time. From evidence, order was restored and debate on the bill continued. The argument for the appellants that such conduct amounted to forceful amendment of the Constitution in contravention of article 3(4) of the Constitution is not borne out in those circumstances. The violence meted to some members in the House, though illegal, was not done because anyone wanted the members to be forcefully excluded; it was because the members had defied the code of conduct of Members of Parliament and the expected decorum in the House. I do not find it acceptable either that debate in the House would have been forcefully stopped on account of some members' defiance. According to the law and established practice, the acceptable and recognized medium of debate in the house is through speech and voting. When that fails and some members resort to thwarting further debate through chaos, the law empowers the Speaker to reign in, just as she did. When the orders of the Speaker are ignored or defied, it is only expected that force would be applied. The only test at this moment is that the force has to be reasonable.

In the instant case, the test of reasonableness failed. But, as I have pointed out above, the impact could not vitiate the entire process of enacting the Bill.

The other claim was that there was also interference and violence outside Parliament in the process of consultation by Members of Parliament which restricted public participation in the process of amending the Constitution. This matter has been adequately dealt with under issue 2 above.

I am therefore in agreement with the findings of the Constitutional Court that the violence in and out of Parliament did not vitiate the entire process of enacting the impugned Act. The third issue is therefore answered in the negative.

ISSUE 4: Whether the learned Justices of the Constitutional Court erred in law when they applied the substantiality test in determining the petition.

Mr. Mabirizi, appellant in Appeal No. 02 of 2018, submitted that under Article 137 of the constitution, the Constitutional Court has no jurisdiction to apply the 'substantiality' test. He further submitted that court has no powers to determine disputes and grant remedies outside its jurisdiction. He contended that Article 137 of the Constitution gives the Constitutional Court no jurisdiction and power to determine whether the contravention affected the resultant action in a substantial manner. He further contended that its work is to determine whether the actions complained against are inconsistent with and/or in contravention of the Constitution and when it finds in favour, to declare so, give redress or refer the matter to investigation.

He concluded that since this role is limited to only determining whether there was contravention of the constitution, not the degree of

contravention, there is no way the Constitutional Court could go ahead to investigate, moreover without any pleading to that effect, whether the contravention of the Constitution affected the enacted law in a substantial manner.

Counsel for the appellants in Appeal No. 03 of 2018 (the MPs) submitted that the Justices of the Constitutional Court erred in law by applying the substantiality test in evaluating and assessing the extent to which the Speaker and Parliament failed to comply with and/or violated the Rules of Procedure of Parliament as well as the invasion of Parliament. Counsel contended that whereas its applicability is expressly provided for in electoral laws, in constitutional matters the test is totally different. The Constitution being the supreme law of the land provide for no room of any scintilla of violation.

Counsel further submitted that there cannot be room for certain individuals and agencies of government to violate the Constitution with impunity, more so the Parliament of Uganda which is charged with the duty of protecting the Constitution and promoting democratic governance in Uganda under Article 79 (3) of the Constitution. He relied on the decision of this honourable court in ***Paul K. Ssemogerere & 2 Ors versus Attorney-General SCCA. NO. 1 OF 2002;*** where it was held that the constitutional procedural requirements are mandatory.

Counsel for Uganda Law Society (Appeal No. 4 of 2018) submitted that in election matters, the substantiality test relates to standard and burden of proof whereas in constitutional matters, it is article 137(3) and (4) as well as the usual rules of evidence which apply. Counsel

argued that the application of the test to a constitutional petition was erroneous and led to a wrong decision.

In reply, the Attorney General submitted that the Constitutional Court correctly applied the substantiality test and, in so doing, reached a proper conclusion. He further submitted that the substantiality test is used as a tool of evaluation of evidence. He argued that to fault the Court for applying the substantiality test in a constitutional petition meant that a court in interpreting the Constitution should not apply a tool of evaluation in determination of the matter before it and, in his view, such a proposition would be absurd.

The Attorney General contended that the test is derived directly from the law or may be adopted by a Judge while evaluating the evidence. Therefore, whether it is constitutional court, or an ordinary suit, it is trite that the matter or matters in controversy should be determined after a proper evaluation of evidence.

He cited the case of **Nanjibhai Prabhudas & Co. Ltd versus Standard Bank Ltd [1968] E.A 670** where it was held that the Courts should not treat any incorrect act as a nullity with the consequence that everything founded thereon is itself a nullity, unless the incorrect act is of a most fundamental nature. In the view of the Attorney General, the alleged non-compliance was a procedural irregularity, which was not of a most fundamental nature as to render a law null and void.

The learned Justices of the Constitutional Court variously applied the substantiality test while assessing whether an alleged wrong or breach of a particular law or procedure was fundamental enough as to vitiate the impugned law or thee process of enacting the same.

From my observation, I believe the appellants misconstrued the way in which the Constitutional Court used the term 'substantial manner'. It cannot be true, as the argument by the appellants appears to be, that the moment the electoral laws in Uganda incorporated a provision on substantiality, the term lost its other legal and natural meaning. Substantiality has meaning and context that is distinct and detachable from election matters. The Black's Law Dictionary, 9th Edition at page 1565 defines **substance** as the **"essence of something; the essential quality of something, as opposed to its mere form."** At page 943, the Black's Law Dictionary defines substantial justice as **"Justice fairly administered according to rules of substantive law, regardless of any procedural errors not affecting the litigant's substantive rights; a fair trial on the merits."**

This context of substantive justice has since been imported into our law even before the electoral laws referred to by the appellants. The 1995 Constitution of the Republic of Uganda, in Article 126 (2) (e) provides

> *In adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principles —*
>
> *(a)…….*
>
> *(b)…….*
>
> *(c)…….*
>
> *(d)…….*
>
> *(e)* <u>*substantive justice*</u> *shall be administered without undue regard to technicalities.* (emphasis added).

Furthermore, under article 137 (5) (a) of the Constitution, there is another introduction of the word "substantial". It says:

"Where any question as to the interpretation of this Constitution arises in any proceedings in a court of law other than a field court martial, the court –

(a) may, if it is of the opinion that the question involves a substantial question of law … refer the question to the constitutional court for decision in accordance with clause (1) of this article.

It is clear from this that the concept of substantiality either of justice or of law has been introduced into our jurisprudence by the Constitution itself. The court is required to consider whether substantive justice would be denied by undue regard to technicalities; or, if an issue is raised if an issue should be referred to the constitutional court for interpretation, the court must make a finding as to whether the issue involves a substantial question of law.

Whether one baptizes this 'substantiality test' or any other name, it does not take away the duty of the court to evaluate the evidence and the law before it so as to determine whether substantive justice has been served.

In my view therefore, it is acceptable for the Court to overlook matters of form and focus on the substance of the matter before it where the situation so warrants. Where, for instance, the Court finds that there was breach of some provision of the Rules of Procedure of Parliament but the breach did not affect the process of legislation in a substantial manner, the Court is not barred from applying the substantiality test in such circumstances. Clearly, it is not intended under the law that every breach should vitiate a court process. There are some breaches that only speak to form other than the substance of a particular matter.

Mr. Lukwago argued that in line with the decision of this honourable court in ***Paul K. Ssemogerere & 2 Ors versus Attorney-General SCCA. NO. 1 OF* 2002;** constitutional procedural requirements are mandatory. That is true. But let us look at and analyse the constitutional procedural requirements that are relevant to the impugned bill and Act herein as against those that were in issue in the **Ssemogerere case**.

Under article 91 (1) of the Constitution, **"the power of Parliament to make laws shall be exercised through bills passed by Parliament and assented to by the President."** Article 94 (1) thereof empowers Parliament to make rules to regulate its own procedure including the procedure of its committees. Article 94 (4) thereof provides –

The rules of procedure of Parliament shall include the following provisions

a. *the Speaker shall determine the order of business in Parliament and shall give priority to Government business;*

b. *a member of Parliament has the right to move a private member's bill;*

c. *the member moving the private member's bill shall be afforded reasonable assistance by the department of Government whose area of operation is affected by the bill; and*

d. *the office of the Attorney-General shall afford the member moving the private member's bill professional assistance in the drafting of the bill.*

All the above provisions were, in my view, observed and satisfied in the case of the original Bill as presented by Hon. Magyezi. I have already

discussed in detail the procedure for bringing and passing a bill into an Act of Parliament for amendment of the Constitution. I have indicated that in as far as the original Constitution (Amendment) Bill was concerned, all the procedures as required by the Constitution were complied with. The amendments to that original bill that were introduced at the stage of the Committee of the Whole House, debated and passed in a manner that did not comply with the procedures set out by the Constitution were simply not passed.

It is therefore clear in my opinion that the facts and circumstances of this case are distinguishable from those in **Dr. Paul K. Ssemogerere & Anor vs AG (Supra).** In the **Ssemogerere case,** there was no certificate of compliance from the Speaker at all. In this case there was a certificate of compliance; only that some provisions in the Act had not been certified by the Speaker. The fate of those provisions has been duly determined. Secondly, in the **Ssemogerere case**, Parliament had passed an Act of Parliament that had amended a number of other provisions of the Constitution either expressly, by implication or by infection without following the procedure set out by the Constitution in respect of those other articles. This cannot be said of the amendment bill and Act that have been saved by the Court.

In the instant case, it is my opinion that none of the requisite constitutional procedures were compromised by the Constitutional Court. The Constitutional Court also found that the Rules of Procedure of Parliament were substantively observed during the enactment of the impugned Constitution (amendment) Act. The Court further held that the breaches that occurred had no substantive effect on the process of

enactment of the said Act. I agree with the learned Justices of the Constitutional Court in that regard.

In my view therefore, the criticism towards the decision of the Constitutional Court on this point was out of context and was unjustified. This is with the exception of where the learned Justices based themselves on the substantiality test as used under the electoral laws. Such reliance was erroneous on the part of the learned Justices. Otherwise, as I have indicated above, in the context of substantive justice, the test was duly applicable. Issue 4 is therefore answered in the negative.

In the result, I would dismiss this appeal with an order that each party shall meet their own costs.

The final decision of the Court therefore is as follows:

1. **By unanimous decision of the Court, the preliminary objections fail.**

2. **By unanimous decision of the Court, issue 1 and 5 on the Basic Structure Doctrine and the Removal of the Age limit fail.**

3. **By majority decision of 4 to 3, issue 2 on the process of enactment of the Act fails.**

4. **By majority decision of 4 to 3, issue 3 on the violence/scuffle inside and outside Parliament fails.**

5. **By majority decision of 4 to 3, issue 4 on the substantiality test fails.**

6. **By unanimous decision of the Court, issue 6 on the vacation of office by the President after attaining the age of 75 years fails.**

7. **By unanimous decision of the Court, issue 7 on the procedural irregularities in the Constitutional Court fails.**

8. **By majority decision of 4 to 3, the decision of the Constitutional Court is upheld. This appeal therefore fails.**

9. **With regard to costs, it is the unanimous decision of this Court that each party shall bear their own costs in this Court.**

Dated at Kampala this ..... day of ..... 2019.

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BART M. KATUREEBE
CHIEF JUSTICE