

THE NATURE AND PURPOSE OF A NATIONAL CONSTITUTION

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INTRODUCTION

Uganda is currently engaged in the process of making a new National Constitution. It is the declared policy of the NRM Government that a constitution should not be imposed on the people by force, but that the people themselves must be involved in the formulation and promulgation of their constitution. Accordingly, the Ministry of Constitutional Affairs and the Uganda Constitutional Commission were established to implement this policy by giving the people of Uganda ample opportunity to participate in the process of making a new constitution so as to come out with a popular and lasting constitution based on national consensus, and which will be respected and upheld by all the people of Uganda.

It is important to involve the people in the process of making their constitution because a constitution should reflect their ideals, values, interests and aspirations. Unless the people embrace the constitution as their own brain child, they may not respect and safeguard it. In order for the constitution to command their loyalty, respect, obedience and confidence, the people must identify themselves with it through involvement and a sense of attachment. A good and viable constitution should be generally understood and accepted by the people. The involvement of the people in constitution-making is therefore important in conferring legitimacy and acceptability to the constitution. It should also be mentioned that such a democratic and popular method of evolving a constitution serves to explode the misconception commonly held among African leaders that the power to govern means the power to make a constitution. The right to change a constitution should remain with the people, just like the right to elect their leaders.

In order to enable the people to participate meaningfully in the exercise of making a new constitution, it is necessary to educate and sensitize them through seminars, workshops and public discussions, so that they may contribute their views from a point of knowledge rather than ignorance. In general, the people should know the socio-economic and political problems the country has gone through, the root causes of these problems, possible solutions to these problems, and what the people of Uganda can do to solve the problems. In particular, the people should know what a national constitution is, what it contains, why it is important, and why we are making a new one.

This paper therefore seeks, first, to define a national constitution, and to explain its character and purpose. Secondly, it attempts to describe the various forms of constitutions. Thirdly, it discusses the need for a new constitution. Finally it outlines the aims and objectives of the new constitution.

2. WHAT IS A NATIONAL CONSTITUTION?

The word "Constitution" is derived from the verb to "constitute" which according to the Shorter Oxford Dictionary, means, among other things, "to set up, ordain, appoint, frame, form, make up or compose". The term constitution therefore literally means the action of constituting, framing or establishing something. A national constitution therefore is defined by the same dictionary as:

"The system or body of fundamental principles according to which a nation, state or body politic is constituted and governed."

But a constitution is not merely a set of fundamental principles upon which a state is organised, it is also the basic law of the country. In his book entitled Constitutional Law and Government in Uganda, Prof. Kanyeihamba emphasises this legal aspect in his definition of a constitution when he states:

"a constitution of a state consists of the basic and fundamental laws which the inhabitants of a state consider to be essential for their governance and well being. The constitution lays down political and other state institutions and distributes powers among them and puts limitations on the exercise of those powers."

From the above brief survey, we can define a constitution as a set of basic principles and laws upon which the state is organised and which establishes the major organs of government, defines their functions and powers and relationship amongst them, and sets out the rights and duties of the citizens.

A national constitution, has therefore both political and legal dimensions. In political terms, a constitution is the basic decision of a people on how it wants to live. It has been described as a socio-political frame-work through which the polity agree on who gets what, when and how. It is said to define "political space" and the relationship between the state and its citizens. It is a kind of a "power map" and "charter of government". It has been described as a social contract or covenant between the state and its subjects on the manner of governance and exercise of state power.

In legal terms, a constitution is the fundamental and supreme law of the country. It is the basic law from which all laws derive their validity. Therefore any law which conflicts with the constitution has no legal effect. A written constitution is even supreme over the legislature.

Accordingly a constitution is regarded as having legal sanctity or being sacred. It deserves the highest respect and obedience from the leaders and the people alike. It follows therefore that a constitution represents the deepest norms and ideals by which the people govern their political life.

3. PURPOSE AND IMPORTANCE OF A CONSTITUTION:

A national constitution serves a number of important functions. In the first instance, it sets out the principles and values upon which the state is organised and governed. The ideals and aspirations provide the country with direction and a vision for the future, and prescribe the legitimate purposes or interest which state power is to be used.

Secondly, a constitution provides a foundation for orderly government by defining and limiting the powers of government agencies. It establishes checks and balances within the main branches of government namely the Executive, the Legislature and the Judiciary, through the doctrine of separation of powers. A constitution establishes government based on the rule of law and which is limited by law. It thus provides a legal basis for Governmental operations and makes constitutional government possible. It therefore prevents anarch or dictatorial government which knows no legal bounds.

A constitution acts like peace treaty. It is negotiated by all the people including the various social forces. It lays down arrangements between conflicting socio-political groups or interests in order to restore peace. As a national socio-political framework or contract, it binds all the parts of the country and the people together giving them a sense of belonging and national conscienceness, and thus consolidating national unity.

A constitution is an important democratic institution. It is a viable instrument of democratisation. Through the establishment of democratic principles and institutions, a constitution provides peaceful means of solving social conflicts instead of resorting to violence or armed conflict. For this very reason a constitution is an important institution in promoting peaceful change of government by following accepted democratic principles for acquisition and relinquishment of state power as laid down in the constitution.

Finally a constitution safeguards the basic rights and freedoms of the people by incorporating a Bill of Rights, and providing the machinery for their enforcement through an independent judiciary and other institutions. Apart from protecting the integrity of the human personality, the free exercise of human rights ensures that people can fully participate in their governance and hence control their destiny. It can therefore be concluded that a constitution is an indispensable instrument for good and modern governance.

4 CONTENTS OF A CONSTITUTION:

What then does a Constitution contain? As I said earlier on, a Constitution sets out the principal organs of the State and defines their powers. These organs are the executive, the legislature and the judiciary. The legislature makes law, and the judiciary interpretes and administers the laws. Within the executive branch you have the Presidency whose qualifications, election, powers and removal must be defined. There are the Ministers, the Public Service, the Armed Forces, the Police and other Constitutional Bodies and Offices like Electoral Commission, Public Service Commission, the Auditor General, whose functions and powers must be defined. There is the legislature or Parliament (now called NRC) whose powers composition, qualifications for members and election of members must be set out. And last there is the judiciary (or Judicature) consisting of courts, judges and magistrates, whose jurisdiction or powers, appointment, privileges are laid down to safeguard their independence from undue interference by the executive or the legislature.

A Constitution also contains provisions defining citizenship, how it is acquired and how it may be lost. There are also provisions setting out the fundamental rights and freedoms which are inborn and inalienable rights of every human being. These include the right to life and liberty, the right to property, to privacy etc freedom of expression, association and of conscience or religion, freedom of movement, right to a fair trial, right not to be subjected to unhuman and degrading treatment.

The Constitution may contain provisions describing the territorial limits of the country, its official or national language, how land is administered, control of public finance, handling of foreign relations like treaties, and it may also have Directive Principles of State policy setting out the political, social, economic and cultural objectives or ideals of the nation.

And lastly, a Constitution may also set out the duties of a citizen e.g. to respect the national flag and national anthem, to respect State Property, to defend the nation when called upon to do so, to defend the Constitution, and to contribute to the development of the nation.

The contents of a particular Constitution may be dictated by the history of the country and its political problems. A country which has emerged from war may wish to guarantee peace and stability. A country which has experienced divisionism or separatism may wish to promote more national unity through a Unitary system or it may wish to recognise regional autonomy. A Constitution may also be influenced by the cultural and traditional values of the people. This may lead to the recognition and preservation of certain aspects of culture which are fundamental to the well being of the people. The Constitution must inevitably be influenced by the contemporary views and aspirations of the people. These may reflect their fundamental values and philosophy of life. Today many Ugandans are yearning for peace, freedom, unity, democracy, justice and a reasonable standard of life. The new Constitution must address these and related issues.

5. TYPES OF CONSTITUTIONS:

In framing Constitutions various models or forms may be used to articulate the agreed values, ideals, and principles. A country may choose a Presidential system of Government instead of Parliamentary one. Under a Presidential System of Government the three organs of Government are sharply separated by observing the doctrine of separation of powers which keeps each organ in its own sphere or responsibility. Thus the President and his Ministers are not members of Parliament. The President is normally elected nationally and is generally accountable to the people. A good example where a Presidential System of Government operates is the United States of America.

The opposite is the Parliamentary system or "the Westminster Model" where the Chief Executive, the Prime Minister is a member of Parliament, and so are his Ministers and are all collectively responsible to Parliament. A good example of this type of constitution is India or the 1962 Constitution of Uganda.

A country may adopt a Republican form of Constitution or a monarchical one. Republicanism rejects rule by divine right or by monarchy or king, and advocates that sovereignty lies with the people who have the right to choose their leaders. Most countries are now republics, USA, France, West Germany, Kenya, Tanzania, etc are all republics. On the other hand a monarchical constitution recognises kings or hereditary rulers as national leaders, in most cases as heads of states, e.g. in Britain, Malaysia, Scandinavian and Benlux countries. The 1962 Constitution of Uganda is another example of a monarchical Constitution because it recognized kings not only as traditional rulers but also as political rulers since any of them could become President of the country.

A country may also choose a federal or unitary Constitution. In a federal Constitution the powers of government are divided between the central government and the constituent governments or states in such a way that each constituent part is legally independent within its own sphere. The legislatures of the federal and state governments have powers to pass laws in specified limited areas. But each is sovereign in its own areas, though their powers are limited. But neither is subordinate to the other; both are coordinate.

Federal Constitutions can be found where different parts which have enjoyed autonomy or independence for a long time decide to come together and unite in a single nation e.g. United States of America, Canada, Federal Republic of Germany. They can also be found where widely different tribes and peoples are grouped together under a single unit e.g. in Switzerland or Nigeria. A federal Constitution may also arise out of a fear of domination by a section of the population by larger communities i.e. as means of protecting minorities.

A Unitary Constitution is almost the opposite of a federal one. Under a Unitary Constitution, the state is organised as a single unified government and constituent districts hold power at the discretion of the central government. The central government is therefore supreme and there are no subsidiary sovereign bodies. But the country is normally divided into local units which are given some functions to carry out on matters affecting the people directly. The 1967 Constitution of Uganda is a good example of a Unitary system of government while the 1962 is an example, though not so good, of a Federal Constitution. Other examples of Unitary Constitutions are France and Britain.

Both the Federal and Unitary forms of government have advantages and disadvantages. The federal system accommodates the interests, cultures and traditions of various communities in the country and allows local initiatives for development. But it is an expensive system to operate because of the multiplicity of governments and agencies, and it can also militate against national unity because of divided loyalties.

The Unitary system is simple and cheaper to administer. It allows for national planning and allocation of resources at national level and provides a focus for national unity. But this system can be rigid and fail to respond to local needs, thus killing local initiatives for development.

Because of the difficulties seen in the federal and unitary systems, there is another form of constitution based on devolution of powers and which has basically a Unitary Government with a strong decentralised local governments whether at district or regional levels e.g. USSR, Yugoslavia, and Tanzania.

These forms are useful in studying various systems and Constitutions, but it is more important to understand the principles and ideals upon which they are based so that one can address the substance rather than form of these Constitutions or systems. One has also to realize that what a Constitution says and what happens in practice are not always the same things.

Finally there is the question of how the Constitution adapts to changing conditions of a given society. Normally, this is taken care of by making provisions for amendment of the Constitution by the legislature. Provisions for amendment may be rigid or flexible. They are rigid if it is difficult to amend the constitution e.g. by requiring $2/3$ majority or referendum. It is flexible if the method of amendment is easy by requiring a simple majority. A Constitution may contain both flexible and rigid method of amendment depending on the importance attached to the provision. In this way stability and change are harmonised, and the Constitution retains its basic structure, ideals and authority while recognizing and embracing change and development for its own preservation and for the good of the society it serves.

6. WHY DO WE NEED A NEW CONSTITUTION?

Uganda has had three Constitutions since it attained nationhood. These are the Independence Constitution of 1962, the "Pigion Hole" Constitution of 1966, and the Republican Constitution of 1967. The 1966 Constitution was merely an interim one and was replaced by the 1967 Constitution. The main Constitutions Uganda has had are therefore the 1962 and 1967 Constitutions. The 1962 Constitution was abrogated in 1966 and replaced by the 1966 Constitution. This later Constitution was replaced by the 1967 Constitution. The 1967 Constitution has gone through various trials and tribulations by successive regimes but it has survived complete abrogation till this day. Instead it has suffered frequent suspensions and amendments since 1971. In law it is still the Constitution of Uganda.

Current public opinion is sharply divided on which Constitution the country should be governed. There are three positions taken. There are people who would like the 1962 Constitution restored as it was, because to them that is the only legitimate Constitution Ugandans negotiated and agreed to have. They argue, it was illegally abrogated without their consent. There are those who maintain that there is nothing wrong with the 1967 Constitution on which the country has been governed for so long, and that what is needed is merely to amend it to bring it in line with current aspirations. There are those who believe that none of the two Constitutions can serve present day Uganda, and that what is needed is to make a new Constitution but picking out what is good from the past Constitutions.

These divergent positions reveal our failure to agree on the socio-political framework which should form the basis of our governance. In other words there is no national consensus on what type of Constitution Uganda should have. The lack of general agreement has been caused partly by our colonial past which was based on divide and rule, a policy which emphasised and exploited our ethnic, religious social and political differences. We have therefore to discover our common interests and harness our pluralism for nation building.

The two Constitutions themselves have not been spared serious criticisms. It is pointed out that the 1962 Constitution was made in a hurry and in a foreign country mainly for purpose of securing independence. It is argued that few people participated in its making and that the degree of participation lacked depth and foresight since political awakening in the country was low, even among the elite. In the result some temporary compromises were made resulting in unholy-alliances like the UPC/KY Alliance which could not stand the test of time. It failed to harmonise republicanism and monarchism.

Equally the 1967 Constitution was not made under an ideal environment. There was a state of emergency.

The term of office of the UPC Government had expired though it is arguable that it had been extended in 1966 following the Obote coup d'etat or revolution as the High Court called it in Matovu Case. It is true there was widespread discussion of the Constitutional proposals in the media and in the National Assembly, but the majority of the people were not consulted on the drastic changes that the Constitution introduced like abolition of kingdoms, federalism and concentration of too much in the President. It is therefore maintained that the 1967 was made by a few people to protect their own interests.

As regards the contents of the Constitutions, it is argued that the 1962 Constitution merely endorsed the historical disparity in the treatment of different parts of Uganda. Consequently some areas had federal status like Buganda others semi-federal status like Bunyoro, Toro and Ankole, others territory status like Busoga, and the rest of the districts unitary status. Therefore some areas had special or privileged status which was resented by the others. The arrangement was a hotchpotch formula which could not build a united country. It is for this reason that the 1962 Constitution has been criticised as having merely confirmed the colonial order. No wonder it introduced a West Minister Model of government.

The main criticism about the 1967 Constitution is that although it created parity of treatment between different districts, it concentrated too much power in the President and the Central Government. The President who had combined the roles of President and Prime Minister was given power to promulgate ordinances when National Assembly was not sitting. He had power to appoint almost all public officers as the Public Service Commission became merely advisory. There was no requirement for popular election of the President. He merely assumed power if his party won elections. Local Governments were not given power to elect their leaders to carry out development or administer social services without direction from the centre. This strangled local initiatives and development.

Finally it is argued that there is a need for a new political order in the country. Drastic changes have taken place in the country since independence. There is even need to correct what went wrong during colonialism which past constitutions did not correct. There are global changes taking place throughout the world, and Uganda should not be taken un-aware by the wind of change. The constitution requires to address modern and current issues which have cropped up like the position of the army, protection of environment, status of women and rights of children, national ideals and objectives, democratisation, pluralism, development and so forth. There is therefore a need for socio-economic and political trans-formation. There is a need for a fresh start and now is the appropriate time when the government is seeking to introduce a fundamental change in the politics of Uganda.

7. AIMS AND OBJECTIVES OF THE NEW CONSTITUTION:

As you are no doubt aware Uganda has gone through a very traumatic history since independence. This tragedy has left a multitude of scars on the face of the country and its people. Our political institutions have been run down, our economy has been plundered, our people have been brutalised and improversed. Our social services have been neglected and destroyed. Peace and stability have perpetually eluded us. The unity of the people of Uganda has been undermined by divisive elements. The advancement of our people has been hampered by bad leadership based on greed selfishness intolerance, factionalism, dictatorship and militarism. The country has continued to experience both political and economic crises.

The new constitution is intended to address these problems and crises and reverse the trend. Most of the aims and objectives of the new constitution are set out in section 4 of the Uganda Constitutional Statute 1988. These objectives are as follows:

- (a) To ensure that Uganda is an independent and sovereign country within its existing territory;
- (b) To set up a free and democratic system of government that will enable the people to enjoy their basic rights and freedoms;
- (c) To provide for workable political institutions that will enable the people to reach general agreement on important issues and provide for change of government in an orderly manner;
- (d) To identify and divide powers and duties of the Executive, Legislature and Judiciary in such a way that they can check on and balance each other to ensure that no branch exceeds or abuses the powers given to it;
- (e) To try to provide for a system of government which enables the people to play an active role in the governance of their country;
- (f) To try to develop a system of election which is democratic free and fair and which will ensure that those elected to represent the people in the National Legislature and lower levels are true representatives of the people;

- (g) To set up and provide ways of ensuring that those who hold public offices and political posts are answerable to the people for their actions;
- (h) To ensure that the judiciary is independent.

In addition to the above nine objectives, the current constitutional debate has identified four more goals which the new constitution should serve. These are:

- (i) To restore peace, security and stability in Uganda;
- (ii) To foster unity and national consciousness amongst the people of Uganda;
- (iii) To promote socio-economic development and social justice in the country;
- (iv) To promote regional and international co-operation and the maintenance of peace and security in the world.

These objectives are noble, democratic, just, humane, dynamic, progressive and relevant to our socio-economic and political transformation process. They raise important constitutional issues which Ugandans must discuss freely, frankly, objectively and constructively. The challenge that faces Ugandans is to agree on how to translate these lofty ideals and objectives into reality. They are being called upon to suggest concrete measures which will ensure their realisation. By so doing they will be able to emerge with a socially relevant constitution tailored to their needs and interests. That will be a popular and enduring constitution which will provide a sound foundation for building a new Uganda.

TOWARDS A NEW CONSTITUTIONAL ORDER IN UGANDA:

THE MEANING, NEED AND OBJECTIVES OF THE NEW CONSTITUTION

A Paper presented by the Hon. Mr. Justice B J Odoki,
Chairman of the Uganda Constitutional Commission, at
a Constitutional Seminar for members of the National
Resistance Army Council held at the International
Conference Centre on 8 - 10 January, 1991

WHAT IS A NATIONAL CONSTITUTION?

It will be useful to start this paper by defining what a Constitution means. Definitions can be regarded as necessary evils in intellectual discussions. They are necessary because they help to explain an idea or concept in concise terms. But they are evils in that they can be controversial or contentious so that normally there is no general agreement on most of them. As such they are usually taken to serve the interests of the user and to be restricted to the context and circumstances in which they were propounded. Therefore they have to be accepted with caution. The definition of a national Constitution is no exception.

The word "Constitution" is derived from the verb to "constitute." According to the Shorter Oxford Dictionary, the word "constitute" means among other things to set up, ordain, appoint, frame, form, make up or compose. The term "Constitution" therefore literally means the action of constituting, framing or establishing something. The same Dictionary however gives a good general definition of a national Constitution as being,

"The system or body of fundamental principles according to which a nation, state or body politic is constituted and governed."

The above definition is more or less similar to the one provided by the Encyclopaedia Britannica, which defines a Constitution as;

"both the system by which a country is governed and the particular document or collection of documents establishing the basic rules and institutions of the political system."

The only new element introduced in the second definition is that of the form of a Constitution as a document. It is true that most modern constitutions are now written following the example of the United States in 1787, and only a few countries like Britain and Israel have unwritten Constitutions.

In his book entitled Modern Constitutions, Prof. Wheare introduces yet another element in the definition of a Constitution:

"The constitution then for most countries in the world is a selection of the legal rules which govern the government of that country and which have been embodied in a document."

The new element introduced is the legal character of the Constitution, as a body of legal rules or laws. This legal aspect or status of a Constitution is an important characteristic of a modern constitution which distinguishes it from a mere political charter. Thus Professors Wade and Philips in their well known text book on Constitutional Law state:

"By a Constitution is normally meant a document having a special legal sanctity which sets out the framework and principal organs of the government of a state and declares the principles governing the operation of those organs."

And Prof. Kanyeihamba in his book entitled Constitutional Law and Government in Uganda, is in general agreement with the two authors when he writes:

"a Constitution of a state consists of the basic and fundamental laws which the inhabitants of a state consider to be essential for their governance and well being. The Constitution lays down political and other state institutions and distributes powers among them and puts limitations on the exercise of those powers."

The list of definitions could be longer but I believe that those quoted above will suffice in leading us to formulate a working definition of a national Constitution. For the purpose of this paper, a Constitution can be defined as a set of basic principles and laws upon which a state is organised and which establishes the major organs of government, defines their functions and powers and the relationship amongst them and sets out the rights and duties of the citizens.

A national Constitution has therefore political and legal dimensions. In political terms a Constitution is the basic decision of a people on how it wants to live. It has been described as a socio-political framework by which the polity define who gets what, when and how. It is said to define "political space" and relationship between the state and its citizens. It is a kind of "power map" and a charter of government. It has been described as a social contract or covenant between the state and its subjects on the manner of the exercise of state power. In legal terms a Constitution is the fundamental and supreme law of the country. It is the basic law from which all laws derive their validity. Therefore any law which conflicts with the Constitution has no legal effect. Accordingly a Constitution is regarded as having legal sanctity or being sacred. It deserves the highest respect and obedience by the leaders and the people alike.

As it can be seen a Constitution is an indispensable instrument for good governance. A Constitution provides a foundation for orderly government and establishes government limited by law and based on the rule of law. It provides a means of solving social conflicts by peaceful means through democratic institutions. As a national socio-political contract or framework, it binds the people together and promotes national unity. It safeguards the basic rights and freedoms of the people. It provides a vision for the future by incorporating ideals and aspirations of the people.

CONTENTS OF A CONSTITUTION:

What then does a Constitution contain? As I said earlier on, a Constitution sets out the principal organs of the State and defines their powers. These organs are the executive, the legislature and the judiciary. The legislature makes law, and the judiciary interpretes and administers the laws. Within the executive branch you have the Presidency whose qualifications, election, powers and removal must be defined. There are the Ministers, the Public Service, the Armed Forces, the Police and other Constitutional Bodies and Offices like Electoral Commission, Public Service Commission, the Auditor General, whose functions and powers must be defined. There is the legislature or Parliament (now called NRC) whose powers composition, qualifications for members and election of members must be set out. And last there is the judiciary (or Judicature) consisting of courts, judges and magistrates, whose jurisdiction or powers, apppointment, privileges are laid down to safeguard their independence from undue interference by the executive or the legislature.

A Constitution also contains provisions defining citizenship, how it is acquired and how it may be lost. There are also provisions setting out the fundamental rights and freedoms which are inborn and inalienable rights of every human being. These include the right to life and liberty, the right to property, to privacy etc freedom of expression, association and of conscience or religion, freedom of movement, right to a fair trial, right not to be subjected to unhuman and degrading treatment.

The Constitution may contain provisions describing the territorial limits of the country, its official or national language, how land is administered, control of public finance, handling of foreign relations like treaties, and it may also have Directive Principles of State policy setting out the political, social, economic and cultural objectives or ideals of the nation.

And lastly, a Constitution may also set out the duties of a citizen e.g. to respect the national flag and national anthem, to respect State Property, to defend the nation when called upon to do so, to defend the Constitution, and to contribute to the development of the nation.

The contents of a particular Constitution may be dictated by the history of the country and its political problems. A country which has emerged from war may wish to guarantee peace and stability. A country which has experienced divisionism or separatism may wish to promote more national unity through a Unitary system or it may wish to recognise regional autonomy. A Constitution may also be influenced by the cultural and traditional values of the people. This may lead to the recognition and preservation of certain aspects of culture which are fundamental to the well being of the people. The Constitution must inevitably be influenced by the contemporary views and aspirations of the people. These may reflect their fundamental values and philosophy of life. Today many Ugandans are yearning for peace, freedom, unity, democracy, justice and a reasonable standard of life. The new Constitution must address these and related issues.

3. TYPES OF CONSTITUTIONS:

In framing Constitutions various models or forms may be used to articulate the agreed values, ideals, and principles. A country may choose a Presidential system of Government instead of Parliamentary one. Under a Presidential System of Government the three organs of Government are sharply separated by observing the doctrine of separation of powers which keeps each organ in its own sphere or responsibility. Thus the President and his Ministers are not members of Parliament. The President is normally elected nationally and is generally accountable to the people. A good example where a Presidential System of Government operates is the United States of America.

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Federal Constitutions can be found where different parts which have enjoyed autonomy or independence for a long time decide to come together and unite in a single nation e.g. United States of America, Canada, Federal Republic of Germany. They can also be found where widely different tribes and peoples are grouped together under a single unit e.g. in Switzerland or Nigeria. A federal Constitution may also arise out of a fear of domination by a section of the population by larger communities i.e. as means of protecting minorities.

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Both the Federal and Unitary forms of government have advantages and disadvantages. The federal system accommodates the interests, cultures and traditions of various communities in the country and allows local initiatives for development. But it is an expensive system to operate because of the multiplicity of governments and agencies, and it can also militate against national unity because of divided loyalties.

The Unitary system is simple and cheaper to administer, it allows for national planning and allocation of resources at national level and provides a focus for national unity. But this system can be rigid and fail to respond to local needs, thus killing local initiatives for development.

Because of the difficulties seen in the federal and unitary systems, there is another form of constitution based on devolution of powers and which has basically a Unitary Government with a strong decentralised local governments whether at district or regional levels e.g. USSR, Yugoslavia, and Tanzania.

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4. WHY DO WE NEED A NEW CONSTITUTION?

Uganda has had three Constitutions since it attained nationhood. These are the Independence Constitution of 1962, the "Pigion Hole" Constitution of 1966, and the Republican Constitution of 1967. The 1966 Constitution was merely an interim one and was replaced by the 1967 Constitution. The main Constitutions Uganda has had are therefore the 1962 and 1967 Constitutions. The 1962 Constitution was abrogated in 1966 and replaced by the 1966 Constitution. This later Constitution was replaced by the 1967 Constitution. The 1967 Constitution has gone through various trials and tribulations by successive regimes but it has survived complete abrogation till this day. Instead it has suffered frequent suspensions and amendments since 1971. In law it is still the Constitution of Uganda.

Current public opinion is sharply divided on which Constitution the country should be governed. There are three positions taken. There are people who would like the 1962 Constitution restored as it was, because to them that is the only legitimate Constitution Ugandans negotiated and agreed to have. They argue, it was illegally abrogated without their consent. There are those who maintain that there is nothing wrong with the 1967 Constitution on which the country has been governed for so long, and that what is needed is merely to amend it to bring it in line with current aspirations. There are those who believe that none of the two Constitutions can serve present day Uganda, and that what is needed is to make a new Constitution but picking out what is good from the past Constitutions.

These divergent positions reveal our failure to agree on the socio-political framework which should form the basis of our governance. In other words there is no national consensus on what type of Constitution Uganda should have. The lack of general agreement has been caused partly by our colonial past which was based on divide and rule, a policy which emphasised and exploited our ethnic, religious social and political differences. We have therefore to discover our common interests and harness our pluralism for nation building.

The two Constitutions themselves have not been spared serious criticisms. It is pointed out that the 1962 Constitution was made in a hurry and in a foreign country mainly for purpose of securing independence. It is argued that few people participated in its making and that the degree of participation lacked depth and foresight since political awakening in the country was low, even among the elite. In the result some temporary compromises were made resulting in unholy-alliances like the UPC/KY Alliance which could not stand the test of time. It failed to harmonise republicanism and monarchism.

Equally the 1967 Constitution was not made under an ideal environment. There was a state of emergency.

The term of office of the UPC Government had expired though it is arguable that it had been extended in 1966 following the Obote coup d'etat or revolution as the High Court called it in Matovu Case. It is true there was widespread discussion of the Constitutional proposals in the media and in the National Assembly, but the majority of the people were not consulted on the drastic changes that the Constitution introduced like abolition of kingdoms, federalism and concentration of too much in the President. It is therefore maintained that the 1967 was made by a few people to protect their own interests.

As regards the contents of the Constitutions, it is argued that the 1962 Constitution merely endorsed the historical disparity in the treatment of different parts of Uganda. Consequently some areas had federal status like Buganda others semi-federal status like Bunyoro, Toro and Ankole, others territory status like Busoga, and the rest of the districts unitary status. Therefore some areas had special or privileged status which was resented by the others. The arrangement was a hotchporch formular which could not build a united country. It is for this reason that the 1962 Constitution has been criticised as having merely confirmed the colonial order. No wonder it introduced a West Minister Model of government.

The main criticism about the 1967 Constitution is that although it created parity of treatment between different districts, it concentrated too much power in the President and the Central Government. The President who had combined the roles of President and Prime Minister was given power to promulgate ordinances when National Assembly was not sitting. He had power to appoint almost all public officers as the Public Service Commission became merely advisory. There was no requirement for popular election of the President. He merely assumed power if his party won elections. Local Governments were not given power to elect their leaders to carry out development or administer social services without direction from the centre. This strifflled local initiatives and development.

Finally it is argued that there is a need for a new political order in the country. Drastic changes have taken place in the country since independence. There is even need to correct what went wrong during colonialism which past Constitutions did not correct. There are global changes taking place throughout the world, and Uganda should not be taken unaware by the wind of change. The constitution requires to address modern issues and current issues which have cropped up like the position of the army, protection of environment, status of women and rights of children, national ideals and objectives, democratisation, pluralism, development and so forth. There is therefore a need for socio-economic and political transformation. There is a need for a fresh start and now is the appropriate time when the Government is seeking to introduce a fundamental change in the politics of Uganda.

5. AIMS AND OBJECTIVES OF THE NEW CONSTITUTION

In framing the new Constitution the Government has given certain broad guidelines which form some of the fundamental principles and objectives of the new Constitution. These are contained in section 4 of the Uganda Constitutional Commission Statute, and are as follows:

- (a) To ensure that Uganda is an independent and sovereign country within its existing territory;
- (b) To set up a free and democratic system of government which will enable the people of Uganda to enjoy their basic rights and freedoms;
- (c) To provide for workable political institutions that will enable the people to reach general agreement on important issues and provide for change of government in an orderly manner;

- (d) To identify and divide powers and duties of the Executive, Legislature and Judiciary in such a way that they can check on and balance each other to ensure that no branch exceeds or abuses the powers given to it;
- (e) To try to provide for a system of government which enables the people to play an active role in the governance of their country;
- (f) To try to develop a system of election which is democratic free and fair and which will ensure that those elected to represent the people in the National Legislature and lower levels are true representatives of the people;
- (g) To set up and provide ways of ensuring that those who hold public offices and political posts are answerable to the people for their actions;
- (h) To ensure that the judiciary is independent.

In addition to the nine objectives specifically set out in the Statute, I wish to add the following five aims which I believe the new Constitution should endeavour to achieve:

- (i) To restore peace, security and stability in Uganda;
- (ii) To foster unity and national consciousness amongst the people of Uganda;
- (iii) To promote socio-economic development and social justice in the country;
- (iv) To establish measures that are designed to safe-guard the Constitution and the creation of a culture of Constitutionalism
- (v) To promote regional and international co-operation and respect for international law.

(a) Guarantee National Independence and Territorial Integrity:

The first objective of the new Constitution is to guarantee the national independence and territorial integrity and sovereignty of Uganda. Although Uganda may have acquired only flag independence in 1962, nevertheless it did recover the right to self-determination which is highly cherished. The right of Uganda to exist as a nation - state capable of deciding on its own affairs including its political and economic systems without interference and direction from outside must be carefully guarded. Secondly there is a need to keep Uganda as one peaceful and united territorial entity and not to allow it disintegrate or any part of it annexed by a foreign power. The role of the army in maintaining the territorial integrity is well recognised especially against external aggression. But the army has played and continues to play crucial roles in the politics of Africa. The type of army we should have and the role it should play in the future politics of Uganda is one of the Constitutional issues to be determined.

(b) Promote National Unity and Consciousness:

The question of national unity is a major problem facing Uganda. The question is related to the process of nation-building. The "territorial shell" known as Uganda was put together during the colonial period out of many different nationalities or tribes. The colonial regime encouraged the differences between the various nationalities through their policy of divide and rule. Many Post colonial leaders exploited such differences based on tribe, religion and other sectarian practices to acquire and retain power.

How can we translate the current desire of unity in diversity into real terms? How can we evolve new politics which avoids divisions based on ethnic or religious difference? How can we promote our diverse cultural values without causing conflicts with national aspirations and modern realities?

Can we evolve a national language to promote our unity and national identity? How should we determine who is or should be a Ugandan citizen? There is a need to promote factors which can enhance unity and national consciousness, drawing on our common history, culture, economic realities, and other common interests. Therefore we have to identify our common interests that bind us together as Ugandans, build a new national ethic and vision and agree on a new social contract based on principled compromises and genuine interests. The process of national-building will be further advanced by building truly national institutions, promoting national reconciliation and rehabilitation and ensuring even development and equitable distribution of national resources.

(c) Establish Democratic System of Government:

The Constitution should establish a free and democratic system of government that will guarantee the fundamental rights and freedoms of the people of Uganda. In Constitutional theory democracy goes hand in hand with human rights. Democracy has been defined as a government of the people by the people and by the people. It is a philosophy of political organisation. In terms of Uganda what type of democracy should be established? Is it Parliamentary or representative democracy or is it participatory or popular democracy or is it both? It is well known that in Western liberal democracies emphasis is placed on representative democracy. In Uganda there is a young and thriving popular system of participatory democracy through the RC System. What is the future of this type of democracy and how will it relate to political parties if they form part of future political organisation in the country? Political parties have played a controversial role in the politics of Uganda. What is the future of pluralism or multi-party politics in Uganda? Why has genuine democracy evaded Ugandans even under multiparty political system?

Democracy is one of the most important constitutional issues facing Uganda. As it has been said democracy is a frequent bed-fellow of constitutionalism, if not a lawful spouse. Constitutionalism is a theory concerned with limited government and individual rights, both of which are attributes of a democratic government. Other elements of constitutionalism include accountability of government through periodic elections, rule of law, separation of powers, and an independent judiciary. The challenge of Ugandans is to find a formula which will return power to the people to freely choose their leaders and effectively participate in the government, in order to forestall dictatorship and violation of their basic human rights. In addition the new Constitution must also address the issue of the form of government. The form may be unitary, federal or based on devolution of powers or decentralisation. The form of government is a major question that the people of Uganda have to agree upon in order to consolidate our national unity while at the same time allowing the various areas and regions some freedom or autonomy to develop themselves as best as they can through local initiatives.

(d) Create Democratic Institutions for Establishing Consensus:

The new Constitution should create viable institutions which will ensure maximum consensus and orderly succession of Government. This is a very important goal. There is a need for political institutions which are democratically elected and that are accountable to the people. These institutions must be capable of representing the views of the people effectively. They must provide a forum and opportunity for discussion debate and allow market place of ideas to flourish. They must mirror the peoples views on given issues at given times. Indeed the Constitution is also required to develop a system which will ensure peoples participation in the governance of their country.

Consensus is the idea that society's widely shared views should give content to the Constitution. It means widely shared fundamental values or common interests. It is a reference to the people. One of the reasons why Uganda has not had political stability has been the failure to obtain consensus from the people on how to resolve the perennial social conflicts which in most cases have been resolved by resort to violence. It is therefore a great challenge to the people of Uganda to devise political institutions which can provide a peaceful medium of solving these conflicts through consensus. The political institutions the people of Uganda agree on must be capable of ensuring peaceful change of government.

(e) Develop Free and Fair Electoral System

This leads me to the next basic goal which is to develop a democratic free and fair electoral system that will ensure true peoples representation in the legislature and at other levels. Fair and free elections is one of the fundamental instruments of guaranteeing democracy and peaceful change of government. Claims about rigging of elections account for a high percentage of military coup d'etats and civil-wars in Africa. The people of Uganda must address this issue to evolve a genuine democratic system which is free of corruption fraud and manipulation of the masses. What type of electoral system should be established? How should elections be conducted and by what authority or institution? What safeguards should be built into the system to ensure fair-play and integrity of the process?

(f) Safeguarding Basic Human Rights:

Ugandans have in the recent past experienced some of the grossest violations of human rights in Africa. This is not because basic rights and fundamental freedoms were not recognised in the Constitution but because first the ruling regimes at the time did little to safeguard and protect them and the people were too weak and ignorant to fight for them.

How should the new Constitution address this issue? How should the basic rights be protected and enforced? How can we address the causes which led to their violation? What institutions should be established for this purpose? Do we need a permanent Human Rights Commission, or a Human Rights Court or a Constitutional Court? What about the content of rights? Do we need to include special rights for women, children and other disadvantaged groups?

(g) Guarantee of Judicial Independence

The new Constitution should guarantee the independence of the judiciary. Independence of the Judiciary is a cornerstone of any democratic government. Without it there is no rule of law and without the rule of law basic rights cannot be enforced. The independence of the Judiciary also enables meaningful judicial review to take place, that is the power of the courts to rule on the Constitutionality of laws and government actions. The Commission will be anxious to receive views on what measures should be incorporated in the Constitution to ensure that the judiciary remains independent and administers justice impartially to all Ugandans without fear or favour. What type of judicial institutions and judges do we need in Uganda? How can we ensure that justice is not only done but is seen to be done? How can we make justice more accessible, cheaper, simpler and speedier?

(h) Establish Separation of Powers and Provide Checks and Balances:

The new Constitution should recognise and demarcate the division of responsibility among state organs of the executive, the legislature and the judiciary, and to create checks and balances between them. This objective concerns the doctrine of separation of powers which was originally propounded by Montesquieu, as a means of avoiding tyranny.

It was feared, as it is still today, that if power was concentrated in one organ, it would have absolute power which would corrupt it absolutely thus resulting into dictatorship. The checks and balances are there to ensure that each branch is kept within its powers and is accountable for its actions. In most political systems the executive is a very powerful branch and tends to acquire more powers with time. There is therefore a need to tame the executive so that it does not become despotic and oppressive. But how is the executive to be tamed in the new Constitution while at the same time ensuring that the Government has sufficient powers to govern?

(i) Provide for Accountability of Leaders:

The new Constitution must address the principle of accountability of public officers and politicians. This issue relates mainly to the Leadership Code, as well as to the need for leaders to be accountable to the people for their conduct and actions. There must be public institutions to enforce discipline, respectable conduct and to watch over the official activities of the various leaders. Uganda has suffered in the past from bad leadership which mismanaged and plundered the economy through corruption and abuse of office. This objective is intended to introduce into the constitution measures designed to promote clean and honest leadership in the country. At present there are a number of such measures to deal with this problem e.g. the office of the Inspector General of Government (IGG), the Public Accounts Committee (PAC), and the proposed Leadership Code Bill. Ugandans will have to decide whether these measures are adequate or if they should be incorporated in the new Constitution.

(j) Restore Peace and Security:

Peace and security have eluded Uganda for over twenty years. There have been intermittent civil wars since 1966. These wars have led to much destruction of life and property and created a state of instability and insecurity. Some of the insecurity was state inspired while ordinary criminal elements took advantages of the situation. Without a peaceful and secure environment, no meaningful development can take place. Therefore there is a need to find a formula which will restore permanent peace and security in the country.

(k) Promote Socio-Economic Development:

Uganda is one of the poorest countries in the world. There is therefore a need to address the problem of a back-ward or under-developed economy which is heavily dependant on the economies of the developed world. There is a need to redress the equilibrium in order to secure an independent economy for as it has been said, political independence is meaningless without economic independence. What strategies should be adopted to achieve the goal? To what extent should the economy be liberalised? Should we adopt the strategy of mixed economy? The Constitution is important in this areas because it provides for the economic objectives of the state, protection of right to property and freedom of economic activity, management of natural resources like land, minerals, control of public finance, taxation and planning.

Social services in the country have been broken down. Ignorance, disease and poverty are still the major characteristics of the socio-economic well-being of our society. Therefore illiteracy, malnutrition, lack of medicare, clean water, suitable housing and other essential services is the order of the day. The situation is worse in war ravaged areas which require urgent rehabilitation. The Constitution should provide some social objectives which will guarantee improved social services to the people.

(1) Foster Regional and International Co-operation:

Uganda has been a laughing stock in the international community in the recent past. It was the "sick man of Africa." That image must be changed because this country deserves to be the "Pearl of Africa." Uganda needs to put its house in order so that it can play its rightful role in the international community. Uganda is not an island and there is increasing interdependence and co-operation amongst the nations of the world. Therefore there is a need to formulate policy objectives which can protect Uganda's independence and sovereignty and other interests as well as promote regional and international co-operation.

(m) Establish Constitutional Safeguards:

It will be seen from the foregoing discussion that the history of Uganda is characterised by political instability caused among others, by violent changes of government followed by abrogation or suspension of Constitutions. Many past regimes have acquired power through the barrel of the gun rather than the ballot box. Constitutions have received very little respect and as a result Uganda, like many African countries, have had constitutions without constitutionalism.

As a result there is great concern amongst the people about the need to establish safeguards for the new Constitution so that it can form a solid bedrock for Constitutional Government in Uganda. How this can be achieved is a crucial issue that the people should address. For a Constitution to be respected by the people, it must reflect their current ideals and aspirations for the future. That is one of the reasons why the Commission will formulate the draft Constitution from the views of the people. The process of the people participating in the formulation and adoption of the new Constitution will give it moral force and legitimacy and promote its popularity and general acceptance. There is also a need to demystify the Constitution by ensuring that it is widely read, taught, studied and understood by all Ugandans. All these measures are important because the people are among the greatest safeguards for the Constitution.

The Military have been identified with forces which have little regard for the Constitution. Therefore there is a need for the Army to understand its role in society which should include protecting democratic institutions like a Constitution. There are people who suggest that coup-d'etats should be outlawed like they did in the Nigerian Constitution of 1979, Article 1(2) as follows:

"The Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with provisions of this Constitution."

Although this provision did not prevent a subsequent military coup d'etat, similar provision appears in the recent Constitution of Nigeria of 1989.

In the Constitution of the Federal Republic of Germany there is a provision giving the people the right to resist or revolt against any unconstitutional seizure of power: Article 20(4) states:

"All Germans shall have the right to resist any person or persons seeking to abolish that Constitutional order should no other remedy be possible."

Ugandans see the need to democratise the instruments of coercion so that the people can defend their institutions against usurpers and tyrants. This calls for military training for all able bodied Ugandans.

Lastly, there is a dire need to create a new political culture of constitutionalism which will safeguard the new Constitution.

6. CONCLUSION:

It can be concluded from the preceding discussion that a Constitution is an indispensable institution for good and democratic government because without it power is on the loose. We have seen that there are cogent reasons why we need a new Constitution as the past ones can no longer adequately serve the interests of present day Uganda. We have examined the aims and objectives of the new Constitution and seen that they are noble, democratic, just, humane, dynamic, progressive and relevant to our socio-economic and political transformation process.

The various objectives which have been outlined above have formed the core of the Constitutional issues identified by the Constitutional Commission which are explained in more details in our publication entitled Guidelines to Constitutional Issues. The questions relevant to these issues are separately set out in our pamphlet entitled, Guiding Questions on Constitutional Issues. We recommend reference to these two documents for further study of these issues.

The real challenge that faces Ugandans is to agree on how they will translate these lofty ideals and objectives into reality. They are called upon to suggest concrete measures which will ensure their realization. In so doing the people of Uganda must understand that our mission is to come out with a home-grown Constitution that is socially relevant and tailored to their needs and interests. As Mwalimu Nyerere said in 1965,

"We refuse to adopt the institutions of other countries even where they served those countries well because it is our conditions that have to be served by our institutions. We refuse to put ourselves in a strait-jacket of Constitutional devices not of our own making."

I believe that the people of Uganda will successfully answer the challenge by making a Constitution of the people, by the people and for the people.