

## The Challenges of Constitution-making and Implementation in Uganda

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The making of a new constitution in Uganda marked an important watershed in the history of the country. It demonstrated the desire of the people to fundamentally change their system of governance into a truly democratic one. The process gave the people an opportunity to make a fresh start by reviewing their past experiences, identifying the root causes of their problems, learning lessons from past mistakes and making a concerted effort to provide genuine solutions for their better governance and future development. The constitution-making process was thus a major step towards the democratisation of the country which had experienced nearly thirty years of oppression, tyranny and exploitation. It restored Uganda to the constitutional path. The process has been hailed as unique and unprecedented in the history of constitution-making in Africa and elsewhere. It was an epic process lasting over seven years commencing in 1988 when the Uganda Constitutional Commission was established until 1995 when the new constitution was promulgated by the Constituent Assembly. The distinct characteristic of the process was the popular participation by the people that was achieved through wide consultation and national public debate. The process of popular participation contributed to the building of a national consensus on the most suitable form of governance and promoted the general acceptability and legitimacy of the constitution. Such has been the interest in Uganda's constitution making process that it has been the subject of considerable interest and study by scholars and constitutional reformers both within and outside Uganda.<sup>1</sup>

The new constitution enacted in October 1995 was equally a unique and home-grown document deeply influenced by the history, culture, values and aspirations of the people of Uganda and the need to strike genuine compromises between diverse interest groups. The provisions of the → constitution were by and large based on the wishes of the people as expressed in their views to the constitutional commission. In the Constituent Assembly, most of the provisions in the constitution were adopted by the delegates through consensus. However, a few controversial provisions were resolved through majority vote and some of these continue to attract controversy, debate, and

challenge in courts of law. The controversial provisions mainly relate to the political system especially the issue of suspension of political party activities, the referendum on political systems, the entrenchment of the movement system in the constitution, federalism, and the issue of land.

The implementation of the constitution poses perhaps more difficult challenges than its making. There is a need to make the constitution a dynamic instrument, and a living institution, in the minds and hearts of all Ugandans. The constitution must be internalised and understood in order for the people to truly respect, observe and uphold it. It must be implemented in both the spirit and to the letter. There is a need to establish and nurture democratic institutions to promote democratic values and practices within the country. It is only then that a culture of constitutionalism can be promoted amongst the people and their leaders.

This chapter examines the challenges and problems that were experienced by the major actors in the constitution-making process: the NRM government, the Uganda Constitutional Commission, the Constituent Assembly and the people, including civil society. It also attempts to identify the major challenges facing the country in implementing the new instrument.

### Historical background

Uganda has had three constitutions since independence, none of which satisfactorily answered the needs and aspirations of the people. The manner in which the constitutions were made and unmade, the suitability of the institutions and processes that were established, and the extent to which they were viable and acceptable have long been a subject of debate and controversy. The major problem was that Ugandans failed to agree on the most appropriate socioeconomic and political framework for their governance. In the result, the country experienced a crisis of political and constitutional instability that lasted thirty years. To address the above problem the NRM government initiated the constitution-making process in 1988 in order to provide an adequate opportunity for freely determining the system of governance. On 8 October 1995, the process was successfully concluded and the people of Uganda promulgated their fourth constitution after a lengthy and wide consultation.

Uganda as a nation is a creature of British colonial administration. The 56 different indigenous communities now inhabiting the country were brought together during the colonial period following the declaration of a British protectorate over Uganda in 1894. These peoples consisted of four main language groups, the Bantu in the south and west, the Nilotics and Nilo-Hamites in the north and north-east and the Sudanic group in the north-west. These ethnic groups which had reached different levels of political development

in their social organisation can be divided into two main categories. The first group comprised the Bantu societies of the lacustrine area which included the Baganda and Banyoro who had highly developed centralised governments under a series of kingdoms. The second group consisted of the segmented non-Bantu peoples who lived to the north of the Nile, where the largest political unit was in general the clan. These societies had different languages, cultures and social systems. The colonial administration imposed its own system of administration on these groups of peoples. A system of indirect rule was established whereby the British administered the protectorate through the local chiefs and kings. In effect the kings surrendered their sovereignty in return for British 'protection.'

Uganda regained her independence on 9 October 1962 with all the trappings of constitutionalism. A constitution had been worked out, the result of negotiation among the major political actors of the day. The constitutional arrangements were aimed at working out political formulae for balancing conflicting interests of the political elite of the day. The constitutional formulae entailed a periodically elected parliament, a cabinet drawn from and responsible to parliament, federal and quasi federal status for Buganda and the kingdom areas, and unitary status for the rest of the country. Powers for the major organs of government were defined. On the first anniversary of independence, the original 1962 constitution was amended to provide for a ceremonial president to replace the governor-general. The Kabaka of Buganda was elected first president.

In 1966, following a confrontation between the then Prime Minister Apolo Milton Obote and Sir Edward Mutesa, president of Uganda and Kabaka of Buganda, the 1962 constitution was abrogated by Obote and replaced by the interim constitution of 1966 which was adopted without protest by members of the National Assembly. This constitution came to be known as the 'pigeon-hole constitution.' Obote became president and the post of prime minister was abolished. In 1967 Obote introduced another constitution that was republican in nature. It abolished kingdoms and aspects of federalism and turned Uganda into a unitary state. The president was given excessive powers over appointments and making laws through ordinances and detention without trial. Although the constitution recognised the multi-party system of government, opposition political parties were later banned, effectively transforming Uganda into a single-party state.

While Obote was in Singapore attending a Commonwealth conference in early 1971, General Idi Amin staged a coup d'état and became President. He suspended the constitution and political institutions and unleashed a reign of terror and murder. Idi Amin was in 1979 overthrown by a combination of forces from Tanzania and Ugandan exiles there who had formed the Uganda National Liberation Front (UNLF). After unsuccessful coalition governments

by Yusuf Lule and Godfrey Binaisa a general election was organised by the Military Commission under Paulo Muwanga in December 1980. Four parties namely the Uganda Peoples Congress (UPC), the Democratic Party (DP), the Conservative Party (CP) and the Uganda Patriotic Movement (UPM) contested the elections. The UPC won the elections, but the results were disputed by the other parties. The UPM leadership under Yoweri Museveni went to the bush and waged a guerrilla war against the Obote government for five years.

In July 1985, Obote was overthrown by his two generals, Tito Lutwa Okello and Bazillio Olara Okello. A peace accord was signed in Nairobi between the Okello junta and Museveni, but the agreement failed to halt the war or establish an enduring settlement. In January 1986, the National Resistance Army (NRA) of Yoweri Museveni captured power in Kampala. A broad based government was formed under the National Resistance Movement (NRM). It included various socio-political forces in the country. Its blue print for running the interim administration was the *Ten Point Programme* which included restoration of democracy, security, human rights and economic reconstruction under a mixed economy on its agenda. Political party activities were suspended and a no-party system introduced. Its main organs were the Resistance Councils (RCs) from the village level to the national level with elected committees. These RCs had administrative, political and judicial functions and formed the core of the NRM system of government.<sup>2</sup>

### Democratic change and constitutional reform

It is necessary to identify and recognise the need for constitutional change in order to launch it successfully. The objectives to be achieved must be clearly articulated and accepted. People will not support a cause which has not been properly defined. In Uganda, there was general agreement for constitutional reform largely because the three constitutional arrangements had been made with little input from the population, and secondly the provisions they contained were not democratic and modern enough to answer current interests and aspirations. What was not agreed was the nature and extent of reform. Some groups like the monarchists/federalists advocated the immediate restoration of the 1962 constitution that had guaranteed their cherished institutions. The multipartyists especially the UPC advocated for the simple amendment of the 1967 constitution, and not its complete replacement. It was the challenge of those in charge of the process to convince the different forces that ultimately it would be the people to decide.

Democracy is normally achieved after a protracted struggle. Such struggle needs leadership and popular support. The NRM government had gone to the bush to fight for democracy. The government formed the vanguard to champion the struggle for constitutional reform after the NRM had led

the country. Therefore at the time the NRM assumed power, there was a leadership committed to constitutional reform, as well as popular support for the process. Because the NRM government was committed to constitutional reform, it provided the resources necessary for the exercise and an enabling environment for free public participation and debate.

The preparation of a new constitution that would correct the mistakes of the past as demanded by the people was high on the agenda during the armed struggle by the NRM. Its vision was to see a popular constitution evolved by the people themselves that would consolidate the fundamental change in the politics of Uganda, promised on its capture of power in January 1986. One of the basic objectives of this change was to return power to the people to take charge of their own destiny. Since a constitution was the basic decision of the people on how they wanted to live and be governed, it was absolutely necessary to involve them in the formulation of that socioeconomic and political framework so that it could form a binding and acceptable social contract for their governance. The constitution would institutionalise, regularise and legitimise the use and exercise of state power. Secondly, since the NRM government was an interim administration committed to returning the country to a truly democratic system of government, it was necessary to ensure that a democratic constitution was put in place during the period of transition, to guarantee and promote democratic, as well as other common values and goals, upon which the people could be generally united.

### Strategies and models for reform

For any programme to be successfully implemented there must be a realistic and acceptable plan of action to define the strategies necessary for the execution of the programme. The plan of action must be acceptable to the various stakeholders. If it is imposed there may not be full participation in the programme. Neither is there likely to be widespread acceptance of the outcome. Uganda was faced with the challenge of designing a realistic and acceptable plan of action for the constitution-making process.

The Plan of Action was first published in the Uganda *National Resistance News* in 1981 during the early stages of the bush war. The NRM viewed its main political task after defeating Obote as the organisation of a speedy return of democratic government and 'as part of laying the groundwork for returning Uganda to democratic government, the interim administration shall see to it that a new constitution based on popular will is drafted and promulgated by a Constituent Assembly elected by the people themselves.'<sup>3</sup> The consultation was to be carried out by a constitutional committee which would prepare a draft constitution.

Why did the NRM government adopt this model? Three options were open to government. The first was for the government to prepare a draft constitution and present it to the legislative body of the time, the National Resistance Council (NRC)—for debate and adoption. Such an option would have excluded the majority of Ugandans from participating in the process. The second was to convene a national conference of all the significant socio-political forces in the country to draft and adopt the new constitution, as has been done in several Francophone African countries such as Benin, Togo, Congo and Zaire (now the Democratic Republic of Congo). This method would also have excluded the majority of the people from directly participating in the process. The third alternative was to split the process into two stages. The first would be the establishment of a committee of experts to gather the views of the people and draw up proposals and a draft constitution. The second stage would be the establishment of an elected constituent assembly to debate and adopt the constitution. This is the methodology that has been adopted by most Anglophone countries like Nigeria and Ghana and to some extent in Zambia and Tanzania.<sup>4</sup>

The third methodology was adopted in order to give the people of Uganda ample opportunity to formulate and promulgate a constitution of their own choice. The draft constitution would be formulated by a constitutional commission composed of experts, after collecting the views of the people, and it would be adopted by a constituent assembly consisting of representatives of the people. This methodology would achieve two objectives. First, the constitution would be freely negotiated by the people themselves and not merely imposed upon them. Secondly, the constitution would be made not only by a few, but all Ugandans.

### Institutional mechanisms to manage reform: The Uganda Constitutional Commission

In 1986 the NRM government established a ministry of constitutional affairs to make appropriate arrangements for the preparation of a new constitution and to oversee the process. The first major institutional mechanism was the Uganda Constitutional Commission that was established by Statute No.5 of 1988. The law set out the purpose for establishing the commission, its composition, and terms of reference. The commission consisted of twenty-one members appointed by the president in consultation with the minister responsible for constitutional affairs.<sup>5</sup> The members were to be appointed on the basis of personal integrity, professional skill and expertise. The commission had a chairperson who was a justice of the Supreme Court, a vice chairperson who was a professor of political science and a secretary who was a professor

of history. Other members were highly qualified in various fields and represented the national diversity of Uganda. Two of its members were women. The commissioners were required to perform their functions impartially and in practice enjoyed complete independence from interference from any quarter.

The appointment of the commission by the government did not pass without criticism from several quarters. It was alleged that the members had been hand picked to rubber stamp a constitution already prepared by the NRM government. It was their contention that most members were pro-NRM and not representative of all interest groups. The critics would have preferred members to be nominated by various interest groups. Such a procedure is no doubt more transparent but it can also lead to a stalemate. The government however positively responded to these criticisms by appointing representatives of certain interest groups which felt they had not been represented. The commission therefore appeared fairly representative and balanced. As President Museveni himself has explained on the selection of commissioners:

They were selected because they represented the broad spectrum of opinions in the country. Some were identified with the idea of a movement structure of governance, some were from the old political parties, some were from the monarchist groups, and some were from the churches.<sup>4</sup>

The functions of the commission were to review the constitution of Uganda with a view to formulating proposals for a new constitution, and to prepare a draft document for debate. In order to do so the commission was required to 'seek the views of the general public through the holding of public meetings and debates, seminars, workshops and any other form of collecting views,' and 'to stimulate public discussion and awareness of constitutional issues.'<sup>5</sup> The commission was required to submit its final report to the minister responsible for constitutional affairs within two years or such further period as the minister found necessary. It was found necessary to extend the period for a total of two years due to the need to give the people adequate time to contribute their views and for the commission to do justice to those views.

Apart from the above operational terms of reference, the statute contained some of the basic objectives that the new constitution should achieve namely to:

- guarantee the national independence and territorial integrity and sovereignty of Uganda;
- establish free and democratic system of government that will guarantee the fundamental rights and freedoms of the people;
- create viable political institutions that will ensure maximum consensus and orderly succession to government;

- recognise and demarcate division of responsibility among the state organs of the executive, the legislature and the judiciary, and create viable checks and balances between them;
- endeavour to develop a system of government that ensures people's participation in the governance of their country;
- endeavour to develop a democratic free and fair electoral system that will ensure true people's representation in the legislative and at other levels;
- establish and uphold the principle of public accountability of all holders of public offices and political posts;
- guarantee the independence of the judiciary.<sup>6</sup>

The above provisions contain the basic principles of liberal democracy and constitutionalism. It was therefore abundantly clear that the new constitution should be grounded on democracy. During the constitutional debate more political and socio-economic goals for the new constitution were identified to include the following:

- restore peace, security and stability in Uganda;
- foster unity and national consciousness amongst the people of Uganda;
- promote socio-economic development and social justice in the country;
- promote regional and international co-operation.

On the basis of the above terms of reference, the commission interpreted its mandate to first of all carry out wide consultations with the people of Uganda and secondly, to formulate a democratic and popular constitution based on national consensus and guarantee the promotion of stability, peace, unity, progress and social justice.

### Methodology, programme and activities

The major challenge faced by the commission in designing its methodology was to ensure that the population was given adequate opportunity to participate in the process to produce a constitution of their choice. To do so the people had to be well informed about the nature of the constitution, its content and why a new one was being made so as to contribute from a point of knowledge and make informed decisions. The people had to be given adequate time to discuss the issues involved among themselves and prepare their submissions for presentation to the commission. The second challenge was to collect the views from the entire country and document them, and the third was to carefully study and analyse all the submissions received. The final challenge was to draw up proposals for a new constitution in a final report, and to

prepare a draft constitution on the basis of those proposals. In order to carry out its task the commission drew up a programme and timetable of work.<sup>9</sup>

The commission spent the first two months planning the entire programme, holding internal seminars for the commissioners, and preparing materials and the methodology for educating the people. The first education programmes to be held were at the district level. All 34 districts were visited by commissioners and seminars were held for each district for two days. All the leaders—both local and national—representatives of civil society and education institutions attended. A total of over 10,000 participants attended these seminars. This was an important national coverage which proved beyond doubt that the exercise was not only serious but also national. The commissioners also received suggestions on how to improve the organisation and effectiveness of the exercise.

In response to the district seminars the commission prepared information materials to enlighten the people and guide them in discussing constitutional issues. The constitutions of 1962 and 1967 were reprinted. Three booklets, namely, *Guidelines on Constitutional Issues*, *Guiding Questions on Constitutional Issues*, and *Brochure on Preparation of Memoranda* were prepared. The documents contained the constitutional agenda for public debate and contribution of views. They listed and explained 29 constitutional issues on which the views of the population were being sought. All these materials were subsequently distributed free of charge to all seminar participants, resistance committee members and other organised bodies, and individuals throughout the country and abroad. The documents supplemented the commission's programmes on the media especially Radio Uganda and Uganda Television in English and local languages.

After the district seminars, the commission conducted sub-county seminars, and these formed the core of the entire exercise of educating and sensitising the people from the grassroots. They were held in the 782 sub-counties throughout the country. Throughout this period and subsequently, the commission organised various seminars for institutions of higher learning and for major social groups in the country. These seminars lasted one or two days.<sup>10</sup> In addition to seminars organised by the commission, many Ugandans of various levels and interest groups organised their own gatherings to educate themselves and enable them to discuss constitutional issues. Finally, to supplement debates and seminars in schools and colleges an essay competition on constitutional issues was organised from May, 1990 to December 1991. Its objectives were to provide an additional channel to the youth in the process of making a new constitution, to stimulate awareness, debate and discussion of constitutional issues, and to encourage the youth to understand their national constitution and to respect it. The students were divided into four categories from primary to university level.<sup>11</sup>

After completing the educational exercise which generated an open public constitutional debate throughout the country, the commission embarked on the exercise of collecting views from the sub-counties and the general public in May 1991. All sub-counties were re-visited, some more than once. People were mobilised to freely submit their views. The commissioners themselves visited the sub-counties to collect the views of the people.<sup>12</sup>

The results of the commission's outreach activities were most encouraging. Of particular interest were the views from the ordinary people at RC I and II, which made up over 10,000 memoranda. Ugandan communities abroad actively participated in the debate and submitted memoranda. Apart from the Uganda People's Congress (UPC) as a party, there was no group in Uganda that refused to participate or had a negative attitude towards the constitution-making process. The submission of memoranda from the various parts of Uganda appeared to be fairly balanced even from areas where there was insecurity.

### Study and analysis of views

The task of studying and analysing the submissions received from the public was enormous and challenging, but was necessary if the constitution was to reflect the general views of the people. Therefore the commission had to examine each submission presented to the commission. To do so, many submissions had to be typed out or translated into English to facilitate study by all the commissioners. In addition, the views had to be categorised under each of the twenty nine constitutional issues on which views had been sought. Issues on which there was consensus or which remained controversial also had to be identified. Additional research and the technical staff had to be recruited to speed up research and computerisation of materials, because pressure was mounting to bring the constitution making exercise to an end.

On many issues it was clear from the memoranda that there was a consensus. There was consensus on the issue if it received overwhelming support or rejection in all categories of the various sources received. An issue was supported by a majority when it received majority support from all categories of sources received. A controversial issue was one which received majority support in some categories and a significant minority support in some categories or one with strong minority opposition from all categories.

On the controversial and highly sensitive issues, the commission undertook a statistical analysis to give a picture of the frequency of support for the main viewpoints on each of the controversial issues in the views submitted. The issues on which statistical analysis was undertaken included the adoption of a national language, aspects of citizenship requirements such as dual citizenship; enforcement of human rights; choice of political system;

restoration of traditional rulers; choice of federal or unitary form of government, choice of electoral systems, aspects of legislature, aspects of the presidency, and the issue of safeguards for the new constitution. This elaborate system of analysing people's views was put in place to allay fears that public views would be ignored or rigged out.<sup>13</sup>

The commission first prepared draft chapters of the report based on the constitutional issues identified at the commencement of the exercise. Several committees consisting of a group of commissioners were formed to carry out this task. The draft chapters and recommendations were presented to the plenary session of all commissioners and discussed. Subsequently, the entire report was edited for publication by the commission. It must be emphasised that the recommendations were based on the views of the people not on the preference of the members of the commission. The draft constitution was prepared from the approved final recommendations of the commission. The draft constitution was initially prepared by a team of commissioners and legislative drafting experts. The draft was then discussed chapter by chapter until the final text was approved.

### The draft constitution

A constitution is a long-term national strategy for the socio-economic and political development of a country. But it must also address both short-term and medium term objectives. It must balance stability and change, idealism and reality, rights and duties and powers and responsibilities. It must be precise but coherent, comprehensive but viable, and must meet the expectations of a large majority of the people without ignoring the interests of the minority. These concerns affect both the form and the substance of the document. Some challenges of form which the commission faced included how long the constitution should be and how much the constitution should contain. The second issue was whether two documents should be written, one interim and the second permanent. The commission decided to abandon the idea of an interim constitution to cater for the transition to democracy in favour of drawing up a single comprehensive document with interim or transitional provisions included in the transitional chapter. The commission was also initially disposed to writing a short, precise constitution in simple language, but due to the vast number of constitutional issues raised by the people and the need to address them fully, it prepared a fairly long draft constitution.

After studying the main sources of information used by the commission, namely the 25,547 submissions, the commission's observations and analysis of society, including its culture, common history and aspirations, the past constitutional arrangements since independence, and a comparative study of constitutional arrangements of other countries, the commission

deduced the following theoretical or philosophical bases for formulating its recommendations:

- The constitution should provide institutional mechanisms for strengthening national unity taking into account the cultural, religious, regional, gender, class, age and physical diversities of Uganda's peoples.
- While taking into account Uganda's social, cultural and political diversities, the constitution should transcend interests of narrow groups.
- The constitution should identify those Ugandan residual values which can serve as firm foundations for the new constitution.
- There should be efforts to provide for a balance of forces that no one single socio-political force or institutional structure can manipulate such resources as it has to subvert the constitution and dominate other groups and structures.
- A new constitutional order should ensure that institutional structures are viable, coherent and integrated to promote a culture of constitutionalism and ultimate socio-economic and political objectives which guide future development.
- There should be constitutional mechanisms for ensuring transfer of power by peaceful and democratic means.
- Since the NRM assumed power, institutional frameworks have been established and appear to be gaining legitimacy. There should be serious evaluation of these to see the extent to which they may be integrated into the new constitutional order.
- The new constitutional order should come to terms with Uganda's past and present and respond to its aspirations for the future.<sup>14</sup>

The commission's mandate was to make constitutional proposals based on the views of the people. However, while on many issues there was national consensus, several others remained a subject of controversy. The commission had to devise a formula that would strike the right balance between conflicting views in order to promote compromise and reconciliation.

The failure to generate adequate consensus on several of the constitutional issues despite a lengthy and serious public debate demonstrated the apparent unwillingness of Ugandans to compromise. This was not a new feature in Ugandan politics. As long ago as 1961, the *Munster Report* which made proposals for the independence constitution observed as follows:

No one who examined Uganda's political and social life could fail to be disturbed by one prominent characteristic: The unwillingness to compromise. Many people in Uganda still have to learn that all government, especially democratic governance, depends upon compromise and willingness to see other points of view in matters large and small.

Further the very conception of a united Uganda implies the need for a wider loyalty to which local loyalties will from time to time have to give way.<sup>15</sup>

In 1961 the major controversial issue revolved around the position of the kingdom of Buganda in independent Uganda. The answer to that question largely affected the ultimate constitutional arrangements adopted in the independence constitution. The fact that the 1967 constitution abolished kingdoms and the system of federalism, meant that these issues were to be resurrected in the constitutional debate but they continued to remain contentious. The challenge faced by the commission was to make recommendations that would resolve these outstanding contentious issues.

The views were sharply divided between those for and against the restoration of traditional rulers. Some viewed the institution of traditional leaders as archaic while others saw the matter as a cultural right. The commission recommended the restoration of the institution where the people concerned so wished, but with the institution restricted to a cultural and developmental role. It also recommended the return of the properties and assets. The government decided to restore some traditional institutions and return their properties before the draft constitution was debated.<sup>16</sup> One traditional institution—the *Obugabe* of Ankole—remains in limbo even at the time of writing.

The issue of whether the form of government should be federal or unitary was also controversial. The monarchists considered it part and parcel of (*ebiyaffe*), 'returning their things' as it was in the 1962 constitution. Those opposed to this arrangement feared that the 1962 scenario would be recreated whereby some areas would enjoy this 'privilege' while others had only unitary status. The commission's compromise was to recommend decentralisation and the devolution of powers at district level for the whole country. Views on the question of national language were sharply divided between Luganda and Kiswahili. There were strong arguments in favour of each. However, the commission did not consider it viable to recommend one of them but opted for both together with other major local languages.

The issue which provoked the greatest controversy in the constitution-making process was the question of the political system. The central issue was whether or not the country should return to multiparty politics. If not, what political system should operate? A minority of the populace wanted an immediate restoration of political parties because freedom of association and political organisation was a fundamental right which could not be suspended or curtailed. Moreover, they argued, parties were not the cause of Uganda's problems. The majority of the people wanted political parties to be suspended for varying periods from 5 to 20 years because they thought that they had

been responsible for the mistakes of the past. In the meantime, it was proposed that the NRM system of government would continue with some modifications to make it more open, democratic and accountable. To strike a compromise the commission recommended that both political systems should be included in the constitution and that the people should have the right to periodically choose a political system of their choice through referenda until a consensus emerged in future on the most suitable permanent political system. The commission also recommended that if this issue is not conclusively resolved by the Constituent Assembly, it should be resolved by referendum and the outcome be incorporated in the new constitution.<sup>14</sup>

The report and draft constitution were presented to the president of Uganda on 31 December 1992. From that day, the report and draft constitution became public without the need for further action by government. Subsequently, the government published the report and draft constitution to make them easily available to the public. The proposals by the constitutional commission were received with mixed feelings. Commenting on the report of the constitutional commission President Museveni has said:

I think the final report was quite representative of the peoples views because on some of the crucial points such as whether or not political parties should become fully operational or not, I knew the opinion in the country to be against parties, and this is what the report showed. In fact the Commissioners watered down what the people wanted – the people did not want the return of parties for a very long time – but the Commission compromised on a return to party activity five years from the first elections held under the new Constitution. Therefore the Commission was a temporising force as far as some local and international political thinking was concerned. They gravitated more towards international thinking especially on political parties rather than reflecting the views of the people themselves.

### The Constituent Assembly discussion and adoption of the 1995 constitution

The manner in which a constitution is finally adopted by the people is fundamentally important in demonstrating the legitimacy, popularity and acceptability of the constitution. A constitution which is imposed by force cannot form the basis of a stable, peaceful and democratic system of governance. To command loyalty, obedience, respect and confidence, the people must identify themselves with the document through involvement and a sense of attachment.

The issue of which body would discuss and adopt the new constitution was hotly debated throughout the period of the commission's work and immediately thereafter. The legal position at the time the commission was

established was that the existing National Resistance Council (NRC) and the National Resistance Army Council (NRAC) would participate in the process of discussion and adoption of the new constitution presumably with other additional representatives.<sup>17</sup>

This provision was made after the constitutional commission was set up but before the members of the NRC had been elected. It was therefore assumed that the members of the NRC had been mandated to adopt the new constitution. Those against this formula contended that the current members had lost their popular mandate by extending their period in the legislature without the consent of the electorate. Another reason advanced against the existing NRC debating the constitution was that it consisted of many members who had not been elected but were simply presidential nominees or were historical members from the 'bush days.' It was also pointed out that the election was not by direct popular mandate but by electoral colleges. The majority of the people therefore wanted fresh directly elected delegates with a special mandate to discuss the draft constitution.

After analysing the views of the people, the commission submitted an interim report on the adoption process which recommended that the draft constitution should be discussed and adopted by a Constituent Assembly consisting of directly elected delegates by universal adult suffrage and interest groups elected by their respective organisations. The main purpose behind this recommendation was to ensure that the future constitutional order enjoyed a wide degree of acceptability among the politically significant forces and that all social forces should participate in the process of adopting the constitution to dispel fears of manipulation or rigging the process and to establish permanent bases for the legitimacy of the new constitution. The government accepted these recommendations and embodied them in the Constituent Assembly Statute 1993<sup>18</sup> which was passed after strong opposition from the members of the National Resistance Council. The Statute established a Constituent Assembly whose functions were basically to scrutinise, debate and prepare a final draft of the constitutional text and to enact and promulgate a new constitution for Uganda.<sup>19</sup>

The commission was to complete its work within 4 months subject to an extension of not more than 3 months. That extension was found necessary and given. The delegates to the Constituent Assembly (CA) <sup>20</sup> numbered 288 in all and were drawn from a cross-section of dominant political forces in Uganda.<sup>21</sup> The CA composition not only ensured direct representation of the population but it also sought broad representation of various interest groups which could otherwise have been left out through direct elections. The result was a large and costly assembly. The statute also established a commission for the CA consisting of a Commissioner for the Constituent Assembly and deputies appointed by the president on the advice of the cabinet. The

functions of the commissioners were to organise and conduct elections for the Constituent Assembly, to administer its deliberations and to conduct any referendum required under the statute.<sup>22</sup>

The constituencies were demarcated, the voters registered and elections held on a non-partisan basis. This meant that every candidate was elected on his or her own individual merit, rather than on the basis of political affiliation. Use of political party, tribal or religious affiliations or other sectarian grounds was prohibited. Campaigning was conducted through candidates meetings organised by returning officers in each parish in an electoral area. The object of the meeting was to enable all candidates to meet together and address voters and answer questions from them, public rallies and public demonstrations in support of candidates were prohibited.

The Commission for the Constituent Assembly and a number of accredited organisations carried out civic education for voters. The major shortcoming in the election campaign was the use of colossal sums of money by candidates dictated by demands from the voters who expected to gain financially from the elections. The candidates were prepared to spend large sums of money in order to invest for the next round of parliamentary elections. Judith Geist decried this worrying practice when she stated:

the voters took a type of mercenary rationality not unknown to previous Ugandan elections. While alarming to many, this is more a rational calculus than the response to strictly sectarian appeals that plagued past elections. It carries its own problems. Persons elected because of the depth of their pockets may not be best equipped to discuss and decide constitutional issues.<sup>23</sup>

The elections were held in March 1994. Local and international observer groups were invited by the government to monitor the electoral process to ensure that it was free and fair. The international observers came from 18 countries and organisations. The overall assessment by the observers was that despite some administrative weaknesses like failure to adequately display registers, the electoral process was free and fair and the results reflected the democratic choice of the people of Uganda. The elections represented an important step towards democracy. The OAU report made the following conclusion about the process:

All international observers were of the opinion that even though there were some inadequacies and minor violations of the electoral laws, the elections were administratively well conducted and that the conduct of the elections was done in an open and fair manner. This is remarkably so considering the background of the 1980 reportedly rigged elections. There was no evidence of deliberate and systematic attempt to influence the outcome or alter the results of the elections. The calm atmosphere at

prevailed on polling day and the extraordinarily good behaviour of all concerned encouraged people to vote and was the factor that underpinned the high turnout. Generally, the elections can be considered as a reflection of the political choice and aspirations of the people of Uganda. The high sense of participation shown by Ugandans is highly commendable.<sup>24</sup>

Nelson Kafir has also observed that:

the Constituent Assembly elections could lay claim to being the most free and fair of Ugandans through nation wide elections since independence. But the elections also posed a challenge by adding a transitional stage in the struggle for power and the return to democracy that will be concluded with the elections to a new Parliament under the rules set by the Constitution produced by the Constituent Assembly. At stake are the questions whether the National Resistance Movement (NRM) will be the dominant political force in the years to come and if it is so whether it will radically restructure Ugandan politics as it had promised when it emerged triumphant in 1986 from its five year guerrilla campaign to overthrow the government.<sup>25</sup>

On the whole, the quality of delegates and the debates in the CA was high. There was a mixture of old and young politicians as well as persons who merely wanted to participate in the discussion and adoption of the constitution. There were some whose contribution was however minimal due to the nature of the subject matter. The NRM had more than two thirds of the delegates in the assembly. The assembly had a chair and a deputy nominated by the president and elected by the delegates of the assembly at its first sitting. The delegates were sworn in on 12 and 13 May 1994 and commenced business on May 18.

The assembly prepared and adopted its own rules of procedure.<sup>26</sup> The quorum of the assembly was agreed at half the members. The CA used to sit for 32 hours a week. Decisions by the assembly were to be by consensus as far as possible. Where consensus was not obtained the matter would be resolved by voting. The motion would be carried if it obtained the support of not less than two-thirds of the delegates voting. The matter was regarded as contentious if the motion was supported by the majority of delegates voting, but did not obtain the required two-thirds. A contentious matter would be referred to the minister who would present it to the nation for resolution through a national referendum. Most of the issues were resolved by consensus or voting and only two issues proved contentious. These were the provisions relating to the movement political system and referendum on political systems and the question of holding presidential and parliamentary elections on separate days. The first issue was resolved after delegates supporting the clauses on the movement and referendum on political parties to be deleted and the presidential

and parliamentary elections to be held on the same day, but failed to get majority on both issues had walked out of the assembly and then returned. The second issue was resolved after delegates had been sent to their constituencies for consultations.

The CA established several committees to facilitate its work. The most important were the Business Committee and the Legal and Drafting Committee. The latter dealt with the content and text of the constitution, and assisted in wording and synchronising constitutional amendments during the debate. The debate progressed through several stages. The first was the general debate where each of the delegates addressed the assembly. This was intended to heal wounds of the past, minimise mistrust, build confidence between delegates and lay the foundation for reconciliation, mutual respect and consensus. The second was the consideration stage where the CA began the main task of debating the constitution chapter by chapter. Initially, all the discussions were planned to take place in plenary session. But it was soon realised that the plenary sessions were too slow and this necessitated the formation of five select committees to handle specific chapters of the draft constitution and to submit reports to the general plenary for consideration. This strategy greatly expedited the work of the assembly.

Several caucuses were formed to organise support for various positions in the draft constitution. The main ones were the National Caucus for Democracy (NCD), the NRM caucus and the Buganda Caucus. NCD became the principal platform for the immediate restoration of multi-party politics. The NRM caucus was committed to blocking such immediate restoration and advocated a no-party (Movement) system of politics for the time being. The Buganda caucus was devoted to the restoration of federalism and the consolidation of monarchy in Buganda.

After 16 months of debate the constitution was enacted by the Constituent Assembly on 22 September 1995. It was promulgated by the assembly in the presence of the president and the members of the NRC on 8 October 1995. It is worth noting that more than 80 per cent of the draft constitution was adopted. But the CA did not have the benefit of official representation of the commission to present the proposals in order to guide them nor did they have any white paper or government position on the draft constitution. These omissions could have contributed to the acrimonious debates that took place thus prolonging the process of adoption of the constitution.

### Challenges in implementing the new constitution

A constitution is neither self-enacting nor self-executing. Making a constitution is one thing and implementing it is quite another. The implementation of a new constitution poses serious challenges to the

government as well as the people to harness the letter and spirit of the constitution and to advance the democratic process and the socio-economic well-being of the people. In order to implement the constitution, appropriate democratic institutions must be established through which the people must exercise power directly or through their selected representatives. Democratic values and practice must be fostered amongst the population to empower them to actively participate in their own governance. Implementing a constitution is an expensive enterprise. Therefore adequate resources must be made available to facilitate the building of strong democratic institutions and pillars of state. Appropriate policies must be put in place to stimulate and promote socio-economic development by attracting local and foreign investment and to enable the people improve the quality of their lives. Government must also create an enabling atmosphere of peace and security to promote the protection of basic human rights and the rule of law.

The greatest initial challenge that faced implementation of the new constitution was the organisation of the presidential, parliamentary and local government elections to return the country to democratic rule after a long period of disenfranchisement. It must be observed that the constitution gave the mandate to the NRM government to manage this transitional process. Elections are an indispensable pre-requisite to democracy. The constitution vests all power in the hands of the people who must be governed through organs created by the constitution only with their consent. As Judith Geist observes,

An election addresses the issue of periodic reaffirmation of or alteration in the presentation of the public in the institutions of policy making and governance. Elections confer legitimacy on governments by providing a chance for the citizenry to alter the composition of the government. They can also provide channels for citizen input on policy issues directly, through referenda, or in the extreme case to alter the nature of the government itself, through constitutional exercises.<sup>27</sup>

The new constitution preserved the NRM government as the transitional government and it was to remain in power from the time of coming into force of the new constitution until a new government was elected in accordance with the new constitution. The government was required to exercise its functions with such modifications as to bring them into conformity with the new constitution.<sup>28</sup> The government was mandated to make laws to establish an interim election commission whose composition, appointment and functions were to be in conformity with the new constitution, to make interim laws for elections, and tribunals for determination of disputes and appeals.<sup>29</sup> The NRC enacted the necessary legislations to regulate the organisation of the elections. The *Parliamentary Elections (Interim Provisions) Statute 1996* and

the *Parliamentary Elections (Interim Provisions) Statute 1996*. The two elections were to be held separately.

The constitution prescribed the manner in which the President would be elected, the qualifications for office and the procedure for nomination. Article 103(1) of the 1995 Constitution provides that the 'Election of the President shall be by universal adult suffrage through a secret ballot.' The *Presidential Elections (Interim Provisions) Statute 1996* provided for the manner of holding of public meetings and facilitation of the elections. Presidential elections were held on 9 May 1996. The turn out was estimated at 79 per cent of the registered voters. The elections were won by President Museveni with 74.3 per cent of the votes, Dr Paul Semogerere of the DP with 23.6 per cent and Mr Kibirige Mayanja with 2.1 per cent. The election was viewed by both local and internal observers as free and fair and there were no petitions against the successful candidate.<sup>30</sup> The next challenge was to organise parliamentary elections. The constitution prescribed the composition and different mode of electing each category of members of the legislature. There were directly elected members to represent constituencies to be elected by universal adult suffrage and by secret ballot. Women representatives for each district, and representatives of the army, youth, workers and persons with disabilities were to be determined by parliament.<sup>31</sup> The NRC decided that the army would have 10 representatives, three representatives for workers and five representatives for each of the youth and persons with disabilities.

The procedure for elections of these special interest groups was prescribed by the minister of state for constitutional affairs. They were to be elected by their respective named organisations. The commission had to appoint returning officers for the elections. The country was divided into 214 constituencies for directly elected members, and there were 39 electoral colleges for women. The elections were held on the basis of the no-party system on an individual basis. There were 862 candidates for the 214 constituencies. The campaign period was 45 days and based on joint meetings. Elections were held on different dates for different special interest groups. Although the elections were generally free and fair, there were allegations of intimidation by candidates or their agents, use of abusive language and the ferrying of supporters from one point to another. The international observer group noted some shortcomings on polling day including canvassing by individual candidates, lack of screens around ballot marking tables thus affecting secrecy, illegal cards, and some district officials actively supporting particular candidates especially in the Northern and Western regions. But they concluded,

The elections we observed from 24<sup>th</sup> to 28<sup>th</sup> June were transparent. Despite the deficiencies that we have outlined, the International Observer Group

believes that true Parliamentary elections mark a further positive step within the transition process in Uganda.<sup>32</sup>

Local government elections formed the last stage in the electoral process to return the country to democratic governance in accordance with the new constitution. These elections were conducted over a period of nine months from August 1997 to April 1998. The elections were the first major activity undertaken by the permanent Electoral Commission set up in November 1996, and were conducted after the enactment of the Local Government Act 1997.<sup>33</sup> The process of election was not similar for all units of local government. Secret ballot was used for higher level namely for district/city and municipality chairpersons and councillors other than for special interest groups, and the method of queue-voting was deployed for the election of chairpersons and councillors of units at the sub-county level and below. Organising such elections throughout the country was a big challenge to the Electoral Commission. It had to carry out the demarcation of electoral areas, train officials, carry out voter education and update voter registers.

## Conclusion

Every constitution is influenced by what has happened in the past. It is also affected by the present situation and by people's aspirations for the future. The constitution-making process in Uganda attempted to address Uganda's future in light of its past history and more recent developments. The constitutional framework arrived at was based on the views of the people and generally reflected the national consensus of the people of Uganda. The constitution therefore enjoys a high degree of acceptability and legitimacy. This is not to deny that there may be some shortcomings in the document. Nevertheless, the constitution has definitely succeeded in delivering the country onto the constitutional path—a firm but long journey to democracy.

Many people expected that the constitution would solve all their social, economic and political problems. This was one of the motivating forces behind the high response and full participation in the constitution-making process. The people expected the constitution to serve their needs, interests and aspirations. They expect the constitution to promote the principles of unity, peace, equality, democracy, freedom, social justice and progress so that they may live in peace and prosperity. In particular the government has a fiduciary duty to ensure that the constitution is upheld and implemented in a creative and dynamic manner so as to improve the welfare of the people. The constitution is a living instrument which must grow through amendment and interpretation by the courts. Therefore constitutional development must be an ongoing exercise. We must continue the dialogue and consultation

amongst the diverse groups and communities so as to build compromises on issues that divide us. In so doing we must develop democratic values of tolerance of diverse views, a spirit of compromise, acceptance of majority views while respecting the minority, and the settlement of disputes by peaceful means.

Some areas which require reconsideration and where dialogue should continue include: the formation of a national government (or grand coalition), introduction of proportional representation, coexistence between movement and the multiparty political system and the future of the movement system, federalism or quasi-federalism, some aspects of land, issues in the bill of rights like the death sentence, the size and composition of parliament, the right to censor or recall members of parliament, the number of constitutional bodies, the effect of the Treaty for East African Co-operation on the constitution and the cost of implementing the constitution. This may call for another constitutional review. Let me conclude with the words of President Museveni at the opening of the Constituent Assembly:

We must ensure that our political institutions spring from our social structure. If we are to develop, we must evolve constitutional models which liberate us from our backwardness. We must modernise our societies and lay the foundation for industrialisation. We cannot modernise, industrialise or develop without creating an appropriate institutional framework within which to work. It is the historic responsibility of this Constituent Assembly to set our country on the path to development and prosperity.<sup>34</sup>

The Constituent Assembly completed its historic mission over five years ago. It is now the political challenge of the government and the people of Uganda, to commit themselves to internalising, upholding and defending the constitution by creating and sustaining a culture of constitutionalism among the polity.

## Notes

1. See, Hansen and Twaddle (1994); Hansen and Twaddle (1992); Mukholi (1995), and Odoki (1993).
2. For a historical introduction to Uganda, see Mutibwa (1993); Hansen and Twaddle (1988), and Museveni (1997).
3. Museveni (1990): 20-21.
4. See further Waliggo (1994): 18.
5. Uganda Constitutional Commission (UCC) Statute 1988, Section 2.
6. Museveni (1997): 193.
7. UCC Statute, section 5.
8. *Ibid.*, section 4.
9. The programme was divided into six phases namely,
  - (1) Planning, publicity, and internal seminars;
  - (2) Education of the people and discussion of constitutional issues;
  - (3) Collection of the people's views;

- (4) Analysis and study of the views;
- (5) Review of the constitution and comparative study of constitutions;
- (6) Preparation of the final report and draft constitution.
10. Seminars were organised for the following groups and institutions: the Uganda Law Society, the police, the prisons, the youth, the women, permanent secretaries, medical doctors, and nurses, engineers, manufacturers, political leaders, national teachers colleges, theological colleges and national colleges of commerce.
11. A total of 5844 essays were received from all over the country.
12. As a result the commission received the following submissions from individuals, groups interest and RCs and educational seminars reports:
 

|                                   |               |
|-----------------------------------|---------------|
| (a) District seminar reports      | 33            |
| (b) Institutional seminar reports | 53            |
| (c) Sub-county seminar reports    | 813           |
| (d) Individual's memoranda        | 2,553         |
| (e) Group memoranda               | 839           |
| (f) RC 5 memoranda                | 36            |
| (g) RC 4 memoranda                | 14            |
| (h) RC 3 memoranda                | 564           |
| (i) RC 2 memoranda                | 2,225         |
| (j) RC 1 memoranda                | 9,521         |
| (k) Essay competition             | 5,844         |
| (l) Newspaper articles            | 2,763         |
| (m) Position papers               | 290           |
| Total                             | <u>25,547</u> |
13. The list of all persons and organisations which submitted views to the commission and the statistical analysis were published in one volume of the commission's final report entitled *Index of Sources of Peoples Views*.
14. UCC report, 56.
15. Quoted by Waliggo (1994) *op.cit.*, at 38.
16. See Constitution (Amendment) Statute 1993 No.7 of 1993, and Traditional Rulers (Restitution of Assets and Properties Statute 1993 (No.8 of 1993).
17. Statute No.1 of 1989, section 14 B.
18. Statute No.6 of 1993.
19. *Ibid.*, section 8.
20. *Ibid.*, section 4.
21. (1) Directly elected delegates from electoral areas 214  
 (2) Representatives from special interest groups as follows:
 

|                                                                                                                 |            |
|-----------------------------------------------------------------------------------------------------------------|------------|
| (a) One woman delegate from each district elected by electoral college of RC III Councillors and Women Councils | 39         |
| (b) National Resistance Army                                                                                    | 10         |
| (c) Trade Unions                                                                                                | 2          |
| (d) Two members from each of the political parties which participated in the 1980 General Elections namely:     |            |
| (i) The Conservative Party                                                                                      | 2          |
| (ii) Democratic Party                                                                                           | 2          |
| (iii) Uganda Patriotic Movement                                                                                 | 2          |
| (iv) Uganda Peoples Congress                                                                                    | 2          |
| (3) The National Youth Council                                                                                  | 4          |
| (4) The National Union of the Disabled Peoples of Uganda                                                        | 1          |
| (5) Ten delegates appointed by the President on the advice of cabinet                                           | <u>10</u>  |
|                                                                                                                 | <u>288</u> |

22. *Ibid.*, sections 20 - 24.
23. Geist (1994). *op.cit.*, 90.
24. Sec Report of Constituent Assembly elections 1994, Commission for the Constituent Assembly May 1995: 332.
25. Kasfir, 148.
26. *The Constituent Assembly (Rules of Procedure) Instrument 1994 S.I 174 of 1999.*
27. Guest, *op.cit.*, 90.
28. Article 263.
29. Article 264.
30. See generally the Report of the Presidential and Parliamentary Elections 1996 Electoral Commission, Kampala.
31. Article 78.
32. Report of the Presidential and Parliamentary Elections, 1996, *op.cit.* 153.
33. Act No.1 of 1997.
34. Museveni, (1997) *supra*, 194.

## References

- Geist, Judith (1994) 'Political Significance of the Constituent Assembly Elections' in Hansen, H.B and M Twaddle (eds.) *From Chaos to Order: The Politics of Constitution making in Uganda*, Kampala: Fountain Publishers.
- Hansen, H.B and M. Twaddle (1994), *From Chaos to Order: The Politics of Constitution making in Uganda*, Kampala: Fountain Publishers.
- \_\_\_\_\_ and M. Twaddle; (1992) *Changing Uganda*, Kampala: Fountain Publishers.
- \_\_\_\_\_ and Twaddle (1988) *Uganda Now: Between Decay and Development*, Kampala: Fountain Publishers.
- Kasfir, Nelson (1994) 'Uganda Politics and the Constituent Assembly Elections of March 1994' in *From Chaos to Order The Politics of Constitution-making in Uganda*, Kampala: Fountain Publishers.
- Mukholi, David (1995) *A Complete Guide to Uganda's Fourth Constitution*, Kampala: Fountain Publishers.
- Museveni, Y. K. (1997) *Sowing the Mustard Seed*, London: Macmillan Publishers.
- Museveni, Y.K., (1990) *Mission to Freedom: Uganda National Resistance News 1981 -1985*, Kampala: NRM Secretariat.
- Mutibwa, P.M. (1993) *Uganda Since Independence*, Kampala: Fountain Publishers.
- Odoki, B. J. (1993) 'Writing a Democratic Constitution' *East African Journal of Peace and Human Rights*.
- Waliggo, John Mary (1994) 'The Constitution-making Process and the Politics of Democratisation' in *From Chaos To Order: The Politics of Constitution making in Uganda*, Kampala: Fountain Publishers.