



**REPORT ON THE DIALOGUE HELD DISCUSSING THE INDEPENDENCE  
THE JUDICIARY AT IMPERIAL ROYALE HOTEL ON THE 22/ MAY/ 2019.**

*Topic: “The basic structure doctrine vs. Constitutional restraint; take aways from the age-limit decision.”*

**INTRODUCTION:**

Center for Public Interest Law (CEPIL) is undertakes a project aimed at enhancing Judicial Independence in Uganda by promoting accountability and efficiency within the Judiciary. One of the ways of achieving this is by assessing the transformative role of the Judiciary through research and analysis of strategically selected public interest judgments with the aim of championing discussions, debate and dialogue on the jurisprudential value of these decisions in shaping the role of the Judiciary. It is intended that reports from this action oriented research and analysis will form the basis for key stakeholder engagements but also inform the different arms of Government about what needs to be done to improve the state of the Judiciary.

**OBJECTIVE**

Public discussions on key judgments expose areas of both weaknesses and strengths in the Judiciary thereby holding the Judiciary accountable. In addition, this provides a platform for discussion and an avenue for brainstorming recommendations to mitigate the challenges undermining the Judiciary to effect its mandate.

The dialogue was carried out to examine the independence of the Judiciary in light of the Supreme Court’s decision and its role as the custodian of the Constitution and the Rule of Law.

**DIALOGUE**

In line with this mandate, a dialogue was held on the 22<sup>nd</sup> May 2019 from 9:00 am to 12:30 pm

The discussion involved 42 participants from a cross section of the society including judicial officers, civil society actors, human rights defenders, politicians, journalists, academics, lawyers and other members of Ugandan society.

The topic for discussion was premised on the decision of the Supreme Court arising from the Consolidated Constitutional Appeal No.2 of 2018 (Male Mabirizi, Gerald Karuhanga and 5 others, and Uganda Law Society Vs. Attorney General) commonly referred to as the "age-limit decision)

### **Brief facts of the Judgment (As shared by Mr. Benson Tusasirwe, the key note Speaker at the dialogue)**

The 20th day of December 2017 marked the climax of one of the most dramatic events in the constitutional history of Uganda. On that day an extremely acrimonious constitution amendment process culminated in the enactment of the Constitution (Amendment) Act, by which Article 102 (b) of the 1995 Constitution was repealed, removing the “age-limit” qualification to stand for president of Uganda. Those in favor of the amendment celebrated the victory of numbers. Those against lamented. A week later, the President assented to the Bill, which thereby became law.

Within a short time several constitutional petitions were filed in the Constitutional Court challenging the amendment. The petitions were consolidated and heard by the Court sitting at Mbale. On 26th July 2018, the Court delivered its judgment, dismissing the petitions by a majority of 4 to 1, Justice Kenneth Kakuru dissenting.

Three separate appeals were filed in the Supreme Court (by Male Mabirizi, Gerald Karuhanga and 5 others, and Uganda Law Society) which were later consolidated and heard under Constitutional Appeal No 2 of 2018.

The 112 grounds of appeal the appellants had raised in their Memoranda of Appeal were reduced to eight issues. Seven of these were procedural in nature, relating to whether the amendment was valid, considering the process through which and circumstances under which it was effected. However, the first ground, which is our concern in the present discourse, related to what is known in constitutional theory as the Basic Structure Doctrine (BSD) and was worded as follows:

*“Whether the learned justices of the Constitutional Court misdirected themselves on the application of the basic structure doctrine.”*

### **DISCUSSANTS**

**Mr. Simon Peter Kinobe (President Uganda Law Society) gave the opening remarks.**

The Hon. Deputy Chief Justice Alphonse Owiny-Dollo opened the discussion with a few comments on the topic.

The key discourse was given by Mr. Benson Tusasirwe, a Senior Lecturer of Law, Makerere University.

Mr. Daniel Ruhweza, a lecturer at school of law, Mr. Allen Mukama representing the Attorney General and Mr. Henry Onoria, a legal Consultant were the key panelists. The panelists were moderated by Mr. Charles Mwanguhya.

### **REMARKS FROM THE DEPUTY CHIEF JUSTICE.**

His Lordship thanked the organizers of the dialogue. That such a forum is needed for debate and for the legal minds to make contribution to the decisions given by Courts of law.

He expressed his disappointment in the legal regime of this country for it inclined to criticizing the 'person of the judge' as opposed to critiquing/ analyzing the judgment or decision given by the Court.

He gave an example of his decision to take the Court to seat in Mbale. The populace criticized the decision without analyzing the reasons why. He stated that, the law provides that unless the head of the Constitutional Court decides otherwise, the Court shall sit in Kampala. The decision to take the Court to sit in Mbale was because people must be made part of the process of adjudication and this affords the Court the opportunity to move closer to the people.

That the Constitutional Court allowed anybody and everybody the opportunity to cover the proceedings of Court thereby making people part of the process.

He also stated that the Court sitting elsewhere, as the case was with Mbale affords the judicial officers a rare opportunity for them to discuss with each other what happened in Court and analyze the proceedings thereafter.

He also expressed his disappointment on the lack of intellectual discourse. The intellectuals are not guiding the debate and the discussion. These, he recommended must rise up to point out what's wrong and what's right in a healthy way.

He noted that the people have erroneously term the decision "age-limit" yet that was one of the least of the issues that were addressed by the Court in Mbale. The Constitutional Court addressed many others issues, inclusive was age limits.

He said that there is a difference between the theory of Constitutionalism and the practice of Constitutionalism. The practice differs one country to another and in Uganda, the Judiciary follow the letter and the Spirit of the law. In other words, what does the law say about certain facts. The Courts should not engage in speculation and political activism but in judicial activism.

He said the Courts did not interfere with the most important provision in the Constitution that safe guards the people's right to elect their leaders every five years. The People of Uganda are capable of voting the President they want. He gave instances of West Nile,

Teso, & Northern Uganda that have continuously voted against the President. That the solution lies with the people and not the Court.

He reiterated the fact that all the judges discussed the best structure doctrine and found that Article 102 of the Constitution was not part of it. Amending the Article did not destroy in any way the sanctity of the Constitution, Uganda's Constitution is still as strong as always because it still has its pillars in place for instance, the right to vote was not down away with. He noted that labeling the debate as "Togikwatako" was misplaced in the first place, because the provision is one that can be amended by Parliament.

He stated that the Constitutional Court did not amend the provision to remove age limits, but were simply dealing with the question of whether Parliament had the right to amend that Article 102 of the Constitution. That the Court found Parliament had the right to amend that article and even made a finding that they did so recklessly.

On whether this would vitiate the amendment, he enjoined the participants to analyze the substantiality test. Would for example a lack of consultation or consultation thereof affect the decision of the Member of Parliament to vote for or against the amendment. The consultative process does not directly affect the structure. He also noted that in the passing of the amendment, there were three levels of violence. One from the Members of Parliament themselves, the other from the defiance of the speaker and the other because there were an uniformed army persons in Parliament. But by the time the MPs realized the army was in the Chambers, they had already discussed their matters. Therefore, the presence of the army did not influence the decision of Parliament.

He however noted that the Courts of Law castigate the army from entering the chambers of Parliament.

He also noted that the Judgment carries within it the values, norms and aspirations of the people as provided for by Article 126 of the Constitution. The people's values, norms and aspirations have been captured within the Constitution/law. The courts do not have the responsibility to move around this country looking for people's opinions.

He encouraged other organizations to have such discourses so that we have a healthy state.

## **KEY PRESENTATION**

The Key note address was given by Mr. Benson Tusasirwe. He led the participants into understanding what the best structure doctrine is, its importance, how the doctrine played out in the Constitutional and the Supreme Court decisions and what we can take away from the decisions of the Court.

He noted that it is erroneous to say that the judges did not discuss the doctrine while delivering their judgments. Both Courts (C.O.A & Supreme) Court, even the dissenting judges held a unanimous view that the best structure doctrine applies in Uganda and that the Article 102 (b) of the Constitution did not fall under it.

He noted that this doctrine, which has its origin in India is to the effect that a national Constitution has certain basic features which underlie not just the letter but also the spirit of the Constitution.

He noted that the doctrine gives the Courts power to interfere with the power of the Parliament to make amendments to the provisions of the Constitution that alter the best structure of the Constitution. He however noted that what constitutes best structure is not listed and varies from country to country. The Judiciary should be able to look at the history of their country, the political environment, the national vision, national objectives and directive principles etc to determine what elements make up the best structure.

He noted that ordinarily, each Constitution contains provisions for its own preservation by providing elaborate procedures for amendment. But overtime, these may not be enough when those in power violate those procedures.

That the best structure doctrine is an implied restraint that should have been used in the age limit case but unfortunately was not.

He noted that the Judiciary is the Custodian of the rule of law and should have arisen to the occasion to protect the Constitution.

He noted that historically, bad governance, and even totalitarian rule, rarely come in a huge torrent, overnight but in small doses. That in the case of Uganda, first were the complaints of sham elections, but our courts used the substantiality test, stating that although there was rigging and irregularities in the elections, these did not substantially affect the result of the election. Then the judges were told to shut up because they did not participate in the revolution. Then the "rape of the temple"-High Court, then the invasions of the Chambers of Parliament by the army etc

He noted that the decision therefore missed an opportunity to prevent the incremental nibbling away at the Constitution and the rule of law.

## **POINTS/ISSUES RAISED IN THE DISCUSSION**

The Panelists agreed that the judges discussed the best structure doctrine while delivering their judgments. That it's only a matter of whether we agree with them or disagree.

They also took note of the fact that the public do not know the crux of the decision. They do not understand the concept of best structure or what it entails. The public is more concerned about the political question in the judgment.

The Panelists also agreed that the best doctrine principle applies in Uganda.

Other points that were brought out were;

- That the age limit decision should be looked at as part of the broader context of the debate. That the broader context is the issue of Constitutionalism and good governance. That it shouldn't be cast out as not important and political because the politics sometimes informs the law.
- That one should take into consideration that the amendment was brought in at the backdrop of 2016 with a specific aim to have the incumbent President stand again in the coming elections and therefore courts should not have been dead to the political dynamics of the amendment before that was before them.
- That most judges tried to stick to the letter of the law and that is why we ended up with the kind of judgment we have. Politics sometimes informs the law and the intent of the amendment, the background of a particular law should be taken into consideration. Dr. Onoria gave the example of how the judges in the Susan Kigula matter on death penalty looked at the history of the country, the background to the law and made a decision. The judges did not exercise their powers to make a well-reasoned judgment.
- That we should all take note of the fact that there are laws in our country that are enacted for one individual or for the convenience of one person. These can be for their benefit or to curtail the rights of others such as the age limit amendment.
- That although the Constitution has procedures for challenging an election, the question is whether the courts have the independence to make a judgment that unseats the incumbent President.
- That the courts should uphold Article 1& 2 of the Constitution. The power belongs to the people.
- That the decision of the Court is in essence the decision of the people. And not always will the people agree with the decision made but courts have the duty to by and large make a decision that is legal. It should be based on facts, evidence and the law. That in as much as there is legal truth, there is also political truth and the courts should be informed on both.
- That often times the Judiciary is more executive minded than the Executive itself. They would rather do the safe thing than venture beyond the law, even when judicial activism calls for it

### **QUESTIONS THAT WERE DISCUSSED.**

The following were some of the questions that were discussed. Whether they were answered or not is dependent on what the participants took away from the discussion;

- Is Justice so blind that it can't see?
- Can the people actually choose their leaders with the current political environment?
- Was the decision to take the Court to Mbale necessary or a political move?

- Should politics be divorced from the law?
- How does the age limit judgment affect the young people?
- Did the judges take into consideration the values, norms and aspirations of the people?
- What is the place of the Preamble of the Constitution in the best structure doctrine?
- Are the powers of the President unlimited?
- What implication does the age limit judgment have on youth participation in politics and governance?
- Did Parliament have the right to amend Article 102 (b) of the Constitution?

## **RECOMMENDATIONS**

### **The discussants proposed the following recommendations;**

- That in adjudication of such complex matters, the judges should carefully take into consideration the spirit of the legislation as opposed to only the letter of the law.
- Judges should be independent of all external factors while making their decisions.
- Stakeholders should not shy away from discussing important issues like the one at hand for fear of antagonizing certain sections of government.
- The people should elect good caliber of representatives (Members of Parliament), who shall ably represent their views in Parliament and call them to account on the mandate given
- That we should all play our roles in upholding the Constitution, the duty should not be left to the Courts

Overall this dialogue was successful as it started a discussion on holding the Judiciary accountable for decisions made by them and the far reaching effects that they have on the society.