The Basic Structure Doctrine and Constitutional Restraint: Take-away from the "Age Limit" Decision

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"African dictatorships never lose elections because such elections are neither peaceful, free nor fair."

[Willy Mutunga][1]

Introduction

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culminated in the enactment of the Constitution (Amendment) Act, by which Article 102 (b) of the 1995 Constitution was repealed, removing the "age-limit" qualification to stand for president of Uganda.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 favour 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.[2]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 though 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."*

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[1] Willy Mutunga (2001) "Constitutions, Law and Civil Society: Discourses on the Legitimacy of Peoples' Power" in Joe Oloka-Onyango (ed), *Constitutionalism in Africa: Creative Opportunities, Facing Challenges*.Kampala: Fountain.

[2]These were Const. Petition No. 49 of 2017, Male Mabirizi v. AG; Const. Petition No. 3 of 2018, Uganda Law Society v. AG; Const. Petition No. 5 of 2018, Gerald Karuhanga v. AG; Const. Petition No. 10 of 2018, Prosper Businge v. AG; and Const. Petition No. 13 of 2018, Abaine Jonathan Buregyeya v. Attorney General.

In this presentation, I address the content of the Basic Structure Doctrine, its scope and limitations. I then comment on the decision of the Supreme Court in **Consolidated Constitutional Appeal No. 2 of 2018**; ***Male Mabirizi Kiwanuka & Others v. Attorney General***. Finally, I discuss the implications of the decision for constitutional restraint on governmental power, or what is generally known as constitutionalism.

The Basic Structure Doctrine: a general overview

The Basic Structure Doctrine (BSD) was enunciated by the Supreme Court of India in one of its most important decisions ever, in the case of ***Kesavananda Bharati v. The State of Kerala*** **(1973) 4SCC 225**. The doctrine is to the effect that a national constitution has certain basic features which underlie not just the letter but also the spirit of that constitution. These features constitute the *Inviolable Core* of the constitution, and any amendment, which purports to alter the constitution in a manner that takes away that basic structure, is void and of no effect. The rationale of the decision was that an amendment which makes a change in the basic structure of the constitution is not really an amendment but is, in effect, tantamount to rewriting the constitution, which parliament has no power to do. The court held that as the Supreme Court of the land, it had a limited power to review and strike down amendments which went to the very heart and core of the constitution, by seeking to alter its basic structure.[3]The BSD was upheld and relied on in subsequent decisions in India itself, and in many other jurisdictions.[4]

In the South African case of ***Executive Council of Western Cape Legislature v. The President of the Republic of South Africa & others*****, CCT/27/95; [1995] ZACC8; 1995 (10) BCLR 1289; 1995(4) SA 877, explained the doctrine as follows:**

> There are certain fundamental features of parliamentary democracy not spelt out in the Constitution but which are inherent in its nature, design and purpose… there are certain features of the constitutional order so fundamental that even if parliament followed the necessary amendment procedures it could not change them.

In their wisdom, the courts did not lay down a list of provisions it considered to constitute the basic structure. Consequently, the claim of any particular feature of the constitution to be part of the "basic structure" is determined by the courts on a case by case basis. Whether or not a provision is part of the basic structure varies from country to country, depending on each country's peculiar circumstances, including its history,

[3] For my earlier discussion of the Doctrine, published just as the moves to amend the Constitution were reaching the fever pitch, see Benson Tusasirwe "Constitution amendment is void as it violates 'Basic Structure Doctrine'", *Daily Monitor*, 25th October 2017.

[4] In their judgments in the *Mabirizi* Appeal, the Chief Justice and all the other six Justices of the Supreme Court discuss in detail the decisions from all over the world relating to the BSD.

political challenges and national vision. In answering this important question, courts will consider factors such as the preamble to the constitution, national objectives and directive principles of state policy (in countries which have them in their constitutions, such as Uganda), the bill of rights, the history of the constitution that led to the given provision, and the likely consequences of the amendment.

The importance of the BSD.

The BSD has over the last 45 years assumed a significance way beyond what its proponents may have had in mind. The idea that though parliament has wide powers to amend the Constitution, it powers are unlimited and do not extend to the power to tamper or do away with clauses which are basic to the structure or essence of the constitution is now considered an important safeguard against the possibility of a party or group having a controlling majority in parliament abusing its majority to erode the essence of the Constitution by doing away with vital clauses which they consider bothersome or inconvenient to their exercise or retention of power, or by introducing provisions that enable them to entrench themselves in power.

Ordinarily, a constitution contains provisions for its own preservation. For example, most constitutions prescribe more elaborate procedures for their amendment than are prescribed for ordinary statutes. However, a time comes when these are not enough to protect the constitution. Such a situation arises when a party has an overwhelming majority of members of parliament and can use its numbers to pass any amendment. In such a situation, the express provisions of the constitution are not enough to protect it. In ***Kesavananda Bharati***(Supra), Sikri, CJ explained the importance of the doctrine in guarding against abuse of parliamentary majorities and warned about the likely consequences of such abuse. He stated:

> …a political party with two-thirds majority in parliament for a few years could so amend the constitution as to debar any other party from functioning, establish totalitarianism, enslave the people, and after having effected these purposes make the constitution unamendable or extremely rigid. *This would no doubt invite extra-constitutional revolution* (my emphasis).

Sometimes where a situation of a majority intoxicated with power threatens constitutional stability, the constitution can still be protected by certain constitutional restraints known as constitutional conventions. These are underlying norms which are not in written law but are nevertheless considered binding and which cannot be easily overridden. In a polity like the UK, with centuries of a culture of constitutionalism, Constitutional Conventions are almost as sacred as the Mosaic Decalogue—the Ten Commandments that underwrite the Judeo-Christian civilisation, and only the most fool hardy would dare contravene them.

In younger nations, however, that is not the case. Both the express restraints on power enshrined in the constitution, and implied ones derived from the conventions, are weak.

In a country like Uganda express constitutional restraints and those funded on unwritten conventions are easily overridden. Legal revolutions, whereby the existing constitutional order has been overthrown and replaced not in the manner prescribed by the constitution were experienced in 1966, 1971, 1979, 1985 and 1986.

The 1995 Constitution attempted to prevent such legal revolutions by outlawing the operation of the Kelsenian theory, through Article 3.[5] However the provision would possibly not prevent a subversion of the purpose of the constitution through a procedurally lawful amendment of the Constitution, with the same result as if the constitution had been overthrown. Which is where the BSD comes in.

The 1995 Constitution has its own in-built restraints on power. The President may not have his way, against the wishes of Parliament. But what if Parliament and the President contrive a common mischief, to make nonsense of the Constitution? Then the Judiciary is expected to come in. The BSD comes in handy in this regard, as a tool the Judiciary can employ to prevent self–cantered adulteration of Constitution, where the express provisions of the constitution itself are not usable, for one reason or the other. At that point the BSD provides the last restraint against the erosion of constitutionalism.

It is my contention that BSD should have been used as a restraint in in the Age Limit Case. Unfortunately, it was not.

How the BDS played out in the Constitutional Court and the Supreme Court

Before the Constitutional Court, the applicability of the BSD was extensively addressed. The Five Justices were all unanimous on two aspects:

1. That the BSD is applicable in Uganda.
2. That whether or not a given provision of the Constitution is part of the basic structure, the *Inviolable Core* of the constitution, varies from country to country, and is dependent on the history and poetical realities of each country, and the character of its Constitution.

The Justices, however, were divided on what Constitutes the basic structure of Uganda's Constitution. To Owiny-Dollo, DCJ the provisions constituting the basic structure are: the sovereignty of the people (Art.1), the Supremacy of the Constitution (Art. 2), Democratic governance and practices, a unitary state, separation of powers, the bill of Rights (Chapter 4) and independence of the judiciary. That these are part of the basic structure because they are entrenched by Art 260 of the constitution.

For Remmy Kasule, JCC they are: sovereignty of the people, supremacy of the Constitution, defence of the Constitution (Art. 3), Non-derogation of certain rights (not

[5] According to the theory advanced by the Austrian Jurist Professor Hans Kelsen in his magnum opus, *Pure Theory of Law*, a coup d'etat is an internationally recognised mode of changing the existing constitutional order, and when such a change successfully occurs, it a legal revolution, a law-creating phenomenon whose validity is determined not by its legality but by its effectiveness.

all but the ones protected under Article 44), democracy especially the right to vote, abolition of the one-party state, and independence of the judiciary. Elizabeth Musoke, JCC the limited herself to sovereignty of the people and the non–derogable clauses in bill of rights; while for Chaborion Barishaki, emphasis was on popular sovereignty.

Kenneth Kakuru, JCC had the most expansive conception of the doctrine, which he construed to cover sovereignty of the people, supremacy of the constitution, political order through a durable and popular constitution, constitutional and political stability based on the principles of unity, peace, equality, democracy, freedom, social justice and public participation. He added the rule of law, observance of human rights, regular free and fair elections, separation of powers, accountability of government to the people, non-derogable rights, the idea that land belongs to the people and cannot be taken away from them by Government without appropriate compensation, the idea that the state holds natural resources in trust for the people, the duty of citizens to defend the constitution, and abolition of the one-party state.

I have personally find Justice Kakuru's notion of the BSD closer to my own. I have underlined some of the aspects he considers to be part of the basic structure because most are not actually express provisions in the constitution itself, but are derived from the Preamble to the Constitution and the National Objectives and Directive Principles of State Policy. It is my submission that to identify the things which constitute the basic structure, you do not just look at express words of the Constitution. You have to look at the spirit of the Constitution, which may not be captured by a slavish commitment to the express words.

The preamble and the National objectives set out at the beginning of the 1995 Constitution cannot be overlooked if you want to appreciate the character of the 1995 Constitution which, the Justices unanimously agreed, is a key consideration in determining the basic structure of the constitution. So, for example, there is no express provision in the Constitution that "there shall be political stability". But can anyone deny that the quest for stability is at the heart of the constitution? Can an amendment that is obviously a recipe for instability pass the test, merely because the Article amended is not an entrenched one under Article 260, but is one that can be amended the ordinary way?

In my view, therefore, the BSD has to be viewed for what it is—a call on the Judiciary to become *activist* and not *constructionist* in defending the Constitution. A doctrinaire approach misses the point, by insisting that if the framers of the Constitution had wanted to treat certain articles as critical, they would have expressly done so, and that what they did not entrench under Article 260 was not deemed critical.

This is my point of departure with the majority in both courts. In determining whether a provision constitutes the basic structure of the Constitution, its wording is important. However, the wording is not the end of the story.

Surprisingly, all the five Justices of the Constitutional Court, and all the seven of the Supreme Court were unanimous in their finding that Article 102 (b) of the constitution is not part of the basic structure of the constitution. Most of them also held that the articles which constitute the basic structure are those which the Constituent Assembly (CA) chose to entrench in Article 260 of the Constitution, which can only be amended by going back to the people.

There are other points in the judgments that one can take issue with: the seeming condonation of the reprehensible and abominable invasion of the chamber of parliament by the armed forces; grossing over the intervention of state agents in the consultations by MPS; the apparent disregard of the fact that about 50%, of the opposition members were expelled and thereby excluded from the debate and vote on the amendment; the use of the infamous "substantially" test to determine the effect of wrongful actions during the amendment process; the refusal to consider the cumulative effect of this and earlier amendments on the stability and integrity of the country; the seeming insensitivity to the abuse of numbers (majorities) by the ruling party, and several others.

My take on these will be evident as I discuss the decision and its implications

Take-away (1): The philosophical and practical limitations of BSD

The basic structure doctrine is not some magic wand, a cure-all for all the constitutional challenges that afflict a county. After all the doctrine has its own inbuilt limitations.

In the first place, it is not a rule of law, it is merely a philosophical postulate, a guide to assist the Constitutional Court and any court dealing with appeals in Constitutional matters, when dealing with an amendment or proposal amendment, to determine whether the amendment goes to the root or core of the Constitution and is therefore a no-go area for parliament.

Secondly, it is prone to the usual vagaries of judicial decision making. The law is rarely set out in black and white. It is often full of grey areas, of various shades. Because of that, as the late Justice Mulenga used to say, "the law is debatable". What that means is that you can rarely assert the exact legal position on any matter with the accuracy of geometry.

A judge deciding any case depends very much on his or her own judgment, even in situations where the law is couched in mandatory terms. That is why a final decision of court is a "judgment" it is the Judge's own conclusion on the law and facts/evidence. So when a judge is called upon to determine whether a given constitutional amendment touches the core of the Constitution and, therefore offends the BSD, his or her answer depends very much on what he/she considers to be basic to the Constitution. After all there is no list of constitutional provisions which, without question, constitute the basic structure of the constitution.

Above all it should be borne in mind that a decision in a constitutional case, and in public interest litigation generally, is not a merely a legal decision. Such litigation has been referred to as a politics by other means.[6]Whether or not a judge will find a given Constitutional provision basic or fundamental to the Constitution is a highly charged legal as well as political question. The answer a judge gives to such a question often depends on what he/she considers to be his/her ultimate responsibility.

The basic structure doctrine is an aspect of legal philosophy/jurisprudence. And like all aspects of legal philosophy, it does not operate with the accuracy of mathematics. It is prone to the vagaries of politics and the personal idiosyncrasies of the judicial officer applying the same.

Looking at the Masirizi case, you immediately notice that right from the Constitutional Court, the Justices could never agree on what aspects of the 1995 Constitution constitute its basic structure. However, Justice Stella Arach Amoko, with whom all the other Justices concurred, correctly stated that to determine what aspects constitute the basic structure of any constitution, you have to look at the history and also the future aspirations of the society enacting the constitution. You have to consider, what informed the constitution, that is to say, what mischief didthe framers of the Constitution seek to cure, what society did they aspire for.

But that is precisely where the problem begins. Members of any given society are never unanimous on what the history is or means. Neither are they ever unanimous on what the future ought to be. *History is never just facts; it is facts as interpreted by the narrator*. Historical phenomena are never categorical, even in the most obvious of circumstances. Ugandans are not even unanimous on whether Amin was a hero or a monster!

To use a less extreme example, since 1986, there have been two major shades of opinions as to the nature of democracy, and the interpretation to be given to our political history. A section of the political class almost wholly blames political pluralism for the problems Uganda has gone through and therefore make the case for a "no-policy" democracy. This school of thought is led by the President, for quote he:

> We in the NRM argued that there are no healthy grounds for political policy polarisation in Uganda at the time because of the absence of social classes. In Western democracies, parties have usually been founded on some sort of class basis—parties for the middle class, parties for the workers, and so on. On what basis would parties in Uganda be formed, since Ugandans are overwhelmingly one class, peasants? The polarisation one is likely to get in Uganda and countries like it is vertical polarization – tribe A will joint party A, tribe B Party B and so on. They will all be sectarian…[7]

[6] See Joe Oloka-Onyango (2017), *When Courts Do Politics*. Newcastle-Upon-Tyne: Cambridge Publishers; J. A. G. Griffith (1991), *The Politics of the Judiciary*, 4th Edition, London: Fontana Press; Peter Von Doepp (2009), *Judicial Politics in New Democracies: Cases from Southern Africa*, London: Lynne Reinner Publishers; Rachel Ellet (2013), *Pathways to Judicial Power in Transitional States*, London: Routledge.

[7] Yoweri K. Museveni (1995), *Sowing the Mustard Seed: The Struggle for Freedom and Democracy in Uganda.* London: Macmillan, p. 195.

Of course this analysis may not stand close scrutiny, but that is for another day. For our present purposes the question is: how then do you frame a basic structure out of a history that is so amorphous? From their own conception of history, the Justices of both courts drew up their own lists of what in their view were the basic features of the 1995 Constitution. They were unanimous on some but not on others.

It is my contention that that is where they missed the point. *I do not think that it is helpful to draw up a list of Articles that constitute the basic structure of the national Constitution.* What is "basic" is not the wording of the provisions. It is not the letter of the constitution, but the spirit. Hence democracy and right of participation are a basis feature, but multi-patyism is not. When looking for the basic structure, you do a dis-service if you look at the actual words, rather than what they intended to achieve.

A proper understanding of the BSD, therefore is not that there are certain provisions that parliament can never amend. It is that parliament has not the power to amend the constitution in order to bring about certain results: a fascist state, an autocracy a theocracy and so on. Every article is amendable, but not in a manner that erodes the underlying purpose of the constitution. Even the bill of rights can be amended, but not in a manner that take away the essence of rights enshrined therein, but so as to introduce new rights or even to impose limitations on the enjoyment of certain rights, so long as the limitations introduced are "reasonable and demonstrably justifiable in a free and democratic society (Art. 43). By this logic if is debatable whether Katureebe, CJ was correct when he stated at p. 13 of his judgment that Parliament has no power to change Uganda from a presidential system to the parliamentary system. Technically it can, subject to complying with the prescribed procedure.

However, that is not and should not be the point. The point is and should be, that because of the implications of a given amendment, bearing in mind our history and aspirations, it is not proper to amend certain articles, when the likely consequences of doing are grave. Then parliament should be considered obligated to go back to the people or to leave such changes to a constituent assembly, because the effect of the amendment is either to undermine the very purpose for which the Constitution was made, or to in effect create substantially a new Constitutional order. In this, as in other decisions, the Constitutional Court, and a higher court considering an appeal against the decision of a Constitutional Court is not just a court of law. These things are beyond law. The question, as in many constitutional cases is never whether the thing is legal. The question is whether it is proper—a question that goes beyond law, right into the arena of philosophy, history and politics.

Which brings us to the question of Article 102 (b). A lot of ink and time were wasted on whether Parliament had power to amend the Article. The misleading argument which majority Justices of the Supreme Court bought into was that if the framers of the Constitution wanted to entrench the Article, they would have listed in Article 260 as one of these which require a referendum or other special process in order for it to be amended. To me this missed the point. What makes a provision part of the basic

structure is not the fact that it is no listed. It is a question of the consequences of the amendment at the point in time when the amendment is sought to be effected.

In ***Dow v. Attorney General of Botswana*** **(1992) LRC (Const) 623, 668** Aguda, J.A. stated:

> The Constitution is the supreme law of the land and it is meant to serve not only this generation but also generations yet unborn.

In numerous decisions our own superior courts accepted that the Constitution is a living instrument, which should not be interpreted using a doctrinaire approach. That in constructing the constitution, you are must not look at the state of things at the time it was enacted, but at the present time, but also with an eye to the future.[8]

It could well be that as at 1995. When the Constitution was promulgated, age limits were not the critical issue. After all, as Katureebe, CJ points out, none of the dictators who tore up Uganda's soul in the past was an old man neither were Hitler, Mussolini, and all the brutes of history.

But in my view the court ought to have approached the question in holistic manner. In the first place, the timing of the amendment left no doubt that it was designed to cater for the stay in power of a specific individual, who happened to have closed the maximum age permitted for one to stand. The question then should have been, is it consistent with the spirit of the Constitution, to amend the constitution whenever it suits the convenience of an individual? Can a constitution that is amended in such circumstances ever retain the sanctity it requires for it to operate as a blue-print for a society? Secondly, Court should have borne in mind that in 2005, a related amendment was effected, removing term limits, again just to accommodate the convenience of the same individual. To now repeat the process, with basically the same arguments (that Parliament has the power to amend, anyway, was to actually tell the world that there is nothing special about the Constitution.

But the more serious point about this was that because of the earlier (2005) amendment, which removed the term limits, the 2017 amendment in effect removed the very last measure against a life presidency. *I verily believe the framers of the 1995 Constitution would be shocked if they were to be told that it is okay to have a life presidency*, yet that is the effect of the amendment. In a long chain of cases, including *Tinyefuza* (supra) the courts all over the commonwealth have held that what should be considered is not the expressed purpose but the effect of the provision. The effect of the amendment is obvious; whatever clever words the sponsors of the amendment may have cooked out of their creative minds. Court therefore should have been worried about the cumulative effect of the repeated amendments, all driven by personal convenience. Surprisingly, the Supreme Court took the easy route of finding that the 2005 amendment was not being contested before the Court.

[8] *Attorney General v. Salvatori Abuki& Another*, Constitutional Appeal No. 1 of 1998, *Attorney general v. Maj. Gen. David Tinyefuza,* Constitutional Appeal No. 1 of 1997.

Thirdly, in ***Dow. Attorney General*** (supra), whose dictum our own courts have treated with the utmost respect, Amissah, J.A. expressed a very common sense position that

> The makers of a constitution do not intend that it be amended as often as other legislation."

When challenges arise during the life of a country, they are expected to be addressed in a manner that fits into the existing constitutional frame work, rather than changing the constitutional framework to fit the new challenges. Only in the most compelling circumstances, for example where a constitutional provision has clearly outlived its usefulness, or has become a fetter to the advancement of society, should an amendment be pursued. In the instant case these pushing for the amendment simply and arrogantly proclaimed that the laws allow them to amend the constitution. No one can seriously claim that the age-cap had become outdated or a fetter on the growth of our democracy. They also argued, tongue in cheek, that the provisions of Art 102 (b) were discriminatory against the very young and the very old and that the people, who are sovereign, should be left to determine the personal competence of a candidate rather than artificially restrict their choice. This is, of course a pedantic argument: so why do we limit the voting age? Why do we disqualify those who are suffering from mental disability? Should we remove the retirement age and leave civil servants, judges and members of the armed forced forces to save until they cannot stand? In a word, why don't we just leave everything to the people?

It is really simple. The basic structure Doctrine is a subjective doctrine. Provisions of the Constitution constitute its basic structure depending on their centrality to the specific constitutional order the given constitution was meant to provide for. And in determining what the intended constitutional order was, you look at the history and the aspirations for the future.

Looking at our constitutional history, all the past Constitutions had bills of rights. In all the bills, the rights were laid down with limitations or clawbacks all couched in the standard language of the 1949 Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic Social and Cultural Rights (ICESCR) and the African Charter of Human and Peoples' Rights (ACHPR). Although the bill of rights in Chapter 4 of the 1995 Constitution introduced certain novel features, it is not a unique creature of the 1995 Constitutional order. For example, it is considered as novel because it proclaims in Article 20 that fundamental rights and freedoms of the individual are inherent and not granted by the state, and that the rights "shall be respected, upheld and promoted" by all organs and agencies of government and by all persons. But even without this provision in the Constitution, that still remains the legal position. Fundamental rights are not fundamental because the Constitution says so. The state and all persons have the obligation to respect, uphold and promote the right, not because Article 20 says so.

So to me the 1995 Constitution's uniqueness is not because it has a very wordy bill of rights. Even Article 1 which proclaims sovereignty of the people does not create that

sovereignty. The people would still be sovereign even if Article 1 was omitted. The formal sovereignty of the people is a philosophical construct founded on the notional contract that gives rise to the modern state.

Even other provision for a unitary state, a presidential system, the right to vote in presidential elections, independence of the judiciary, and so on are not unique to the 1995 Constitution. They were also in the 1967 Constitution. However, that did not prevent of reign of terror from being unleashed.

To me the provisions that were peculiar and therefore basic to the 1995 Constitution were those designed to address the central political problem of Uganda's political history: the problem of an imperial presidency. A lot has been written on the problem of presidentialism, and I need not repeat the discourse here.[9] The point is that the 1995 Constitution set out to prevent the emergence of a presidential behemoth. The obvious way was though the president having to renew his mandate by going back to the people after five years. Of course the presidency was also supposed to be controlled through mechanisms like an independent judiciary, the requirement that presidential appointments be vetted, and the power of parliament to control the purse through appropriations and the exercise of general oversight on behalf of the people.

However, the true genius of the framers of the 1995 Constitution was in realizing that in a young and fragile democracy, just emerging out of the clutches of dictatorial regimes and a ruinous civil war, it was possible to subvert democracy through the power of incumbency; the control the sitting president has on the electoral commission which he appoints, the possibility of commercializing elections and then using state resources to obtain undue advantage, the possible abuse of the armed forces and security agencies in elections by the commander-in-chief, and the intimidation of courts, which may limit their capacity to punish electoral excesses. Because of these possibilities, which have all come to be realized, it was not enough to put in place democratic structures. The framers of the constitution, therefore made sure that if these weaknesses or limitations of liberal democracy prevented genuine choice, at least at some point the incumbent would have to go, the unfair advantages notwithstanding. The magic bullets designed to achieve this were two: Article 102 (b) on age limits and the erstwhile Article 105 (2). When all else failed, these would be the final insurance against endless tyranny or a life presidency. In 2005, the first guarantee was removed. In 2017, the last was touched.

In considering the centrality of Article 102, the court had an obligation to consider the fact that with Article 105(2) already amended, the last bulwark is what was now being considered. There is no way you can say that this last ditch defence against unlimited power and a life presidency is not core to the 1995 Constitution.

[9] Fredrick Sekindi 2016), "Another Perpetuation of incumbency through the supreme law: The conceptualisation of the presidency under the 1995 Constitution", [2016] Africa Journal of Comparative Constitutional Law, p. 90 – 130; Joe Oloka-Onyango (1995), "Taming the President: Some critical reflections on the executive and separation of powers in Uganda" EAJPHR, Vol. 2 No. 2.

It may well be that the framers of the 1995 Constitution did not realize that these safeguards could easily be done away with by a mischievous or even well-meaning but misguided parliament, so they never entrenched them. But that is precisely the point made by Manyindo, DCJ (as he then was) in ***Tinyefuza v. Attorney General***, **Constitutional Petition No. 1 of 1997**, that over the years, the weight attached to given provisions may change. To me the Court was obligated to consider that the presidency that the repeal of Article 102(b) was going to entrench had already been in office for over 30 years, through elections that were three times contested in the Supreme Court, with the Court making the unusual finding on all three occasions that the elections were not free and fair but were nevertheless valid?

Take-Away (2): Implications of the "Age-limit" Decision

What the "Age-Limit" decision means for our jurisprudence can be viewed not just from what the court said, but also what it did not say. But they are also to be derived from the surrounding circumstances.

Historically, bad governance, and even of totalitarian rule, rarely come in one huge torrent, overnight. They come in small doses, nibbling away at the system – a bite bare, a scratch there until you have no liberties to talk of. In the case of Uganda, first there were complaints of sham elections, but our courts' answer was that they did not substantially affect the result. Judges were told to shut up because they did not participate in the revolution, and nothing happened. Then the High Court was invaded in the full glare of the press. We suspended court operations for a week-or-so, and it was business as usual. When Pro-Kayihura goons invaded Court again—Makindye Court this time, people barely noticed, because it had begun to become the normal to rubbish or even invade courts with arms. Then the invasions spread over to another branch of government—when the chamber of Parliament was invaded. In any other country, if the Parliamentary Sergeant–at-arms was unable to restore order, business would have stopped for as long as it took to do so. In Uganda, we do not take such nonsense—we invade and beat up the MPs. For our present purposes, the interesting point is how court reacted. The sum of the "Age limit" decision is that it was a bad thing alright, but not too bad to substantially affect the result. That a law passed in those conditions was okay! *When will it ever be considered unacceptable for the executive arm to physically attack another arm of government during the latter's conduct of its business? When a Judge in court?*

The circumstances aside, the decision itself is a missed opportunity to prevent the incremental nibbling away at the constitution. It was a missed opportunity to assert the power of Constitutional restraint, the power of checks and balances. Instead, we chose to differ to the older doctrine of separation of powers. In my view, this did no auger well for the defence of the constitution.

But more importantly, the more the courts are hesitant to be forthright in the defence of the Constitution, the more we risk radical change from elsewhere. To paraphrase Sikri, CJ in the

Kesavananda case, if you allow a regime to use its majority in parliament to entrench itself you are inviting the possibility of extra-constitutional revolution. Justice Opio Aweri hinted at this at p.33 of his Judgment, when he pointed out that the earlier removal of term limits was what was making people *"desperately hanging to Article 102 (b) as a ray of hope to prevent a repeat of history"* Well, the Court dashed their hope of averting a repeat of history. Where will they look next?

Conclusion

Professor Willy Mutunga noted that in Africa, presidents do not lose elections because the elections are neither free nor fair (seen footnote 1 above). Under the 1995 Constitution, there were in-built mechanisms to ensure that the Mutunga reality notwithstanding, our president would not become a life-president. In 2005 we removed term limits, meaning one can be president until one is 75, so long as he can win an election. We have now amended the Constitution to provide that even after 75 he can continue in office, until nature intervenes. Has the basic structure of the Constitution really remained the same? Or to put it differently, without these restraints how is the Constitution different from the 1967 Constitution? In the "Age-Limit" case, both the Constitutional Court and the Supreme Court did not address themselves to this. Of course the legal system we operate requires that justice should be blind. But should it be that blind—to the consequences of its adjudication?