AN ANALYSIS OF THE SEPTEMBER 2015 CONSTITUTIONAL COURT RULING ON THE ELECTIONS OF SPECIAL INTEREST GROUPS

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I. Introduction

The Constitution of the Republic of Uganda 1995 is the Supreme law of the land, meaning that all other laws of the land constantly have to measure their legitimacy against it. Where there is an inconsistency between these other laws and the Constitution, the Constitution prevails and the other laws are void to the extent of the inconsistency.

It is the duty of the Constitutional Court of Uganda to weigh the legitimacy of these other laws against the Constitution. In this regard, the Constitutional Court is a guardian, if you like, of the Constitution, tasked to interpret any domestic laws that are perceived to be in inconsistent with the Constitution.

In 2010, the Constitutional Court was called to exercise its mandate in the following three cases:

i. Constitutional Petition No. 37 of 2010 (Kasozi Robinson v. Attorney General)
ii. Constitutional Petition No. 40 of 2010 (Legal Action for Persons with Disability v. Attorney General, the Electoral Commission and NUDIPU)
iii. Constitutional Petition No. 48 of 2010 (Moses Mauku &Catherine Aneno v. Attorney General)

While all the above three petitions were filed separately in 2010, they were eventually consolidated into one by the Court and disposed of at once. Why? They all challenged the constitutionality of different aspects of the law relating to election of special interest groups to the Parliament of Uganda. These special interest groups include representatives of the army, youth, workers and persons with disabilities. It is noteworthy that even though the petitions were filed in 2010, they were only heard and disposed off in 2015. In fact, the judgment itself was delivered on 29th September 2015. By then, one national parliamentary election had already been carried out in 2011 under the challenged law and another election is about to take place in early 2016.

This paper examines what effects such a judgment may have on the landscape of the 2016 elections and how, if at all the judgment affects the current representatives of special interest groups who were elected under the challenged laws. It also looks at the ramifications of the judgment on how far the Parliament of Uganda can delegate its law making powers and ends with an examination of how the Constitutional Court chose to deal with international legislation, specifically, the United Nations Convention on the Rights of Persons with Disabilities.

II. Background and Case Summaries

a. Background

To fully understand the thrust of the three cases, one needs to first appreciate the following facts;

i. At the time of filing the petitions, there was already in place a set of laws governing the elections of the various special interest groups. The 2011 elections were held under these laws.
ii. However, a few years down the road, these laws were amended and new ones brought in place to govern the election of some special interest groups.
iii. The petitions were initially filed challenging the constitutionality of certain aspects of the "old law".
iv. Following the amendment of the "old law", the petitioners were also allowed to amend their petitions to take into consideration the developments brought about by the new laws.
v. The Constitutional petitions in their new form then challenged both the old law under which the 2011 elections took place as well as the constitutionality of some aspects of the new laws.

The amended petitions were met with resistance from the Attorney General and the other Respondents, who argued *inter alia* that the petitions were overtaken by events because of the conduct and conclusion of the 2011 elections, and that it was improper for the petitioners to challenge provisions of new laws which were not in force at the time of filing the petitions in 2010. The Constitutional Court over-ruled/disallowed the objections on the grounds that, the petitioners were allowed to amend their petitions by the Constitutional Court itself, and thus to ask the same Court to disallow these amendments after it had granted them would be asking it (the Court) to sit on appeal to hear its own decision, which is illegal. Secondly, that the delay in hearing the petitions on time was the fault of the Court and the petitioners should not be blamed for it. In the words of the Court;

> *These objections would not have arisen had this Court met its constitutional responsibility, heard and determined the petitions prior to the holding of the 2011 elections. It was the duty of this Court… to grant priority to the hearing of constitutional petitions in preference to all other matters… It was the failure of this Court that allowed further developments to take place while the petitioners' actions remained unheard. We cannot fault the petitioners for taking into account the developments that occurred since they filed their petitions so that the same are considered together with the original complaint.*

It is important to note that it takes certain humility of heart for a Court of the caliber of the Constitutional Court to accept its own failings. The Court further ruled that the basic complaint of the petitioners had not changed in character, in spite of the holding of the 2011 elections and the forthcoming 2016 elections. The Court argued that the Petitioners' complaint was that the old law in relation to the special interest groups was unconstitutional and the holding of the 2011 elections did not overtake this complaint. If anything, it even made it more urgent to resolve the Petitioners' complaints. The Court then proceeded to hear the petitions on their merits

b. Case Summaries

i. Constitutional Petition No. 37 of 2010 (Kasozi Robinson v. A.G)

The gist of this petition is that whereas the Constitution requires Parliament to enact a law prescribing the procedure for elections of Parliamentary representatives for special interest groups, Parliament instead delegated this authority to the Minister. In turn, the Minister also either delegated this authority to "third parties" or did not make any procedure at all. The petitioners argued that Parliament did not have the authority to delegate its law-making powers to a Minister and that certainly the Minister was wrong to further delegate powers he did not have in the first place. The Constitutional Court decided to look at each special interest group separately *vis-à-vis* the above contentions.

- **The Army**: The Petitioners argued that the Minister made regulations by which he delegated his delegated authority to the Uganda Peoples Defence Forces (UPDF) Council. It was then left to the Council to elect the representatives in "such manner and by such procedure as shall be determined by that Council". The Court agreed with the petitioners ruling as follows;

> *We agree with the Petitioners that Parliament did not have this authority [to delegate its law-making powers]. Its duty under the Constitution was to enact the relevant law that would provide the procedure of election of the representatives of the army... If Parliament did not have the authority to delegate its duty in this regard, then definitely the Minister did not have the authority to delegate a duty or powers he did not have. And even if the Minister had such powers, he or she would have no authority to further delegate the same.*

The Court then declared as unconstitutional the provision of law which gave the UPDF Council authority to elect army representatives, i.e. Regulation 3 of the Parliamentary Elections (Special Interest Groups) Regulations, Statutory Instrument (SI) 30 of 2001 as amended by SI 6 of 2011. The Petitioners had also argued that political parties are not allowed to campaign for army representatives, which violates their (the army representatives') right to freely associate. The Court disagreed, ruling that under the Constitution, the army is required to be non-partisan.

- **Workers**: It was argued here that the Minister did not even prescribe the procedure for election of Workers' representatives, but rather invoked the Constitution of the Federation of Trade Union Organizations.

As above, the Court ruled that Parliament should have made the procedure itself because it had no authority to delegate these powers to the Minister. Court then declared as unconstitutional, the provision of law which gave the Minister power to make regulations to elect Workers' representatives. i.e. Section 8 (4) (d) of the Parliamentary Elections Act 17 of 2005. Court also declared as unconstitutional the regulations made by the Minister in relation to the election of workers' representatives i.e. Regulation 10 of the Parliamentary Elections (Special Interest Groups) Regulations Statutory Instrument (SI) 30 of 2001 as amended by SI 6 of 2011.

The Petitioners also argued that the general effect of the above disputed law was to create an electoral college out of two federations of workers i.e.—NOTU (the National Organisation of

Trade Unions) and COFTU (Central Organisation of Free Trade Unions). This means that only workers affiliated to the said organizations could participate in the elections of workers' representatives. Workers not belonging to any of the above trade unions could not do so, and this violated their right to associate. The Court agreed with the Petitioners, that indeed workers who are not members of the said federations were excluded from participating in the process of electing workers' representatives. However, Court did not quite agree that this amounted to a violation of their right to associate, ruling that it only amounted to a disenfranchisement of such workers.

- **Persons with Disabilities (PWDs)**: This special interest group had both an "old law" and a "new law." The 2011 election was conducted under the 'old law' i.e. the Parliamentary Elections Act 17 of 2005 as well as the regulations made thereunder, that is, the Parliamentary Elections (Special Interest Groups) Regulations SI 30 of 2001 as amended by SI 6 of 2011.

It was only later that Parliament made the National Council for Disability (Amendment) Act 6 of 2013 which effectively dealt with the election to Parliament of representatives for PWDs. The Petitioners challenged certain provisions of both the 'old law' and the 'new law.' The bone of contention under the 'old law' was that while this law allegedly provided for a procedure to elect representatives of PWDs, this procedure was not as envisioned by the Constitution.

What procedure is this?

The old law provided that representatives of PWDs would be elected by an Electoral College consisting of a specified number of persons from each district, in a manner to be determined by the Minister. The Minister created regulations stating that these persons had to come from the organized associations and groups under the structure of the National Union of Disabled Persons (NUDIPU) in that district. The Court ruled that Parliament partly complied with its duty inasmuch as it provided that elections for PWDs representatives would be by way of electoral colleges. However, in delegating to the Minister the authority to determine composition of the Electoral Colleges, Parliament exceeded its duty. Court then declared as unconstitutional the applicable provision of the 'old law' allowing Parliament to delegate its law-making power in that regard as well as the related Regulation made by the Minister, that is: Section 8 (4) (e) of the Parliamentary Elections Act 17 of 2005 and Regulation 10 of the Parliamentary Elections (Special Interest Groups).

The petitioners further challenged parts of the 'new law' [Part VA] alleging that those parts violated the right of PWDs to freely associate in relation to political parties. Court however disagreed, ruling that the provisions of the new law are compliant with the mentioned right. In this regard, the Court left the new law intact.

- **Youth**: This special interest group also had an 'old law' and a 'new law'. The 2011 election was conducted under the 'old law' i.e. the National Youth Council Act Cap 319 as well as the Parliamentary Elections Act 17 of 2005. Subsequently, Parliament enacted the National Youth Council (Amendment) Act, 2010 and the National Women's Council (Amendment) Act, 2010 as the 'new law'.

The old law provided that youth representatives should be elected in a manner prescribed by the Minister, by district youth councils who shall constitute an electoral college within the region of

representation, further that the woman youth representative should be elected by a national youth conference in a manner to be prescribed by the Minister through regulations. Court ruled, just as it did for PWDs, that Parliament partly performed its duty [by providing that elections would be by way of electoral colleges and the national youth council]. However, it also ruled that Parliament had no authority to delegate its authority to the Minister in the manner that it did.

The Petitioners also argued that the national budget of 2010/2011 made provisions for National Youth Councils and yet these are voluntary organisations whose funding should not be appropriated from the consolidated fund. They wanted provisions of the relevant laws which allow the National Youth Councils to lay their budgetary estimates before Parliament to be declared unconstitutional. On this issue, Court disagreed with the Petitioners, and ruled that;

> *These statutory organizations [youth councils] are set up by law and that law prescribes that they will be funded …out of public monies from the consolidated fund. The organizations in accessing public funds will have to comply with the law and the Constitution… If the law passed by Parliament ordains that those statutory organizations shall be funded from the public purse, their estimates are properly part and parcel of the estimates of Government to be laid before Parliament for its consideration.*

ii. Constitutional Petition No. 40 of 2010 (Legal Action for Persons with Disability v. A.G, the Electoral Commission and NUDIPU)

This petition challenged certain aspects of both the 'old law' under which the 2011 elections were conducted as well as the 'new law' which came into force afterwards. The 'old law' was Parliamentary Elections Act 17 of 2005 as well as the regulations made thereunder; the Parliamentary Elections (Special Interest Groups) Regulations SI 30 of 2001 as amended by SI 6 of 2011, while the 'new law' is the National Council for Disability (Amendment) Act 6 of 2013 which amended the National Council for Disability 2003. The Petition also sought a Declaration that both the 'old law' and the 'new law' infringed on the United Nations Convention on the Rights of Persons with Disabilities, 2006 which Uganda ratified and is bound by.

a. **The 'Old Law'**: The Petitioners argued that the old law under which Members of Parliament representing PWDs in 2011 were elected was discriminatory, in that, unlike Members of Parliament representing women who are elected by secret ballot by all women registered to vote under a voters' register maintained by the Electoral Commission, representatives of PWDs in 2011 were elected by an unelected Electoral College of NUDIPU and moreover without a voter's register maintained by the Electoral Commission, secondly, that unlike women and youth who solicit for votes only in their designated geographical areas, contestants for Parliamentary representatives for PWDs in 2011 had to traverse the whole country soliciting for votes from members of NUDIPU who are scattered across the country. Those contestants who could not afford to do so were disadvantaged, thirdly, that any PWD who wished to be a member of the Electoral College had to be a member of NUDIPU. Those who were not members were excluded from participating and this violated their right to vote and be voted, and that placing election matters in the hands of a non-governmental organization (NUDIPU) which is not a

statutory body, but functions under its own constitution as was done in 2011 is an abrogation by Government of its constitutional obligation to take all necessary measures to ensure that all citizens qualified to vote, register and exercise their right to vote, among others.

The Constitutional Court considered all the above grievances and ruled among others that

i. PWDs who did not belong to NUDIPU were unconstitutionally disenfranchised in the 2011 elections since the elections were conducted in accordance with the structures of NUDIPU, a voluntary non-governmental organization.
ii. The law that allowed NUDIPU to form an Electoral College in the 2011 elections infringed on the right of non-members to freely associate, since it took away the right of non-members to participate in the elections unless they opted for membership of NUDIPU.
iii. The mere fact that Parliament prescribed different procedures for each special interest group was not necessarily evidence of discrimination. It depended on other considerations possibly including the population of the special interest group in question. In any case, it was open to Parliament to prescribe different procedures for each special interest group as long as those procedures conform to the Constitution.
iv. The requirement for intending candidates to traverse the whole country to campaign did not amount to inhuman and degrading treatment. It might have been inconvenient or expensive for some intending candidates, but that did not render the same inhuman and degrading treatment
v. There was no requirement for the Electoral Commission to maintain separate registers for each special interest group. It was enough that the Electoral Commission maintained a voters' register in which all voters could register irrespective of any mechanism or procedure set up by Parliament.
vi. The Attorney General, the Electoral Commission and NUDIPU were in breach of the Constitutional requirement to respect, uphold and promote the rights and freedoms enshrined in the Bill of Rights in the Constitution.

The Court then declared as unconstitutional the provisions of the 'old law' that disenfranchised PWDs who did not belong to NUDIPU i.e. Section 8 (4) (e) of the Parliamentary Elections Act 17 of 2005 and Regulation 10 of the Parliamentary Elections (Special Interest Groups)

b. **The 'New Law'**: The Petitioners also argued that some provisions brought in by the 'new law' that is Section 31A and Schedule A of the National Council for Disability Act 2003 as amended by Act 6 of 2013 were unconstitutional because:

i. Like the 'old law', they also prescribed different procedures for the elections of representatives of special interest groups which is discriminatory.
ii. They continued to constitute one national Electoral College for PWDs with representatives from across the whole country although this time the Electoral College took the form of the National Council for Disability. Just like before, intending candidates have to traverse the whole country to campaign which amounts to inhuman and degrading treatment.
iii. There are PWDs who may not wish to participate in the above National Council for Disability and as it is their right not to associate with the same; this right would be violated for the reason that would not be able to participate in the elections.

iv. The new provisions of law are inconsistent with the constitutional requirement that the Electoral Commission creates and maintain voters registers, in this case voters registers for PWDs.

Just as before, the Constitutional Court considered all the above grievances and ruled as follows;

i. The mere fact that Parliament prescribed different procedures for each special interest group was not necessarily evidence of discrimination. It depended on other considerations possibly including the population of the special interest group in question. In any case, it was open to Parliament to prescribe different procedures for each special interest group as long as those procedures conform to the Constitution.
ii. The requirement for intending candidates to traverse the whole country to campaign did not amount to inhuman and degrading treatment. It might have been inconvenient or expensive for some intending candidates, but that did not render the same inhuman and degrading treatment.
iii. The National Council for Disability is a statutory body, open to all disabled person. Merely because an individual chooses to exercise his/her right not to participate in such a statutory body does not make the challenged provision of law unconstitutional. The challenged "new law" is thus valid for as long as it does not compel an individual to participate.
iv. There was no requirement for the Electoral Commission to maintain separate registers for each special interest group. It was enough that the Electoral Commission maintained a voters' register in which all voters could register irrespective of any mechanism or procedure set up by Parliament.

While the Petitioners also sought a Declaration that both the "old law" and the "new law" infringed on the United Nations Convention on the Rights of Persons with Disabilities, 2006, the Court declined to entertain this particular issue. In the words of the Court;

> *We are of the view that this issue is not a matter calling for constitutional interpretation of the Constitution of Uganda and we need not consider the same as it does not arise within the terms of Article 137 of the Constitution [on the mandate of the Constitutional Court].*

c. Constitutional Petition No. 48 of 2010 (Moses Mauku &Catherine Aneno v. A.G)

The Petitioners here had three issues; one, that the participation of workers representatives in partisan politics is inconsistent with the constitutional right to participate in political organizations and trade unions because upon appointment, these representatives cease to represent workers' interests and start representing the interests of the political party on whose ticket they entered Parliament, secondly, that the law governing the elections of workers' representatives to Parliament is inconsistent with the constitutional right to associate freely insofar as representation of workers in Parliament is restricted only to two trade union federations; NOTU and COFTU, and finally, that the act of workers' representatives in Parliament in holding salaried and permanent offices in Trade Unions is inconsistent with the Constitution.

The Court ruled that;

i. In respect of the contention that workers' representatives should not engage in partisan politics, Court was not persuaded that persons representing or intending to represent workers in Parliament infringe any article of the Constitution by being sponsored or associating with any political part or organization.
ii. In respect of the argument regarding NOTU and COFTU, the Court ruled that the fact that some workers were excluded from participating in the elections of representatives was not an infringement of their right to associate but rather an infringement on their right to vote.
iii. Regarding the issue of workers' representatives also holding permanent and salaried jobs, Court ruled that while this might raise a policy issue for the trade unions, it was not a constitutional question for interpretation of the Constitution. Rather, it was for the individual trade unions and federations to decide or provide for it in their bye-laws.

III. The Decision of Court

Having considered all three cases at ago, the Constitutional Court ruled that the challenged law in relation to the election of the representatives of the army, youth and workers is void for being inconsistent with the Constitution, an injunction was granted against the respondents restraining them from conducting elections for the special interest groups of the army, youth and workers under the law which the Court has found to be unconstitutional and finally that the election for representatives of PWDs may go ahead as the law in relation to the same was valid. The Attorney General being dissatisfied with the judgment lodged a Notice of Appeal, indicating an intention to appeal to the Supreme Court.

IV. Emerging Issues from the Ruling

Perhaps the greatest issue for debate which arises out of the Constitutional Court decision is the fate of the office bearers who were elected in 2011 under a then valid law which has since been declared void in 2015. Do they automatically leave office? What happens to the work that they did during their term in office? The reports they wrote, if any and the debates they contributed to; are these also rendered void?

In the wake of the judgment, the Daily Monitor Newspaper of Wednesday September 30th 2015 carried the headline "Court scraps Workers, UPDF, and Youth MP Seats." The next day on Thursday 1st October 2015, the New Vision Newspaper on page 6 reported mixed reactions from the public, government and Members of Parliament itself. A Member of Parliament reportedly commented, thus: "According to the Court's ruling, the special interest groups are sitting here illegally..." On the sidelines, workers' unions demanded that the incumbent special interest group Members of Parliament be thrown out of Parliament since the law that governed their elections was nullified by Court.

Parliament, itself run an article reading "Constitutional Court ruling does not throw out current MPs". Part of that article stated that, the representatives of the affected groups are still serving

MPs until the end of their mandate which ends after the election of representatives to the next election and subsequent swearing in. The Deputy Speaker, Rt. Hon. Jacob Oulanyah while presiding over a sitting of Parliament on Wednesday, 30th September 2015 also made it clear that the ruling does not direct the said MPs to vacate their seats in the current Parliament.

All of this begs the question: What exactly is the effect of a law that is declared unconstitutional? Mr. Oliver P. Field wrote an interesting paper on this topic entitled "Effect of an unconstitutional Statute". which was published in the Indiana Law Journal Vol. 1 Issue 1, Article 1 in January 1926. In his paper, he compared several judgments of Indiana Courts on the effect of unconstitutional statutes.

He poses these questions: Does a declaration of unconstitutionality have the effect of repealing a statute or does the statute become inoperative from the time of the decision which declares it unconstitutional, or is the statute to be considered *void ab initio* from the date of the purported enactment of it by the legislature? Let us first look at the proposition that upon the Constitutional Court declaring the challenged law invalid, the law became void right from the date of its purported enactment.

The law in contention happens to be on particular sections of mainly the Parliamentary Elections Act 17 of 2005 and the Parliamentary Elections (Special Interest Groups) Regulations SI 30 of 2001 as amended by SI 6 of 2011. These laws date back to 2005 and 2001 respectively. In between 2001 and 2005, over two general elections were held, with special interest groups being represented in all of them. Should we then say that the Constitutional Court ruling runs retrospectively to affect all these elections?

a. General Analysis

Generally, l submit that the above legal contention can hardly be the spirit in which the decision was made. The decision cannot travel backwards to affect acts which were done before it was passed. It only takes effect as at the date on which it was passed i.e. the 29th of September 2015. Work done by the representatives in the current Parliament before that date is still valid. To think otherwise would have far reaching implications, such as having to probably expunge from the Hansard the deliberations of these representatives, to strike out their names from any committees that they sat in, with of course the necessary implications on quorum and the validity of decisions made in such committees.

It would be more practicable to adopt the view that a statute which is declared unconstitutional is inoperative only from the time of the decision and not from the time of its purported enactment. This way, the acts of the representatives done while the law was still valid retain the force but any other acts done subsequently do not.

So then does this mean that the special interest group representatives should be "thrown out" of Parliament, as some pockets of people were clamoring for? While this paper agrees with the contention that the Court did not expressly rule that the special interest group representatives should vacate Parliament, it calls for a certain caution to be adopted while approaching the decision.

The affected Parliamentarian having now discovered that they came to the House through a law which has since been declared unconstitutional should simply have the grace to not participate in Parliamentary affairs any more- after all the decision was delivered about six months to the next round of elections. They should also refrain from drawing any salaries and emoluments from the House as they wait either for the Appeal to be instituted and heard by the Supreme Court or the term of the ninth Parliament to come to an end.

b. The Injunctive Order

This paper now turns to the decision of the Constitutional Court in granting an injunction to the restrain the Attorney General and the other respondents from conducting elections of special interest groups under the now-declared unconstitutional law. This injunction is a call to Parliament to amend the necessary law in good time before the next elections are held—if at all special interest groups are to make it back to the House. It is unfortunate that the Constitutional Court decision was delivered a few months to the general elections when most political parties and even individuals have already made plans regarding special interest group representatives and probably even expended a considerable amount of resources in so doing.

But perhaps, an even greater challenge is how quickly the necessary amendments can successfully make it through the lengthy law-making procedure seeing as the quorum of the house is highly inconsistent for the reason that most of the unaffected members of the House are already away engaging in consultations for the next elections.

Moreover there is no escape from this duty as the Constitutional Court was emphatic that the duty to make law lies squarely on the shoulders of Parliament and that Parliament cannot delegate this duty. The luckier category of the special interest groups is the PWDs, can of course breathe a sigh of relief as they prepare for the next elections untouched seeing as the Constitutional court upheld the "new law" under which their elections are to be held. However, this paper considers it very much a pity that the Constitutional Court abstained from commenting on the United Nations Convention on the Rights of Persons with Disabilities, 2006 vis-à-vis the challenged aw. Understandably (and this paper agrees) those were issues that did not call for the Constitutional interpretation of the Constitution of Uganda.

V. Conclusion and Recommendations

With this ruling, one is left to wonder what the future of all other laws that were made by the Ministers under delegated legislation. Have not the floodgates been opened to more litigation regarding these laws purely on the basis that they were made by a Minister ostensibly without authority? Should Parliament take the necessary measures to curb this? If so what measures should Parliament take? Yet even then, does Parliament even have the power to take such steps regarding laws already made? Or perhaps we should all just wait and "watch the space?"

This paper recommends that the current affected Parliamentarians should abstain from participating in Parliamentary affairs until the filing, hearing and disposal of an appeal to the

Supreme Court or the holding of the next elections, whichever one comes sooner. It also recommends an expeditious amendment to the law governing the affected special interest groups before the next election to allow for the elections of special interest groups.

References.

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