THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(CORAM: S.T. MANYINDO - DCJ, G.M. OKELLO - J, LADY JUSTICE A.E. MPAGI-BAHIGEINE, J, J.P. TABARO - J, AND F.M.S. EGONDA-NTENDE J.

CONSTITUTIONAL PETITION NO. 1 OF 1996

B E T W E E N

MAJOR GENERAL DAVID TINYEFUZA :: :: :: PETITIONER

VRS.

ATTORNEY GENERAL :: :: :: RESPONDENT

JUDGMENT OF MANYINDO - DCJ;

The Petitioner, Major General David Tinyefuza, joined the National Resistance Army (NRA), now Uganda Peoples' Defence Forces (UPDF) in 1981. At that time the NRA was a guerilla Army engaged in the struggle to oust the Government of the day. They succeeded and took over the reigns of power on 26-1-86. By that time the petitioner was a Senior Officer and a historical member of the High Command of the NRA.

Under section 14A of Legal Notice No. 1 of 1986, as amended by Decree No. 1 of 1987, the "bush" NRA became the National Army of Uganda from 26-1-86, and an Army Council was established consisting among others, Senior Army Officers as at 26-1-86. That Army was formally raised and regulated by the National Resistance Army Statute, 1992 (No. 3 of 1992) which came into force on 24-4-92, and which repealed the Armed Forces Act and Legal Notice No. 1 of 1986. By virtue of section 9 thereof the petitioner, in his capacity as a Senior Officer, became a member of the National Resistance Army Council, created under that section. He also became a Member of the new High Command under section 10(1) (c) of the same Statute, as a historical member of the NRA as at 26-1-86. In 1988, he was promoted to the rank of Brigadier. In 1989, he was further promoted to his present rank of Major General. In that same year he was appointed Minister of State for Defence, a post he held until 2-2-93, when he was appointed Presidential Advisor on Military Affairs.

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The letter of appointment was written on 24-5-93, but the appointment was backdated to 2-2-93. The appointment was on contract terms, for a period of 24 months.

From 1994, to 1995, the petitioner also represented (at defferent times) the NRA in the National Resistance Council (Parliament) and the Constitutent Assembly. On 28-11-96, he was summoned by the Parliamentary Sessional Committee on Defence and Internal Affairs and through the Minister of State for Defence (General), to testify before that Committee in connection with the civil strife in Northern Uganda. He appeared before the Committee and testified freely and at great length. Before us he adopted that testimony and the entire record of proceedings before the Committee as part of his case. In the Course of his testimony before the Parliamentary Comittee the petitioner made a stinging attack on the Uganda Peoples' Defence Force, (as the Army had come to be known under the present Constitution which came into force on 8-10-95), in its conduct generally and in particular, its handling of the insurgency in Northern Uganda.

Those criticisms were widely reported by the media and press. Apparently the criticisms did not go down well with some Senior Government and Army officials. For example the Army Commander was reported by the partly Government owned New **Vision** News Paper of 4-12-96, to have told the same Parliamentary Committee when he appeared before it that the petitioner should have first resigned from the Army if he wanted to express his own views and not those of the Army. The Minister of State for Defence (General), Hon. **Amama** Mbabazi, was reported by the same News Paper of 8-12-96, to have said, in an interview with that paper, that he thought that somebody was "up to something" and the petitioner "was playing along." And in the New Vision of 18-12-96, it was reported that President Museveni had told a Press Conference at State House on 17-12-96, that the petitioner would have to sort out his problems with the Army before he was allowed to resign. This was after the petitioner had submitted his resignation from the UPDF and its High Command on 3-12-96.

The letter of resignation was addressed to the President and Commander-in-Chief of the Peoples' Defence Forces. The reads thus:-

"

Presidential Advisor on Defence

KAMPALA.

3-12-1996

His Excellency

President of Uganda

Commander - in - Chief - UPDF

Chairman of High Command.

Re: Resignation Form UPDF and High Command

Your Excellency,

With great difficulty, I have decided to resign as a Member of the Uganda People's Defence Forces and also resign from the UPDF.

There are several reasons but most important among those is that I feel I am unjustily being harrassed over my testimony before that Parlimentary Committee on Defence and Internal Affairs.

To require me to appear before the High Command so that Action is taken against me is rather too high handed.

I will state my reasons briefly:-

Article 90 (1) of the Uganda Constitution 1995, states among other things that 'Parliament shall appoint standing Committees and other committees necessary for the efficient discharge of its functions.'

Then Article 90 (4) says ' In the exercise of their functions under this Article, committees of Parliament 90 (4) may call any Minister or any person holding public office and private individuals to submit memorandum or appear before them to give evidence.'

Article 90 (4) (c) " shall have powers of the High Court for (i) Enforcing the attendance of witnesses and examining them on Oath Affirmation or otherwise. (ii) Compelling the production of Documents and (iii) issuing a commission or request to examine witnesses abroad.".

As can be seen from the above, I did appear before the Parliamentary Committee on Defence and Internal Affairs under Article 90(4) (c). Its terms of reference were set by Parliament. These include among others -

(a) Give evidence as to the causes of Kony War;

(b) Why it has taken Government so long to end that war;

(c) The effects of that war on the Country;

(d) How that war can be ended.

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It is in light of the foregoing that I appeared before the Committee and gave testimony. In so doing I may have displeased a few people but when giving Evidence under Oath you do not do so to please people but to tell the truth, something I did very well in my view as a matter of fact. There are many things which remained unsaid, which in my view thought were not good for National Security and in any case which may not have had serious bearing on the subject matter before the Committee.

This goes to prove that whatever was said was in good faith and to try to help this Country end the prevailing wars all around.

I wish to state that:-

(a) I did not request nor volunteer to appear before this Committee.

(b) Was summoned by it.

(c) The Summons were served on the Army Commander who only informed me. The terms of Reference which allow the press a free access were not set by me.

(d) In my view, a Parliamentary Committee on Defence and Internal Affairs has a right to know matters concerning the Army and war. After all that is why it was set up.
Article 42 of our Constitution requires that any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a Court of Law in respect of any Administrative decision taken against him or her.

I am of the strong view that I will not have that Constitutional right before the UPDF High Command for obvious reasons.

It is therefore, because of the above that I must resign from the Army and subsequently its High Command. I find it unjustified to continue serving in an institution whose bodies I have no faith in or whose views I do not subscribe to.

I must say sir, that it was a privilege and an honour to serve the National Resistance Army and the UPDF and more particularly to serve under you. As one said, I owe must to your wise guidance and kindly for bearance. I know my own faults very well and I do not suppose I am an easy subordinate; I like to go my own way. But you have kept me on the rail's in difficult and stormy times, and have taught me much. For all this, I am grateful. And I thank you for all you have done for me.

Needless to say, it has been a great honour to have been a Member of this Historic Army and Mission". We have achieved much in war; may we achieve even more in peace.

Your Very Devoted Commorade,

DAVID-TINYEFUZA-MUWUNGU-BWAJOJO

MAJOR GENERAL "

.../5.

The letter was copied to several persons, including the Minister of State for Defence (General).

On 8th December, 1996, the Minister of State for Defence (G) replied as follows:-

"MSD/G/1
8th December 1996

Maj. Gen. David Tinyefuza,
President's Office,
KAMPALA.

RE: YOUR RESIGNATION FROM UPDF

Yours addressed to H.E. The President and Commander-in-Chief of 3rd instant and copied to me among others refers.

Having looked at the laws/regulations of the NRA Statute and its subsidiary legislation relevant to the issue at hand, and having consulted with the Commander-in-Chief and, furthermore, having exhaustively discussed it in the Meeting of the High Command, I advise you that the resignation of officers is governed by the National Resistance Army (Conditions of Service) (Officers) Regulations, 1993. These provide in reg. 28 (1) that for an officer to resign his commission, the Commissions Board, established by Reg. 3 (1) of the same Statutory Instrument No. 6 of 1993, would have to grant permission for such resignation in writing.

As you know one of the hallmarks of the NRM struggle has been the restoration of the rule of law. All Ugandans individually and collectively are equal before and governed by the law enacted by the authorised organs of state.

This is, therefore, to informyou that your purported resignation is null and void by virtue of the above quoted provisions. I have taken trouble to quote them extensively for your benefit. I would advise that you follow the right procedure in case you are contemplating resigning your commission.

Amama Mbabazi
MINISTER OF STATE FOR DEFENCE (G)"

The Petitioner then presented before us this petition under Articles 50 and 137 of the Constitution and Fundamental Rights and Freedoms (Enforcement Procedure) Rules 1992 Directions, 1996. The petition reads thus:-

"

PETITION

The Petition of DAVID TINYEFUZA of c/o P.O. Box 2255 - Kampala, whose names are stated at the foot of this petition:-

1. Your Petitioner is a person having interest in or is affected by the following matters being inconsistent with the Constitution of the Republic of Uganda 1995, whereby your Petitioner is aggrieved:-

   (a) That the letter of the Hon. Minister of State for Defence (G) addressed to the Petitioner Ref: MSO/G/1 dated 8th day of December, 1996, rejecting the Petitioner's resignation from the Uganda People's Defence Forces and it's High Command and requiring the Petitioner to resign in accordance with Regulations 28(1) of the National Resistance Army (Conditions of Service) (Officers) Regulations 1993 is unconstitutional for being contrary to Articles 25(2) and 25(3) (c) of the Constitution of the Republic of Uganda 1995.

   (b) Proceedings in the Parliamentary Sessional Committe on Defence and Internal Affairs are privileged under Article 97 of the Constitution and as such cannot form a basis for any disciplinary and or Criminal/Civil action against the Petitioner in any Court of Law and/or administrative body of any kind.

2. Your Petitioner states that the actions of the Minister of State for Defence requiring him to tender his resignation in accordance with the National Resistance Army (Conditions of Service) (Officers) Regulations, 1993 Reg. 28(1) is unconsitutional and therefore null and void on the following grounds:-

   (a) The Petitioner ceased to be a continuing full time member of a regular force as defined in the Army Code, upon his appointment to the Civil Service of the Republic of Uganda as Presidential Advisor on the 24th day of May, 1994.

   (b) The Petitioner was not resigning a Commision as required by Regulation 28(1) of the National Resistance Army (Conditions of Service) (Officers) Regulations, 1993 since no Commission has ever been issued to him in accordance with Regulation 13(3) of the said Regulations.

   (c) Having ceased to be a Member of a regular force the Petitioner was obliged to regularise his status in relation to the regular force and the High Command.

   (d) In the circumstances elaborated in the Petitioner's resignation letter, affidavit in support of this Petition and the testimony before the Parliamentary Sessional Committee, the Petitioner is a conscientious objector within the meaning of Article 25(2) and 25(3) (c) of the Constitution, and as such his resignation cannot be questioned.

3. Therefore your Petitioner prays that the Court may grant a declaration that the following measures and acts are in consistent with the Constitution in their application to the Petitioner and are a violation of his fundamental human rights granted in the following Constitutional Provisions:

(a) (i) Regulation 28(1) of the National Resistance Army (Conditions of Service) Regulations 1993;

(ii) Any threatened disciplinary, administrative, criminal or Civil action or actions against the Petitioner in any tribunal, forum, or Court of law, arising out of his testimony before the Parliamentary Session Committee on Defence and Internal Affairs;

was inconsistent with the Constitution of the Republic of Uganda;

(i) Articles 25 (2) and 25(3) (c);

(ii) Articles 20, 23, 25 (2) and 25 (3)(c);

(iii) Article 97.

(b) Grant orders restraining all persons whatsoever from interfering or threatening to interfere or denying the Petitioner of the exercise of his right and freedom guaranteed by the provisions of the Constitution."

It is supported by three affidavits sworn by the Petitioner on various dates.

In his answer to the petition, the respondent contended (a) that the petition lacks a cause of action as it does not show that there is an act or ommission by any person or authority which contravenes or is incosistent with a provision of the Constitution, (b) that the letter of the Minister of State for Defence quoted above did not require the petitioner to perform forced labour or do or refrain from doing anything that is inconsistent with the Constitution, but only advised the petitioner to resign according to law; (c) that no disciplinary and/or criminal or civil action has been taken against the petitioner by anyone as a result of the petitioner's testimony to the Committee and (d) that the affidavits accompanying the petition were fatally defective. In another line of defence,

it was contended that the petitioner is and remains a Member of the UPDF until he resigns in accordance with Regulation 28 (1) of the National Resistance Army (Conditions of Service) (Officer) Regulations, 1993. The answer to the petition was (officers) Regulations, 1993. The answer to the Petition was accompanied by an affidavit sworn by Hon. Amama Mbabazi on 6-1-97.

When the petition came up for hearing, the learned Solicitor General, Mr. Kabatsi, who represented the Attorney-General, raised preliminary points of objection to the effect - (a)the affidavits accompanying the petition were defective as they contained lies and grave inconsistences, (b) the requisite fees were not paid and (c) the petition does not disclose a cause of action as it does not allege that a specific act or ommision violates a provision of the Constitution.

After hearing the reply of Mr. Lule, learned Senior Counsel for the petitioner on the points of objections, we decided to join the preliminary objection with the questions arising on merits and decide them together. It is necessary therefore for me to deal first with the question whether this petition is maintainable, in other words, whether it is compretent. On the question of Court Fees there was evidence - from the receipts in possession of Counsel for the petitioner and the endorsements on the Registrar's file - that the petition was accompanied by Court Fees of Shs. 10,500/- and Shs. 100,000/- security for costs as required by the Rules. So there was rea dily no merit in this point of objection.

With regard to non-disclosure of a cause of action, the petitioner's case as can be gathered from the petition and the accompanying affidavits, is that (a) under the Constitution no one has the right to qu stion him on what he said to the Parliamentary Committee and (b) that he is entitled to a declaration to effect that he is no longer a Member of the UPDF and therefore cannot be subjected to Military service which would amount to subjecting him to forced labour. Now Article 25 (2) protects the individual against forced labour. Since the petitioner claims that the Government wants to keep him in the Army against his will, and to question him and possibly discipline him as a result of his testimony to the Committee which would violate the protection given to him by Article 97 of the Constitution, it seemed clear to me that he was entitled to petition this Court for redress under Article 50(1) of the Constitution which provides:-

"50. (1) Any person who claim that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent Court for redress which may include compensation."

On the face of it the Petition disclosed a cause of action. with regard to the validity of the affidavits, Mr. Kabatsi's first complaint was that the petitioner's affidavit in reply to that of Hon. Amama Mbabazi was fatally defective in that in paragraph 8 thereof the petitioner does not disclose, when he should his source of information but merely states that he was advised by his lawyers that Military Regulations no longer apply to him since he ceased to be a Member of a regular force when he was appointed Presidential Advisor on Military Affairs. Mr. Kabatsi submitted that the petitioner should have stated the name or names of the lawyer or lawyers who so advised him. The law on the point seemed to me to be well settled. An affidavit must state the means of the deponent's knowledge or the ground of his or her belief with regard to the matters set out in the affidavit. See: **Caspair Ltd. -v- Harry Gandy (1962) E.A. 414 at 417.** In the instant case the petitioner averred that his source of information were his lawyers. I could not see it as necessary to particularise the lawyer or lawyers as in this context the lawyers must be the lawyers who drew up the petitioner's affidavit.

As for the alleged lies and inconsistences, it was argued by Mr. Kabatsi that some of the averments in the affidavits made those affidavits contradict each other and also were at variance with the petitioner's testimony to the Committee in some material respects. It seemd clear to me that Mr. Kabats's arguments went to the merits of the petition which was premature. In my opinion the case of **Bitaitana and 4 Others -v- Kananura High Court Civil Appeal No. 47 of 1976,** Allen J. (as he then was) which Mr. Kabatsi cited in support of his contention that the petition must fail as it was supported by totally defective affidavits can be distinguished from the instant case. In that case the affidavits supporting the petition contained several deliberate falsehoods. The deponent did not disclose the source of some of his information and worse still, the Notice of Motion was itself defective in that it did not state the grounds of the application.

Kananura (supra) was a decision of the High Court which can only have persuasive influence on this Court. Allen J, took a very strict stand in that case and even criticised **higher** Courts on the point albeit orbiter, when he stated:

"Before I take leave of this case I should like to express my misgivings about the lenient attitude by the Court of Appeal for East Africa in dealing with irregularities".

With respect of the learned Judge , the decision of the Court of Appeal for East Africa in: **Uganda vrs Commisioner of Prisons, Ex Parte Matovu (1966) E.a. 514** is to be preferred. In that case the applicant was detained under Emergency legislation. He took out habeas corpus proceedings in the High Court. At the same time constitutional issues were framed and referred to the Constitutional Court for determination. Clearly the writ of habeas corpus was defective. Nevertheless, the Court took the position that as the liberty of a Citizen of Uganda was involved, the application as presented was not objected to and that as consiserable importance was attached to the questions of law under reference, the case ought to be heard on merit in the interest of justice.

The case before us relates to the fundamental rights and freedom of the individual like the petitioner which are enshrined in and protected by the Constitution. In my opinion it would highly improper to deny him a hearing on technical or procedureal grounds. I would even go further and say that even where the respondent objects to the petition as in this case, the matter should proceed to trial on the merits unless it does not disclose a cause of action at all. This Court should readily apply the provision of Article 126 (2) (e) of the Constitution in a case like this and administer substantive justice without undue regard to technicalities. It is for the above reasons that I can not uphold Mr. Kabats's objections.

During the course of the trial Counsel for the petitioner sought to put in evidence a document which was attached to the petitioner's affidavit in reply as **Annexture A4**. It was objected to by the Counsel for the respondent. I was one of the four Judges who upheld the objection for reasons which we promised to give in the judgment. These are my reasons. First, **Annexture A4** was a photostat copy of a radio message. Counsel for the petitioner did not at time have the original transcript. Second, the author of the message was not full disclosed on the document. Mr. Lule informed us that he did not have instructions then as to who the author was. Third, the document was not signed. Fourth, it was crossed with a bold ink line in the middle all though its five pages. In those circumstances I did not regard it as a genuine document to be received in evidence.

Happily for the petitioner, the original transcript was subsequently obtained and produced in evidence as it was not crossed, it was signed and it was acknowledged by Hon. Amama Mbabazi - in cross - examination - as the meassage sent to all Members of the High Command, including the petitioner, by the President of Uganda/Commander - in -- Chief of the Uganda Peoples' Defence Forces.

I now turn to the petition on the merits. At the Commencement of the hearing of the petition the Counsel for the parties framed the agreed issues as follows:-

"1. Whether on his appointment to the post of Presidential Advisor on Military Affairs the Petitioner became a public servant by virtue of the terms as spelt out in the letter of his appointment.

2. Whether upon his appointment with effect from 2nd February, 1994, the terms of service spelt out in the letter of appointment were the terms governing the Petitioner and his service relationship with the Republic of Uganda.

3. Whether upon being offered new terms of service, set out in the letter of appointment, the Petitioner continued to be governed by the terms of his old employment too, in the Uganda Armed Forces.

4. Whether having served in the Army and appointed to a new position outside the Military establishment, the Petitioner continued to be a Member of a regular force as defined in the National Resistance Army statute and the Regulations made thereunder.

5. Whether in his new status, arising from his new terms of service set out in his letter of appointment the Petitioner continued to be subject to Military law, to which Members of the Uganda Peoples' Defence Forces are subject.

6. Whether to be a Member of the High Command as defined or set out in the National Resistance Army statute one must of necessity also have to be a Member of a regular force.

7. Whether the letter from the Minister of State for Defence (Annexture "E" to the Petition) which declared the Petitioner's resignation and departure from the Army and the High Command "null and void" was in effect a denial of the Petitioner's liberty and calculated to require the Petitioner to Perform forced labour.

8. Whether the Petitioner resigned from the High Command and refused to be a Member of a regular force as a conscientious objector in accordance with Article 25(2) and 25(3) on the Constitution, 1995.

9. Whether the testimony given by the Petitioner before the Parliamentary Sessional Committee on Defence and Internal Affairs was made on a privileged occasion and entitled the Petitioner to immunity from any actual or threatened prosecution, harassment or victimization guaranteed by Articles 97 and 173 of the Constitution, 1995, and the provisions of the National Assembly (Powers and Privileges) Act Cap. 249 Laws of Uganda, 1964 Edition.

10. Whether the letter from the Minister of State for Defence and the reported conduct of the other authorities in the Government and the Army amounted to a threat to the Petitioner's fundamental rights and freedoms guaranteed and protected under Articles 20, 23, 25 (2), 25 (3) (c) and 97 thus justifying the Petition.

11. Whether the Petitioner is entitled to the declarations and remedies prayed or any other".

No doubt some of the issues overlap. From those issues, the declarations sought, the evidence adduced and the submissions of Counsel for the parties it can be said that the rea.l questions for determination are:-

1. Whether the testimony given to the Parliamentary Sessional Committee on Defence and Internal Affairs by the Petitioner is covered by the Parliamentary immunities and privilages provided in Article 97 of the Constitution.

2. Whether the letter of the Minister of State for Defence (General) to the petitioner, declaring the latter's purported resignation from the UPDF and its High Command null and void and the reported conduct of some Government and Army Officers amounted to a denial of his liberty and a **threat** to his fundamental rights and freedoms and a **was calculated to require him** to perform forced labour.

3. Whether having been appointed Presidential Advisor on Military Affairs ouside the Military establishment, the petitioner continued to be a member of the Army.

4. If the answer to (3) is in the affirmative, whether the petitioner continued to be governed by the terms of his employment in the Army and was subject to **Military** Law while also being governed by his terms of service as Presidential Advisor on Military Affairs.

5. whether a Member of the High Command must necessarily be a Member of the Army.

6. Whether the petitioner is a conscientious objector within the meaning of Article 25 (2) and (3) of the Constitution.

7. Whether the petitioner has resigned from the High Command of the Army.

8. Whether the petitioner is entitled to the declarations he seeks.

I propose to deal with those question in that order. But perhaps I should first and briefly address my mind to the principles that govern the interpretation of the Constitution. I think it is now well established that the principles which govern the Contruction of Statutes also apply to the Construction of Constitutional provisions. And so the widest construction possible in its context should be given according to the ordinary meaning of the words used, and each general word should be held to extend to all ancilliary and subsidiary matters. See: **Republic -v- El. Mann (1969) E.A. 357** and **Uganda vrs. Kabaka's Government (1965) E.A. 393.**

As was rightly pointed out by Mwendwa, CJ, (as he then was) in **El.Mann** (supra), in certain contexts a liberal interpretation of Constitutional Provisions may be called for. In my opinion Constitutional provisions should be given liberal construction, unfetterred with technicalities because while the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed may give rise to new and fuller import to its meaning. A Constitutional provision containing a foundamental right is a permanent provision intended to cater for all time to come and, therefore, while interpreting such a provision, the approach of the Court should be dynamic, progressive and liberal or flexable, keeping in view ideals of the people, socio-economic and politico - cultural values so as to extend the benefit of the same to the maximum possible.

In other words, the role of the Court should be to expand the scope of such a provision and not to extenuate it. Therefore, the provisions in the Constitution touching on fundamental rights ought to be construed broadly and liberally in favour of those on whom the rights have been conferred by the Constitution.

If a petitioner suceeds in establishing breach of a fundamental right, he is entitled to the relief in exercise of Constitutional jurisdiction as a matter of course. However, the Court may decline relief if the grant of same, instead of advancing or fostering the cause of justice, would perpetuate injustice or where the Court feels that it would not be just and proper for example if the matter has been overtaken by events. In my opinion, in this regard, there seems to be no distinction between the enforcement of a fundamental right and a legal right under a general law.

The second principle is that the entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountacy of the written Constitution. The third principle is that the words of the written Constitution prevail over all unwritten coventions, precedents and practices. I think it is now also widely accepted that a Court should not be swayed by considerations of policy and propriety while interpreting provisions of a Constitution.

I now turn to consider the questions raised by the petition. With regard to the first question, whether the petitioner's testimony before the Parliamentary Sessional Committee was made on a privileged occasion with the result that no one can question him, harrass him or even take any action against him on account of that testimony, I would answer the question in the **affirmative.** Even Mr. Kabatsi admitted in his final address to the Court, that that testimony was given on a privileged ocasion.

It was his submission that in fact no one was contemplating prosecuting, harrassing or victimising the petitioner because of what he stated to the committee. The protection lies in Article 97 of the Constitution which provides as follows:-

> "97. The Speaker, the Deputy Speaker, Members of Parliament and any other person participating or assisting in or acting in connection with or reporting the proceedings of Parliament or any of its Committees shall be entitled to such immunities and privileges as Parliament shall by law prescribe."

The relevant law is to be found in the National Assembly (Powers and Privileges) Act (Cap 249). Under section 9 thereof the Parliament or a Sessional Committee of Parliament may summon witnesses to testify before it. Under section 14 any person summoned to testify or produce papers, books, records or documents before the Parliament or a Committee thereof is entitled, in respect of such evidence or the disclosure of any communication or production of the articles referred to above to the same right or privilege as before a Court of law. There are, under that section, exceptions as to what a witness may say or produce before the Parliament or a Sessional Committee thereof but they are not relevant to this case.

The evidence before us shows that the petitioner was summoned as a witness by the Committee in his capacity as a Senior Officer in the Army and a Presidential Advisor on Military Affairs. He was to testify on, inter alia, the cause or causes of the war or Civil strife in **Northern** Uganda and to suggest to the Committee a possible solution to the problem. It was the evidence of Hon. Amama Mbabazi that it was agreed by the Committee and the Ministry of Defence that Army Officers should be summoned through him as Minister of State for Defence. This was for disciplinary purposes. The petitioner was so summoned, whereupon the Minister directed the Army Commander to allow the petitioner to respond to the summons. That was done.

It is clear from the record of proceedings before the Committee that the petitioner was assured by the Committee that his testimony would be privileged. Clearly the Committee had in mind the provisions of Article 97 of the Constitution and the National Assembly (Privileges and Powers) Act (Cap. 249).

Regarding the second question, whether the Minister's letter touching on the petitioner's purported resignation and the conduct of other Government and Army officials derogated from the petitioner's liberty, threatened his fundamental rights and freedoms and was calculated to require him to perform forced labour in the Army, it seems clear to me that in that letter the Minister merely expressed his opinion that the purported resignation was null and void as it was not done according to the law. He then went on to advise the petition to proceed under Regulation 28 (1) of the National Resistance Army (Conditions of Service) (Officers) Regulations, 1993 which were made under section 104 of the NRA Statute, 1992.

Mr. Lule's argument was that to require the petitioner to resign in accordance with Military Law when he was not a Military action could be taken against him in the process of resignation. Of course this argument begs the question whether the petitioner is a Military person or not which will be dealt with later in the judgment. Suffice it to say here that in my opinion the letter in question was neither an act nor a threat to the petitioner's liberty and fundamental rights. It did not state that the petitioner could not resign from the Army. On the contrary, it advised him to resign but legally. So the threat of forced labour did not arise.

However, threats can easily be deduced from (a) Hon. Amama Mbabazi's statement to the Sunday Vision of 8-12-96, to the effect that somebody was up to something and the petitioner was playing along; (b) the reported statement by the Army Commander in the New Vision of 4-12-96, to the effect that the petitioner should have resigned from the Army before giving the damaging or damanding testimony to the Parliamentary Committee; (c) the statement by the Commander - in- Chief of the UPDF to the effect that the petitioner would have to sort out his problems with the Army before he could resign and the message (exh. P2) sent to the High Command by the Commander - in-Chief, in connection with the petitooner's testimony to the Parliamentary Committee. The contents of exh. P2 cannot be discussed here for securtity reasons.

The News-paper reports have not been denied. The presumption must be that they were occurate. Exhibit P2 contained some serious allegations against the petitioner which could lead to some sort of action being taken against him for what he had said to the Parliamentary Committee. That would clearly be unconstitutional under Article 97 of the Constitution. However, I cannot agree that those statements - in the press and in exh. P2 - were calculated to require the petitioner to perform forced labour as it was never claimed therein that the petitioner had to remain in the Army and perform forced labour. In any case under Article 25 (3) of the Constitution forced labour does not include military service.

And so I would answer the second question thus; the Minister's letter in question did not deny or in any way threaten the petitioner's liberty and fundamental rights, nor did it require him to perform forced labour, but the said statements to the press and the radio message in exh. P2 constituted a threat to the petitioner's liberty and freedom.

I now turn to the third question - whether the petitioner continued to be a Member of the Army even after his appointment as Presidential Advisor on Military Affairs. His stand is that he was a non commissioned Officer in the Army and that upon his appointment to the public service he ceased to be a member of the Army. In other words, that that appointment terminated his employment in the Army. It would follow then that at the time he testified before the Parliamentary Committee he did so only as a public servant and not as a Military man.

For the respondent it was contended that he was a Commissioned Officer and that his appointment to the Public service did not and could not take him out of the Army. He could leave the Army only with the permission of the Commissions Board under Regulation 28(1) of the National Resistance Army (Conditions of Service) (Officers) Regulations, 1993. It is not disputed that the petitioner has been a Senior Officer in the Army. What is disputed is whether he is a Commissioned Officer or not. It is therefore necessary to examine the chequered history of commissions in the Army of Uganda in order to decide whether the petitioner was a Commissioned Officer or not.

Before 1971, the National Army was governed by the Armed Forces Act (Cap 295). Section 11 of that Act provided for the Defence Council and its composition. Under section 96 (1) the Defence Council was empowered to make regulations to govern the Armed Forces. Section 96 (2) (c) empowered the Defence Council to make regulations in respect of the ranks of officers and men of the Armed Forces, the numbers in each rank and the use of uniforms by the Officers and men.

The Defence Council made Regulations know as The Armed Forces (Conditions of Service) (Officers) Regulations, 1969 under Statutory Instrument No. 30 of 1969. Part I thereof related to Commissions. Under Regulation I thereof the Commissions Board was established. One of its functions was to advise the Defence Council in respect of appointment of persons to commissions in the Armed Forces - Schedule 2 of those Regulations contained the format of the warrant of appointment to commissions. That format clearly emphasized the supremancy of the Defence Council.

Following the Military coup de tat of 1971, the Armed Forces Act was amended by the Amin regime. Under section 5 of the Armed Forces Decree (No. 1 of 1971), some sections or parts of the Armed Forces Act, 1969 ceased to have effect.

The composition of the Defence Council was also changed. It was to consist of the Military Head of State who was also the Chief of Defence Staff and Commander - in - Chief of the Armed Forces as Chairman, and other persons specified in that section. Previously the Defence Council consisted of the Prime Minister, the Minister of Defence, the Chief of Defence Staff, the Army Chief of Staff, the Chief of Air Staff and other persons to be appointed by the Prime Minister on the advice of the Cabinet.

Clearly, under the 1971 Decree the Comissions Board whose function had been to advise the Defence Council on matters of promotions, appointments and retirement of Officers, became redundant since the Head of State had become the Chairman of the Defence Council and also the Commissions Board in his capacity as Chief of Defence Staff. The Existing Law (Miscellaneous Repeal) Statute (No.2 of 1980) which repealed the composition of the Defence Council which would be the body to determine and issue Commissions to officers in the Army under the Armed Forces Act, 1969 which was still in force. No mention was made of the sections of the Armed Forces Act and the Regulations made thereunder which were repealed by Decree No. 1 of 1971. The matter has since been put right by the National Resistance Army Statute, 1992 (No. 3 of 1992).

It seems clear to me therefore, that in 1988 when the Army ranks were regularised to match with internationally recognised ranks, there was no Defence Council which could sanction the commissions. Under Article 78 of the 1967 Constitution which was in forne until 8-10-95, the President enjoyed the power to appoint, promote and dismiss Members of the Armed Forces. It was in excessive of that

power that in 1988, the President, as Supreme Command of the Armed Forces, promoted the petitioner to the commissioned rank of Brigadier under General and Administrative Order No. 6 under sub-heading 2 Promotions/Commissions.

There can be no doubt that the ranks of Brigadier and Major General are commissioned ranks. The petitioner freely accepted the appointment and promotion to those well recognised commissioned ranks of Brigadier and Major General. In my view it is immaterial that no warrant of commission was issued. I find therefore, that the petitioner was a commissioned officer in the NRA.

Under section 5 (1) of the National Resistance Army Statute 1992, No. 3 of 1992 service in the Army is a continuing full-time job and a member of the Army is liable to be employed on active service any time. Similary under the Public Service Standing Orders a public servant is engaged on full time basis. It follows that an Army Officer cannot be a public servant at the same time. And so when the 1993, the President appointed the Petitioner to a public service job as Presidential Advisor on contract terms, he thereby took him out of the Army. There is no doubt that the President's power to appoint Army Officers included power to remove them from the Army.

There was evidence to the effect that as a matter of practice the Army Council allows Officers in the Army to accept assignments in the public service while remaining Army Officers. Clearly this practice contravenes section 5 (1) of the NRA Statute. There was also some evidence to the effect that while a Presidential Advisor, the petitioner continued to enjoy certain facilities from the Army which included salary. Obviously he was not entitled to receive double salary. He might have enjoyed the other facilities in his capacity as a member of the High Command which is understandable. My finding on the third question is therefore that the petitioner ceased being a member of the Army on 2-2-1993, when he was appointed Presidential Advisor on Military Affairs.

In view of my finding as regards the third question, I would answer the fourth question - whether the petitioner continued to be governed by both the terms of service in the Army and those of the service in the public service and was subject to Military Law in the negative. He was governed only be the terms of the contract in the public service.

Since he was no longer a member of the Army he could not be subjected to Military Law except in his capacity as a historical member of the High Command.

As for the fifth question, whether a Member of the High Command must also be a Member of the Army, the answer is clearly no. This point was easily agreed by the Counsel for both parties. Under section 10(1) of the National Resistance Army Statute, 1992, the high Command consists, among others, the original Members of the High Command (the bush High Command) as at 26-1-86, which includes the petitioner and some civilians as ex officio members. As the law stands, it appears that historical or original Members of the High Command are there for life unless they resign. This may explain why under subsection (2) of the said section, an original Member of the High Command cannot participate in the proceedings of the High Command in circumstances specified therein.

The sixth question - whether the petitioner is a conscientious objector under Article 25 (2) and (3) of the Constitution - is of no consequence now in view of my finding that the petitioner is not a member of the Army. No one is asking him or forcing him to join the Army. Mr. Lule did make the interesting submission that a member of the Army can be a conscientious objector if he begins to question the propriety of military service as a conscientious objector. My view is that one cannot be a member of the Army and at the same time be a conscientious objector to that Army as military service is not forced labour under Article 25 (3) (c). Only an ousider, a civilian, may refuse to join the Army on the ground that he or she is a conscientious objector. A member of a disciplined force has no choice in the matter. His or her work there cannot be said to forced labour. The momment that person loses faith in the Army and in the way it operates then that person must resign from the Army.

I now turn to the seventh question - whether the petitioner has resigned from the High Command of the Army. There is no provision as to how a historical member, like the petitioner, resigns from the High Command. It may be that the resignation should be addressed to the Commander in-Chief of the UPDF as the petitioner did here on 3-12-96. The word "resignation" has a very definite connotation. In Black's Law Dictionary, it is defined as "formal renouncement or relinquishment of an office; it must be made with the intention of relinquishing the office accompanied by an act of relinquishment." The date of resignation is normally the date specified in the writing by which one has resigned or if no date is specified therein, the date of receipt

of such a writing to the addressee. In the instant case the date of receipt of resignation is 3-12-96. I find that the petitioner resigned from the High Command on that date.

In conclusion, I would grant the declarations (a) that any threatened disciplinary, administrative, criminal or civil action or actions against the petitioner in any tribunal, forum or Court of law, arising out of his testimony before the Parliamentary Sessional Committee on Defence and Internal Affairs would be unconstitutional as it would violate Article 97 of the Constitution; (b) that Regulation 28(1) of the National Resistance Army (Conditions of Service) (Officers) Regulations, 1993, is not applicable to the petitioner as he is not a member of the Army. I do not find it necessary to an order in restrant make in view of the holding that any disciplinary action by anyone arising from the petitioner's testimony to the Parliamentary Sessional Committee would be unconstitutional.

I would order that the respondent pay the petitioner's costs of this Petition.

Dated at Kampala this...25th... day of ....April,..... 1997.

S.T. MANYINDO
DEPUTY CHIEF JUSTICE

In accordance with the unanimous view it is ordered that the following declaration shall issue:-

(1) That any threatened disciplinary, administrative, criminal or civil action or actions against the Petitioner in any tribunal, forum or court of law, arising out of his testimony before the parliamentary sessional committee on Defence and Internal Affairs would be unconstitutional as it would violate Article 97 of the constitution;

(2) That Regulation 28 (1) of the National Resistance Army (conditions of Service) (Officers) Regulations, 1993, is not applicable to the petitioner as he is not a member of Army.

The other declaration or orders sought are not granted. It is also ordered that the respondent shall pay the petitioner's costs of this petition.

DATED at Kampala this 25th day of April, 1997.

S.T. MANYINDO
DEPUTY CHIEF JUSTICE

I CERTIFY THAT THIS IS THE TRUE COPY OF THE ORIGINAL.

MURANGIRA J.
REGISTRAR COURT OF APPEAL.

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(CORAM: S.T. MANYINDO, DCJ; G.M. OKELLO, J; A.E.M. BAHIGEINE, J; J.P.M. TABARO, J; AND F.M.S. EGONDA-NTENDE, J.)

CONSTITUTION PETITION NO. 1/96

BETWEEN

MAJOR GENERAL DAVID TINYEFUZA ..... PETITIONER

AND

ATTORNEY GENERAL ..... RESPONDENT

JUDGMENT OF G. M. OKELLO, J.

This Petition has attracted a great deal of interest from members of the public, either because of its press coverage or because of the personalities involved. Whatever may be the reason, the case is important. It is a challenge to the government commitment to its promise to return the country to Constitutionalism. A large sum of money had been spent from the public funds to gather informations to produce this Constitution of Uganda 1995. It is the the Constitution, and not any organ of government which is Supreme. It is the duty of every citizen individually or collectively to uphold, protect and defend the Constitution. It is therefore logical and fitting that the public should demonstrate keen interest to ensure that the contents of this Constitution are zealously respected by all.

That Petition made two major challenges. Firstly on the Constitutionality of the letter of the Minister of State for Defence (G) rejecting the Petitioner's resignation and requiring the latter to follow military laws when the Petitioner claimed that he had been removed from the Army upon his appointment as a Presidential Advisor on military affairs. Secondly, it questioned the Constitutionality of any threatened disciplinary, criminal or civil action in any court or tribunal against the Petitioner on account of the Petitioner's testimony before the Parliamentary Sessional Committee on Defence and Internal Affairs. served -

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The Petitioner had joined the NRA (now UPDF) during its bush war days when it was still a guerilla force. At 26th Janua. 1986 when the NRA seized state powers, the Petitioner was not only a member of the NRA but was also a member of its High Command and the Army Council. By Legal Notice No. 1 of 1986, the NRA was converted into a National Army for Uganda. The Petitioner had served the NRA in various capacities. He was Commanding Officer at various places including the North. At various times he was the head of military intelligence and head of combatant operations (CCC). In 1988 when the President and Commander-in-Chief by General and Administrative Order regularised the ranks of the NRA officers to the internationally recognised ranks, the Petitioner was ranked to a Brigadier. In 1989, he was promoted to a Major General. Between 1990 and 1992, the Petitioner served as a Minister of State for Defence (MSD). Then by a letter dated 24th May, 1994, the Petitioner was appointed a Presidential Advisor on military affairs. This is a Public Service post. The appointment was back-dated to take effect from the 2nd February 1993. It was a two years renewable contract. The terms and conditions of the appointm were set out in detail in the letter of appointment.

Later in 1996, a Parliamentary Sessional Committee on Defence and Internal Affairs was set up to probe into all aspects of the armed conflict currently taking place in the North and to recommend possible solutions. Because of his experience and di involvement in the armed conflict in the North, the Petitioner was on 28th November 1996 summoned to the Parliamentary Sessional Committee to give evidence. On 29th November 1996, the Petitioner appeared before the Committee in obedience to the summons. After he was assured of his personal immunity, the Petitioner testified before the Committee on oath. The evidence was critical of the manner in which some senior army officers were handling the conflic The criticism was not taken well by some government and army senior officers.

A few days after ~~his testimony, the~~ Petitioner saw in New Vision Newspaper Reports attributed to some government and army senior officers criticising the Petitioner's evidence.

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The Petitioner perceived the reports as exposed him to atmosphere of fear and he felt that his human rights were about to be infringed. Then on 3rd December 1996, he wrote to H.E. The President and Commander-in-Chief and Chairman of the Army High Command and Minister of Defence tendering his resignation from the Army and its High Command. Subsequent to his letter of resignation, the Petitioner received a letter dated 8th December 1996, Annexture 'E' to the Petition, from the Minister of State for Defence (G) rejecting the Petitioner's resignation and required him to resign as a serving military officer in accordance with Reg. 28(1) of the NRA (conditions of service) (officers) Regulations 1993. Thereafter, there was another report in the New Vision, a government owned newspaper, of 18th December, 1996, (Annexture A3 to the Petitioner's affidavit in reply) attributed to the President saying to the effect that the Petitioner would have to follow procedure to resign. In view of the above scenario, the Petitioner filed this Petition on 19th December, 1996.

The Petition was supported by three affidavits of the Petitioner.

The Respondent filed an answer in which he denied all the allegations contained in the Petition. The answer was supported by an affidavit of Hon. Amama Mbabazi, Minister of State for Defence. He also gave a verbal evidence when he was summoned by court in terms of rule 12(2) of the Modifications to the Fundamental Rights and Freedoms (Enforcement Procedure) Rules 1992 Directions 1996.

When the Petition was called for hearing, the learned Solicitor General who represented the Attorney General raised a preliminary objection challenging the competence of the Petition before this court. Three grounds were advanced in support of the objection, namely:-

(1) that no court fees were paid by the Petitioner at the time of filing the Petition.

(2) that the Petition was supported by defective affidavits and

(3) that the Petition discloses no cause of action.

The objection was strongly opposed. After hearing the arguments from Counsel for both parties, the court reserved its

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opinion on the matter to be incorporated in the main judgment and directed the hearing of the Petition to proceed. The reason for that decision was based on the importance of the Petition concerning a citizen's right guaranteed under the Constitution. Court did not want to stifle the case from the bud on technicalities.

I now deem it appropriate to tackle the preliminary objections at this stage. The learned Solicitor General pointed out correctly, in my view, that rules 3 of the Modifications to the Fundamental Rights and Freedoms (Enforcement Procedure) rules 1992 Directions 1996 requires a prescribed court fees plus security for costs of Shillings 100,000/= to be paid at the time of presenting a Petition for filing. He submitted that in the instant case, court fees were not paid at the time of presenting the Petition. The learned Solicitor General argued that payment of court fees was not the kind of technicalities envisaged in article 126(2)(e) of the Constitution of Uganda 1995. He submitted that the non-payment of the prescribed court fees rendered the Petition incompetent and prayed that the Petition be struck out for incompetence.

It transpired in the course of the hearing that both the prescribed fees plus the requistite security for costs were paid and receipts issued. Mr. Lule leading Counsel for the Petitioner had the receipts and produced them to court. One receipt was for shillings 10,500/= and the other for shillings 100,000/=. Both receipts described both payments as court fees. The Registrar confirmed that both the prescribed court fees and security for costs were duly paid notwithstanding the mis-description in the receipt.

Payment of the prescribed court fees plus a further shillings 100,000/= for security for costs at the time of presenting a Petition is clearly mandatory under rule 3 of the Modifications to the Fundamental Rights and Freedoms (Enforcement Procedure) Rules 1992 Directions 1996. Failure to comply with that requirement is punishable under rule 4 thereof which enjoins the Registrar not to receive such a Petition. There is no doubt that there was due compliance with the requirement of rule 3 in the instant case.

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The full amount of Shs.110,500/= was paid at the time of presenting the Petition. This covered the prescribed court fees of Shs.10,500/= plus the security for costs of shs.100,000/=. The receipts issued on receipt of the money wrongly described both payments as court fees. This of course was a misdescription in part since Shs.100,000/= was a refundable security for costs. The Petitioner cannot be blamed for that mis-description. That was the work of an official of the court. In the circumstances I would find no merits in this ground of objection.

The second ground of objection was that the Petition was supported by affidavits which contain very grave and serious defects in themselves and with others. The following defects were alleged, namely:-

(a) that the affidavits are inconsistent in themselves and with others.

(b) that the affidavits did not disclose the sources of information.

(c) that the affidavits did not distinguish between matters sworn on information and those deponed on the deponent's own knowledge.

The learned Solicitor General referred to various paragraphs of the Petitioner's affidavit of 12th December 1996 and some passages in the Petitioner's testimony before the Parliamentary Committee to show inconsistencies in the affidavit. The paragraphs referred to were:- 2, 12, and 17 and a passage on page 61 of the Petitioner's testimony. In those paragraphs and the passage on that page, the Solicitor General pointed out, the Petitioner stated that he was a member of the UPDF. But that in paragraph 18 of the same affidavit and in paragraph 8 of the Petitioner's affidavit in reply dated 12th of February 1997, the Petitioner made statements which contradicted the previous ones. The Solicitor General argued that in these latter paragraphs, the Petitioner stated that he had ceased to be a member of the regular force upon his appointment to the post of Presidential Advisor.

The Solicitor General further pointed out that in paragraph 7 of his affidavit of 12th December 1996, the Petitioner falsely stated that the Petitioner had represented the Army on the Constitutional

Commission. When the Respondent had pointed out that that statement was false, the Solicitor General argued, the Petitioner sought to correct the error in paragraph 12 of his subsequent affidavit dated 12th February 1997. The Solicitor General submitted that inconsistency or falsehood in an affidavit cannot be ignored however minor. He cited the following cases as authorities for that proposition:-

(1) Sirasi Bitaitano & 4 Others Vs E. Kananura (1977) HCB 34

(2) Kabwenukya - Vs - John Kisigwa (1978) HCB 257

(3) Milton Obote Foundation - Vs - C. Ogwal and Others HCCS No. 690/96 (unreported).

Another ground of attack on the affidavits sworn in support of the Petition was that the affidavits did not disclose the sources of information where facts are based on information. The learned Solicitor General submitted, correctly in my view, that affidavit which is sworn on facts based on information and belief, must disclose the source of the information and the grounds for belief. The following cases were relied on for authorities for that view.

(1) A.N. Phakey - Vs - World Wide Agencies Ltd (1948) 15 EACA 1

(2) Caspair Ltd. - Vs - Happy Gandy (1962) EA 414

The learned Solicitor General submitted that in the instant case, affidavit sworn in support of the Petition did not disclose sources of information where facts are based on information. He cited paragraphs 8 and 9 of the Petitioner's affidavit in reply dated 12th February 1997 as examples of those omissions.

The next complaint against the affidavit in support of the Petition was that the affidavit did not distinguish between facts deponed to on information and those sworn on the deponent's own knowledge. The learned Solicitor General contended, rightly in my view, that an affidavit must distinguish between facts sworn on information and those sworn on the deponent's own knowledge. The following case was cited as authority for that view.

Noor Mohamed Jan Muhamed - Vs - Kassamali Virji Madhvani (1953) 20 EACA 8

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Mr. Lule responded that the affidavits in support of the Petition did not contain inconsistencies. Sources of information, he said, were disclosed were facts were based on information. He explained that the words "my lawyers" in paragraphs 8 and 9 of the Petitioner's affidavit in reply dated 12th February 1997 means the lawyers who drafted the document. He drew the court's attention to its duty under article 126(2)(e) of the Constitution of Uganda 1995, to administer substantive justice without undue regards to technicalities. Relying on article 2(1)(2) and 273(1) of the Constitution, Mr. Lule submitted that the cases cited by the learned Solicitor General being existing laws must be construed so as to bring them in conformity with the Constitution.

Article 2(1) provides that the Constitution "is the Supreme Law of Uganda and shall have binding force on all authorities and persons throughout Uganda."

Article 2(2) provides that if any other law or any custom is inconsistent with any of the provisions of the Constitution, the Constitution shall prevail and that other law or custom shall, to the extent of the inconsistency, be void.

Article 273(1) saves existing laws.

The defects which the learned Solicitor General complained about in the affidavits are technicalities which are not fundamental. In cases concerning fundamental rights of a citizen such technicalities must be considered in light of article 126 (2)(e) of the Constitution of Uganda 1995 and be ignored to avoid compromising substantive justice. That is what the Legislatures must have intended in the above Constitutional Provision. This was done in Uganda - Vs - Commissioner of Prisons exparte Matovu (1966) EA 574 where at page 521, Sir Udo Udoma C.J. as he then was, while dealing with technical defects in application concerning the liberty of a citizen had this to say,

> "We decided in the interest of justice to jettison formalism to the wind and overlook the several deficiencies in the application and thereupon proceeded to the determination of the issue referred to us"

The case before us concerns the fundamental rights and freedom of a citizen guaranteed under the Constitution of this country. The principle applied in Matovu's case above will be adopted here too.

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It is in line with article 126(2)(e) of the Constitution. It is appropriate to ensure that cases concerning fundamental rights of a citizen are not killed at birth.

The third ground of objection was that the Petition discloses no cause of action. Mr. Kabatsi pointed out that article 137(3) of the Constitution of Uganda 1995 requires a Petitioner to allege an act or omission which violates a provision of the Constitution to constitute a cause of action. The learned Solicitor General pointed out that the act complained of was that the Minister of State for Defence in his letter advised the Petitioner to follow the law. That advice, Mr. Kabatsi submitted, cannot be unconstitutional because it does not violate any provision of the Constitution.

Mr. Lule responded that the Petition discloses a cause of action. He pointed out that to determine whether or not a Petition discloses a cause of action one must look at only the Petition itself and the supporting affidavit. He argued that article 137(3) of the Constitution of Uganda 1995, creates a right of action to a person who alleges that,

(a) an Act of Parliament or any other law or

(b) an act or omission of any person or authority is inconsistent with a provision of the Constitution. Mr. Lule pointed out that this Petition covers article 137(3)(a) and (b) of the Constitution. He submitted that article 137 must be read together with article 50(1) which gives right of action where there is a threat to violate one's fundamental right.

It is instructive to state the principle applicable to determine whether or not a Petition discloses a cause of action. I have not been able to lay my hands on a Constitutional Petition case directly on the point. But by analogy, it is perhaps helpful to refer to the observations of spray Ag. President of the defunct Eastern African Courts of Appeal in Attorney vs Clouch (1972) EA at page 394 paragraph A and B where he said,

"In deciding whether or not a suit discloses a cause of action, one looks ordinarily, only at the Plaint (Jiraj Shariff & Co. - vs - Chotai Farey Store (1960) EA 374) and assumes that the facts alleged in it are true"

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I respectfully agree with that principle. In the case before us, it is only the Petition and the supporting affidavits that must be looked at and to assume that the facts stated therein are true, to decide whether the Petition discloses a cause of action.

This Petition was brought under article 50(1) and 137(3) of the Constitution of Uganda 1995. Article 50(1) authorises any person who,

> "claims that a fundamental right or freedom guaranteed under this Constitution has been infringed or threatened to bring action to court for redress."

Article 137(3) on the other hand, authorises any person who alleges either that an Act of Parliament, or any other law or anything in or done under the authority of any law; or any act or omission by any person or authority is inconsistent with or in contravention of this Constitution to bring action to this Constitutional Court for a declaration.

The instant Petition alleges as unconstitutional the letter of the Minister of State for Defence rejecting the Petitioner's resignation from the UPDF and its High Command and requiring the Petitioner to resign in accordance with Reg. 28(1) of the NRA (conditions of service) (officers) Regulations 1993 for being contrary to article 25(2) and 25(3)(c) of the Constitution of Uganda 1995.

I further alleges a threatened disciplinary, or criminal or civil action against the Petitioner on account of his testimony before the Parliamentary Sessional Committee as being contrary to article 97 of the Constitution.

Assuming that what are contained in the Petition and the supporting affidavit are true, reading articles 50(1) and 137(3) together, is clear to me, that the Petition discloses causes of action. Whether the letter of the Minister actually infringes the stated provisions of the Constitution or not is a matter to be determined at the close of the hearing of the Petition.

Similarly, whether the Newspaper reports and the Radio message contained threat is also a matter to be determined by the trial. For these reasons, I would find and hold that the Petition discloses causes of action.

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Before I tackle the merits of the Petition itselt, there is one more issue which I must deal with. In the course of the hearing, leading Counsel for the Petitioner had attempted to tender in evidence a photocopy of a Radio message which was annexed to the Petition as annexture A4. That attempt was resisted by the Solicitor General on the grounds that (1) it was a photocopy, (2) its source was not disclosed, (3) it was not signed and (4) it was crossed. It was crossed vertically through all the pages with a thick black ink. After hearing arguments from both Counsels, Court ruled by 4 to 1 that the document was inadmissible and reserved its reasons to be incorporated in the judgment. I was one of the four Judges who ruled against its admissibility. As for the reasons for that, I associate myself with the reasons given by My Lord Justice Manyindo DCJ which I had the chance to read in draft.

As if not to feel being undone, Mr. Lule later in cross-exa examination handed to Hon. Amama Mbabazi the same recorded Radio message but this time in original hand written form. Hon. Mbabazi recognised it as a Radio message which was sent by H.E. The President to the Minister of State for Defence (G) and Copied to all members of the High Command including the Petitioner. He thought the document was restricted. Consequently a second attempt to tender it in evidence was again resisted but this time on ground of national security. Court however ordered that it be admitted in evidence since it is relevant to the case but that it should be admitted in camera. So it was done and the document is marked in evidence as (Exh P2.)

I now turn to consider the merits of the Petition itself. Our task in this Petition is to interpret certain provisions of the Constitution of Uganda 1995 in relation to certain acts and measures which the Petitioner alleged are contrary to the provisions of the Constitution. It is perhaps appropriate at this point, to set out the principles that govern interpretation of a Constitution.

In Andrew Lutakome Kayiira and Paul Semogerere - Vs - Edward Rugumayo and two others - Constitutional case No.1 of 1979 - Odoki J as he then was adopted the principles governing interpretation of statute. In doing so, he followed earlier cases like (1) Uganda - vs - Kabaka's Government (1965) EA 395; (2) Republic - Vs - E.L. Mann (1969) EA 357.

It would appear clear from those cases that the principles which govern interpretation of statute also apply to interpretation of Constitutions. The rule of statutory interpretation are set out clearly in Craies on Statute 6th Edition at page 66 as follows:-

> "The Cardinal rule of Construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. The Tribunal—— that has to construe an Act of a legislature or indeed any other document has to determine the intention as expressed by the words used. And in order to understand those words, it is natural to inquire what is the subject matter with respect of which they are used and the object in view —— If the words of the statute are themselves precise and un-ambiguous, then no more can be necessary than to expound thos words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the laws-givers. Where the language of an Act is clear and explicit, we must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the legislatures."

The above quotation is clear. The rule is simply put, that where the words of the document to be construed are clear and unambiguous, they must be given their ordinary and natural sense irrespective of the consequences. An argument was advanced that a more liberal interpretation should be adopted to interpret a Constitution than an ordinary statute. Commenting on that view, Mwendwa CJ had this to say in Republic Vs E.L. Mann above,

> "We do not deny that in certain context a liberal interpretation may be called for; but in one cardinal respect, we are satisfied that a Constitution is to be construed the same way as any other legislative enactment, and that is where the words are precise and un-ambiguous, they are to be construed in their ordinary and natural sense. It is only where there is some imprecision or ambiguity in the language that any question arises whether a liberal or restricted interpretation should be put upon the words."

It must also be added that in "Maxwell on Interpretation of Statute 3rd Edition" page 3498, the learned authors put the point in this way,

> "The tendency of modern decisions upon the whole, is to narrow materially the difference between what is called a strict and a beneficial construction. All statutes are now construed with a more strict regard to the language and criminal statutes with a more rational regard to the aim and intention of the legislature than formerly. It is unquestionably right that the distinction should not be altogether erased from the judicial mind, for it is required by the spirit of our own free institutions that the interpretation of all statutes should be favourable to personal liberty and it is still preserved in a certain reluctance to supply the defects of language or to eke out the meaning of an obscure passage by strained or doubtful inferences. The effect of the strict construction might almost be summed up in the remark that, where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject, and against the legislature which has failed to explain itself."

It is clear from the above quotation that to determine the intention of the legislature, the words used should be the tool. Where they are precise and un-ambiguous their ordinary and natural meaning must be given effect to. Where a passage is obscure and ambiguous and leaves doubt as to its meaning, the benefit of the doubt must be given to the subject rather than to the legislature which has failed to be clear. I would adopt these principles in the interpretation of the constitutional provisions at hand.

The following issues were agreed on by Counsel for both parties for determination of the court:-

(1) whether on his appointment to the post of Presidential Special Advisor on Military Affairs the Petitioner became a public servant by virtue of the terms of service spelt out in the letter of his appointment.

(2) whether upon his appointment with effect from 2nd February 1993; the terms of service spelt out in the letter of appointment were the terms governing the Petitioner and his service relationship with the Republic of Uganda.

(3) whether upon being offered new terms of service, set out in the letter of appointment, the Petitioner continued to be governed by the terms of his old employment, too in the Uganda Armed Forces.

(4) whether having served in the Army and appointed to a new position outside the military establishment, the Petitioner continued to be a member of a regular force as defined in the National Resistance Army Statute and the Regulations made thereunder.

(5) whether in his new status, arising from his new terms of service set out in his letter of appointment, the Petitioner continued to be subject to military laws, to which members of the Uganda Peoples Defence Forces are subject.

(6) whether to be a member of the High Command as defined or set out in the National Resistance Army Statute one must of necessity also be a member of a regular force.

(7) whether the letter from the Minister of State for Defence (Annexture 'E' to the Petitioner) which declared the Petitioner's resignation and departure from the Army and the High Command "null and void" was in effect a denial of the Petitioner's liberty and calculated to require the Petitioner to perform forced labour.

(8) whether the Petitioner resigned from the High Command and refused to be a member of a regular force as a conscientious objector in accordance with article 25(2) and 25(3) of the Constitution.

(9) whether the testimony given by the Petitioner before the Parliamentary Sessional Committee on Defence and Internal Affairs was made on a privileged occasion and entitled the Petitioner to immunity from any actual or threatened prosecution, harassment or victimization guaranteed by Articles 97 and 173 of the Constitution 1995 and the Provisions of the National Assembly Powers and Privileges Act Cap 249 Laws of Uganda 1964.

(10) whether the letter from the Ministry of State for Defence and the reported conduct of the other authorities in the government and the army amounted to a threat to the Petitioner's fundamental rights and freedoms guaranteed and protected under articles 20, 23, 25(2), 25(3)(c) and 97 thus justifying the Petition.

(11) Whether the Petitioner is entitled to the declaration and remedies prayed or any others.

From the Petition, its supporting affidavits, the answer to the Petition and the affidavit in support thereof and the verbal evidence given before us plus the arguments of Counsel on both sides, there are only two fundamental issues in this case. The above issues are all subsidiary to these fundamental issues. They are,

(1) whether the Petitioner is protected from any actual or threatened prosecution, whether disciplinary, criminal or civil on his testimony before the Parliamentary Sessional Committee on Defence and Internal Affairs.

(2) whether the Petitioner was removed from the Army upon his appointment as Presidential Advisor effective from 2nd February 1993.

I shall deal with these two fundamental issues in that order.

PROCEEDINGS BEFORE PARLIAMENTARY COMMITTEE.

Paragraph 1(b) of the Petition was couched in these words,

> "Proceedings in the Parliamentary Sessional Committee on Defence and Internal Affairs are privileged under Article 97 of the Constitution and as such cannot form a basis for any disciplinary and or criminal/civil action against the Petitioner in any court of law and or administrative body of any kind"

The Petitioner's case is that, he is protected by article 97 of the Constitution from prosecution actual or threatened or any harassment on his testimony before the Parliamentary Committee. He alleged that there was threat to take disciplinary action and probably to punish him under the military code of conduct on account of his testimony before the Parliamentary Sessional Committee. He deponed in his affidavit that he feared that his fundamental rights guaranteed under that article 97 of the Constitution was therefore threatened. His fear was based on Newspaper reports attributed to some government and army senior members.

The Solicitor General conceded that the Petitioner is protected on his testimony before the Parliamentary Committee under article 97 of the Constitution but contended that the Newspaper reports attributed to the government and army senior members did not constitute any threat to the Petitioner.

From the above, the issue here has turned on whether there was evidence of threat to take disciplinary or other action against the Petitioner on account of his testimony before the Parliamentary Committee.

Article 97 of the Constitution enjoins Parliament to make laws prescribing Parliamentary immunities and privileges. Parliament responded to this order. It made laws - the National Assembly (Powers and Privileges) Act Cap. 249. Section 14(1) thereof provides for a witness who testifies before Parliament or it committee same rights and privileges as those who testify before a court of law. The Petitioner is covered under this provision on account of his evidence before the Parliamentary Committee.

The Respondent denied that the Newspaper Reports attributed to the Army Commander and Hon. Amama Mbabazi contained any threat to take disciplinary or any other action against the Petitioner on account of his testimony before the Parliamentary Committee.

"Threat" is an ordinary English word whose dictionary meaning includes expression of an intention to hurt, punish or cause paint etc. I have read Newspaper Reports attributed to some government and army senior members. In New Vision of 4th December 1996 was a Report with the Caption "Army Chief tells Tinyefuza to quit". This Report was attributed to the Army Commander who was reported to have said,

> "If Tinyefuza wanted to express his own views he should have resigned, otherwise he has to abide by the agreed position taken by the army. Muntu charged that Tinyefuza's utterances on Friday were against UPDF organisational structure".

The New Vision of 7th December, 1996 carried another Report entitled "Tinyefuza to face High Command". This was attributed to the President who was reported to have said,

> "Tinyefuza could be summoned before the High Command as a serving military officer under the Military Code".

The same article reported the Army Commander to have said:

> "Tinyefuza was undisciplined and a deviant who should have resigned before testifying. The testimony was meant to cause friction and undermine the cohesion within the army which jeopardises national security".

In the Sunday Vision of 8th December, 1996 was a Report which was attributed to Hon. Amama under the heading, "Tinyefuza is up to something". The article reported Hon. Amama to have said, "I do not want to discuss this Tinyefuza issue, but I think he is trying to make a huge mountain from a mole. I think somebody is up to something and Tinyefuza is playing along".

The New Vision of 18th December of 1996 carried yet another Report under the title,

> "No split in the army over Tinyefuza".

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This was attributed the President who was reported to have said, "If he (Tinyefuza) wants to go, we shall let him go after he has sorted out his problem with the army. If he committed an offence in the army, he will have to sort out that one first."

This last report summed up clearly the intention. If he committed an offence with the army he will have to sort out that one first. The Reports attributed to the Army Commander and Hon. Mbabazi imputed to the Petitioner commission of offences against the army code of conduct. For example, indiscipline, subversion, intrigues are offences under the army code of conduct. Imputation of commission of offence is an expression of an intention to punish.

The Radio message (Exh P2) confirmed the Petitioner's fear. It sets out certain offences for which the Petitioner would have been disciplined under the army code of conduct and directed the High Command meeting to consider them and recommend causes of action. Mr. Kabatsi submitted that the Radio message (Exh P2) was inconclusive and did not constitute a threat. I do not agree. By labelling charges against the Petitioner and directing the High Command meeting to consider them, the Radio message had sufficiently expressed an intention to punish the Petitioner. What could be a clearer expression of intention than framing charges against someone. I would hold that there was a threat to take disciplinary action against the Petitioner on account of the testimony the Petitioner gave before the Parliamentary Committee on Defence and Internal Affairs then probing into the causes of the armed conflict being waged in the North of Uganda. The Petitioner is entitled to the protection of this court against that threat.

This now leads me to the second fundamental question in this Petition which is whether the Petitioner was removed from the army upon his appointment as Presidential Advisor.

Paragraph 1(a) of the Petition alleges,

"(a) that the Minister of State for Defence (G)'s letter of 8th December 1996 rejecting the Petitioner's resignation and requiring the Petitioner to resign in accordance with Reg. 28(1) of the NRA (conditions of service)(officers)

Regulations 1993 is contrary to article 25(2) and 25(3) (c) of the Constitution of Uganda 1995.

Article 25(2) of the Constitution of Uganda 1995 prohibits compelling any person to perform forced labour. The relevant provision reads that,

"No person shall be required to perform forced labour."

Article 25(3)(c) of the same Constitution sets out one of the limitations of what amounts to forced labour. The relevant provision reads that,

> "any labour required of a member of a disciplined force as part of that member's duties as such or, in the case of a person who has conscientious objections to service as a member of a naval, military or airforce, any labour which that person is required by law to perform in place of that service."

REMOVAL FROM ARMY

The Petitioner's argument was that he could not follow that procedure provided under the military law because he is not subject to military laws. He had ceased to be a member of the regular force when he was appointed to the Public Service as a Presidential Advisor and that he had not been a member of the Regular Reserve or any other component of the army. The Petitioner deponed in paragraph 6 of his affidavit of 12th December 1996 that he was appointed an Advisor to H.E. The President by a letter dated 24th May 1994. The appointment was on a two years renewable contract which was backdated to 2nd February 1993.
Mr. Lule pointed out that the power of appointment conferred on the President under any article of the Constitution includes the power to remove, suspend or to reinstate by virtue of section 24 of the Interpretation Decree No. 18 of 1976.

The Petitioner's letter of appointment set out the conditions of the appointment in detail. The conditions and terms of service in that letter and those prescribed in section 5(1) of the National Resistance Army Statute No. 3 of 1992 both require full time service. Mr. Lule

submitted that these are mutually exclusive and that by making the subsequent appointment with the terms and conditions of service exclusive of the earlier appointment, the President had in fact removed the Petitioner from the army and appointed him to the Public Service.

In support of that view, the Petitioner deponed in his affidavit that his salary and other entitlements which he used to receive as an army officer were stopped. He cited a letter from the Secretary for Defence (Annexture 'F') to the Petitioner's supplementary affidavit as evidence of the stoppage. The Petitioner's affidavit further showed that since his appointment as Presidential Advisor, the Petitioner had been paid his salary from the Public Service through the President's office and that his said salary was being deducted to pay graduated tax. He produced three salary pay slips (Exh. P1) to substantiate the points that his salary was paid from Public Service through the office of the President and that his said salary was being deducted to pay graduated tax. Mr. Lule pointed out that army officers are exempted from payment of graduated tax by virtue of Reg. 33 of the National Resistance Army (conditions of service)(officers) Regulations 1993.

The Respondent's case was that despite those conditions and terms of the Petitioner's subsequent appointment as Presidential Advisor, the Petitioner is still a member of the Regular force. That if anything it is the subsequent appointment which is to be void.

The Respondent's case hinges on two grounds namely:-

(1) That the National Resistance Statute No. 3 of 1992 does not provide for that manner of removal of an army officer from the army.

(2) That there is a policy which allowed army officers to be employed outside the army but still retained their membership of the army. The letter of appointment, the solicitor General submitted, did not remove the Petitioner from the army. Removal from the army, the Solicitor General argued, can only be in accordance with the law. Hon. Amama-Mbabazi (PW1) told court both in his affidavit and in his testimony that the

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Petitioner is still a member of the army. He testified to the existence of a policy in the UPDF passed by the High Command in 1992 which allows Army Officers to be employed outside the army but still retain their membership of the army. He produced various documents (Exh. D1-9) to show Army officers who under the policy were employed outside the army but still retained their membership in the army.

It was a further contention of the Respondent that the Petitioner is still a member of the army because he continued to be paid his emoluments and entitlements as an army officer. Hon. Amama Mbabazi produced assorted documents (Exh.D-10-21) to show that the Petitioner was continued to be given salary, food rations, army uniforms, fuel and other benefits from the army as an army officer after his appointment as President Advisor.

Another reason which the respondent advanced for the view that the Petitioner is still a member of the army is that the Petitioner had held out himself as an army officer even after his appointment as Presidential advisor. Hon. Amama Mbabazi cited instances where the Petitioner held out himself as an army officer. The instances were first that the Petitioner, told the Parliamentary Committee that the Petitioner is a Major General in the UPDF; the Petitioner presented himself and was elected by the army as a member of the Constituent Assembly representing the army, and continued to represent the army in that forum until 1995 when the constitution was promulgated.

In response, Mr. Lule challenged the evidence to show that the Petitioner continued to receive his entitlements in the army as un satisfactory. The documents (Exh.D10-21) he said, do not contain the Petitioner's signature acknowledging receipt. He submitted that as there was admission of dishonesty among the officials in the army institution, it was necessary to produce satisfactory evidence before a finding of fact could be made that the Petitioner received or authorised receipt of those items.

On the argument that the Petitioner had held out himself as an army officer, it was replied for the Petitioner that the doctrine of estoppel cannot operate to hinder operation of law. He cited a Book entitled "Maxwell on Interpretation of Statute 12th Edition by P. St. J. Langan". Mr. Lule submitted that the law does not regard the Petitioner as a member of the army and the Petitioner cannot be estopped from saying that he is not a member.

He finally reiterated that the Petitioner was removed from the army upon his appointment as a Presidential Advisor.

I shall deal with these arguments in that order.

It is conceded by Counsel for both parties that the appointment of the Petitioner as a Presidential Advisor was directed by H.E. The President under Article 104(1) of the Constitution of Uganda 1967 as modified by legal Notice No.1 of 1986. The letter of appointment annexture 'C' to the Petition, sets out in detail the terms and conditions of service for the post.

For brevity I shall not reproduce the letter here. It suffices to the state that the appointment gives the Petitioner a full-time employment on a two years' renewable contract with effect from 2nd February, 1993. The conditions of service prescribed in Section 5(1) of the NRA Statute No. 3 of 1992 for a member of a Regular force is that,

> "Every member of a Regular force shall be on continuing full-time military service and shall at all time be liable to be employed on active service".

The conditions of service contained in the Petitioner's letter of appointment and those prescribed in the above quoted provisions are clearly mutually exclusive. Mr. Lule pointed out, and this was conceded by the Respondent that the Petitioner was appointed and promoted in the army under Article 78 (2) (b) of the Constitution of Uganda 1967 as modified by Legal Notice No. 1 of 1986.

(c) terms and conditions of service of Uganda Peoples' Defence Force....".

The above article places emphasis on Parliament. It departed from the Uganda Constitution of 1967 whose article 78 (1) which dealt with the power to appoint army officers, placed emphasis on the President. Clause 4 of that Article gave Parliament discretion to regulate the power conferred on the President by Article 78 (1) above.

In compliance with article 210 above Parliament made laws, the National Resistance Army statute No. 3 of 1993. Section 104 (1) thereof empowers the Minister responsible for defence after consultation with the NRA council to make by Statutory Instrument Regulations to ensure discipline and good administration of the army and generally for the better implementation of the provisions of this statute.

The National Resistance Army (Conditions of Service) (Officers) Regulations, 1993 (SI No. 6 of 1993 was made under the above provisions of the statute. Reg. 27 thereof prohibited removal of an army officer from the army except in accordance with the statute and Regulations made under it. Reg. 28 (1) provided the procedure for resignation and retirement of an army officer from the army. Resignation may be permitted under that Regulation by the Commission Board. Reg. 27 of the NRA (Conditions of Service) (Officers) Regulations 1993 is a subsidiary Legislation. It cannot over-ride the power to remove given under Section 24 of Decree 18 of 1976.

Sub-Section 2 of Section 104 of the NRA Statute No. 3 of 1992 empowers the Minister to provide for things like transfer and secondment of army officers from the army to offices outside the army but he chose not to do so. The rule of strict construction pointed out earlier in this judgment is that where words or sentence leaves reasonable doubt as to its meaning which the canons of interpretation fail to solve, the benefit of the doubt must be given to the subject and against the Legislature which has failed to explain itself.

It would appear to me clear that Section 5(1) of NRA Statute No. 3 of 1992 is ambiguous as to whether an army officer can be employed outside the army and still retain his membership in the army. The Regulations made under that statute also makes no provision for secondment of army officers to offices outside the army while retaining their membership in the army. The NRA statute No. 3 of 1992 and the Regulations made under it are in the regard ambiguous. On the principle of construction stated above, the benefit of the doubt must be given to the Petitioner. That he was removed from the army upon his appointment as Presidential Advisor.

The contention that there is a policy which allowed army officers to be employed outside the Army but still retain their membership in the army is untenable because any policy which is not reduced into law cannot be enforced by courts.

In this age of Constitutionalism, when the rule of law is being restored, it is necessary that any policy which affects the right of citizen must be reduced into law not only for predicability of action but also for certainty of purpose. The alleged policy having not been reduced into law is un enforceable by Courts.

The argument that the Petitioner continued to be paid his emoluments and other benefits as an army officer is not supported by any satisfactory evidence. The documents Exh.D 10-21 which Hon. Amama Mbabazi produced in court to substantiate the argument do not bear the Petitioner's signature or that of his agent acknowledging receipt of those items. When the Petitioner denied receipt of the items, the Respondent relied on the explanation that Senior and busy Army officers of the Petitioner's category do not line up to receive their entitlements from their junior officer. They would send their aides for the same. That explanation is not enough. Better evidence was required to rebut the denial. Clear evidence to connect the Petitioner with receipt of those items was necessary. The necessity for such evidence became greater when there was admission of dishonesty in the Institution of the Army. Evidence or Affidavit from the Petitioner's aides or agents was necessary to show that receipt

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of those items were on the Petitioner's authority. That was not availed.

The evidence available indicated that some of the items were received by the Petitioner in his other capacities; either as a member of the High Command or as a Member of the Army Council. It is conceded that membership of the High Command was not dependent on membership of the army. And that being a member of the High Command, entitles one to automatic membership of the army council. Hon. Amama Mbabazi further conceded that as a member of the Army council, the Petitioner was entitled to army escorts. The Petitioner conceded that vehicle Land Rover 110 Reg. UPE 745 was retained by him for official use of those army escorts. He further conceded that fuel was also obtained from the army for use in that vehicle for that purpose. It was the evidence of Hon. Amama Mbabazi that members of the High Command are allocated vehicles by virtue of the position they hold except those who were members as at 26th January, 1996. It is conceded that the Petitioner was a member of the High Command as at 26th January, 1986.

The above evidence casts doubt as to whether the Petitioner continued to be given this emoluments and other benefits as an army officer after his appointment as Presidential Advisor. It is important to note that Hon. Amama Mbabazi had stated in his evidence that part of the policy passed by the High Command in 1992, was that salaries of army officers who were employed outside the army would be paid by the institution which employed them. The army, he said, would not pay salaries of such officers during the tenure of their employment outside the army.

In that regard, Hon. Mbabazi stated that salary payments were made from the army to the Petitioner after the Petitioner's appointment as Presidential Advisor in error. The Petitioner of course denied receipt of those payments. The point is, payment made in error does not prove that the payee is still a member of the army.

To reiterate that he had been removed from the army upon his appointment as Presidential Advisor, the Petitioner produced in evidence his three salary pay slips (Exh. P1) to show not only that his salary was paid by the Public service through the President's office but also that an amount was being deducted from it to pay graduated tax.

The Respondent did not challenge the evidence that the Petitioner's salary was deducted to pay graduated tax. Reg. 33 of the Regulations 1993, exempts army officers from payment of graduated tax in these words,

> "An officer shall be exempt from payment of graduated tax"

The deduction of the Petitioner's salary to pay graduated tax would be incompatible with the claim that the Petitioner is still a member of the army in view of that rule.

The contention that the Petitioner had held out himself as an army officer after his appointment as Presidential Advisor cannot be sustained in view of the well established principle of the law that the doctrine of estoppel cannot operate to hinder an operation of law.

In "Maxwell on Interpretation of Statute 12th Edition by P.St. J. Langan" to which we were referred by Counsel for the Petitioner, the learned author said at page 333, that,

> "Estoppel cannot operate to prevent or hinder the performance of a statutory duty or the exercice of a statutory discretion which is intended to be performed or exercised for the benefit of the public or a section of the public".

The Petitioner having been removed from the regular force and there is no suggestion that he was appointed to a regular reserve or to any other component of the army is not regarded under section 14(1) of the National Resistance Army Statute No. 3 of 1992 as a member of the Army. His views as to what he is and whatever he does showing that he is an army officer are irrelevant because membership of the UPDF is a matter of law. The doctrine of Estoppel cannot operate to stop the Petitioner from asserting what the law say it is.

MINISTER OF STATE FOR DEFENCE (G)'S LETTER

The Petitioner's case was that the Minister of State for Defence (G)'s letter ref. MSO/G/1 dated 8th December 1996 rejecting the Petitioner's resignation and requiring the Petitioner to resign in accordance with Reg. 28(1) of the NRA (conditions of service) (officers) Regulations 1993 is unconstitutional for being contrary to - (a) article 25(2) of the Constitution of Uganda 1995 because the Petitioner had ceased to be a member of the army upon his appointment to the Public Service as a Presidential Advisor.

The Petitioner had indeed been removed from the army as shown above upon his appointment as Presidential Advisor. The salient question to answer is whether the letter of the Minister of State for Defence in requiring the Petitioner to comply with Reg, 28 (1) of the NRA regulations 1993 (SI No. 6 of 1993) contravenes article 25(2) of the Constitution?

The controversial letter of the Minister reads as follows:-

"Major General David Tinyefuza,
President's Office
Kampala.

Re: Your Resignation from UPDF

Yours addressed to H.E. The President and Command-in-Chief of 3rd Instant and copied to me among others refers.

Having looked at the laws/Regulations of the NRA Statute and its subsidiary legislations relevant to the issue at hand, and having consulted with the Command-in-Chief and, further more, having exhaustively, discussed it in the meeting of the High Command, I advise you that the resignation of officers is governed by the National Resistance Army (Conditions of Service) (officers) Regulations 1993. These provide in Reg. 28(1) that for an officer to resign his commission, the Commission Board, established by Reg. 3(1) of the same Statutory Instrument No. 6 of 1993, would have to grant permission for such resignation in writing.

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As you know, one of the hall "marks of the NRA struggle has been the restoration of the rule of law, all Ugandans individually and collectively are equal before and governed by the law enacted by the authorised organ of state.

This is therefore to inform you that your purported resignation is null and void by virtue of the above quoted provisions. I have taken trouble to quote them extensively for your benefit. I would advise that you follow the right procedure in case you are contemplating resigning your Commission."

Signed
Amama-Mbabazi
Minister of State for Defence (G)

c.c. H.E. The President.
c.c. The Speaker of Parliament
c.c. The Chairman,"
Parliamentary Committee on Defence and
Internal Affairs.
c.c. The Army Commander.

The words "your purported resignation is null and void by virtue of the above quoted provisions" in the first part of the last paragraph of that letter are controlled by the adjective "null and void". Longman Dictionary of Contemporary English (1984) Reprint's Definition of "null and void" includes without force or effect in law. That sentence means that the Petitioner's resignation was without force or effect in law by virtue of the provisions quoted. That amounts to a rejection of the Petitioner's resignation.

The sentence "I would advise that you follow the right procedure in case you are contemplating resigning your commission" in the last part of the last paragraph in that letter is controlled by the verb "Advise".

The word "advise" of course means to recommend a line of action. That sentence in the ordinary and natural sense of the words used means that the letter recommended that the Petitioner follows the procedure under Reg. 28(1) of the NRA (conditions of service) (officers) Regulations 1993. It is important to note that the Petitioner had already been removed from the army upon his appointment as Presidential Advisor on 2/2/93. He was no longer a member of the army. He was resigning his membership of the High Command. It was conceded that membership of that body was not dependent on membership of the army. It was further conceded that there was no prescribed procedure for resigning from membership of the High Command. The Solicitor General admitted that a letter addressed by a member to the President and Chairman of the Hill Command would be a proper and effective signal by the member of his intention to quit. This was exactly what the Petitioner had done on 3rd December 1996. He wrote a letter addressed to H. E. The President, Commander-in-Chief and Chairman of the High Command. It was not suggested that such resignation needed a prior acceptance to take effect.

To reject the Petitioner's resignation and "advise" that he follows the procedure prescribed for military officers when he is not a member of the army as stated in section 14(1) of the NRA Statute No. 3 of 1992 does not make sense. The word "advise" in that context in its ordinary and natural sense would be unreasonable. Its correct and proper construction in that context would be "required" or "compelled". By requiring or compelling the Petitioner to resign as a military officer when he is not one, would be forcing him to do the work of a military man. That would run contrary to article 25(2) of the Constitution of Uganda 1995 since it is not his wish to work as military officer. That would be forced labour.

The Petitioner further alleged that the letter of the Minister is contrary to article 25(3)(c) of the Constitution. The Petitioner had stated in his letter of resignation(Annexture 'D') to the Petition that,

/...

"I find it unjustified to continue serving in an institution whose bodies I have no faith in or whose views I do not subscribe to."

Mr. Lule submitted that in the above circumstances, the Petitioner became a conscientious objector. To force him to resign as a member of the army when he is not such a member would go counter to article 25(3)(c) of the Constitution. It was the Respondent's case that the Petitioner being a member of the army, cannot claim to be a conscientious objector.

Article 25(3)(c) of the Constitution was reproduced earlier in this judgment. Longman Dictionary of Contemporary English (1984) Reprint, definition of the words "conscientious objection" is objection on moral or religious belief. The same Dictionary defines "conscientious objector" as a person who refuses to serve in the armed forces because of moral or religious belief.

In this case, the Petitioner was found to have been removed from the army upon his appointment as a Presidential Advisor on 2nd February 1993. He was not a member of the army when he wrote his letter of resignation. In that letter he left no doubt that the Petitioner on moral ground, no longer wants to rejoin the army. To force him to resign as a military officer under reg. 28(1) of the NRA (conditions of service)(officers) Regulations 1993 . would be forcing him despite his moral objection to be a member of the army. That would be unlawful as it would run contrary to article 25(3)(c) of the Constitution.

COMMISSION

This now brings me to the question of commission. One of the reasons which the Petitioner advanced for the view that he was not a member of the army was that he was not commissioned. He was not resigning his commission because no such commission was issued to him in accordance with Reg. 13(3) of the NRA (conditions of service) (officers) Regulations 1993.

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It is pertinent to repeat that it was agreed by Counsel for both parties that the Petitioner was appointed and promoted effectively by H.E. The President under article 78(2)(b) of the Constitution of Uganda 1967 as modified by Legal Notice No.1 of 1986. The disputed commission of the Petitioner was effected by the General and Administrative Order No. 5 (Exh.D22-23) in 1988. Mr. Kabatsi submitted that the unorthodox method was adopted because there was a vacuum in the law governing the control and administration of the army. He explained that the Armed Forces Decree No. of 1971 had merged the Commission Board which advised the Defence Council with the Defence Council itself. In his views, Statute No. 2 of 1980 complicated the position further when it repealed the Armed Forces Decree No. 1 of 1971 without providing for the composition of the Defence Council which determined the question of Commission until when the NRA Statute No. 3 of 1992 and the Regulations made under it were made. Relying on section 43 of the Interpretation Decree No. 18 of 1976, Mr. Kabatsi submitted that the General and Administrative Order No.5 (Exh.D22) which set out the format by which the Petitioner was commissioned shall not be invalidated because it deviated from the Commission Warrant Form prescribed by law.

The relevant "General and Administrative Order" took the following form.

"General and Administrative Order No.5.

2. Promotions/Commissions.

His Excellency Lt. General Yoweri Kaguta Museveni, The President of the Republic of Uganda and Commander-in-Chief of the National Resistance Army and Airforce is pleased to announce the promotions/Commissions of the under mentioned officers and Non-Commissioned officers of the National Resistance Army and Airforce to ranks as indicated against their names with effect from 6th February 1988."

The document appended a list. In the list, the Petitioner RO/31 David Tinyefuza was included. The rank indicated against his name was a Brigadier and MHC.

The Commission Warrant as was prescribed under Regulation 17 of the Armed Forces (conditions of service)(officers) Regulations 1969 which was made under the Armed Forces Act Cap 295 was in this form.

"His Excellency
The President and Commander-in-Chief of The Republic of
Uganda.....

TO THE TRUSTY AND WELL BEHAVED:

Greetings

"I depose special trust and confidence in your loyalty, courage and good conduct do by these presents constitute and appoint you to be an officer in the Armed Forces of the Republic of Uganda.

You are .....

President of the Republic of Uganda

Signed

(regular service)."

There is no doubt that the above two forms are different but their substance was the same - to appoint or to commission, Mr. Kabatsi had submitted that the unorthodox method was adopted because there was a vacuum in the law governing the control and administration of the army then. I do not agree. I do not agree also with the explanation given by him. The Armed Forces Decree No. 1 of 1971 had merely suspended the operation of certain sections of the Armed Forces Act Cap 295 and the Regulations made under it only during the continuance in force of the Decree. Once the Decree was repealed by Statute No. 2 of 1980, the position of the law governing the control and administration of the army reverted to the period before Armed Forces Decree No. 1 1971 was made. The Armed Forces Act Cap. 295 and the Regulations 1969 (SI No.30 of 1969) made under it were revived. The Armed Forces (conditions of service)(officers) Regulations 1969 (SI 30 of 1969) provided for procedure to commission army officers and prescribed the Commission Warrant.

Section 109(2) of the NRA Statute No. 3 of 1992 saved these Regulations. Only the Armed Forces Act Cap 295 was Repealed. It is therefore not true that there was a locuna in the law regarding commissioning of army officers in 1988.

I agree however with Mr. Kabatsi that the deviation in the form used to commission the Petitioner shall not invalidate the commission by virtue of section 43 of the Interpretation Decree No. 18 of 1976. The relevant section reads that,

> "43 - where any form is prescribed by any Act or Decree, an Instrument or Document which purports to be such a form shall not be void by reason of any deviation therefrom which does not affect the substance of such Instrument or Document or which is not calculated to mislead".

Though the General and Administrative Order No. 5 by which the Petitioner was commissioned, deviated from the prescribed form, the substance was to confer commission. There is no suggestion that it was calculated to mislead. The officers who were commissioned by that method are still recognised by their said rank. The whole world recognise them as such. I would therefore hold that the General and Administrative Order No. 5 (Exh. D22) effectively conferred commission on the Petitioner. It must be noted that in the event of resigning under Reg. 28(1) of the National Resistance Army (conditions of service)(officers) regulations 1993, an officer is not expected to surrender his commission. That is not a requirement of the law. When one resigns his post one does not return his or her Instrument of appointment as Mr. Lule seems to imply.

In summary, I would find as follows:-

(1) That the Petitioner is protected on his testimony before the Parliamentary Sessional Committee on Defence and Internal Affairs.

(2) That there was a threat to take disciplinary action against the Petitioner on account of his testimony before the Parliamentary Sessional Committee on Defence and Internal Affairs.

(3) That the Petitioner was removed from the army upon his appointment as a Presidential Advisor effective from 2nd February 1993.

(4) That Reg. 28 (1) of the NRA (conditions of service) (officers) Regulations 1993 (SI No.6 of 1993) is not applicable to the Petitioner.

(5) That the Petitioner was commissioned.

Consequently, I would allow the Petition and grant all the Declarations sought in the Petition except for an order in restraint, which I do not find any necessity to make. I would also award costs of this Petition to the Petitioner.

Dated at Kampala this 25th day of April, 1997.

G. M. OKELLO

JUDGE.

I CERTIFY THAT THIS IS THE TRUE COPY OF THE ORIGINAL.

MURANGIRA J.

for REGISTRAR COURT OF APPEAL.

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA HOLDEN AT KAMPALA

(CORAM: S.T. MANYINDO - DCJ, G.M. OKELLO - J, A.E.M. BAHIGEINE - J, J.P.M. TABARO - J AND F.M.S. EGONDA-NTENDE)

CONSTITUTIONAL PETITION NO. 1/96

BETWEEN

MAJOR GENERAL DAVID TINYEFUZA .... PETITIONER

AND

ATTORNEY GENERAL .... RESPONDENT

JUDGEMENT OF A.E.M. BAHIGEINE - J

This matter raises a question of considerable public importance and in my view of considerable difficulty.

It assumes importance because it involves a question of construction of various legal provisions relating to the running of the administration of the UPDF and the liberty of a member of such forces under the constitution to quit the forces if he so wishes.

The petitioner Major General David Tinyefuza was represented by Mr.Godfrey Lule SC of M/S Sebalu, Lule & Co. Advocates assisted by Peter MuliraEsq of Mulira & Co. Advocates together with John Matovu, John Tumusingize Esq and Paul Nsibambi Esq while the learned Solicitor General Mr. Peter Kabatsi represented the Government being assisted by the Director of Civil Litigation Mr. Nasa Tumwesige and State Attorney John Matsiko,Esq.

This Constitutional Petition No. 1 of 1996 arose out of a letter of resignation dated 3.12.96 from the Petitioner addressed to the Commander in Chief of the UPDF and Chairman of the High Command. It was annexed to the Petition as Annexture "D". The letter was a sequel to a spate of newspaper articles following the

Petitioner's testimony before a Parliamentary committee probing the causes of the insurgency in Northern Uganda. He was summoned and duly appeared before it on 29.11.96. The newspaper articles denounced the Petitioner's testimony, reproduced the views of top army officers requiring the Petitioner to resign (New Vision of 4th December 1996) imputed or construed subversive motives in the testimony of the Petitioner (Sunday Vision of 8th December 1996) and required the Petitioner to follow laid down army procedures for resignation (New Vision of 18th December 1996).

In a radio communication to the members of the High Command of which the Petitioner was still a member, the Chairman of the High Command directed the High Command to consider charging the petitioner with certain offenses... The admissibility of the communication was the subject of a heated argument between both counsel and the Court agreed to admit the document in the absence of the public including the Press since it formed the basis of his case. - Ex P2. As the document touches and concerns the security of the state its contents will not be set out in this judgement.

The Petitioner fearing that as a consequence of the directives in the said document he would be charged before the High Command with offenses arising out of his testimony before the Parliamentary Committee which he thought was true and given in good faith on a privileged occasion decided to put in his resignation Annex "D". When the resignation was not accepted and he was instead told to follow laid down procedures of resigning under Regulation 28 (1) of N.R.A Regulations Statutory Instrument No. 6 of 1993 (Annex "E" dated 8th December 1996), he decided to file the Petition before this Court, on 12.12.96 with supporting affidavits.

The Petitioner alleged that the army authorities by requiring him to resign from the army in accordance with Regulation 28 (1) of N.R.A Regulations and threatening disciplinary, administrative, Criminal or Civil actions against him

arising out of his testimony before the Parliamentary Committee were acting contrary to the Constitution and threatened to interfere with his human rights. He therefore prayed this Court for an order restraining the Respondent from so acting by declaring such measures and acts to be inconsistent with the constitution in their application to him and a violation of his fundamental human rights as guaranteed thereunder.

At the commencement of the hearing the learned Solicitor General raised a number of preliminary objections to the Petition as presented. Since we were of the unanimous view that there was a cause of action disclosed as the matter concerned the liberty of the individual we decided that the hearing do proceed and we would give our views on the objections in the judgement.

Here are my views. The first objection was that the requisite fees had not been paid and this would render the Petition incompetent. During the arguments it transpired shs. 100,000/= being the prescribed security for costs had been paid and so were the Court fees of 10,500/=. The fault lay with the cash office for not writing out the receipts correctly and also with the Registry clerks for not properly endorsing the records.

The second objection concerned Article 126 (2)(e) of the Constitution which prescribes that substantive justice shall be administered without undue regard to technicalities; however the learned Solicitor General contended the Petition was materially defective as it was supported by affidavits which contained grave and serious inconsistencies which could not be cured so as to support the Petition. Most of the points canvassed under this objection were either as to the form of the affidavits or real issues before us. Relying on Uganda vs. Comr of Prisons Ex parte Matovu (1966) EACA 514 at 521 holding "H" where their Lordships decided in the interests of justice to "jettison formalism to the winds" while interpreting the constitution regarding the liberty of a citizen, it is clear the objection would be unsustainable.

The last objection was that the Petition disclosed no cause of action as it failed to allege the act or omission which violated the constitution in accordance with Article 137 (2)(b). In Mr. Kabatsi's view the Minister's advice to the Petitioner to follow the correct procedure laid down by law could not be unconstitutional. Mr. Lule SC countered that indeed this was the crux of the matter before the Court. I say it is.

I shall now deal with the issues seriatim. The facts have been set down in the judgement of my Lord the DCJ which I have had the benefit of reading in draft.

Issue No. 1 is whether by appointment as special Presidential advisor on military affairs under Article 104 (1) of the 1967 Constitution the Petitioner became a public servant and ceased being a member of the Armed forces (para 2 (a) Petition).

Article 104 (1) provides:

> "Subject to the provisions of this constitution power to appoint persons to hold or act in any office in the public service of the Government of Uganda
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> .....
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> .....
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> including power to confirm appointments to exercise disciplinary control over persons holding or acting in such offices and to remove such persons from office shall vest in the President."

The letter appointing the Petitioner advisor set out the terms and conditions of his appointment. Mr. Lule SC argued that these terms excluded other

terms and by the time of writing his letter of resignation the Petitioner was no longer a full time member of the regular force as defined in the N.R.A Statute No.3 of 1992 but a member of the Public Service.

This letter dated 24th May 1994 and marked as Annex "C" reads:

"I am pleased to inform you that His Excellency the President has in accordance with the powers vested in him under Article 104 (1) of the Constitution of Republic of Uganda directed that you be offered appointment to the post of Presidential Advisor on Military Affairs with effect from 2nd February 1993. The terms and conditions of your appointment are as follows:

(a) Duration - 24 months subject to renewal or termination at the pleasure of the Appointing Authority.

(b) Shs.1,102,000p.m.

(c) Gratuity 30% of annual salary

(d) Leave - annual 3 days per month

(e) Housing free and fully furnished or a consolidated allowance of 500,000/= per month in lieu thereof.

(f) Transport - chauffeur driven vehicle on official duties.

(g) Aide - staff - Two security guards, four domestic servants or cash payment in lieu thereof. Water, electricity, telephone and medical

attention as applicable to pensionable servants; subsistence allowance while travelling on official duties in and outside Uganda."

Sgd: D. Martin Orech

Head of the Civil Service

Counsel for the Petitioner argued that at the time he gave his evidence before the committee, the petitioner was a member of the Public Service and was not subject to military law. He was required to surrender the assets he was holding as a member of the Army (letter dated 4th January 1993 & marked "7"). He claimed whatever was retained by him like the radio and the vehicle UPE 745 were so retained for use as a member of the High Command. It was pointed out even after the termination of the contract the Petitioner did not revert to the army. He remained in the same position and continues to receive his salary and other emoluments todate (time of hearing).

Issue No.2 whether upon his appointment with effect from the 2nd February 1993, the terms of service spelt out in the letter of appointment were the terms governing the Petitioner and his service relationship with the Republic of Uganda - covered under Issue No.1.

Issue No.3 whether upon being offered new terms of service set out in the letter of appointment the Petitioner continued to be governed by the terms of his old employment, the Uganda Armed Forces. Counsel for the Petitioner argued that if this were so it would have been mentioned in the letter of appointment. Even in the army law there is no provision which requires that members of the army given appointment as civil servants would continue to be serving as members of the armed forces. In the absence of any clear provision of the law it cannot be said that the Petitioner continued to be a member of the armed forces. Under

section 2 of the N.R.A Statute No.3 of 1992, setting out composition of the army the Petitioner does not fall under any definitions of a member of the armed forces, the basic qualification is to be on full time and active service. The army consists of (a) a Regular Force; (b) a Regular Reserve and (c) such other force as may be prescribed by the N.R.A council. One could cease being a member of the regular active force if one became a member of a regular reserve. But he had to transfer by specific action. With regard to the definition of "such other force" the Petitioner was not aware of any such other prescribed force. It was argued that since he did not fall under any definition under section 2, it could not be claimed that he was still a member of the Uganda Armed Forces. Mr. Lule SC pointed out that even if the Petitioner allegedly described himself as a soldier before the Committee and in the Constituent Assembly, the law does not permit him to claim that what he is not. He referred to Maxwell on Interpretation of Statutes 12th Edn. pp 333 and 334 where Atkin L J when discussing the doctrine of estoppel said "whatever the principle may be (referring to a contention regarding approbation and reprobation) it appears to me it does not apply to this case, for it seems to me well established that it is impossible in law for a person to allege any kind of principle which precludes him from alleging the invalidity of that which the Statute has on grounds of general public policy, enacted shall be invalid" Counsel quoted further at pp 334..... "This conclusion must follow from the circumstances that an estoppel is only a rule of evidence which under certain special circumstances can be invoked by a party to an action, it cannot therefore avail, in such a case to release the Plaintiff to escape from an obligation to obey such a Statute, nor can it enable the defendant to escape from a Statutory obligation of such a kind on his part". He submitted it was immaterial what the Petitioner had said he was. The Court has to look at the law to determine what he actually is. And the duty of each party is to obey the law.

Issue No.4 - whether having served in the army and appointed to a new

position outside the military establishment, the Petitioner continued to be a member of a regular force as defined in the N.R.A Act and the Regulations thereunder - covered under Issue No.3.

Issue No.5 - whether after his appointment to Public Service he continued to be subject to military law to which members of UPDF are subject. Counsel argued that Section 14(1) of the Statute No.3 of 1992 provides which person is subject to military law. The Petitioner does not fall under any sub-section of Section 14(1).

Issue No. 6 - whether to be a member of the High Command as defined or set out in the N.R.A. Act one must of necessity also have to be a member of a regular force - was conceded. Answer is not necessarily.

Issue No. 7 - whether the letter from the Minister of State for Defence (Annex "E") to the Petition which declared the Petitioner's resignation and departure from the army and the High Command "null and void" was in effect a denial of the Petitioner's liberty and calculated to require the Petitioner to perform forced labour. Counsel for the Petitioner contended that since the Statute excluded the Petitioner from the application of the law to him, a regulation (Reg 28) made under the statute could not apply to him. The refusal of the Petitioner's right to resign and requiring him to follow a law which did not apply to him was a violation of the Petitioner's liberty and if he submitted to the Minister's decision he would be subjecting himself to forced labour which is prohibited under Article 25 of the Constitution - Issue No 8 covered under 7.

Issue No. 9 - whether the testimony given by the Petitioner before the Parliamentary committee was made on a privileged occasion. Mr. Lule SC argued that the Petitioner believed and he was assured by the committee that whatever he said was privileged and he had immunity especially as it took the form of questions and answers. He was therefore shocked when the army top officers threatened to charge him with offenses under the army laws. In proof of this

allegation counsel wished to tender a document to which the Solicitor General successfully objected. The document was subsequently admitted in camera - Ex P2. The Minister did not contest the privilege and immunity conferred to witnesses testifying before Parliamentary Committees.

Issue No. 10 - whether the letter from the Minister of State for Defence and the reported conduct of the other authorities in the Government and the Army amounted to a threat to the Petitioner's fundamental rights and freedoms guaranteed and protected under Articles 20, 23, 25(2), 25(3)(c) and 97 thus justifying this Petition - covered under Issue No. 9.

Another issue was later introduced by the Solicitor General - whether the Petitioner was a commissioned officer.

Mr. Lule SC submitted that by the time N.R.A took over power in 1986 Commissions had been done away with the Amin era. There was a vacuum as regards the armed forces. The new order wanted to cater for the guerrilla bush forces in relation to Armed Forces within the meaning of the Armed Forces Act. In this regard several measures were taken including administrative Orders No. 5 & 6 - Ex D 22 whose purpose was merely to equate the guerrilla ranks to International ranks. He argued these were not meant to confer Commissions as indeed no warrants were ever issued. It is the warrant which constitutes a commission. It is the warrant which is surrendered if one were to resign. Mr. Lule SC argued the Petitioner was never commissioned and the appointments and promotions conferred on him were not in accordance with the Armed Forces Act nor any provisions thereunder.

During his submissions the Solicitor General applied and was permitted by the Court to call the witness who had deponed to the affidavits in support of the Government's case. Hon. Mbabazi the Minister of State for Defence (General).

In rebuttal of the Petitioner's argument that upon appointment as advisor to the President the Petitioner ceased being a member of the regular force, the

Minister testified there was a policy/practice to transfer members of armed forces to positions outside the army as Ministers while they retained their positions in the armed forces. This was because the UPDF was a productive force. He gave examples of Hon. Tom Butime, Brig. Jim Muhwezi; Dr. Col Kiiza Besigye; Major General Elly Tumwine; Major Fred Mwesigye; Major General Frederick A. Oketcho. The witness affirmed that the Petitioner was still an officer in the army. He received a salary and other benefits from the army. He tendered in several documents on which the salary and other benefits were allegedly received by the Petitioner and were signed by persons other than the Petitioner. No witness was called to testify as to the authorship of these documents. In fact the Minister repeatedly confessed to lack of knowledge or familiarity with most of them. They were therefore of no evidentially value. The equipment which the Petitioner was found to be holding together with body guards, it was submitted, by his counsel were held by him as a member of the High Command. The witness further testified that the Petitioner was appointed and attended the Constituent Assembly as a member of the army. The witness also tendered in documents relating to appointment of army officers to public offices who retained their positions in the army - Ex D1 - D9. He also tendered in a document regarding the issue of new pips to the Petitioner on 15.10.96 - Ex D 11, a list of military escorts guarding the Petitioner - EX D 12. The witness tendered in copies of the General and Administrative orders issued by the Army Commander on 18.2.88 by which a number of officers including the Petitioner were commissioned and promoted on 10.12.89. However the witness subsequently admitted that if the petitioner received any benefits from the army, this was an error because he was supposed to receive such benefits from his new office although he was still retained in the army.

In his submissions the learned Solicitor General Mr. Kabatsi first dealt with two issues:

(a) as to who was the Minister of Defence and

(b) the commissioning of officers.

Mr. Kabatsi stated that under the new constitution, there was no substantive Minister of Defence. There were two Ministers of State for Defence - one for training and the other for general matters. He submitted that the Minister of State for Defence (General) was deemed to be the substantive Minister of Defence.

With regard to commissioning of officers, Mr. Kabatsi stated that although up to the time of Amin era, commissioning of officers was done in accordance with the Armed forces Regulations, Statutory Instrument No. 30 of 1969 and there were forms which were filled when applying for warrants of commissions, when Amin took over power in 1971 the use of forms was in practice neglected and the system was thrown into disarray leaving Amin as Chairman of the Defence Council with full powers. The Defence Council would be the body to deal with commissions. However when N.R.A. came to power Legal Notice No. 1/86 converted the guerrilla N.R.A to a National Army. It was regularized to International Standards and the President acting under Article 78 (2)(b) of the 1967 Constitution which remained in force commissioned officers including the Petitioner. This provision empowered the President to appoint, promote and dismiss any member of the Armed Forces. The President never used any format and lack of it would not nullify the commissions so granted. He acted under Administrative Orders 5 & 6 - Ex D 22. But later he said the Petitioner received his commission in the Bush and made a member of the High Command. After the army was regularized on 6th February 1986 the Petitioner was promoted to Brigadier and later to Major General. He contended all this time the Petitioner never said he was not a commissioned officer.

In his substantive submissions Mr. Kabatsi dealt with the issues as framed.

With regard to whether or not the Petitioner ceased being a member of the regular army on his appointment to Civil Service the solicitor General submitted

that the law does not prohibit a member of the army from serving in other capacities. Article 83 (1) (i) of the Constitution for instance specifically prohibits civil servants from membership of Parliament while Article 78(1)(c) permits a member of the army being a member of Parliament but that there is nothing in the army statute and Regulations which prohibits a member of the army from serving elsewhere. He argued that section 92 of the statute set out the circumstances under which a soldier can leave the army - by way of punishment, resignation or retirement and Regulation 28 (1) requires that for resignation an application must be submitted to the Commissions Board. He pointed out that it was not open to members of the army to be removed from the army except by following the regulations of the Army Statute. Appointment as Presidential Advisor is not one of the ways of leaving the army and the letter appointing the Petitioner advisor to the President did not constitute termination of his membership of the armed forces. There were many other army officers serving in other capacities who nevertheless are still members of the armed forces. In any case the Petitioner still regarded himself a member of the armed forces. In his letter of resignation the petitioner portrayed himself as still a member of the armed forces. In Ex D 11 he received pips as a member of the armed forces, he received uniforms he received various supplies by agents because senior officers could not go and line up for them. The Petitioner still kept army firearms, he still had escorts, he still received fuel rations, salary and above all he continued to represent the army in the N.R.C up to July 1996. The Solicitor General contended the law would not allow a serving officer to be removed from the army in any other way than under the Statute/Regulations and Regulation 28 provides that a removal of a member of this army has to be confirmed by a Board set up under the Regulations 3(1) and 4 for that purpose amongst others. He then referred to Ex P 2 tendered in by the Petitioner in camera. He contended that the contents were not conclusive but were subject to the provisions of the law.

With regard to whether there was a threat or violation of the petitioner's fundamental rights, Mr. Kabatsi submitted that newspaper reports were mere hearsay and should not be relied upon. He referred to Halsbury's Laws of England 3rd Edn. Vol. 15 page 294 to the effect that a fear existing on the basis of rumour is unreasonable. He said the fact that there were no denials by the State was immaterial because the state does not conduct its business in the press. He pointed out that if in fact what was reported in the papers could be considered, it was the contrary of what is alleged by the Petitioner. The Solicitor General referred to the letter written to the Petitioner by the Minister advising him to follow the law in tendering his resignation and argued that following the law would not deny the Petitioner his right to resign nor would it expose him to forced labour. He considered there was nothing threatened to be done. With regard to the protection under Clause 25(3)(c) of the constitution, to fall under this clause one had to be a civilian and not a soldier who would already be in the army.

In summing up his submissions on the issues Mr. Kabatsi stated that issues Nos. 1, 2 & 3 should be answered in the affirmative but that the Petitioner was still governed by the terms of the army. He pointed out that the Petitioner continued enjoying some benefits from the army.

With regard to Issue Nos. 4 & 5 whether the Petitioner continued to be a member of the Regular force in accordance with the N.R.A Statute and Regulations Counsel submitted that a member of the army left the armed forces only according to the Statute and Regulations. If this was not followed, one continued to be in the army.

Issue No. 6 whether to be a member of the High Command one must of necessity have to be a member of a regular force was conceded by the solicitor General - one need not.

With regard to Issue No. 7 counsel submitted that the letter from the Minister to the petitioner did not constitute an act nor a threat but an advice as

to how the Petitioner could properly resign.

In answer to Issue No. 8 counsel contended that paragraph (c) of Article 25 (3) referred to civilians and not to army personnel. If an army personnel became a pacifist while serving he could apply to the Board to be assigned other duties.

With regard to Issue No. 9 the solicitor General conceded that the Petitioner was entitled to immunity provided he did not fall under any of the exceptions under the National Assembly (Powers & Privileges) Act (Cap 249). He contended that the letter from the Minister to the petitioner did not constitute a threat and offend Article 20(1) of the Constitution which guaranteed fundamental and other human rights and freedoms.

So much on the submissions of both learned counsel.

I now turn to my opinion on the issues as framed and agreed by the parties.

But first, there is no doubt in regard to the proper principle of interpreting Statutory Enactments which is also the same as regards the interpretation of Constitutions. The general rule is, if the effect of the words in their ordinary and natural sense is clear and unambiguous, to give to those words that effect and no other. The Legislature must be intended to mean what it has plainly expressed. In interpreting Statutes affecting Constitutional rights of an individual, unless a clear and unambiguous intention so to do appears from a statute it should not be construed so as to invade the liberty of a citizen, but if possible to respect such rights, for laws are presumed to have been passed with deliberation. With the foregoing in mind:-

Issue No. 1 - whether on appointment as Presidential Advisor the petitioner became a public servant. My opinion is that he did and the manner and terms governing his appointment excluded all other appointments.

Issue No. 2 - whether the terms spelt out in the letter of appointment were the terms governing the Petitioner and his service relationship with the Republic of Uganda. If it had been intended that the Petitioner would continue to be a

member of the army, he would have been appointed under other articles under which other ministers were appointed. Chapter 10 of the Constitution spells out the Public Service to mean service in any civil capacity of the Government and Article 175 defines a public officer as any person holding or acting in an office in the public service whose emoluments are payable directly from the consolidated fund or directly out of moneys provided by Parliament. Once in that capacity the Petitioner became subject to the Standing Orders Chapter I E - 7 Regulation 2 which prohibits employment outside the Public Service in the following terms:

> "No officer shall at any time engage in any occupation or undertaking for gain outside his official duties which would require his or her attention any time during official hours."

Letter "F" from the Ministry of Defence directed him to hand over, and move to the President's office. I think therefore the whole exercise was in transferring the Petitioner and not merely to transfer his emoluments. The letter did transfer all the duties and services of the Petitioner to the Public Service under Article 104 and in particular the Public Service did acquire exclusive jurisdiction and or powers over the Petitioner to the exclusion of N.R.A.

Alternatively if the Authority so wished the Petitioner could have been appointed for a specific time with leave of absence without pay from the N.R.A to join the Public Service after which he would revert to N.R.A - which is permissible under the Standing Orders - Chapter 1 - A - 1 Regulation 14(1).

Considerations were argued before this court based upon questions of policy and practice. The Minister of State for defence testifying made it clear that it was the policy to transfer army officers to other sectors of public service because UPDF was a productive army. It is no part of the court's duty to criticise this policy but the court can and must see that this policy is carried out within

the ambit of laid down rules of law. It is crucially important to note that what is termed "policy of the Government" with reference to legislation or in regard to a particular subject matter is generally a very uncertain thing upon which all sorts of opinions each varying from the other may be found by different persons and is a ground too unstable upon which to rest the judgement of the court in the interpretation of Statutes - Hadder v Collector (Hadder v Barney) 5 Wall (U>S) 107 18 Led 518.

The supposed policy of the Government cannot in a judicial tribunal prevail over the plain provisions of the law. We can look to such policy in so far as it may throw light on the legislative intention of a statute and effectuate such policy where deducible. Otherwise nothing becomes law simply and solely because the legislative powers or Authority will that it be so. To become law they must express their determination in the prescribed manner. So much on Issue No. 2.

Issue No. 3 - whether upon being appointed on new terms the petitioner continued being governed by the terms of the Uganda Armed Forces. It is not my view that the Petitioner continued being governed by the Armed Forces terms. The vehicles he had as a member of the armed forces were taken away from him (letter from Ministry of Defence). In so far as the Petitioner did not fall under the composition of the army (Statute No. 3 of 1992) the Petitioner ceased being a member of the Armed Forces. I can see no such inference from the course that the legislature has taken that a public servant can hold two appointments simultaneously from different institutions and each requiring continuous full-time service.

Issue No. 4 - whether having served in the army and appointed to a new position outside the military establishment the Petitioner continued to be a member of a regular force as defined in the N.R.A Statute and Regulation - covered under Issue No. 3 above.

Issue No. 5 - whether in his new status the petitioner continued to be

subject to Military Law. S.14(1) Statute No. 3/92 provides who is subject to military law:

(a) Every officer and militant of Regular force.

(b) Every officer and militant of a Regular Reserve and any force prescribed under section 2 when he is

(i) undergoing drill or training whether in uniform or not;

(ii) in uniform;

(iii) on duty;

(iv) on continuing full-time military service;

(v) on active service;

(vii) serving with any unit of a Regular force, or

(viii) present, whether in uniform or not, at any drill or training of a Unit of the army.

If the Petitioner does not fall under any of the above definitions as it appears he does not, I have the opinion that he is not subject to military law.

Issue No. 6 - whether to be a member of the High Command one must of necessity also have to be a member of a regular force – not contested.

Issue No. 7 - whether the letter from the Minister of Defence to the Petitioner which declared the Petitioner's resignation null and void was in effect a denial of the Petitioner's liberty calculated to require him to perform forced labour.

The Minister's letter could have been mere advice to the Petitioner to resign under Regulation 28, but as I have already held S.14(1) of the statute (No. 3 of 1992) excludes the Petitioner from the ambit of the definition of who is a member of the army, the Regulation cannot be made to apply to him to nullify his resignation. Regulations derive their authority from the parent Statute and

should be construed in the light of the Statute generally and in particular to be consistent with its substantive provisions.

Refusal to accept the petitioner's resignation would require him to continue serving in the army contrary to his conviction, an act which would amount to forced labour. The Solicitor General argued that the concept of forced labour (or conscientious objection) applies only to civilians. This takes us back to the issue of whether by the terms of his appointment as Presidential Advisor the petitioner continued in the army. I have already held to the contrary. Therefore the Solicitor General's argument is inapplicable. I think looking at Article 25 as a whole it is not difficult to see the relationship between respect for individual conscience and the valuation of human dignity that motivates unremitting protection by the constitution and lies at the very heart of our democratic political system. Hence the inappropriateness of any act intended to muzzle the manifestation of one's conscientious objection without justification.

Issue No. 8 is covered under Issue No. 7.

Issue No. 9 - whether the testimony by the Petitioner before the parliamentary Committee was privileged. Both parties agreed that the Petitioner would be entitled to immunity. However under the document Ex P 2 which was the basis of his petition and which was initially successfully objected to by the Solicitor General but was eventually accepted to be tendered in camera, the Petitioner claimed that there was a threat of charging him under the Courts Martial in respect of his testimony before the Parliamentary Sessional Committee. The authenticity of the document was admitted by the Minister of State for Defence (General). In my view therefore the alleged threat was genuine considering the numerous press reports to the same effect which were just lightly brushed aside by the Solicitor General. I would uphold the petitioner's right to seek protection of this court against the intended prosecution.

The Solicitor General argued that the Petitioner need not have proceeded

by way of a Constitutional action.

Article 50(1) is very specific:

> "Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened is entitled to apply to a competent Court for redress which may include compensation."

What is a competent Court in this regard is provided by Article 137(1):

> "Any question as to the interpretation of this Constitution shall be determined by court of Appeal sitting as the Constitutional Court".

There was therefore no other way the Petitioner could seek and obtain redress than by way of a Constitutional action.

Regarding the issue as to whether the Petitioner was a commissioned officer, when the N.R.A. took over power, Legal Notice No. 1 of 1986 section 13 (ii) saved the existing laws in the following terms:

> "Subject to this Proclamation the operations of the Constitution and the existing Laws shall not be affected by this Proclamation, but shall be construed with such modifications qualifications and adaptations as are necessary to bring them in conformity with this Proclamation."

The Armed Forces Act Cap 295 had remained in force and under section S.96 thereof, Statutory Instrument No. 30 of 1969 was put in place. This provided for application forms to be filled in under Schedule 1 Parts 1 & 11. The greetings or warrants appear in Schedules 2 & 3. thereto. The Armed Forces Act and Legal Notice No. 1 of 1986

remained in force until repealed by section 109 of N.R.A. Statute No. 3 of 1992 but saving Statutory Instrument No. 30 of 1969.

Section 109 (2)(a) of Statute No. 3 of 1992 provides: -

> "Notwithstanding such repeal any Statutory Instrument or regulation made under that enactment and in force immediately before the commencement of this Statute shall until such instrument or regulation is altered, revoked or otherwise modified under this Statute, continue in force as if such instrument or regulation had been made under this Statute".

It is therefore not correct to say there was a vacuum regarding the law applicable. Since there was a law in place, it is a little difficult to see how a plea of mere lack of format could prevail over total noncompliance with the express provisions of that law I confess inability to agree that this was the intention of the interpretation Decree S.43 regarding form. Applications had to be made and there were forms to be filled, which step was a pre-requisite to the issuance of a commission. Nonetheless since an executive order does not have the force of law I maintain an administrative order such as Ex D 22 executed in the name of the President should have been authenticated in some way in the manner prescribed by the rules which rules were in existence. I would therefore hold the Petitioner was not commissioned. Alternatively if lack of format would not nullify a commission, this informality should equally be availed to the Petitioner's resignation.

I now come to the last point as to whether the petitioner can resign. It was pointed out that there were provisions by which a person can leave the army but that there was no provision as to how a member of the High Command could resign. The Minister of State told the Court that one can only resign being a member of

the High Command if one ceases to be what made him a member of the High Command e.g by virtue of his office. That may well be so if that person so chooses. I cannot think the Statute intended that if any body wanted to opt out it should not be possible to do so. This would be coercive and unworkable. Looking at the structure of the High Command (Section 10 of the Statute) it seems to me impossible to arrive at any other conclusion than that the Petitioner can address his resignation directly to the chairman of the High Command, who is the President. I should say I have found the law most unambiguous. I have had to scrutinize with considerable care the provisions on which the executive depended in justification of its action. It is a recognized rule that such provisions should be interpreted if possible so as to respect individual rights. I have done this and have done it in the interests of both the State and the Petitioner.

Consequently my humble opinion is that the Petitioner will be entitled to the declarations and remedies sought viz:

(a)(i) Regulation 28(1) of N.R.A (conditions of service) (officers) Regulations, 1993 is inapplicable to him.

(ii) Army threatened disciplinary, administrative, criminal or civil action or actions against the Petitioner in any tribunal, forum, or Court of law, arising out of his testimony before the Parliamentary Session Committee on Defence and Internal affairs is inconsistent with the Constitution Articles 25(2) & 25(3)(c), Article 20, 23, 25(2) and 25(3)(c) and Article 97.

I would award costs of this Petition to the Petitioner.

DATED At Kampala this 25th day of April 19..97.

A.E.M. Bahigeine

JUDGE

I CERTIFY THAT THIS IS A TRUE COPY OF THE ORIGINAL.

Joseph Murangira

For: REGISTRAR COURT OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(CORAM: S.T. MANYINDO - D.C.J., G.M. OKELLO - J., A.E. MPAGI BAHIGEINE - J. J.P.M. TABARO - J., F.M.S. EGONDA NTENDE - J.

CONSTITUTIONAL PETITION 1/96

B E T W E E N

MAJOR GENERAL DAVID TINYEFUZA ..... PETITIONER

A N D

ATTORNEY GENERAL ..... RESPONDENT

JUDGMENT OF J.P.M. TABARO, J.

This Constitutional Case was filed by Major General David Tinyefuza on 12/12/1996 alleging that his rights, freedoms and liberties were being threatened by Government. The matter arises out of the testimony the Petitioner gave before the Parliamentary Sessional Committee on Defence and Internal Affairs on 29/11/1996. In his testimony, the petitioner, was critical of the Army's performance in Northern Uganda, and other areas where there is insurgency or rebel activities. It appears the petitioner was asked to testify to causes of the rebellion, why it has subsisted for a long time and what can be done to bring it to an end. After giving the testimony, it would appear, he was summoned to the High Command in connection with what transpired when he gave the testimony. Fearing that adverse action might be taken against him, Petitioner, wrote a letter of resignation to the President, who, it will be recalled, is also the Commander-in-Chief of the Armed Forces and Chairman of the High Command of the Army. In response to the letter ("Annexure "D) to the Petition, the Minister of State for Defence (General) Hon. Amama Mbabazi (CW 1) countered that the resignation was null and void and advised the petitioner to comply with Regulation 28 of the National Resistance Army (Conditions of Service) (Officers) Regulations 1993 (SI No 6 of 1993). Under that regulation

the army Commissions Board may permit any officer to resign his commission in writing at any stage in his service (or to retire on pension after a minimum of thirteen years of reckonable service).

From the affidavits sworn by the Petitioner and the Minister of State for Defence (General) Hon. Amama Mbabazi, as well as the latter's oral testimony as a court witness (CW I) it is amply clear that Petitioner joined the former National Resistance Army in 1981 which was (then) a guerrilla force fighting the then Government of Uganda. It will be recalled that in 1986 (on 26/1/1986) the NRA took over the government of Uganda and by virtue of the 1986 Proclamation (Legal Notice No 1 of 1986) formalised assumption of power of the Government of Uganda by the National Resistance Movement. It is not disputed that the NRA subsequently constituted the national army of Uganda. Needless to state, with promulgation of the Constitution, 1995 the NRA became the Uganda People's Defence Forces. In 1988 under General and Administrative Order No 5, the hitherto guerrilla army was regularised to conform to internationally recognised ranks. Petitioner in the General and Administrative Order is described as Brigadier David Tinyefuza (MHC). It is one of the basic issues as to whether Petitioner was properly and legally commissioned. This will further be dealt with later herein. In December, 1989 the petitioner was promoted to the rank of Major General under Administrative Order No 41. Later on, on 24/5/1994 the petitioner was appointed as Presidential Advisor on Military Affairs with effect from 2nd February, 1993. The letter of appointment is signed by D. Martin Orech, the then Head of the Civil Service. The letter states in the first paragraph:-

> "I am pleased to inform you that His Excellency the President has in accordance with powers vested in him under Article 104 (1) of the Constitution of the Republic of Uganda, directed that you be offered appointment to the post of Presidential Advisor on Military Affairs with effect from 2nd February, 1993".

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The duration of the appointment was 24 months subject to renewal. The appointment could be terminated at the pleasure of the Appointing Authority. No formal letter of renewal has since the expiration of 24 months been given to the petitioner although he continues to enjoy the terms conditions and benefits attached to the appointment. After petitioner was appointed Presidential Advisor on Military Affairs, the Secretary for Defence, B. Mbonye, wrote to him in these terms:-

"RETURN OF MINISTRY OF DEFENCE FACILITIES"

Following your appointment as presidential Advisor on Defence, I am informed that your office will be based in the office of the President. I am also informed that, the office will provide facilities required to enable you perform your duties.

This is to request you therefore to instruct officers under your command to return some of the facilities which were given to your office before the present appointment. Those in our records are the following motor vehicles which are in our register as belonging to the Ministry of Defence:

1. UD 0249 Nissan Laurel-already returned.
2. UD 273 Land Rover pick up.
3. UD 0290 Peugeot 504
4. UD 0291 UPE 745 Land Rover
5. UD 0293 Peugeot 504
6. UD 0311 UPN 771 Land Rover Defender
7. UD 0312 UPX 086 T/Stout

The Army will provide facilities required by virtue of your position in the NRA.

B. Mbonye
SECRETARY FOR DEFENCE

Other terms and conditions in the letter of appointment concern salary, gratuity, leave, housing transport, police guards and domestic servants, water and electrticity, medical attention, and allowances.

In his letter tendering resignation petitioner stated that he was resigning from the UPDF and its High Command. The letter, Annexure 'D', in part states'

> I find it unjustified to continue serving in an institution whose bodies I have no faith in or whose views I do not subscribe to"

Before hearing commenced, counsel for the respondent raised a number of objections, basically procedural in nature, in connection with the contents of affidavits in support of the petition which respondent alleged contained false statements, as well as payment of court fees. However, as the Court was satisfied that there was a cause of action the petitioner was permitted to proceed with his case. Since Uganda v. Commissioner of prisons, Ex Party Matovu, [1996] EA 514 was decided, by the High Court of Uganda when it was the Constitutional Court of the Country, it would appear in a constitutional case involving the personal liberty of a citizen of Uganda the court may validly disregard formalities and proceed with substantive issues. In Matovu's case (supra) at P.521 para H, Sir Udo Udoma C.J. (as he then was) stated, "we decided in the interests of Justice, to jettison formalism to the winds and overlook the several deficiencies in the application, and thereupon proceeded to the determination of the issues referred to Us".

Leading learned counsel for the petitioner, Mr. Lule (SC) framed issues which he submitted to the respondent for his opinion as to whether they could be regarded as the issues agreed upon by the parties. The Learned Solicitor General, Mr. Kabatsi, for the respondent agreed to the same. I have perused the same diligently, especially as some of them were jointly urged by learned counsel for the petitioner. In my humble opinion the basic issues from which any other emanate can be looked at as follows:-

(1) Whether the petitioner's testimony before the Parliamentary Sessional Committee on Defence and Internal Affairs is privileged and cannot be basis of action against the petitioner.

(2) Whether petitioner's appointment as Presidential Advisor made him a public servant and ceased to be a member of the Army.

(3) Whether petitioner was governed by terms and conditions regulating the Armed Forces.

(4) Whether petitioner is subject to Military Law.

(5) Whether a member of the High Command must be a member of Regular Force.

(6) Whether petitioner is being required to perform forced labour.

(7) Whether petitioner is a conscientious objector.

(8) Whether petitioner' rights and/or liberties are threatened so as to justify a Constitutional Court intervention.

(9) Whether any government official has acted in contravention of the Constitution and therefore whether court can grant orders to restrain the Official or officials from taking any action or actions against the state.

Issue No. 6 in my scheme arises from the fact that petitioner's letter of resignation was rejected, by the Minister of State for Defence (General). It is the petitioner's contention that the resignation complied with the law and hence requiring him to remain in the Armed Forces is tantamount to obliging him to render forced labour. As regards the question of a conscientious objector, it is the submission of the petitioner that he no longer believes in the UDPF and therefore, it is contended that he qualifies as a conscientious objector on the ground that the Constitution protects a conscientious objector who does not wish to render labour in a naval, military or air force.

In my understanding of the law, whereas general principles which govern construction of statutes apply to the interpretation of constitutions (see A.G. of Uganda v. Kabaka's Government [1965] E.A. 393, Republic v El Mann [1969] E.A. 357, Dr. Rwanyarare & 2 Others v. Attorney General, Constitutional Case No. 1 of 1994, unreported (decided when the High Court of Uganda was the Constitutional Court under 1967 Constitution), when the import of some enactment is inconclusive or ambiguous, the court may properly lean in favour of an interpretation that leaves private rights undisturbed. Legislation which purports to invade any right of personal freedom should be construed strictly. Where an Act of Parliament is permissive, not imperative, in its terms, where the power it confers is discretionary, the court will hold that that intention is that the discretion shall so far as possible be exercised so as to leave private rights intact - A.G. for Canada v. Hallet & Carey Ltd (1952) A.C. 427 p.450. The same principles are stated in "Cases in Constitution Law" by D.C. Keir & F.H Lawson Oxford .(4th Edition) at Page 11. It appears doubt is resolved

approach the facts, and the law so as determine whether the petitioner's constitutional rights are being violated, that is, whether the Executive's actions in question are inconsistent with the constitution, or not.

Article 97 of the Constitution is couched in these words:-

> "The Speaker, the Deputy Speaker, member of Parliament and any other person participating or assisting in or acting in connection with or reporting the proceedings of Parliament or any of its committees shall be entitled to such immunities and privileges as Parliament shall by law prescribe". Under the National Assembly (Powers and privileges Act (cap 249) witnesses before parliament or its committees enjoy the same rights and privileges as those before a court of law.
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> In his affidavit and testimony before this court the Minister of State for Defence (General) Hon. Amama Mbabazi (CW I) endeavoured to draw a distinction between immunities and privileges to the persons mentioned in the article, and the proceedings. However, I think no such intention appears in the plain wording of the article. The learned Solicitor General, Mr. Kabatsi, rightly, in my opinion concedes that what the petitioner stated before the Parliamentary Committee is privileged and cannot be basis of punishment for the petitioner, whatsoever. It is the case for the respondent, however, that the rejection of the petitioner's resignation by the Minister of State for Defence (General) was lawful and only required the petitioner to observe the law by complying with Regulation 28 (of the NRA (Conditions of Service) (Officers) Regulations, 1993. Hence, the learned Solicitor General contends, the Minister's act cannot be said to be inconsistent with the Constitution since the minister is merely advising the petitioner to follow the law.

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During the course of arguments, Mr. Lule Sc contended that the petitioner cannot resign under the regulation in question because no formal commission or warrant of appointment was issued to him. As willbe recalled, ranks in the NRA were regularised in 1988 before the enactment of the NRA, Statute 1992, (Petitioner became - Brigadier) Hence, ordinarily, the Armed Forces Act (Cap 295, now repealed by the NRA Statute, 1993, should have been complied with. The format of warrant of appointment for regular commission was to be found in schedule 2 to the Armed Forces (Conditons of Service(Officers) Regulations, 1969, (SI No 31 of 1969). It is, perhaps, pertinent to note that the format of the warrant of appointment for regular commission now in the second schedule of the NRA Conditions of Service) (Officers) Regulations 1993 is basically the same except for a few modifications.

But, it is not disputed that the NRA of which petitioner was a member by 26/1/1986, when the NRM assumed power of the Government of Uganda, subsequently became the Army of Uganda by virtue of L.N. 1 of 1986. S. 109 of the NRA Statute, 1992 which repealed the Armed Forces Act (cap 295), and the schedule to the Proclamation L.N, I of 1986, provides in S. 109(2)(b)——

> "every officer commissioned and very militant enrolled or re-engaged under that enactment who is in the Army immediately before the commencement of this statute shall continue on, and after such commencement to serve in the Army as if he had been re-engaged, as the case may be, under this statute".

It appears to me therefore that S. 109 of NRA, Statute, 1992 has a general saving effect for all those officers and combatants who were commissioned before the NRA Statute, 1992 was enacted. Can commissioning refer only to the act of presenting the officer with the formal warrant of appointment? It cannot be so. It is only the culmination of a long process of vetting, training and receiving instructions. Holding otherwise would defeat the intention of the legislature.

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Under S. 43 of the Interpretation Decree (No 18 of 1976, Laws of Uganda) where any form is prescribed by an Act or Decree an instrument or ducument which purports to be in such form shall not be void by reason of any deviation there from which does not effect the substance of such instrument or document or which is not calcultated to mislead. General and Administrative Order No 5 (Exhibit D 22) would appear to be printed on headed papers of the National Resistance Army bearing its official logo or emblem. In the first paragraph of the document it is spelt out in clear terms that:-

> "His Excellency Lt. General Yoweri Kaguta Museveni the President of the Republic of Uganda and Commander in-Chief of the National Resistance Army and Air Force is pleased to announce the regularisation of officer ranks to international recognised ranks within the Armed Forces of Uganda and the equating of former NRA ranks with professional ranks with effect from the 6th February, 1988".

The second paragraph of the document, which is General and Administrative Order No. 6, the petitioner is named as RO/31 Brigadier Tinyefuza (MHC), under the heading "Promotions/Commissions". At the end the document is signed by one Lt. Col. James Sebagala, Deputy Chief of Personnel and Administration, National Resistance Army. The authenticity of the document is not in dispute. Nor is the meaning of the order contested. Evidently the document refers to commissioning or promotion of the petitioner to the rank of Brigadier. Since in 1981 he became a member of the Army(or Uganda in contradistinction to the former guerrilla force) and since under S. 109 of NRA Statute all such members of the army became members of the NRA, I am impelled to find that the petitioner was duly commissioned into the National Resistance Army in 1983. The elegant format envisaged in SI No 31 of 1969 was not followed but since the meaning is clearly conveyed the departue from the form should not be allowed to vitiate or invalidate

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The learned authors were primarily writing in a British context. However, substitute the word Government for ruler and the observations will apply to Uganda or any other country that has chosen constitutionalism as its guiding principle, for that matter.

I would agree with learned leading counsel for the petitioner, Mr. Lule Sc that it is significant that the appointing authority invoked Article 104 of the 1967 Constitution and not Art.78, of the then Constitution, (1967). Article 104 vested power to appoint persons to the public service in the President, while Article 78 of the 1967 Constitution vested in the President power to determine the operational use of the Armed Forces to appoint members of the Armed Forces, to promote them and to dismiss any member of the Armed Forces.

Hon. Amama Mbabazi (CWI) asserted that in 1992 the High Command decided that members of the NRA could serve in other government organs and/or agencies and remain members of the army. I prefer to believe that the Hon. the Minister of State for Defence meant well in making the assertion notwithstanding that minutes to that effect were not tendered in evidence. But, of course it is not sufficient to express good intentions, The practice must be grounded on the Constitution, the NRA Statute or any other law applicable in the Republic of Uganda' to be binding. To hold otherwise would be to sanction inconsistency with the Constitution, that is, violation of the rule of law. Perhaps the case for the respondent would be stronger if the petitioner were appointed under Art. 78 of 1967 Constitution which places the command of the Armed Forces under the President. It could possibly be argued that the petitioner as an army officer was being deployed as a Military Advisor. But, even then, there must be specific laws empowering the appointing to authority to deploy members of the Armed Forces in public service without severing them from the Armed Forces.

Mr. Lule SC submitted that being a member of the Armed Forces and serving in the public service are mutually exclusive, in view of the provisions of S.5(5) of the NRA, Statute, 1992.

They are worded as follows:-

> "Full time S.5.1. Every member of a Regular Force Service shall be on continuing full time - military service and shall at all - times be liable to be employed on - active service".

Under Uganda Government standing Orders "unless otherwise provided in the terms of his or her employment every Public officer is employed on the understanding that the whole of his or her time is at the disposal of the Government, and if the usual office hours are insufficient to deal with the pressure of work it is his or her duty, whenever it becomes necessary to do so, to work outside office hours without extra remuneration - (Standing Orders) Chapter 1 para 1 at P.403.

Absence from the duty station requires the consent of the officer in charge - para 3 (ibid).

Perusal of the rules governing office hours in the army and public service leads to the conclusion that one cannot serve in both. Because they are mutually exclusive as both demand full time attention. The NRA Statute, 1992 which shall be read with modifications to mean the law governing the UPDF by virtue of Article 273 of the Constitution, does not say that members of the Army can be deployed in the public Service. Mr. Kabatsi canvassed that the Constitution does not prohibit members of the Army from belonging to other organs of Government. He gave the example of Art.78 (1) (c) of Constitution which makes army representatives members of Parliament. That is so. However, if it were the intention of the constitution makers to authorise

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army personnel to be deployed in the public service, no doubt express provisions to that effect would have been inserted. Equally significant we have to bear in mind that it is personal liberty of an individual subject that is at stake. As that is so, the principle in Attorney General of Canada v. Hallet and Carey Ltd (1952) A.C. 427 at P.450, is in point that is, when the rights of a subject are involved, whether personal or proprietory, and the import of the enactment in question is inconclusive or ambiguous, the court may properly lean in favour of an interpretation that leaves private rights undisturbed. In other words such statutes are subject to strict interpretation. This approach appears to have found favour with (the Privy Council) - in A.G. of the Gambia v. Momodou Jobe [1984] A.C. 689 at 700 (LORD DIPLOCK) in which it was stated.

> "A Constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction".

Naturally, what is in issue are matters of liberty and freedom because petitioner may be subjected to military law. Under the Army Code of Conduct for example, under ss 13 and 16 NRA Statute, 1992 offences unknown to ordinary penal law are created. These are, quest for cheap popularity, liberalism, intrigue and double talk, tribalism and nepotism and formation of a clique in the Army. They attract possible sentence of life imprisonment.

I think there is nothing in the NRA Statute, 1992 or the Constitution, that could have empowered the appointing authority to retain the petitioner in the army after his appointment to the public service. I must hold therefore, that petitioner's appointment to public service severed him from the Army and is no longer a member of the UPDF. It was contended, emphatically, for the respondent that the practice in the Army has been to retain army officers serving in

other agencies of government, in the army. On this issue it must be pointed out that there can be no estoppel against a statute (see Maxwell on Interpretation of Statute, 12th Edition, at P.334) less so can estoppel be invoked to modify a written Constitution. As regards army equipment that petitioner might have made use of, or army privileges that might have accrued to him, I think this was not out of the ordinary for the reason that as a matter of law, the petitioner is a member of the High Command, in accordance with S. 10(1)(c) of the NRA Statute, 1992. In any case the letter from the Secretary for Defence virtually divested him of all facilities that he enjoyed as an army officer. High Command members as of 26/1/1986 continue to be members. They need not belong to the Regular Force. As a matter of law, in terms of Regulation 33 of NRA Regulations, 1993 (SI No 6 of 1993) army officers are exempt from the payment of graduated tax. Petitioner's counsel submitted that salary payment vouchers (Exh. D.21) indicate that graduated tax was deducted from the petitioner's remuneration. Unfortunately, the exhibit was tendered in photocopy and is not clear. However, in view of the fact that a subject's liberty is what is at stake this is not a matter that can be resolved in favour of the state. I cannot find that there were no graduated tax deductions made from the petitioner's salary. It is true that Petitioner was deployed in Northern Uganda when rebellion broke out there. But that alone cannot operate to modify the Constitution. It is not necessary to opine as to whether or not conscription is constitutional since it is not in issue.

Lastly, in connection with petitioner's status the court was referred to Regulation 27 of the NRA Regulations, 1993 (S.I) No 6 of 1993 and a submission made to the effect that the petitioner cannot be removed from the Army except in accordance with the Regulations.

Regulation 27 provides as follows:-

"No officer shall be dismissed from service or have his service terminated except in accordance with the statute or regulations made under the statute".

It is beyond contention that the statute does not say that an army officer can serve both in the Army and the Public Service. Hence if the regulation sought to modify the statute, and more so the constitution, it would be invalid for being ulta vires. However, I think the true intent in the regulation is to safeguard army officers against arbitrary dismissal or arbitrary termination of services. No intention can or should be read into the regulation so as to enable army officers to remain in the Army after appointment to the public service.

Whereas the law defines membership of the High Command, under S.10 of the NRA Statute, 1992, it is silent as regards resignation from the same. Under S.24 of the Interpretation Decree. 1976 where by any Act or Decree a power to make any appointment is conferred, the authority having power to make the appointment shall also have power (subject to any limitations or qualifications which affect the power of appointment) to remove, suspend, reappoint or reinstate any person appointed in the exercise of the power. In a word. the power to appoint includes power to remove. Hence, in absence of prescribed procedure for resigning from the High Command the petitioner cannot be faulted for having addressed his resignation to the Commander-in-Chief of the Armed Forces and Chairman of the High Command who, by law, is the President of the Republic of Uganda. And respondent has not shown any delegated authority under which the Minister of State for Defence could lawfully exercise power and reject the petitioner's resignation from the High Command. It has been indicated that petitioner's appointment to the Public Service severed him from the Army, in which case no law can oblige him to follow Regulation 28 of the NRA (Conditions of Service) (Officers) Regulations, 1993 as advised by the Hon. the Minister of state for Defence (General).

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The Chairman of the High Command has not indicated whether the petitioner's resignation was rejected or accepted, since 3/12/1996 when the letter of resignation was written. This is beyond contention.

Article 28 of the Constitution requires that in the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. In view of this provision I do not think it would be constitutional to treat the petitioner's resignation as ineffectual within the bounds of a free and democratic society.

In light of my findings that the petitioner's relationship was severed from the army by virtue of his appointment to the Public Service, it is crystal clear that he cannot be subjected to Military Law. At the same time Article 28 of the constitution protects the petitioner against appearance before the High Command. Hence it follows, as daylight follows night, that obliging him to remain in the Army or High Command, without his consent would be tantamount to requiring him to render froced labour, in absence of provisions in the constitution permitting conscription in this regard.

It was also contended for the petitioner that he does not wish to serve in an army in which he no longer believes and therefore, under Art. 25(3)(c) he qualifies as a conscientious objector. In view of the conclusions I have reached I do not find it imperative to resolve this question. I can only state, in passing, that it is possible for a person to develop moral or religious views which incline him to object to the use of force in solving human problems. Thereby such a person becomes a conscientious objector and, in my humble opinion, he or she should be permitted to leave the Armed Forces on account of his or her pacifist principles.

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Under Article 50 of the Constitution, Whether the orders sought to protect the petitioner can be granted depends on the question of absence or presence of a threat or threats against his personal liberty or proprietory interests (the latter are not in controversy in this case). After the petitioner testified before the Parliamentary Sessional Committee on Defence and Internal Affairs, it is not in dispute that the Army Commander, the Minister of State for Defence (General) as well as the Commander-in-Chief of the Armed Forces and Chairman of the High Command made some remarks about the petitioner in connection with his testimony before the Parliamentary Committee. It is not in dispute that the petitioner was thereafter summoned to appear before the High Command. The Army Commander complained that the petitioner was undisciplined and accused him of trying to undermine cohesion in the army which could jeopardise national security. There is no rebuttal as to the assertion that the Minister of State for Defence (General) thought that someone was up to something and the petitioner was playing along.

Finally, in the same regard, it is beyond contention, from Exhibit P.2 that the High Command stated that the petitioner in his testimony might have committed intrigue, was guilty of indiscipline and political confusion by a serving officer, and giving false impression to the enemy. Insubordination and subversion are accusations also levelled against the petitioner. The High Command was going to be convened for the purpose of recommending a course of action to be taken against the petitioner. Under Military Law, in terms of S. 37 of the NRA Statute, 1992 spreading harmful propaganda is a possible capital offence. In its definition it includes making oral or written statements ill of the Army or the Government excepting constructive criticism. Taking all these factors relating to statements from the High Command and the Ministry of Defence, there can be no doubt that there is a threat or threats against the personal liberty of the petitioner. Once a constitutional court has found that any act or omission by any person or authority is inconsistent with the constitution,

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as in this case, a remedy is available under Article 137 (4)o of the Constitution. I would declare, therefore, that it would be inconsistent with the Constitution for any organ of state or authority to prefer or threaten to prefer any disciplinary, administrative, civil or criminal action against the petitioner in any tribunal, forum, or court of law for any matter arising from the Petitioner's testimony before the Parliamentary Sessional Committee on Defence and Internal Affairs. I would declare that Regulation 28(1) of the National Resistance Army (Conditions of Service) (Officers) Regulations, 1993 does not apply to the petitioner for he ceased to be a member of the Army when he was appointed to the Public Service as Presidential Advisor on Military Affairs in 1993. I would grant the orders of redress prayed for and declare that no organ of state or authority can proceed against the petitioner.

By virtue of my finding that taking action against the petitioner would be unconstitutional, I would find a restraining order unnecessary. I would award costs to the petitioner.

Dated at Kampala this 25th day of April, 1997.

J. P. M. TABARO

JUDGE.

I CERTIFY THAT THIS IS THE TRUE COPY OF THE ORIGINAL.

MURANGIRA J.

REGISTRAR COURT OF APPEAL.

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

[CORAM: S.T. M/NYINDO;DCJ; G.M. OKELLO; J. E.E.M. BAHIGEINE; J. J.P. TABARO;J. F.M.S. EGONDA NTENDE;J.]

CONSTITUTIONAL PETITION NO. 1 OF 1996

MAJOR GENERAL DAVID TENYEFUZA : : : : : : : : : : PETITIONER

VRS.

ATTORNEY GENERAL : : : : : : : : : : RESPONDENT

JUDGMENT OF F.M.S. EGONDA NTENDE

Major General David Tinyefuza, the petitioner, seeks the protection of this court from punishment by the Army for his testimony to Parliamentary Committee on Defence and Internal Affairs. He also seeks a declaration that he is not a serving officer in the Army and other ancillary orders. The facts of this case are not substantially in dispute though the application of the Law to them is under severe contention. I propose to initially set out the facts not in contention.

Major General Tinyefuza is a veteran of the bush war that culminated into the assumption of the reigns of Government by the National Resistance Movement and Army in January 1986. He was a member of the National Resistance Army. On the assumption of the power of Government, the National Resistance Army became the official armed forces of the Government. The petitioner continued to serve in that Army.

Initially, like all other officers and men of that Army the petitioner had no internationally related rank. In 1988 this position changed. The President and Commander in Chief of the Army decided to apply the internationally related ranks to the army. He assigned the Petitioner the rank of Brigadier. The following years the President promoted him to Major General.

The Petitioner served in several capacities in the Army. He was subsequently appointed a Minister of State for Defence. On the 24th May 1994, he was informed by the Head of Civil Service, that His Excellency the President had appointed him, under Article 104 (1) of the Constitution to the post of Presidential Advisor on Military

Affairs with effect from 2nd Feb, 1993 on a contract for 2 years which was renewable. The Petitioner served in this capacity and presumably continues to serve in the same capacity to-day.

On the 28th November 1996, the Petitioner received summons through the Army Commander to appear before the Parliamentary Sessional Committee on Defence and Internal Affairs. This Committee was investigating the war in Northern Uganda. The Petitioner appeared on the 29th November, 1996. He testified in response to the questions put to him by the Committee. In the Petitioner's words his answers.

> "took the form of comments expressions of belief, criticism and analysis".

The Petitioner's testimony was reported and drew public response from the Army Commander, the Minister of State for Defence and the President. In a radio communication to the Minister of State for Defence (General Duties) and all members of the High Command, the President and Commander in Chief directed the High Command to meet over the issue of the Petitioner's testimony to the Parliamentary Committee. The President was seeking their advice in the matter. He also set-out his views. In his opinion the Petitioner was subversive.

A meeting of the High Command was called. The petitioner, an original member of the High Command, preferred to submit a leter of resignation from both the Army and the High Command rather than appear before the High Command. The President, on reading this letter, again communicated to the Minister of State for Defence and members of the High Command and detailed further his views on the Petitioner's testimony before the Committee.

The President was the view in Ex. P2 that the Petitioner had committed certain offenses against Military Law.

These offenses arose from the testimony of the Petitioner given to the Committee. The High Command met under the Chairmanship of the Minister of State for Defence (General). After that meeting the Minister wrote to the Petitioner informing him that his resignation from the

Army was null and void. He advised him to submit the resignation to the Commissions Board under Reg. 28 (1) of the National Resistance Army (Conditions of Service (Officers) Regulations, 1993.

The Petitioner perceived his Constitutional rights to be threatened and filed the present action. He seeks the protection of this court from any disciplinary, civil or criminal action arising out of his testimony to the Parliamentary Committee. He asserts privilage. He also seeks a declaration that he is no longer a member of the Armed Forces of Uganda having been removed and taken to the Civil Service with effect from 2nd February, 1993. As a result, Regulation 28 (1) of the Army Regulations does not apply to him.

The Attorney General opposed this action. It was the case for the Attorney General that the Petitioners rights were neither threatened nor infringed. And that the Petitioner was still a serving member of Armed Forces of Uganda to whom Regulation 28 applied in case he wished to resign.

At the commencement of hearing of this petition, Mr. Kabatsi, the learned Solicitor General, raised a preliminary objection seeking to strike out this petition. We heard the objection. We declined to make a ruling on it at that stage, reserving our decision in our main judgment. I shall proceed to deal with this matter and another matter upon which we reserved our ruling at this stage.

Mr. Kabatsi raised three matters basically. Firstly, he submitted that the Petitioner had not paid the requisite fees for the Petition. Relying on Sub-rules (3) and (4) of Rule 4 of the Constitutional Court Petition Rules, he submitted that the Registrar should not have received the petition unless fees had been paid. He prayed that the petiton be struck out.

Secondly, Mr. Kabatsi submitted that the petition was defective as it was supported by affidavits which contain grave inconsistencies and defects. These affidavits and the petition should be struck off. He referred to a number of statements in the affidavit sworn on 12/12/96 which conveyed the impression that the Petitioner was of the view that he was a member of the army until 3/12/96. Mr. Kabatsi also referred to the testimony of the Petitioner before the Parliamentary Committee which was to the same effect. This was inconsistent with para 18 of the first affidavit and the petitioner's affidavit in reply sworn on 12/2/97 in which he contended that by virtue of his appointment to the Civil Service in 1993 he ceased being a member of Army.

Mr. Kabatsi then turned to the petition. He contended it disclosed no cause of action as there was no act or omission on which it was founded. He asserted that all the Minister did was to advise the Petitioner. It did not amount to any action or omisson. He submitted that this exalted court was being taken on a fishing expedition. He prayed that the petition be struck out.

He referred us to the following authorities in support of his submission.

1. Nuru Mohamed Jan Mohamed
   vrs.
   Kassamali Virji [1953] 20 EACA 8

2. Phakey vs. World Agencies Ltd.
   [1948] 15 EACA 1

3. Gasper Ltd. vs. Harry Grandy
   [1962] EA 414

4. Silas Bitaitaine vs. Kananura
   [1977] HCB 34

5. Kabwimuklya vs. Kasigwa
   [1978] HCB 251

6. Milton Obote Foundation

vs

Cecilia Ogwal & 2 Others
H.C.C. S. No. 690 of 1996.

Mr. G. Lule, Senior Counsel, for the Petitioner resisted the objections to the petition. He submitted that payments for fees was effected and produced receipts to that effect. He submitted that the affidavits had been properly sworn. There was no statutory requirement under the Oaths Act requiring the distinction in the concluding paragraph, paragraphs, sworn to the knowledge or information and belief by the deponent. Referring to the case Law that required this, Mr. Lule Senior Counsel submitted that this had been modified by Art. 126(2) (e) of the Constitution. Those cases had paid undue regard to technicalites.

Mr. Lule S.C. cited the case of Uganda vs. Commissioner of Prisons, Ex-parte Matovu [1966] EA 514 in support of his contention that the Petition be heard.

Mr. Lule S.C. submitted that the authorities cited by Mr. Kabatsi did not deal with inconsistencies. And in any case the matters referred by Mr. Kabatsi were the matters on trial. The alleged inconsistencies were capable of an explanation.

He further submitted that all the affidavits disclosed the source of information, where reliance was placed on information. The petitioner has a team of Lawyers which provided the information.

Mr. Lule S.C. further submitted that the petition disclosed a cause of action. He referred to Art. 137 and 50 of the Constitution. He stated that the Petitioner was apprehensive that his rights were threatened by the Minister of State for Defence action in purporting to reject his resignation letter and applying rules that do not apply to the Petitioner. This was the crux of the case and could only be judged after a trial and not before.

Mr. Lule submitted that as this was a constitutional matter, whatever irregularity existed, should not defeat the matter now. It should be heard.

We called the Registrar to satisfy us as to the payment of fees and security for costs. We were satisfied that fees of Shs. 10,500/= and shs. 100,000/= being security for costs had been paid in this matter. Accordingly this head of objection fails.

With regard to the alleged inconsistencies in the Petitioners affidavits relating as to whether the Petitioner was a member of the Army or not, this was raised prematurely. It was one of the matters on trial. It was in issue and it was therefore a matter that had to be decided by the court after a trial of the issues before the court. It did not render the affidavits false or any one of them false at that stage. This matter had to be decided after hearing and considering all the evidence in the case and the Law applicable. The inconsistencies could be capable of an explanation. In any case, it is still open to a court to sever the falsehoods from the truthful portion. In such a case, it would discard the falsehoods and retain the truthful portion. The appropriate stage for a decision on this point including whether to reject the affidavit for a falsehood, in this particular case, should be at the conlusion of the trial and not at its commencement.

In Sirasi Bitaitana vs Kananura [1977] H.C.B. 32 and Aristella Kabwimukya vs John Kasiga [1978]HCB 251 the decision whther or not to rely on the affidavits in question was made not at the commencement of the hearing but after hearing fully the matter before the court.

Mr. Kabatsi submitted that the deponent, of an affidavit must distinguish, I presume, at the end of the affidavit, matters sworn to on the basis of his own knowledge from those sworn to

on the basis of information and belief. And that the source of information or belief must be stated. I agree that the source of information or belief must be stated. And where the sources have not been disclosed, such affidavit would be defective. However, I do not agree that failure to distinguish paragraphs based on knowledge and paragraphs based on information belief is fatal to an affidavit. In the first place there is no statutory requirement for it to be so. Secondly the authorities are divided on the subject. Thirdly, as long as the sources of information or grounds for belief have been stated in the affidavit, I cannot imagine any conceivable prejudice that an adverse party or court would suffer from such an omission. Mr. Kabatsi cited none. The state was not put to any prejudice. Neither was the court. It is such situations as this that framers of our constitution had in mind in enacting Article 126 (2) (e). It stated:-

> "2. In adjudicating cases of both a civil and criminal nature, the courts shall, subject to Law, apply the following principles -
>
> (a) .....
> (b) .....
>
> (c) .....
> (d) .....
> (e) Substantive justice shall be administered without undue regard to technicalities."

This head of objection, in my view, is just a technicality. It cannot stand in the way of substantive justice.

In addition courts in and outside this country have been consistent in matter of constitutional importance, in insisting that irregularities in form or other defect in pleadings will not deter the courts in investigating the substance of the matters in issue. In Uganda vs Commissioner of Prisons, ex-parte Matovu [1966] EA 514, the Constitutional Court stated at page 521:-

"On examining the papers in this matter our first reaction was to send the case back to the Judge with a direction that the matter be struck out as we were of the opinion that there was no application for a writ of habeas corpus properly before him. There was no motion in support of which the two affidavits were filed, it appearing that counsel for the applicant had erroneously treated the affidavits filed as the application. Furthermore, there was no respondent mentioned in the affidavits as headed.

On reflection, however, bearing in mind the facts that the application as presented in the first instance was not objected to by Counsel who had appeared for the state: that the liberty of a citizen of Uganda was involved; and that considerable importance was attached to the questions of Law under reference since they involved the interpretation of the constitution of Uganda. We decided, in the interests of Justice, to Jettison formalism to the winds and overlook the several defects in the application, and thereupon proceeded to the determination of the issues referred to us."

In Rwenyarare & Others vs Attorney General (Ruling No.2) Misc. App. No. 85 of 1993, 1996 (1) Commonwealth Human Rights Law Digest 111 following Jaundo vs. Attorney General of Guyana [1971] AC 972 I expressed a similar view. A citizen whose Constitutional rights have allegedly been trampled upon must not be turned away from the court by procedural hiccups. It is as relevant then as it is now.

Mr. Kabatsi submitted that the petition disclosed no cause of action as required by Article 137 of the Constitution. Article 137 (3) States:-

"3 A person who alleges that:-

(a) An Act of Parliament or any other Law or any thing in or done under the authority of any Law;

(b) Any act or omission by any person or authority, is inconsistency with or in contravention of a provision of this constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate".

Of course, this Article must be read together with Article 50 (1) which provides:-

"Any person who claim that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or thretened, is entitled to apply to competent Court for redress which may include compensation".

On reading both the petition and supporting affidavits, it is clear that the petitioner is alleging that he perceives a threat to prosecute him for the testimony he rendered before the Parliamentary Committee. The Petitioner asserts that his appearance before the Committee was privileged. Privilege of the Proceedings is denied by the Respondent in an affidvit in support to the answer to the petition.

There is another matter in contention. Whether regulation 28 of the National Resistance Army (Conditions of Service) (Officers) Regulations 1993 applies to the Petitioner or not.

The Petitioner asserted in the petition that applying this regulation to him was contrary to Articles 25 (2) and 25 (3) (c) of the constitution. It may be the view of the State that there is no substance in this claim. As a court we can only find so after hearing the matter and not before.

For those reasons, I would reject the preliminary objection by Mr. Kabatsi.

Before turning to the main petition I wish to deal briefly with one other matter upon which we reserved reasons on a 4 to 1 decision of the court to reject admission in evidence of Annexure A4 to the affidavit in reply dated 12th Feb, 1997.
As Mr. Lule S.C. was addressing us, he referred to Annexure A4 which was a photostat copy of what turned out to be subsequently admitted as Ex. P.2. Mr. Kabatsi objected on the grounds that it was a photocopy and its source was unknown. The Court by 4 to 1 majority rejected the document.

I was unable to join in the decision of the majority for several reasons. On the face of it the document was pertinent to the issues under investigation. Mr. Lule S.C. who appeared to be under the impression that he could not call any oral evidence to deal with this document suggested that the court could call upon the Petitioner to testify as to the authenticity of the document in question especially as it was claimed, the Petitioner was in possession of the original from which copies had been made.

This case was the first case to be filed under the new constitution and the present rules. There is bound to be some uncertainty initially as to how certain situations, especially of some difficulty, are to be approached by Counsel and or the parties. In my humble view the duty of the court in such situations, using the ample authority and discretion in its armour, is to assist the parties put before it all evidence relevant to the matters in issue. As the contents of this document were especially pertinent to the Petitioner's claims that his fundamental rights and freedoms were under threat, I would have invited the Petitioner to take the witness' stand to testify about the document in question. This appeared, at that stage to be the wish of Counsel for the Petitioner, but he was

under impression that only the court can call a witness to give oral testimony; and that Counsel could not apply that witness be called. As it turned out this was not exactly true for Mr. Kabatsi applied to call a witness and the application was granted.

PRINCIPLES OF CONSTITUTIONAL CONSTRUCTION :

I now wish to turn to the Main Petition. But before I do so I would like to review what I regard as some of the basic Principles in the construction and interpretation of the constitution in general and the enforcement and protection of fundamental rights and freedoms in particular. This is especially so as this is the first case before this court since the promulgation of the constitution.

Perhaps, it may be useful to state that the process of birth of this constitution was in some respects unique in our Constitutional history. Constitutional instability and gross abuse of fundamental human rights and freedoms characterise the history of our country. It is against that background and a burning desire to produce a home grown consitution that could assure the people of this country the protection of foundermental freedoms and rights, and the building of a just, free and democratic society that the process that terminated into the promulgation of this constitution was moved forward. This is succinctly set out in the preamble. It states in part:-

> ".... We the people of Uganda:
>
> Recalling our history which has been characterised by political and constitutional instability;
>
> Recognising our struggles against the forces of tyranny, oppression and exploitation;
>
> Committed to building a better future by establishing a socio-economic and political order through a popular and durable National Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress;

../12.

.....

.....

.....

DO HEREBY, in and through this Constituent Assembly solsemnly adopt, enact and give to ourselves and our posterity, this constitution.....

The abiding values in this constitutional dispensation are clearly set forth. These are unity, peace, equality, democracy, freedom, social justice and pregree.

In order to ensure that all citizens, organs and agencies of the state never loose sight of those values and are firmly guided by these values in all our actions a statement of National objectives and directive principles of State policy was set forth between the preamble and chapter 1 of the constitution. The position of this statement just as much as its content are very instructive. To start with the position, it is just before you commence chapter I. You must first look at it before you proceed further. And the reason for this is not far to see. It is found in the first paragraph.

It states:-

"1. Implementation of Objectives

(i) The following objectives and principles shall guide all organs and agencies of the State, all citizens, organisations and other bodies and persons in applying or interpreting the Constitution or any other Law and in taking and implementing any policy decisions for the establishment and promotion of a just free and democratic society."

[Emphasis is mine].

In applying or interpreting the constitution or any other law, the courts and indeed all other persons must do so, so we are ordained, for the establishment and promotion of a just, free and

democratic society. That ought to be our first canon of construction of this constitution. It provides an immediate break or departure with past rules of constitutional construction laid down in Kabaka's Government vs Attorney General 1965 E.A. 393.

At the same time it provides a bridge to the Highly persuasive principles of constitutional interpretation applied by the Highest Courts in the Commonwealth on the path towards the establishment of a just, free and democratic society.

By the use of the concept of a just, free and democratic society, the constitution acknowledges an objective ideal which is our goal or our destiny. In matters of interpretation where the words of the constitution or other Law are ambiguous or unclear or are capable of several meanings, a benchmark has been established to enable us make a choice. And the choice ought to lead to a just free and democratic society. In travelling this path, it is not our personal opinions or idiosycrancies that matter. It is the commands of the constitution that we must obey. In doing so, we may have to use aids in constructions, that reflect an objective search for the correct construction. These may include international instruments to which this country has acceded and thus elected to be judged in the community of nations.

Our Constitution by nature of Article 20 thereof, which is a new provision without the equivalent in the old Constitution, sets another point of departure in respect of fundamental rights and freedoms. It states:-

(1). Fundamental rights and Freedoms of the individual are inherent and not granted by the state.

(2). The rights and freedoms of the individual and groups enshrined in this chapter shall be respected, upheld and promoted by all organs and agencies of Government and by all persons".

The duty imposed on all persons and all organs of Government, of which this court is part is threefold. We must respect, uphold and promote all the rights and freedms of individual and groups. This Article, by stating that these rights are inherent in the individual and not granted by the state, sets these rights from any in the constitution granted by or under the constitution. In respect of the rights in this chapter 4, the constitution is recognising their inherent existence in the individual and not merely creating the rights. To that extent they must be looked at in different light from other rights created by Law.

Article 20 would appear to be conceptually based on Article 1 of the Universal Declaration of Human Rights which states:-

> "..... All human beings are born free and equal in dignity and rights.
> ....."

Human beings are born with and possess the rights set out in that declaration. The rights are inherent and not conferred by any mortal authority or person. Perhaps, it is for this reason that Article 45 of the Constitution states:-

> "The rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this chapter shall not be regarded as exluding others not specifically mentioned".

Since chapter 4 only catalogued but did not create the rights contained therein, the rights not mentioned, are still available, once they are ascertained. Article 45 specifically saves all other rights inherent in a human being which may arise with the progress of society.

The language of chapter 4 is, as was noted by Lord Diplock in interpreting a similar chapter in the constitution of Trinidad and Tobago in the case of Thornhill vs. Attorney General of Trinidad and Tobago [1981] AC 61 PC at page 69

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> "..... not described with particularity that would be appropriate to an ordinary Act of Parliament nor are they expressed in words that bear precise meanings as terms of legal art. They are statements of principles of great breadth and generality, expressed in the kind of language more commonly associated with political manifestos or Internation Coventions...."

The reason for this lies in the desire, as stated in the preamble to constitution, to build a durable National Constitution that would stand the test of time serving the current generations and posterity. As a result, its amendment, as in our case, may be the subject of limitations. This point was made by Amissah J.P. of the Court of Appeal for Botswana in the case of Dow vs Attorney General [1992] LRC Const. 623 at pages 632-633 when he stated :-

> " The makers of a Constitution do not intend that it be amended as often as other legislation; Indeed it is not unual for provisions of the Constitution to be made amendable only by special procedures imposing more difficult forms and heavier majorities of the members of the legislature. By nature and definition, even when using ordinary prescriptions of statutory construction, it is impossible to consider a constitution of this nature on the same footing as any other legislation passed by a legislature which is itself established, with powers circumscribed, by the constitution. The object it is desired to achieve evolves with the evolving development and aspirations of its people".

In the same case Aguda JA at page 665 dealt with the duty of the court in this manner. He stated :-

"The Constituon is the Supreme Law of the land and it is meant to serve not only this generation but also gengerations yet unborn. It cannot be allowed to be a lifeless museum piece; on the other hand the courts must continue to breath life into it from time to time as the occasion may arise to ensure the health growth snd development of the state through it.....
We must not shy away from the basic fact that whilst a particular construction of a constitutional provision may be able to meet the designs of the society of a certain age such a construction may not meet those of a later age ... I conceive it that the primary duty of the Judges is to make the constitution grow and develop in order to meet the just demands and aspirations of an ever developing society which is part of the wider and larger human society governed by some acceptable concepts of human dignity."

The breadth and generality of the language of the chapter 4 of the constitution impel the court to give a generous and liberal construction consistent with the establishment of a just free and democratic society. This is the thrust that the Hihghest Courts in the Commonwealth have taken in dealing with fundamental rights and freedoms. In Minister of Home Affairs & Anor vs Fisher & Anor on appeal from the Court of Appeal of Bermuda [1980] AC 319 at Page 328 the Privy Council Stated:-

" These antecedents and the form of chapter 1 itself, call for a generous interpretation avoiding what has been called "the austerity of tabulated legalism" suitable to give to individuals the full measure of the fundamental rights and freedoms referred to ....."

In Attorney General vs. Momodou Jobe, an appeal from the Court of Appeal of Gambia[1984] AC 689 at page 700, Lord Diplock, stated:-

> "A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction".

In R vs Big M Drug Mart Ltd 1985 18 DLR (4th) 321, 395 - 6th Spreme Court of Canada dealt with this matter in relation to their charter of rights Dickson, J., opined:-

> "The interpretation should be ... a generous rather than legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the charter' protection".

This approach was applied in the case of Unity Dow vs Attorney General [supra] a decision of the Court of Appeal for Botswana. Aguda JA explained what this approach imported at page 668:-

> "Generous construction means..... that you must interpret the provisions of the constitution in such a way as not to whittle down any of the rights and freedoms unless by very clear and unambiguous words such interpretation is compelling....."

Finally and still on principles of constitutional construction I would like to touch just on one other principle. And that is in construing our constitution it is imperative that all the provisions thereof touching on a subject are looked at as a whole in order to decipher the spirit or purpose of the constitution.

The US Supreme Court in South Dakota vs North Carolina, 192 US 268 [1940], L Ed. 448 at page 465 dealt with this matter and stated that it was an:-

> ".... elementary rule of constitutional construction that no one provision of the constitution to be segregated from all others, and to be considered alone but that all provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument".

The principles discussed above are in my view consistent with the establishment and promotion of a just, free and democratic society which is the rock upon which the construction of our constitution has been grounded by the constitution itself.

THE MAIN ISSUES.

I now wish to turn to the main questions before this court.

In my view there are basically two matters before this court for resolution. These are:-

1. Wether the petitioner can be prosecuted by the Army for offences allegedly committed in the course of his testimony to the Parliamentary Committee on Defence and Internal Affairs;
2. Whether the Petitioner continued to be a member of the Army after his appointment to the post of Presidential Advisor to the President on Military Affairs in the Civil Service of this Country.

I will deal with them in that order.

THREATS AGAINST THE PETITIONER IN RESPECT OF HIS TESTIMONY TO THE PARLIAMENTARY COMMITTEE

The petitioner testified before the Parliamentary Committee on a wide range of matters involving the insurgency or civil war in Northern Uganda. His testimony is before us. He was answering questions put to him by the Committee members or its officers.

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In response to this testimony as reported in the press and the resignation letter of the Petitioner, the President directed, in Ex. P.2. the High Command to meet and advise him. I have read Ex. P.2. which was admitted in camera. I shall not therefore discuss its contents here. I am satisfied though that it discloses a substantial and serious threat to prosecute the Petitioner in accordance with Military Law for serious offences alleged to arise directly from his testimony to the Parliamentary Committee.

In his address to us, Mr. Kabatsi did not contest the truth of Exhibit P.2 On the contrary, he asserted that since the President indicated that he would seek the opinion of the Attorney General, the messages did not support the petitioner's contention that his rights were threatened. Mr. Kabatsi further submitted that even if the Petitioner was prosecuted, he would claim privilege as his appearance before the Parliamentary Committee was privileged under Article 97 of the Constitution. This concession of privilege by Mr. Kabatsi, parting company with the Affidavit of Hon. Amama Mbabazi filed in support of the Respondents case, made common ground with the Petitioner's case that his appearance and testimony before the Committee was protected by privileged under Artic1 97 of the Constitution.

Once a threat arises to a person's fundamental rights and freedoms, he is entitled to seek redress in the appropriate court under Article 50 of the Constitution. He does not have to wait for the threat to be put in effect and then claim his rights. The Petitioner did not have to wait to be prosecuted before asserting his privilege under Article 97.

Article 97 of the Constitution States:-

> " The speaker, the Deputy Speaker, members of Parliament and any other person participating or assisting in or acting in connection with or reporting the proceedings of Parliament or any of its committees shall be entitled to such immunities and privileges as Parliament shall by Law prescribe".

The Law on the statute book in relation to this matter is the National Assembly (powers and previleges) Act, chapter 249. Under section 14 (1) of the Act a witness before a Parliamentary Committee is granted the same privilege as enjoyed by a witness in a court of law. It reads:-

> " (1) Every person summoned to attend to give evidence or to produce any paper, book, record or document before the Assembly or a Committee thereof shall be entitled, in respect of such evidence or the disclosure of any communication or the production of any such paper, book, record or documents to the same right or privilege as before a Court of law".

There are exceptions a witness may not disclose or produce in S. 14 (2) and 14 (3) of the Act but these are not an issue in the current proceedings. Section 14 (4) thereof bars the production of any testimony before a Parliamentary Committee being used in any proceedings, civil or criminal against the witness, except in respect of offences under sections 89,93,95 and 96 of the Penal Code Act.

It was conceded by the Solicitor General that the Petitioner enjoyed privilege in respect of his testimony to the Parliamentary Committee. This concession came towards the end of the proceedings.

It is clear from the Ex. P.2 the President's messages to the Minister of State for Defence that the President was of the firm opinion that the Petitioner had committed offences against Military Law by virtue of the contents of his testimony to the Committee. The threat to the Petitioner's rights lay in the very fact that the Chief Executive of this nation had come to the conclusion that the Petitioner had committed offences against Military Law; and had set the machinery of state in motion in relation to those offences and the Petitioner.

The Petitioner enjoyed absolute privilege, at least in respect of the offences not excepted in section 14(4) of the National Assembly (Power and privileges) Act. Nobody, including the President, or the army, could outside the proceedings in the Committee, institute any criminal, Civil or even disciplinary proceedings against the Petitioner for his testimony to the committee. It was privileged.

Privilege, as in this case was conferred to protect the integrity of democratic government. In investigating matters of national concern and interest Parliament and all those who appear before it or its committees are protected to allow a robust debate of matters of Public importance and interest without fear of prosecution for alleged crimes so committed.

At the same time, punishment or threat of punishment by an organ of the state against a citizen for views expressed by that citizen on a matter of public importance maybe a violation of freedom of expression protected under Article 29(1) of the Constitution. It states:-

> "1. Every person shall have the right to
> (a) freedom of speech and expression, which shall include freedom of the press and other media".

This fundamental freedom is found in all Regional and International Human Rights Instruments. Article 10 of the European covenant on civil and political rights; Article 9 of the African Charter on Human and peoples rights; Article 13 of the American Convention of Human Rights; and Article 19 of the International convenat on civil and political rights. It enjoys universal acclaim. The reason for the primacy of this freedom is explained in Handyside vs. United Kingdom, a decision of the European Court of Human Rights, in para 49:-

"..... Freedom of expression consitutes one of the essential foundations of such [democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to Article 10 (2) it is applicable not only to "information" or "ideas" that are favourably received or regarded as in inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population".

[Page 51, Article 19 Freedom of Expression Manual]

This fundamental freedom was also discussed in the US Supreme Court Case of Thornhill vs Albama 310 US 88 (1940). Justice Murphy stated:-

" The Ffeedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publically and truthfully all matter of public concern without previous restraint or fear of subsequent punishment.

.....

.....

.....

Freedom of discussion if it would fulfil its historic function in this nation must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

.....

.....

.....

But the group in power at any moment may not impose penal sanctions of peaceful and truthful discussion of matters of public interest merely on showing that others may be persuaded to take action inconsistent with its interests. Abridgement of the liberty of such discussion can only be justifified only where the clear

danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion".

The Parliamentary Committee was engaged in an inquiry into the causes of the war in the north and possible solution. This was a matter of substantial public interest and importance. It needed the assistance of all actors in this tragic situation. Assistance by the Petitioner, in the form of his testimony to the Committee, was an exercise of the fundamental freedom of expression including the freedom to impart ideas. These may have been viewed as balanced or imbalanced criticism. Nevertheless, in my view, the exercise of this freedom of expression should not be attended by subsequent penal sanctions based on the ideas so imparted. To do so would ran counter to the establishment of a just free and democratic society.

MEMBERSHIP OF THE ARMY.

I now turn to the second essential issue for consideration. Did the Petitioner continue to belong to the Armed Forces After his appointment by the President to the post of Presidential Advisor on Military Affairs?

Hon. Amama Mbabazi was called as a witness to testify basically on this issue. The thrust of his testimony was that the Petitioner is still a member of the Army and that he continues to receive benefits from the Army. He testified that sometime in 1992 the High Command met and agreed upon a policy which was to the effect that Army officers posted outside the Army would continue to belong to the Army but their salaries would be met by the respective host organisations. He referred to a number of Military officers to whom this policy or practice applied.

Until very recently, in fact even after the filing of this petition, the Petitioner was somewhat unsure of the position. Initially from some of his affidavits and the testimony before the committee, he regarded himself as belonging to the Army until his letter of resignation dated 3rd Dec. 1996. Finally, the position that was taken by the Petitioner's Counsel was that membership of the Army was a question of law. The holding out by the Petitioner or being held out by authorities as a member of the Army was irrelevant.

Accordingly Mr. Lule S.C. contended that the Petitioner at Law ceased to be a member of the Army on his appointment to the civil Service.

Mr. Kabatsi contended that the Petitioner in fact and in Law is and continues to be a member of the Army. Firstly, he places reliance on the fact that the Petitioner himself believed that to be the position and held himself out as a member of the Army. Secondly, Mr. Kabatsi states that in accordance with Regulation 27 of the National Resistance Army (Conditions of Service) (Officers) Regulations, 1993 no officer can be removed from Army except in accordance with the National Resistance Army statute or regulations made under that statute. It would be illegal for any authority including the President to purport to remove the Petitioner from the Army in any other way other than in accordance with the statute.

For obvious reasons, the raising of any army is a matter that is governed strictly by Law. To do so ouside the Law is on the face of it treasonable. In our case the National Resistance Army Statute, No. 3 of 1992 governs the Army following the Constitution. Section 1 of the statute authorised the raising of an Army. Section 2 deals with composition. It states:-

> "2 (1) The Army shall consist of
>
> (a) a regular force;
>
> (b) a regular reserve; and
>
> (c) such other force as may be prescribed by the National Resistance Army Council".

It was not suggested at any stage of these proceedings which of these 3 forces the Petitioner belonged to. But from the evidence before us, it is clear that at one time he belonged to a Regular force and not any of the other two. It is unnecessary to consider membership of those other two forces as it has not been suggested that the Petitioner belonged to any of them.

Section 5(1) of the National Resistance Army Statute deals with service in a Regular force. It states:-

> "5(1) Every member of a Regular force shall be on continuing full time military service and shall at all times be liable to be employed on active service".
>
> [Emphasis is mine].

It is the contention of the Petitioner that he ceased to be a member of this Army on 2nd Feb. 1993 when his appointment to the Civil Service took effect. The state contends otherwise. Mr. Kabatsi submitted that the Petitioner continued to belong to the Army even when he was appointed to the Civil Service. In his view, if anything, it is the Petitioner's appointment to the Civil service which may be questioned but not his continued membership of the Army.

To ascertain the correct position in Law it is important to examine both the constitution that was in effect at the time and all other pertinent laws.

Article 78 of the 1967 Constitution dealt with the Armed forces. It is this constitution that was in effect until 8th October 1995. Article 78 states:-

> "(1) The Supreme Command of the Armed Forces of Uganda shall vest in the President.
>
> (2) The Powers conferred upon the President by clause (1) of this article shall include,
>
> (a) power to determine the operational use of the Armed forces;

(b) power to appoint members of the Armed Forces, to make appoints on promotion to any office in the armed forces and to dismiss any member of the armed forces".

Using the authority of this provision the President in 1988 appointed the Petitioner to the rank of Brigadier in the Army. Using the same authority the President promoted him to the rank of Major General in 1989. This was common ground between the parties.

In 1994, exercising the authority vested in the President by virtue of Article 104 of the Constitution the President appointed the Petitioner to the post of Presidential Advisor on Military affairs with effect from 2nd Feb. 1993. The letter of appointment sets out the terms of his appointment including salary, duration, gratuity, leave, housing, transport; aid staff; medical attention and other allowances. The letter of appointment makes no reference at all to the Petitioners position in the Army. It is totally silent on the issue.

Under the National Resistance Army Statute, the Minister was authorised to make regulations for various matters. This is under section 104. S. 104(2) reads:-

"Without prejudice to the generality of the provisions of subsection I of this section, the Minister after consultation with the National Resistance Army Council may make regulations in the following matters:-

(a) _____

(b) _____

(c) _____

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"Without prejudice to the generality of the provisions of subsection I of this section, the Minister after consultation with the National Resistance Army Council may make regulations in the following matters:-

(a) _____

(b) _____

(c) _____

(d) Conditions of service, including conditions of service relating to enrolment and to the pay, pensions, gratuities and other allowances of officers and militants of each force and deduction therefrom.

(e) the secondment, transfer, discharge, and promotion of officers, and militants of each force.

(f) ----------

The Minister has so far made some regulations in relation to section 104(2) (d) - the National Resistance Army (conditions of service,) (Officers) Regulations 1993.

He has not made any regulations in relation to Section 104(2) (e). Whereas it is possible, as it is authorised under this provision to second officers, I presume, outside the Army, no regulations governing this matter have been made. All we were told was a policy or practice determined by the High Command. I am afraid, it was the business of the Minister, not the High Command, after consultation with the National Resistance Army Council, to make the relevant regulations. This is a matter that ought to be governed by clear regulations at law; if for no other reason, at least to acquaint the officers and men of their rights and obligations as envisioned in the preamble to the National Resistance Army Statute which stated in part:-

"----------

And whereas it is common knowledge that the previous members of the Army were generally unaware of the Law governing them and generally unguided as to how a good military person should conduct himself. ....."

[Emphasis is mine.]

The function of the High Command are provided for under section 10 (5) of the statute.

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"5. The High Command shall :-

(a) Advise the President in emergency situations and in matters relating to National Security or deployment of the Army;

(b) advise the President when Uganda is at war

(c) perform such duties as maybe conferred upon it by Law in Uganda; and

(d) perform such other functions as the President may direct."

It was not drawn to our attention that the President had conferred upon the High Command the duty to make policy or issues practice directives with regard to control and administration of Army officers. No Law was drawn to our attention authorising the High Command to make this policy or authorise the practice. The rest of the other functions of the High Command are advisory.

It is clear to me that the High Command had no authority to set policy in this area. The High Command in doing so acted without authority in Law.. Its policy therefore cannot have the force of Law. In any case, courts are enjoined to apply the law and not Government policy. Courts will only take cognisance of policy that arises in Law and not otherwise.

As I stated in Elizabeth Nakanwagi vs Sterling Civil Engineering (U) Ltd. and another H.C.C.S. No. 690 of 1993 (unreported)

"Defendant No. 2 is a Constitutional body which is enjoined to act in accordance with the constitution, and the public Lands Act and any Law. It cannot act ouside the letter and spirit of the Law. Not even when it cites government policy. The Courts cannot take cognisance of Government policy which is contrary to the Law and much less enforce the same.

Goverment policy must be taken to be consistent with the Law of the Land and Courts cannot give effect to what is contrary to the Law under the guise of Government policy ....."

At the time the Petitioner was appointed to the Civil Service, there were no regulations dealing with secordment of transfer of officers from the Army to the Civil Service. Under the Public Service Standing Orders, chapter 1-A(i) No. 4 it is possible for persons to join the Civil Service from other organisations. This is so if they have been granted leave of absence from their organisations. The Petitioner was not granted leave of absence from the Army.

By virtue of section 5(1) of National Resistance Army Statute, service in a regular force of the Army is full time military service. In my view by being moved into the civil service by a competent authority, the Petitioner was no longer able to be on full time Military service in the Army. And it was not suggested that he was on covert full time military service in the Civil Service.

His service were employed on a full time basis into the Civil service. Service in either capacity is, in my view, mutually exclusive. For an Army officer to serve in other facets of public life, and continue to serve in the Army this must be authorised by Law. This is the case with joining the legislature. Otherwise, it would be in contravention of section 5(1) of the National Resistance Army Statute. I do not accept Mr. Kabatsi's submission, that for as long as it is not prohibited, it is permissible. I take the view that it would be inconsistent with section 5(1) of the National Resistance Army

Statute for an army officer to be on full time service outside the Army Establishment and continue to be a member of a regular force.

In the present case the appointing authority at the time, both to the Army and the civil service, was one and the same person. This was the President. Having chosen to move the Petitioner from one full time service organisation to another full time service organisation, the only logical inference, in my view, is that he removed the Petitioner from the Army and put him in the Civil service. He had the authority to do so. And literally his appointment amounted to a removal from the Army establishment into the civil service. I am bolstered in this view by section 24 of the Interpretation Decree which states:-

> "Where by any Act or decree a power to make any appointment is conferred, the authority having power to make the appointment shall also have power (subject to any limitations or qualifications which affect the power of appointment) to remove, suspend, reappoint or reinstate any person appointed in the exercise of the power."
>
> [Emphasis is mine.]

This explains the authority the President exercised not only in case of the Petitioner but also the other officers, Hon. Amama Mbabazi cited. Of course under the current constitution, the position is greatly altered. But that is not relevant to the present proceedings. [See Articles 208 to 210 of the Constitution].

Mr. Kabatsi submitted that the President had no authority to remove an officer from the Army in light of Reg. 27 of the 1993 National Resistance Army Regulations. The answer to that is that a regulation made under a Statute of Parliament will not override an express power granted in the constitution.

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Regulations made under the National Resistance Army Statute 1992, could not limit or override the Constitution which was the Supreme Law of the Land. [See Article 1 of the 1967 constitution.]

In the result I would find that the Petitioner ceased in Law to be a member of the Army with effect from 2nd Feb 1993;

Notwithstanding whatever he believed, his purported resignation from the Army on 3rd Dec, 1996 was superfluous. For there can be no estoppel against the Constitution. [See Tellis and others vs Bombay Municipal Corporation and others [1987] LRC (Const.)351]

MEMBERSHIP OF THE HIGH COMMAND

There remains one ancillary matter to deal with. It is common ground between the Petitioner and the Respondent that the Petitioner continued to be a member of the High Command by Law regardless of his status as a serving Army officer or not. This is so by virtue of section 10 (1)(c) of the National Resistance Army Statute. It is/was common ground that no mode is provided for at law as to how a person such as the Petitioner could resign membership. The common sense approach would dictate that if a person resigned membership of a body, he addresses his letter of resignation to the chairman of that body, in this case the President and Commander in Chief of the Army, who is the Chairman of the High Command.

The Minister of State for Defence in his letter to the Petitioner dated 8th Dec. 1996 declared the Petitioner's resignation null and void. The Minister had no authority to declare the Petitioners resignation from the High Command null and void.

The 1993 Army regulations do not govern or regulate the High Command. The Petitioner's resignation from the High Command ought to be attended to by the High Command taking into account the fact that the Petitioner, cannot be compelled to belong to

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the High Command, when he no longer wishes to be a member thereof.

COMMISSIONING OF OFFICERS.

There is one other matter I wish to touch on briefly. This is the matter of commissions. The President, as he was empowered to do under Article 78 of the 1967 Constitution Commissioned Officers in the National Resistance Army in 1988. The officers and the general public were notified by a General Administrative Order No. 6 of 1988 issued by the Army Commander.
The President did not issue warrants as required under Rule 17 of S. 1 No. 30 of 1969, The Armed Forces (conditions of service) (officers) Regulations 1969. Perhaps this was on the advice of the Legal Advisor to Government. For Mr. Kabatsi argued before us that at the time commissions were issued in 1988, these regulations were not in force. I do not agree. The Armed Forces Act chapter 295 under which the Regulations were made was in force until it was repealed by section 109(1) of the National Resistance Army Statute 1992. Section 109(2) of the said Statute saved the 1969 Regulations and others.
It provided:-

"(2) Notwithstanding the repeal specified in the proceding sub-section,

(a) any statutory instrument or regulation made under that enactment and in force immediately before the commencement of this statute, continue in force as if such instrument or regulation had been made under this statute;"

These regulations were altered or otherwise modified by the National Resistance Army (condition of service) (officers) Regulations S.1 No.6 of 1993, made under the National Resistance Army Statute 1992.

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The 1969 Regulations and the Armed Forces Act under which they were made were still in force in 1988 when commissions were granted. Of course, they had to be construed with such modifications as would bring them in conformity with Legal Notice No. 1 of 1986. Article 13(ii) of Legal No. 1 of 1986 stated:-

> "subject to this proclamation the operations of the Constitution and the existing Laws shall not be affected by this proclamation, but shall be construed with such modifications qualifications and adaptations as are necessary to bring them in conformity with this proclamation."

The President acted in accordance with Article 78 of the 1967 constitution. This should have been followed up with the issuance of warrants under the 1969 Regulations which provided the form for a commission. Much as the failure to comply with these rules is not necessarily fatal to the commissions, it is imperative that the President complies with the letter and spirit of the Law for, with respect, the whole nation learns from him. For as Justice Brandeis stated in a dissenting opinion in Olmstead vs U.S 277 U.S 438:-

> "Our government is the potent ominpresent teacher. For good or ill, it teaches the whole people by example ..... If the Government becomes Lawbreaker, it breeds contempt for the law, it invites every man to become Law unto himself, it invites anarchy."
>
> [Quoted from Human rights, Justice and Peace, Manual of References page 63.]

CONCLUSION:

In the result I would find that the Petitioner has substantially succeeded in the main prayers. I would grant a declaration to the effect that he cannot be punished or otherwise disciplined or questioned by anybody or authority including the Army for his testimony to the Parliamentary Committee. He is entitled to protection, from violation of his freedoms and rights.

Secondly, I would hold that Regulation 28 of the 1993 Regulations does not apply to the Petitioner as he ceased to be a serving member of the Army with effect from 2nd Feb 1993.

I would allow this Petition with costs to the Petitioner.

Dated at Kampala this 25th day of April, 1997.

F.M.S. EGONDA-NTENDE

J U D G E.

I CERTIFY THAT THIS THE TRUE COPY OF THE ORIGINAL.

MURANGIRA. J.

REGISTRAR COURT OF APPEAL.