THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA

AT KAMPALA

CORAM: HON MR JUSTICE G.M. OKELLO, JA.
HON LADY JUSTICE A.E.N MPAGI-BAHIGEINE, JA.
HON MR JUSTICE SG ENGWAU, JA.
HON MR JUSTICE A. TWINOMUJUNI, JA.
HON LADY JUSTICE C.N.B KITUMBA, JA.

CONSTITUTIONAL PETITION NO 3 OF 2000

BETWEEN

1. PAUL SSEMOGERERE]
2. ZACHARY OLUM]::::::::::::::::::::::::::::::::::: PETITIONERS

AND

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

JUDGMENT OF G.M. OKELLO, JA.

This is a Petition in which the Petitioners challenge the validity of Referendum (Political Systems) Act 2000 herein after referred to as the impugned Act.

Parliament of the Republic of Uganda had on 7/6/2000 passed the impugned Act to provide for the holding of a referendum to choose a political system. The petitioners who felt aggrieved by the manner the

impugned Act was passed filed this Petition on 22/6/2000. In the Petition, they alleged that the impugned Act was passed by Parliament without following the procedures and time frame laid down in the Constitution of the Republic of this country. They accordingly prayed that:-

(a)(i) This court declares:- that the passing of the Referendum (Political Systems) Act 2000 by Parliament without first referring it to the relevant Standing Committee of Parliament was inconsistent with article 90(1) and (3) of the Constitution,

(ii) that the enactment of the political system Referendum law which denies political parties the constitutional right to participate in the referendum to choose a political system under article 271 but instead institutes the Movement as the only recognised political system before the Referendum is held and in contravention of articles 20, 21, 29, 73, 75 and 269 of the Constitution is null and void and ineffectual,

(iii) that Parliament was incompetent to enact the Referendum (Political System) Act 2000 upon expiry of the time prescribed by the Constitution and thereby reduce the time allowed for canvassing, the law so enacted is null and void,

(iv) that the passing of the Referendum (Political System) Act 2000 was outside the competence of Parliament to the extent it was calculated to alter the judgment or decision of the courts between the Petitioners and the Government,

(v) that the Referendum (Political System)Act 2000 is a colourable legislation whose objectives and effect is to outlaw Political Organisations and institute a one party state and consequently the Act is in contravention of the Constitution.

(b) They also prayed for costs of the Petition.

The Petition was supported by affidavits of the Petitioners and one from Hon Omara Atubo, MP.

The respondent filed an answer to the Petition. In the answer he denied all the allegations contained in the Petition. He contended that the impugned Act was duly passed by Parliament in full compliance with the Constitution. The answer was supported by the affidavit of Mr. Joseph Matsiko, Principal State Attorney, and also of Hon. E.K. Ssekandi, Speaker of Parliament.

From the pleadings, the following five issues were agreed upon by counsel for both parties for determination of the court:-

1. Whether or not the Referendum (Political Systems) Act, 2000 is law and can be challenged.
2. Whether or not the procedures applied in enacting the Referendum (Political Systems) Act were consistent with the procedures prescribed under the Constitution of Uganda.
3. Whether or not the Act was made in contravention of Article 271 of the Constitution of Uganda.
4. Whether or not the absence of a law regulating the activities of Political Organisations as provided in Article 269 of the Constitution contravened article 69 by perpetuating a political environment under which the people of Uganda could not make a free and fair choice of the political system as to how they should be governed.
5. Whether or not any reliefs should be granted.

Issue No 1.

Whether or not the Referendum (Political System) Act 2000 is law and can be challenged.

Mr. Tibaruha, Solicitor General, and counsel for the respondent told us that he had intended to challenge the competence of this Petition in a preliminary objection. He however, waited until after counsel for the Petitioner submitted on the issue. In my view, it makes more sense to start with the argument of Mr. Tibaruha on this issue.

He contended that The Referendum (Political System) Act 2000, the impugned Act, is a spent law as it has already had its full effect. It was passed for the purpose of holding a referendum in compliance with article 271 of the Constitution to choose a political system which the people of Uganda wanted to adopt. The said referendum was held on 29/6/2000. Its results were published by the Electoral Commission (EC) in the Uganda Gazette of 28/7/2000 under General Notice No 280. The impugned Act, therefore, ceased to exist. It no longer forms part of the Revised Laws of Uganda which came into force on 1/10/2003 by Statutory Instrument No 69 of 2003. It is now listed in the Chronological Table of Enactments Vol 1 Page (CVii) of the Revised Edition of Laws of Uganda as spent. It, therefore, can not be challenged in this court under article 137(3) of the Constitution. He cited as authority for that proposition, **Attorney General VS Dr. James Rwanyarare & others, Constitutional Appeal No 2 of 2003** where the Supreme Court of Uganda stated that a dormant law can not breach the Constitution as it is ineffective.

Mr. Lule responded that Mr. Tibaruha did not state when the impugned Act became dormant. Was it dormant at the time the Petition was filed or now at the time of hearing of the Petition? In his view, the Petition was filed in 2000 to challenge the Constitutionality of the impugned Act. He pointed out that under section 13 of the Interpretation Act Cap 3, the repeal of an Act does not affect the rights, privileges, obligations or liabilities acquired, accrued or incurred under the repealed law.

The right to challenge an Act of Parliament or any other law is provided by Article 137(3) of the Constitution as follows:-

" **A person who alleges that:-**

(a) **an Act of Parliament or any other law or anything in or done under the authority of any law; or**

(b) **any act or omission by any person or authority;**

is inconsistent 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."

Article 137(3) (a), therefore, empowers any person who alleges that an Act of Parliament, or any other law or anything in or done under the authority of any law is inconsistent with or in contravention of a provision of the Constitution to challenge it in this court. What was the status of the impugned Act on the 22/6/2000 when the Petitioners filed this petition to challenge it! Was it dormant or active!

The undisputed evidence available indicates that the impugned Act was passed on 7/6/2000 to provide for the holding of a Referendum in compliance with article 271 to choose a political system. It was assented to on 9/6/2000 and was published in the Gazette on the 12/6/2000. Section 2 of the Interpretation Act Cap 3 defines an Act of Parliament to mean a law made in Parliament. The impugned Act, therefore, became law on 12/6/2000 though its section 2 back-dated its effective date to 2/7/1999.

The referendum for which it was made was scheduled to be held on 29/6/2000. The impugned Act achieved its full effect and therefore became spent when the referendum was held and its results were published by the Electoral Commission (EC) on 28/7/2000 under General Notice No 280. According to the results, the Movement Political System was adopted.

That meant that when this Petition was filed on 22/6/2000, the impugned Act was in force and not dormant. It was challengeable. Failure of the court to hear and dispose of the Petition before the holding of the referendum can not be visited on the Petitioners. Even if the impugned Act had expired, that expiry could not render the Petition incompetent. If it had expired, the rights created by the impugned Act would not have been affected by the expiry of the Act. Section 13 (2)© of the Interpretation Act (Cap 3) saves the rights, privileges, obligations and liabilities created by a repealed or spent Act.

It provides thus:-

> " **Where any Act repeals any other enactment, then unless the contrary intention appears, the repeal shall not:-**
>
> (c) **affect any right, privilege, obligation or liability, acquired, accrued or incurred under any enactment so repealed."**

That meant that the right conferred by the impugned Act to hold the referendum on 29/6/2000 was not affected by the expiry of the Act. The

complaint in the Petition was about the situation as at the time when the Petition was filed. The judgment would also relate to that.

I would also add that a system which has been set in place by or under an Act of Parliament or any law can be challenged at any time not withstanding the repeal or expiry of the Act. This is possible under article 137(3) (a) last portion which states:-

"... or anything in or done under the authority of any law ..."

In my view, this provision is wide enough to cover that situation.

My answer to issue No 1 would therefore be in the affirmative.

Issues Nos 2 and 3.

(2) Whether or not the procedure applied in enacting the Referendum (Political System)Act 2000 was consistent with the procedures prescribed under the Constitution.

(3) Whether or not the Act was made in contravention of Article 271 of the Constitution.

Mr. Lule contended that the procedures applied in enacting the impugned Act were inconsistent with the procedures prescribed by the Constitution and that the Act was made in contravention of article 271 of the Constitution. He pointed out firstly that article 90(3) of the Constitution

requires all Bills to be referred to a Standing Committee of Parliament elected under article 90(1) &(2)(a) of the Constitution. The Committee would discuss, make recommendations on the Bill and report to Parliament. According to Mr. Lule, the evidence provided Hon. Z. Olum and Hon. Omara Atubo shows that these procedures were not followed. He stated that the evidence provided by Hon. E.K. Ssekandi, Speaker of Parliament, shows that the Bill was referred to a Committee of the whole House which discussed and reported on it to Parliament.

Learned counsel submitted that that procedure did not comply with the procedures provided under the Constitution. His reason was that the Committee of the whole House is not a Standing Committee elected under article 90(2) as provided for in article 90(3)(a).

Secondly, that article 271(2) requires a two years period for the people of Uganda to be free to canvass for public support for a political system of their choice before the holding of the referendum. According to him, this could only happen if the laws under article 271(4) were put in place before to give the people the two years freedom to canvass. He submitted that the impugned Act which is the law made under article 271(4) was made and published less than one month to the date of holding the referendum and only one year to the expiry of the term of the first Parliament. The life of the first Parliament started on 2/7/1996 as proclaimed by His Excellency the President, Yoweri Kaguta Museveni on 30/6/1996 (Annexture 6 to the Petition). According to him the making of the impugned Act only one year to the expiry of the term of the first Parliament was in contravention of article 271(2).

He pointed out that section 2 of the impugned Act back-dated the effective date of the Act to 2/7/1999. According to him, this was intended to stretch the time backward but it did not help matters as certain things cannot be done in arrears. He submitted that the narrowing of the time provided in article 271(2) amounted to a variation of that article and consequently amending it without following the amendment procedures laid down in the Constitution. He pointed out for instance, that there should have been a mathematical count of the votes as provided for under article 89. According to him, the available evidence showed that there was no such a count of votes.

In counsel's view, the time allowed under the Act for the people to canvass and the conditionalities placed under the Act particularly section 12(8) thereof, make it impossible to achieve the conditions set in article 271.

Mr. Tibaruha did not agree. He contended that the procedures adopted in passing the impugned Act were not inconsistent with the procedures provided under the Constitution. There was no breach of the procedure set out in article 90 as the Bill was referred to a Committee of the whole House. It scrutinised the Bill, made recommendations thereon and reported on it to Parliament. The Committee of the whole House was the only Committee mandated to discuss Bills. All Bills must be passed by Parliament and assented to by the President to become law. Once these two steps have been followed, then the law is duly passed. Failure by a Standing Committee of Parliament to discuss a Bill was not fatal. It does not render the resultant Act unconstitutional.

It was his views that the impugned Act was not passed in contravention of article 271(2). The two years period stated in article 271(2) for the people of Uganda to be free to canvass for public support for choice of a political system was not dependent on the enactment of Political Parties Organisations Act. Clauses 2 and 3 of Article 271 must be read together. The effect is that only one year is given for canvassing for public support for choice of a Political system. There was no evidence that the right of the people to canvass for public support for choice of a political system was limited by any authority. The impugned Act was made by Parliament in compliance with article 271(4).

Section 2 of the impugned Act was intended to validate any Act taken in good faith for the purpose of the referendum under article 271. According to him, section 12(8) only requires a notification of 72 hours. It does not require that permission be sought to canvass. It does not permit any authority to disallow any person to canvass for public support.

It is important that I start considering these issues by pointing out that it is needless to emphasise that the Constitution of the Republic of Uganda is the supreme law of the land and has binding force on all authorities and persons throughout the land. {art. 2(1)}. That meant that its provisions must be obeyed by all. In **Paul K. Ssemogerere & Z. Olum vs The Attorney General**, Constitutional Petition Appeal No 1 of 2000, the Supreme Court (Kanyehamba JSC) said:-

"... if Parliament is to claim and protect its powers and internal procedures, it must act in accordance with the Constitutional provisions which determine its composition and the manner in which it must perform its functions. If it does not do so, then, any purported decision made outside those constitutional provisions is null and void and may not be claimed to be an act of Parliament."

That meant any law passed outside the procedures laid down by the Constitution is no law at all. To determine whether in passing the impugned Act Parliament followed the procedures laid down in the Constitution, it is necessary to set out articles 89 and 90 which are relevant in this context. Then it shall be considered in the context of the evidence provided by witnesses from both sides as to what transpired in Parliament on 7/6/2000 when the impugned Act was passed.

Articles 89 provides:-

"(1) Except as otherwise prescribed by this Constitution or any law consistent with this Constitution, any question proposed for decision of Parliament shall be determined by a majority of votes of the members present and voting.

(2) The person presiding in Parliament shall have neither an original nor a casting vote and if on any question before Parliament the votes are equally divided, the motion shall be lost."

Article 90 provides:-

"(1) Parliament shall appoint Standing Committee and other Committees necessary for the efficient discharge of its functions.

(2) The following shall apply with respect to the composition of the Committee of Parliament:-

(a) the members of Standing Committees shall be elected from among members of Parliament during the first session of Parliament.

(b) the rules of procedure of Parliament shall prescribe the manner in which the members and chairpersons of the Committees are to be elected.

(3) The functions of the Standing Committees shall include the following:-

(a) to discuss and make recommendations on all Bills laid before Parliament;

(b) to initiate any Bill within their respective areas of competence;

(c) to assess and evaluate activities of Government and other bodies;

(d) to carry out relevant research in their respective fields; and

(e) to report to Parliament on their functions

(4) In the exercise of their functions under this article, Committees of Parliament:-

(a) may call any Minister or any person holding public office and private individuals to submit memorandum or appear before them to give evidence;

(b) may co-opt any member of Parliament or employ qualified persons to assist them in the discharge of their functions;

(c) shall have the powers of the High Court for

(i) enforcing 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. "**

Article 90(1) above provides for the appointment of Standing Committees. Its members are to be elected from among Members of Parliament. The functions of the Standing Committees are spelt out in article 90(3). They include **"to discuss and make recommendations on all bills laid before Parliament."**

There appears to be no dispute that the Bill which resulted into the impugned Act was discussed by a **Committee of the whole House.** The evidence of Hon. E.K. Ssekandi supports this. The issue is whether that complies with the procedure provided in article 90(3).

I think that article 90(2)(a) is quite clear as to what is a Standing Committee of Parliament. It is constituted during the First session of Parliament and its members are elected from among members of Parliament. This differentiates Standing Committee from the **Committee of the whole House.** The latter is not specifically mentioned in article 90(1) of the Constitution but may be covered under **" and other Committees necessary for the efficient discharge of its functions"** in that article.

The functions of the two Committees are also different. The functions of the Standing Committee are set out in article 90(3) of the Constitution. The functions of the **Committee of the whole House** are not spelt out in the Constitution. Under rule 101 of the Rules of Procedure of the 6th Parliament a Bill is referred to a Standing Committee after the first reading.

It moves to the **Committee of the whole House** only when the second reading is passed.

In view of the above, I agree with Mr. Lule that a Standing Committee is not the same with the **Committee of the whole House**. So when the Constitution stipulates that bills be referred to an appropriate Standing Committee, Parliament can not substitute a **Committee of the whole House** for a Standing Committee. Failure to refer the bill to a Standing Committee in the instant case amounted to failure to comply with the procedures laid down in the Constitution.

In Paul K. Ssemogerere & 2 others (supra), the Constitutional (Amendment) Act 13 of 2000 was struck down by the Supreme Court for being unconstitutional because certain steps in its legislative process were not followed.

Kanyeihamba JSC said:-

> **" It can never be over-emphasised that whereas Constitutional provisions may be amended constitutionally, they can never be waived at all."**

Indeed, since article 90 2(a) requires all Bills to be discussed by a Standing Committee constituted under article 90. That can not be waived and a committee of the whole House substituted for a Standing Committee. To that extent I would find that Parliament did not follow the procedure laid down in the Constitution in passing the impugned Act.

This leads me to the question whether the impugned Act was passed in contravention of article 271(2). It is important to note that this article provides as follows:-

> " **Two years before the expiry of the terms of the first Parliament elected under this Constitution, any person shall be free to canvass for public support for a political system of his or her choice for purposes of a referendum."**

That provision provides that two years before the expiry of the term of the first Parliament elected under this Constitution, any person must be free to canvass for public support for choice of a political system of his choice. Article 271(3) provides that the referendum referred to in clause (2) of this Article shall be held during the last month of the fourth year of the term of that Parliament. That meant that under the Constitution, the people of Uganda are given about one year to freely canvass before the holding of the referendum. On this I agree with Mr. Tibaruha.

Clause 4 of article 271 provides:-

> " **Parliament shall enact laws to give effect to the provisions of this article."**

That meant that Parliament is enjoined to make laws two years before expiry of the term of the first Parliament elected under this Constitution, to

set the people of Uganda free to canvass for public support for the choice of a political system.

The undisputed evidence available shows that the impugned Act was passed on 7/6/2000. It was assented to on 9/6/2000 and was published in the Uganda Gazette on 12/6/2000. The five years life of the first Parliament elected under this Constitution started on 2/7/96 by a Presidential Proclamation dated 30/6/96. Using a simple mathematical calculation, it is clear that the impugned Act was made during the fourth year of the life of the first Parliament. That is, one year before the expiry of the term of that Parliament.

Mr. Lule submitted that the impugned Act was made in contravention of article 271. I agree.

Article 271(2) provides:-

> " **Two years before the expiry of the term of the first Parliament elected under this Constitution, any person shall be free to canvass for public support for a political system of his or her choice for purposes of a referendum.** "

The above provision meant that the people of Uganda shall be free two years before the expiry of the life of the first Parliament elected under this Constitution to canvass for public support for choice of a political system. That meant that the law under clause 4 of article 271 had to be put in

place two years before the expiry of the term of the first Parliament under this Constitution.

It is agreed by counsel for both parties that the impugned Act is the law that was made in fulfillment of article 271(4). As shown above it was made late, only one year before the expiry of the term of the first Parliament. That was clearly in contravention of article 271(2) above.

Mr. Lule submitted that the narrowing of the time provided in article 271(2) amounted to amending the article without following the amendment provisions contained in the Constitution. I agree. It was held by the Supreme Court in **Paul K. Ssemogerere and 2 others (supra)** that variation of a provision of the Constitution amounts to amending it and that amending any provision of the Constitution without following the amendment procedure laid down in the Constitution renders the exercise unconstitutional.

Attempt by Parliament in section 2 of the impugned Act to backdate the effective date of the Act to 2/7/99, was intended to stretch the time backward to comply with article 271(2). This did not and cannot succeed. Default had already been committed when the Act was not put in place two years before the expiry of the life of the first Parliament elected under this Constitution. Back dating the effective date of the Act could not help. The Constitution wanted the law to be in place two years before the expiry of the life of the first Parliament. Section 2 of the impugned Act purported to allow Parliament to make the law outside the time prescribed by the

Constitution. This had the effect of amending article 271(2) of the Constitution. That is not effective without following the amendment procedures laid down in the Constitution. This was not followed here.

Mr. Lule further submitted that the limited time allowed under the impugned Act for canvassing, coupled with the restrictions contained in the Act particularly in section 12(8) thereof made it impossible to achieve the intentions of article 271(2).

The intentions of article 271 are clear.

(1) that the referendum to choose a political system would be held under the Movement political system.

(2) Law/laws would be put in place two years before the expiry of the term of the first Parliament elected under this Constitution, to set the people of Uganda free to canvass for public support for choice of a political system of their choice.

Sections 12(8), (9), (10) and (11) provide as follows:-

> " 12(8). Any person or group of persons who wishes to canvass for any side in the referendum in any public place by way of meeting or public address, shall, in writing, notify the sub-county or Division chief of the area and the police officer in-charge of the area, not less than seventy two hours before the canvassing,

meeting or public address which he or she wishes to undertake.

12(9). A person or group wishing to canvass and referred to in subsection (8), shall give the police officer in-charge of the area or the sub-county or Division chief such information relating to the activity that that person or group wishes to undertake as the police officer may reasonably require.

12(10). Canvassing for the referendum shall cease twenty four hours before the date of polling in the referendum.

12(11). Any person who contravenes subsection (8), (9) or 10 of this section, commits an offence and is liable on conviction, to a fine not exceeding twenty five currency points or imprisonment not exceeding three months or both."

As we have seen earlier in this judgment, article 271(2) required that the people of Uganda would be free two years before the expiry of the term of the first Parliament elected under this Constitution to canvass for public support for a choice of a political system. The laws envisaged under article 271(4) were to give effect to those intentions. Clause 3 of article 271 provided that the referendum to choose a ~~public~~ political system would be held in

the last month of the fourth year of the terms of that Parliament. By a simple mathematical calculation, that gave approximately one year to the people to freely canvass for public support before the referendum was held.

The undisputed evidence available however, shows that the impugned Act which was made in compliance with article 271(4) became law on 12/6/2000 when it was published in the Uganda Gazette. The referendum intended under clause 3 of article 271 was scheduled to be held on 29/6/2000. That gave a period of less than one month for canvassing. However, under section 12(10) of impugned Act, canvassing was to stop a day before the voting day. That left only 16 days, as against one year under the Constitution, for the people of Uganda to canvass for public support to choose a political system. As if that shortness of the time was not bad enough, section 12(8) of the impugned Act imposed further restrictive conditionalities. It required a seventy two (72) hours written notification to the Sub-county or Division chief of the area and the police officer in-charge of the area each time he wanted to address a public rally in an area around the country. And further information regarding his intended activity as the police officer in-charge of the area may require from him/her.

Paragraph 5 of Hon. Z. Olum's supplementary affidavit, which remained uncontroverted, shows that this conditionality was a serious impediment to the envisaged freedom to canvass for public support for the choice of a political system. He and his Democratic party member colleagues were prevented by the police from holding peaceful rallies in several places across the country for instance in Tororo, Mbarara, Nkonzi and Gulu.

In my view, firstly, the short time, 16 days, allowed under the impugned Act, as against one year intended under the Constitution, for the people of Uganda to canvass for public support to choose a political system, was inconsistent with article 271(2).

Secondly, the conditionalities set out in the impugned Act particularly section 12(8) thereof are repugnant to the freedom envisaged in article 271(2).

It is interesting to note that section 12 of the impugned Act is really a replica of section 13 of the Referendum and other Provisions Act No 2 of 1999 which was later declared by the Supreme Court to be unconstitutional.

Thirdly, the voting method. Article 89 is very clear on the method of voting. A bill is considered passed when it is supported by a majority of members of Parliament present and voting.

In Paul Ssemogerere and 3 others vs the Attorney General, Constitutional Appeal No 1 of 2002, the Supreme Court considered this article and contrasted it with articles 259(1) and 261 as to the mode of ascertaining majorities for effecting constitutional amendment. In that case, voting was by shouts of 'Aye' or 'Noes'. The Supreme Court (Kanyeihamba JSC) said:-

" In my view for constitutional amendment, the voting in Parliament should be determined by the head count of members in favour of and against the amendment at the second and third readings by lobby division or such other mode as can ascertain that the division or such other mode as can ascertain that the supporters of the amendment are two thirds of the total number of members of Parliament."

In the instant case, the Hansard which was attached to the affidavit of the Rt Hon. E.K Ssekandi, Speaker of Parliament, shows merely that **"Question put and agreed to."** It does not show how the majorities were determined. This is clearly contrary to what is stated in article 89. This article requests the majority to be ascertained by head count or other methods that can ascertain majorities.

The impugned Act purported to abridge the time set out in article 271(2), thus amending it. To that extent, its passing should have had the support of two third majority in its second and third readings. The Hansard which is the undisputed evidence of what transpired in Parliament on that 7/6/2000 does not reveal that majority. The voting method adopted by Parliament when passing the impugned Act did not reveal the majority. That did not comply with the provisions of articles 259(1) and 261 of the Constitution either.

I would therefore agree that the impugned Act was made in contravention of article 271 of the Constitution.

This now brings me to issue No 4:-

Whether or not the absence of a law regulating the activities of Political Organisations as provided in article 269 of the Constitution, contravene article 69 by perpetuating a political environment under which the people of Uganda could not make a free and fair choice of the political system as to how they should be governed.

Mr. Lule pointed out that article 69 of the Constitution empowers the people of Uganda to freely choose a political system under which they wish to be governed. In his view, this article read together with article 269 shows that until the law on Political Organisations is put in place, people subscribing to multiparty system can not freely canvass their views. Such a law should have been in place before the Referendum to choose a political system was held. He submitted that the purported choice of a political system under article 69 was a hoax as only those subscribing to the Movement were free to canvass. In his view that Referendum at which the political system was chosen contravened article 269.

Mr. Tibaruha contended that this issue was misconceived and irrelevant as it did not arise from the pleadings. It was challenging the referendum that was held on 29/6/2000. That is not a constitutional issue. The Petitioners should have challenged the results of the referendum under the Act. Article 269 did not designate any particular time. He prayed that this issue be dismissed.

I wish to tackle the question of competence of this issue first. Under O 13 r 1 of the Civil Procedure Rules (SI 65-3), issues arise when a material proposition of law or fact is affirmed by the one party and denied by the other. The provision reads thus:-

> " (1) **Issues arise when a material proposition of law or fact is affirmed by one party and denied by the other.**
>
> (2) **Material proportions are these proportions of law or fact which the plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute a defence....."**

In the instant case, the petitioners in paragraph I(e) of their Petition affirmed as follows:-

> " **The omission by Parliament to enact the Political Organisations Bill under article 269 allowing political party activities has so thoroughly corrupted the democratic process that the fundamental right to free and fair elections can not be provided in the Referendum in contravention of article 69 of the Constitution."**

The respondent denied the above allegation in paragraph 1(e) of his answer as follows:-

" The fundamental right to free and fair elections in the Referendum is not in any way fettered by Parliament or at all."

There can be no doubt, therefore, that this issue arose from the pleadings as shown above. Had the learned Solicitor General looked at the pleadings more closely, he would have realised that his criticism was without base. The issue is not at all misconceived. It is properly framed. It is challenging whether the holding of the Referendum on 29/6/2000 before the laws regulating the activities of Political Organisations were made in accordance with article 269 was not inconsistent with article 69.

Mr. Tibaruha contended that that is not a Constitutional issue. I respectfully disagree. Holding the referendum on 29/6/2000 was an act done under the authority of a law (the impugned Act). It is now settled that when any person **alleges that an Act of parliament or any other law or anything done under the authority of any law is inconsistent with or in contravention of a provision of the Constitution,** then it raises a question of constitutional interpretation under article 137(3)(a) of the Constitution. Therefore, the allegation that the holding of the Referendum on 29/6/2000 was inconsistent with article 69 is a constitutional issue. That criticism too has no base.

Article 69 and 269 provide thus:-

" 69(1) The people of Uganda shall have the right to choose and adopt a political system of their

choice through a free and fair elections or a referendum.

(2) The political system referred to in clause (1) of this article shall include:-

(a) the Movement political system:

(b) the Multiparty political system; and

(c) any other democratic and representative political system.

Transitional Provisions.

269:- On the commencement of this Constitution, until Parliament makes laws regulating the activities of Political Organisations in accordance with article 73 of this Constitution, political activities may continue except:-

(a) opening and operating branch offices;

(b) holding delegates' conferences;

(c) holding public rallies;

(d) sponsoring or offering a platform to or in anyway campaigning for or against a candidate for any public elections;

(e) carrying on any activities that may interfere with the Movement political system for the time being in force."

It is clear that article 69(1) above gives to the people of Uganda the right to choose and adopt **through free and fair elections or referenda,** a political system under which they wish to be governed. What however is not clear under the Constitution is the term **"free and fair elections or referenda."** This term has not been defined in this Constitution.

Mr. Walubiri, in his book: **Uganda, Constitution at Cross Roads 1999** at Page 312 attempted to throw some lights on the meaning of this term. He wrote;-

" **Article 69(1) of the Constitution requires that the choice of a political system be done through free and fair elections or a referendum. The Constitution does not define or describe the concept of "free and fair elections or a referendum." International law and practice has over the years defined what contributes to a free and fair election or a referendum. You have to look at the totality of the exercise and make a value judgment."**

In **Col (RTD) Dr. Besigye Kizza vs Museveni Yoweri Kaguta and Another**, Election Petition No 1 of 2001. Justice B.J. Odoki, Chief Justice of Uganda offered an opinion as to what constitutes a free and fair election. He said:-

> " To ensure that elections are free and fair there should be sufficient time given for all stages of the elections, nominations, campaign, voting and counting of votes. Candidates should not be deprived of their rights to stand for elections and citizens to vote for candidates of their choice through unfair manipulation of the process by election officials. There must be a leveling of the grounds so that the incumbents or Government Ministers or officials do not have an unfair advantage. The entire election process should have an atmosphere free of intimidation, bribery, violence, coercion or anything intended to subvert the will of the people. The election procedures should guarantee the secrecy of the ballot, the accuracy of counting and the announcement of the results in a timely manner. Election law and guidelines for participating in elections should be made and published in good time. Fairness and transparency must be adhered to in all stages of electoral process. Those who commit electoral offences or otherwise subvert the electoral process should be subjected to severe sanctions. The Electoral Commission must consider and determine election disputes speedily and fairly."

One therefore, must look at the entire elections or referendum exercise to determine the question of freedom and fairness. Nonetheless, sufficiency of time for all stages in the exercise, level grounds, fairness and transparency are some of the factors that constitute, free and fair elections or referenda.

In the instant case, the evidence available shows that the referendum to choose a political system was held on 29/6/2000. This was done before the Political Parties and Organisations Act No 18 of 2002 came into force. That Act came into force on 17/7/2002. That meant that when the referendum was held, the shackles with which article 269 bound the Political Organisations were still on. Without removing the bondage, the free and fair elections or referenda provided for in article 69 can not be achieved. They remain illusory. The referendum that was held on 29/6/2000 when the Political Organisations were still bound by the shackles placed on them by article 269, could not have been free and fair because the people who subscribed to political philosophies different from that of the Movement did not fully canvass their views. The impugned Act with its shortcomings was not enough. There was need to pass a law under article 73 to remove the bondage placed by article 269 before holding the referendum on 29/6/2000. The referendum was therefore held in contravention of article 69.

Finally, I now move to issue No. 5 which is " **whether or not any reliefs should be granted.**"

Mr. Tibaruha submitted that the Petitioners are not entitled to the reliefs sought. He emphasised that this was so even if this court were to hold that the Act of 2000 was unconstitutional. In his view, that holding would not affect the referendum that was held under the Act on 29/6/2000 because of the doctrine of retrospective court ruling. According to him, the essence of the doctrine is that when a statute is held to be unconstitutional, the order does not have retrospective effect so as to set aside the obligations, rights or anything done under the statute prior to the date of the judgment declaring the statute unconstitutional. He cited **Public Prosecutor vs Dato Yap Peng** (1988) LRC (Const) 69, a Malaysian case; and Sections 13(2) of the Interpretation Act Cap 3.

Mr. Lule's response on the doctrine of prospective over-ruling was that the case cited by Mr. Tibaruha was relating to criminal acts. He submitted that for this, there is a constitutional provision, article 28(3). The case was therefore inapplicable.

I have had the chance to read that case of **Public Prosecutor vs Dato Yap Peng (1988) LRC (Const) 69 a Malaysian case**. The brief facts of the case were as follows:-

Section (418A) in the Criminal Procedure Code of Malaysia empowered the Public Prosecutor by a certificate under his hand to require a court subordinate to the High Court to transfer a case pending before it to the High Court for trial and cause the accused to appear before the High Court. That provision had been in force for over eleven years. Many convictions and acquittals had been secured under it.

Later the constitutionality of the provision was challenged. The Malaysian Federal Court held that the provision did not contravene a provision of their Constitution concerning equal protection of law.

However, when Dato Yap Peng was arraigned in their High Court having been transferred from a lower court under that provision, he objected. He contended that that Section of the Criminal Procedure Code infringed section 121(1) of their Federal Constitution so that his transfer to the High Court was invalid. Zakaria Yatim J. upheld that contention.

On appeal to their Supreme Court, the appeal was dismissed on the ground that:-

> " **(1) the power to transfer cases was a judicial power and section 418A was a legislative encroachment on the judicial power to adjudicate disputes vested in the courts under article 121(1). The power of the Public Prosecutor under article 145(3) did not extend to regulation of criminal procedure or the jurisdiction of the courts, but related only to the prosecution not trial of criminal proceedings. His powers to institute proceedings was complete once the court was seized of jurisdiction.....**
>
> (2) **When a statute was declared unconstitutional *after a long standing current of decisions to the contrary*,**

the Court would not give retrospective effect to the declaration so as to set aside proceedings which had taken place under the statute prior to the date of the judgment declaring it to be unconstitutional. The doctrine of prospective over ruling could be applied by the Supreme Court to give such retrospective effect to its decision as it considered just but in this case no retrospective effect would be given to the decision."

Clearly, the above case concerns criminal matters. The doctrine of prospective over-ruling refers to the highest court of the land. This Court is not. Its decisions can be overturned by the Supreme Court. Even if it were the highest court of the land, it had never ruled before that the impugned Act was Constitutional. That case, is thus, distinguishable from the instant case. It is therefore not a useful authority here.

Section 13(2) of the Interpretation Act provides:-

" Where any Act repeals any other enactment, then unless the contrary intention appears, the repeal shall not

(a) revive anything not in force or existing at the time at which the repeal takes effect;

(b) affect the previous operation of any enactment so repealed or anything done or suffered under any enactment so repealed;

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed;

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if repealing Act had not been passed."

My findings on issues No 2 and 3 were that:-

(1) Parliament did not follow the procedures laid down in the Constitution when passing the impugned Act.

(2) The impugned Act was made in contravention of article 271(2) when it was not put in place two years before the

expiry of the term of the first Parliament under this Constitution. The impugned Act was therefore void ab initio. It thus could not expire since it never existed.

In the result, I would allow the petition and give the following reliefs:-

(a) Declaration that:-

(i) the passing of the Refrendum (Political Systems)Act 2000 by Parliament on 7/6/2000 was in contravention of articles 89, 90(1) & (3) of the Constitution for failure to follow the voting procedure set out in article 89 and failure to refer the Bill to the relevant Standing Committee of Parliament as prescribed in the Constitution.

(ii) Holding the Referendum under the Referendum (Political Systems) Act 2000 before passing a law under article 269 to set free Political Organisations contravened article 69.

(iii) Parliament had no authority to pass the Referendum (Political Systems) Act 2000 after the expiry of the period stated in article 271(2), without first amending that provision of the Constitution.

(b) **Order**:

(i) The respondent to pay the Petitioners' costs of this Petition.

By a unanimous decision therefore, the Petition is allowed on the terms stated herein.

Dated at Kampala this 25th **day of** June **2004**

G.M. OKELLO.
JUSTICE OF APPEAL.

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO.3 OF 2000

CORAM: HON. MR JUSTICE G.M. OKELLO, JA
HON. LADY JUSTICE A.E.N. MPAGI-BAHIGEINE, JA.
HON. MR JUSTICE S.G. ENGWAU, JA
HON. MR JUSTICE A. TWINOMUJUNI, JA
HON. LADY JUSTICE C.N. B. KITUMBA, JA

1. PAUL K. SSEMOGERERE]
2. ZACHARY OLUM] :::::::::::::::::::::::::::::::: PETITIONERS

VERSUS

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

JUDGEMENT OF A.E.N. MPAGI-BAHIGEINE, JA

This petition was filed by Dr Paul K. Ssemogerere and Hon Zachary Olum M.P. against the Attorney General, challenging the constitutionality of the Referendum (Political Systems) Act 2000. It was brought under **The Fundamental Rights And Freedoms (Enforcement Procedure Rules 1992 Directions 1996)**.

It was filed on 26.06.2000 for the purpose of testing the validity of The Referendum (Political Systems) Act before the Referendum of 29.06.2000. However, that was not possible for one reason or another and it has now been heard belatedly.

I had the opportunity of reading the draft judgements of my brothers Okello and Twinomujuni JJ.A which were the working documents in this exercise. They practically left no stone unturned and I do not intend to traverse the same course. I entirely agree with their findings and orders. I will only make one or two brief comments just for further emphasis.

The following were the issues framed by consent of both parties, for determination by the court:

1. Whether or not the Referendum (Political Systems) Act , 2000 is law and can be challenged.
2. Whether or not the procedures applied in enacting the Referendum (Political Systems) Act, 2000 were consistent with the procedures prescribed under the Constitution of Uganda.
3. Whether or not the Act was made in contravention of Article 271 of the Constitution of Uganda.
4. Whether or not the absence of a law regulating the activities of political organisations as provided in Article 269 of the Constitution contravened Article 69 by perpetuating a political environment under which the people of Uganda could not make a free and fair choice of the political system as to how they should be governed.
5. Whether or not any reliefs should be granted.

The following declarations were sought:

(i) That the passing of Referendum (Political Systems) Act 2000 by Parliament in one day, 7th June, 2000, without first referring to the relevant Standing Committee of Parliament was inconsistent with Article 90 (1) and (3) of the Constitution.

(ii) That the enactment of a Political Systems Referendum law which denies political parties of the constitutional right to participate in the referendum to choose a political system under Article 271 but instead institutes the `Movement' as the only recognised political system before the Referendum

is held and in contravention of Articles 20, 21, 29, 73, 75 and 269 of the Constitution is null and void and ineffectual.

(iii) That Parliament was incompetent to enact the Referendum (Political Systems) Act 2000 upon expiry of the time prescribed by The Constitution and hereby reduce the time allowed for a convassing, the law so enacted is null and void.

(iv) That the passing of the Referendum (Political Systems) Act 2000 was outside the competence of Parliament to the extent it was calculated to alter the Judgement or decisions of the Courts between the petitioners and the Government.

(v) That the Referendum (Political Systems) Act 2000 is a colourable legislation whose objectives and effect is to outlaw Political Organisations permanently except the Movement political organisations and institute a one party State and consequently the Act is in contravention of the Constitution."

The following are the few areas I would lend emphasis to:

As to whether the Referendum (Political Systems) Act 2000 is law to be challenged, there is no presumption that an expired statute is to be treated as dead for all purposes as contended by the Solicitor General. The expired Act has to be looked at in its entirety and the objectives thereunder examined and ascertained - See **Spencer vs Hooton (1920) 37 TLR 280 at p.281.** In the instant case, the task is easy because the saving provisions generally confined to the effects of a repealed Act are specifically made to apply to an expired Act by the **Interpretation Act (cap 3), Section 13 (3) -Volume I Laws of Uganda 2000.** Thus the grievances arising under the expired Referendum (Political Systems) Act 2000 which still

ripple the political landscape can be entertained in a court of law. This is the mischief of Article 137 (3)(a) of the Constitution which gives any party aggrieved by an act of Parliament, or any law or anything in or done under the authority of any law, unlimited access to this court to seek redress.

This is further clarified by this court's recent decision in **Uganda Association of Women Lawyers and Others v Attorney General, Constitutional Petition No.2 of 2003,** declaring **Rule 4, of the (Enforcement Procedure) Rules 1992 Directions, 1996,** to be inconsistent with the Constitution. This decision removed the impediment in the access to this court, of the 30 days' rule, within which an aggrieved party had to seek redress, from the date when she perceived the grievance. This therefore leaves the door open to seek redress from this court for generations to come.

I would therefore hold that the Solicitor General's objection to this court entertaining this petition is unsustainable. The Act is clearly challengeable.

Regarding the procedure adopted by Parliament in passing the Act I would point out that it is the role of this court to determine whether the means chosen by the legislature in suspending the constitutional provisions so as to attain its objective of passing the Referendum (Political systems) Act in record time of just three hours were justifiable.

The crux of the matter in this regard was whether the committee of the whole House could be a substitute for the relevant standing committee mandated by the Constitution to carry out certain functions, during the passing of an Act.

Article 90 (1) makes it mandatory for Parliament, during its first session, to appoint standing committees and other committees necessary for the efficient discharge of its functions. It is noteworthy that members of the standing committees are elected from among members of Parliament, and are elected during the first session of Parliament, (2)(a). The 1995 Constitution does not name a committee of the whole

House nor spell out its functions. Some of the functions of the standing committees as specified under 90 (3) are to discuss, scrutinize, carry out research and make recommendations on all bills laid before Parliament, carry out relevant research in their respective fields, and report to Parliament on their functions. In a nutshell the main function of standing committees is to consider Bills in the minutest detail and depth, thus doing what the House as a whole could not easily do if it had time. The committee of the whole House as its name implies consists of all members of the House in a less formal guise presided over by a Chairman instead of the Speaker.

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The Hansard of 7th June 2000, Annexture "A" to the Hon Speaker's affidavit reveals what took place that day in the House.

Some Members of Parliament are recorded as having complained about the unexpected and unusual speed with which they were rushing through the bill, as they were not prepared. Hon Nsambu is recorded as having expressed his concern thus:

> **"Mr Speaker Normally when we come here to debate things, all members are given copies of the Bill. But there are a number of people who are not having them and if. . . if Mr Speaker the Hon member is giving me this copy, how can you expect me to debate the same now when it has just been handed to me?"**

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Similarly, Hon Omara Atubo in his affidavit in support of the petition (paragraph 7), lamented:

> **". . . The Order paper for the business of Parliament of that day 7th June, 2000 did not indicate that there would be a second and third reading of the Bill. . . .**

The Referendum (Political Systems) Bill 2000 was gazetted and distributed to Hon Members on Monday, the 5th June and that has been this day, given the first reading with the leave of this House assembled on this last session of the Sixth Parliament. The motion is that, the Bill be given the Second Reading and this has now been allowed. . .”

After passing the resolution suspending Rule 39 which concerns Notice of Motions, Rule 99(5) and 99(6) which concern First Reading of Bills, Rule 100(5) which concern Second Reading, the House constituted itself into a committee of the whole House and the Bill was read a Second time and thereafter the Third time. On the Second Reading, however, Clauses 1 to 24 were adopted without any comment from the floor. Only cursory comments were made regarding clause 25; clauses 26 – 27 were not commented on either, only clauses 28 and 29 received some attention after which the Hon Minister of Justice and Constitutional Affairs moved the House to resume for the the Committee to report thereto.

I would say, with respect, that the requirements of Article 90(3) were not complied with. It did not receive the full treatment as envisaged by the Constitution. The Constitution makes it clear that the inquiry and scrutiny of the Bill must crucially rest on the committee, whose membership would be fewer and can make meaningful discussion and contributions rather than the entire membership of the whole House.

The Hansard further reveals that no kind of voting on any issue ever took place. This was clearly in breach of Article 89 (1) which stipulates:

“. . . any question proposed for decision of Parliament shall be determined by a majority of votes of the members present and voting.

(2) **The person presiding in Parliament shall have neither an original nor a casting vote and if on any question before Parliament the votes are equally divided, the motion shall be lost"**

It has been reiterated by the Supreme Court that Article 89 (1) means that ascertaining the majority in the House can hardly be made by any means other than actual counting. It is a question of dealing with numbers. – See **Paul Ssemogerere and Others vs The Attorney General, Constitutional Appeal No.1 of 2002.**

It is the Constitution, not Parliament which is the ultimate source of all lawful authority. The rules of procedure of Parliament including those which were flouted by the House were made subject to the Constitution, under Article 94. The obligations imposed by the Constitution had to be fulfilled. Article 2 stipulates that any conduct which is inconsistent with the Constitution is invalid. Though pressed for time, as the Hon Minister of Justice and Constitutional Affairs is recorded as having exhorted the House, that the need for speed was real as the Act should have been passed a long time before, within the time frame spelt out by Article 271, it is clear that the speedy exercise could not save the situation. No Parliament, however bona fide or well meaning can make any law or perform any act which is not sanctioned by the Constitution. The process was clearly flawed. In this respect Parliament would not be immune from judicial scrutiny nor would the resultant Act so passed enjoy constitutional blessing. I derive support from the case of **Paul K. Semogerere and Zachary Olum v Attorney General, Constitutional Appeal No.1 of 2000**, where my Lord, Kanyeihamba JSC, observed:

> **"It is clear that if Parliament is to claim and protect its powers and internal procedure, it must act in accordance with Constitutional provisions which determine its composition and the manner in which it must perform its functions. If it does not do so, then, any purported**

decision made outside those constitutional provisions is null and void and may not be claimed to be an Act of Parliament."

The Referendum (Political Systems) Act 2000 was supposed to have been made two years before the expiry of the term of the 1st Parliament so as to operationalise Article 271 and thus enable the people to exercise their fundamental right and freely canvass and campaign for public support for a political system of their choice for purposes of the referendum.

Article 271 provides:

"(1) **Not withstanding the provisions of Article 69 of this Constitution, the first presidential, parliamentary, local government and other public elections after the promulgation of this Constitution shall be held under the movement political system.**

(2) **Two years before the expiry of the term of the first Parliament elected under this Constitution, any person shall be free to canvass for public support for a political system of his or her choice for purposes of a referendum.**

(3) **During the last month of the fourth year of the term of Parliament referred to in clause (2) of this article, a referendum shall be held to determine the political system the people of Uganda wish to adopt.**

(4) **Parliament shall enact laws to give effect to the provisions of this article."**

The Bill, having been Gazetted on 12.06.2000 and the referendum held on 29.06.2000, left the people with less than one month within which to freely campaign and canvass, though Article 271(2) prescribed a whole year for that purpose. This drastic abridgement of the constitutionally prescribed time for canvassing support had the effect of indirectly amending Article 271 under Article 258, but outside the Constitutional procedure for amending the Constitution which

has to be by a special Act of Parliament. The fact that the Act was backdated to 02.07.1999 by section 2 was of no consequence. Though the power of Parliament to pass legislation includes a power to enact retrospective legislation such legislation must be valid and validly passed. As indicated above the Act was not valid and was not validly passed. It is also to be observed that even where retrospective legislation might be valid, in certain circumstances, Parliament cannot alter certain passed facts or events. It was a fact that people had not campaigned or canvassed for support as and when they were expected to, by the Constitution. The literal meaning of this impractical legal fiction was that people could campaign in arrears as poignantly put by Mr Lule SC. It could not be possible. The time had long gone by. I can hardly agree with the Solicitor General that despite Article 269 people had been free to campaign all along before the passing of the Act. It is in black and white that this could not have been possible because Article 269 still firmly maintained a lid on such activities, excepting the movement organisation which is in contravention of Article 75 prohibiting the formation of a one party state in Uganda, as was unanimously held by this court in **Constitutional Petition No.5 of 2002, Paul K. Ssemogerere and 5 Others vs Attorney General of Uganda.**

The result was that the people were unjustifiably deprived of their fundamental rights to freely associate, exchange and express their political ideas and aspirations. They were incapacitated politically as they could not campaign to effect their political destiny in one way or another.

In sum I would have no hesitation in holding that the Referendum (Political Systems) Act, 2000 failed to pass the test of being called an Act of Parliament. I would declare it null and void.

As pointed out above, having agreed with my brothers on all issues I would grant the declarations sought.

Dated at Kampala this ..... 25th ..... day of ..... June 2004

A.E.N. MPAGI-BAHIGEINE
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA
AT KAMPALA

CORAM: HON. JUSTICE G. M. OKELLO, JA
HON. JUSTICE A. E. N. MPAGI-BAHIGEINE, JA
HON. JUSTICE S. G. ENGWAU, JA
HON. JUSTICE .A. TWINOMUJUNI, JA
HON. JUSTICE C. N. B. KITUMBA, JA

CONSTITUTIONAL PETITION NO. 3 OF 2000

BETWEEN

1. PAUL K. SSEMOGERERE)
2. ZACHARY OLUM) :::::::::::::::::: PETITIONERS

AND

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

JUDGMENT OF ENGWAU, JA

The petitioners are challenging the validity of the Referendum (Political Systems) Act, 2000, herein after referred to as the Act, as being null and void on several grounds which may be summarised as follows:-

(i) **That Parliament passed the Act on 7th June, 2000 without referring it to a Standing Committee of Parliament;**

(ii) **That section 2 of the Act was in effect amending article 271 (2) without following the procedures laid down in articles 259, 260 and 261 of the Constitution;**

(iii) **That the passing of the Act on 7th June, 2000 by Parliament was done outside the time prescribed under article 271 (2) of the Constitution;**

(iv) **That the Act promotes and establishes one political party, the Movement, contrary to article 75 of the Constitution;**

(v) **That the Act denied political party activities the right for free and fair elections; and**

(vi) **That the Act was intended to nullify the decision of the Supreme Court of Uganda in Constitutional Appeal No. 1 of 2000, contrary to articles 28, 9[illegible] and 128 (2) of the Constitution.**

The petitioners and Hon. Omara Atubo, Member of Parliament, swore affidavits in support of the petition. The respondent filed a reply that was supported by the affidavits of Mr. Joseph Matsiko in his capacity as a Principal State Attorney and Hon. Edward K. Sekandi, the Speaker of Parliament, who attached a copy of Hansard to his affidavit.

At the commencement of the hearing, the following issues were framed for determination, namely:-

1. **Whether or not the Referendum (Political Systems) Act, 2000 is law and can be challenged.**

2. **Whether or not the procedures applied in enacting the Referendum (Political Systems) Act were consistent with the procedures prescribed under the Constitution of Uganda.**

3. **Whether or not the Act was made in contravention of article 271 of the Constitution of Uganda.**

4. **Whether or not the absence of a law regulating the activities of political organisations as provided in article 269 of the Constitution contravened article 69 by perpetuating a political environment under which the people of Uganda could not make a free and fair choice of the political system as to how they should be governed.**

5. **Whether or not any reliefs should be granted.**

The 1st issue is **whether or not the Referendum (Political Systems) Act, 2000 is law and can be challenged**. Mr. Godfrey Lule SC, learned counsel for the petitioners, submitted that the Act is law and can be challenged. In his view, the Act by

its form, character and process of its making was intended to be law by Parliament. It was enacted by Parliament under article 271 (4) of the Constitution to address a need under article 271 (1) thereof.

Whether it can be challenged or not Mr. Lule contended that the Act can be challenged under article 137 (3) of the Constitution. He submitted, therefore, that the petitioners allege that the Act is inconsistent with some provisions of the Constitution.

Mr. Lucian Tibaruha, learned Solicitor General, does not agree. He submitted by way of a preliminary objection on a point of law that the Act is no longer our statutory law. It is not listed in Volume One of the Laws (Revised Edition) Act that came into force on 1st October, 2003. He submitted, therefore, that under section 13 (3) of the Interpretation Act (Cap 3) the Act stands repealed. In his view, the sole purpose for which the Act was enacted was for the holding of a referendum. The Electoral Commission, under General Notice No. 1 of 2000 appointed 29th June, 2000 as the day the referendum would be held and it was indeed held on that day. It was his contention that the Act expired on that day. Mr. Tibaruha submitted, therefore, that the Act cannot be a subject of challenge in this court and it cannot be judicially noticed any more as an Act of Parliament. In support of his argument, Mr. Tibaruha relied on the authority of **Attorney General vs Dr. James Rwanyarare & 9 others, Supreme Court Constitutional Appeal No. 2 of 2003** in which

it was held, inter alia, that a dormant law cannot breach the Constitution because it is ineffective.

Mr. Lule does not agree. His contention was that the Act was passed by Parliament on 7 - 6 - 2000 and it was assented to on 9 - 6 - 2000. It was published on the gazette of 12 - 6 - 2000. The petition, according to counsel, was filed on 22 - 6 - 2000 and in time when the Act was valid law in force for the purposes of holding a referendum under the provisions of article 271 of the Constitution. Mr. Lule then submitted that the Act was and is still a subject of challenge in this court under article 137 (3) (a) & (b) of the Constitution. In his view, the Act was not dormant at the time and, therefore, **Dr. Rwanyarare case (supra)** is not applicable in the circumstances of this petition.

Mr. Lule further submitted that under section 13 (2) of the Interpretation Act, the repeal of the Act under section 13 (3) thereof does not affect the previous operations. In counsel's view, the effect of repeal is that the Act must be considered as it was although it may not be law today.

The petition is challenging the validity of the Referendum (Political Systems) Act, 2000 under article 137 (3) (a) & (b) of the Constitution which reads as follows:-

"137 (3). A person who alleges that -

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

anything in or done under the authority of any law; or

(b) any act or omission by any person or authority -

is inconsistent 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."

The Act being challenged was passed by Parliament of Uganda on 7 - 6 - 2000. It was assented to by the President on 9 - 6 - 2000 and it was published on 12 - 6 - 2000. The date of assent, in my view, should have been the date when the Act came into force. By the provisions of section 2 of the Act, however, it came into force on 2 - 7 - 99. It was purposely enacted by Parliament for the holding of a referendum. Under General Notice No. 1 of 2000, the referendum was held on 29 - 6 - 2000. The results were published on the gazette of 28 - 7 - 2000 under Gener: Notice No. 280 of 2000. In that publication, the Electoral Commission (EC) confirmed that the people of Uganda had adopted the Movement Political System under which they would be governed. The system is still in place. The Act, in my view, can be challenged in this court. It was valid law in force when the petition was filed. It was not dormant law. The decision in **Dr. Rwanyarare case (supra)** does not apply in the instant petition. The effect of the repeal of the Act does not affect its

previous operations. See: section 13 (2) of the Interpretation Act. I would, therefore, resolve the 1st issue in the affirmative.

The 2nd issue is **whether or not the procedures applied in enacting the Referendum (Political Systems) Act, 2000 were consistent with the procedures prescribed under the Constitution of Uganda.** Mr. Lule's concern here is that according to the affidavits sworn by Hon. Zachary Olum and Hon. Omara Atubo, both of whom were Members of Parliament (MPs) at the material time, the procedure applied in enacting the Act was not the procedure prescribed under the Constitution. Both MPs were not cross-examined on their affidavit evidence. It can be presumed, therefore, according to Mr. Lule, that the contents of their affidavits reflect the truth of how the Bill was passed into law by Parliament on 7 - 6 - 2000.

Learned counsel further submitted that Hon. Edward K. Sekandi, Speaker of Parliament, also swore an affidavit of what happened on 7 - 6 - 2000 about the Act. Hon. Speaker attached a copy of Hansard to his affidavit. According to Mr. Lule, the affidavits sworn by Hon. Zachary Olum, Hon. Omara Atubo and Hon. Edward K. Sekandi, together with a copy of the Hansard, it is clear that Hon. Mayanja Nkangi, the Minister of Justice and Constitutional Affairs, as he then was, moved a motion in the House that Parliament suspends the Rules of Procedure of Parliament to pass the Bill on 7 - 6 - 2000. The motion was passed and the Bill was read the first time, second time and

third time in succession and was declared passed in a record time of only 3 hours, without first being referred to the relevant Standing Committee of Parliament as envisaged by article 90 of the Constitution.

Mr. Lule submitted that under article 90 (1) of the Constitution, it is mandatory that Parliament appoints standing committees and other committees necessary for the efficient discharge of its functions. The function of the standing committee, among others, is to discuss and make recommendations on all bills la before Parliament. Under article 90 (2) (a) of the Constitution, the members of standing committees shall be elected from among members of Parliament during the first session of Parliament. According to Hon. Omara Atubo's affidavit, no Standing Committees/Sessional Committees were appointed immediately after the official opening of Parliament before transacting any other business in Parliament on 7 - 6 - 2000. The Parliament instead constituted itself into a Committee of the whole House for the purpose of discussing the Bill ar thereafter made recommendations to itself.

It was the contention of Mr. Lule that the functions of a Committee of the whole House are different from the functions of the standing committees. He submitted that under article 90 (3) (a) of the Constitution, a standing committee must **discuss and make recommendations on all bills laid before Parliament** unlike a Committee of the whole House of

Parliament. (Emphases added). Failure by Parliament to follow the procedure prescribed in enacting the Act under article 90 of the Constitution, according to Mr. Lule, rendered the Act null and void. In his view, the holding of the referendum purportedly under the Act, was also null and void.

Mr. Lule submitted further that the Act was passed by Parliament without adhering to the provisions of article 89 of the Constitution that requires voting. According to Mr. Lule, there is nothing on record to establish that voting took place. Mr. Lule submitted that in the absence of a majority of votes of the members present and voting, the only voting that took place was by voice. It was his contention that in **Attorney General vs Dr. Paul K. Ssemogerere & 3 others, Constitutional Appeal No. 1 of 2002,** the Supreme Court confirmed the decision of this court that voting by voice is unconstitutional. He, therefore, invited this court to hold that Parliament enacted the Act in contravention of article 89 (1) of the Constitution.

Mr. Tibaruha did not agree. According to him it is not mandatory under article 90 of the Constitution that every Bill must be referred to a relevant Standing Committee. In his view, when Parliament constitutes itself into a Committee of the whole House, it discusses a Bill and makes recommendations to Parliament just as any Standing Committee would do. All Members of Parliament participate and according to Hansard, the Committee of the whole House discussed the Bill clause by

clause. He submitted, therefore, that a Committee of the whole House is a Standing Committee in terms of rules 105, 106 and 107 of the Rules of Procedure of the 6th Parliament. In his view, the Act did not contravene article 90 (1) & (3) (a) & (e) of the Constitution as alleged. He, however, made no mention of article 89 of the Constitution. He then concluded that a Bill becomes law once it is passed by Parliament and assented to by the President. In his view, those are mandatory requirements, which must be met before a Bill becomes law.

It is not in dispute that the Referendum (Political Systems) Act, 2000 was passed by Parliament after it had been scrutinised by a Committee of the whole House. It was not referred to a Standing Committee. Does that procedure invalidate the Act? In order to appreciate the arguments of both counsel, it is necessary to reproduce articles 89 and 90 of the Constitution.

"**90. (1) Parliament shall appoint standing committees and other committees necessary for the efficient discharge of its functions.**

(2) The following shall apply with respect to the composition of the committees of Parliament -

(a) the members of standing committees shall be elected from among members

of Parliament during the first session of Parliament;

(b) the rules of procedure of Parliament shall prescribe the manner in which the members and chairpersons of the committees are to be elected.

(3) The functions of standing committees shall include the following -

(a) to discuss and make recommendations on all bills laid before Parliament.

(b) .....

(c) .....

(d) .....

(e) to report to Parliament on their functions.

(4) .....

(a) .....

(b) .....

(c) .....

(i) .....

(ii) .....

(iii) ....."

(Emphasis added).

In my view, **other committees** which Parliament is required to appoint, in addition to standing committees, a committee of the whole House would fully fit in, necessary for the efficie discharge of its functions. It is not in dispute that no standing committees were appointed during the first session of Parliament immediately after the official opening on 7 - 6 - 2000. The 6th Parliament instead constituted itself into a Committee of the whole House for the purpose of debating the Bill and all Members of Parliament participated.

As Parliament is empowered to appoint a Committee of the whole House as one of its committees, that committee in effect was a good as a standing committee necessary for the efficient discharge of the functions of Parliament. The Committee of the whole House was, therefore, in my view, one of the standing committees. It carried out the same functions as any standing committee would do. It carried out those functions in terms of rules 105 (1), 106 (1) and 107 of the Rules of Procedure of the 6th Parliament of Uganda as envisaged by article 90 (2) (b) of the Constitution. The rules of the Constitution followed by

Parliament in enacting the Referendum (Political Systems) Act, 2000, in my view, did not contravene article 90 (1) and (3) (a) & (e) of the Constitution, and to that extent is not null and void.

As regards the method of voting by Members of Parliament before the Bill was passed as an Act of Parliament, it is necessary to reproduce the provisions of article 89 (1) of the Constitution.

> "89. (1) **Except as otherwise prescribed by this Constitution or any law consistent with this Constitution, any question proposed for decision of Parliament shall be determined by a majority of votes of the members present and voting."**

It is settled in this Court and the Supreme Court in **Attorney General vs Dr. Paul Kawanga Ssemogerere & 3 ors, Constitutional Appeal No. 1 of 2002** that voting by voice is invalid. It is the contention of Mr. Lule that as the Act was passed by Parliament through voting by voice, that procedure contravened article 89 (1) of the Constitution, and to that extent renders the Act null and void. I agree. As Mr. Tibaruha did not address court on the matter I have no comment to make.

The 3rd issue is **whether or not the Act was made in contravention of article 271 of the Constitution of Uganda.** In order to appreciate the arguments of counsel for both parties it

is necessary to reproduce the provisions of article 271 of the Constitution as hereunder:

"271. (1) **Notwithstanding the provisions of article 69 of this Constitution, the first presidential, parliamentary, local government and other public elections after the promulgation of this Constitution shall be held under the movement political system.**

(2) **Two years before the expiry of the term of the first Parliament elected under this Constitution, any person shall be free to canvass for public support for a political system of his or her choice for purposes of a referendum.**

(3) **During the last month of the fourth year of the term of Parliament referred to in clause (2) of this article, a referendum shall be held to determine the political system the people of Uganda wish to adopt.**

(4) **Parliament shall enact laws to give effect to the provisions of this article."**

Mr. Lule submitted that article 271 (2) of the Constitution gives a clear period of 2 years for the people of Uganda to freely canvass and adopt a political system of their choice. Before the people of Uganda could freely canvass and adopt a political system of their choice, a law according to Lule, was required to be in place under article 271 (4) of the Constitution. Parliament in compliance made the Referendum (Political Systems) Act, 2000 on 7 - 6 - 2000. The Act was assented to on 9 - 6 - 2000 and the same was published in the gazette of 12 - 6 - 2000, one month less before holding a referendum.

Mr. Lule further submitted that under article 271 (3) of the Constitution, Parliament was supposed to pass a law referred to in article 271 (2) one year in advance before holding a referendum. The Referendum (Political Systems) Act was passed on 2 - 6 - 2000 and was assented to on 9 - 6 - 2000. As the referendum was held on 29 - 6 - 2000, that would have given the people of Uganda only 20 days during which to freely canvass for public support and adopt a political system of their choice in contravention of article 271 (3) of the Constitution. In an attempt to cure the defect, Parliament, however, backdated the law by 12 months. The Act came into force on 2 - 7 - 99. Mr. Lule's concern was that you cannot perform the activities in arrears.

Mr. Lule further pointed out that the effect of section 29 of the Act was to validate all the things which were done under the Referendum Act, 1999, yet that Act was nullified. He submitted that nullification of any law makes that law void ab initio. It was

his contention, therefore, that the Act was made in contravention of article 271 of the Constitution. It narrowed the time to less than 2 years which amounted to a variation in the provisions of that article. The variation, according to counsel, amounted to an amendment of the Constitution without following the procedure laid down in Chapter Eighteen of the Constitution. Consequently, the variations under sections 2 and 29 of the Act rendered it void ab initio.

Mr. Tibaruha did not agree. He submitted that the Referendum (Political Systems) Act, 2000 does not amend article 271 of the Constitution, and therefore, it is not inconsistent. He submitted that the 1995 Constitution does not prohibit retrospective legislation. In his view, section 2 of the Act does not negate any right or obligation under the Constitution. He also submitted that section 29 of the Act was intended to validate any actio taken or purported to have been taken in good faith, and any statutory instrument made or purported to have been made in good faith, before the publication of this Act in the gazette for the purposes as required by article 271 (2) and (3) of the Constitution.

Now for Parliament to backdate the date when the Act came into force tantamounts to retrospective legislation. Does Parliament have authority for retrospective legislation? Mr. Tibaruha's answer is in the affirmative while that of Mr. Lule is in the negative. In order to appreciate both answers it is necessary to consider the following provisions of the Constitution. First, article 1 (1) of the Constitution reads:

> **"1. (1) All power belongs to the people who shall exercise their sovereignty in accordance with the Constitution."**

The Referendum (Political Systems) Act, 2000 was passed on 7 - 6 - 2000 and assented to on 9 - 6 - 2000. The date of assent, in my opinion, would have been the date when the Act came into force, and that would have given the people of Uganda only 20 days before holding a referendum on 29 - 6 - 2000. Article 271 (2) and (3) of the Constitution give the people of Uganda a two-year period before the expiry of the First Parliament or one-year period respectively, during which to freely canvass for public support for a political system of their choice before holding a referendum. Retrospective legislation in my view, had denied the people of Uganda all the power that belongs to them in exercising their sovereignty under article 1 (1) of the Constitution. The people of Uganda did not freely canvass for public support for a political system of their choice. It was assumed that they did so but the

people of Uganda did not. Section 29 of the Act which purports to validate what the people of Uganda did not do, does not help the situation either.

The effect of section 2 of the Act, in my view, was an attempt by Parliament to amend the provisions of article 271 (2) and (3) of the Constitution. If that was what the legislators intended to do, then the procedure stipulated in Chapter Eighteen and under article 258 of the Constitution would have been followed. Parliament, in my view, was also attempting to nullify the decision of the Supreme Court in Constitutional Appeal No. 1 of 2000, contrary to articles 28, 92 and 128 (2) of the Constitution.

Secondly, article 2 (1) of the Constitution reads:

> "2. (1) **This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.**"

Clearly, in Uganda the Constitution is supreme and not Parliament. It was, therefore, an invalid exercise by Parliament to pass retrospective legislation against the provisions of article 271 (2) and (3) of the Constitution. Parliament was required to put in place a law 2 years before Parliament expired or 1 year before holding the referendum. Failure to comply with that constitutional requirement, retrospective legislation under section 2 of the Act did not cure that defect. It was unconstitutional

unlike in the United Kingdom where Parliament is supreme and would pass retrospective legislation. Section 2 of the Act, in my view, contravenes article 271 (2) and (3) of the Constitution.

The 4th issue is **whether or not the absence of a law regulating the activities of Political Organisations as provided in article 269 of the Constitution contravened article 69 by perpetuating a political environment under which the people of Uganda could not make a free and fair choice of the political system as to how they should be governed.**

Mr. Lule pointed out from the outset that in order to appreciate the complaint in the 4th issue, article 69 (1) and (2) must be read together with article 269 of the Constitution. He then submitted that persons subscribing to multiparties could not open branches or hold rallies at the time when the referendum was held. He contended that the law on political parties should have been replaced otherwise only the movement system was allowed to carry all the activities alone. In his view, the referendum was held when the free choice of the people was not met. It was Hobson's choice which in his view was no choice at all because only one system was in operation and no other choice. It was his contention that because of that the Referendum Act offended article 69 of the Constitution.

Mr. Lule's second complaint was in respect of section 12 of the Act. This section deals with rules to be followed for canvassing before the referendum was held. In counsel's view, the rules imposed more restrictions when, in fact, article 269 was still in force. The restrictions under article 269 coupled with the restrictions imposed by section 12 of the Act made it impossible to have a free and fair referendum at the time.

Mr. Tibaruha submitted that the 4th issue was misconceived and irrelevant. According to him, it was neither pleaded nor is it constitutional issue. The petitioners were at liberty to challenge the results of the referendum under the Act but they did not. In his view, this issue should be dismissed.

The 1st complaint raised in the 4th issue is that the people of Uganda have a right to choose and adopt a political system of their choice through free and fair elections or referenda as enshrined in article 69 (1) of the Constitution. The choice of a political system through a referendum that was held on 29 - 6 2000 was between the movement political system and the multi-party political system under article 69 (2) of the Constitution. Before the holding of that referendum, Parliament was required to put in place a law regulating the activities of political organisations for free and fair elections or referenda under article 73 of the Constitution. This means that the enactment of such a law would bring the demise of article 269 of the Constitution.

That never happened because article 269 was still operational during the referendum of 29 - 6 - 2000. It also means that the referendum was not held under free and fair atmosphere because people subscribing to multi-party system were in bondage. They could not interact with supporters at the grassroots as they were not allowed to hold rallies or open branches. The import of section 12 of the Act was still to restrict them the more. All the activities were left for the movement political system alone in contravention of article 75 of the Constitution.

The 5th issue is **whether or not reliefs should be granted**. Mr. Lule prayed for grant of reliefs that the Act was null and void. In consequence, the referendum held under it the people of Uganda did not have a choice. Therefore, the Act was unconstitutional.

Mr. Tibaruha dismissed the request for grant of reliefs. He submitted that the petitioners are not entitled to any relief even if it is held that the Referendum (Political Systems) Act, 2000 was null and void because the results of the referendum would not be affected. He relied on the doctrine of "**prospective overruling**" enunciated in **Public Prosecutor vs Dato Yap Peng (1988) LRC 93.** The effect of that doctrine can be simply summarised that when the Supreme Court, as the highest court, holds that a Statute is unconstitutional, after overruling a long string of decisions to the contrary, the court will not give retrospective effect to the declaration of unconstitutionality to set aside proceedings of convictions or acquittals which had taken place

under that statute prior to the date of the judgment which declared it to be unconstitutional. The convictions or acquittals secured as a result of the application of the impugned statute previously will accordingly not be disturbed. Mr. Tibaruha asked this court not to grant any relief to the petitioners on the ground that whether or not the Act of 2000 is declared null and void, the decision does not affect the results of the referendum.

In reply, Mr. Lule submitted that the doctrine in question relates to criminal cases and does not apply to cases of a civil nature. He also supported his argument by relying on the provisions of section 13 of the Interpretation Act to the effect that repeal of an Act does not affect the previous operations.

The doctrine of "**prospective overuling**" in **Dato Yap Peng** case (supra) does not apply in this case of a civil nature. Repeal also of an Act does not affect previous operations. In the result, I would allow the petition and grant the following remedies:-

(i) The Referendum (Political Systems) Act, 2000 was null and void.

(ii) The referendum held under that Act, the people of Uganda did not have a choice.

(iii) The Act was unconstitutional.

(iv) The petitioners are entitled to costs.

Dated at Kampala this 28th day of June 2004.

S. G. Engwau

JUSTICE OF APPEAL.

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CORAM: HON. MR. JUSTICE G.M. OKELLO, JA
HON. LADY JUSTICE A.E.N. MPAGI-BAHIGEINE, JA
HON. MR. JUSTICE S.G. ENGWAU, JA
HON. MR. JUSTICE A. TWINOMUJUNI, JA
HON. LADY JUSTICE C.N.B. KITUMBA, JA

CONSTITUTIONAL PETITION NO.3 OF 2000

1. PAUL K. SSEMOGERERE }
2. ZACHARY OLUM }.....PETITIONERS

VERSUS

ATTORNEY GENERAL .....RESPONDENT

JUDGMENT OF TWINOMUJUNI, JA:

INTRODUCTION

This petition was brought under article 137(3) of the Constitution to challenge the validity of The Referendum (Political Systems) Act, 2000 which was enacted into law on 9th of June 2000 and the referendum which was held under the Act on 29th June 2000. It sought for declarations, among other things, that the Act was null and void ab initio and therefore the referendum which was held under it was null and void as well.

The petition is supported by three affidavits sworn by the petitioners and one sworn by Hon. Omara Atubo, Member of Parliament. The respondent filed an answer to the petitioner in which he asserted that both The Referendum (Political Systems) Act 2000 and the referendum which was held pursuant to the Act were enacted and organised in accordance with the Constitution. The answer to the petition is supported by an affidavit sworn by Mr. Joseph Matsiko, a Principal State Attorney employed by the respondent. It is further supported by an affidavit sworn by the Speaker of Parliament, Rt. Hon. Edward K. Sekandi, sworn on 23rd April 2004. Attached to the affidavit is a copy of the Hansard which contains a full record of proceedings of the National Assembly on the afternoon of 7th June 2000, when the Act was debated and passed.

THE BACKGROUND

The background facts to this petition are as follows:-

On the afternoon of the 7th June 2000 at exactly 3.20 p.m., the National Assembly of Uganda convened at Parliament House. Shortly after the communication from the chair, Hon. Mayanja Nkangi, the then Minister of Constitutional Affairs, tabled a Bill entitled The Referendum (Political Systems) Act 2000 (herein after called the Act.). The Head Note to the Act read:

> **"An Act to make provision for holding of the referendum required to be held under article 271 of the Constitution to determine the political system the people of Uganda wish to adopt and for other related matters."**

He moved that it be read the first time, which was done. Thereafter, he applied that rules of procedure of Parliament be suspended to enable the house read it the second and third time and enact the same into law that afternoon. That was done. The Bill was hurriedly debated through the 2nd and third readings and was passed at 5.50 p.m. On 9th of June 2000 the Act received Presidential assent. Section 2 of the Act provided that the Act would be deemed to have come into force on 2nd July 1999. Section 4 of the Act provided that the referendum shall be held. Section 5 provided that the Electoral Commission shall appoint and publish a date between 3rd June 2000 and 2nd July 2000 on which the referendum would be held. By that time, however, the Electoral Commission had already, in General Notice No.277 of 2000 published on 17th May 2000, appointed and published the 29th June 2000 as the day on which the referendum would be held. On that day a referendum was duly held. Under General Notice No.280/2000 published on 28th July 2000, the Electoral Commission informed the people of Uganda that they had adopted the Movement Political System provided for in Article 69 of the Constitution.

On the 22nd of June 2000, the petitioners filed this petition. When the petition came up for hearing on 17th October 2000, it was agreed by the parties and the court that this petition be stayed to abide the results of a related petition challenging the validity of Act No.13 of 2000 (the first amendment to the Constitution of Uganda, 1995). The matter was concluded in the Supreme Court on 29th January 2004. Hence these proceedings now.

THE ISSUES

At the hearing of this petition on 28th April 2004, the parties agreed on the following issues for determination:

1. Whether or not The Referendum (Political Systems) Act, 2000 is law and can be challenged.

2. Whether or not the procedures applied in enacting The Referendum (Political Systems) Act, 2000 were consistent with the procedures prescribed under the Constitution of Uganda.

3. Whether or not the Act was made in contravention of article 271 of the Constitution of Uganda.

4. Whether or not the absence of a law regulating the activities of political organisations as provided under article 269 of the Constitution contravened article 69 by perpetuating a political environment under which the people of Uganda could not make a free and fair choice of the political system as to how they should be governed.

5. Whether or not any reliefs should be granted.

At hearing, the petitioners were represented by Mr. Godfrey Lule and Mr. Joseph Balikuddembe. The respondent was presented by Mr. Lucian Tibaruha, the Solicitor General and Mr. Joseph Matsiko, the Principal State Attorney in the Ministry of Justice and Constitutional Affairs.

EVIDENCE

As already mentioned above, three witnesses gave evidence in support of the petition and two witnesses gave evidence in support of the reply to the petition. All evidence was by affidavit. The first petitioner Dr. Paul Kawanga Ssemogerere is a veteran politician and the President General of the Democratic Party. He has served as a Member of Parliament for a number of terms and as Deputy Prime Minister and Cabinet Minister for a number of years. He deponed that he was affected by the enactment of the Act in his capacity as a citizen and also as a member and leader of the Democratic Party. The gist of his evidence is that he learnt about the manner of its enactment from the 2nd petitioner who is a Member of Parliament and Hon. Daniel Omara Atubo another sitting Member of Parliament. From his experience in politics and his knowledge of the Constitution, he is convinced that the Act was enacted unconstitutionally. He decided to contest it in this Court.

The other two witnesses are Members of Parliament and were present in the House when the Act was enacted and they described in their respective affidavits what transpired. Most of their testimony is corroborated by the evidence of Rt. Hon. Edward K. Sekandi and especially the Hansard containing the proceedings of the day which is attached to his affidavit. Though Mr. Joseph Matsiko swore an affidavit in support of the reply, its contents are mainly his legal interpretation of what transpired in the House. No cross-examination of any of these witnesses took place presumably because there was no controversy as to how the Act was enacted. Most of

were framed and agreed upon raise questions of legal and constitutional interpretation, which I now propose to go into.

GENERAL RULES OF CONSTITUTIONAL INTERPRETATION

The jurisdiction of this court is conferred by Article 137 of the Constitution. It states:

> "(1) .....
>
> (2).....
>
> (3) A person who alleges that -
>
> (a) an Act of Parliament or any other law or anything in or done under the authority of any law; or
>
> (b) any act or omission by any person or authority,
>
> is inconsistent 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".

By the nature of the issues which have been framed in this petition, this court is being moved to perform three major duties conferred upon it by Article 137(3) of the Constitution:

(a) Declare whether or not The Referendum (Political Systems) Act, 2000 is inconsistent or contravens the Constitution.

(b) Declare whether any act done under the authority of that law contravenes or is inconsistent with the Constitution.

(c) Harmonise various articles of the Constitution relevant and incidental to the Interpretation in (a) and (b) above.

The rules and principles of Constitutional Interpretation in common law jurisdictions in general, and in Uganda since 1995 in particular, have been exhaustively discussed by the Supreme Court and this court in **Major General Tinyefuza vs. Attorney General Constitutional Case No.1 of 1996** and **Attorney General vs. Major General Tinyefuza Constitutional Appeal No.1 of 1997** respectively. I also had occasion to discuss at length the same principles in **Dr. James Rwanyarare & Anor vs. Attorney General, Constitutional Petition No.5 of 1999** and **Zachary Olum and Anor. vs. Attorney General, Constitutional Petition No.6 of 1999.** I shall not repeat them here in detail. Lawyers who may be interested in the details can visit those authorities and read the details for themselves. In this judgment, I only intend to give a general summary of the principles involved. I cannot do any better than quote from the judgment of Manyindo, DCJ (as he then was) in Major **General Tinyefuza vs. Attorney General** (supra) where he summarised the principles as follows:

> *"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 construction of statutes also apply to the construction of the 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 vs. El Mann [1969] EA*

357 and Uganda vs. Kabaka's Government [1965] EA 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, unfettered 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 fundamental 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 flexible, keeping in view ideals of the people, social-economic and political-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 provision in the constitution touching on fundamental human rights ought to be construed broadly and liberally in favour of those on whom the rights have been confirred by the Constitution."[Emphasis mine]

In the same judgment, the learned Deputy Chief Justice observed:

"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 paramountcy of the written Constitution. The other principle is that the words of the written constitution prevail over all unwritten conventions, precedents and practices."

In **Smith Dakota vs. North Carolina, 192 US268(1940)** the US Supreme Court opined:

"It is an elementary rule of constitutional construction that no one provision of the Constitution is to be segregated from the others and to be considered alone but that all the provisions bearing upon a particular subject are to be brought into view and to be interpreted as to effectuate the greater purpose of the instrument."

Finally, we must never loose sight of the provisions of Article 126(1) that:

"Judicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with the law and with the values, norms and aspirations of the people."

[Emphasis mine]

Continuously bearing these principles in mind, I now turn to consideration of the agreed issues in this petition.

ISSUE NO. ONE: WHETHER ACT IS LAW AND CHALLANGABLE

The gist of this issue is whether The Referendum (Political Systems) Act, 2000 is law that can be challenged in a Constitutional Court. This issue must have been framed at the request of the Attorney General because Mr. Godfrey Lule, learned counsel for the petitioners, confessed that he did not comprehend what the issue was about. Mr. Lucian Tibaruha, the learned Solicitor General who appeared for the respondent soon revealed what it was all about. His submissions on the issue went as follows:

The Act was enacted under the authority of article 271(4) of the Constitution. Its sole purpose was to enable the holding of a referendum stipulated in the article. It was assented to by the President on 9th July 2000 but was deemed to have come into force on 2nd July 1999. On the 29th June 2000, the referendum was held in accordance with the Act. On 28th July 2000 the Electoral Commission published the results of the referendum and the Act expired and lapsed. The Act is now listed as spent in the Laws of Uganda which came into force on 1st October 2003. Under article 137(3)(a) only an Act of Parliament can be challenged in this court but The Referendum (Political Systems) Act is no longer such an Act and cannot be a subject of challenge in this court. Mr. Tubaruha cited section 13 of the Interpretation Act and **Attorney General vs. Dr. Rwanyarare and Others, Constitutional Petition No.2 of 2003** in support of his arguments.

In reply, Mr. Lule submitted that the Act was enacted by Parliament and was assented to by the President. It was intended to be a law to serve a purpose stipulated in article 271(3). The purpose, to enable the holding of a

referendum on political systems, was achieved on 29th June 2000. The Movement Political Systems which was declared chosen is still in place. In his view, the case of **Attorney General vs. Rwanyarere** (supra) was distinguishable on the facts of the instant case and section 13(2)(b) and (c) means that the Act has to be challenged at the time it was enacted. He pointed out that when this petition was filed on 22nd June 2000, the Act was still a valid law and therefore it was a law that was and is capable of being challenged.

It is now common knowledge that article 271 under which the Act was enacted has **expired**. It was a transitional provision which stipulated that a referendum on political systems in article 69 of the Constitution had to be held one year before the elections of the second Parliament to be elected under the 1995 Constitution were held. It is also common knowledge that the Act was enacted for the sole purpose of making provision for holding of a referendum required under article 271 of the Constitution. That referendum was held on 29th June 2000. There after the Act **"expired"** and ceased to be law. Nevertheless, before it **"expired"**, this petition was filed in this court to challenge the Act. This petition was filed on 22nd June 2000, just under two weeks after it received Presidential assent. I have no doubt that at the time the petition was filed, the Act had not yet expired. That's why subsequently a referendum was held under its authority. I see absolutely no reason why it could not be challenged under article 137(3) of the Constitution. In my judgment, this objection to the petition cannot be sustained.

There is yet another reason why the objection cannot stand. I hold the view that even if the petition had been filed long after the "**expiry**" of the Act, the challenge to the expired Act would still be valid. There are two reasons in support of this view and both of them have their basis in article 137(3) which I shall reproduce here for ease of reference:

> "**Article 137(3). A person who alleges that-**
>
> **(a) an Act of Parliament or any other law or anything in or done under the authority of any law; or**
>
> **(b) any act or omission by any person or authority,**
>
> **is inconsistent 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."**[Emphasis mine]

The first reason is that this article permits a challenge where

> **"anything done under the authority of any law.....is inconsistent or in contravention of the Constitution".**

In the instant case, following the enactment of the Act, a referendum was held to decide which, of the Political Systems in article 69, the people of Uganda preferred. On 28th July 2000, the Electoral Commission announced that the people had chosen The Movement Political System. Up to this day the system is in place. In my humble opinion, for as long as the system remains in place its validity can be challenged under article 137(3) of the Constitution.

The second reason is that article 137 does not provide any time bar within which petitions must be filed in court. The only time bar was stipulated in Legal Notice No.4 of 1996 otherwise known as

> **"Modifications to the Fundamental Rights and Freedoms (Enforcement Procedure) Rules, 1992 Directions, 1996."**

Section 4(1) of those rules provides:

> **"The petition shall be presented by the petitioner by lodging it in person, or by or through his or her advocate, if any, named at the foot of the petition, at the office of the Registrar and shall be lodged within thirty days after the date of the breach of the Constitution complained of in the petition."**[Emphasis mine]

Recently, in the case of **Uganda Association of Women Lawyers and 5 others vs. the Attorney General, Constitutional Petition No.2 of 2003,** the above quoted rule was in a unanimous judgment of this court declared unconstitutional. Therefore, in my view, the Movement Political System which was put in place under the authority of article 271 and The Referendum (Political Systems) Act 2000 could last one hundred or more years!

I am aware that article 74 of the Constitution provides ways in which a political systems put in place under article 271 can be changed. Article 74 provides:

> **"(1) A referendum shall be held for the purpose of changing the political system-**

(a) if requested by a resolution supported by more than half of all members of Parliament; or

(b) if requested by a resolution supported by the majority of the total membership of each of at least one half of all district councils; or

(c) if requested through a petition to the Electoral Commission by at least one-tenth of the registered voters from each of at least two-thirds of the constituencies for which representatives are required to be directly elected under paragraph (a) of clause (1) of article 78 of this Constitution.

(2) The political system may also be changed by the elected representatives of the people in Parliament and district councils by resolution of Parliament supported by not less than two thirds of all members of Parliament upon a petition to it supported by not less than two thirds majority of the total membership of each of at least half of all district councils.

(3) The resolutions or petitions for the purposes of changing the political system shall be taken only in the fourth year of the term of any parliament." [Emphasis mine]

I wish to point out here that this article does not provide a time frame within which the political system can be changed. All that this article provides for

is that IF the people of Uganda want to change a Political System, they can do it on request in a **RESOLUTION OR PETITION** in the manner stated therein above. However, IF such a request is to be made, the **RESOLUTION OR PETITION** shall only be taken in the fourth year of the term of any Parliament.

It should be noted that this article, especially clause (3) does not say that a referendum shall be held in the fourth year of the term of any Parliament. It is only **resolutions** or **petitions** which will be taken if requested. Of course, if no request is made, no referendum will be necessary. There is no requirement in our Constitution to hold a referendum once every five years as A MUST. Article 74 of the Constitution contains no such requirement. A referedum under that article can only be held IF requested in accordance with the article. So theoretically, a political system chosen under article 271 could stay in power for a hundred years.

If I am correct in this analysis, any one living in Uganda during the continuance of the political system could challenge the system under article 137 of the Constitution. This is because our Constitution was adopted, enacted and given to ourselves and our posterity - See the preamble. The easiest and the most logical way to challenge the system would be to challenge the validity of the law under the authority of which the system was put in place. In the instant case, the law to challenge would be article 271 and the Act of 2000 although both have expired.

I have considered the provisions of section 13 of the Interpretation Act and the Supreme Court case of **Attorney General vs. Dr. Rwanyarare and others** (supra) which were relied on by the learned Solicitor General. I am

afraid I do not find them relevant or useful to his case. I shall discuss section 13 of the Interpretation Act in this judgment.

My conclusion on this issue is that this petition is valid because it was filed when the Act was still law. However, even if the Act had expired, it could have been filed any other time as long as the political system that was put in place under the authority of the Act is still in place.

ISSUE NO. THREE: CONSISTENCY OF THE ACT WITH ARTICLE 271

This is whether or not the Act was made in contravention of article 271 of the Constitution. I find it more logical and convenient to discuss and dispose of this issue before discussing issue No.2 which is about validity of the procedures which were followed by Parliament when enacting the Act. Issue No.3 raises the question as to whether Parliament should have bothered to enact the Act in the first place. I think this should be disposed of before considering whether Parliament followed the correct procedure in enacting the law.

Mr. Lule for the petitioners attacked the Act on three fronts:

(a) That article 271 of the Constitution required that the Act be enacted at least two years before the referendum under the article was held. In this case, the Act was enacted just three weeks before the referendum was held. In the process the people were not given at least two years to freely canvass public support for a political system of their choice as required

by article 271(2). This contravened the article and rendered the Act null and void.

(b) Section two of the Act provided that the Act would be deemed to have come into force on 2nd July 1999. Though this was intended to manipulate time by stretching it backwards to comply with article 271(3), it was an attempt to amend article 271(2) by shortening the period provided by the article to canvass for a political system of the people's choice. Not only did this contravene the Constitution but it in effect amended the Constitution without complying with chapter 18 of the Constitution.

(c) That some provisions of the Act, especially section 12 thereof clearly contravened article 271(2) of the Constitution. Section 12 of the Act in Mr. Lule's view, imposed restrictions on the freedom of association and assembly whereas article 271(2) provided that anyone shall be free to canvass for public support for a political system of his/her choice.

In reply, Mr. Tibaruha submitted that the Act did not contravene article 271 at all. First, article 271(4) did not stipulate the time when the law to operationalise the article should come into force. It does not provide anywhere that it had to be enacted at least two years before the referendum. In his view, article 271(2) and (3) had to be read together and the total effect would be that the law had to be made at least one year before the referendum. Parliament had power to make retrospective legislation. Since section 2 of the Act backdated the Act by one year, the Act complied with

article 271. In his view, section 2 of the Act did not have the effect of amending article 271 but instead it made the Act compliant with the article.

Mr. Tibaruha defended the provisions of the Act generally and those in section 12 thereof in particular. In his view, that section did not restrict the freedoms of assembly or association. The rights of the people to canvass for a political system of their choice was recognised. All that it required was to simply notify the authorities in writing 72 hours before a meeting was held. The authorities did not have powers under the Act to stop any meeting once notified of it.

I will start by laying out in full the provisions of article 271 of the Constitution. It provides:

> "271(1) **Notwithstanding the provisions of article 69 of this Constitution, the first presidential, parliamentary, local government and other public elections after the promulgation of this Constitution shall be held under the movement political system.**
>
> (2) **Two years before the expiry of the term of the first Parliament elected under this Constitution, any person shall be free to canvass for public support for a political system of his or her choice for purposes of a referendum.**
>
> (3) **During the last month of the fourth year of the term of Parliament referred to in clause (2) of this article, a referendum shall be held to determine the political system the people of Uganda wish to adopt.**

(4) Parliament shall enact laws to give effect to the provisions of this article."[Emphasis mine]

A number of points stand out of the provisions of this article:

(a) Parliament is given power to enact laws to regulate the holding of a referendum to chose a political system provided in article 69.

(b) Both articles 69 and 271(2) require that the exercise be conducted in free and fair manner.

(c) Article 271 (2) and (3) read together clearly show that the people were entitled to at least twelve months of free canvassing before the referendum was held and two years of political freedom before parliamentary elections were held.

The issue then is whether this Act which was enacted purposely to fulfil the requirements of article 271 did in fact comply with its requirements. *I must state here categorically that by providing that the people must be free to canvass for support for referendum one clear year before it was held, article 271 set a time limit within which Parliament had to make law to provide for the holding of the referendum and also to provide for an atmosphere in which a free and fair referendum could be held. To me, this means that both the law to be enacted under articles 73(1) and 271(4) had to be in place two years before the Parliamentary elections of 2001 and one year before the holding of the referendum which was held on 29/6/2000. In my judgment this Act was enacted almost three years late in contravention of the Constitution. Without both laws, there was no way canvassing for public*

support could start. The Referendum Act was needed to give guidelines on how the canvassing would be done, how the elections would be conducted, how the referendum question(s) would be framed, who would frame it (them) e.t.c. Moreover, it was necessary for the people to know what the referendum question(s) would be before any canvassing could start. The political Parties and Organisations Act, 2002 which was to be enacted under the authority of article 73 had to be in place in order to free political parties which had been in bondage since 1995. In my judgment this Act was enacted almost three years late in contravention of the constitution. Without that law, a conducive atmosphere for holding a free and fair referendum as required by articles 61(a), 69 and 271(2) could not exist. This is why I believe that both these Acts should have been in place at least one year before the referendum of 29/6/2000 was held. They should have been enacted between October 1995 and June 1999.

Therefore, the enactment of The Referendum Act 2000 on 9th June 2000 only 20 days before the referendum contravened the requirements of article 271 in that respect.

Did the provision of section 2 of the Act which made the effect of the Act retrospective for one year cure the defect? In my humble view, it could not. Mr. Tibaruha submitted that Parliament has a right to pass retrospective legislation on any matter. He did not cite to us any authority for that proposition. The proposition could be true in countries which have no written constitutions and where Parliament is Supreme. In Uganda Parliament is not Supreme. It is the People and the Constitution who are Sovereign and Supreme respectively. Parliament cannot validly pass law

that takes away a right or a freedom guaranteed under the Constitution. Our Constitution guarantees the right to a free and fair election. It guarantees the right to free speech, thought and assembly. Articles 271, 69 and 61 required that a referendum held under article 271 be free and fair. The atmosphere for such a referendum had to be in place at lease one year before the referendum. Parliament had no power to pass a law with retrospective effect that would take away those rights. That was unconstitutional.

Section 2 of the Act also had another problem. To the extent that it purported to abridge the period allowed by article 271 to canvass for support from 12 months to only three weeks, it would have the effect of varying the meaning of that article. That would tantamount to amending it by implication or infection within the meaning of article 258. To do that, Parliament had to comply with chapter 18 of the Constitution - See **Paul K. Ssemogerere and 2 others vs. The Attorney General, Constitutional Appeal No.1 of 2002 (SC)**(unreported). It is common knowledge that, that was not done. For this reason too, the Act contravened article 271 of the Constitution.

I have also noticed that section 27 of the Act provides as follows:

> **"Notwithstanding the provisions of any other law, the referendum required to be held under article 271 of he Constitution shall be held in accordance with this Act."**
> [Emphasis mine]

The phrase **"any other law"** naturally includes the Constitution. It also includes article 271 of the Constitution. This section, read with this in mind

now means that no matter what article 271 states, the referendum under that very article shall be held, not in accordance with the article, but in accordance with the Act. This means that despite clear expression of article 271 that the people should be free to canvass for a referendum to be held under that article, section 27 of the Act states that the Act would prevail no matter what it provides. One may then ask: which of the laws is Supreme. This is really tantamount to contempt of the Constitution. It is the duty of this court to hold that section 27 renders the Act inconsistent with article 271 and therefore null and void.

The last question for consideration on this issue is whether the Act contains provisions, especially section 12, which contravene the letter and spirit of article 271. This matter is closely related to matters raised in the fourth issue. I propose, therefore, to deal with it when I deal with that issue.

All in all I would answer issue No.3 in the affirmative.

ISSUE NO.TWO: WHETHER THE ACT WAS ENACTED IN ACCORDANCE WITH THE CONSTITUTION

The issue here is whether or not the procedures applied in enacting the Act were consistent with the Constitution.

We are lucky that the evidence on the procedure which was followed in enacting the Act is not in dispute. We have the Hansard which was introduced in evidence by the affidavit of the Speaker of Parliament which I have already referred to. It is a complete and accurate record of what took place on the afternoon of the 7th June 2000. The complaint of the petitioners

is simply that procedures set out in articles 89 and 90 of the Constitution were not followed when enacting the Act. In his submissions, Mr. Lule complained that article 89 was not followed at all because the record shows that no voting took place. He submitted that the only voting which took place was by voice which this court and the Supreme have declared to be invalid. He cited the case of **Attorney General vs. P.K. Ssemogerere and 3 others Constitutional Appeal No.1 of 2002** in support of that argument. Mr. Lule argued further that article 90 was also not followed at all. That article, according to him, is mandatory. It requires that all Bills be submitted to a Standing Committee of the House whose functions is, among other functions, to scrutinise and make recommendations to Parliament. In this case the Bill was discussed by a Committee of the Whole House which is not a Standing Committee of Parliament. He invited us to hold that when the Constitution prescribes a procedure to be followed in doing anything, then that thing must only be done, and can only be validly done in accordance with that procedure. Failure to comply invalidates what was done.

Mr. Tibaruha, in reply did not agree. In his view, the Constitution was followed to the letter. He submitted that article 90 of the Constitution does not require that every Bill be submitted to a Standing Committee. It only provides that Parliament can appoint Committees to help it discharge its duties efficiently. One such a Committee which Parliament has appointed is the Committee of the Whole House where all Members of Parliament participate. The Bill in the instant case was submitted to and discussed at length by the Committee of the Whole House. Mr. Tibaruha further

submitted that under article 91, there are two mandatory prerequisites, namely:

(i) a Bill must be passed by Parliament.

(ii) It must be assented to by the President.

Once these two are complied with, the Bill becomes a valid Law. Parliament has powers to regulate its own procedure and the discussion of Bills by the Standing Committee is not a constitutional requirement. He invited us to hold that the constitutional requirements in articles 89, 90 and 91 were followed and the resulting Act is valid. Mr. Tibaruha did not address us on the question of voting in Parliament.

I will now set out the provisions of articles 89:

> **"Article 89(1) Except as otherwise prescribed by this Constitution, or any law consistent with this Constitution, any question proposed for decision of Parliament shall be determined by a majority of votes of the members present and voting".** [Emphasis mine]

I now deal first with the complaint about the procedure on voting in Parliament. The record of proceedings contained in the Hansard shows that no voting in terms of open division or secret balloting took place at all. It shows that throughout the proceedings from start to finish no such voting took place. For example, when a decision was being taken to suspend the rules of Parliament to enable Parliament debate and finalise the Bill as a matter of urgency, the Hansard reveals this procedure:

"THE DEPUTY SPEAKER: Now I put the question to the motion by the Hon. Minister of Justice to suspend the Rules which were mentioned.

(Question put and agreed to)".

This was the format which was followed throughout all the stages of the Bill. At the end of the session the Hansard reports the following:

"THE MINISTER OF JUSTICE AND CONSTITUTIONAL AFFAIRS (Mr. Mayanja Nkangi): Mr. Speaker, I beg to move that the Bill entitled 'The Referendum (Political Systems) Bill 2000' be read the third time and be passed.

(Question put and agreed to)".

The rules of Parliament provides for voice voting. Presumably that is how this agreement was ascertained. Now, the question is: does this procedure comply with article 89 which requires that:

"any question proposed for decision of Parliament shall be determined by a majority of votes of members present and voting?"

This court had opportunity to discuss the meaning of article 89 in the case of **Paul Ssemogerere and Anor. vs. The Attorney General, Constitutional Petition No.3 of 1999.** This court was considering a similar situation where Parliament enacted the Referendum and Other Provisions Act, 1999 using

the voice voting method. In unanimous decision of the court, it stated [per Twinomujuni, JA] as follows:

> "Did the Hon. Speaker follow the constitutional requirement contained article 89(1) of the Constitution when the Referendum and Other Provisions Act was being debated or passed? From his own evidence in court, he complied with the constitutional requirement by following Rule 76 of the Rules of Procedures of Parliament which states:
>
> *'when the question has been put by the Speaker or Chairperson, the votes shall be taken by voices of 'Aye' and 'No' and the result shall be declared by the Speaker or the Chairperson.'*

The question is whether one can comply with the constitutional requirement that decisions be determined by *'a majority of votes of members present and voting'* by asking members to shout *'Aye' or 'No'*. The constitutional requirement is mandatory. It does not give the Speaker any discretion at all. For the House to take a decision he must be satisfied that more than half of the members present and voting have supported the decision. How can this be reflected through the *'Aye'* and *'No'* vote? Rule 75 of the Rules of Procedure of Parliament provides:

'A Vice-President or a Minister who, by virtue of article 78 of the Constitution, is an ex-officio Member of Parliament, shall not vote; and accordingly, the Speaker shall take all necessary steps to ensure that any such person does not vote on any issue requiring voting.'

[Emphasis mine]

How can the Speaker ensure that ex-officio members have not voted if the shouting method of voting is used?

Hon. Ayume testified that Rule 76 of the Rules of Parliament was enacted to provide for flexibility in procedures of Parliament. I agree that there may well be good reasons for that. I understand this is the procedure followed in the *'Mother of Parliaments'* the British parliament. But article 89 of our Constitution is very clear. The British do not have it. For us in Uganda each decision of parliament must be taken by the *majority of members present and voting.* In my humble opinion, nothing short of physical counting can comply with this requirement. The records should be able to show the number of members who supported the decision, the number of those who opposed it, the number of those who abstained. The total number of members present and voting in the House should be able to show that at the time of voting there was a quorum. In my view, the phrase *'the votes shall be taken by voices of 'Aye' and 'No'* in Rule 76 of the Rules of Parliament conflicts with

and contravenes the requirement of article 89(1) that decisions should be determined by '*a majority of votes of members present and voting.*' Rule 76 of the rules of Parliament is therefore null and void to that extent.

I am aware of the existence of Rule 77 of Rules of Procedure of Parliament which provides in part:

'77(1) The Speaker may in his or her discretion, order for a division;

(2) where after the Speaker or the Chairperson has announced the results for the voting under rule 76, immediately, forty or more members stand in their places signifying their disapproval of the out come of the vote, the Speaker or the Chairperson shall order for division.'

In my view, this rule gives a discretion to the Speaker on the mode of voting which conflicts with the mandatory requirement of article 89 of the Constitution. It seems to me that under that article, division or any other method that would accurately reflect that the majority of members present and voting supported the matter being decided upon, is compulsory. If I am right, then Rule 77(1) and (2) are also null and void to that extent.

An examination of the Hansard exhibited in this petition shows that the Referendum and Other Provisions Act No.2/99 was passed using the so called consensus method of voting of *'question put and agreed to'* which cannot reflect how many members were present and how many of them supported the passage of the Act. In my opinion the procedure followed offended article 89 of the Constitution. In our Constitution, each vote counts separately. The Speaker of Parliament has no vote. Ex-officio members of Parliament have no vote. Only a transparent method of voting which ensures that only those entitled to vote have voted must prevail. That is what article 89(1) of the Constitution puts in place. Omnibus voting is unconstitutional."

In the very recent decision of the Supreme Court, in Paul Ssemogerere and 3 Others vs. The Attorney General, Constitutional Appeal No.1 of 2002, (per Kanyeihamba, JSC) the court stated:

"I am constrained to state in the clearest of terms that the procedural rules and mode of ascertaining majorities for effecting constitutional amendments are not found in the Constitution (Amendment) Act 13 of 2000 but in the provisions of the Uganda Constitution of 1995 itself. It is evident therefore that the two thirds majority of all members of Parliament required for the second and third readings of a bill to amend the constitution cannot be ascertained by voice voting under the parliamentary

practice of using shouts of *'Aye' or 'Noes'* to indicate consent or dissent, respectively. In my view, for constitutional amendment, the voting in Parliament should be determined by the head count of members in favour of and against the amendment at the second and third reading by lobby division or such other mode as can ascertain that the supporters of the amendment are two thirds of the total number of members of Parliament. In my opinion, it is the strict observance of the constitutional rules of procedure for determining the will of the majority in Parliament that will create and nurture a culture of belief in Ugandans that they are truly and democratically represented and governed."
[Emphasis mine]

I have no further wish to add anything to these authorities lest I water them down. What must be stated clearly, however, is that the voting procedure adopted to enact the Act was unconstitutional.

Now, I move to the second leg of this issue.

"Article 90 (1) Parliament shall appoint Standing Committees and other Committees for efficient discharge of its functions.

(2) The following shall apply with respect to composition of the Committees of Parliament-

(a) Standing Committees shall be elected from among members of Parliament during the first session of Parliament;

(b) The rules of procedure shall prescribe the manner in which the members and Chairpersons of the Committees are to be elected.

(3) The function of Standing Committees shall include the following:

(a) to discuss and make recommendations on all bills laid before Parliament;

(b) to initiate any bill within their respective areas of competence;

(c) to assess and evaluate activities of Government and other bodies;

(d) to carry out relevant research in their respective fields; and

(e) to report to Parliament on their functions."[Emphasis mine]

Mr. Lule has argued that this article is mandatory and that all Bills of Parliament must be submitted to a Standing Committee for action in accordance with article 90(3). In his view, failure to submit the Referendum (Political Systems) Bill 2000 to such a committee rendered the subsequent Act null and void ab initio.

Mr. Lucian Tibaruha did not agree. According to him, article 90 does not lay down a mandatory requirement that all Bills must go through any particular Committee. Parliament is empowered to appoint such committees as it may deem fit to assist in the efficient transaction of its business. In the instant case, there was in existence a committee of the Whole House which scrutinised the Bill and made recommendations to the Whole House. In his view, the provisions of article 90 were fully complied with.

There are two matters to be resolved on this issue:

(a) Does article 90 of the Constitution make it mandatory that all Bills of Parliament be submitted to a Standing Committee of Parliament before it is debated and passed into law?

(b) Can a Committee of the Whole House pass as a Standing Committee mentioned in article 90(2)(a) and (3) of the Constitution?

To me, the answer to the first question is clearly in the affirmative. Article 90 is very simple and very clear. Looking at the language used, the deliberate repetition of the word **"shall"** in the article and the functions bestowed on the Committee by article 90(3), I have no doubt in my mind that the framers of the Constitution intended that this provision would be mandatory.

The answer to the second question is slightly more involved. Under article 90 of the Constitution, Parliament has power to appoint:

(a) Standing Committees, and

(b) Other Committees,

necessary for efficient discharge of its functions.

Article 94(1) provides that:

> **Subject to the provisions of this Constitution, Parliament may make rules to regulate its own procedure including the procedure of its Committees."**

Pursuant to the above powers, the 6th Parliament, which enacted the impugned Act, made rules of procedure to regulate its proceedings. The rules create the following committees:

(i) Committee of the Whole House - Rule 101(1).

(ii) Standing Committees - Rule 116.

(iii) Sessional Committees - Rule 116

(iv) Select Committees - Rule 144.

(v) Special/Adhoc Committees - Rule 146.

It should be noted that except **"Standing Committees,"** none of the Other Committees mentioned above is specifically mentioned in article 90. However, they are grouped together under the term **"Other Committees".** All the above committees have one function in common, namely, to enable Parliament to efficiently discharge its functions. The Standing Committees, however, are singled out in the Constitution for additional functions which are stated in article 90(3) of the Constitution (supra). They are the only ones which exercise the functions mentioned in article 90 and the ones to which ALL Bills of Parliament must be submitted before they are enacted into law.

Can a Committee of the Whole House pass as a Standing Committee? In my humble opinion, it cannot because of the following reasons:

(i) Article 90(2)(a) provides that Members of Standing Committees shall be elected from among Members of Parliament during the first session of Parliament. It is common sense that a Committee of the Whole House is composed of ALL Members of Parliament. The two committees, therefore cannot be one and the same thing.

(ii) Even the rules of the 6th Parliament recognised, rightly in my view, the distinction between the two. Rule 101 provides that after a Bill has been read for the second time, it shall be submitted to a Committee of the Whole House. Rule 102 provides that the Committee shall not discuss principles of the Bill, but only its details. This is quite different from the functions bestowed on Standing Committees by article 90(3). Rule 99(5) provides that the functions of the Committee be exercised as soon as the Bill has been read the first time.

I am aware that Rule 99(5) introduces the confusing use of the term **"Sessional Committee"** instead of **"Standing Committee."** The functions of Sessional Committees are quite different from those of Standing Committees provided for under article 90(3). I think the correct term to be used in that rule should have been **"Standing Committee."**

The Rules of Procedure of the 6th Parliament of Uganda confuse the use of terms **"Standing Committee"** and **"Sessional Committees".**

This confusion was noticed and raised by Hon. Nusubuga Nsambu, Member of Parliament for Makindye West, during the debate on the Referendum (Political Systems) Bill 2000. He is quoted on page 9789 of the Hansard as having stated as follows:

> **"Thank you very much, Mr. Speaker. The way I understand Article 93(a) is that, although we have been sending Bills to the Sessional Committee, it appears we were committing a mistake. There should have been a Standing Committee which deals with Bills. That is why you find that now we are in a dilemma to differentiate between the Sessional Committee and the Standing Committee. It was an error that we did not appoint a Standing Committee, which we need to rectify."**

Mr. Nsambu was then interrupted by the Speaker after which he said:

> **"This is what I am saying, that although we have been sending Bills to the Sessional Committee, we committed a wrong, because, it does not qualify with the Bills. It is only the Standing Committee, which should have been dealing with Bills."**

This legitimate objection was brushed aside when Hon. Wapakabulo informed the House as follows:

> **"Point of information. Thank you Mr. Speaker. I think we have been using Sessional Committees for purposes of educating ourselves on the Bills, but there is a Committee, which is perpetual in this House. That Committee is the Committee of the Whole House and at the end of the Second**

Reading, the Bills automatically stand referred to the Committee of the Whole House. The Committee of the Whole House sits with the Speaker becoming the Chairman and we go through Clause by Clause and make recommendations to the House and if the report is adopted, we proceed accordingly. So, we are not committing any breach of the Constitution. I thank you."

Upon this information, the House seems to have made the fatal assumption that a Committee of the Whole House was the committee mentioned in article 90 of the Constitution and that it can perform the functions of the Standing Committees and those of Sessional Committees. With the greatest respect to Parliament of Uganda, it is only the Standing Committees elected under article 90(2)(a) and empowered by article 90(3) which have the duty to scrutinise all Bills of Parliament after their first reading. The functions of the Sessional Committees are contained in Rule 143 of the Rules of the 6th Parliament as follows

"(a) to examine and comment on policy matters affecting the Ministries covered by them;

(b) to initiate or evaluate action programmes of those Ministries and to make appropriate recommendations on them;

(c) To examine critically Bills brought before the House before they are debated.

(d) **to examine critically government recurrent and capital budget estimates and to make recommendations on them for the general debate in the House;**

(e) **to monitor the performance of Ministries; and**

(f) **to ensure Government compliance."**

Although there may be some overlaps, these functions are quite different from those of Standing Committees contained in article 90(3) and rule 119 of the Rules of the 6th Parliament. Rules 117 and 118 of the rules also add more confusion on the use of terms **"Standing Committee"** and **"Sessional Committees".** The committees mentioned in rule 118 appear to be more suited to perform the functions under article 90(3) and rule 119 of the rules. Yet, they are called Sessional Committees. In accordance with the Constitution, they should be called Standing Committees. The Committees mentioned under rule 117 appear more suited to handle functions in rules 143, yet they are the ones called Standing Committees. It is only Standing Committees through which ALL Bills must go for scrutiny, study and recommendation to Parliament as in article 90(3). Whatever other Committees do is entirely up to Parliament. There is therefore need for Parliament to re-examine its rules, especially rules 117 and 118 so that Standing Committees can assume their rightful role under article 90(3) of the Constitution.

I have delved into this matter deeply because I believe Hon. Nsubuga Nsambu's plea to rectify the rules was apparently not taken up and the

same confusion appears to be still going on in the present Parliament. This could lead into future disasters.

To conclude issue No.2 of the framed issues, I observe that by providing that:

> **"Members of Standing Committees shall be elected from among members of Parliament during the first session of Parliament,"**

The framers of the Constitution made it very clear that a Standing Committee cannot be the same thing as a Committee of the Whole House. It provides that Standing Committees shall be elected from among Members of Parliament during its first session. How then can such a committee be the same thing as the Committee of the Whole House where every Member of Parliament is a member? I have no doubt that Parliament has the power to constitute itself as a committee of the Whole House as one of **"Other Committee's"** mentioned in article 90(1) but such a Committee of the Whole House cannot perform the functions mentioned in article 90(3) as those are exclusively conferred on Standing Committees. It follows therefore that in passing The Referendum (Political Systems) Act, 2000, Parliament committed a fatal error by failing to submit the Bill to a Standing Committee of the House. If I can be permitted to borrow the language of Kanyeihamba, JSC in the above last quoted decision of the Supreme Court; (i.e. Constitutional Appeal No.1 of 2002).

> **"It can never be over emphasised that whereas the Constitutional provisions may be amended constitutionally, they can never be waived at all."**

In the instant case, Parliament waived mandatory provisions of article 90, which act was unconstitutional.

I would answer this issue in the negative.

ISSUE NO. FOUR: ARTICLE 269 VERSUS ARTICLES 69 AND 271 OF THE CONSTITUTION

This issue is:

> **"Whether or not the absence of a law regulating the activities of Political Parties provided in article 269 of the Constitution contravened article 69 by perpetuating a political environment under which the people of Uganda could not make a free and fair choice of the political systems as to how they should be governed."**

The issue is framed in a wordy and roundabout fashion as it seems to move around the question it seeks to raise. If I understand it well, and let me be permitted to rephrase it accordingly, it means this:

> **Could a referendum held to choose a political system of people's choice be free and fair as required by articles 69 and 271 when it was carried out when article 269 of the Constitution and section 12 of the Act were in force?**

I propose to be brief on this issue because I have already partly pronounced myself on the issue in this judgment and in other fora.

Firstly, Article 269, which has now expired, provided as follows:

"On the commencement of this Constitution and until Parliament makes laws regulating the activities of political organisations in accordance with article 73 of this Constitution, political activities may continue except-

(a) opening and operating branch offices;

(b) holding delegates' conferences;

(c) holding public rallies;

(d) sponsoring or offering a platform to or in any way campaigning for or against a candidate for any public elections;

(e) carrying on any activities that may interfere with the movement political system for the time being in force."

In short, political organisations were prohibited from getting into contact with the people. This article was still very much in force when the 29th June 2000 referendum was held. At the time when the people were being asked to chose between Movement and Multiparty political systems, the parties themselves were in a cooler and could not say anything in their own defence.

Secondly, Mr. Lule, during his submissions in court, complained that section 12 of the Act which prescribes rules of canvassing in the referendum introduced draconian measures under which no free and fair referendum could be held. This complaint was made when he was submitting on the third issue of this petition. When dealing with the issue, I promised that I would deal with the matter when dealing with this issue because I felt that it was more related to the concept of a free and fair election which comes out more clearly in this issue.

Section 12 of the Act provides:

"12.(1) subject to the Constitution and to this Act, any person or group of persons is free to canvass for support of any side in the referendum and may form a referendum committee or a similar structure for the purpose.

(2) For the purposes of the referendum, the side shall consist of individuals and organised groups who subscribe to the multiparty system or the movement system, or to any other political system as the case may be.

(3) The individuals and groups subscribing to the political systems referred to in subsection (2) shall, in respect of each political system to which they subscribe, establish a national referendum committee consisting of not more than twenty members and submit the details of the committee to the Commission by such date as the Commission shall prescribe.

(4) It shall be the duty of a national referendum committee to organise the canvassing for its side, and to appoint agents for the purposes of canvassing and voting.

(5) A national referendum committee shall be free to organise at national and local levels until the referendum is held.

(6) Subject to the Constitution and any other law, every person or group of persons shall enjoy freedom of

expression and access to information in the exercise of the right to canvass in the referendum.

(7) .....

(8) Any person or group of persons who wishes to canvass for any side in the referendum in any public place, by way of meeting or public address, shall, in writing, notify the Sub-county or Division Chief of the area and the police officer in charge of the area, not less than seventy two hours before the canvassing, meeting or public address which he or she wishes to undertake.

(9) A person or group wishing to canvass and referred to in subsection (8), shall give the police officer in charge of the area or the Sub-county or Division Chief such information relating to the activity that that person or group wishes to undertake as the police officer may reasonably require.

(10) .....

(11) Any person who contravenes subsection (8), (9) or (10) of this section, commits an offence and is liable on conviction, to a fine not exceeding twenty five currency points or imprisonment not exceeding three months or both."

Mr. Lule complained that these provisions impose too severe restrictions and since article 269 was still in place, no free and fair referendum could be held.

Mr. Lule complained that these provisions impose too severe restriction and since article 269 was still in place, no free and fair referendum could be held.

Mr. Tibaruha dismissed issue No.4 outright. He submitted that it was not a constitutional issue at all and that the petitioners should have challenged the results of the referendum. He further submitted that article 269 did not provide a time limit within which a law to set the political organisations free could be made.

In the case of **Dr. James Rwanyarare and Anor. vs. Attorney General, Constitutional Petition No.5 of 1999** which was decided in June 2000, this court discussed the effect of section 13 of the Referendum and Other Provisions Act 1999 on the referendum which was due to be held. That section is similar to section 12 of the Act now under consideration. I stated in my judgment, and I have not changed my mind since, that, that section 13 must be read together with article 269 to see the full effect they would have on the referendum exercise.

I stated then:

> **"I do not see how a party or any organisation for that matter, that cannot hold a meeting of its main organs (like a delegates conference) for fourteen years can be expected to legally select representatives to constitute a National Referendum Committee as required by section 13 of the Referendum and Other Provisions Act. In my judgment, the political parties are legally incapable of participating in any exercise to form the referendum Committees and will**

remain so for as long as Article 269 remains an interim provision of our Constitution. It is not clear when the interim period will expire but in my view, reading of Article 271(2) (supra) and section 26(1) of the Referendum and Other Provisions Act, suggests that it should have expired by 2nd July 1999 when everyone was freed to participate in canvassing for the referendum. No free and fair referendum can be held under such a bondage. The framers of the Constitution could not have intended such a monstrous result.

In the result, I would hold that as long as Article 269 remains in force, then S.13(2) and (3) of the Act creates a one sided contest in the referendum and contravenes Article 69 of the Constitution."

I hold this view on article 269 of the Constitution and section 12 of the Act in relation to articles 69 and 271 of the Constitution.

I pointed out earlier in this judgment that a law to be enacted under article 73 of the Constitution to regulate political organisations was a MUST at least one year before the 2000 referendum. On the enactment of the law, article 269 was to expire. This means that parties were to be free within the meaning of article 29 of the Constitution. The law was never enacted. As a result the referendum was held under the regime of article 269. When the Political Parties and Organisations Act 2002 was finally enacted more than three years too late, it incorporated article 269 wholesale in its sections 18

and 19. Those sections have already been nullified in the case of **DR. Paul K. Ssemogerere and5 Others vs. Attorney General, Constitutional Petition No.5 of 2002.** It is difficult to understand why the Parliament of Uganda has since 2/7/1999 persistently denied the people of Uganda the right to hold a free and fair election or referenda in contravention of articles 1(4), 61(a), 69(1) and 271(2) of the Constitution. In my judgment failure to enact a law under article 73 adversely affected the referendum of 29/6/2000.

ISSUE NO. FIVE: REMEDIES

I think the petitioners are entitled to the remedies arising from the issue which have been determined in their favour. I shall specify the remedies below presently. However, before I do so, let me dispose of Mr. Tibaruha's submission that they are not entitled to any remedies even if this court was to hold that The Referendum (Political Systems) Act 2000 was null and void. He submitted that on the authority of the Malaysian Supreme Court decision in **Public Prosecutor vs. Dato Yap Peng [1988] LRC (const.) 69 at page 93,** the doctrine of **Prospective overruling** will not permit this court to invalidate the actions which were carried out before the Act was declared null and void by this court. Mr. Lule retorted that the doctrine only applies in criminal cases and has no application in civil and constitutional matters.

In the case cited, at page 93 second paragraph, the doctrine is explained thus:

"The general principle of retroactivity of a judicial declaration of invalidity of a law was modified by the Supreme Court of the United States of America in *Linkletter v Walker 381 US 618 (1965) (at p.628),* when it devised the doctrine of prospective overruling in the constitutional sphere as a practical solution for alleviating the inconveniences which would result from its decision declaring a law to be unconstitutional, after overruling its previous decision upholding its constitutionality. This doctrine was applied by the Supreme Court of India in *I.C. Gelak Nath v Stte of Punjab & Another AIR 1967 SC* 1643 (at pp. 1666-1669). The doctrine - to the effect that when a Statue is held to be unconstitutional, after overruling a long-standing current of decisions to the contrary, the court will not give retrospective effect to the declaration of unconstitutionality so as to set aside proceedings of convictions or acquittals which had taken place under that statute prior to the date of the judgment which declared it to be unconstitutional, and convictions or acquittals secured as a result of the application of the impugned statute previously will accordingly not be disturbed - can be applied by the Supreme Court as the highest court of the country in a matter arising under the Constitution to give such retroactive effect to its decision as it thinks fit, to be moulded in accordance with the justice of the cause or matter before it - to be adhibited, however, with

circumspection and as an exceptional measure in the light of the circumstances under consideration."

With respect, a careful reading of this elucidation will reveal that the conditions which attract the application of the doctrine do not exist in this case. For example, the doctrine was devised in the constitutional sphere

"as a practical solution for alleviating the inconveniences which would result from its decision declaring a law to be unconstitutional, after overruling its previous decision upholding its constitutionality." [Emphasis mine]

Nothing of this sort has happened here. Reference to conviction and acquittal appears to suggest that the doctrine is only applicable in criminal cases. This doctrine can also be applied by the Highest court in the land and not any other court.

Our attention was also drawn to the provisions of section 13(2) and (3) of the Interpretation Act to support the same proposition that a court cannot invalidate acts carried out under the authority of an Act before the Act was declared null and void.

The subsections read:

"(2) Where any Act repeals any other enactment, then unless the contrary intention appears, the repeal shall not -

(a) revive anything not in force or existing at the time at which the repeal takes effect;

(b) **affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed;**

(c) **affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed;**

(3) **Upon the expiry of any Act, this section shall apply as if the Act had been repealed."**

With respect, this provision only applies where an Act repeals another enactment or expires. This, however, is subject to another rider, that the repealing or expiring Act was enacted constitutionally. In this case, the Act is null and void. It never became law either on 2nd July 1999 or on 9th June 2000 when it was assented to. It was void abnitio. It could not expire when it never had a valid existence in the first place. Anything which was done under the authority of that Act was invalid. To rule otherwise would be tantamount to authorising the stampeding of Parliament (as was the case here) to pass Kangaroo style legislation oblivious of the constitution, perform unconstitutional acts allegedly under the authority of such legislation, all with impunity. That would be licensing anarchy.

So, the petitioners are entitled to the following declarations:

1) The Referendum (Political Systems) Act 2000 was null and void from the beginning.
2) The referendum which was held under the Act on 29th June 2000 was invalid.

3) No Political System under article 69 was put in place.

4) Petitioners are entitled to costs.

IMPLICATIONS

The implication of this judment is that by failing to hold a referendum under Article 271 (which has now expired), article 74 of the Constitution may never come into operation. It is dead. That article 74 provides for holding of a referendum **"for the purpose of changing a political system."** If no political system stipulated by article 69 of the Constitution is in place, it is not easy to figure out how a referendum under article 74 can be held. Earlier in this judgment I expressed a considered opinion that article 74 does not stipulate a mandatory referendum to change a political system once in every five years. It only provides that a referendum shall be held if requested in the manner stipulated in the article. But, with this holding that no political system was ever put in place and that article 271 was never complied with, the holding of a referendum under article 74 no longer arises. It would in fact be unconstitutional to use a single penny of the tax payers money in order to change something that has no physical or legal existence.

CONCLUSION

Looking at the history of constitutionalism in this country for the last forty years in general and the last five years in particular, I feel compelled to repeat the warning of the Supreme Court of Uganda in **Paul K. Ssemogerere and Others vs. Attorney General, Constitutional Appeal No.1 of 2002** (supra) where it stated (per Kanyeihamba, JSC) as follows:

"In Uganda, courts and especially the Constitutional Court and this Court were established as the bastion in the defence of the rights and freedoms of the individual and against oppressive and unjust laws and acts. Courts must remain constantly vigilant in upholding the provisions of the Constitution. Only in this way can we in Uganda avoid situations in some other countries which were ably described by Professor Nwabueze of Nigeria in his book entitled: _'Constitutions in Emergent Nations' in the following terms,

> *'The term 'constitutional government' is apt to give the impression of a government according to the terms of a constitution. There are indeed many countries in the World to day with written constitutions but without constitutionalism. A constitution may also be used for other purposes than a restraint upon government. It may consist to a large extent of nothing but lofty declarations of objectives and a description of the organs of government in terms that import no enforceable restraints. Such a constitution may indeed facilitate or even legitimise the assumption of dictatorial powers by the government. Indeed, it is not an exaggeration to conclude that for many countries, a constitution is nothing more than a proclamation of what governments are entitled to do, and often do, to restrain the liberty of citizens or deprive them of proprietary interests. In a number of developing countries, constitutions are perceived by those in power, not as protectors of human rights and the liberties of the*

individual but as instruments for legitimising the exercise of power. For the opponents of these rulers, constitutions are understood in terms of the government's legitimacy to exercise arbitrary power, to impose unreasonable laws, arrest and detain persons whose guilt is often highly suspect, to impose restrictions on certain freedoms and rights and to do whatever the ruling oligarchy deems necessary and in the interest of society.'

The founders and makers of the Uganda 1995 Constitution were determined to avoid the situations described by the learned professor. They thus wrote in the preamble to the Constitution that,

'WE THE PEOPLE OF UGANDA:
RECALLING our history which has been characterised by political and constitutional instability;
RECONISING 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;
EXERCISING our sovereign and inalienable right to determine the form of governance for our country, and having fully participated in the Constitution-making process;

NOTING that a Constituent Assembly was established to represent us and to debate the Draft Constitution prepared by the Uganda Constitutional Commission and to adopt and enact a Constitution for Uganda:

DO HEREBY, in and through this Constituent Assembly solemnly adopt, enact and give to ourselves and our posterity, this Constitution of the Republic of Uganda, this 22nd day of September, in the year 1995.

FOR GOD AND MY COUNTRY'

I have reproduced these solemn words of dedication lest we ever forget them. It is the solemn duty of the courts of Uganda to uphold and protect the People's Constitution."

I respectfully agree with each and every word of this extract.

Dated at Kampala...25th.....this day....June.....2004.

.....

Hon. Justice Amos Twinomujuni

JUSTICE OF APPEAL.

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA

AT KAMPALA

CORAM: HON. JUSTICE G. M. OKELLO, JA.
HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA.
HON. JUSTICE S. G. ENGWAU, JA.
HON, JUSTICE A. TWINOMUJUNI, JA.
HON. JUSTICE C.N.B. KITUMBA, JA.

CONSTITUTIONAL PETITION NO. 3 OF 2000

1. PAUL K. SSEMOGERERE]
2. ZACHARY OLUM] :::::::::::::::::: PETITIONERS

VERSUS

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

JUDGMENT OF C.N.B. KITUMBA, JA.

The petition was filed in this court jointly by the two petitioners namely: Paul K. Ssemogerere, who is the President of the Democratic Party and Zachary Olum, who is the Deputy Vice President of the same party and member of Parliament. I shall hereinafter refer to them as the petitioners. The petition is brought against the Attorney General, hereinafter to be referred to as the respondent. The petitioners challenge the constitutionality of the Referendum (Political Systems) Act 2000 which I shall refer to as the Act. The petitioners are seeking for the following declarations from this court under Article 137 of the Constitution..

(1) That the passing of the Referendum (Political Systems) Act 2000 by Parliament in one day, 7th June, 2000, without first referring it to the relevant Standing

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Committee of Parliament was inconsistent with Article 90 (1) and (3) of the Constitution.

(ii) That the enactment of a Political Systems Referendum law which denies political parties of the constitutional right to participate in the referendum to choose a political system under Article 271 but instead institutes the "Movement" as the only recognised political system before the Referendum is held and in contravention of Articles 20, 21, 29 73, 75 and 269 of the Constitution is null and void and ineffectual.

(iii) That Parliament was incompetent to enact the Referendum (Political Systems) Act 2000 upon expiry of the time prescribed by The Constitution and thereby reduce the time allowed for canvassing, the law so enacted is null and void.

(iv) That the passing of the Referendum (Political Systems) Act 2000 was outside the competence of Parliament to the extent that it was calculated to alter the judgment or decision of the Courts between the petitioners and the Government.

(v) That the Referendum (Political Systems) Act 2000 is a colourable legislation whose objectives and effect is to outlaw Political Organisations permanently except the Movement political organisation and institute a one party State and consequently the Act is in contravention of the Constitution.

The petitioners prayed for the costs of the petition.

The petition is supported by the affidavits of both petitioners and Hon. Omara Atubo M.P. which were sworn on 22nd June, 2000. The evidence contained therein is that the Act was introduced in Parliament on 7th June, 2000 and was debated without being discussed by a standing committee of the House and was enacted into law contrary, to the provisions of the Constitution. The second petitioner swore a supplementary affidavit on 16th October 2000. In that affidavit he averred that himself and other members of the Democratic Party were prevented, by police acting on orders of government, from holding peaceful public meetings. This denied them of the right and freedom of association and assembly. He cites this to have occurred in Tororo, Mbarara, Nkozi and Gulu.

There is the answer to the petition in which the respondent denies the averments of the petitioners. The answer to the petition is supported by the affidavit of Joseph Matsiko who is employed as a Senior State Attorney in the respondent's chambers. The affidavit was deponed to on 30th June 2000. In his affidavit, he denies that the Act is unconstitutional. The affidavit by Hon. Edward Kiwanuka Ssekandi, the Speaker of Parliament, was sworn on 23rd April 2004. The Hansard of 7th June 2000 when the Act was debated in the Parliament is attached thereto as Annexture "A". The Honourable Speaker explains that he presided over the passing of the Act as Deputy Speaker of the House and as Chairman of the Committee of the Whole House, at committee stage.

At the beginning of the trial the following issues were framed and agreed upon for determination:-

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"1. Whether or not the Referendum (Political Systems) Act, 2000 is law and can be challenged.

2. Whether or not the procedure applied in enacting the Referendum (Political Systems) Act, 2000 was consistent with the procedures prescribed under the Constitution of Uganda.

3. Whether or not the Act was made in contravention of Article 271 of the Constitution of Uganda.

4. Whether or not the absence of a law regulating the activities of political organisations as provided by Article 269 of the Constitution contravened Article 69 by perpetuating a political environment under which the people of Uganda could not make a free and fair choice of the political system as to how they should be governed.

5. Whether or not any relief should be granted."

During the hearing of the petition, the petitioners were represented by learned counsel Mr. Godfrey Lule, SC and Mr. Joseph Balikuddembe. Mr. Lucian Tibaruha, learned Solicitor General and Mr. Joseph Matsiko, learned Principal State Attorney, represented the respondent. After counsel for the petitioners had concluded his submissions on the whole petition, Mr. Tibaruha submitted on the first issue as a preliminary objection to the whole petition. I shall, therefore, deal with his submissions first.

The learned Solicitor General contended that the Act could not be challenged in court because it had expired and is no longer statutory law of Uganda. He contended that the Act had been passed on 7th June, 2000, assented to by the President on 9th June and published in the gazette on 12th June, 2000. The purpose of the Act was the holding of the referendum under Article 271 of the Constitution for people of Uganda to make a choice of the political system by which they wish to be governed. The referendum was held on 29/6/2000 and the results published in the gazette on 28/7/2000 under General Notice 280 of 2000. The learned Solicitor General argued further that according to the Revised Edition Act with effect from the date appointed, which is 1/10/2000 act, decrees, statutes, statutory instruments and legal notices included in the Revised Edition are the only laws. Those are the only ones to be taken by all courts and for all purposes to be the laws of Uganda and to be judicially noticed as such.

He argued that the Act, which had expired, couldn't be challenged under Article 137 (3) (a) of the Constitution. A dormant law cannot breach the Constitution because it is ineffective. In support of his submission he relied on **Attorney General vs Dr. James Rwanyarare and Others Constitutional Appeal No. 2 of 2003 and section 13 (3) of The Interpretation Act.**

Mr. Lule disagreed. He submitted that the Act could be challenged in courts of law. It was a law passed by Parliament as provided for by Article 271 (4) of the Constitution that Parliament had to make a law for the holding of the referendum for people to choose a political system. He submitted that the court had to look at the law as it was when the petition

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was filed. He implored this court to examine section 13 of the Interpretation Act for the effect of the repealed law.

I take note that this petition was filed on 22-6-2000. The Act was then still valid. This court could not find time to hear it before the referendum was held on 29/6/2000.Mr. Tibaruha's argument that the Act under which the referendum was held has expired is not tenable. In my view, the expiry of the Act is not a bar to a person to petition this court that the law under which the act was done is unconstitutional. Accepting such an argument would lead to absurd situations. It would be impossible to implement the constitutional provisions regarding the defence of the Constitution, as violators would plead expiry of law/s under which they violated the Constitution. However, this court has held that there is no time of limitation for filing constitutional petitions. See: **Association of Uganda Women's' Lawyers and Others vs Attorney General Constitutional Petition No.2 of 2002** (unreported). I also take note of the fact that under the Act something was done. This was the holding of a referendum on the political system to be adopted by the people of Uganda and is, therefore, challengeable.

Article 137 (3) (a) of the Constitution provides:-

> "A person who alleges that -
>
> (a) An Act of Parliament or any other law or anything in or done under the authority of any law;
>
> (b) Any Act or omission by any person or authority
>
> is inconsistent with or in contravention of a provision of this Constitution, may petition the Constitutional Court for a declaration to that effect, and for a redress where appropriate."

The authority of **Attorney General vs. Dr. James Rwanyarare and Others** (supra) is in my humble view not relevant here. The Act complained of was for some time very active and therefore not dormant. It enabled the referendum on political systems to take place. The Act is law and can be challenged in this court. I would answer the first issue in the affirmative.

Issue No.2 - **"Whether the procedure applied in enacting the Referendum (Political Systems) Act were consistent with the procedure prescribed by the Constitution of Uganda."**

Mr. Lule contended that the Act was passed unconstitutionally without following the proper procedure. The submissions were two. Firstly, that the Act was passed without voting contrary to article 89 of the Constitution. Secondly, that the Bill was passed without being considered by a standing committee contrary, to article 90 of the Constitution. He argued that though there was evidence from the Speaker of Parliament that the Committee of the Whole House discussed the Bill, that committee is not the same as a standing committee.

Mr. Tibaruha disagreed. He contended that the Bill was discussed by the Committee of the Whole House. He was quick to add that discussion of the Bill by a standing committee is not an essential requirement in passing an Act of Parliament. According to him the essential requirements are only two. Firstly, that the Bill is passed by Parliament and secondly, that it is assented to by the President. Mr. Tibaruha appeared not to have any problem with the issue of voting and did not make submissions on the same.

Article 89 of the Constitution provides: -

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"89. (1). **Except as otherwise prescribed by this Constitution or any law consistent with this Constitution, any question proposed for decision of Parliament shall be determined by a majority of voters of the members present and voting."** (Underlining supplied)

A close look at the Hansard of the 7th June, 2000 shows that there was no transparent voting on that day. The Deputy Speaker of Parliament who later acted as Deputy Chairman of the Committee of the Whole House simply put questions to House and members agreed.

For example at the time the Bill was passed as an Act of Parliament the record is as follows:-

" BILLS

THIRD READING

THE REFERENDUM (POLITICAL SYSTEMS) BILL, 2000

THE MINISTER OF JUSTICE AND CONSTITUTIONAL AFFAIRS (Mr. Mayanja-Nkangi); Mr. Speaker I beg to move that the Bill entitled "The Referendum (Political Systems) Bill, 2000 be read the third time and do pass.

THE DEPUTY SPEAKER, I put the question (Question put and agreed to)."

I am of the considered view that the method of voting adopted in discussing and passing the Referendum (Political Systems) Act was not

transparent. It did not show the number of members of Parliament present, those who voted for or against the Bill. It did not, therefore, comply with the mandatory requirement of Article 89 (1) of the Constitution. In **Paul Kawanga Ssemogerere and Zachary Olum vs Attorney General, Constitutional Petition 3 of 1999,** this court considered the law on voting in Parliament. This court decided that the voice method was not acceptable. Actual counting should be done. In Supreme Court decision in **Paul K. Ssemogerere and 2 Others vs Attorney General Constitutional Appeal No.1 of 2002** their Lordships held that voting in Parliament must comply with constitutional requirements so as to determine the majority. This could be by head counting or division in the lobby.

I now consider discussion of the bill by a standing committee. It is not in dispute from the evidence of the petitioners and the Hon. Speaker of Parliament that the bill was discussed by the Committee of the Whole House. The issues for determination are two:

(a) Whether it is a mandatory requirement before a bill becomes an Act of Parliament to be discussed by a standing committee and

(b) Whether the Committee of the Whole House is a standing committee.

Standing Committees are provided for in the Constitution by article 90 which states:-

> "90. (1) **Parliament shall appoint standing committees and other committees necessary for the efficient discharge of its functions.**

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(2) The following shall apply with respect to the composition of the committees of Parliament –

(a) the members of standing committee shall be re-elected from among members of Parliament during the first session of Parliament.

(b) the rules of procedure of Parliament shall prescribe the manner in which the members and chairpersons of the committees are to be elected.

(3) The functions of standing committees shall include the following -

(a) to discuss and make recommendations on all bills laid
before Parliament,

(b) to initiate any bill within their respective areas of competence,

(c) to assess and evaluate activities of Government and other bodies,

(d) to carry out relevant research in their respective fields, and

(e) to report to Parliament on their functions.

It appears from the language of article 90 (3) (a) that the standing committees among their functions have <u>to discuss and make recommendations on all bills before Parliament</u>. It follows, therefore,

that the Referendum (Political Systems) Bill was a bill laid before Parliament and had to be discussed by a standing committee.

The Committee of the Whole House is not contained in the Constitution. It is, however, provided for by Rule 101 of the Rules of the 6th Parliament. According to the evidence of the Hon. Speaker that committee is composed of all members of the Parliament and the Speaker is its chairperson. The Constitution does not define what a standing committee is apart from giving its functions and that its members should be elected from the members of Parliament. However, Article 90 (2) (b) states that the rules of Parliament shall prescribe the manner in which the members and Chairperson of the Committee are to be elected.

I am of the considered view that Parliament had the powers to have by its rules the Committee of the Whole House as a permanent standing Committee. The evidence shows that on 7th June the 6th Parliament was just beginning its session and other standing committees had not yet been selected. Parliament resorted to its permanent Standing Committee of the Whole House to discuss the bill. The evidence from the Hansard shows that the bill was referred to the Committee of the Whole House after its first reading. It was duly discussed in the Committee and a report made to Parliament. I am unable to fault the procedure followed.

Regarding the second issue I would say that Parliament only failed to comply with the constitutional provisions on voting when passing the bill into an Act of Parliament. I would answer the second issue partly in the affirmative.

Issue No.3 "Whether or not the Act was made in contravention of article 271 of the Constitution."

It was Mr. Lule's contention that the Referendum (PoliticalSystems) Act was enacted in contravention of the Constitution. He submitted that by article 271 (2) of the Constitution people were given two years to campaign before the expiry of the first Parliament elected under the Constitution. By article 271 (3) the referendum on political systems was to be held during the last month of the fourth year of the term of the first Parliament. However, the Act was passed less than a month before the referendum was held. He complained that by section 2 of the Act, the Act was deemed to have come into force on 2nd July 1999. Counsel further submitted that section 12 of the Act put stringent restrictions on the people who wished to canvass for a political system of their choice.

In counsel's view all these were in contravention of the Constitution. They also amounted to an amendment of the Constitution by variation. However, this amendment was not enacted in accordance with the constitutional procedure. There was no physical counting of members of Parliament present and voting to determine whether a two thirds majority of members present and voting had supported the passing of the bill. When being sent for presidential assent, a certificate should have accompanied the Bill from the Speaker.

Mr. Tibaruha disagreed. He submitted that Article 271 had not been contravened. He submitted that article 271 (4) did not set a date when the Act had to be passed. He argued that sub articles (1) and (2) of Article 271 had to be read together to appreciate that the people had one year within which to canvass for support of the political system of their

choice. He defended the provisions of section 12 of the Referendum (Political Systems) Act. He submitted that the provisions were merely to notify the authorities 72 hours before holding political meetings. The section did not require people to seek for permission before holding meetings. Section 2 of the same Act was retrospective so as to fulfil the constitutional requirements and to rectify actions that had already been done.

It is necessary to quote Article 271 of the Constitution in full before making my judgment on the issue.

> "271 (1) **Notwithstanding the provisions of article 69 of this Constitution, the first presidential, parliamentary, local government and other public elections after the promulgation of this Constitution shall be held under the movement political system.**
>
> **(2) Two years before the expiry of the term of the first Parliament elected under the Constitution, any person shall be free to canvass for public support for a political system of his or her choice for purposes of a referendum.**
>
> **(3) During the last month of the fourth year of the term of Parliament referred to in clause (2) of the article, a referendum shall be held to determine the political system the people of Uganda wish to adopt.**
>
> **(4) Parliament shall enact laws to give effect to the provisions of this article."**

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With due respect, Mr. Tibaruha's argument that Article 271 (4) did not set the date when the Act should be enacted cannot be accepted. Sub-article 2 clearly states that two years before the expiry of the term of the first Parliament elected under this Constitution people would be free to canvass for support of political systems of their choice. According to article 271 (3) the referendum had to be held during the last month of the fourth year of the term of the first Parliament. The law had to be in place to direct the people how such canvassing was to be done. I take it that the subject of choice of the political systems was very important and touched on the human right of association. It must have been the intention of the Constituent Assembly to give people one year to canvass for support of a political system of their choice for the purposes of the referendum.

Section 2 of the Act attempted to give retrospective effect to the law. However, that was not possible. The Constitution provided when the law in respect of the referendum on political system had to be enacted. An attempt by the same law to vary the Constitution is unconstitutional even though it had been done for good intentions. An attempt to rectify actions already done in respect of the referendum was not possible. The people of Uganda did not have a law providing the plan within which to canvass and those who tried were stopped. The evidence supplied in the supplementary affidavit of Hon. Zachary Olum was unchallenged. The second petitioner and his party members who were exercising the right of assembly and association were prevented from doing so. I am in agreement with Mr. Lule that section 12 of the Act seriously curtailed the people's right to canvass for a political system of their choice. I would answer issue No.3 in the affirmative.

Issue No.4

Whether or not the absence of a law regulating the activities of Political organisations as provided by Article 269 of the Constitution - contravened article 69 by perpetuating a political environment under which the people of Uganda could not make a free and fair choice of the political system as to how they should be governed.

It was Mr. Lule's submission that while Article 269 of the Constitution was still in place people who preferred the multiparty political system could not canvass for support of a political system of their choice. According to him only those of the movement political system could canvass for political support. He submitted that this contravened article 69 of the Constitution.

In reply Mr. Tibaruha contended that the issue was irrelevant and misconceived. He submitted that the petitioners should have challenged the results of the referendum.

Article 269 provides:-

> **"On the commencement of the Constitution and until Parliament makes laws regulating the activities of political organisations in accordance with article 73 of this Constitution, political activities may continue except –**
>
> **(a) opening and operating branch offices,**
>
> **(b) holding delegates' conferences,**
>
> **(c) holding public rallies,**
>
> **(d) sponsoring or offering a platform to or in any way campaigning for or against a candidate for any public elections,**

27h

(e) **carrying on any activities that may interfere with the movement political system for the time being in force."**

The political parties were in brief not allowed to reach their members at grass-root level. Their meetings had to be restricted as per article 269 of the Constitution. On the other hand the people of Uganda had the right to choose and adopt a political system of their choice through a free and fair referendum as prescribed by article 69 of the Constitution. This was not easy with the restrictions in article 269. I would therefore, answer issue No.4 in the affirmative.

Issue No.5:

"Whether or not any reliefs should be granted."

Mr. Lule submitted that the petitioners are entitled to all the reliefs as prayed for in the petition. Mr. Tibaruha submitted that the petitioners are not entitled to any remedies. Even if this court finds that the Act was unconstitutional that should not affect what was done before. He submitted that it is settled law that an Act of Parliament remains valid until it has been successfully challenged in court. In support of his submission he referred to a Malasian case of **Public Prosecutor vs. Data Yap Peng [1988] LRC Const. 69** for the principle of retrospective overruling. I have looked at the authority, which refers to criminal cases. The principle stated therein, as I understand it, is that the most superior court in the country may deliver many decisions stating the position of the law. When it overrules itself, such overruling does not affect previous acquittals or convictions. I must say that this principle is not binding on this court. I will not follow it.

In conclusion I would say that the Act was passed in contravention of the Constitution, as there was no transparent voting. It also offended article 271 of the Constitution. The Act was void and as such is unable to support the purpose for which it was intended.

I would allow the petition with costs to the petitioners.

Dated at Kampala this 25th day of June, 2004.

C.N.B. Kitumba

C.N.B. Kitumba

JUSTICE OF APPEAL