

Dream deferred?

Democracy and Good Governance:

An Assessment of the Findings of Uganda's Country Self-Assessment Report under the African Peer Review Mechanism

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LIST OF ACRONYMS/ABBREVIATIONS

AG – Attorney General

APRM – African Peer Review Mechanism

AU – African Union

CRC – Constitutional Review Commission

DP – Democratic Party

HSIC – Heads of State Implementation Committee

IBA – International Bar Association

ICCPR – International Covenant on Civil and Political Rights

IMF – International Monetary Fund

JATT – Joint Anti-Terrorist Team

JLOS – Justice, Law and Order Sector

KEC – Kenya Electoral Commission

NEPAD – New Partnership for Africa’s Development

NESC – National Economic and Social Council

NPA – National Planning Authority

NRA – National Resistance Army

NRM – National Resistance Movement

OAU – Organisation of African Unity

PEAP – Poverty Eradication Action Plan

POSA – Public Order and Security Act

PPOA – Political Parties and Organisations Act

RC – Resistance Council

UBC – Uganda Broadcasting Corporation

UDHR – Universal Declaration of Human Rights

UPC – Uganda Peoples Congress

ZEC – Zimbabwe Electoral Commission

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SUMMARY OF THE PAPER

The New Partnership for Africa's Development (NEPAD) heralds dawn of a new African continent with a commitment to redeem the continent in economic, social and political terms. One of the features of NEPAD is the African Peer Review Mechanism (APRM), based on the belief that no redemption can occur unless African countries engage in some form of self-assessment, critiqued through a peer review mechanism. The countries that have acceded to the APRM are expected to be objective and to carry out their self-assessment in all areas including good political governance, in good faith and in a transparent manner. Uganda has completed its Country Self-Assessment Report (Self-Assessment Report) November 2007. It should be noted, however, that the credibility of a self-assessment report and its findings depends on how objective the process was and whether it was independent of political forces. The process in Uganda shows that the APRM process is to a certain extent state-centric, with a largely executive controlled body, the National Planning Authority (NPA), designated as the National Focal Point. In spite of this, the process of the actual preparation of the Report by the APRM Commission enjoyed relative independence from the government. The Commission was constituted, on the face of it, by a relatively politically independent team representing a wide array of stakeholders from both the public and private sector.

A review of the Self-Assessment Report indicates that Uganda has registered progress in the area of governance, including free and fair competition for political power and respect for the rule of law and supremacy of the Constitution. What is apparent from the Self-Assessment Report, however, is that the progress registered is mainly in comparison to past governments. The Report discloses a number of challenges that have hampered the deepening of democracy in the country. The biggest shortcoming of the Report, however, is that in some respects it judges progress by the extent to which the country has ratified the international instruments that prescribe standards of democracy and human rights. Sight is lost of the fact that ratification of an international instrument may not necessarily mean implementation. This appears to be the situation in Uganda.

A review of evidence both within and outside the Report shows that the country is far from having free and fair competition for political power, respect for the rule of law and supremacy of the Constitution. These conclusions are based on the following:

- The Electoral Commission is not only poorly funded but is also administered in a manner that does not assure all political candidates of its impartiality. Evidence suggests a Commission which is substantially still under the wings of the ruling National Resistance Movement (NRM) Political Organisation.

While the Commission has registered some progress in salvaging its image, that progress has been very slow; it has been frustrated mainly by failure on the part of government to adequately facilitate the Commission.

- In the same way as its predecessors, the ruling party has deliberately suffocated multi-party democracy and has for most of its term reigned over a largely one-party state. The 2006 change from the Movement system to Multi-Party democracy has not ended the violation of the right to engage freely in political activity. The ruling party is bent on using both police and military force to suppress free political activity.
- The rule of law and supremacy of the Constitution has largely not been observed, Constitutional amendments have taken place following processes influenced by corruption and intimidation. Additionally, court decisions have been ignored with impunity. Government dissent of judicial processes has been expressed openly, especially by the use of the military to undermine the decisions of court.

In light of the above, pressure should be placed on the NRM Government to honour the country's commitments to full democracy and respect for the rule of law. The judiciary and other institutions that support democracy and human rights should be respected. The Electoral Commission must not only be allowed to operate in an impartial manner but should also be provided with adequate facilities in order to effectively carry out its mandated functions.

I. INTRODUCTION

Uganda completed its Country Self-Assessment Report under the African Peer Review Mechanism (APRM) of the New Partnership for Africa's Development (NEPAD) at the end of 2007.¹ The 670 page report submitted to the NEPAD Secretariat details the extent of Uganda's execution of NEPAD's objectives to achieve the following: (i) democracy and good political governance; (ii) good economic governance and management; (iii) good corporate governance; and (iv) socio-economic development. The Report details both positive and negative aspects of Uganda's advances in all the above listed areas. This paper is intended to review the Report with respect to the extent to which democracy and good political governance has been developed in the country. In this paper, I deal with only a few aspects of democracy and good governance, in particular, free and fair competition for political power and commitment to uphold the rule of law and supremacy of the Constitution. According to the Country Report:

Uganda has a good record of complying with democracy and good political governance principles, standards and codes. There are about eighty (80) instruments relevant to political governance, out of which Uganda has ratified 44. The Government of Uganda (GOU) has had a good ratification record since the late 1980s.²

What is clear from the above is that the Report judges Uganda's performance mainly on the basis of its ratification and domestication of the relevant treaties, standards and codes. This however may be the wrong premise. Ratification and domestication of international standards is one thing; implementation of the standards is quite another. Uganda's problem appears not to be ratification but implementation. This of course is not to ignore the fact that Uganda has not ratified some very important treaties such as the Protocol to the African Charter on the Rights of Women. As a matter of fact, most of the standards incorporated in the instruments that the country has ratified have not been fully implemented. When compared to past regimes, Uganda is performing well, inspite of this, the country is yet to realise full democracy and

¹ See Uganda African Peer Review Mechanism (APRM) National Commission *The country self-assessment report* (November 2007), available at <<http://www.nepaduganda.or.ug>> (accessed on 15 February 2008) (Country Report, 2007).

² Country Report, Executive Summary, at xx.

good political governance. This is what this paper sets out to illustrate.³ The paper also compares the APRM process in Uganda with similar processes in other countries, including Mauritius where the process failed, and Rwanda, where the process was successful. Other countries referred to include Ghana and South Africa. South Africa has, for instance, been praised for having adopted a number of innovations in the APRM process. The innovations included the establishment of APRM Provincial Governing Councils in all the nine provinces of the country in addition to the National Governing Council. This is addition to simplification of the questionnaire and its translation into the country's official languages.⁴ The APRM process was also given wide media coverage. The comparative methodology is intended to assess the extent to which the Uganda process responded to the challenges that led to the collapse of the process in Mauritius and adopted good practices from successful countries. The most obvious cause of the failure of the Mauritius process was its state-centric nature; this was in addition to the lack of political leadership and resources (including technical expertise) to facilitate the process.⁵

The paper begins by detailing the origins and goals of NEPAD and its commitment to democracy and good political governance and the nature of the APRM and its processes in Uganda. The paper then uses and supplements evidence from the report to illustrate the advances that Uganda has made to realise full democracy and good governance. This is done against the background of Uganda's political history of anarchy, dictatorship, civil war, the withering away of human rights and the rule of law and a leadership that for a very long time was based on one-party rule. The NRM has, to a very large extent, not lived up to the promises in its Ten Point Programme which

³ The phrase "the dream deferred" in the title of this paper is derived from Thabo Mbeki's autobiography *The Dream Deferred: Thabo Mbeki* by Mark Gevisser, Jonathan Ball Publishers (2007). Gevisser uses Mbeki's life to illustrate the disillusionment prevalent in post-apartheid South Africa as expectations of the future non-racial South Africa are let down. The reader is taken through the journey of the African National Congress (ANC), seen through the life of Mbeki and his family, particularly his father Govani Mbeki. What is apparent is that many dreams have not been realised in the "new" South Africa, which is characterised by manoeuvring as seen in the politics of the ANC. The leaders of the ANC are largely pre-occupied with warding off not only external opposition but internal dissent as well. In the introduction Gevisser describes Mbeki's overarching dream as one of 'self-determination – personal, political and psychological'. Yet, while referring to Mbeki's writings, Gevisser surmises that '[i]t is hard to engage with this discourse ... without coming to the conclusion that its writer's dream of self-determination remained somewhat deferred, even when he sat in the presidency' (at xxxiii). While there are relatively satisfactory levels of democracy and good governance in South Africa, in Uganda these have largely become "the dream deferred".

⁴ *South Africa Country Review Report* available at <<http://www.aprm.org.za/>> (accessed on 5 June 2008), at para 1.7

⁵ Shiela Bunawaree *The African Peer Review Mechanism in Mauritius: Lessons for Phase I Africa Governance Monitoring and Advocacy Project* (AfriMAP) (June 2007).

was intended to transform Uganda and bring about fundamental change.⁶ The Ten Point Programme was an instrument representing the ideological and philosophical stand of the government on how to address Uganda's problems.⁷ Its main purpose was to reverse the ills of colonialism on democracy and the economy which were exacerbated by the country's post independence regimes. Commitments were made to promote democracy and to seek to protect Uganda against human rights violations perpetrated by dictators.⁸

⁶ See 'Why NRM's betrayal is good news for the departed leaders' *Daily Monitor*, 8 April 2008.

⁷ See Mutibwa 1992, at 179.

⁸ See Uganda: Ten Point Programme at < <http://www.country-data.com/cgi-bin/query/r-14126.html> > (accessed on 8 April 2008).

II. NEPAD AND ITS COMMITMENT TO DEMOCRACY AND GOOD GOVERNANCE

The transformation of the Organisation of African Unity (OAU) into the African Union (AU) has been accompanied by a number of initiatives intended to promote democracy, good governance, human rights and socio-economic development on the African continent. One such innovation is NEPAD, ‘a pledge by African leaders, based on a common vision and firm and shared conviction, that they have a pressing duty to eradicate poverty and to place their countries...on a path of sustainable growth and development.’⁹ NEPAD ‘centres on African ownership and management’ and ‘is based on the agenda set by African peoples through their own initiatives and their own volition to shape their destiny.’¹⁰ Self ownership of NEPAD’s development agenda, anchored in the belief that African countries have the primary responsibility for socio-economic development, is considered to be NEPAD’s breakthrough when compared to previous socio-economic development agendas.¹¹ The whole idea of NEPAD is to promote coordinated development rather than haphazard country specific economic planning and development.¹² NEPAD also differs from other development initiatives because of its commitment to democracy, good governance and human rights.

Africa has historically manifested itself as a continent that provides fertile ground for dictators to flourish; indeed, the dictatorships of Idi Amin and Sani Abacha in Nigeria are fresh in our minds. It should be noted that alongside the emergence of ‘a new breed of democratic African leaders’ is the emergence of ‘a new breed of African dictators’. One need not mention Robert Mugabe amongst the many contemporary African dictators. Yet, while many African regimes have not been characterised as dictatorships, most times for diplomatic purposes, they could be characterised as oppressive and violators of basic human rights.

The 1990s should be recorded as monumental years in Africa’s political history. The international community, pushed mainly by the World Bank and the International Monetary Fund (IMF),¹³ coerced many African countries to repeal their archaic constitutions. Many of these constitutions prohibited multi-party democracy and entrenched one party rule; in some countries, free and fair elections aside, there

⁹ *The New Partnership for Africa’s Development (NEPAD) Framework Document*, adopted at Abuja in October 2001 available at <<http://www.nepad.org/2005/files/documents/inbrief.pdf>> (accessed on 6 February 2008), at para 1.

¹⁰ NEPAD Document, para 47 and 48.

¹¹ Norbert Funke & Saleh M. Nsouli *The New Partnership for Africa’s Development (NEPAD): Opportunities and challenges* (2003) International Monetary Fund. Paper was presented at the Joint Africa Institute’s High Level Seminar on NEPAD, 9 – 11 December 2002, Dakar Senegal, available at <http://www.ssrn.com/sol3/papers.cfm?abstract_id=879144> (accessed on 13 February 2008), at 1.

¹² Olaopa, 2006, at 186.

¹³ Collectively referred to as International Financial Institutions (IFIs).

weren't even any guarantees that an election would take place. This trend was reversed by the international community which presented multi-party democracy and free, fair and regular elections as pre-conditions for international aid.¹⁴ Before receiving development aid, on which many African countries depend, the IMF and World Bank required proof of transformation towards full democracy. It should be noted, however, that the 'democracy' and 'good governance' produced in the 1990s was unsustainable. Many factors explain this situation, one of which is the fact that the International Financial Institutions (IFIs) mainly concentrated on technocratic rather than social changes that would leave a lasting impact and plant democracy on firm ground.¹⁵ More importantly, the whole process was riddled with a number of contradictions, which only worked to paralyse rather than reform African states. One such contradiction was the call for transparent and efficient governments. While at the same time authoritarian governments were positioned to implement unpopular reforms such as the Structural Adjustment Programmes.¹⁶ It is not surprising, therefore, that the democracy resulting from these processes was hollow. According to Carlos Santiso:

[T]he initial enthusiasm with the global resurgence of democracy may have been too euphoric and somewhat naïve. Stagnant transitions, the increasing fragility of democratisation processes as well as the realisation of incomplete or imperfect nature of the new democracies have watered down initial expectations. In many parts of the world democracy is fading, eroding or falling, disillusionment about democracy has replaced the optimism that marked the early 1990s as elected governments are riddled with corruption, incompetence and instability.¹⁷

It is therefore not surprising that “a genuine culture of democracy” still eludes almost all African countries; the majority of countries have not yet developed into institutionalised or consolidated democracies.¹⁸ To confirm Santiso's concerns, one need not look beyond the human rights abuses following the 2005 elections in Ethiopia, the violence accompanying the rigging of the 2007 elections in Kenya and

¹⁴ Democracy characterised by a guarantee of basic civil and political rights was presented by the international community as a pre-condition for international development. Of course, the connection between democracy and development has been a matter of great controversy, see for instance Gerring, John., Barndt, William. and Bond, Philip. *Democracy and Growth: A Historical Perspective* Paper presented at the annual meeting of the American Political Science Association, Philadelphia Marriott Hotel, Philadelphia, PA, Aug 27, 2003 available at <http://www.allacademic.com/meta/p63999_index.html> (accessed on 21 May 2008); Prenab Bardhan Democracy and development available at <<http://globetrotter.berkeley.edu/macarthur/inequality/papers/BardhanDemoc.pdf>> (accessed on 21 May 2008); and Gerring, John *Democracy and Human Development* Paper presented at the annual meeting of the American Political Science Association, Marriott Wardman Park, Omni Shoreham, Washington Hilton, Washington, DC, Sep 01, 2005 available at <http://www.allacademic.com/meta/p40287_index.html> (accessed on 21 May 2008). I do not intend to discuss this controversy

¹⁵ Mafeje, 2002 in in Peter Anyang' Nyong'o *et al* (eds.) *New Partnership for Africa's Development: A new path?* (2002) Heinrich Böll Foundation 49, at 84.

¹⁶ *Id.*, at 84 – 85.

¹⁷ Santiso, 2001, at 157.

¹⁸ Kizza *et al*, 2008, at 2.

the conduct of the Zimbabwe Electoral Commission (ZEC) following the March 2008 presidential elections. Sanitos has added that while the new democracies possess all the formal institutions of democracy, these often remain empty shells, failing to function effectively and to provide the necessary checks and balances.¹⁹ The Kenya Electoral Commission (KEC) and ZEC could be cited as examples of such empty shells. The continent has also witnessed the reversal, and attempts to reverse, presidential term limits in many countries, including Zambia, Nigeria, Cameroon, Malawi and Uganda. It is against this background that NEPAD's commitment to democracy and good governance should be understood.

NEPAD adopts the definition of good governance provided by Kofi Annan to mean the means of creating well-functioning and accountable political, judicial and administrative institutions, which citizens regard as legitimate and in which they participate in decisions that affect their daily lives and by which they are empowered.²⁰ It is acknowledged that the objectives of NEPAD cannot be achieved without, among other things, promoting and protecting democracy and human rights and developing clear standards of accountability, transparency and participatory governance.²¹

*It is generally acknowledged that development is impossible in the absence of true democracy, respect for human rights, peace and good governance. With the New Partnership for Africa's Development, Africa undertakes to respect global standards of democracy, the core components of which include political pluralism, allowing for the existence of several political parties and workers' unions, and fair, open and democratic elections periodically organised to enable people to choose their leaders freely.*²²

To promote democracy and good governance, NEPAD has adopted a Democracy and Political Governance Initiative intended to contribute to strengthening the political and administrative framework of states in line with the principles of democracy, transparency, accountability, integrity, respect for human rights and promotion of the rule of law.²³ Further commitment to democracy, good governance and human rights is made in the Declaration on Democracy, Political, Economic and Corporate Governance.²⁴ This Declaration commits the heads of state to undertake measures intended to achieve the following objectives:

¹⁹ Sanitos, op.cit. at 157.

²⁰ See Koffi Annan, *Partnerships for a global community* (1998).

²¹ NEPAD Document, para 49.

²² NEPAD Document, para 79.

²³ NEPAD Document, para 80.

²⁴ Adopted by the AU Inaugural Assembly of Heads of State and Government, 18 June 2002, AHG/235 (XXXVIII) Annex I.

- The rule of law;
- The equality of all citizens before the law and liberty of the individual;
- Individual and collective freedoms, including the right to form and join political parties and trade unions in conformity with the constitution;
- Equality of opportunity for all;
- The inalienable right of the individual to participate by means of free, credible and democratic political processes in periodically electing their leaders for a fixed term of office; and
- Adherence to the separation of powers, including the protection of the independence of the judiciary and of effective parliaments.²⁵

The Declaration also commits states to support democracy and the democratic process by ensuring that: national constitutions reflect democratic ethos and provide for accountable governance; promoting political representation by providing for all citizens to participate in the political process in a free and fair political environment; strengthening and establishing an appropriate electoral administration and oversight; and heightening public awareness of the African Charter on Human and Peoples Rights, especially in educational institutions.²⁶ Good governance, according to the Declaration, is to be supported by adopting clear codes, standards and indicators of good governance; accountable, efficient and effective civil service; ensuring the effective functioning of parliament and other accountability institutions, including parliamentary committees on corruption; and ensuring the independence of the judicial system.²⁷ Human rights must be promoted and protected by facilitating the development of vibrant civil society organisations, including strengthening human rights institutions; supporting the African Charter on Human and Peoples Rights and the African Commission and Court on Human and Peoples Rights; strengthening the co-operation with the UN High Commissioner for Human Rights; and ensuring responsible free expression, including of the freedom of the press.²⁸

It should be noted, however, that NEPAD has not been without its criticisms, based mainly on its objectives and structural set up. An example of a very lucid critique is one made by Pan-African scholar Dani Nabudere.²⁹ Nabudere submits that there is no need for Africa to seek to integrate itself with the global economy since it is already part of it; this is because the continent's 'marginalisation does not lie in its being excluded from the global economy, but in being the most exploited in that

²⁵ Declaration on Democracy, at para 7.

²⁶ Declaration on Democracy, para 13.

²⁷ Declaration on Democracy, para 14

²⁸ Declaration on Democracy, para 15.

²⁹ Nabudere, 2002, in Peter Anyang' Nyong'o *et al*, op.cit.

global economy'.³⁰ The African leaders 'instead of choosing the path of political unity, have opted for colonial division of Africa as the basis of its transformation. That will never happen'. According to Nabudere, it 'is political unity alone that can make it possible for Africa's rich natural and cultural resources to be the basis of Africa's development and not financial resources from outside.' This criticism is well-founded, because much of NEPAD's success is dependent on mobilising external resources. There is no clear and irrevocable commitment to use African resources to eradicate Africa's problems. I have, for instance, faulted the commitment to tackling the problem of HIV/AIDS, which is dependent on the mobilisation of resources by leading an international campaign for increased financial support. It is my submission that Africa should begin to solve its problems using the locally available resources.³¹

2.1 NEPAD and the APRM process

As an implementation mechanism, NEPAD sets up a Heads of State Implementation Committee (HSIC), composed of five heads of state (promoters of NEPAD) and ten other heads of state (two from each region). The functions of this Committee include identifying strategic issues that need to be researched, planned and managed at the continental level; setting up mechanisms for reviewing progress in the achievement of mutually agreed targets and compliance with mutually agreed strategies; and reviewing progress in the implementation of past decisions and taking appropriate steps to address problems and delays.³² One of the initiatives produced by the work of HSIC has been the APRM, which was approved by the Heads of State and Government as the mechanism for the promotion of adherence to, and fulfilment of, the commitments in the Declaration on Democracy.³³

The APRM arises from an instrument voluntarily acceded to by states as an African self-monitoring mechanism.³⁴ The mandate of APRM is to ensure that the policies and practices of participating states conform to the agreed political, economic and corporate values, codes and standards contained in the Declaration on Democracy.³⁵ This mechanism is intended to promote the 'sharing of experiences and reinforcement of successful best practices, including identifying deficiencies and assessing the needs for capacity building.'³⁶ The management of the APRM is vested in a Panel of seven

³⁰ Id., at 64.

³¹ Mbazira, 2004, at 47.

³² NEPAD Document, para 201.

³³ Declaration on Democracy, para 28.

³⁴ The following countries had by April 2007 acceded to the APRM: Algeria, Angola, Benin, Burkina Faso, Cameroon, Egypt, Ethiopia, Gabon, Ghana, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Nigeria, Republic of Congo, Rwanda, Saõ Tomè and Príncipe, Senegal, Sierra Leone, South Africa, Sudan, Tanzania, Uganda and Zambia.

³⁵ APRM Base Document, AHG/235 (XXXVIII) Annex II, para 2.

³⁶ APRM Base Document, para 3.

Eminent Persons, consisting of Africans who have distinguished themselves in careers that are considered relevant to the work of the APRM; this is in addition to being persons of high moral stature and committed to the ideals of Pan Africanism.³⁷

Unlike other international monitoring body processes, the APRM is not a mechanism for enforcing international standards. Instead, the APRM is supposed to act as a catalyst for African countries to discover for themselves best policies and practices that will achieve the objectives of NEPAD.³⁸ The APRM process follows four stages, which are designed to achieve the objective of both self-assessment and assessment by the Panel of Eminent Persons, concluding with a peer like review carried out by the participating states. The first stage commences with the participating country preparing a Self-assessment report, which is prepared after a national information gathering process using the questionnaire supplied by the APRM secretariat.³⁹ At this stage, the country is also expected to formulate a preliminary time bound programme of action, based on existing policies, to improve its governance and socio-economic development.⁴⁰ The country report is intended to provide a basis for helping the country improve its Programme of Action. It provides a basis for consolidating the shared values and standards in governance and highlights the weaknesses and challenges of the country in its pursuit of the objectives of NEPAD. The Self-assessment report is sent to the APRM secretariat. Upon receipt of the report, the Secretariat arranges a visit of an African Peer Review Team (APR Team) to the country. While in the country, the APR Team will carry out the widest range of consultations with government officials, political parties, parliamentarians and representatives of civil society (including the media, academia, trade unions, business and professional bodies).⁴¹

The third stage is the preparation of a report by the APR Team based on the information provided by the government and from other official and unofficial sources. The Team is supposed to discuss its draft report with the government in order to ensure the accuracy of the information and to provide the government with an opportunity to react to the findings of the Team and to put forward its own views

³⁷ APRM Base Document, para 6.

³⁸ Stals, 2004, at 137.

³⁹ The purpose of the questionnaire is to provide participating states with a format that can serve as a checklist to determine whether the various stakeholders participating in the process have responded to their concerns. See questionnaire at <[http://www.nepaduganda.or.ug/documents/APRMquestionnaire\[1\].pdf](http://www.nepaduganda.or.ug/documents/APRMquestionnaire[1].pdf)> (accessed on 6 February 2008).

⁴⁰ See *Objectives, Standards, Criteria and Indicators for the African Peer Review Mechanism ("The APRM")* NEPAD/HSGI-03-2003/APRM/Guideline/OSCI, para 6.

⁴¹ APRM Base Document, para 19.

on how the identified shortcomings should be addressed.⁴² The Team is supposed to append the response of the government to its report. The Team's report is also supposed to clear a number of points in instances where problems are identified, these include questions of whether there is the will on the part of government to find measures to address the problems identified, the resources necessary to take the corrective measures and how government can provide its own measures. This is in addition to the question of how long the process of rectification will take given the existing resources. The report of the APRM Team is supposed to be submitted to the participating Heads of State and Government which begins the fourth and the final stage. Where the country under review demonstrates the will to find solutions to the problems identified, the participating states are supposed to support the state in this endeavour and to give it appropriate assistance. In the absence of such will, the participating states are supposed to engage the state in constructive dialogue. If this is unsuccessful, the states may give the country notice of their collective intention to proceed with appropriate measures by a given date.⁴³ At the moment, it is not yet very clear the kinds of measures that may be adopted in this regard.

2.1.1 The APRM Process in Uganda

By the time of this paper the APRM process in Uganda was at the second stage, the APRM Team had just left the country after making a number of consultations. After acceding to the APRM, the government of Uganda in 2004 designated the National Planning Authority (NPA) as the focal point.⁴⁴ The NPA is a statutory agency tasked with the function of producing comprehensive and integrated development plans for the country.⁴⁵ The NPA was tasked to set up the national structures and ensure that NEPAD initiatives and the APRM are integrated into the national planning process.⁴⁶ This is in line with NEPAD's guidelines for countries to participate in the APRM.⁴⁷ The guidelines require that every participating country establishes a focal point for the process, 'which should be at a Ministerial level, or a person that reports directly to the Head of State or Government, with the necessary committee supporting it.'⁴⁸ The establishment of Uganda's focal point and its positioning should be contrasted with the process in Ghana, which dedicated a full ministry, the Ministry of Regional

⁴² APRM Base Document, para 21.

⁴³ APRM Base Document, para 24.

⁴⁴ The Focal Point is intended to be a communication and co-ordination agency, serving as the liaison mechanism between the national structures and the continental structures including the APR Panel and APRM Secretariat. The Focal Point is supposed to develop, co-ordinate and implement the in-country mechanisms of preparing the self-assessment report and is also responsible for hosting the APR Panel. See Kajee, 2004 in *SA Yearbook of International Affairs*, 2003/04, at 247.

⁴⁵ See the National Planning Authority Act, 2002. See <<http://www.npa.or.ug/>> for details on the work of the NPA.

⁴⁶ See Country Report, 2007, at 19.

⁴⁷ The guidelines are available at <<http://www.nepad.org/aprm/>> (accessed on 15 February 2008).

⁴⁸ See para 34 of the guidelines.

Co-operation and NEPAD, followed by the establishment of a focal point within this Ministry. Rwanda's approach has been different; the president has established an office of a special representative on NEPAD issues within the Presidency.

It should be noted that the NPA is not at ministerial level. Rather, it is an independent statutory body; that does not report directly to the President. Instead, it submits its reports to the Minister who in turn submits the same to Parliament for approval.⁴⁹ One could thus argue that the NPA is not completely independent from the Executive. As a matter of fact, its chairperson, deputy chairperson and three of its members are appointed by the president for a term of five years, renewable once.⁵⁰ This means that while serving their first term, members of the NPA may not want to risk not having their term renewed by embarrassing the executive. Indeed, the NPA Act allows the President to remove any member from office, among others reasons, for misconduct, misbehaviour and incompetence.⁵¹ It should be noted, however, that the remaining members of the NPA, composed of ex-officio members, is not appointed by the President. This portion is composed of heads of bodies that the NPA Act designates as bodies affiliated to the NPA.⁵² The problem, however, is that the leaders of a sizeable number of these bodies are appointed by the Executive. An example is the Uganda Bureau of Statistics, whose Board chair is appointed by the Minister responsible for statistics.⁵³ The National Environment Management Authority is not any different.⁵⁴ The state centric nature of the NPA could be compared to the position in Mauritius where, the National Economic and Social Council (NESC), appointed as the focal point has more than half its membership as government appointed. This is one of the factors identified as accounting for the subjective nature of the report produced by Mauritius which simply praised government.⁵⁵

However, the lack of independence of the NPA could be counter-balanced by the independence of the APRM Commission, which after all is responsible for preparing the report. For the purposes of the self-assessment, what is most important is having in place an independent team to carry out the assessment. To ensure such independence, the APRM Commission was established alongside the NPA with independence from the latter. The Commission was tasked with the function of facilitating the APRM process in the country and to ensure the participation of all stakeholders.

⁴⁹ NPA Act, section 8(6).

⁵⁰ See sections 5(1) and 5(4) of the NPA Act.

⁵¹ NPA Act, section 5(5).

⁵² Section 5(3). These include the Uganda Bureau of Statistics, Economic Policy Research Centre, National Council for Science and Technology, Population Secretariat, Local Government Finance Commission, body responsible for human resource development, Town and Country Planning Board, Non-Government Organisations' Forum, Uganda National Chamber of Commerce, The Uganda National Farmers Association, National Agricultural Research Organisation, the Treasury, National Environment Management Authority, Uganda Manufacturers Association, and the Equal Opportunities Commission.

⁵³ Uganda Bureau of Statistics Act, Cap 310, section 4(2).

⁵⁴ See section 11 of the National Environment Act, cap 153.

⁵⁵ See Bunwaree, 2007 op.cit, at 17.

The Commission was not only representative of a number of interests but was also fairly balanced in terms of the various stakeholders represented. The Commission is composed of representatives of government, including local government and stakeholders from civil society such as women's groups, trade unions, disabled persons, the media, the chamber of commerce, the law society, the churches, parliament and academia.⁵⁶

The Commission also reported that the self-assessment exercise was carried out in three phases: pre-assessment, the assessment itself and post-assessment. The pre-assessment phase was intended to create public awareness of APRM, sensitize all stakeholders and the domestication of the questionnaire.⁵⁷ At the assessment stage, the Commission adopted four research instruments which it employed in the assessment in addition to holding public meetings and receiving memoranda from various groups following guidelines published in the media. The tools included desk research, expert panel interviews, group discussions and a national sample survey. In addition to engaging consultants to facilitate the self-assessment process, the Commission participated in media campaigns to publicise the process, conducted public hearings and entertained views from various interest groups.⁵⁸

The Commission took steps to adapt the questionnaire to Uganda's conditions. One of the reasons identified for the collapse of the process in Mauritius was the failure to adapt the questionnaire, with the consequence that it did not yield the expected results: '[t]he complexities and length of the APRM questionnaire meant that many participants ... did not then actively participate in the process.'⁵⁹ In Uganda, the task of domesticating and reformulating of the questionnaire was left to Technical Partner Institutions, who used their expertise in specific areas to modify the questionnaire accordingly.⁶⁰

⁵⁶ The members of the Commission, as nominated by their respective constituencies included Professor Semakula Elisha – Chairperson (Academia – Makerere University); Bishop Niringiye Zac (Church – Uganda Joint Christian Council); Mr. Kaye Saul (Government – National Planning Secretary); Hon. Abia Bako (Opposition – Parliament of Uganda); Mr. Agaba Abbas (Youth – National Youth Council) Mr. Baingana Emmanuel (Trade Union – National Organisation of Trade Unions); Hon. Buchanayandi Tress (Ruling Party – Parliament of Uganda); Mr. Busuulwa Abdul (PWDs – National Union of Disabled Persons in Uganda); Ms. Drito Alice (Media – Uganda Media Union); Mr. Guma Fredrick (Local Government – Former District Chairperson, Jinja); Ms. Katungye Rossette (Government – Ministry of Foreign Affairs); Mr. Kezaala Jowad (Moslems – Inter-Religious Council of Uganda); Mr. Madhivani Nitin (Private Sector – Uganda National Chamber of Commerce and Industry); Professor Mwaka Victoria (Women – National Association of Women's Organisation of Uganda); Mr. Nyamugasira Warren (Civil Society – Uganda National NGO Forum); Mr. Ochia Max (Government – Ministry of Finance, Planning & Economic Development); Mrs. Najjembe Rose Muyinda (Women – National Women's Council); Mr. Nkunzingoma Deo (Legal Fraternity – Uganda Law Society); Mr. Odwedo Martin (Government – Office of the Prime Minister); Hon. Sabalu Mike (Member of Parliament – Parliament of Uganda); Mr. Wanzala Daniel (Farmers – Uganda National Farmers Federation); and Ms Angye Silvia (Ex-Official).

⁵⁷ The stakeholders consulted included youth, farmers, women, persons with disabilities, Police, Prison and military forces, the Judiciary, Parliament, opposition political parties, labour unions, religious groups, the media, local government authorities and the Uganda Human Rights Commission.

⁵⁸ Country Report 2007, at 20. For an example of such public hearing see 'Busia wants Museveni assessed' *Monitor* Newspaper 1 August 2007.

⁵⁹ Bunwaree 2007, at 15.

⁶⁰ Country Report, 2007, at 21.

On the face of it, one would have no ground to doubt the independence of the Commission. This compares with the APRM process in Rwanda, where the APRM Support Mission from the NEPAD Secretariat voiced concerns regarding the membership of the Commission, which was mainly composed of public officials. This criticism resulted in the restructuring of the Commission by drawing representation from diverse stakeholders, including the public, private and civil sectors of Rwanda. This was found to be satisfactory.⁶¹

⁶¹ See *African Peer Review Mechanism: Country Review Report of the Republic of Rwanda* available at <<http://www.nepad.gov.rw>> (accessed on 5 May 2008), at paras 53 and 57.

III. The State of Democracy and Governance in Uganda

3.1 A historical context

It would be hard to appreciate Uganda's democracy and governance challenges without an understanding of the country's political history. This is because the challenges facing Uganda in deepening democracy and good governance are a manifestation of her political, economic, social and military history.⁶² The country's history is tainted with civil war, dictatorship, one party rule and the violation of human rights in all its forms. When Uganda gained independence from colonial rule on 9 October 1962, expectations were high: the country had finally broken from the oppressive yoke of colonialism. Little was it known that the 1962 Independence Constitution was flawed and the harbinger of bad governance in the country. The Constitution had created an imbalance of power between the different regions. Some regions like Buganda were characterised as kingdoms, with a federal relationship with the central government, while others remained subject to strict central government control. Yet all these regions were to compete for political power by producing a president and vice president. Buganda would later produce the first President, who also doubled as the *Kabaka* (King) of Buganda. This was viewed by other regions as Buganda domination. According to George Kanyeihamba, the Constitution created a President who required no mandate from Uganda as a whole: all he needed was to be a ruler of a kingdom or district, and also only one kingdom or district could determine the qualification of this high office.⁶³ At the same time, the Constitution created the office of the Prime Minister, who was appointed from the majority party in the legislature with substantial executive powers.

It is against this background that the first Prime Minister, Milton Obote, the head of the Uganda People's Congress (UPC), used political manipulation and military backing to seize power and to later abrogate the Independence Constitution.⁶⁴ The 1966 Interim Constitution was adopted without debate; the members of the legislature woke up to find in their pigeon holes copies of the draft Constitution to be adopted. The 1967 Constitution effectively abolished the kingdoms and created an executive President with considerable power exercised by a centralised government. The militaristic way in which Obote ousted the Kabaka and adopted the 1966 Constitution meant that he would depend on the military for his stay in power. This marked the beginning of the militarisation of politics in Uganda: armed oppression and detention were relied on as the normal response to the opposition.⁶⁵ Since then, in spite of its central role of maintaining security, the army has often gone overboard and fallen short of society's expectations.⁶⁶ According to Amii Omara-Otunnu:

⁶² Id., at 4.

⁶³ Kanyeihamba, 2002, at 79.

⁶⁴ See Karugire, 1980, at 196.

⁶⁵ Arnold, 2005, at 280.

⁶⁶ Naluwairo, 2006.

*The usurpation of state power by the army dealt a series of devastating blows to democratic processes in the country. The distinctive features of the system of government and administration which became established were the devaluation of human lives, the use of force in social interactions, the presentation by the power élite of political problems as being essentially military in nature, ... and the domination of civilian institutions by the armed forces.*⁶⁷

The Obote government was extremely sensitive to criticism; it considered criticism anathema: '[t]he only public criticism that was welcomed was the one which praised government policies and boosted ministers' personal standing in the country.'⁶⁸ After attempted assassinations on Obote on 18 December 1969, all political parties except the UPC were banned. This meant a *de facto* one-party state for Uganda.⁶⁹

The despotic way in which Obote administered the government and dealt with the opposition laid the foundation for his downfall, but more so was the way in which he managed the army. Discontent and the emergence of factions within the military resulted in the January 1971 *coup d'état* by Idi Amin. The abrogation of the 1962 Constitution and the judicial endorsement of the irregular manner in which the 1966 Constitution was adopted created a lasting impression that a constitution could be abrogated or ignored and/or suspended. The latter is what Idi Amin did, via Legal Notice No. 1 of 1971 in which he suspended parts of the 1967 Constitution including the supremacy clause; the Constitution could be overridden by decrees passed by the Military Council. The country quickly degenerated into dictatorship. The government issued orders prohibiting politicians from making public statements and prohibiting all political activity. The law prohibited any person from managing, taking part in or collecting subscriptions for any political party or organisation or taking part in any public meetings or processions for the purpose of imparting political ideas.⁷⁰

While the overthrow of Idi Amin was lauded both within and outside Uganda it marked another era that eluded democracy and good governance. The period of transition leading to the 1980 elections was characterised by unconstitutional manoeuvring, which saw the overthrow of the government and hijacking of the electoral process by the Pro-UPC Military Commission. The 1980 elections, which were supposed to usher in a new democratic government, remain contested. They were fraught with heavy gerrymandering and riddled with many irregularities and coercion,⁷¹ and the

⁶⁷ Omara-Otunnu, 2002, at 445.

⁶⁸ Kanyeihamba, *op.cit.*, at 131.

⁶⁹ See generally Willets, 1975.

⁷⁰ See Kanyeihamba, *op. cit.*, at 146.

⁷¹ Oloka-Onyango, 2005, at 1.

fact that the process was directed by the Pro-UPC Military Commission, which took over from the electoral commission, leads to the conclusion that the elections were rigged.

3.1.1 *A History of Abrogation of Judicial Independence*

Uganda's political history is also highlighted by blatant disregard of the doctrine of judicial independence. While colonialism introduced a western type legal and judicial system, it did not embrace all its tenets; relegated to the background was the doctrine of separation of powers and full judicial independence. The most visible relegation of judicial independence was through the appointment of chiefs, who acted as agents of indirect rule; the chiefs donned executive, judicial and legislative powers.⁷² The higher administration was not any different, the Governor, who was the head of the protectorate, himself exercised executive, legislative and judicial power, and a number of his decisions were expressly excluded from judicial review.⁷³ The judges and magistrates were appointed by the administration and could summarily be dismissed at will.

While independence introduced some political changes, most of the institutions of government, including the judiciary, remained intact. Executive domineering over the judiciary continued. Uganda's history has numerous examples of executive disregard and the overruling of court orders. The most cited example is the case of *Ibingira v. Uganda*.⁷⁴ Grace Ibingira, a cabinet minister, had been arrested by Obote's government following intelligence reports that the ministers were planning to pass a vote of no confidence in the President. The ministers were detained under deportation laws, which they successfully challenged in the Court of Appeal after losing in the High Court. The Court of Appeal held that the deportation laws were unconstitutional and ordered the High Court to consider the applicant's application for *habeas corpus*. The administration simply re-arrested the detainees under emergency laws and validated their deportation by a retrospective piece of legislation presented in Parliament and passed the same day. In circumstances that depict judicial compromise, the detainees lost a Court of Appeal case challenging the validation legislation and subsequent detention. The case has been described as showing that in the new independent Uganda judicial independence was but a myth.⁷⁵

⁷² See Oloka-Onyango, 1994 in Mamdani & Oloka-Onyango, 1994, at 470.

⁷³ See Monica Twesiime Kirya *The independence and accountability of the judiciary in Uganda: Opportunities and challenges* available at <<http://www.kituoachakatiba.co.ug/twesiimemonica.htm>> (accessed on 26 March 2008).

⁷⁴ [1966] E.A. 306.

⁷⁵ According to Oloka-Onyango 'Ibingira case represented the high-point in the demise of the independence of the judiciary, especially with respect to matters relating to the fundamental rights and freedoms section of the Constitution'. Oloka-Onyango 1994 op.cit, at 482

The compromised independence of the post-independence judiciary is also reflected in the case of *Ex Parte Matovu: Uganda v. Commissioner of Prisons*.⁷⁶ In this case, the court followed the positivist principles propounded by a German scholar, Hans Kelsen to sanction an unconstitutional change of government.⁷⁷ The members of the Court believed that a decision that the Constitution was irregular would have challenged their legitimacy, which was ultimately based on the Constitution. The High Court held that a constitutional order can validly be swept aside by a revolution: ‘if the revolution is victorious in the sense that the person assuming power under the change can successfully require the inhabitants of the country to conform to the new regime, then the revolution itself becomes a law-creating fact.’ According to Oloka-Onyango, ‘the court clothed the patently illegal actions of government in a shroud of legitimacy and thus aided the erosion of its own power and authority.’⁷⁸

The period between 1971 and 1979 was characterised by absolute anarchy, many state functionaries including the judiciary were militarised; quasi-judicial powers were conferred on a number of military and para-military bodies, which resulted in the absolute marginalisation of the judiciary.⁷⁹ The sanctity of the judiciary was defiled when the military arrested the chief justice while in his office; he was dragged in broad day light to an unknown destination. He was never found and is presumed to have died by execution. While the period between 1980 and 1986 witnessed a re-awakening of the judiciary the independence of the institution remained compromised and constrained by pieces of legislation that sought to expressly oust the jurisdiction of the courts: ‘[s]everal ... cases decided under the Obote II regime (12 December 1980 – 15 July 1985) reflected a judiciary that was struggling with laws that were patently outrageous, but was too constrained by the force of history and their own positive leanings to come completely out of the cocoon.’⁸⁰ One of the laws that was recouped and vigorously enforced was the 1967 Public Order and Security Act (POSA),⁸¹ which conferred on the administration very wide powers to order the detention of any person suspected of disrupting the public order or compromising the security of the state.

By the mid 1980s, the country was beset by terror, anarchy and warlordism.⁸² There was a complete break-down of law and order. Everything was militarised, yet the President had very limited control over the army. It is in the midst of this chaos that the National Resistance Army (NRA) seized power ending a protracted civil war.

⁷⁶ [1967] E.A.L.R. 514.

⁷⁷ For a detailed discussion of this decision and its impact on the legal system see Kirkby 2007

⁷⁸ Oloka-Onyango, 1994 op.cit., at 483.

⁷⁹ Id., at 488.

⁸⁰ Id., at 492.

⁸¹ Act 20 of 1967.

⁸² Kizza *et al* op.cit, 52, at 3.

3.2 Findings in the Country Report

In this section I detail and analyse the findings in the report on the issue of democracy and political governance, which is the subject of discussion in chapter three of the Country Report. It should be noted, however, that this discussion does not cover the entire spectrum of the subjects discussed in this chapter: it is restricted to the subject of constitutional democracy and good governance, which is section 3.3 of the Report. The Report mentions the objectives of this section, which is to assess the extent to which constitutionally-established provisions and institutions enable citizens to enjoy their rights and freedoms as they compete for power. In addition to assessing the extent to which free and fair competition for political power is guaranteed,⁸³ this section assesses whether all authorities, including the armed forces and security agencies, respect the rule of law.⁸⁴ To put the discussion in context, I preface this section with a general discussion of the state of constitutionalism under the National Resistance Movement (NRM) Government. This discussion is relevant to understanding the motivation and political foundations for some of the events that have undermined democracy, such as the lifting of the presidential term limits.

There is no doubt that the NRM saved Ugandans from the brutal pro-Obote and later Tito Okello army. The NRM government is also credited with a number of successes in the area of good governance. While some of the reforms heralded by the NRM arose from pressure asserted by the global forces of democratisation, this should not lead one to disregard some of the initiatives of the NRM stemming from its reform agenda it adopted during the civil war. These include the establishment of a system of local government, based on elected councils organised on a bottom-up basis, and the promulgation of the 1995 Constitution by an elected Constitutional Assembly. The other positive changes brought about by the NRM were the freedom of the press and civil society to operate; this is in addition to the attention given to the need to protect human rights. Also, for the purposes of widening the principles of participation in governance and development, the NRM accorded equal rights to men and women and brought on board a number of marginalised groups including persons with disabilities.⁸⁵ Within and outside Uganda the NRM was seen as the only hope for the restoration of democracy and good governance in Uganda. However, as will be seen later, this expectation has, to a very large extent been dashed, as can be seen from the state of constitutionalism in the country.

⁸³ Country Report, 2007, at 45 – 57.

⁸⁴ *Id.*, at 45.

⁸⁵ Kanyehamba, 2002, at 243. Kanyehamba describes the guarantee of the equal rights of men and women as the greatest innovation introduced and practiced by the NRM.

According to Oloka-Onyango, constitutionalism under the NRM can be divided into several distinct phases, the first being the period of experimentation.⁸⁶ Oloka-Onyango highlights some of the important features of this phase, which include the establishment of the elected Resistance Councils. The most prominent feature that he describes, however, was the proscription of political activity, which in effect translated into a ban of political parties.⁸⁷ The reason advanced for the proscription of political party activities was that the turbulent history of the country was mainly a product of political party competition, as well as a belief that political party contestation was a ‘virtue’ of Western industrialised societies and one that would revive primordial identities and promote sectarianism.⁸⁸ This proscription was a very serious blow to the democratic process in Uganda.⁸⁹

It signified that the N.R.A. [National Resistance Army] did not really intend to be a provisional government for only four years, and foreclosed almost all fora for legitimate articulation of group or individual interests not approved by the authorities.⁹⁰

It should also be noted that the election of representative resistance councils, later Local Councils, as participatory as it seemed, was not without problems. Mahmood Mamdani points out the biggest anomaly of this system, which arose from the limiting of direct elections to the village level, the rest were indirect, through electoral colleges.⁹¹ Mamdani describes the impact of this reform: ‘[it] sidelined political parties and banned public campaigns. The effect was the opposite of what had been hoped.’⁹² While in 1989 the Resistance Councils system could have provided a democratically elected National Resistance Council (the first elected legislative body under the NRM government) this did not happen: ‘High level RC elections were so remote from those on the ground that they appeared even more exclusive than what had been the practice of political parties.’⁹³ Mamdani continues to observe that ‘[i]t became clear that while participatory politics is effective for local communities, it becomes a watered down form of democracy beyond the village RC, and getting progressively worse the higher you go’.⁹⁴

⁸⁶ Oloka-Onyango, 2005 at 2

⁸⁷ *Id.*, at 3.

⁸⁸ Kizza *et al*, 2002 *op.cit*, at 3.

⁸⁹ Omara-Otunnu, 2002 *op.cit*, at 448.

⁹⁰ *Id.*, at 448.

⁹¹ Mamdani, 1994, at 97.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

It is against this background that the 1995 Constitution was promulgated. The NRM government favoured the Movement System, which was described in the Constitution as based on the principles of participatory democracy: accountability and transparency; accessibility to all positions of leadership by all citizens; and individual merit as a basis for election to political office.⁹⁵ Those who supported this system as the most appropriate found their justification in the country's history. It was argued that political parties had been characterised by tribalism and sectarianism and that no government had succeeded in providing peace and stability under a multiparty system.⁹⁶ On establishment, the Movement system was structured alongside the Resistance Committee structure, with a National Conference as the topmost structure.⁹⁷ Almost all elected representative councils were co-opted and made part of the National Conference. These included district executive committees, the National Women's Council, the National Youth Council, as well as the Uganda National Chamber of Commerce. All Ugandans, by a very simple interpretation of the Movement Act, became members of the Movement, which in effect amounted to institutionalisation of a single-party state grafted on all structures of the state. A referendum was supposed to be held after two years to determine whether government should continue under the movement system or go multi-party. The referendum was tainted with many irregularities and a very low turnout and merely endorsed the continuation of the Movement System.

Both the 1996 and 2001 presidential and parliamentary elections were held under the Movement System, causing much protest from opposition politicians belonging to the 'banned' political parties. It was, however, clear that in spite of the legal position that all candidates contested the elections under the umbrella of the Movement, during the campaigns, some candidates were more 'movementist' than others. It was clear that the 'pure movementists' had government support and on many occasions used state resources and security agencies to boost their support. Indeed, in what would be a paradox under the Movement System, the incumbent, President Yoweri Kaguta Museveni, was on these two occasions nominated to contest the elections by Movement structures, clearly indicating that the Movement was but a political party suppressing other parties. When Kizza Besigye, who was then still in the Movement, announced that he also intended to run for the presidency under the Movement system, he was quickly denounced by Museveni in what mirrors the Robert Mugabe versus Simba Markoni contest.⁹⁸ Besigye was denounced by Museveni on the ground that he could not purport to stand under the Movement when the Movement organs had

⁹⁵ Article 70(1).

⁹⁶ Kirya, 1998, at 79.

⁹⁷ See section 4 of The Movement Act, Cap 261 of Laws of Uganda 2002.

⁹⁸ See 'Former finance chief to stand against Mugabe' *Guardian* available at <<http://www.guardian.co.uk/world/2008/feb/05/zimbabwe.marktran>> (accessed on 30 March 2008).

not approved his candidacy.⁹⁹ It should also be noted that during the 2001 elections the Movement, by all accounts, conducted itself as a political party, with a logo, a slogan and party colour.

After the 2001 elections, international and domestic pressure was mounted on the Movement to open up political space and free political parties. In March 2003 the Movement held its National Conference and adopted a decision to open the political space. It was nevertheless made clear though that this was for the purposes of getting rid of errant members within the Movement.¹⁰⁰ Earlier in 2001, during the election contests, it was announced that a Constitutional Review Commission (CRC) would be appointed to review the 1995 Constitution. Oloka-Onyango has ably dealt with the motivation for the appointment of the CRC and the flaws in its *modus operandi*,¹⁰¹ I need not belabour these. What is apparent is that the review was mainly intended to amend article 105 which restricted the presidential term to two terms of five years. Through manipulation, intimidation and bribing of members of Parliament, the article was amended in a manner reminiscent of the passing of the 1966 pigeonhole Constitution. The provision is now without any limitation of terms, it merely provides that a person elected president shall hold office for a term of five years. This amendment opened up the space for Museveni to stand in the 2006 elections and go for a 'third' term consolidating his position as president of Uganda for 25 years. All these events provide evidence of the fact that Uganda is yet to consolidate its democracy and good governance. Political governance is characterised by heavy handedness on the part of the opposition, which lets government elude free and fair competition for power, and blatant disregard for the rule of law.

3.2.1 *Free and Fair Competition for Power*

The obligation on the state to guarantee free and fair competition for power can be derived from a number of international instruments that guarantee civil and political rights. This includes the Universal Declaration of Human Rights (UDHR),¹⁰² the International Covenant on Civil and Political Rights (ICCPR)¹⁰³ and the African Charter on Human and Peoples Rights (African Charter).¹⁰⁴ One common feature shared by all these instruments is that they all guarantee the right of each person

⁹⁹ See Monica Twesiime *The state of constitutional development in Uganda* available at <<http://www.kituoachakatiba.co.ug/Constm%202001%20Monica%20UG.pdf>> (accessed on 12 March 2008).

¹⁰⁰ See J. Oloka-Onyango, *Dictatorship and presidential powers in post Kyankwanzi Uganda: Out of the pot into the fire* Human Rights and Peace Centre Working Paper Series No. 3 of 2006, at 2.

¹⁰¹ See Oloka-Onyango, 2005 op.cit.

¹⁰² Adopted and proclaimed by General Assembly resolution 217 A (III) 10 December 1948.

¹⁰³ Adopted by General Assembly resolution 2200A on 16 December 1976, entered into force on 23 March 1973.

¹⁰⁴ Adopted by the Organization of African Unity (OAU) [Now African Union] on 27 June 1981, entered into force on 21 October 1986.

to take part in the government of his country.¹⁰⁵ Article 25 of the ICCPR adds the right to ‘vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.’ The African Charter on Democracy, Elections and Governance¹⁰⁶ is even more detailed: this Charter re-affirms the commitments in the Declaration on the Principles Governing Democratic Elections in Africa.¹⁰⁷ States are required, amongst others, to establish and strengthen independent and impartial electoral bodies and to ensure fair and equitable access by contesting parties and candidates to state controlled media during elections.¹⁰⁸ Uganda is yet to ratify this Charter. However, the Charter makes reference to the Declaration on the Principles Governing Democratic Elections in Africa. This could be interpreted as a source of soft law, yet it mirrors NEPAD’s Declaration on Democracy, Political, Economic and Corporate Governance, which, as seen above, Uganda has acceded to through the APRM.

After detailing the constitutional rights and institutions that advance and protect free and fair competition for power, the Country Report concludes that Uganda’s constitution is consistent with international and regional codes on human and peoples’ rights.¹⁰⁹ Reference is made to the commitments in the Constitution to ensure that citizens participate in political decision-making. Constitutionally, the State is based on democratic principles that encourage the active participation of all citizens at all levels of governance. This is in addition to all people having access to leadership positions at all levels.¹¹⁰ Additionally, to promote these principles, the Constitution guarantees a number of rights necessary to ensure effective participation. All Ugandans are guaranteed the right to participate in the affairs of government, individually or through their elected representatives. This is in addition to participating in peaceful activities that influence the policies of government.¹¹¹ The rights of freedom of expression, conscience, assembly and association, which include the freedom to form and join political or other civic organisations, are also protected.¹¹² Also guaranteed is the right to form political parties and any other political organisation.¹¹³ The right to vote is guaranteed to all citizens of eighteen years and above. Registration as a voter is actually crafted as a duty although the State is required to take all necessary steps to ensure that all qualified citizens actually register and exercise their right to vote.¹¹⁴

¹⁰⁵ See UDHR, article 21; ICCPR, article 25; and African Charter, article 13.

¹⁰⁶ Adopted at the Eighth Extra Ordinary session of the African Union Assembly of Heads of State and Government, 30 January 2007.

¹⁰⁷ AHG/Dec. 1 (XXXVIII).

¹⁰⁸ Article 17.

¹⁰⁹ Report, at 46.

¹¹⁰ Objective II(i) and (ii) of the Directive Objectives and Principles of State Policy.

¹¹¹ Article 38.

¹¹² Article 29.

¹¹³ Article 72.

¹¹⁴ Article 59.

The Report also details a number of institutions and laws designed to protect the rights associated with free and fair competition for power. The institutions include the Uganda Human Rights Commission, the Electoral Commission, the Parliament of Uganda; Courts of Judicature and the Police Force.¹¹⁵ The laws include the Political Parties and Organisations Act 2005 (PPOA), the Presidential Elections Act 2005, the Parliamentary Elections Act 2005, the Electoral Commission Act 1997,¹¹⁶ and the Local Government Act 1997¹¹⁷ as well as the Electronic Media Act, 2005 and the Access to Information Act, 2005. In relation to the implementation of the PPOA, the Report observes that the biggest challenge is the central role given to the Electoral Commission to oversee the activities of political organisations. The Commission suffers from insufficient funding which has affected its performance.¹¹⁸ According to the Report, the biggest deficiency of the Commission is its questionable independence and impartiality.¹¹⁹ It should be noted, however, that to investigate the independence of the Commission one needs to look for more evidence outside the Country Report.

One scholar has submitted that one of the key prerequisites for ensuring the legitimacy of an electoral process is ‘the capacity of the administrative unit mandated to administer the elections, and the unit’s autonomy from political forces.’¹²⁰ One could support this view with the post election violence in the 2007 Kenya elections and the uncertainty created by the ZEC in Zimbabwe; these cases demonstrate that a compromised and partial electoral commission is a recipe for disaster. It is on the basis of this, among others, that the effectiveness of Uganda’s electoral commission should be assessed. It is my view that the state and position of the Electoral Commission in Uganda has gone through two Phases: Phase I is the period of partiality and lack of independence, and Phase II is the transition to relative independence and impartiality. The height of Phase I can be seen in the 2001 Parliamentary and Presidential elections: the Commission was found to have failed to manage these elections, which were marred by violence. Indeed, when Besigye petitioned the Supreme Court to challenge the results, the Court held, amongst others, that the ability of the Electoral Commission to manage the elections in an impartial manner was in doubt.¹²¹ The Court found that there were incidents of multiple voting by single voters, the harassment of voters and the existence of pre-ticked ballot papers.¹²² In one of the many incidents of admonishment, the Court held:

¹¹⁵ At 46.

¹¹⁶ Cap 140 of Laws of Uganda 2000.

¹¹⁷ Cap 243 of Laws of Uganda 2000.

¹¹⁸ Report, at 47.

¹¹⁹ As above.

¹²⁰ Sabiti *et al.*, 2008 in Kiiza *et al.*, op.cit, at 90

¹²¹ See *Besigye v Museveni & Anor* Election Petition No. 1 of 2001.

¹²² See Tumwine-Mukubwa, 2003.

*I must state that I cannot excuse the Electoral Commission for the creation of 1179 polling stations on 11th March 2001 when there was no corresponding voters roll. How did the Electoral Commission expect people to vote from these new polling stations when there was no corresponding voters roll in those polling stations. This meant that the Electoral Commission expected people to go and vote without voter's cards, with no voters roll at polling stations.*¹²³

It has been submitted that although Besigye lost the 2001 elections, the case confirmed the fact that the state of electoral mismanagement in Uganda had not significantly improved since 1980.¹²⁴ In July 2002 the Chairman of the Commission and five of the commissioners were dismissed effectively ending phase I and beginning phase II. The independence of the Commission was put to test in the run up to the 2006 Presidential and Parliamentary elections. The Attorney General (AG) was of the opinion that the imprisoned opposition presidential contestant, Besigye, should not be nominated by the Commission. The AG argued that this is because he was charged with treason and, if subsequently found guilty, his nomination would cause legal complications: 'Irrespective of the fact that Besigye was not yet proven guilty, his nomination would pose legal complications to the Commission, if after nomination, he is convicted of treason.'¹²⁵ It is also reported that the Commission was under pressure from State House Officials and the President not to nominate Besigye. It is alleged that the President even met the Chairperson of the Commission and asked him not to nominate Besigye.¹²⁶ In spite of these pressures, the Commission went ahead and nominated Besigye. It should nevertheless be noted though that this was against the background of the President renegeing and publicly disowning the AG on the issue.¹²⁷ This could have resulted from both domestic and international pressure. Additionally, an election without Besigye would have cast legitimacy on the results.

In the run-up to the elections the Electoral Commission established an Inter-party Electoral Liaison Committee in order to address the interests and complaints of political parties. Similar arrangements were replicated in all districts. The Country Report observes that this Committee, which met twice a week 'peacefully solved a significant number of election related disputes, and played a positive role in co-ordinating the campaign programmes of parties and candidates.'¹²⁸

It should be noted, however, that apart from the challenges of overcoming its legacy of partiality and a lack of independence, one of the biggest challenges facing the Commission is access to adequate financial resources to enable it carry out its

¹²³ Judgement of Karakora JSC, at 127, as quoted by Mukubwa, 2003 op.cit., at 58.

¹²⁴ Sabiti *et al*, 2008, op.cit, at 97.

¹²⁵ *Id.*, at 104.

¹²⁶ *Id.*, at 105.

¹²⁷ *Id.*

¹²⁸ Country Report, 2007, at 51.

functions effectively. The Country Report gives evidence of this by quoting financial figures in the Commission's budget, which indicate shortfalls and substantial arrears. It is, for instance, reported that out of UGs 30,211,323,000 requested for the current financial year, only 17,240,000,000, approximately 57% was provided. The Country Report notes that this shows the lack of commitment on the part of Government to the activities of the Commission.¹²⁹ The other challenge, according to the Country Report and other authorities,¹³⁰ is the failure to pass enabling legislation on electoral matters on time.¹³¹ A notorious and disturbing example cited is the Referendum and Other Provisions Act, whose passing and assent left the Commission with only 50 days to organise a country-wide referendum. All these problems have hampered the Commission's capacity to organise elections that guarantee free and fair competition for political power. This has been in addition to other factors detailed in the next few paragraphs.

It is my submission that the transition to multi-party democracy has not resulted in full democracy as quickly as expected. This has arisen, amongst others, from the unfamiliarity with multi-party democracy and the frail nature of the parties themselves. The cause of this can be found in the observation made in the Country report:

For most of the period ... Uganda was governed under the Movement political system. In turn, this hindered free operations of political parties and alienated the majority of the population from [sic!] understanding the concept of political pluralism. Uganda held its first multiparty election in twenty years in 2006. All stakeholders – voters, political party leaders and the Electoral Commission were not accustomed to this form of elections.¹³²

It should be noted be emphasised that the suffocation of multi-party democracy predates the Movement system. The NRM inherited a country characterised by one-party rule and the unscrupulous monopolisation of political power. To a certain extent, the NRM only maintained this *status quo*. Freedom to engage freely in political activity has eluded Uganda since it attained independence, completely disappearing between 1971 and 1979 during the reign of Idi Amin. Yet the 1980 elections were simply a charade. Since then, political parties have not had a chance to organise themselves and adopt clear strategies in the quest for their survival. It is therefore not surprising that almost all political parties have been unable to adopt democratic processes of internal decision making. The failure of the Democratic Party (DP) to hold its mandatory annual delegates conference, which has resulted in one of its

¹²⁹ Id., at 52.

¹³⁰ See Sabiti, *et al* op.cit, at 98.

¹³¹ Country Report, 2007, at 51.

¹³² Id.

members seeking judicial intervention, is an example of this.¹³³ The State-owned media has also made it hard for political parties to flourish and the right to freely and fairly compete for political power to materialise fully. This section of the media is fond of marginalising opposition candidates and giving more coverage to members of the ruling party. For instance, it was reported that during the 2006 Presidential campaigns, Prime news on Uganda Broadcasting Corporation (UBC) TV, gave Museveni 62.4% coverage in comparison to 11.5% given to Besigye.¹³⁴ The partiality of UBC has been confirmed in a recent survey concluding that the national broadcaster runs skewed programmes to propagate the partisan views of the ruling NRM.¹³⁵ Political parties have also found it hard to operate in an environment where the rule of law is not observed and the supremacy of the Constitution is not respected.

3.2.2 *Rule of Law and Supremacy of the Constitution*

The doctrine of the rule of law has historically been based on the writings of Professor AV Dicey, who defines the doctrine as comprising three fundamental tenets: First, the regular law of the land is supreme so that individuals should not be subjected to arbitrary power; second, state officials are subject to the jurisdiction of the ordinary courts of the land in the same manner as individuals; and lastly the constitution is a result of the ordinary law of the land so that courts should determine the position of the executive and bureaucracy by principles of private law.¹³⁶ Understood in its most elementary form, the rule of law demands that everything that government does must be authorised by the law. It is important to note, however, that over the years, the principle has grown and seen tremendous development. It will not allow government conduct to pass simply because it has been authorised by law if it violates fundamental rights and liberties.¹³⁷ Even in those countries without written constitutions such as the United Kingdom, the principle of the rule of law has led to the development of certain restrictions on the exercise of public power akin to those imposed by constitutions.

The Country Report justifies the process of adopting the 1995 Constitution as having been done in accordance with the rule of law; the constitutional process was preceded by a participatory collection of views by a Constitution Commission and ended with the adoption of the Constitution by an elected Constitutional Assembly.¹³⁸

¹³³ See *Zirimala Kiggundu v The Democratic Party (DP) of Uganda* Civil Suit No. 98 of 2008 [High Court of Uganda, pending].

¹³⁴ Democracy Monitoring Group *Presidential and parliamentary elections 2006 Final Report* [on file with author], at 43.

¹³⁵ 'UBC a mouthpiece of the government – report' *Daily Monitor* 25 April 2008.

¹³⁶ Dicey, 1982, at 1. See also Brewer 1989, at 90.

¹³⁷ Mbazira, 2007.

¹³⁸ See *Report of the Uganda Constitutional Commission: Analysis and recommendations* (May 1993).

The Report also details a number of provisions in the Constitution that uphold the rule of law and the supremacy of the Constitution.¹³⁹ What is clear from the rest of the Country Report, however, is that, in practice, the government of Uganda has upheld the rule of law only in comparison to previous regimes. The Report makes reference to the process leading up to the 2005 amendment of Article 105 of the Constitution in order to remove the limits on presidential terms. Parliamentary procedures were manipulated by, for instance, insisting on open voting and not secret ballot. The justification given for the adoption of this procedure was tenuous; it was argued that Members of Parliament, by voting openly would be accountable to their constituencies.¹⁴⁰ Open voting was favoured by the ruling party because, as is alleged, it had paid out bribes to Members of Parliament to ensure that the vote went in its favour. Open voting could, therefore, have been a form of accountability for the money received on the part of those who had received the bribes.

However, the Country Report is not emphatic in highlighting the effects of the lifting of term limits on democracy and good governance in the country. At best, the Report observes that ‘the amendment disregarded the recommendations made by several notable CSOs and eminent persons in society like Bishops.’¹⁴¹ Those who advocated for the lifting of the presidential term limits argued that the limitation was an unnecessary technicality that served no purpose. Professor Ssemakula Kiwanuka, for instance, argued that presidential term limits are undemocratic in the sense that they prevent the development of durable and democratic institutions and principles such as the right of the people to choose.¹⁴² The argument was continued that presidential term limits reduce voter choice since the citizenry are denied the opportunity to vote for a candidate of their choice.¹⁴³

The motivation for lifting the presidential term limits in Uganda can be retraced to the wider context of African politics, down to the politics of the NRM. The biggest problem that Africa has been facing is the failure by many leaders to hand over power peacefully through free and fair elections. The period between the 1960s and 1970s which is the period in which most African countries gained independence from their colonial masters, was characterised by military *coups d’ etats* as the principal instrument for bringing about political and constitutional changes.¹⁴⁴ In other countries, the 1980s and early 1990s witnessed guerrilla insurrections leading to the fall of government such as Obote’s in Uganda. These processes entrenched

¹³⁹ See Country Report, 2007, at 58 – 60.

¹⁴⁰ Id., at 62.

¹⁴¹ Id.

¹⁴² See Ngonzi, 2003, at 13.

¹⁴³ Id.

¹⁴⁴ Jjuuko, 1995, at 32.

a political orientation and culture that political power could only be surrendered at gunpoint and that those who had acquired power through such means would only surrender it in the same way. This explains why the breeze of democratisation and free and fair elections that swept across Africa in the late 1980s, through the 1990s, was largely meaningless. In many countries elections were manipulated by incumbents, with opposition parties suffocated in elections run by electoral bodies that were extensions of the ruling parties.

I have already alluded to the situation in Uganda, where successive governments have been brought to power either by *coup d'état* or by political manipulation characterised by government orchestrated violence. The NRM government came to power through a guerrilla war and has continued to hold power through political manipulations. When the NRM assumed power it forestalled political competition by banning political parties. The period between 1986 and 1996 was a period of transition where no presidential elections were held. However, the 1996 elections (held under the Movement System) were simply an endorsement of a one-party state and of the incumbent president. Since 1986, NRM politics has been built around the autocracy of Museveni, the 'God-given' leader of the party. This legacy has, however, not been without challenge as was illustrated by the opposition in the run up to the 2001 elections. To fend off such opposition, a plan was hatched to lift the presidential terms limits. Within the NRM camp, it was submitted that the progressive government policies adopted by Museveni were dependant on him for implementation, which made it necessary that he be given a third term.¹⁴⁵ It was also argued that within the NRM there was no viable alternative as no one else could hold the NRM and the country together.¹⁴⁶ Museveni himself, together with his cronies, have on more than one occasion proclaimed that freedom fighters do not simply hand over power and that Museveni is not about to let others reap the fruits of his military struggles.¹⁴⁷ It is not surprising therefore that talk of a fourth term, making it thirty years of Museveni power, is beginning to fill the air.¹⁴⁸ On his recent visit to Uganda, the President of Libya, Muammar Gaddafi, urged Museveni to rule for life, as long as he had the will of the people. Gaddafi argued that presidential term limits were a tenet of western democracy alien to Africa. He praised Zimbabwe's Robert Mugabe and Museveni as true African leaders that should continue to lead.¹⁴⁹

¹⁴⁵ Ngonzi, 2003, op.cit., at 13.

¹⁴⁶ Okuku, 2005, at 203.

¹⁴⁷ See Kanyehamba, 2002, at 271. See also 'Tinyefunza backs Museveni' *Daily Monitor* 2 March 2008.

¹⁴⁸ See 'MPs join Maj. Mutale to push for 4th term' *Daily Monitor* 17 March 2008.

¹⁴⁹ See 'Gadafi urges Museveni to stay on' *Daily Monitor*, 18 March 2008. The NRM government's choice of tenets of western democracy has been very selective, choosing only those tenets that advance the interest of those in government. The most common example of this is the insistence on western industrialization and building of a middle class while at the same time rejecting tenets that reduce the risk of dictatorship. See Ngonzi 2003, op.cit., note 130, at 16.

The removal of presidential term limits has very grave implications for democracy and good governance. It has been described as a sanction of executive dictatorship and the creation of a life presidency.¹⁵⁰ Okuku has argued that the process of changing the term limits should be seen as a process of incremental despotism, that it is an attempt by ‘the rulers to concentrate power in the presidency with imperial trappings and to violate the doctrine of separation of powers as a safeguard against authoritarianism.’¹⁵¹ During the constitution making process the issue of presidential term limits was never contentious, either in the process of collecting people’s views or in the actual debate over the Draft Constitution. There was general consensus that presidential tenures be limited to two terms. Justification for this was found in Uganda’s history: ‘the limit was a deliberate measure to ensure that persons elected to office of president, which office carries a lot of power and immunity, do not get tempted to extend their tenures beyond the periods initially mandated.’¹⁵² The Odoki Constitutional Commission concluded that term limits would put an end to the phenomenon of self styled-life presidents.¹⁵³ According to the Constitutional Commission: ‘The disadvantage of indefinite re-election is the danger of personal ambition, and of using the office to secure re-election to the neglect of more important duties of State.’¹⁵⁴

The lifting of the term limits and the re-election of Museveni in 2006 has come with the obvious effects of over staying in power. Acts of corruption, abuse of power and the grabbing of public land, sometimes to the detriment of social services such as education, have escalated. The other problem is that the state has lost its identity, which has been subsumed by Museveni in a manner characteristic with known dictators in history. The ruling party itself, however strong its members proclaim it to be, is based on weak party structures, yet its existence is based only on the person of Museveni. Access to office within the party itself and to public office, while in principle proclaimed to be based on the principle of individual merit, is mainly based on individual patronage. Another visible incident of complacency is the increasing tendency to undermine the institutions charged with law enforcement and upholding the rule of law, as evidenced by the blatant disregard of the principle of the independence of the judiciary.

3.2.3 *Law Enforcement Mechanisms*

The Country Report details a number of developments that have taken place within the institutions charged with upholding the rule of law and ensuring access to justice. These developments are epitomised in the Justice, Law and Order Sector (JLOS), which has been adopted as a sector-wide approach to ensure personal safety, security,

¹⁵⁰ See Okuku, 2005, op.cit., note 146.

¹⁵¹ Id.

¹⁵² Okuku, 2005, at 190.

¹⁵³ Ngonzi, 2003, at 15.

¹⁵⁴ Constitutional Commission, 1993, op.cit., note 138, at para 12.91.

rule of law and due process in the administration of justice.¹⁵⁵ JLOS is composed of the Ministry of Justice and Constitutional Affairs; Ministry of Internal Affairs; the Judiciary; the Uganda Prisons Service, the Uganda Police Force, the Directorate of Public Prosecutions, the Judicial Service Commission, the Uganda Law Reform Commission, the Ministry of Gender, Labour and Social Development, and the Ministry of Local Government. JLOS emerges against a background characterised by inefficient service delivery in the justice sector. The Ugandan justice system is faced with a number of challenges, including: slow disposal of cases and a huge case backlog, overcrowding in prisons, inaccessibility to justice dispensing structures, ignorance of rights of those seeking justice, human resource and logistical problems in the various justice dispensing institutions, corruption and inadequate and outdated legislation.¹⁵⁶ The Country Report also observes that the lack of accountability and limited information exchange across the sector contributes to serious service delivery problems.¹⁵⁷

JLOS has been linked to Uganda's Poverty Eradication Action Plan (PEAP),¹⁵⁸ which is the country's strategic plan to fight poverty through a good institutional framework for delivering public goods and services. The linkage between the PEAP and JLOS is derived from the fact that PEAP adopts sector-wide approaches in drawing and implementing sector specific poverty eradication programmes. It is this sector wide approach which also includes civil society and donor community participation that is manifested in JLOS.¹⁵⁹

It should be noted, however, that apart from detailing the programmes, plans and objectives of JLOS, the Country Report does not analyze the progress that this sector has made in realizing its objectives. It has been reported elsewhere that JLOS has made considerable progress regarding law reform, and increased awareness of the sector as well as in the elaboration of rights and duties. This is in addition to increased confidence in the justice system and the reduction of prison populations.¹⁶⁰ JLOS prides itself for having pushed for the enactment of a number of laws intended to address the case backlogs and delays in the administration of justice, and updating various pieces of legislation and making them available for use. The sector has also

¹⁵⁵ Country Report, 2007, at 62.

¹⁵⁶ Danish Ministry of Foreign Affairs *DANIDA Access to justice component in Democracy, Justice and Peace Programme Uganda 2006 – 2010: Component description* (October 2005) available at <<http://www.danidadevforum.um.dk/en/menu/Topics/GoogGovernance/Programmes/Country/Programmes/Africa/Uganda/>> (accessed on 11 February 2008) [Hereinafter DANIDA, 2005], at 3. See also Country Report, at 66.

¹⁵⁷ Country Report, at 66.

¹⁵⁸ Ministry of Finance, Planning and Economic Development *Poverty Eradication Action Plan* (2004/5 – 2007/8).

¹⁵⁹ See Jjuuko, 2008, at 139.

¹⁶⁰ See Justice, Law and Order Sector, presentation at the *Twelfth Government of Uganda/Developmental Partner Annual Review 25 – 26 June*, Sheraton Hotel Kampala.

initiated anti-corruption strategies to increase accountability and to reduce incidents of bribery. Others actions include the establishment of Case Management Committees, the Commercial Justice Reform Programme, community service sentences, the Case Backlog Clearance Programme and the establishment of the Centre for Arbitration and Dispute Resolution.¹⁶¹

It should be noted, however, that the efforts and achievements of JLOS are being undermined by the government's reluctance to adhere to the doctrine of the separation of powers. This reluctance is especially exemplified in the government's failure to respect the independence of the judiciary and its deliberate efforts to erode it. The Country Report details the constitutional provisions that establish the Republic of Uganda, consistent with the doctrine of separation of powers; the country has a legislature, the executive and the judiciary, which are institutions existing in their own right, as well as provisions that create checks and balances.¹⁶² The Country Report also illustrates examples of cases that indicate the judiciary's determination to operate as an independent institution and to uphold the supremacy of the Constitution. An example of such a case is *Major General David Tinyefuza v. Attorney General*.¹⁶³ It is noted in the Country Report that the Executive respected both the procedure and verdict of the courts in this case.¹⁶⁴ The other case cited is that of *Dr. Paul Ssemwogerere and Zachary Olum v. Attorney General*;¹⁶⁵ it is noted that the significance of this case lies in the fact that hitherto no Ugandan court of law had had the courage to invalidate an Act of Parliament that dealt with a fundamental policy of the government of the day.¹⁶⁶ Reference is also made to *Col (Rtd) Dr. Kizza Besigye v. Yoweri K Museveni and Electoral Commission*.¹⁶⁷

The importance of the doctrine of separation of powers and the principle of the independence of the judiciary is obvious. In separation of powers terms, a formal

¹⁶¹ See Jjuko, 2008, op.cit, at 153 – 161.

¹⁶² See Country Report, 2007, at 113 – 115.

¹⁶³ Constitutional Appeal No. 1 of 1997. In this case, after making statements in Parliament criticizing the manner in which the government was handling the war in Northern Uganda, Major Tinyefunza, a serving member of the Uganda Peoples Defence Forces (UPDF) was summoned by the UPDF High Command to explain his statements and face disciplinary action. Instead of answering that call he chose to tender in his resignation from the army, which was rejected by the High Command. He petitioned the constitutional court to protect his right not to be subjected to forced labour. The Supreme Court overturned a decision of the Constitutional Court and found against him, holding that the special circumstances in which soldiers served prevented them from withdrawing their labour at will.

¹⁶⁴ Country Report, 2007, at 115.

¹⁶⁵ Constitutional Appeal No. 1 of 2001. In this case the Petitioners successfully challenged the constitutionality of a Constitutional Amendment which had been passed without following the procedures of Rules of Procedure of Parliament.

¹⁶⁶ Country Report, at 116. Reference is made to Kanyeihamba, 2006.

¹⁶⁷ Election Petition No. 1 of 2006. This case arose as a contest of the results of the 2006 Presidential election, the petitioner also requested for a recount of the votes. The Court found anomalies but ruled that they had not been substantial enough to alter the results of the election.

distinction is made between the legislative, executive and judicial functions of the state. This is referred to as *trias politica*¹⁶⁸ which is followed by the principle of the separation of personnel.¹⁶⁹ These principles require that the powers of making legislation, administration and adjudication be vested in three distinct organs of state. Each one of these organs should be staffed by different officials and employees. A person serving in one organ is disqualified from serving in any of the others. The third principle is the separation of functions. This principle demands that every organ of state authority be entrusted only with its appropriate functions. The legislature ought only to legislate, the executive to confine its activities to administering the affairs of the state, and the judiciary to the function of adjudication. These three principles together establish the ‘pure’ as opposed to the ‘partial’ version of the doctrine.¹⁷⁰

The ‘partial’ version instead emphasises the significance of checks and balances.¹⁷¹ Checks and balances, now a fourth principle, represents the special contribution of the United States of America (USA) to the doctrine.¹⁷² In the USA, checks and balances allow one organ to intervene in the area of another. Congress’s legislative power is subject to executive and judicial checks;¹⁷³ the executive and judicial functions are respectively also checked by the other branches. The executive may exercise checks and balances against the legislature through the veto powers of the President;¹⁷⁴ though vetoed, bills may be presented to Congress again, but they will require a two-thirds majority to become law.¹⁷⁵ The judiciary exercises checks and balances against the legislature through the power of procedural and substantive review.¹⁷⁶ Congress exercises checks and balances against the executive by approving the appointment of judges of the Supreme Court and ambassadors to take up diplomatic posts, and may circumscribe the judiciary by passing legislation that undermines the decisions of the courts.

It should be noted, however, that in order to effectively exercise its functions the judiciary must enjoy a high level of independence from the other organs of state. It must also dispense justice and adjudicate disputes in an impartial manner and without fear or favour. Judicial independence has three key components: (i) an

¹⁶⁸ See Vile, 1967.

¹⁶⁹ See Mbazira, 2007, op. cit, at 102.

¹⁷⁰ Barber, 2001, at 60.

¹⁷¹ Id.

¹⁷² Van der Vyver, 1993, at 178.

¹⁷³ Judicial review of legislative and executive action has been described as the most common and dramatic instance of checks and balances. This is because it has allowed courts to exercise very strict control over the other organs by issuing orders which these organs are legally bound to abide by. See Pieterse 2004, at 386.

¹⁷⁴ The recent veto by President George Bush of a proposed law linking to a timetable the withdraw of troops from Iraq as condition for funding is an example of this. See BBC News ‘Bush and democrats locked on Iraq’. Sourced at <<http://news.bbc.co.uk/2/hi/americas/6616361.stm>> (accessed on 3 May 2007).

¹⁷⁵ Constitution of the United States of America, Article I section 7.

¹⁷⁶ Van der Vyver, 1993, op.cit., at 180.

independent process of appointment of judicial officers; (ii) permanent tenure of office for judicial officers; and (iii) sufficient funding for the judiciary, which includes appropriate salaries for judicial officers.¹⁷⁷ It has been submitted that for a society to thrive under an environment of freedom, democracy, justice and respect for human rights, it is important for that society to have and believe in a culture of a respected, independent, impartial and fearless judiciary.¹⁷⁸ Unfortunately, this is not the case in Uganda. The government has failed over the years to uphold the independence of the judiciary with disastrous consequences for democracy, human rights and the rule of law. Loss of judicial independence negatively affects the quality of justice and leads to loss of public confidence in the judiciary. According to Kanyeihamba, belief that the judiciary is no longer independent or impartial makes the judiciary virtually useless; '[l]oss of faith and trust in the Judiciary by the general public is as grave an occurrence as the discovery that he [sic!] Executive is authoritarian or Parliament has been rendered a rubber stamp by other organs of government.'¹⁷⁹ A partial judiciary and one whose independence has been compromised would not be able to uphold such rights as access to justice, fair trial and the attendant guarantees.

While the period after 1986 has witnessed a number of reforms in the area of governance and the administration of justice, culminating in the promulgation of the 1995 Constitution, it has also been characterised by a number of contradictions and paradoxes that undermine judicial independence. Oloka-Onyango details some of the paradoxes characterising the period between 1986 and 1994, noting that:

[The] paradox is reflected in the way in which the NRM regime has alternatively attacked the foundations of the legal system, by, for example, questioning its colonial heritage, while at the same time, opportunistically resurrecting colonial laws; espousing the notion of "grassroots" democracy while prohibiting political party activity, and condemning the courts for being too lenient with grant of bail to "obvious criminals", while (as in the case of Tabliqs), demanding that courts grant bail even in circumstances that are manifestly irregular.¹⁸⁰

The 1995 Constitution has several provisions that guarantee the independence of the judiciary, at least on paper. For instance, it proclaims that judicial power is derived from the people and shall be exercised in the name of the people in conformity with law and with the values, norms and aspirations of the people.¹⁸¹ The Constitution

¹⁷⁷ See Madhuku, 2002, at 231.

¹⁷⁸ Kanyeihamba, 2002, op.cit, at 289.

¹⁷⁹ Kanyeihamba, G., 'The culture of constitutionalism and the doctrine of separation of powers' Paper presented at the *Public Lecture on State of Separation of Powers in Uganda*, organised by the Human Rights and Peace Centre, Faculty of Law, Makerere University [Unpublished, on file with author], at 17.

¹⁸⁰ Oloka, 1994, at 493 [Footnote omitted].

¹⁸¹ Article 126(1).

also states that in the exercise of judicial power the courts shall be independent and not be subject to the control or direction of any person or authority:¹⁸² ‘[n]o person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions.’¹⁸³ Other provisions that strengthen the guarantee of judicial independence include financial provisions that direct that the expenses of the judiciary be charged on the consolidated fund and that the judiciary be self accounting;¹⁸⁴ provisions establishing an independent judicial officer appointment process through the Judicial Service Commission;¹⁸⁵ and provisions that guarantee the tenure of office of judicial officers.¹⁸⁶

The provisions of the Constitution on judicial independence mirror those of constitutions in other democracies in the world.¹⁸⁷ The difference, however, lies in the fact that the practice in Uganda has made the constitutional provisions hollow and rhetoric. Government has continued to undermine the independence of the judiciary in a number of ways. Contrary to the constitutional obligation that all organs and agencies of state accord the courts such assistance as may be required to ensure their effectiveness the government has deliberately ignored the judiciary. This has left the judiciary financially constrained, running without adequate logistical facilitation.¹⁸⁸ This is in addition to operating on a skeleton staff due to the reluctance of the government to appoint judicial officers. The funding allocated to the judiciary has steadily been scaled down since 2003, which has forced the courts to scale down their operations, in some respects up to 60 percent.¹⁸⁹ It is widely acknowledged that funding and facilitation of the judiciary has an impact on the level of its independence. This is because a poorly funded and ill-equipped judiciary will not be able to dispense justice in a timely manner, which may lead to a loss of public confidence in the judiciary system.¹⁹⁰

Assaults on judicial independence have also been characterised by the politicisation of the process of the appointment of judges, with the President publicly proclaiming on several occasions that the judiciary is performing poorly because serving judicial officers are not NRM cadres. This has been coupled with the blatant defiance of

¹⁸² Article 128(1).

¹⁸³ Article 128(2).

¹⁸⁴ Article 128(4) & (4).

¹⁸⁵ Article 142.

¹⁸⁶ Article 144.

¹⁸⁷ See section 165 of the Constitution of the Republic of South Africa.

¹⁸⁸ Danish Ministry of Foreign Affairs *DANIDA Access to justice component in Democracy, Justice and Peace Programme Uganda 2006 – 2010: Component description* (October 2005) available at <<http://www.danidadevforum.um.dk/en/menu/Topics/GoogGovernance/Programmes/Country/Programmes/Africa/Uganda/>> (accessed on 11 February 2008) [Hereinafter DANIDA, 2005], at 3

¹⁸⁹ International Bar Association *Judicial independence undermined: A report on Uganda* (September 2007) (IBA 2007), at 32.

¹⁹⁰ See Madhuku, 2002, op.cit, at 244.

court orders and the public admonition judges. The most blatant disregard of judicial independence occurred from 2004 to 2006, which even forced such organisations as the International Bar Association (IBA) to investigate the level of respect for the principle of judicial independence in Uganda.¹⁹¹ The IBA concluded that:

*[W]ithin a democratic society it must be possible to discuss and criticise court decisions. Given the nature and purpose of the principle of the separation of powers, however, the Executive has to exercise caution in criticising judicial decisions. Evidence suggests that the Uganda Government has gone beyond legitimate criticism of court decisions and has intimidated individual members of the judiciary.*¹⁹²

The events from which the IBA draws this conclusion are described in the following paragraphs.

In June 2004 the Constitutional Court ruled that the Referendum (Political Systems) Act 2000 was unconstitutional and, therefore, null and void. This provoked anger, uncontrolled outrage and a vicious attack by the President on the judiciary; he is quoted as having said that the major work for the judges was to settle chicken and goat theft cases but not to determine the country's destiny.¹⁹³ Earlier, the President had said that:

A close look at the implications of this judgment [...] shows that what these judges are saying is absurd, doesn't make sense, reveals an absurdity so gross as to shock the general moral common sense. [...] In effect what this means, is that this court has usurped the power of parliament, to amend the constitution, Government will not allow any institution even the court to usurp the power of the constitution in any way'.¹⁹⁴

The President went on to state that the judiciary was not impartial as it was staffed by sympathisers of the opposition political party, the Democratic Party (DP). He publicly proclaimed that the days of an impartial judiciary were numbered, as he would soon 'sort them out'.¹⁹⁵ Following these statements, and other incidents of government incitement, the public took to the streets and demonstrated against the judges. For fear of their safety, the judges were forced to close the courts. In 2005, the President directed an end to evictions of *bona fide* occupants of land and threatened to sack judges who did not abide by his edict and instead issued what he described as 'bogus eviction warrants'.¹⁹⁶

¹⁹¹ See IBA, 2007.

¹⁹² Id, at 39.

¹⁹³ Id, 2007, at 21.

¹⁹⁴ Id.

¹⁹⁵ See Nampewo, 2007 in Mute, 2007, at 93.

¹⁹⁶ IBA, 2007, at 23.

Other eye catching incidents include a letter written by a minister to the Chief Justice to protest the ruling of a judge by which leave was granted to former employees of the Ministry to sue government.¹⁹⁷ A 2006 ruling by the Constitutional Court that the Military Court Martial did not have the powers to try civilians was also followed by another admonition with the President stating that the ruling of the Court is not something he would agree with.¹⁹⁸ The Court Martial actually continued with its trials in disregard of the ruling.

The most horrifying incident occurred on 16 November 2005 when the High Court was invaded by gun-wielding security agents known as the Joint Anti-Terrorist Team (JATT), a unit formed to fight terrorism. Their mission was simple, re-arrest and deliver to the Court Martial suspected rebels facing treason charges if and when released on bail. After their failure to re-capture the accused as their sureties refused to sign bail papers for fear of delivering them in military hands members of JATT came back to Court the next day dressed in police uniforms. These events brought back bad memories for those who had lived to witness the horrors of Idi Amin's dictatorship. According to the Principal Judge, Justice James Ogoola, the deployment was 'the most grotesque violation of the twin doctrines of the rule of law and the independence of the judiciary' that had occurred since the abduction of Chief Justice Ben Kiwanuka from the same court premises.¹⁹⁹

The same events were repeated on 1 March 2007, when the accused were this time arrested and driven to an unknown destination in a police van. One of the defence counsel was assaulted by the security operatives during the re-arrest; newspapers the next day carried his picture in which he was bleeding from the nose with his lawyer's shirt soaked in blood.²⁰⁰ This incident was followed by something unprecedented in the legal history of Uganda: judicial officers went on strike and were joined by practising lawyers.

The events above illustrate a very fragile situation, which puts Uganda in the confines of a failed state, a state which has a complete disregard of the law and of its own institutions. All this has been motivated by the immense desire to monopolise political power at any cost, even if it means disregarding very basic doctrines that define political and moral authority states. What the country needs at this stage is to move its constitutional provisions away from hollow statements of legal rhetoric. A culture of respect for the doctrine of separation of powers and true commitment to democracy and good political governance needs to be cultivated.

¹⁹⁷ Nampewo, 2007, at 94.

¹⁹⁸ IBA, 2007, at 24.

¹⁹⁹ See *Id.*, at 27.

²⁰⁰ 'Africa's judiciary asserts independence' *Mail & Guardian Online*, 01 April 2007.

IV. Conclusion

NEPAD emphasis on democracy and good governance, if taken seriously, is likely to promote such rights as the right to take part in the conduct of public affairs directly or through freely chosen representatives and to vote in and be elected at genuine periodic elections.²⁰¹ Additionally, through the various socio-economic projects envisaged, NEPAD has the potential to promote economic, social and cultural rights and to uplift the people's standard of living.²⁰² The APRM is relevant because it promotes a form of self-reflection, which if acted on would advance democracy and good governance. The Uganda Government should, therefore, take the findings in the Country Report, and other external criticisms, seriously and act on them.

The Country Report provides very useful information on Uganda's advances and deficiencies in the area of democracy and governance. The report concludes that Uganda has a good record of complying with democracy and good political governance principles, standards and codes.²⁰³ However, as I have already observed, the problem is that the Report bases this conclusion on the fact of ratification of the international instruments that incorporate these standards. Ratifying an instrument is one thing. Domesticating and actually implementing the standards it prescribes is another. The extent to which the Country has advanced its democracy and good governance can only be assessed on the basis of the implementation of the standards and not mere ratification of the standards. At least the Country Report adopts this methodology in drawing conclusions on the extent to which some human rights have been guaranteed and protected. For instance, the Report observes that Government should conform to the standards spelt out in the ICCPR and in the African Charter and the provisions of the Constitution made to ensure freedom of expression and the media.²⁰⁴ The Report also noted the weaknesses of the Electoral Commission, which include inadequate funding and doubts regarding the independence of the Commission. To guarantee the independence of the Commission, the Report recommends the amendment of the electoral laws to guarantee security of tenure of the Commissioners.²⁰⁵

It should be noted that in the respects where progress is recorded, this is only when assessed in comparison to "past regimes" of Milton Obote and Idi Amin. The advances become hollow when assessed against established principles of democracy and good governance. The country has been characterised by one-party rule in the form of the Movement system, partial and compromised electoral processes perpetrated by an

²⁰¹ Article 25 of the International Covenant on Civil and Political Rights (ICCPR) and article 13 of the African Charter on Human and Peoples' Rights.

²⁰² See Mbazira, 2004, op. cit.

²⁰³ Country Report, 2007, at xx.

²⁰⁴ Id., at xxiv.

²⁰⁵ Id., at xxiii.

inefficient and ill-equipped electoral commission enjoying doubtful independence. The problem of incumbency still afflicts the country, being run by a political party and president not about to relinquish power through peaceful means. The rule of law has been relegated to the background and the country is facing unprecedented levels of interference in judicial functions. As illustrated above, the manner in which the NRM has governed the country to a very large extent deviates from its undertakings in the ten point programme

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