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Final Report

**COMMENTARY ON THE DRAFT OF THE
UGANDAN CONSTITUTION**

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INTRODUCTION

I am honored by this opportunity to participate, however marginally, in the momentous task of preparing a new constitution for Uganda. And I am delighted at the prospect of working with Ugandan colleagues who share my intellectual interest in the constitution-making process and my belief that the constitutional choices a society makes--among alternative political structures and among ways of preserving the rights of the citizens and restraining the power of the state without disabling it from serving the nation--can ultimately determine whether the Ugandan people will now at last realize that benign condition of economic and political life predicted for them at the time of independence.

The following comments on the draft Constitution are offered in a spirit of considerable diffidence. Every nation has its own cultural genius and unique historical experience. Every constitution will in some sense embody that genius and reflect that experience. Outsiders can be sympathetic students of the nation's culture and history, but they cannot pretend to apprehend it in so deep and personal a way. Hence even if they have closely followed the process through which a draft has evolved, they will sometimes find obscure and strange what to the drafters is quite clear and familiar. The outsider will, moreover, tend to be instinctively critical of constitutional arrangements not only different from those of his own country with which he is familiar, but sometimes antithetical.

Outside experts can, however, bring at least a few compensating advantages. One is the flipside of his or her relative unfamiliarity with the conditions which generated the draft and with the draft itself. Involvement in constitution-making is an intellectually and emotionally intense affair. All of us who have been intensely involved in one sort of thing or another know how easy it is to lose a little perspective. That is one danger of being a direct rather than a vicarious participant. The other is the universal instinct to (in that old idiomatic phrase) concentrate on slamming shut the door of precisely that barn from which the horses recently escaped rather than concentrating on dangers not yet experienced or on new means of countering the nomadic inclinations of horses. The very detachment that handicaps the outsider in many respects may nevertheless make him or her peculiarly useful in bringing a different point of view to the table.

And after all, while all nations have unique histories, all have certain problems in common. One is the tendency of the executive to accumulate power at the expense of the other branches of government. In the United States we began a couple of decades ago, when it became clear to all reasonable people that U.S. Presidents had enormously increased their power, to speak of the "Imperial Presidency" and to begin the difficult task of reducing the power imbalance. Another universal problem is to maintain civilian control over the military establishment or, more precisely, to keep the military integrated into the larger society. A third is the tendency of politicians when they are in control of the government to use the taxing and spending power of government to maintain themselves in

office. A fourth is finding the right balance between individual rights and the community's interests. A fifth, particularly important for ethnically diverse societies (as most are these days) is finding the right balance between, on the one hand, respect for each groups rights to preserve its heritage and refine its culture, and, on the other, both the rights of heretical individuals within groups and of the nation conceived as a single whole. A seventh is how to push governmental activity down to the level where ordinary people can most readily understand and control it, while retaining at the center sufficient authority to carry out functions that cannot be performed locally in an efficient or fair way and to maintain minimum standards of equity and efficiency. An eighth is how to incorporate international law into the national legal system so that the national courts can help the state to meet its international obligations.

The range of constitutional alternatives for addressing these and other generic issues is wide but not infinite. An outsider like myself can contribute by helping to identify the range of options and indicating which ones seem to work best under which circumstances. I think that my opportunity to be of some use may be enhanced by the fact that I am familiar with a number of constitutional structures and a variety of ways of handling such critical and delicate matters as states of emergency and human rights. I was for eight years a member of the Human Rights Commission of the Organization of American States and served two terms as the President of that body. In the course of our work, we looked very closely at the constitutions of the countries we investigated. In the course of preparing for this assignment, I have also scrutinized the constitutions of major West European states and the new constitutions of several states in Eastern Europe.

With those preliminary caveats, let me turn to the draft constitution. For the most part, I will comment only on particular chapters or articles. But perhaps you will permit me one or two general observations. Although you have no doubt considered these points, perhaps it will be interesting to see how they appear to a lawyer with a different background and experience. The first observation relates to the length of the draft constitution. It is more than ten times longer than that of the United States including amendments accumulated in the course of two hundred years.

The U.S. Constitution contains eight articles and twenty-six amendments compared to the 313 articles and four schedules in the Ugandan draft. The proposed constitution is also several times longer than constitutions recently adopted states by states transiting to democratic rule, states such as Poland and the Slovakian Republic. Most West European constitutions, with the notable exception of Germany's, are much shorter. Many of my colleagues believe that one of the reasons for the success of the United States in living within the framework of one constitution for two centuries is its brevity. It sets out the basic structure of government and the electoral process, defines individual rights (primarily in a set of amendments adopted almost immediately after the basic text was ratified) and that is about it. Thus it endows the political branches with a broad discretion to act in response to changing conditions.

The drafters of the Ugandan Constitution, moved no doubt by the lamentable events leading to and following the breakdown of the constitutional arrangements established at the time of independence, obviously have taken a very different approach. I presume that they were also responding to the demands and concerns of the population which has been so broadly and admirably consulted. As I comment on individual articles, I will call attention to those which seem to be to get into details of policy and governance that most other countries have chosen not to constitutionalize.

I am struck by the significant hurdles the drafters have placed in front of any effort to amend the constitution once it is in force. The one thing the drafters of any document intended to endure can count on is that the future will contain many surprises. And one of those surprises is the way in which constitutional provisions adopted in light of experience have an impact other than the intended one because they are forced to operate in an altered political, social or economic climate. A constitution that makes many policy choices is likely to become something of a straitjacket for legislators responding to new opportunities and threats to society. The clash of constitutional restraints with imperative necessities can create social and political crises. Temporarily an otherwise weak minority may be unduly empowered by its ability to block constitutional amendments. In the longer term, majorities will overrun constitutional barriers to actions they deem imperative. They will do so by means of outlandish interpretations of constitutional language or simply by ignoring the constitution. In either case, the rule of law suffers.

Excessive length may also affect adversely the high dignity of a constitutional document. Its length will discourage ordinary citizens and schoolchildren from becoming familiar with its text. It will be a document for the lawyers and judges, the specialists. The charismatic virtues of brevity are not limited to constitutions. The most remembered and most influential public statement in the history of the United States is the Gettysburg Address of President Abraham Lincoln; it is also one of the shortest of recorded Presidential speeches.

A second general observation relates to the use of the masculine pronouns ("he" or "his") in many articles where the intention clearly is to include men and women. Paragraph 10(a) of Article 286 does state that "words importing male persons include female persons and corporations." While it is probably adequate to assure accurate interpretation of the relevant provisions, it cannot address the symbolic issue.

One of the distinguishing features of this draft is the extent to which it seeks to give Ugandan women genuinely equal rights and opportunities. If the relevant provisions are approved, they will place Uganda in the forefront of states on this issue. The drafters clearly felt that merely providing for non-discrimination on the basis of gender would not suffice to overcome the historical subordination of women with all the consequent injury to women and to men too: Inequality in education and many other areas for half the population has gravely affected the quality of human resources, the key to economic and social progress.

It is a commonplace of contemporary understanding to recognize the power of words. Without words we cannot think. The words we use shape our thoughts and drive our actions. So retention of the traditional masculine pronoun as an omnibus way of referring to the entire population seems inconsistent with the intention to alter the status of women. Would not men be shocked and feel insulted if the tradition were reversed and only "she" or "her" were used when the drafters meant men and women without distinction? The matter is easily addressed: By using both the masculine and the feminine ("he or she"; "his and her") or by using a combined form such as "(s)he". I think that the former is more aesthetically pleasing and more common. Men may still be surprised; but that, after all, would tend to advance the drafters' purpose; changing the symbols of inequality is hardly less important than changing the formal law.

CHAPTER ONE

THE CONSTITUTION

Article 3:

Paragraph (2)--The language may give to this provision a broader reach than the drafters intend. What concerns me is the danger that legislation incorporating this language will be adopted. If it were, it might be construed by a court to cover strong condemnation of the constitution and vigorous advocacy of its comprehensive revision. Such a construction would be particularly likely in the event that following such condemnation and advocacy by some persons, others attempted by unlawful means to alter the Constitution. In that event, the prior advocacy might be construed as "incitement." The term "abets" might lead to the application of a "reasonable person" standard thus relieving the prosecution of the burden of showing that the defendant actually intended to abet an attempt to overthrow. My concern in this regard is heightened by the significant restraints on free speech which the Constitution legitimizes. For as a result, public advocacy alone might be sufficient to support a conviction for treason. Concern is further heightened by the prohibition of partisan activity unless and until the electorate adopts a referendum in favor of party democracy. In addition, I note that the constitution does not explicitly protect the right of association much less association for partisan political purposes. The sum of the matter is that because of its reach and ambiguity, this provision and legislation adopted under it could have considerable "chilling" effect on the exercise of free speech and on political activity.

Paragraphs (4) and 5--The breadth of language may defeat the purpose of Chapter One, Article 3, namely to protect the constitution both from formal overthrow and from lawless acts which strip it of operational consequence. For instance, the declaration of a "right and duty" of all citizens "to resist any person or group of persons seeking to subvert . . . the established constitutional order" could be read by some, including members of the police and military, to justify persecution of groups advocating revision of the constitution, the rapid establishment of party government, etc. The term "constitutional order" is broad and vague. So is the word "subvert."

Paragraph (5)--Its unqualified license to persons to resist suspension, overthrow and abrogation also should occasion concern. It does not limit them to "means which do not themselves violate specific provisions in the Constitution including its enumeration of human rights and freedoms." Thus it could encourage vigilante activity by private groups, as well as abuse of authority by public ones. Armed forces overthrowing constitutional governments in Latin America have often justified their behavior on grounds that they are upholding the "constitutional order" against its subversion by civilian governments.

The obviously legitimate objective of preserving the constitutional order could, I think, be achieved with much less risk to that objective and to other constitutional interests by reducing Article 3 to something along the following lines:

(1) The right of every citizen, acting alone or in concert, to criticize the Constitution and to advocate its amendment is guaranteed.

(2) Any person or persons who conspire or attempt to alter the constitutional by force or other illegal means are guilty of treason and shall be punished according to law.

(3) In the event any person or group, including public officials, attempts to overthrow the constitution by violent means, every citizen is entitled to resist and in doing so will enjoy the same rights and immunities as members of the police and armed forces exercising legitimate authority under the constitution."

CHAPTER TWO

THE REPUBLIC

Article 4:

Paragraph (1)--I wonder whether the word "unitary" may unduly restrain the discretion of the political branches concerning the delegation of power to districts and localities. Persons favoring a highly centralized state might claim that delegation violated the requirement that the State be "unitary."

Paragraph (2)--One or two small drafting points. As written, the first clause seems designed to constitutionalize the existing districts, but the next clause gives the Parliament unlimited authority to alter district boundaries, thus seeming to cancel the first clause. I presume that the intent of the drafters was simply to say that, until changed, the lines existing at the time the Constitution comes into force will be operative, but the Parliament is free to alter them at will. This thought could be expressed more clearly if two independent clauses were not used.

A more substantive question is whether, in addition to altering district boundaries, Parliament is free to do away with districts altogether. I think that would not be consistent with the intent of the drafters, taking the document as a whole. Moreover, I wonder whether the spirit of the provision would be violated if districts were not simply altered but were combined into a very few super-districts. Since these are potentially volatile issues, I think it would be best to address them in clear language so that the alternatives are clear to the members of the Constituent Assembly.

Article 6:

While clearly precluding adoption of a state religion, the Article could be construed as allowing public subsidy of particular religions. If the intent of the drafters is to preclude the state from favoring one religion over another, so that any benefit extended to one must be available to all (and possibly to agnostics as well), this needs to be said more clearly or the matter will end up in the courts.

CHAPTER THREE
NATIONAL OBJECTIVES AND DIRECTIVE PRINCIPLES
OF STATE POLICY

Article 8:

Paragraphs (1) through (3) are a little hard to distinguish from each other; they are, moreover, written in very broad and open-textured language. In light of the canon of interpretation that, when interpreting a constitutional or legislative text, a court should assume that every provision has a distinct meaning and that there is no duplication, it is difficult to predict how the Article will be construed by the courts. Thus it could turn out to be a generator of controversy and litigation.

Paragraph (4) is coy in its reference to "the supreme political authority." Is that the President? The Parliament? The Constitution as interpreted by the Supreme Court? In the event of a political confrontation between the branches, this ambiguity would become very important.

Article 9:

Paragraph (3)--It could be construed to allow Parliament to restrict access to leadership positions. In fact, restriction may be appropriate on such grounds as experience, age, education, etc., that is on grounds related to competence to perform the task. If the intent is to reassure people that ethnic origin will not adversely affect access, perhaps it would be advisable to say so directly. That would leave Parliament with discretion to adopt criteria that do relate to ability to perform.

Is there any risk that this paragraph might be construed to limit the power of Parliament to adopt affirmative action programs for traditionally underrepresented ethnic and regional and religious groups? If so, is that the intent of the drafters?

Paragraph (6)--Was it the intent of the drafters to deny to all organizations in which authority flows from seniority or lineage religious status the right to participate in politics?

Article 10:

This is clearly one of the most significant articles in the constitution, dealing as it does with the limits of permitted pluralism in a multi-ethnic state. Equally clear is the effort made by the drafters to strike a balance between the interest in promoting national unity,

on the one hand, and honoring diversity on the other. Of the eight paragraphs, I would like to comment only on the third and fifth.

However, I am struck by the breadth and generality of language in other paragraphs, language so broad that its construction by the courts is impossible to predict. As an example, I note paragraph six's declaration that "There shall be established and nurtured institutions and procedures for resolution of conflicts fairly and peacefully." Surely that is one function of the courts. But less formal institutions specializing in mediation and conciliation at the grass roots would doubtless be valuable. This language appears to impose on the state the absolute obligation to establish such institutions. Can compliance with so broadly worded an obligation be measured in a consistent way? The intent is to promote inter-communal concord. Is it not inevitable that the concrete means, particularly in the case of institutions, will have to be elaborated by the Parliament and the President in response to changing circumstances and resources? Is anything gained by putting in the constitution obligations that have no agreed content and thus can only spark inconclusive debate? Perhaps I make too much of this matter of language without clear substantive content. Arguably it does no damage and will be seen simply as a statement of hopes and aspirations.

Paragraph (3)--Some nationalists are always inclined to treat everything that is particular to a particular culture in a multi-ethnic state as disturbing to unity and cohesion. Since the very act of occupying the state's principal offices tends to make one an advocate of the national over the regional and particular, while local leaders are inevitably drawn into the role of stewards of local interests, a certain tension is inevitable. In the absence of specific guarantees for sub-national communities, that tension tends to be resolved in favor of central power on every occasion. As a result, the ethnic communities often feel under assault. This leads to a redoubling of efforts to protect local practices which in turn exacerbates relations with the central government. Soon the parties are drawn into a downward spiral of mutual suspicion and hostility.

One way of avoiding this outcome is to begin by demarcating with some precision the minimum rights of sub-national communities. One way of stating that minimum is article 27 of the UN Covenant on Civil and Political Rights which provides that:

"In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

To be sure, the international community has come to doubt that statement is entirely sufficient to achieve the proper balance between centralizing tendencies and ethnic particularities. So the UN Commission on Human Rights, in which African states from now the single largest block, has adopted a Declaration on Minority Rights which goes a little bit further. Still, no one questions the right of the national government to work to develop

the sense of belonging to a national community as wide as the boundaries of the state and of seeking to instill in all people a common civic culture and political philosophy. The only question I am raising here is whether at this point in the Constitution where the basic character and fundamental policies of the state are being articulated, it would not be advisable to declare those objectives in such a way as not to convey the impression that the national government has an unlimited discretion to decide what cultural values and practices disturb the unity and cohesion of the state. Paradoxically, paragraph (3) may excessively constrain the state. Concern for national unity is only one of the two reasons why the national government may refuse to tolerate local practices. The other is to prevent those practices from impinging on the rights of the individual. I think, for instance, of the practice widespread in the world of mutilating the sexual organs of female children. I wonder, therefore, if it would not be appropriate to say something here about the priority of fundamental human rights.

Paragraph (5)--Although the intent is clear, the language is somewhat ambiguous. What, for instance, would be the impact of this language on tests for access to the government service, schools, or jobs in private industry which impact adversely on certain ethnic groups? This is a controversial issue in the constitutional jurisprudence of the U.S. The courts have placed an increasingly heavy burden of proof on institutions seeking to justify skill and aptitude tests which have an adverse impact. Another issue is whether the language is intended to allow the state to legislate only with respect to access to public offices and services or also with respect to those in the private sector? Could the state seek to eliminate or at least discourage private schools set up by communities exclusively for their members? Finally one may ask whether or to what extent the provision could induce legislation that would impinge on freedom of speech?

Article 11:

Paragraph (2)--The stated obligation "to avoid undue dependence on other countries and institutions" in the economic sphere, implying as it does relatively autarchic economic policies, appears anomalous in a constitution being drafted at an historical moment when most countries are abandoning inward-looking and statist approaches to growth and development in favor of relatively free markets and the strongest possible participation in the vast international system of trade and investment. Countries, obviously including the United States (as illustrated by its ratification of the North America Free Trade Agreement) are accepting indeed embracing mutual dependence as the only avenue to economic vitality.

This language could be used to challenge every sort of economic measure tending to liberalize the Ugandan economy and international agreements opening markets for Uganda abroad.

Article 12:

Paragraph (3)--Was the reference to "institutions" intended to include private ones? Most private human rights institutions refuse state money in order to maintain their independence, so important to their credibility in this sensitive area. What is needed for them is to guarantee respect for their independence and to commit the state to cooperate with and to protect private human rights institutions.

Paragraph (7)--The intention might be more precisely and categorically expressed by declaring to the effect that "The state shall make no law nor in any other way interfere with the right of all citizens, groups, and communities to have access . . ."

Article 14:

I would like to consider the two paragraphs together. Although presumably intended to strengthen the position of women, to enable them to overcome age-old discrimination, to allow them to become full participants in the political, social and economic life of the country and thus to enrich the country's human capital as well as to protect the human rights of all its citizens, the paragraphs seem to have the opposite effect. The first is relatively innocuous, but patronizing in tone and thus suggestive of subordinate status. I refer particularly to the statement that "The State shall recognize the significant role of women in society." The word significant used in relation to a group comprising fifty percent of the population implies something more than marginal (i.e. insignificant) but less than equal.

Whatever doubts might exist about whether the implication is fairly perceived are removed by the second paragraph which "refers to "natural maternal functions" and "unique status," the historic justifications for denying to women equality of opportunity in government and the work place. If the intention of the drafters is to eliminate gender discrimination, then at a minimum they need to say that "The State shall enforce equality of opportunity and of legal rights for men and women."

Article 18

Paragraph (5)--The political process in every country is the means by which it is determined who gets what when and how. It is concerned above all with taxing and spending. In a democratic society, most political disputes concern who is to be taxed how much and how the resulting revenues are to be allocated. Hence efforts to fix a particular allocation of resources by incorporating it into the constitution cut sharply across the grain of democratic politics. This paragraph, by calling for "the provision of adequate resources" for the "effective" functioning of organs and institutions at all levels will make every dispute over the taxing and spending powers into a constitutional one, a result calculated to poison political dialogue.

It is also an invitation for the courts to get involved in politics. For the constitutional standard of "adequate resources" for "effective functioning" is so imprecise that judges are left free to interpret it any way they wish, i.e. to make political decisions. Moreover, the standard could be used to challenge the constitutionality of Parliamentary decisions to consolidate institutions and functions or relocate them for purposes of greater efficiency or equity. In short, I see this paragraph as a recipe for political troubles.

Article 19:

Paragraph (3)--In the area of law enforcement, I worry about calls for the use of "all measures." Surely what is intended is all measures "consistent with the human rights express and implied in this constitution."

Article 20:

Paragraph (6)--This is, I fear, a cavil, but I wonder whether the language is sufficiently broad to achieve the drafters' benevolent intent. Surely the State is also concerned with the health, safety and welfare of persons who are not employed for wages or salaries: Persons out of work; the self-employed; mothers who remain at home to take care of their children; children; etc. What, I think, is intended is enforcement in places of employment of reasonable measures for protecting the health and safety of workers and for cushioning the effect of redundancies.

Article 21:

Paragraph (1)--Another cavil: To the extent that the State is governed by persons selected in free and fair elections, the people in general are participants by proxy in the development process. Obviously what is intended here is grass-roots, direct participation in project planning and implementation. Some language that might convey this distinction is the following:

"In planning and executing development projects in different parts of the country, government officials shall consult with persons who are reasonably likely to be directly affected if the project is implemented. Parliament shall by law provide mechanisms to assure effective local participation in project planning and execution."

Article 22:

Here is another portentous article, one that therefore requires very close scrutiny, for it can affect the shape of the country's politics and economy.

Paragraph (1)--The constitution elsewhere prohibits discrimination. So this paragraph must be intended not simply to require the Parliament to adopt anti-discrimination laws; rather it seemingly requires the legislative and executive branches to take positive measures not simply to facilitate but actually to provide equal opportunity. The obligation, in other words, is not to make a reasonable and good-faith effort, but to succeed. Thus the State is saddled with obligations and attendant expectations it cannot hope to satisfy.

In every country, genetic endowment and family play a key role in determining who will succeed. The state can never hope entirely to overcome these differences in opportunity that obtain at birth. And in attempting to do so, a state may become so intrusive as to diminish the general welfare. What many countries do is establish a good and subsidized system of education. It helps the children of poor families to overcome the disadvantage of being born to poor parents. Countries may also set aside a percentage of positions in the state service for persons from traditionally disadvantaged groups, although this is rather more controversial. These and other measures nevertheless fall short of "providing [without excuse or qualification] equal opportunity."

Paragraph (2)--In its first part, this paragraph seems to duplicate the first. However, its second clause does get onto new ground. It is new and it is precarious. Modern welfare democracies like those of North America and Western Europe try to balance a commitment to individual achievement in all areas, including economic competition, with a commitment to protect even the most incompetent, as well as its vulnerable citizens from destitution. One of the reasons they reject the radical redistribution of income and wealth is, therefore, moral, for the original distribution is the result not only of luck and inheritance, but also imagination and hard work. The more successful the state is at fostering equality of opportunity, particularly through the system of public education, the greater the likelihood that differences in income, at least, will be related to differences in disciplined effort. Redistributive policies also are limited by practical considerations: Particularly in a world where capital and people with skill and entrepreneurial imagination can move easily across national frontiers, countries which devalue these qualities by stripping away the fruit of successful labor find that they have injured if not killed the proverbial gold-egg-laying goose.

At a minimum, imposing on the state an obligation to see that wealth is equitably distributed will discourage foreign investment. It will also encourage a politics of extreme envy and thus it will discourage Ugandans from striving to excel in the economic sphere. When the camouflage was lifted from the Soviet and East European economies we confirmed not only the stagnant character of states where inequality is treated as a disease, but also the public corruption associated with a state constitutionally obligated to massive intrusion into the spheres of economic life.

I am sure that all Ugandans, like peoples elsewhere, will applaud constitutional commitments to non-discrimination, to an educational system designed to assist all Ugandans in developing their full potential, and to the progressive development of a safety net that will protect the sick, the disabled, the unemployed and the young from extreme deprivation. This paragraph, however, seems to commit the state to policies that have been repudiated in most of the world because they ended up delivering neither equality nor welfare nor freedom. I am sure that is not what was intended.

Subsequent paragraphs reinforce the impression made by (2). Like (2) they also lay the seeds of future disillusionment. For they establish duties for the state with which it cannot fully comply. Paragraph (3), for instance, though fairly anodyne, still manages to make the state in a sense absolutely liable for failure to "provide a peaceful, secure and stable political environment " Even those employing totalitarian or extreme authoritarian means have difficulty in these troubled times providing absolute peace. Look at most central cities in the United States, at riots in France, at assaults on foreigners in Germany, at the civil unrest in Northern Ireland and in Georgia. Political developments often occur for reasons largely beyond the control of the state: global economic recession, refugee flows resulting from unrest in other countries, natural disasters.

Articles (4) through (6), while also susceptible to benign interpretation, nevertheless function collectively to convey the impression of a constitutional purpose to thrust government into every nook and cranny of social and economic life. Among other things they therefore imply big government. Most of the world is now moving in the opposite direction. The emphasis is on getting the government out of areas where private actors are more efficient, to making government smaller but also more competent in doing what governments alone can do, which among other things is monitoring private sector activity to make sure that private monopolies do not spring up where public ones have been dissolved and to guarantee that private actors do not exploit their freedom.

Paragraph (6)--I want to emphasize this paragraph because it could prove to be a burden on the country's developmental goals. Development experts agree that security of tenure in land is a key to sustained agricultural productivity. Shouldn't this paragraph be balanced by some provision guaranteeing the right to property and stating that it can only be taken for a public purpose on the payment of just compensation?

Article 24:

I see here in particularly acute form the tendency that affects all of the articles dealing with economic objectives (which, you will note, are all phrased not in terms of aspirations but categorical obligations). If the constitution states that "The State shall control important natural resources" and further implies that the state shall manage them, then if the President decides that they cannot be efficiently developed unless efficient private companies are given long-term leases or management contracts (with the government

taking a solid hunk of profits, rents and royalties), he or she will be accused of violating the constitution. As written, Article 24 denies to the government needed flexibility. Like many other articles imposing obligations on the government, it seems to evince a lack of confidence in democratic processes. For if one has confidence in democracy, then there is no need to constitutionalize policy choices.

Article 26:

If all Ugandans have rights to all of the good things enumerated, then presumably the state has a corresponding obligation to provide them. It is something no state, however rich, could manage. The state can attempt to assure the provision of a minimum service, let us say in the case of health or education. But in order to guarantee equality of access, it would have to prevent people from supplementing that minimum. Surely that is not what the drafters' intend. Inequality is inherent in a society which allows, even if it does not encourage, individual initiative. Moreover, at the present time, the government probably lacks the resources to provide everyone even in the most remote parts of the country with clean and safe water, much less with pensions. In the case of medical services, the drafters concede that equality is impossible by providing in Article 28 an obligation on the state simply to "take all practical measures to ensure the provision of basic medical services."

Article 28:

Paragraph (2)--Protection is a matter of degree. What is preventable is clear for some illnesses, but not for others. The incidence of malaria can be reduced and its consequences rendered less severe. Elimination has proven to be infinitely more difficult than was once imagined. What is intended here, presumably, is an obligation to universal inoculation against those diseases against which inoculations are fairly effective. Given the extent to which we are speaking here of degrees of protection, is it wise to put into the constitution something which could mislead people into thinking that the government has the means if only it had the will to protect them?

Article 34:

Arguably this is another instance of good intentions and admirable objectives stated in language so open-ended that it could be abused to the detriment of the very human rights it is designed to defend.

Paragraphs (1) and (2)--Is there a negative implication in "1" that customary "values" (not simply practices) which in the judgment of the state's political leaders are not democratic or are inconsistent with human dignity will be suppressed (not merely ignored)? Terms like human dignity and even democracy have broad penumbra. Even among people

of good faith opinions differ about the contents of the penumbra. The second paragraph does much to aggravate the risk of intolerance that lurks in its predecessor. Promotion and Preservation of cultural values are restricted to those which contribute to a Ugandan identity; almost by definition traditional ethnic culture does not. And again virtually by definition, traditional culture is readily seen as inconsistent "with a modern way of life."

One thing can be said with confidence, namely that the language is difficult to reconcile with either the declaration on minority rights or recently developed law on the rights of indigenous people. I think that the conflict between the natural interest in promoting modern democratic values and a larger national community with respect for traditional cultures could be reconciled if language were incorporated stating something to the effect that while it is the function of the state to promote a democratic culture, human rights, and a shared sense of national community, it shall do this without prejudice to the right of any group within the Ugandan community to preserve their values and practices except where the latter violate the constitution or internationally recognized human rights.

The now apparent failure of totalitarian states like the former Soviet Union to instill in a multi-ethnic population a common identity and modern democratic values confirms that the desired identity and values cannot be manufactured by propaganda and indoctrination. Changed values and perspectives stem from positive experiences. A democratic Ugandan state with a dynamic economy and a political class respectful of human rights will by its nature progressively infuse the population with respect and affection for the symbols of the nation, including its constitution, and with modern democratic values.

Article 36:

I yield to no one in concern for the environment. And I am, therefore, delighted to see that concern in a constitutional document. But I fear that this article, in its present form, imposes on the state obligations which no state could fulfill.

No state, for example, can satisfy the duty "to ensure that all persons enjoy a clean and healthy environment." Cleanliness and healthiness are quintessential matters of degree. After all, there are many pollutants naturally in the environment, for example background radiation. More importantly, the degree of cleanliness and health that can be achieved by state action is in part a function of tradeoffs with other goals electorates value such as economic growth and jobs.

The central point--one that needs perpetual restatement in every country rich and poor and that politicians no less than electorates are often reluctant to concede--is the finiteness of public resources. The revenues of every government are small in comparison to the qualitatively unlimited appetites of electorates for goods and services. New water-treatment plants must compete with demands of farmers for feeder roads that will enable them to bring their produce to market, for public health centers, for schools and school

materials, etc. If the democratic system is working properly, candidates compete for votes by offering voters different bundles of goods and services. Each election is like a plebiscite on the trade-offs among good things. If environmental goals are given overriding importance in the constitution itself, the electorate is deprived of the right to choose.

Of course, environmental and developmental goals are often not only compatible, they are complementary. That is the thrust of paragraph "2", an exemplary statement. The insistence on "balance" in paragraph "3" also is to be applauded, although it might be more precise to speak of a balance that leads to sustainable growth since there will always be a balance; the question is what kind of balance.

Paragraph "6" is a certain source of litigation and contention and disappointment in government performance. In an ideal world, all people would have access to energy units sufficient to meet their needs and at no cost in environmental degradation. The world is less than our ideal. I suppose the intention here is to urge on governments a policy of providing people with energy sources other than the forests which are rapidly disappearing all over the world in part because they are for many poor people the only source of energy. But the language does not set goals; it purports to create unyielding rights and obligations. And so we return to the question of finite revenues and infinite demands. We return to the world of tradeoffs and hence, I should think, to the quotidian world of politics.

Article 38:

Paragraph (1)--Sub-paragraph "c" seems a little obsolete in that it was the Cold War with its attendant pressure to push countries toward one or another of the geostrategic poles which gave specific meaning to the terms "peaceful coexistence and non-alignment. Sub-paragraph "d" may carry an unintended negative implication, namely that Uganda will pursue close cooperation primarily or even exclusively with its geographic neighbors. In today's tightly-linked world in which geographic proximity is less important than ever before in history, countries seek and find trading and security partners in many parts of the world. The implication could be addressed with a minor change in language that would emphasize the traditional ties with other countries in East Africa while at the same time declaring the commitment of Uganda to policies promoting regional and international peace and cooperation.

The difficulty of stating the full range of foreign policy objectives, much less of tactics and strategies, argues in favor of a very brief anodyne statement along the lines suggested above and nothing more lest the Constitution unduly restrain the state's discretion in pursuing the national interest.

Article 39:

The idea that citizens have duties as well as rights is as old as the French Revolution and its reappearance here is beyond criticism. But the present statement of those duties could lead to unintended consequences and in tone grates a bit against the constitutional guarantees of human rights. The first point that strikes me is, I suppose, largely one of style. I refer to the duty to "love" the country. Love is an inner state that cannot be dictated. Nor can it be measured or even objectively identified. And if the state attempts to translate love into objective acts of affection or obeisance, it is likely to intrude into protected zones of personal freedom, particularly freedom of conscience and the right to privacy. What may properly be demanded is loyalty, respect for the law and for one's fellow citizens, a readiness to assist the public services in time of emergency, and so on: The society may, in other words, insist on certain deeds, but not on certain thoughts.

The second point I would like to raise concerns the duty "to foster national unity." I wonder if this could be converted into a prohibition of advocacy for minority rights or the amendment of the constitution to establish a federal form of government, what the Northern League in Italy now seeks to achieve.

The third point is stimulated by the stated duty "to engage in gainful employment." I am less worried about this duty being used as the basis for punishing the lazy heir to a fortune than its conversion into laws allowing police to treat the unemployed as criminals. Moreover, do we wish to regard all those who either cannot work or choose to do other things such as remain at home caring for children or the elderly as failing in their duties to the nation? I am similarly a little concerned about the implications of the duty "to work diligently in his/her chosen occupation." Do we really wish to penalize laziness either in its acute or moderate forms?

CHAPTER FOUR

CITIZENSHIP

Articles 40-49:

I would like first to consider Articles 40-46 together. I am not quite clear about the legal status of a person born in Uganda to non-Ugandan parents after 1962 and particularly after 1976. I take it that persons falling into this group have no right to be registered as citizens. Do they nevertheless have a right to apply for registration? Does any person who came to Uganda illegally but has lived in the country for twenty or more years and behaved well and contributed economically acquire the right to become a citizen? Suppose a person is brought to Uganda by parents who are refugees. Can it be said that he "voluntarily migrated"? Do refugees fall altogether out of the category of the "voluntarily migrated"?

What is the distinction between having an entitlement to be registered as a citizen and having a right to apply for registration? Are the criteria to be applied by the National Citizenship and Immigration Board substantially different than those that determine whether a person is entitled to be registered? Where are those criteria enumerated?

Decisions concerning citizenship will generally have enormous consequences for the person involved. It would therefore appear that decisions of the Board should be subject to judicial review. Is it clear in the Constitution that such a right to review exists? The constitutional draft does allow decentralization of the Board's functions to the district level. But I cannot find anything detailed about the organization of district boards.

Overall, I wonder whether the level of detail is appropriate for a constitutional document. It is doubtless important to define who shall be regarded as a Ugandan at the time the constitution is being considered and comes into force. But thereafter, is there not something to be said for leaving citizenship and immigration questions to the Parliament, that is to the political process? The level of detail in paragraph (3) of Article 46 struck me as peculiarly appropriate for legislative treatment.

Article 47:

We return here to the question of what duties may a state impose on its citizens and still remain democratic. In many Latin American countries, where there is a long tradition of military establishments functioning as mini-states within the state, as self-appointed guardians of the national interest and as agents of power enjoying absolute impunity, criticism of the military is a crime under the name of "disrespect." Criticism of civilian governments also is restricted by threats of punishment for "bringing the state into disrepute" or "showing disrespect for the nation," etc. The short of the matter is that paragraph (1a)

is an invitation to suppress dissent by criminalizing condemnation of government personnel or policies. Arguably there is a distinction between protecting the honor and prestige and good name of the state and of particular political leaders. In practice, however, leaders have a powerful instinct to break through that distinction. And this is particularly so in the case of a constitutional system which combines in one person the role of symbolic and operational head of state. The risk to democracy is further aggravated here by the obligation actively to promote the prestige of the state.

Paragraph (b) poses a different problem. It encourages legislation open up a vast terrain of poorly defined obligations for the citizen. The requirement that citizens "refrain from doing acts detrimental to the welfare of other persons" may at first glance appear admirable. But here too we have an obligation readily subject to abuse. In life there are many good things that cannot be divided; hence there are zero-sum games. If one man has been in love with a woman all his adult life and she falls in love with me, my marrying her could well be regarded as detrimental to the first lover's welfare. Similarly if we compete for the same job. Democracy cannot exist where the rule of law does not exist. If obligations are stated in broad and vague terms, people do not know what they may do without fear of liability of criminal punishment and public officials may make up definitions of illegal behavior to suit their whims and interests.

Article 48:

Paragraph (b)--Deprivation of citizenship is in many circumstances a violation of human rights. Many Latin American scholars regard it as an illicit form of punishment. I, myself, think it might be justified in a limited range of cases. Perhaps it would be advisable to write some criteria into the constitution to assure that the rights of naturalized citizens are reasonably protected.

CHAPTER FIVE

FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS

I wonder if the drafters considered simply incorporating verbatim the rights set out in the UN Covenant on Civil and Political Rights. To begin with, such a step would insure that Uganda was in full compliance with internationally recognized standards. In addition, because the International Committee established to monitor compliance with the Covenant has been issuing reports for over fifteen years, we now have a considerable interpretative gloss which could serve as a guide to Uganda's political leaders, its judges and its ordinary citizens. Political and judicial decisions concerning this part of the constitution would be more predictable. Verbatim incorporation would, moreover, give to this new constitution a special allure, an aura of moral propriety which could only contribute to the national interest.

A final reason for at least considering incorporation is it would lead to an exercise in comparison between the rights recognized in the Covenant and those included in this draft. To be honest, the latter are significantly more limited. I do not, for instance, see any equivalent of the freedom of association found in Article 22 of the Covenant or the related right to peaceful assembly declared in the Covenant's Article 21. Nor do I see in the draft the obligation to separate accused detainees from those that have been convicted, a matter of considerable practical importance for the fair administration of the system of justice. On the other hand, I think that the Ugandan constitution speaks more broadly than the Covenant to the right to privacy.

Article 50:

I wonder if there is not some element of repetition in the several paragraphs concerning equality. As I noted above, because judges will always try to find distinct meaning in every provision of a constitutional text, repetition increases the probability of unintended interpretations. What is the difference between "equal protection of the law" and "equality under the law"? I think the particular intent is to prohibit traditional male-oriented patterns of land-ownership and of inheritance generally. Perhaps the distinction paragraphs (2) and (3) could be spelled out just a bit.

Article 51:

Paragraph (1)--I think that in several places the text is a little unclear. The right to education is subject to a variety of constructions. The obvious first question is: how much education? Primary only? How many years are implied in that case? What about persons now illiterate? Is the provision intended to be retroactive?

With respect to the right to privacy of communication, how does this affect the authority of the courts to authorize electronic intercepts?

Paragraph (2)--Here is an exception so worded that it could swallow up the entire set of guarantees. I refer to the requirement that "In the enjoyment of the rights and freedoms . . . no person shall prejudice . . . the public interest." Remember that this exception or, if you will, qualification comes on top of the provision allowing the suspension of rights in the event of an emergency. The term "public interest" is subject to an infinite variety of interpretations by the authorities. Many politicians are unable to distinguish between their personal or party interests and the public interest.

Article 52:

The intention severely to limit use of the death penalty could be made more effective by limiting it not only to "very grave circumstances" but also to a highly restricted set of crimes. Indeed, whatever the circumstances, application of the death penalty to all but the gravest crimes would violate general principles of law found in the major legal systems of the world. I believe I am right in saying that all but one of the states in the Council of Europe and virtually all of the Latin American states have simply abolished capital punishment. But it is frequently applied within the United States.

Article 53:

Paragraph (1)--I think that the intent of the drafters could be underscored by adding after the word "laws": "consistent with the provisions of this constitution."

Paragraph (3)--Two points here: First, I think it would be sufficient if the suspect is brought before a "judge," even if the judge is not in his court. Second, and more important, for urban areas the seventy-two hour delay that is allowed seems excessive. Most abuse of prisoners occurs shortly after their arrest. Hence, to prevent the torture and lesser forms of cruel and inhuman treatment that are endemic in most of the world's system of justice, the public security forces should be given as little time as possible free of judicial supervision. Twenty-four hours would be appropriate in most circumstances. For the countryside, a limited exception for travel time could be employed.

Paragraph (4)--It seems to conflate two concerns. One relates to the terms for provisional liberty. The other concerns the right to a speedy trial. I think that they should be dealt with separately, because different sets of interests are at stake. The right to provisional liberty is normally unrelated to the time required to begin a trial, since the former is effective immediately, while a considerable period could elapse before trial seemed unduly delayed. To be sure, I do see a connection: The threat to release someone the state wants held motivates the state to move with expedition. That is fine as far as it

goes. But with respect to provisional liberty, it does not go very far. Certainly the common law view would be that unless there is a substantial risk that the accused will flee or there exists highly persuasive evidence that the individual is a grave threat to the community, provisional release (either on surety or personal recognizance) is appropriate.

Paragraph (7)--It is precisely during states of emergency that the right of habeas corpus is most important for the protection of human rights. Of course, if the constitution allows, as this text apparently would, all rights to be suspended in a state of emergency, then suspension of habeas corpus is a corollary of so radical a position. In fact, international law is perfectly clear on this point: some rights can never be suspended, in particular the right not to be summarily executed, to be tortured, to be convicted without due process, to be discriminated against on the basis of race, religion, ethnicity, or gender, and the right to a family and freedom of conscience. What international law does allow, among other things, is administrative detention under decent conditions and for relatively brief periods. Judicial supervision of the public authorities is crucial for the prevention of abuse of detainees. Of course, by virtue of the right to effect administrative detention, the writ will be applied somewhat differently. The public authorities will have to produce the person names, but they are not required to make out a prima facie case; it would be sufficient for them to show that they had reasonable grounds for believing that the individual constituted a threat to public order.

Administrative detention is a grave enough threat to human rights even if it is subject to judicial review. Eliminate review and you eliminate the last line of protection for the individual.

Article 55:

Two kinds of issues tend to arise under provisions concerning forced labour. One is conscription for national service, particularly the armed services. When conscription was first introduced in the United States in the last century, it was furiously resisted in some areas. Probably best to be clear about this matter and to provide an exception insofar as military service is concerned for conscientious objectors.

The other issue is convict labour. I see no international legal objection to allowing it. But unless such an exception is spelled out, the courts might construe this language as precluding it.

Article 56:

With respect to paragraph (a), I think the more common formulation of the condition would be that the taking etc. "shall be for a public purpose" and nothing more, since that covers everything that the state may do for the health, safety, and general welfare of the polity.

Article 57:

Paragraph (1)--For the sake of clarity, I would be inclined to state simply that a search is lawful only if it has been authorized by a court of appropriate jurisdiction on a showing of just cause.

Paragraph (2)--It may be a little too broad. Is it intended to preclude entry by administrative officials for inspections related to public health and safety? Is it intended that all unconsented public entry shall require a warrant? One may wish to distinguish between the home and property used for commercial purposes.

Paragraph (3)--What we have here is another of those broad exceptions so worded that it could easily end up consuming the rule. I would eliminate the exception, on the one hand, while, on the other, providing the authorities with some latitude to inspect particularly commercial premises even without a warrant.

Article 58:

Paragraph (2)--Exclusion of the press and public inevitably threatens the guarantee of due process (and often other rights as well) and would therefore be inappropriate except in extreme circumstances. One of the earliest steps toward the rule of law in England was the condemnation of secret proceedings in courts set up by the King. In the event of a state of emergency, the right of the accused to a public trial can be limited to the extent absolutely necessary. The broad exceptions in this paragraph would apply under ordinary conditions. I think due process would be better protected (and public confidence in the courts enhanced) if the power to exclude were drawn more narrowly and the objecting parties had the right of an immediate appeal to the Supreme Court.

Paragraph (3e)--The assistance to counsel is so central to the rule of law and the right to fair process, I wonder if the drafters would consider extending the right to free counsel (for indigents) to defendants in all cases where the potential sentence is long-term imprisonment.

Paragraph (4)--I wonder whether sub-paragraph (a) needs to be tightened up a bit by being more specific. For if many burdens of proof are transferred to the defendant, one soon has done away with the presumption of innocence.

Paragraph (6)--I am sure the drafters agree that a right of appeal in a criminal case is an essential element of due process. In order to exercise the right effectively, the defendant generally requires a copy of the proceedings. Hence in the case of persons who cannot afford to pay for it, the copy should be provided free of charge.

Article 59:

Paragraph (1b)--As an academic, I naturally take a considerable interest in this paragraph. Perhaps paradoxically, I wonder if it might not be useful to deal with the problem of academic freedom not by isolating it but by including it implicitly in a provision guaranteeing the right not be discriminated against in public or private employment on grounds of political belief, along with a caveat that the provision should not be construed to prevent the occupants of public offices filled by popular elections to select assistants of their own party, making it clear that such persons are not part of the regular public service, that is that their tenure would be tied to the tenure of their political masters.

Paragraph (3)--This escape clause is surprising and disappointing. It effectively disembowels the rights granted in the previous paragraphs. The "public interest" limit is no real limit at all: All laws, other than private bills, are presumed to be in the "public interest." Similarly the phrase "to the extent acceptable in a free and democratic society" is too vague to constitute a limit on the power of the Parliament to ride roughshod over due process and other rights. Faced with such vague standards, most courts will defer to the legislative judgment.

Article 60:

Paragraph (3)--The operational consequences of the language is unclear. Does this paragraph deal with the rights of parents or of children? After all, they are not always the same. What will be the impact of this paragraph on the problem of child abuse? Will it impede the adoption of children?

Article 64:

The last five words of paragraph 1 appear to give Parliament the authority to disregard the right described in the rest of the paragraph. Once again the exception threatens to swallow the rule. There will always be a certain degree of tension between the obligation to respect strong local cultures and the desire, if that is what we have here, for

a strong, centralized state. In this and other articles, the tension seems to be addressed by leaving the collective rights of ethnic minorities largely unprotected. Is that what the drafters intended?

Article 67:

As I indicated in my discussion of the chapter on national objectives, absolute-sounding guarantees of the kind found in paragraph 1 are calculated to produce disillusion and litigation. The term "satisfactory" is not a judicially manageable standard. Safety and healthiness of conditions is a matter of degree. In a democracy, these issues will be worked out through collective bargaining and legislation.

Equal pay for equal work is a theoretically admirable objective. Or perhaps I should simply say that it sounds good. But if relatively free markets are actually functioning, then what people are paid will reflect the market value of their work. Take away market value and we are left without any widely accepted standard of comparison between different sorts of work. Even if the language were "equal pay for the same work," there would be difficulties. We may wish to allow older persons or persons with many dependents, etc. to be paid more.

My tentative suggestion would be to simply say that Parliament is empowered to adopt laws governing the conditions of employment in both the public and the private sectors.

Article 70:

Paragraph (1)--All human rights treaties and all constitutions with which I am familiar provide that even in a state of emergency, some rights cannot be suspended. I assume that no one would defend the proposition that under any circumstances persons could be tortured or executed without a fair trial.

Paragraph (2)--Why should Parliament be entitled to declare a state of emergency for parts of the country where there is no emergency?

Article 72:

As I have already indicated, this list of non-derogable (i.e. non-suspendable or absolute) human rights is unusually brief. Perhaps that is because the term "human dignity" is intended to cover a number of specific rights. If so, the drafters are making the unnamed

rights hostage to the discretion of future governments and judges. I should think that Ugandans would not want the list of rights that can never be suspended to be any shorter or less specific than the list found in the leading human rights treaties.

Article 73:

The obvious intent of the drafters is that during periods of emergency, the Human Rights Commission will provide that oversight of Executive action which normally is the province of the courts. I think others will join me in finding this substitution a bit paradoxical. Why paradoxical? Because it eliminates judicial review at precisely the moment when it is most needed, when civil liberties and human rights are most under stress because the government feels stressed by the conditions constituting the emergency.

Obviously, in the event of a real emergency, the government may need to adopt measures that would be intolerable in ordinary times. But however excellent the intentions of senior government officials, however firm their determination to act in ways that respect fundamental human rights and the long-term interests of the country, their orders will be carried out by myriad officials at lower levels of the administration some of whom will almost inevitably display an excess of zeal or will use the occasion to settle old scores or gain some other sort of personal advantage. Parliament cannot monitor and correct individual applications of emergency measures, except, perhaps, after the fact. Only the courts have the means and the expertise to review individual applications of emergency decrees.

The Human Rights Commission will almost certainly be less independent than the courts. It will not have sufficient staff to review a large number of cases arising all at once. It will not have the constitutional prestige of the courts. It can supplement the courts, but it cannot replace them. Moreover, the powers actually given to it are quite limited. At most, it can recommend release. Furthermore, it lacks authority to review the overall reasonableness of emergency measures.

For many years I have studied the use and abuse of emergency measures in Latin America. On the basis of that experience I would recommend the following with respect to the courts:

Unless, as a consequence of invasion or civil war, they cannot function, they should remain open during periods of emergency with power to do the following things:

1. appoint assistants or "masters" who would monitor detention centers to confirm that the non-derogable rights of detainees are being respected;

2. entertain special writs by means of which a detainee could challenge the length of his or her detention or could attempt to show that detention did not rest on reasonable suspicion but on personal bias of some official;
3. if the emergency measures are maintained for more than a brief period, then consider whether the continued suspension of a particular right (for example, free speech) is reasonable in light of the then prevailing circumstances. (In my experience, governments have a tendency to prolong states of emergency beyond the point where suspension of rights is really required by the exigencies of the situation. Of course, the executive must have a certain margin of discretion; but I see little risk that courts will readily overrule the executive's judgement that more time is needed. The risk seems to run very much in the opposite direction, that is toward judicial timidity.)

Article 75:

I think that paragraph (2) would be clearer if it said: "Any party to a civil or criminal suit shall have one appeal as of right to a higher court." Parliament, of course, may by law provide for additional appeals for some or all cases.

The first and third paragraphs may be drawn a little too broadly. Most legal systems provide some limits to standing, that is to the criteria a person must satisfy in order to challenge the constitutionality of a statute or the legality of an administrative measure. The grant of such a right broadly to "Any person or organization" creates a number of potential problems. They stem from the apparent grant of a right of appeal to persons who may have no personal or substantial institutional stake in the outcome. Among other things, this could complicate efforts by the government to achieve an amicable settlement. It could result in persons in league with the government rushing to bring suits before they are brought by persons with a real grievance and then not prosecuting the suits vigorously. On the other hand, the proposal to extend standing to organizations concerned with the protection of human rights is very progressive and should be applauded.

Article 76:

Mixing the functions of judge and Commission Member is anomalous. And if, as I think desirable, the Commission is given the power to bring actions before the courts, the mix of functions would be plainly unworkable. In any event, I doubt that judges have the time required to wear both hats well.

CHAPTER SIX

REPRESENTATION OF THE PEOPLE

Article 92:

Before turning to specific paragraphs, perhaps I might venture a general observation which, I recognize, has implications that go far beyond this article. In its present form, the article gives us a rather vague sketch of how parliamentary elections will actually work. Can any person meeting the minimum qualifications for a member of parliament stand? If an aspiring candidate does not need to present a petition signed by a substantial number of electors, it may be necessary to put a very large number of names on the ballot. In order to give all of them equitable access to the media, no one of them will get much. If debates are held, they will tend to be confused scrums. If there are multiple candidates and none can campaign on a party platform, it is extremely doubtful that the candidates will succeed in defining programmatic differences for the electorate. Thus the elections will fail to perform a key function of elections in a democratic system, namely giving the voters a reasonably clear set of alternative plans for achieving objectives the electorate prefers.

If there is no party campaigning and the Movement is the only legitimate "party" (and, since it is a political organization, that is an organization with social and economic goals and plans for achieving them, it has the characteristics of a party--albeit one open to a wide variety of interests) and the President is also the leading figure of the Movement, most candidates will tend to be members of the Movement. So they will be attempting to achieve not only a seat in parliament, but also high place within the Movement. Hence the candidates are almost certain to endorse the program of the Movement and of the President. Therefore, they will probably campaign largely on the basis of personalities or ethnic or religious ties (subtly, of course, in the latter case, since open campaigning on such a basis might be illegal, or at least disqualifying). The net result, I would like to reiterate, is that, even if the number of candidates is severely restricted, elections for parliament are unlikely to perform the vital task of helping the electorate to focus on and to appraise the capacity of proposed economic and social policies to promote their welfare.

Paragraphs (6) and (7) --In connection with fair access to the media, I would like to raise one point. I presume that when the drafters refer to "equitable access and use of the public communication media" they are excluding privately-owned media. The tendency worldwide is to foster diversity in television (and greater employment opportunities) by licensing privately-owned channels. Should not such channels be subject to the equitable access rule?

Articles 94 and 95:

Paragraph 2(e) of Article 94 states that "the Movement shall operate on democratic principles." However, neither it nor any other paragraph sets out those principles or provides guarantees that such principles shall be enforced. Article 95 might possibly be construed as giving parliament the power to declare those principles and to make them effective in the process of creating organs of the Movement and defining their roles. If that is the intent of the article, it can be said either to establish or to underscore rather odd institutional arrangements.

If the Movement is the only legitimate political organization (as I have above defined one), then, as I have suggested, most members of parliament are likely to be Movement members and either to be officials of the Movement or persons aspiring to be such. In that event, parliament could not by definition exercise independent oversight of the Movement. Rather, if it acted at all, it would be to adopt those rules for the governance of the Movement that its existing leaders deemed appropriate. Moreover, as far as public policy is concerned, if most members of parliament are also Movement members then there would not normally be any difference in the position of Parliament on any issue and that of the Movement. The Parliament would seem to represent little more than a duplicate of the Movement.

It would therefore appear that parliament could have an independent operational existence only in the unlikely event that a substantial number of its members were anti-Movement people elected on an anti-Movement platform. One reason that is unlikely is that Movement members will be able to draw on the resources and the prestige of the Movement. Their opponents, however, presumably cannot band together, raise funds, develop a program and run, because they would then be functioning as a de facto political party and the constitution (Article 96) prohibits parties from endorsing, sponsoring or in any way campaigning for or against a candidate.

But in the unlikely event that opponents of the Movement formed a majority in the parliament, would it not be strange if they could then dictate the internal arrangements of the Movement? For if they were armed with such power, they could effectively end Movement government without benefit of a referendum.

Article 96:

I see at least two ways in which this article in its present form may frustrate the presumed intent of the drafters. First, I think that the provisions of this article are difficult to reconcile with those of article 98 which envisions providing the electorate with a free and fair vote on the issue of whether to adopt the party system. In order for that vote to be fair,

advocates of the party system would need to organize and campaign in favor of a change through the referendum mechanism. Article 96 would seem to preclude such campaigning, since the Movement would still be in existence.

A second apparent conflict between articles 96 and 98 arises from the former's preclusion of party activity while the Movement exists and the latter's creation of a mechanism through which the electorate may opt back and forth at five-year intervals between the Movement and a party system. If, on the first occasion the electorate opted for the party system, the Movement ceased to exist, then no organization would be in place for the electorate to opt back to if it grew disillusioned with the parties. But if the Movement continues to exist as an institution, then under 96 the parties are illicit.

Finally, I would like to raise a point relevant here but relevant also to the chapter as a whole. The Movement system is designed with the laudable intention of promoting national unity and correspondingly reducing the tensions among sectarian and ethnic groups that have cost the Ugandan people so dearly in the years since independence. But even if most Ugandans share the same broad objectives, in the humanly inevitable scramble for social goods--for power and prestige, wealth and income--they will tend to organize into competing groups, each seeking a larger share of the pie. And at least to some degree, these groups will correspond to older identities and loyalties: Regional, religious and ethnic. Moreover, despite common objectives like economic growth and environmental preservation, persons will disagree on the means for achieving those ends.

It is thus inevitable that precisely because the Movement is intended to be all-embracing, to exclude no person or group or tendency, competing groups will form within it. They will compete to dominate the offices of the Movement. And so the nation will have a kind of de facto, more-or-less clandestine party system operating within the big tent of the Movement. This de facto party system--we could call it a "factions system"--would, I fear, be more dangerous to national unity than the formal party system because, unlike the latter, it would be unregulated. The factions, for instance, would not be subject to the requirement that they include persons from most of the regions.

Why might a party system ultimately prove more conducive to national unity? Suppose that, as for instance in the case of Germany, the constitution establishes electoral arrangements which tend to produce more than but not many more than two national parties. Coalition government will then be the norm and the coalition members could be sufficiently few in number and compatible in view to achieve a coherent program. Thus both the individual parties (because of the requirement that they have a substantial number of members in most parts of the country) and the coalitions can contribute to the experience of cooperation among groups that have traditionally been noted for their mutual suspicions or outright hostility.

Article 97:

The desire to have broadly representative national parties is understandable. But I think the goal is best achieved through concrete requirements such as those that appear in paragraph (6). The broad language of paragraph (3) may be subject to abuse, that is one can imagine opponents of a party meeting the specific requirements of paragraph (6) attempting to have it declared illegal on the ground that it nevertheless lacks a national character.

CHAPTER SEVEN

THE EXECUTIVE

In recent years, some of the world's leading political scientists have closely studied the numerous Twentieth-Century instances of democratic collapse, rebirth and consolidation. Among them there is increasing agreement that Presidential systems are much less stable, much more prone to crisis and much more brittle in the event of a crisis than parliamentary ones, particularly parliamentary systems dominated by a very few parties which overlap to a significant degree in the programs they propose and the persons to whom they appeal. The parliamentary systems usually include presidents (or constitutional monarchs), but they are required to relinquish party affiliation and preference, and, while embodying the nation and articulating in general terms its values and aspirations, they exercise few real powers other than (in some cases) the right to determine the sequence in which to invite political leaders to try and form governments that can command a majority of the votes in parliament. They may also be empowered to dissolve parliament and call for new elections in the event that no leader succeeds in commanding a parliamentary majority.

One obvious strength of the parliamentary system is the relative ease with which it can discharge the operational head of government, the Prime Minister, if that person loses for whatever reason the confidence of the electorate. In presidential systems, impeachment is the only alternative in such a case and it tends to be prolonged, to paralyze government, and to polarize the nation. Moreover, because the President is the head of the state and the head of the government, he or she is powerfully equipped to resist impeachment, however grave his or her failures of policy or personal conduct.

In addition, by virtue of being head of state, the president in a presidential system is more inclined to act imperiously, since critics--in that they are perforce attacking not simply the operational head of state, but the state itself to the extent it is seen to be embodied in the President--are relatively inhibited by that fact and are more readily silenced or ignored. Presidents in a presidential system also are more likely to act imperiously or impetuously because they are surrounded by persons enjoying high office by virtue of presidential appointment rather than fellow members of parliament who themselves enjoy the legitimacy stemming from electoral triumph and remain sensitive to shifts in electoral opinion. Moreover, the chief of government as parliamentary leader must answer questions in parliament, must in other words confront critics publicly. For all of these reasons, the prime minister is somewhat less likely than the president to pursue a line of policy so at odds with popular sentiment as to create a system-shaking crisis.

A further advantage of parliamentary government is its guarantee that the head of government will be leader of the party or parties that enjoy a parliamentary majority. This coincidence precludes a paralyzing stalemate between the executive and legislative branches.

It also fosters elections in which the voters are treated to a plain confrontation of national programs. It fosters informed choice.

Of course, the system works best in a country seeking to consolidate democracy after a period of authoritarian government, if (a) democratically-organized national parties existed before democracy was overturned and (b) despite being suppressed, they have survived through the anti-democratic era. I suppose that many Ugandans believe that is not the case in there country. And it is certainly true that in some historical instances, strong presidential government has seemingly been useful in helping a country make a difficult transition from authoritarian to democratic government.

Supporters of a presidential system will no doubt invoke the experience of the United States as demonstrating that such a system can be stable and can combine restraints on executive power with strong and effective government. But of course the U.S. has benefitted from having virtually at its inception the elements of a national party system and a broad coincidence of basic ideas and ideals within the electorate, ideas and ideals both requiring and reinforcing democracy. In addition, the U.S. at its birth was blessed with great natural wealth, a fairly homogeneous population, and open frontiers where, people believed, all persons could pursue their ambitions without much competition.

The President

If the Constituent Assembly endorses the drafters' preference for a presidential structure, it will have to pay particularly close attention to the provisions affecting the balance of power between the executive and legislative branches. I think it fair to say that the generally held view among students of presidential democracy is that the legislative body bears the primary responsibility for setting the basic lines of national policy except, perhaps, with respect to certain matters of foreign policy, while the executive is primarily responsible for executing, that is for translating into concrete measures, the broad policies which the legislature embodies in statutes. As I just hinted, some Presidents and some scholars have purported to find in the President at least a co-equal power to set policy in the realm of foreign affairs; but virtually no respectable political or intellectual figure has ever questioned the ultimate authority of Congress over basic issues of domestic policy, above all questions of taxation and spending.

Of course there is some overlap in the U.S. system. The President can veto legislation (but the Congress can override the veto with two-thirds majorities in both houses). And as a practical matter, the unitary character of the executive branch gives to the President a great power to shape policy by proposing legislative responses to any and every national problem. Moreover, since policy is mere rhetoric until reduced to concrete ongoing programs, as the executive branch implements the stated will of the Congress, it necessarily exercises discretion over the precise forms that will is to assume.

Possibly the strongest case for emphasizing legislative power in a Presidentialist system, like the one proposed in this draft, is the tendency of the Presidential office gradually to expand its control of public policy at the expense of the legislative branch. The President has so many advantages in a competition with the legislative branch--even in a political system like that of the United States and to a lesser degree Germany where there is a Supreme Court with clear authority and willingness to demand compliance with the constitution--that the latter needs a strong statement of its ultimate authority to make the basic policy decisions if it is to have any hope of actually being a coequal branch.

If it is indeed the intention of the drafters of this constitution and of the members of the constituent assembly to bring into being a legislative branch of government with really independent power to restrain Presidential will, they might at the outset consider, among other things, two somewhat formal but still not inconsequential changes in the present draft. One would be to put the chapter on "The Legislature" before the one on "The Executive." The other would be to begin each of these chapters with an article defining their respective powers, defining them so as to emphasize the role of the legislature in setting basic policy on domestic matters.

For instance, in the case of the executive, the chapter could begin by saying something along the following lines:

"The executive power shall be invested in a President. The responsibility of the President is to execute the will of Parliament, as manifested in its legislative acts consistent with this constitution, to see to it that the Constitution and the laws and treaties made pursuant to it are faithfully executed, to protect the fundamental rights herein enumerated, and to conduct the foreign relations of the country within the limits established by this Constitution."

Attempting to combine a strong Presidential office with a strong legislative branch can, of course, create serious problems if and when the two branches are controlled by different parties. This is least likely to occur in a country that has essentially a two-party system and elections for the Presidency are held at the same time as elections for the Parliament.

France exemplifies a country that has mixed the presidential and parliamentary systems. Its constitution establishes a president as the head of state, one endowed with some measure of operational power (primarily in the foreign relations field), while purporting to give the great bulk of operational authority to a prime minister who is answerable to parliament. When the Socialist Mitterand has coexisted with prime ministers from the conservative parties, there have been tensions but not paralysis. Still, the apparent viability of the French arrangements may depend too much on the personality of the present President and the country's relative wealth and economic progress.

Article 101:

My general comments on chapter seven foreshadow my observations on this opening article. For the article appears to give the President a position of such operational and symbolic power as to subordinate the other branches of government.

In order to establish civilian control of the military, a precondition for democracy, the President must of course be given the position of "Commander-in-Chief." I wonder if it is necessary also to declare formally that he or she is the Head of State and Head of Government. An alternative, as I have suggested above, is simply to define the responsibilities of the President. This is a matter of form, to be sure, but the form presently used endows the President with even greater symbolic authority that he or she would in any event possess.

The risk of creating a Presidential office that overshadows and subordinates the legislative and judicial branches is aggravated by the statement in paragraph 2 that "The President shall take precedence over all persons in Uganda . . ." After my discussions with members of the Think Tank Foundation and delegates to the Constituent Assembly, I appreciate that this language is driven by concern about the perceived relationship between the central government and traditional leaders. However, no reasonable person could read the constitution as a whole without concluding that the President in particular or the central government in general is, within the constraints of the Constitution, the supreme authority and that traditional leaders occupy a distinctly subordinate position. If the Assembly nevertheless concludes that it would be best to include specific language on this point, it could do so without appearing to establish a hierarchical relationship between the Presidential Office and the Parliament and, most important, the supposedly independent judiciary.

Paragraph 5--In its present form, the paragraph follows precedent in some other countries and exempts the President from civil or criminal responsibility for acts that have anything to do with the governance of the country. I would like to raise the question of whether such a blanket exemption goes too far. After all, it is acts done under color of Presidential authority that can cause the greatest damage to society.

The exemption could be narrowed in various ways. For instance, one might exclude from it acts which "grossly and flagrantly violate the fundamental rights of Ugandans enumerated in this Constitution, in particular the right to life and to protection from physical abuse."

Article 102

Paragraphs 2 and 3--In these paragraphs the Assembly can incorporate its views about the place of international law within the Ugandan legal system.

Globally, one encounters basically three approaches to this issue. The constitutions of most west European countries--including Germany, Italy, and The Netherlands--explicitly make international law part of national law. That is to say, both rules found in treaties to which those countries are parties and rules enjoying virtually universal recognition as binding customary law are treated as being on a par legally with acts of parliament and, of course, with executive decrees. Hence the courts are authorized to enforce these rules and, in case of evident conflict between statutes and treaties or customary law rules, the most recent in time would generally prevail. Such legal systems are called "monist."

The United Kingdom exemplifies the so-called "dualist" approach. Its courts take the now outdated view that international law is strictly a matter between states, that it does not penetrate the national legal system. It follows that international law rules, even those contained in treaties to which the U.K. is a party, have not been recognized and enforced by the courts unless and until they have been incorporated in acts of Parliament. Since in today's world, countries cannot protect their interests without joining the rapidly growing network of international agreements and generally accepted customary practices concerning trade, finance, the environment, and every other subject under the sun, a system like that of the U.K. puts a great additional burden on Parliament. If at least formal international agreements, once approved according to whatever procedure the Assembly finally adopts, became the law of the land, the prospective legislative burden on Parliament would be reduced.

The United States takes an intermediate position. With respect to those treaties dealing with basic issues of policy (which must, therefore, be submitted to the upper house for approval), they are deemed by the courts to be a part of U.S. law if they are interpreted by the courts as being "self-executing." In other words, if the treaty is relevant to a case before a court, the judge must interpret the treaty and decide whether it was intended by the government that it be self-executing. If the court concludes that the government did not so intend, it will not enforce the treaty until it is embodied in legislation.

The U.S. Executive enters into a very large number of international agreements on the basis of a delegation of authority implied from acts of Congress or treaties previously approved by the upper house. As long as these agreements are not in conflict with existing statutes or the terms of the treaties approved by the upper house, they are enforced by the courts.

Finally there is the matter of customary international law. While U.S. courts treat it as part of U.S. law, there is a division of opinion as to its position in the hierarchy of U.S. law. The Supreme Court has yet to rule on the question of whether rules of customary

international law are subordinate to statutes and to executive decrees. It is, however, clear that rules of customary international law take precedence over decrees of local government officials. This conclusion is the inevitable result of the concentration of the foreign relations power in the central government.

Article 110:

I think that the provisions governing "Removal of the President" raise at least two issues worthy of further reflection. One is the procedure applicable where the impetus for removal stems from a perceived abuse of office or other form of misconduct, that is removal for cause. A number of Ugandan scholars have expressed doubt about the wisdom of including Justices of the Supreme Court in the process. Removal, they have argued, is a quintessential political act and for that reason the Court should be sheltered from any involvement lest its reputation for impartiality be impaired. One could, however, argue that impeachment is so potentially traumatic to the polity, overriding as it does the electorate's original choice, that every effort should be made to assure both the appearance and the reality of a fair process. Supporters of the President must be persuaded that the removal effort is driven not by political calculation but by concern for the integrity of the constitutional system and the office of the Presidency. They must be persuaded that the President has indeed abused his or her authority. Requiring, as a condition of removal, a prior finding by three justices of the Supreme Court, that there is a prima facie case supporting the claim of misconduct might well contribute to blocking the initiation of removal proceedings purely for partisan political reasons.

The second point concerns the procedure for removing the President on grounds of physical or mental incapacity. The scheme adumbrated in paragraphs 8-12 appears to require a finding of incapacity by a "Medical Board" as a condition precedent to a decision by Parliament to remove. It further appears that that Board cannot reach a decision unless it examines the President.

Paragraph 10 says that "The President shall be requested by the Speaker to submit himself to the Medical Board within fourteen days after the appointment of the Board." Suppose the President refuses to submit himself? Suppose the President is incapable of making the decision to submit himself and is screened from public view by zealous associates who may at that point be running the Presidential office? To deal with that contingency, one not unknown in the recent history of Africa, the Constitution might provide that the Parliament can proceed without benefit of an opinion from a Medical Board if the President ignores the Speaker's request.

Article 111:

I would also like to raise two points concerning the Vice-Presidency. First, pursuant to paragraph 5, if the President were to die or be removed from office let us say in the first year of his or her term, a person originally elected as Vice-President could complete most of the President's term and then seek two additional terms. One could argue that if the people wish to retain a person for so long a time as the head of government, they should have that option. But that argument proves too much, for it is hostile to any term limits and the drafters clearly believed that a limit was desirable.

Since the incumbent of the Presidential office possesses great electoral advantages when seeking additional terms, and since, in most countries, the group in charge of the government (the President or Prime Minister and his or her close associates) begins after many years in office to lose its energy and creativity, and sometimes its integrity as well (note the recent experiences of Japan, Italy, and Spain), the case for a two-term limit seems to me very strong. (Virtually all Latin American constitutions prohibit consecutive terms and most deny a second term under all circumstances.) Perhaps it would be wise at least to prohibit a person succeeding to the Presidency as a consequence of the President's death or removal from seeking election more than once unless the succession occurred in the final year of the President's term.

The second point, not to be sure one of enormous consequence, concerns the provision in paragraph 7 allowing the President, with the approval of the Council of State, to fill a vacancy in the Vice-Presidential office. Since the Parliament alone has the power to remove the Vice-President, should it not also have the power to approve the person who will fill that office? Admittedly such an arrangement is not logically required. And in the event of the Vice-Presidential office becoming vacant, the position certainly should be filled expeditiously. But the requirement of speedy action can be satisfied by giving to the President the authority to call a special session of the Parliament for the purpose of considering a nominee (in the event Parliament is not in session) and by providing a fall-back option, namely allowing the President to seek approval from the Council of State if Parliament does not decide within a fixed period of time following the President's sending to the Speaker the name of his or her nominee.

Article 113:

Those who believe as I do that every exercise of official power should be principled and directed to the public interest will therefore conclude that the President should be required to justify in terms of principle and the public interest any exercise of the prerogative of mercy.

The Cabinet

If for no other reason than to provide a solid constitutional foundation for the civil and diplomatic service, it might be wise to give a few key ministries (for example, the exchequer) a constitutional position. On the other hand, there is a case for leaving the matter entirely in the hands of parliament and the President. For instance, while drafters today would probably be inclined by force of habit to establish separate ministries of foreign affairs and defense, in years to come this traditional distinction may appear artificial and dysfunctional; both, after all, deal with national security.

The more I think about it the more persuaded I become that constitutionalizing ministries imparts an unnecessary rigidity to the structure of government. Since that is, apparently, the view of the drafters, one wonders why they nevertheless constitutionalized many other elements of the Cabinet system. For instance, why was it necessary to provide for a "Secretary to the Cabinet"? And why include Article 115 concerning how the Cabinet shall be summoned and who shall preside? Even in a parliamentary system, I would have thought, those matters would be subject to the discretion of the head of government.

Article 116:

Paragraph 1--One way to combine parliamentary and presidential systems is to require that all members of the Cabinet be members of Parliament. Among other things, that promotes commonality of interest and ease of communication between the President and party leaders in Parliament and imposes upon ministers the obligation regularly to defend their policies in a structured setting where evasion is more difficult. On the other hand, the business of certain ministries, primarily those with responsibility for financial matters and economic development and, possibly, security, might best be filled by experts whose advanced academic training and experience will not necessarily impress the electorate. And so they might have difficulty obtaining seats in a constituency-based first-past-the-post system rather than one involving proportional representation with party lists.

Paragraph 4--The standard "likely to compromise his office" is too ambiguous to provide ministers with clearly adequate warning. The goal of avoiding conflicts of interest might nevertheless be achieved if ministers were forced to make full disclosure (perhaps once a year) to a select, multi-party committee of the Parliament which would then have the power to issue binding rulings as to whether any particular business connection threatened to compromise the minister's integrity in appearance or in fact.

Article 119:

The enumeration should include "or if he or she becomes physically or mentally disabled."

Article 120:

In what is essentially a Presidential system of government, albeit one with admixtures of parliamentarianism, the reference to the "collective responsibility of Ministers" is a little confusing. For it implies a degree of ministerial independence which is not easy to reconcile with the evident power the President exercises over the ministers, both individually and collectively.

Article 121:

Paragraph 2 provides that, "Upon a vote of censure being passed against a Minister or a Deputy Minister, the President shall . . . take appropriate action in the matter." Is there any appropriate action other than removal? If not, then I would propose saying flatly that the President shall remove the person in question from office.

Article 123:

In the enumeration of the Attorney-General's functions, it might be prudent to state that they "may be performed by him directly or by persons chosen by him and serving at his discretion." (Compare paragraph four of article 124) Arguably some functions should be non-delegable. One which is not enumerated, but might well be deemed non-delegable if it were, would be providing Parliament with an opinion on the constitutionality of any administrative or prospective legislative act, if Parliament or any committee thereof so requests. The utility of imposing such an obligation on the Attorney-General is in part a function of the decision whether or not to give the Supreme Court the power to issue advisory opinions on the constitutionality either of prospective legislation or legislation that has been passed but not yet challenged in a suit brought by a directly affected party. In any event, this and other possible functions could be added to the A-G's plate by act of Parliament pursuant to paragraph 3(e).

Article 124:

Paragraph 6--it might be wise to add at the end: "as long as those directions are consistent with the Constitution."

Paragraph 7--If the Director of Public Prosecutions can only be removed for incapacity or gross misbehavior, then unless a term certain is adopted, occupants of that office might retain their position for years or even decades despite a consistently mediocre performance.

International Relations

Article 125:

Paragraph one as written could be seen as inviting the government to violate "accepted principles of international law" whenever in its judgment (which in practice will be the judgment of one person, the President) they conflict with the national interest. Is it not likely that the longer-term national interest will best be served by a policy of consistent compliance with treaties voluntarily entered into and with those general rules of international law which enjoy broad acceptance (including the obligation to carry out in good faith the terms of treaties)?

Article 127:

This is an article of potentially great importance and therefore deserves extended discussion by the Assembly. In today's world, where states large and small find international cooperation essential for coping with a great range of problems that might once have been handled unilaterally, any Ugandan government will find it necessary to enter into a very large number of agreements with other states. If none of them can come into force without the approval of Parliament, Parliament's docket will quickly become congested unless it adopts very expedited procedures for approving the many agreements that will constitute minor, often highly technical adjustments of agreements already in being. In part because of the constraints of time and in part in order to give the President more leverage in negotiating with other countries, Parliament may sometimes wish to delegate to the President the power to commit the country without any further Parliamentary action, as the President of the United States is authorized to commit the U.S. to reciprocal trading concessions. It is doubtful whether the present language of Article 127(3) will permit this.

So what might be done? One possibility is to add at the end of clause 3 the words: "unless the Parliament shall have previously delegated to the President the authority to enter into a specific arrangement in which case the President shall simply notify Parliament and provide it with the terms of the arrangement. Parliament shall retain the right to terminate such authority by a majority vote not subject to Presidential veto; and in the event an authorized arrangement is concluded, Parliament retains the right to adopt legislation inconsistent with the terms of the arrangement even when in doing so it would prevent Uganda from complying with its obligations under international law."

Article 128:

Presidents, by virtue of their operational control of the country's armed forces and their symbolic status as "Commander-in-Chief," can make war without declaring war. Article 128 appears to reflect the view that the Parliament should participate in the decision to go to war unless, I presume, instant action is required to defend the country against actual or unambiguously imminent invasion. What is needed, I think, is a somewhat more elaborate provision.

Perhaps something along the following lines would reflect the presumed views of the drafters:

[After the present sentence in clause 1] "Except when acting pursuant to a United Nations Security Council authorization adopted pursuant to Chapter 7 of the United Nations Charter or where the country's territorial integrity is immediately threatened by foreign forces or such forces have already invaded, the President shall not authorize Ugandan forces to engage in coercive action outside the borders of the country or otherwise project force beyond those borders until he or she has received approval from Parliament given by resolution supported by not less than two-thirds of all the members." Paragraph 2 might be left substantially unchanged. Then, paragraph 3 might be modified to state that "Parliament may, by a resolution approved by a majority of the members present, assuming the members present constitute a quorum, revoke a declaration of war and/or order the suspension of combat activities by the country's armed forces, whether regular troops or otherwise, wherever they shall be engaged, and the withdrawal of said forces from any place outside the country's frontiers. Such resolution shall not be subject to a Presidential veto. In the event Parliament adopts such a resolution, the President shall immediately issue instructions for a cease fire, although he may continue to authorize the armed forces to act in strict self-defense pending their withdrawal. The Parliament may adopt legislation laying down detailed procedures for carrying out the intent of this Article."

Article 129:

This is another key provision. In many countries, states of emergency have been used, usually by the executive power acting without specific authorization from the legislature, to undermine the rule of law and to abuse fundamental human rights.

Clearly the drafters have attempted to limit that risk, in part by providing for the automatic expiration after ninety days of states of emergency declared by the President. But a President might circumvent that limitation by declaring a new one on the ninety-first or second day. However, as long as Parliament is in session, it could, I presume, frustrate such a maneuver by quickly moving to revoke the declaration. It is very important, therefore, that the Constitution contain procedures making it easy for members of Parliament to effect

an emergency session in the event the Parliament is not in session when the emergency is declared.

But it appears from the text and from its silences that the principal technique the drafters have employed to preserve the rule of law in a time of emergency is to deny to the President the power to suspend any of the rights and freedoms enumerated in the Constitution. However, while I think that would be a natural construction of the text in its present form, such a construction is not inevitable. Why? Because Presidents might argue that one, if not the principal, reason for the declaration of states of emergency is precisely to allow the taking of measures which would otherwise be unconstitutional and that in the practice of other states, such measures often include the suspension of certain individual rights and liberties. Moreover, a future President might argue, nothing in the Article explicitly denies to the President the right to suspend constitutional guarantees to the extent necessary "to deal with any state of emergency declared under this article." (clause 9) Therefore, if the intent of the Assembly is to deny the President such power, it had better do so explicitly.

One advantage of such a denial is the resulting incentive for the President to seek Parliamentary approval at the time a declaration is contemplated or very shortly thereafter. The arguable disadvantage is that the President will be disabled from employing such measures as preventive detention which have appeared necessary in a limited number of extreme situations. The disadvantage is less than it would be under constitutional arrangements in some other countries because, as I noted in my discussion of the chapter on Fundamental Rights, this constitution builds exceptions for public order right into most rights. Hence the declaration of a state of emergency is less consequential under this draft than it would be, for instance, in the constitutions of Canada and most European states. If the Constituent Assembly were to strengthen the guarantees of individual and group rights by narrowing the extant exceptions, then, of course, the importance of this article would be significantly heightened.

But what makes this article important in any event is paragraph 8 which takes the remarkable position that Parliament "may provide for the suspension of any fundamental human right or freedom . . ." I believe that on reflection, the Assembly will conclude that this singular provision needs to be qualified. For one of the clearest principles of contemporary international law and relations is that the means governments may employ to maintain order are not unlimited and, in particular, they may not engage in genocide, murder, torture, or conviction without fair trial. A great many other means are available. Governments may limit speech, press, and association. In extreme cases they may even briefly detain people simply on the reasonable suspicion that they constitute an immediate threat to public order. For a democratic government, one enjoying the support of the majority, such legitimate means are bound to be sufficient. A democratic government which employs murder and torture, on the other hand, will not only fail to preserve the reputation

of the state as a responsible partner in schemes of international cooperation, it will also fail to preserve itself as a democratic government. Some means subvert their stated ends. This would be such a case.

CHAPTER EIGHT

THE LEGISLATURE

A general consideration is whether the present draft contains an unnecessary and possibly oppressive level of detail concerning the organization and particularly the operations of Parliament.

Article 131:

The names, character, importance and composition of interest groups are likely to change over time. But because of the heavily weighted majority required by paragraph 3, it will be very difficult to alter in any way the original establishment of interest group representation. A second issue the Assembly may wish to consider is how the relevant youth and workers organizations will be determined. Will the President decide which organizations can elect representatives? If so, that implies a formal, corporatist relationship between the executive and major organizations of civil society and is likely to result in the latter being largely controlled by the former. Implicit in a corporative relationship is governmental favoritism, a privileging of some supposedly voluntary associations, such as trade unions, at the expense of others. In corporatist political systems, for example, there is invariably an official union or confederation of unions, one which enjoys a special relationship to the government and by virtue thereof, its leaders are usually able to defeat efforts by other elites to shift the allegiance of workers to a new union.

For a time, corporatist arrangements can increase the stability of political systems and reduce social conflict. But monopoly or semi-monopoly power tends to have a corrupting influence. And it inhibits the growth of civil society, that is to say it inhibits the multiplication of private associations. One of the characteristics of the most stable democracies is a richly diverse civil society.

Article 132:

In a federal system like that of the United States, Canada and Germany, an enumeration of the powers of the legislative branch is necessary because power is shared with the provinces, states, etc. The central government may legislate in many but not all fields and the Constitution needs to spell out where the legislative authority of the center ends and that of the federated parts begins. Although the drafters clearly intend to establish strong and vital local governing bodies, they do not appear to have intended to create anything like a federal system. On the contrary, the central government is given the

ultimate responsibility for the welfare of all Ugandans with respect to all matters that are proper subjects of governmental concern. The real limitations are in the Fundamental Rights section.

If my interpretation is correct, then even the most general enumeration of the subjects or goals of legislative action, such as appears in clauses 2 and 3, is superfluous. Yet who can be sure that the enumeration might not someday be interpreted by the Supreme Court as implying some subject-matter limits on the legislative power. I would therefore suggest that the first three clauses be combined in one which says simply that the entire legislative power is vested in Parliament and shall be exercised in accordance with this Constitution.

Article 133:

I would like to raise two issues. First, with respect to the qualifications for standing in a particular constituency, the requirement that the candidate have "some tangible interest in that constituency" is sufficiently ambiguous that it is bound to generate controversy and litigation. Might it not be better to state what constitutes a "tangible interest"?

The second point that might merit further consideration is the exclusion of "traditional leaders." Here the main issue is not one of ambiguity, although the term may not be entirely free of definitional problems. But the main concern, I should think, is whether the exclusion will tend to advance or impede the goal of unity in diversity and is compatible with the spirit of reconciliation and accommodation that infuses the policies of the Movement Government.

Of course, by virtue of being "traditional leaders," certain persons would have electoral advantages in certain constituencies. But others will be advantaged by their wealth or athletic prowess or participation in the revolution or oratorical skills. The field of political competition cannot be made completely level. When someone from the Kennedy family runs in the state of Massachusetts, he or she has a head start. But that is the nature of the world, is it not? And may there not be advantages in allowing traditional leaders to enter Parliament where, in order to be effective, they will have to practice the political arts of compromise and coalition building, where they will mix with leaders of every kind from every corner of the land, and where they will be exposed to the great problems of government?

In any event, can the ban really be made effective? For although they will not be able to stand, traditional leaders can place their weight behind friends or family members who may be the proxies of the leaders. Efforts to prevent traditional leaders from exercising influence on behalf of candidates are bound to generate controversies and will doubtless

leave some part of the electorate feeling that the authorities have acted arbitrarily in going beyond the letter of the constitution concerning who can and who cannot stand. Would it not be best to avoid such controversies?

Article 138:

Re clause 2, if the President refuses to approve a gratuity voted to itself by Parliament, can Parliament override his "veto"?

Article 143:

Paragraph 1--I would like to suggest a slight amendment of the language: "Parliament shall appoint standing committees and such other committees as it deems necessary . . ."

Paragraph 2--What is gained by the enumeration of the standing committees? Experience may reveal a more efficient structure for conducting Parliamentary business. Constitutionalizing the committee structure is unusual. Surely this is a matter calling for flexibility, a matter which should be left to the members of Parliament to decide from time to time. I would urge saying no more than Parliament may establish standing and ad hoc committees and may provide a permanent staff to service the committees. Even that much is probably unnecessary; for I do not doubt the inherent power of Parliament, absent an explicit prohibition, to establish committees and a staff.

Paragraphs 3 and 4--Here too the level of detail seems excessive, suggesting almost a distrust of the capacity of Parliament to organize itself efficiently. Subclause "b" seems to me peculiarly inappropriate for a constitutional document. One might also question the desirability of establishing in the constitution the power of the "Speaker." On the other hand, it may be wise to confirm that the Parliament as a whole or any committee thereof can carry out "relevant research"; however, I think the intent would be more clearly expressed if the words "inquiries and investigations" were added.

Article 147:

It seems inconsistent with the independence and dignity of the Parliament to allow the Executive to "determine the order of priority in the enactment of laws by Parliament."

Article 148:

This is another important provision, one which could prove key to the survival of democracy in times of great stress. In its present form, the Article gives one person, the Speaker, the power to remove Parliament from the equation of public authority in a moment of crisis, leaving the Executive in absolute control. For it seems to impose no limits on the Speaker's authority to prorogue Parliament. Moreover, if Parliament is not in session, perhaps because it has been prorogued, the Speaker can resist summoning the Parliament by citing exceptional circumstances. And suppose the Speaker is incapacitated or out of the country or chooses to make himself (or herself) unavailable? What then?

The Assembly may therefore wish to provide a means for Parliament to convene even if the Speaker is unable or unwilling to summon it into session. And it might provide that a decision by the Speaker to prorogue Parliament must be approved by a simple or weighted majority or, alternatively, that in the event the Speaker proclaims Parliament prorogued, any member may move a resolution to override the proclamation.

Finally, it might be wise to add a sentence at the end of clause 6 stating something along the following lines: "If invasion or internal conflict or natural disaster prevent the holding of an election within the prescribed period, then it shall be held as soon thereafter as possible."

CHAPTER NINE

THE NATIONAL COUNCIL OF STATE

I know of no close analogy to the proposed Council. Of course, it bears some relationship to the upper house in certain constitutional structures in that, like them, it gives equal representation to regions of the country without reference to present or potential differences in population. That could of course be offset to a considerable degree by the President's choice of cabinet members and the Parliament's choice of women members. But in light of its functions, the Council must be seen as a genuine innovation growing out of Ugandan experience and addressing problems and conditions with which the drafters are uniquely familiar. Therefore, an outsider like myself has little to add in the way of comparative analysis.

According to the Report of the Constitutional Commission, the Council was designed in the light of Executive-Legislative confrontations which occurred under previous constitutions and contributed to the overthrow of constitutional government. It was seen as a bridge between the branches and as an institutionalized means of mediating and conciliating disputes between the branches as they arise.

The fact that so elaborate a means was deemed necessary could possibly provide grounds for reconsidering the Commission's decision to reject a parliamentary system which by its nature virtually eliminates the risk of confrontation and deadlock. Moreover, assuming (as I do given the country's diversity) that in the event a party system is ultimately chosen by the voters, there will be more than two parties with substantial representation in Parliament, and coalition government would be the norm. Precisely because control of the executive offices will be shared and can quickly be lost if the Prime Minister fails to satisfy coalition partners, elections in parliamentary regimes tend to seem much less like winner-take-all, life-and-death struggles than elections for President in countries where the state plays a very large role in the economy and the society.

The Commission rejected a parliamentary system apparently because it found very strong support for direct election of the Head of State. Perhaps that sentiment could be satisfied by a hybrid system something like that of the French. However, if the President in the hybrid is given substantial operational (as distinguished from ceremonial) authority beyond selecting who in what sequence can try to organize a parliamentary majority and possibly representing the nation abroad at meetings of heads of state, then, as I indicated earlier, the hybrid can produce its own dangerous form of gridlock.

Article 154:

Here the draft spells out the Council's role as mediator between President and Legislature "in the event of a disagreement [between the two] as to be likely to disrupt the smooth running of the Government." If the experience of the United States, also with a written constitution and Presidential system, is any guide, I would expect that such deep disagreements will often arise from or be convertible into conflicting interpretations of the Constitution. On a number of occasions in American history, the crises of government which spring from harsh disagreement between the branches have been averted or, when not averted, resolved by decisions of the Supreme Court. As one would expect, the Justices generally have been reluctant to involve the Court in disputes between the political branches. And they have preferred to make decisions bearing heavily on inter-branch relations in the context of cases involving private rights of great importance. I think, for example, of the Court's decision during the Korean War that President Truman's seizure of the steel mills in order to terminate a nation-wide strike exceeded his constitutional powers. The Court reached that conclusion in the context of a case brought by the corporate owners claiming that constitutionally protected rights to property had been violated.

Nevertheless, when deadlock between Congress and the President has threatened to paralyze the government of the country, as when President Richard Nixon initially refused to obey a Congressional order to turn over to a Congressional Committee tape recordings of his conversations, the Court has sometimes overcome its reluctance and declared the law. But where the disagreement was not paralyzing and, in the Court's opinion, the issue could be resolved by other means, it has found some basis for evading a substantive decision, most frequently by labeling the controversy a "political question."

One aspect of Article 154 I find striking is its silent exclusion of the Court from a role in the political dramas it is designed to address. If they share my expectation that questions of constitutional interpretation will often be at the heart of these dramas, Members of the Constituent Assembly may wish to consider the wisdom of bringing the Supreme Court into the picture.

One way of doing so would be to provide that if the conciliation effort envisioned in paragraph 2 fails and if the Council concludes that the dispute's resistance to resolution stems from the President's and the Legislature's incompatible constitutional views, it may initiate an action before the Court seeking the Court's interpretation of the relevant constitutional provision(s). Both the President and the Legislature would be entitled to appear before the Court and present arguments on the relevant facts and law in hearings that would have to begin no later than a specified number of days after the suit is initiated. After the hearings, the Court would issue an opinion resolving the issues presented to it and detailing the behavior required of each party in the light of its decision. A referendum would then be employed only if the Executive or the Legislature failed to comply with the Court's instructions.

Note that the Constitutional issue behind a confrontation of President and Legislature might arise in the course of a civil or criminal action. In that event, the Council might be authorized to appear as a friend of the court and urge its expeditious resolution of the constitutional issues implicated in the case.

Paragraph 8--I wonder if I am alone in finding this language a little imprecise and, however construed, to tend toward the serious diminution of legislative power. After all, in any constitutional system, probably the core of legislative power is control of appropriations. If the executive cannot spend unappropriated funds, then the legislature can block the President's policy initiatives by refusing to appropriate the funds necessary to carry them out. Thus the appropriations power is the legislature's principal means for influencing the President's choice of means and ends. Take it away and the Legislature loses most of its policy leverage.

As written paragraph eight tends to take it away or to lay the basis for a constitutional crisis. Of course some provision should be made for the contingency of Congressional failure for one reason or another to pass a new budget and appropriate the necessary funds before the prior year's appropriation is exhausted. The executive branch should not be left with the stark alternatives of shutting down or spending unappropriated funds. On the other hand, it should not be able to proceed comfortably in the event the budgetary process is not concluded in a timely fashion.

The failure to adopt the budget and appropriate funds might result not only from political deadlock over the substance of the budget but from a national emergency which prevents the legislature from meeting. In either event, the best way of reconciling the interest in keeping government functioning and the interest in preserving legislative authority might be to require the legislature to adopt a continuing resolution which would be triggered by the onset of a new fiscal year before the corresponding budget proposal was approved. The resolution would authorize spending for no more than a fixed period (six months would seem reasonable, assuming no national emergency) on programs and at one-half the levels approved for the previous year but modified to reflect changes, if any, in the cost-of-living index. If the legislature failed at its initial session after the adoption of the constitution to adopt such a continuing resolution, the executive would be authorized to proceed as if it had.

Since the continuing resolution is limited in time and prevents the executive from initiating new programs or shifting funds among programs, the legislature would retain much of its leverage over the content of policy. As drafted, paragraph eight fails (a) to address the conceivable failure of Parliament to comply with its directive and (b) to specify the limits I have suggested on overall spending and the reprogramming of funds.

CHAPTER TEN

THE JUDICIARY

An independent judiciary is the last line of defense for the constitution in general and in particular for its provisions concerning fundamental rights. In the American experience, the Supreme and lesser courts have played a crucial role in containing the tendency of the executive to accumulate power, in resolving constitutional collisions between the political branches, and, above all, in protecting the fundamental rights of individuals and groups. They have played this role by successfully asserting the power to invalidate acts and omissions of the government which, in their judgment, violate one or another provision of the constitution. The word "invalidate" implies a wholly negative, blocking role. In fact, in order to protect the values and purposes embedded in the constitution, as determined by them, the courts have both blocked governmental actions deemed unconstitutional and ordered action.

The need to do more than block in order to protect the integrity of the constitutional scheme should be evident. For instance, the government can effectively deprive people of the right to assemble and to speak both by ordering the police to disperse a peaceful assembly and by ordering the police to stand idly by while thugs attack the assembly. The right to equal treatment can be violated simply by refusing arbitrarily to provide a general governmental service or benefit to one person or group. So of course the courts must be able to do more than simply say "stop" to public officials.

The power of the Supreme Court to declare the acts of the legislature and the executive unconstitutional is not set out explicitly in the U.S. Constitution. Rather it was asserted by the Court in an early case, asserted in an eloquent and powerfully persuasive opinion written by perhaps its greatest Chief Justice. And fortunately for the future of the country, this assertion of power, based on the Court's interpretation of the section of the Constitution declaring the structure and jurisdiction of the judiciary, quickly came to be accepted by the other branches, by constitutional scholars, by the organized bar and by the public at large.

In 1787, substantive constitutional review was a remarkable innovation. Unlike the common law, it could not be taken over from the British since the British did not have it. One can reasonably debate whether the drafters of the American constitution clearly foresaw the exercise of such review by the Court they were creating. It is easy to understand why the question was not directly addressed at the Constitutional Convention that year. But today, more than two centuries later, it would be extraordinary for such an important and well understood issue to be left unresolved in a new constitution.

This draft nevertheless fails openly to face the question of the scope of judicial review. So the constituent assembly is left to clarify its position and incorporate it in appropriate language. Britain appears ever more odd in its refusal to adopt a written constitution which is virtually a precondition for substantive constitutional review. Even countries with a civil law tradition, a tradition with a narrow conception of the judicial function based in part on a painfully obsolete theory of language, have been moving toward the acceptance of constitutional review. As I said above, the experience of the United States and other countries demonstrates the importance of constitutional review for maintaining the integrity of the constitution's institutional structure and for protecting the rights of individuals and groups from state power. It is also necessary to protect the integrity of the judiciary itself. For how could judges respect themselves or expect others to respect them if they were to decide civil or criminal cases by applying laws they knew to be inconsistent with the constitution?

The only argument of any weight against substantive constitutional review is that, combined with constitutional provisions protecting the independence of the judiciary, it can inhibit the exercise of majority rule. To this argument there are three responses which together rebut it utterly. The first is that inhibiting a transient, possibly slight majority from deforming a constitutional system adopted in the wake of a revolutionary war to make permanent the values for which the revolution fought, is precisely what a Supreme Court ought to be doing. The second is that unconstitutional measures will often not issue from the majority's will. They may result from some unforeseen parliamentary coalition pursuing personal agendas of certain influential members. Or they may be the actions of executive officials proceeding without parliamentary authorization to effect selfish or vindictive ends.

The third is that no Supreme Court can long resist policies that enjoy broad and sustained public support. And this constitutional draft certainly provides means for the political organs to shape the Court's ideological temper. You will note that pursuant to Article 164, Justices clearly are political appointees. The President is not going to appoint or the National Council of State approve Justices likely to interpret the Constitution perversely and to resolve close cases in ways hostile to widely held views of what the constitution means. Moreover, Article 161 empowers Parliament to increase the size of the Court, a power it obviously could exercise if the Court's decisions were persistently at odds with broadly supported public policies. Indeed, one could argue that the power to increase the number of justices without limit at any time constitutes too great a threat to that degree of insulation from day-to-day politics which the Supreme Court requires if it is to play its critical role in maintaining the constitutional system.

There simply is no persuasive case for going to the immense labor of adopting a written constitution and then failing to establish an independent judiciary with the authority to preserve its essentials. The only serious questions concern two secondary issues. One is whether the authority to interpret the constitution should be concentrated in the Supreme Court. Obviously it has the last word. The question I am raising is whether it should have the only word. Some countries give it a monopoly. The possibly awkward result, however,

is that whenever in the trial of a case with multiple issues, a constitutional question is raised, progress in the case must be slowed while the court and parties send the constitutional question to the Supreme Court for decision. The drafters have opted for sending the question to the High Court from whence it can be appealed to the Supreme Court. In the current circumstances of Uganda, this arrangement may very well recommend itself to the Assembly.

The other issue is whether the courts should be required to provide what has been called a priori review of proposed or adopted statutes and executive acts. The alternative is to restrict review to concrete cases. Because of the rationale for constitutional review in U.S. jurisprudence, abstract review is prohibited albeit with a small loophole of a sort in circumstances where a statute by its very threatening existence tends to inhibit the exercise of fundamental rights, primarily freedom of speech which can be chilled by loosely worded criminal statutes which appear to penalize certain forms of speech. But even this sort of statute must be brought before the Court by a particular plaintiff who can make a plausible case for the claim that he or she will be inhibited pending a determination of the statute's constitutionality.

It could be argued that abstract review authority gets the Supreme Court (I suppose that if abstract review were adopted, jurisdiction would be limited to the Supreme Court) too involved in law making; that statutes the constitutionality of which may be doubtful if one looks only at the language may be applied by the executive in so limited and prudent a manner that the constitutional issue never arises and hence the Court is not forced to short-circuit the political process; that the Court simply does not have the time to review every statute that could possibly be applied in an unconstitutional manner; that the danger to constitutional values posed by a statute can best be judged after it has been converted into administrative action.

On the other hand, one could argue that by authorizing the Court to respond not to the request of a private person or a single legislator but rather to requests for a constitutional judgment emanating from the President, the National Council of State or the Legislature, it can help them to achieve legitimate policy objectives by constitutional means; that waiting until a policy has matured and then invalidating it can produce much harsher confrontations with the political branches; and that waiting until a case makes its way to the Court can mean unnecessary injury to persons whose rights have already been adversely affected.

I believe that reasonable people can and probably will differ on the merits of abstract review.

Beyond these general observations I would like to raise a few narrower questions.

Article 159, paragraph 2:

While the utility of giving to Parliament an extensive authority to prescribe the jurisdiction of the several courts is beyond cavil, I would suppose that Parliament should not have authority to deprive the Supreme Court of Jurisdiction in order to prevent it from addressing a constitutional question, above all in cases involving fundamental rights. To deal with this contingency and to do so with absolute clarity, I would add to the paragraph language along the following lines:

"But once a court has acquired jurisdiction in any case, it may not be deprived of jurisdiction over that case by act of Parliament other than an act transferring the hearing of the case to the High Court, if it is not already there, or to the Supreme Court. Nor may Parliament deny to the High Court or the Supreme Court jurisdiction to issue writs of habeas corpus and mandamus and otherwise to hear claims concerning the alleged violation of the fundamental rights enumerated in this Constitution."

Article 161:

Paragraph 2--Given the Supreme Court's overall responsibility for the performance of the lower courts--responsibility for, among other things, assuring uniformity of decision in like cases throughout the country--the delegates might wish to give the Court constitutionally guaranteed power to allow appeal directly to it from a decision in any lower court.

Paragraph 3--This is an effort to preserve the principle of stare decisis while encouraging the Supreme Court not to turn that laudable principle into an iron constraint. But authorizing the Court "to depart from a previous decision when it appears to it right to do so," might conceivably be seen as inviting the Justices to deviate on the basis of personal senses of justice. Admittedly it is far from easy to articulate the grounds for a court announcing a new rule of decision for cases it deems essentially identical. And perhaps in the end the formulation proposed by the drafters or something much like it will seem the best that can be managed. Still, the members of the Assembly might wish to consider some slightly more detailed formula which would possibly push the Court both to think all the way through the reasons for the change and to articulate them fully. Simply in order to stimulate discussion, let me suggest the following: "when it appears to it that a change in the rule of decision would more accurately reflect the constitution's underlying principles and policies considered in the light of contemporary values and circumstances."

This paragraph provides an opportunity to make a declaration of enormous importance that should also appear in the Chapters on the Executive and the Legislature. At present it says that "all other courts shall be bound to follow the decisions of the Supreme Court on questions of law." I would add: "including, of course, the proper

interpretation of this Constitution." Then it is necessary to declare that what is true for the lower courts is equally true for officials of the other branches of government including the President. In other words, I would reaffirm the Supreme Court's position as the final arbiter of the Constitution's meaning.

Article 164:

By virtue of its power to decide what the Constitution means, the Supreme Court is not like any other court. It requires members with great intellectual reach and philosophical depth who are in touch with the problems and aspirations and broad political and social currents of Ugandan society. They must be steeped in the lessons of history and of the national life. The training and experience appropriate to judges dealing with civil and criminal cases, with common and statutory law is not designed to produce the scope and character of intellect appropriate to a Supreme Court Justice. For that position, previous experience as a judge offers no clear comparative advantage over experience as a professor, a distinguished member of the bar, the public service or political office (assuming in all cases a background of legal education). A fair number of the most honored judges in the history of the U.S. Supreme Court came to the Court without any prior judicial experience.

The case for judicial experience is, admittedly, strengthened in a system like the one proposed where the judges of the High Court can rule on constitutional questions subject to review by the Supreme Court. For in a system of this kind, lower court judges will already have provided some direct evidence of their fitness to perform the special function of constitutional review. But lower court judges will have had to follow Supreme Court rulings. So the evidence of what they will do once they are on the highest court will invariably be ambiguous. Scholars, on the other hand, both those in the academy and at the Bar, will often have elaborated their constitutional philosophies and general intellectual qualities in uninhibited published works which can be studied for clues to their aptitude.

I am simply suggesting that there is not a strong case for making prior judicial experience a constitutional requirement for appointment to the Supreme Court.

CHAPTER ELEVEN

FINANCE

Article 184:

I wonder whether paragraph 1 can be interpreted to restrict the discretion of Parliament unduly. It is designed, I assume, to protect the independence of public servants from vindictive parliamentary action. Were Parliament to single out a public servant for a salary reduction, the result would be analogous to conviction without trial. This is the old and despised Bill of Attainder by means of which English kings outlawed and then destroyed nobles who had gotten in their way. No need to go through the bother of a trial. Bills of Attainder are explicitly forbidden by the U.S. Constitution and our Supreme Court has actually held in the case of an individualized salary reduction that it constituted a Bill of Attainder.

The danger with this language is that it might be held to prohibit Parliament from legislating an across-the-board reduction in the salaries and benefits of all civil servants or at least all those falling into a large class. For example, a serious depression or deflation might make civil service salaries that had previously been reasonable suddenly appear too high in relation to private sector remuneration.

One way to clarify the intention of the drafters is to add at the end of the paragraph the words: "except as part of a general reduction for all officials at the same salary or grade level."

Article 185:

Paragraph 2--Given the apparent purpose of this paragraph, namely to prevent the executive branch from circumventing Parliamentary financial controls by borrowing funds, the language may not be broad enough. As presently worded, it prohibits the Government from borrowing "on behalf of itself or any other public institution or authority except as authorized by or under an Act of Parliament." The question is: "How should or will 'public institution or authority' be defined?" Suppose the Government guarantees a loan to a private Ugandan corporation in which it or some minister has a substantial interest? Or suppose the Government guarantees a loan to a corporation it wholly owned but which is incorporated and has its head office abroad? Would those corporations fall within the meaning of "public institution or authority?" Moreover, will the prohibition be construed to include guarantees?

In order to assure that Parliament retains its principal instrument for exercising control over executive branch conduct, the Constitution needs to preclude both raising money directly and raising it through guarantees. It may suffice to say simply that "Government shall not borrow or raise a loan or guarantee any loan except to the extent authorized by or under an Act of Parliament."

Article 188:

Paragraph 1(a)--This language could be construed so as to force the Bank to act in ways that would undermine Uganda's economy. At first blush, promoting and maintaining the stability of the value of the currency may seem an indisputably good thing to do. But suppose Uganda is being priced out of export markets? In order to preserve those markets and gain new ones, devaluation may be necessary. It is less likely than subsidies to be deemed a violation of international trading rules. In order to give the Bank needed flexibility, the Constituent Assembly might add these words to the paragraph: "but without prejudicing Uganda's effective participation in international trade and finance."

Paragraphs 2 and 3--the paragraphs will appear to be consistent with each other if, at the end of the second, that is after the words "shall not be subject to direction or control of any person or authority," the Assembly adds the words : "other than Parliament."

CHAPTER TWELVE

THE PUBLIC SERVICE

Article 192:

Paragraph 2--Consistent with the evident goal of the drafters to produce a constitution that will promote cordial relations among all Ugandans, I would add at the end of the paragraph the following sentence: "In making appointments, the President shall take into account the goal of broad ethnic and regional representation in all of the key institutions of government consistent with the national commitment to merit as the primary basis for selection and promotion in the private and public sectors alike."

Article 199:

Paragraph 1--Presumably the intent of the drafters was to impose on Parliament the obligation to establish a system of pensions for the public service. The trouble with this text is it could be authorized to allow or require Parliament to custom tailor pensions for particular officials, "bespoke pensions," as it were. I am sure that that was not intended by the drafters. Perhaps the safest thing would be to state simply that in order to facilitate the recruitment and retention of outstanding people for the public service, Parliament shall establish a pension system. Then there can be no confusion and Parliament can take account of changing circumstances to design a system that will best serve the national interest.

Paragraph 2--In most countries in Africa, because well-paying and secure private sector jobs are relatively rare, persons in the government service tend to be relatively privileged by that fact alone. This paragraph adds to the privileges of public service by exempting retirees from income tax on their pensions. This is bound to produce resentment and a feeling of injustice. For it could and almost certainly would result in persons with incomes greater than many other Ugandans, including other pensioners, paying no tax on their higher incomes. Moreover, because the number of persons involved will be substantial, this provision will have placed beyond Parliament's taxing powers an important source of revenue. Among other things, this could result in heavier taxation of private sector activities with consequent depressive effects on economic growth.

CHAPTER THIRTEEN

LOCAL GOVERNMENT

Article 203:

Population increase and economic development inevitably produce substantial migration within the country. Changes in population density among districts will make changes in district lines essential to efficient and fair governance. In light of the virtual inevitability of changes in density, is it wise to require so large a majority in order to make corresponding changes in district lines? Parliamentarians from those districts that lose population will tend to oppose change and, with a two-third majority required, may succeed for a long time at considerable cost to the nation.

I would also like to raise the question of whether it is wise to set out in paragraph 4 the criteria Parliament shall employ in altering district boundaries. Of course they are in a sense obvious. The extent to which the new boundaries take all of them into account will be a matter of degree and opinion. Opponents of change will probably go to court in an effort to block it. Listing multiple criteria encourages litigation, since it will always be arguable that Parliament did not comply. To reduce the incidence of litigation and the prospect of judicial involvement in determining district boundaries, I suggest eliminating the paragraph. It will be difficult enough to make changes. The case for them will have to be strong and surely will require that Parliament justify the changes in light of the sort of criteria contained in paragraph 4. It serves no positive purpose. It could be burdensome.

Articles 207-229:

The irony I find in this cluster of articles concerning the structure and functioning of local government is that they manage at the same time to provide excessive and insufficient details. A prime example of excess detail, this being after all a constitution, is paragraph 2 of Article 222 stating that the District Finance and Accounts Committee "may consult professionals with expert knowledge . . ." Surely this is an implied power!

As for insufficient detail, one source of concern should be the extent to which the various officials in the districts will be able to pay themselves salaries and/or provide themselves with flexible expense accounts. Local government is a good thing, but its virtues in any given case require that its costs be taken into account. Clearly if there is to be any serious decentralization of government, localities must be able to develop a cadre of paid professionals. The case for paying elected policy-makers is less clear, for unless they are also engaged in day-to-day implementation, that is unless they themselves are among the professionals, they can probably hold jobs in the private sector and still find time in the

evening to meet and set public policy and review the work of the public service. Poor countries in particular must rely to a considerable extent on voluntary service. Uganda's economy will not grow without capital investment and a large part of the capital will have to be generated internally.

If local government is performing functions that would otherwise have to be performed by officials hired by the Ministries and if the central government is correspondingly able to reduce its potential expenses for personnel, then all is well. But is that really likely to happen? Public institutions tend to expand and consume available resources. This constitution establishes an elaborate set of local institutions and assigns to them tasks parallel to those of the central government. I call your attention to the enumeration in paragraph 4 of article 210 which includes development, security, health, agriculture, education and social welfare. The central government will inevitably have ministries dealing with those subjects. Experience suggests that both the ministries and their local government counterparts will overlap, will compete as much as or more than they coordinate and complement each other.

Note that because the detailed structure of local government is in the constitution, it will come into being all at once rather than gradually, without a history of collaboration and supplementation with the central authorities. I fear that there will be duplication of function and that competition for influence and scarce resources between central government officials assigned to districts and local officials will actually make it harder to deliver services efficiently and will make people less sure where to go for help with respect to a particular matter. I think that only a Herculean effort by the President and strict budgetary controls and oversight by the Parliament will assure that Ministries exercise only a broad coordinating and monitoring function and avoid duplication.

I see a danger in addition to the potential dissipation of revenues through overlap and duplication arising from the elaborate structure of local government and its uncertain relationship to the central authorities. I see also the danger of too much government activity in general with a resulting tendency to crowd out latent or emerging non-governmental organizations which in the United States and many other democracies play a large role in fields like health, education, youth and women's affairs and social welfare. In these countries, governments channel some of their resources through voluntary organizations which are often able to operate with far lower administrative costs. United Nations aid programs and the World Bank also have discovered the virtues of using voluntary organizations for the delivery of goods and services.

Local government officials will have powerful incentives to justify their revenues by being active, by performing tasks that might be more efficiently carried out through voluntary collaboration among local people and between the organizations created by local people and international voluntary organizations. They may also seek to demonstrate their value by adopting and administering elaborate codes and licensing systems which could end up burdening small traders and other entrepreneurs.

The dangers I have just tried to highlight would exist, of course, even if the constitution said very little about local government. They are dangers inherent in any political system inclined to rely heavily on the state as the organizer and animator and nanny of social and economic life.

CHAPTER FOURTEEN

DEFENSE AND NATIONAL SECURITY

In general I find the articles in his chapter clear and, to the extent I understand the context, relatively uncontroversial. I would like simply to make two very small points.

First, the word "nationalistic" in paragraph 2 of article 231 may not carry quite the meaning intended by the drafters. Of course the armed forces should represent and be devoted to the nation of Uganda. But the term "nationalistic" in ordinary usage has a slightly negative connotation, implying a kind of narrow-minded patriotism, possibly a bit intolerant of the interests of other states. One might just say that the armed forces shall be devoted entirely to serving the interests of all the peoples of Uganda. Second, perhaps only a matter of form: In paragraph 4 of article 234, I would put the final phrase "subject to any laws made by Parliament" immediately after the first two words in the paragraph, "The President"; it would then read--"The President, subject to any law made by Parliament,"

CHAPTER FIFTEEN

INSPECTORATE OF GOVERNMENT

Here too I think the text does not raise many evident problems. Perhaps the Assembly might want to consider whether, in light of the importance of the position of Inspector-General and the need to assure the independence of its occupant, Parliament rather than the National Council of State should have to approve the President's nominee and to agree to his or her removal (see articles 257 and 258).

In paragraph 1 of article 259, I would add to the statement of functions the following language: "to see to it that all public officers and institutions comply with all of the provisions of this Constitution and with all relevant laws and regulations, and in particular that they respect the dignity and the rights of all citizens and of all non-citizens when they are within the national territory."

In article 260 ("Jurisdiction of Inspectorate") I would insert after the words "shall cover officers" the following language: "of any ministry or any local government council, board or other entity directly or indirectly controlled by the public authorities or any person or entity purporting to act or acting in the name of or on behalf of any public authority or official."

CHAPTER SIXTEEN

LEADERSHIP CODE OF CONDUCT

Article 267:

paragraph 1(d)--I would add at the end: "without prejudice to the application of criminal penalties prescribed for the acts in question."

Article 268:

It seems a little odd first to give the Inspectorate a constitutional basis and to endow it with very great power to enforce official compliance with the law and then to provide that Parliament by a simple majority vote can transfer most of the Inspectorate's responsibilities to some other authority. It would be possible to eliminate this anomaly by changing paragraph 1 to read as follows: "The Leadership Code of Conduct shall be enforced by the Inspectorate of Government; however, Parliament may establish an additional enforcement mechanism if it concludes that the Inspectorate is unable by itself to carry out this function."

CHAPTER SEVENTEEN
LAND AND ENVIRONMENT

Article 271:

In giving the Land Commission a largely discretionary authority to regulate the use of all the land in the country, the Constitution may be creating a serious and permanent threat to security of land tenure. The experience of other countries suggests that security of tenure is crucial for investment.

The statement in paragraph 2(b) that "there shall be maximum utilization of land" could lead to environmental degradation because it might be construed as requiring maximum utilization now without due regard for sustainable utilization. So I would insert the word "sustainable" before the word "utilization."

Article 272:

Paragraph (6)--I would insert after "the Uganda Land Commission" in the first line the words: "subject to this Constitution and all laws and treaties made hereunder."

Article 274:

The District Land Committees constitute yet another chunk of public activity which will have to be financed and which will tend to grow.

Article 276:

In order optimally to develop its mineral resources, the government will probably have to enter into very long term leases with foreign investors, for only they are likely to have the huge amounts of capital and the expertise and marketing capabilities that will be required. My concern is that in the event such leases are granted, they might be challenged in court on the grounds that the long term of the lease, together with the extensive authority over the land which any investor in minerals would demand, amounts to divestiture of public ownership. So I think it important to add language to this article stating clearly that the government may enter into such leases.

Article 278:

Paragraph 1 (e) requires Parliament to adopt legislation "prohibiting the dumping of any nuclear or toxic waste on the soil or territory of Uganda." I am afraid that the paragraph requires Parliament to require what cannot reasonably be done. Toxicity is very much a question of degree. The byproducts of a great range of activities in a modern economy can be toxic in some degree. Many medical wastes are toxic. If dumping means depositing without appropriate security precautions, I see no problem. But it could be construed as requiring disposal outside the national territory and that, I am afraid, is unrealistic. So, I think the language should be modified to make it clear that at least so far as toxic wastes are concerned, what Parliament must prohibit is disposal without proper safeguards.