

**THE REPUBLIC OF UGANDA**  
**IN THE SUPREME COURT OF UGANDA**  
**AT MENGO**

**CORAM: ODOKI, CJ; ODER, JSC; TSEKOKO, JSC; KAROKORA, JSC; MULENGA, JSC; KANYEIHAMBA, JSC; BYAMUGISHA, AG.JSC.**

**CONSTITUTIONAL APPEAL NO.1 OF 2002**

BETWEEN

1. **PAUL K. SSEMOGERERE**
2. **ZACHARY OLUM**
3. **JULIET RAINER KAFIRE :::::::::::::::::::: APPELLANTS**

**AND**

**ATTORNEY-GENERAL :::::::::::::::::::: RESPONDENT**

*(Appeal from the majority Judgment of the Constitutional Court of Uganda sitting at Kampala on the 17<sup>th</sup> April, 2002 (Mukasa- Kikonyogo,DCJ, Kato, Kitumba JJA;) with Mpagi- Bahigaine and Twinomujuni JJA; dissenting) in Constitutional Petition No.7 of 2000)*

**JUDGMENT OF BYAMUGISHA, Ag. JSC**

I had the benefit of reading in draft form the lead judgment prepared by Kanyeihamba JSC. I also read all the draft judgments that were prepared by the learned justices of this Court. I entirely agree with the conclusions that have been arrived at that **Act 13 of 2000** is null and void. There was substantial non-compliance with mandatory provisions of the Constitution with regard to the amendment of its provisions. These provisions were ably pointed out in the

lead judgment. I therefore concur that the appeal ought to succeed. I also agree with the declarations that Kanyeihamba JSC has proposed. I have nothing more useful to add.

### **JUDGMENT OF MULENGA JSC.**

I had the advantage of reading in draft the judgment prepared by my learned brother, Kanyeihamba JSC. I agree that this appeal ought to succeed. I also had the further advantage of reading, the judgments of my learned brothers, Odoki CJ, Oder, Tsekooko and Karokora JJ.S.C, with which I agree.

I will briefly give my reasons for allowing the appeal.

The appeal arises from a decision of the Constitutional Court dismissing a petition brought by the above named appellants, under Article 137(3) of the Constitution, challenging the constitutionality of the Constitution (Amendment) Act, **No 13 of 2000**, "the Act". I need not repeat the background to the appeal, as it is sufficiently set out in the judgment of Kanyeihamba JSC. It suffices to say that in their joint petition, the appellants alleged that Parliament passed the Act without due compliance with relevant provisions of the Constitution, and that some provisions of the Act violate some Articles of the Constitution. The respondent contested the petition, and at the start of hearing, took out preliminary objection to the petition, asking the court to strike it out on two grounds, namely, that -

- The affidavits supporting the petition were defective and inadmissible; and
- The court lacked jurisdiction to interpret the Act which had become part and parcel of the Constitution;

The Constitutional Court overruled the objection, holding that the affidavits were admissible, and that the court had jurisdiction to determine if Parliament followed the proper procedure in passing the Act. However, in the course of its ruling, it also held that it -

*" would have no jurisdiction to inquire into the question whether the amending sections, if they properly became part of the constitution, were unconstitutional".*

That holding had tremendous influence on the final decision of the court, as I will illustrate presently. In support of the holding, the court cited its previous decision in **James Rwanyarare & Another vs. Attorney General**, Constitutional Petition No.5 of 1999, and an Indian decision in **Kesavananda vs. State of Kerala** AIR 1973 SC 146. I should observe in passing, however, that the court seems to have misconstrued the latter case, as the majority decision therein does not support the said holding. Be that as it may, the petition proceeded to hearing on one framed issue, namely whether the Act -

*"was passed in compliance with the procedural requirement for the amendment of the Constitution"*, which the court answered by majority of 3 to 2, in the affirmative, and dismissed the petition.

My conclusion from reading the preliminary ruling and the judgments in this case, is that the undercurrent, which is what the court meant to portray in the said holding, was that it had no power to declare any provision of the Constitution void. To my mind, however, jurisdiction to interpret or construe a constitutional provision, and power to declare such a provision void, are two different things. Nevertheless, in the final decision, the majority of the court appear to have considered that their hands were tied by the holding in the preliminary ruling, to the extent that they declined to consider questions, which clearly arose from the pleadings, for fear of *"interpreting one constitutional provision against another"*. The issue of the court's jurisdiction is now subject of the sixth ground of appeal, which reads in part as follows -

*"6. The Constitutional Court erred in law and fact..... when they held that a Constitutional Court would have no jurisdiction to construe part of the Constitution as against the rest of the Constitution..... "*

The Constitution prescribes the jurisdiction of the Constitutional Court in clause

(1) of Article 137, as follows -

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

The court is thus unreservedly vested with jurisdiction to determine any question as to the interpretation of any provision of the Constitution. With regard to interpretation of the Constitution, the court's jurisdiction is unlimited and unfettered. This is reiterated in clause (5), which provides for reference of *"any question as to the interpretation of this Constitution"*, arising in any proceedings in a court of law, to the Constitutional Court *"for*

*decision in accordance with clause (1)".* Clause (3) provides that any person who alleges that a law or anything done under law, or any act or omission by any person or authority, is inconsistent with, or in contravention of, any provision of the Constitution, has a right to access the Constitutional Court directly by petition. Thereupon the Constitutional Court may grant a declaration that such law, thing, act or omission is inconsistent with or contravenes the provision in question. To my mind, the clause does not thereby preclude the court from interpreting or construing two or more provisions of the Constitution brought before it, which may appear to be in conflict. In my opinion, the court has, not only the jurisdiction, but also the responsibility to construe such provisions, with a view to harmonise them, where possible, through interpretation. It is a cardinal rule in constitutional interpretation, that provisions of a constitution concerned with the same subject should, as much as possible, be construed as complimenting, and not contradicting one another. The Constitution must be read as an integrated and cohesive whole. The Supreme Court of U.S.A., in **Smith Dakota vs. North Carolina** 192 US 268 (1940) put the same point thus -

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

There is no authority, other than the Constitutional Court, charged with the responsibility to ensure that harmonisation. Even where it is not possible to harmonise the provisions brought before it, the court has the responsibility to construe them and pronounce itself on them, albeit to hold in the end that they are inconsistent with each other. Through the execution of that responsibility, rather than shunning it, the court is able to guide the appropriate authorities, on the need, if any, to cause harmonisation through amendment. In my opinion therefore, the decision that the Constitutional Court has no jurisdiction to construe or interpret any provision of the Constitution is misconceived and erroneous in law. The sixth ground of appeal ought to succeed.

Grounds 1, 2 and 3 are complaints based on two combined but distinct contentions. In each ground, it is contended first, that the court erred to hold that the Act did not indirectly amend a set of Articles, and secondly that the amendment of the set of Articles was required to be in accordance with Articles 259 and 262. The second contention is reiterated in ground 4, which is a complaint that the court erred in holding that the appellants failed to prove non-compliance with procedures under Articles 259 and 262. The holding by the majority, in respect of the first contention, was that since the three sets of Articles were not included in the

preamble along with those to be expressly amended, the Act did not amend any of them by implication or infection as the appellants alleged. With due respect to the three learned Justices constituting the majority of the court, this holding was not based on any judicial consideration and assessment of the effect of the provisions of the Act on the Articles in question. It seems to me rather, that the holding resulted from the learned Justices' avoidance of any such consideration, apparently on the misconceived notion that the Court did not have jurisdiction to interpret conflicting provisions of the Constitution. This is evident from what each one said in response to the contention that the Act had the effect of indirectly amending some provisions of the Constitution.

- The learned Deputy Chief Justice said:

*"it is not true as suggested by counsel for the petitioners that Act 13 of 2000 amended other provisions of the Constitution indirectly the Act specifically mentioned all the provisions of the Constitution which it had amended. I find no evidence to justify that sort of interpretation which if adopted by court might end up amending all the provisions of the Constitution";*

- Kato J.A. (as he then was) said:

*"Parliament in its wisdom listed the articles it was interested in amending this petition in court now is concerned with the procedure followed by the Parliament but not the effect the amendment will have on other provisions of the law. The question before the court is not what effect will the amendment have on existing laws? The question is: was the proper procedure followed when the Act was enacted?";*

- and Kitumba J.A. said:

*"It is not the duty of this Court to look into the effect or implication of those amendments as doing so would be trying to interpret one constitutional provision against another". (emphasis is added)*

Apart from the misconceived notion, I also find that the holding is unsustainable because it is self-defeating. If the position were that the Act was not intended to, and does not amend the Articles that the appellants allege it purports to do, then it would follow that any provision of the Act, which is inconsistent with any of those Articles, is *ipso facto* void to the extent of that inconsistency. The Constitution empowers Parliament to amend any of its provisions, but does not empower it to make any law that is inconsistent with any of its provisions. Under Article 2 any enactment, which is inconsistent but does not amend the Constitution is void to the extent of the inconsistency.

It is common ground that in sections 2, 3 and 4, the Act expressly seeks to amend Articles 88, 89(1) and 90 by substitution. The centre of controversy is section 5 of the Act that seeks to

amend Article 97 by addition of two clauses, which by cross reference exempt parliamentary minutes and documents from the application of Article 41. While Article 41 guarantees every citizen the right of access to information in possession of the state, its organ or agency, the amendment by section 5 of the Act reserves absolute discretion in Parliament to permit or refuse citizens access to information in possession of Parliament. In this appeal, Mr. Lule S.C. submitted for the appellants that section 5 of the Act has the effect of expressly amending Article 41, and of amending Articles 1, 2, 28, 44, 128 and 137 by implication and infection. For the respondent, Mr. Bireije, the learned Commissioner for Civil Litigation, conceded that section 5 amends Article 41; but he strenuously argued that it does not affect any of the other Articles, on the ground that an amendment must be specific, not implied. My learned brothers have, in their respective judgments exhaustively considered arguments on both sides. I agree with them that an express amendment of one provision of the Constitution may have the effect of indirectly amending another provision. I also agree that in the instant case, section 5 of the Act has the effect of amending not only Article 41, but also Articles 28, 44, 128 and 137. If the provisions of section 5 were in force, those four Articles would have to be construed with modification. I however, agree with the learned Chief Justice, for the reasons set out in his judgment, that the said section does not have the same effect on Articles 1 and 2.

The substance of the second contention in grounds 1, 2 and 3, which is reiterated in ground 4, is that the Articles, which the Act indirectly seeks to amend, were not passed in accordance with the amendment procedures set out in Articles 259 and 262. This is slightly misleading since Article 259 does not apply to all the Articles in question. Article 259 provides that a bill seeking to amend provisions to which it applies -

*"shall not be taken as passed unless -*

- (a) *it is supported at the second and third readings in Parliament by not less than two-thirds of all members of Parliament; and it has been referred to a decision of the people and approved by them in a referendum."*

Article 44 is among the provisions to which Article 259 applies. Since section 5 of the Act indirectly seeks to amend provisions in Article 44, it ought to have been referred to a decision of the people in a referendum. It is not in dispute that the bill for the Act was never so referred. Section 5 therefore cannot "be taken as passed".

Article 262 sets out several requirements. Those pertinent to the instant case are in clauses (1) and (2). Under clause (1), it is mandatory for the second and third readings of an amendment bill to which Article 259 applies, to be separated by at least fourteen sitting days of

Parliament. In the instant case, that requirement was not complied with, because the second and third readings of the bill for the Act (including section 5) were done on the same day. That too was non-compliance in relation to section 5 of the Act. Lastly, clause (2) provides that a bill for the amendment of the Constitution -

*"shall be assented to by the President only if -*

*(a) it is accompanied by a certificate of the Speaker that the provisions of this Chapter have been complied with....*

*(b) in the case of a bill to amend a provision to which article 259... applies it is accompanied by a certificate of the Electoral Commission that the amendment has been approved at a referendum(emphasis is added).* The President assented to the bill for the Act on the same day it was passed by

Parliament alone. Needless to say, no certificate of the Electoral Commission could have accompanied the bill, as the bill was never referred to a referendum. Since the Constitution does not authorise the President to assent to any amendment to Article 44 without the Electoral Commission's certificate of compliance, the assent, as far as it relates to section 5 of the Act is invalid. Similarly, the President is not authorised to assent to a bill seeking, expressly or indirectly, to amend any provision of the Constitution unless it is accompanied by the Speaker's certificate of compliance. The bill for the Act in the instant case, expressly sought to amend provisions in Articles 88, 89, 90, and 97, and Article 41 by express reference. It also sought to insert a new Article 257A, and in my opinion, it indirectly sought to amend Articles 28, 44, 128 and 137. All those amendments had to be in compliance with one or other of the procedures set out in chapter 18, and the President could assent to the bill containing them, only if it was accompanied by the Speaker's certificate of such compliance. Whether any such certificate accompanied the bill, however, is a contentious issue. In his supplementary affidavit in support of the joint petition, the 2nd appellant expressly averred in paragraphs 5 and 6 that amendments sought by the Act did not comply with the required special procedures, and that in particular -

*"The Bill was not accompanied by the prescribed certificate of compliance from the Speaker of Parliament."* The respondent did not contradict that averment, either in the Answer to the Petition or in the only affidavit in support of the answer. At the trial, the contention for the respondent was that the petitioners had the onus to prove the noncompliance which they did not discharge; and in the alternative, that absence of the certificate was not fatal. The majority of the Constitutional Court accepted that contention. Kato JA, who discussed the contention at length, upheld it on two grounds. First, he relied on his earlier judgment in **Uganda Law Society and Another vs. Attorney General**, Constitutional Petition No.8/2000, in which he

opined that the requirement for the Speaker's certificate was intended to avoid the President signing something not legally passed, but was not intended to render a law passed by Parliament void, and added -

*"The issuance of a certificate is a mere procedural and administrative requirement which does not go to the root of the law making process. Since the President assented to the Act, in the absence of evidence to the contrary, one is compelled to conclude that before he did so he was satisfied (sic) that all the formalities had been carried out. My holding on his point is based on the legal doctrine (sic) which states that all things are presumed to have been performed with all due formalities until it is proved to the contrary."* It should be noted, however, that the constitutional requirement is for the Speaker to certify that there was compliance, not for the President to satisfy himself, by any other means, that all the formalities were carried out. Nor can the "presumption of regularity" be a basis for the conclusion in face of the affidavit evidence to the contrary. The learned Justice of Appeal held that the 2<sup>nd</sup> appellant's averment did not prove anything since he did not disclose how he came to know the absence of the certificate. Kitumba JA went further to hold that the 2<sup>nd</sup> petitioner would not on his own be in possession of the knowledge whether a certificate of compliance was attached to the bill or not, because he was neither the Speaker nor a member of staff with the duty to take bills for presidential assent. According to the learned Justice of Appeal, because he did not disclose the source of his information, his affidavit was not worthy of belief. It is remarkable, however, that neither learned Justice of Appeal adverted to the fact that the respondent did not positively deny that averment of fact, by affidavit or other evidence. In my opinion the learned Justices of Appeal were not entitled to reject the evidence without testing its cogency. In view of that, and because that was a fact within the special knowledge of the respondent, I would hold that the onus shifted to the respondent to prove that the bill was accompanied by the Speaker's certificate of compliance. He did not discharge the onus. It is mostly unlikely that the respondent would fail to show that the bill was accompanied by the certificate if in fact it had been so accompanied. I would therefore hold that most probably, the bill for the Act was not accompanied by the Speaker's certificate of compliance.

I do not share the learned Justices' view that the presidential assent is not a law making process but a mere formality. The Constitution allows the President discretion to refuse to assent to a bill, and provides for what has to be done in such special circumstances or eventuality. Save under those special circumstances, which are not applicable in the instant case, a bill does not become law until the President assents to it. In my view therefore, the presidential assent is an integral part of law making process. Under Article 262(2), the

Constitution commands the President, to assent only if specified conditions are satisfied. The command is mandatory, not discretionary. It does not allow for discretion in the President to assent without the Speaker's certificate of compliance. In the circumstances, I would hold that in respect of both the express and indirect amendments, the assent to the bill was invalid for non-compliance with the requirement under Article 262(2)(a). In the result, I would hold that the Act did not become law and its proposed amendments to the Constitution did not become part of the Constitution. Grounds 1, 3 and 4 ought to succeed. On ground 5, I do not wish to add anything to what my learned brothers have said. The ground ought to succeed.

Before taking leave of this case, I am constrained to observe that at the trial the issue of the Speaker's certificate was not treated with the seriousness it deserved. In my view, facts pertaining to constitutional questions ought to be proved with certainty rather than being left to the fate of "hide and seek" between litigants, which the rules on the onus of proof evoke. Whether or not the certificate of compliance accompanied the bill was not a difficult fact to ascertain. I would go as far as to say that if the parties failed to do so, it was open to the court, apart from examining the 2<sup>nd</sup> respondent as to the source of his knowledge, to call direct evidence from the appropriate officer of Parliament without appearing 'to unduly descend into the arena'. The desirability to decide constitutional issues on ascertained facts cannot be over emphasised.

For the reasons I have indicated, I would allow the appeal and grant the declarations and orders proposed by Kanyeihamba JSC.

### **JUDGMENT OF KAROKORA JSC**

I have had the benefit of reading in draft the judgment prepared by my learned brother, Kanyeihamba JSC and I agree with him that the appeal must succeed. I only wish to add my voice on the issue of whether the Constitution (Amendment) Act 13/2000 amended articles 1, 2 (1) (2), 28, 41, 44 (c) and 128 (1) of the Constitution in addition to those which had been expressly mentioned by Constitution (Amending) Act 13/2000 as the articles which were intended to be amended. I shall hereinafter refer to the Act as Act 13/2000.

Mr. Lule (SC) appearing for appellants, submitted that section 5 of the Act 13/2000 expressly amended articles 88, 89, 90, 97, 257 and 257A of the Constitution. He contended that the

majority of the Justices of Constitutional Court were in error when they held that parliament never amended articles 1, 2(1) (2), 28, 41, 44(c) and 128 (1) of the Constitution. He submitted that article 41 was amended by implication whilst articles 1, 2(1) (2), 28, 44 (c) and 128(1) were amended by infection. Counsel submitted that amendment by infection means that the amendment of an article had the effect of amending an article which had not been specifically mentioned at all. He contended that it was immaterial that the amending Act did not categorically state that the Act intended to affect those articles. What was material was the effect, design and impact the amendment had on these other articles. He cited the case of **The Queen Vs Big M Drug Mart Ltd 1987 LRC 332** in support of his submission. On the other hand, Mr. Denis Birijje, counsel for respondent, submitted that articles which were amended were expressly mentioned by the Act 13 of 2000 as articles 88, 89, 90, 97, 257 and 257A. He contended that articles 1, 2(1) (2), 28, 41, 44 (c) and 128 (1) were none of those mentioned to be amended. Counsel submitted that the amendment was done in accordance with articles 258, 261 and 262 (2) (a) of the Constitution, but contended that amendment did not require compliance with article 262 (2) (b). Counsel contended that the appellant had failed to prove that the amendment was not done in accordance with the procedure laid down in the Constitution.

In order to determine whether section 5 of the Act 13/2000 affected more articles than those mentioned by the amending Act, particularly articles 1, 2(1)(2), 28, 41, 44(c) and 128(1) of the Constitution, it is necessary to go through the preamble to the Act and section 5 of the Act itself. The preamble to the Act states as follows:

*"An Act to repeal and replace article 88 of the Constitution to make provision in relation to quorum, to amend article 89 of the Constitution, provide for the number of ascertaining the majority of votes cast on any question, to repeal and replace article 90 of the constitution to recognise the role of the committee of the whole house in the passing of bills and to make provisions in relation to the function of the committees of Parliament; to amend article 97 of the Constitution to protect the proceedings of parliament from being used outside parliament without the leave of Parliament; and to insert a new article 2S7A to ratify certain past acts relating to procedures"*

Section 5 of Act 13 of 2000 which amended article 97 renumbered article 97 as clause 5(1) of that article. Immediately after the new clause (1) there follows a new clause (2) which reads as follows:

*"Notwithstanding article 41 of this Constitution no member or officer of parliament and no person employed to take minutes of evidence before Parliament or any committee of parliament shall give evidence else where in respect of contents of such minutes of evidence or the contents of any document laid before parliament or any such committee, as the case may be, or in respect of any proceedings or examination held before Parliament or such committee, without the special leave of parliament first obtained."*

What we are concerned with here is the impact the Act has on a citizen's right of access to information in possession of the state or any other organ. I agree with submission of Mr. Lule, counsel for appellant, that though Act 13 of 2000 was not purposely enacted to derogate on the right to fair hearing, a careful examination of the preamble to the Act and section 5 of the Act vis-a-vis articles 41 and 44 (c) shows clearly that the Act had that effect. In my view, so long as the Act had this effect on the non-derogable right to fair hearing it does not matter what the purpose behind the enactment was. In the case of **Major General David Tinnyefunza and Attorney General Constitutional Appeal No. 1 of 1997** the majority of the Justices of the Supreme Court held that on the advent of 1995 Constitution article 41, section 121 of the Evidence Act which was intended to shield all unpublished official records from being used in evidence was declared unconstitutional. The section provided inter alia

*"No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of state except with the permission of the officer at the head of the department concerned who shall give or withhold such permission as he think fit"*

Then in **Paul Ssemogerere and Zachary Olumn Vs Attorney General constitutional Appeal No.1 of 2000** the Constitutional Court upheld the decision of the constitutional court that to the effect that on the advent of 1995 constitution, section 15 of the National Assembly (Powers and Privileges) Act became null and void. Section 15 of the above Act stated as follows:

*"Save as provided in this Act no member or officer of the Assembly and no person employed to take minutes of the evidence before the Assembly shall give evidence elsewhere in respect of the contents of any document laid before the Assembly or such committee as the case may be or in respect of any proceedings or examination held before the Assembly or such*

*committee as the case may be, without special leave of the Assembly first had and obtained."*

In the instant case the parliament transplanted the nullified provision of section 121 of the Evidence Act see Major General David Tinyeфуza Vs Attorney General (supra) and into section 5(2) of the Act 13/2000.

Whereas Parliament had powers under article 259 of the constitution to amend any provisions of the Constitution, I agree with Mr. Lule (SC)'s submission that the amendment brought about by section 5(2) of the Act 13/2000 had the effect of amending articles 1, 2(1) (2), 28, 41, 44 (c) and 128 (1) of the Constitution by implication/infection. A number of decided cases from common Law Jurisdiction illustrate amendments by infection.

In the case of the **Queen Vs Big M. Drug Marrr Ltd (1986) LRC 332**, the respondent had been charged with unlawfully carrying on the sale of goods on a Sunday, contrary to the Lord's Day Act, 1970 and acquitted by the trial court. The court of Appeal dismissed the appeal. Further appeal to the Supreme Court of Canada, the main question was whether the Act especially section 4 which prohibited any one to sell any thing or offer for sale or purchase any goods, chattels or to carry on any business of his ordinary calling ... on that day, infringed the right of freedom of conscience and religion guaranteed by section 2 of the Canadian Charter of Rights and Freedom.

The Supreme Court, stated:

*"Both purpose and effect are relevant in determining constitutionality, either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realised through the impact produced by the operation and application of the legislation. Purpose and effect respectively in the sense of the legislation's object and its ultimate impact are linked, if not indivisible Intended and actual effects have often been looked to for guidance in assessing the legislation's object and thus the validity."*

See also the *Attorney General For Ontario Vs Reciprocal Insurers (1924) AC 326 from Canada and The Bribery Commissioner Vs Padrick Ranasinghle (1965) AC 172 from Ceylon.*

In my view, if it was to be otherwise, Parliament could amend any provisions of the Constitution, including the entrenched provisions without complying with the prescribed procedure in chapter 18 of the Constitution as long as it avoided mentioning them in the amending Act.

Now, the question is whether Act 13/2000 amended articles 1 and 2 of the Constitution. Article 1 of the Constitution provides:-

"1. All powers belong to the people who shall exercise their sovereignty in accordance with this constitution. Article 2 of the Constitution provides: -

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

(2) If any other law or any custom is inconsistent with any of the provisions of this constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void."

The provisions of these articles are very clear. It is the people of Uganda who are sovereign and exercise their sovereignty through the Constitution. It is the Constitution, not the Parliament nor executive nor judiciary which is supreme. Each of these organs can only exercise the jurisdiction conferred on it by the Constitution. None can confer on itself jurisdiction not authorised by the Constitution.

Under 1995 Constitution, independence of organs of state must go with responsibility and accountability. Each of these organs must be transparent and accountable in their operations. Under articles 1 and 2 people are sovereign and exercise their sovereignty through the Constitution which is Supreme Law of Uganda and has a binding force on all authorities and persons throughout the country. Article 41 was enacted to guarantee transparency. Any attempt to whittle down article 41 would conflict with articles 1 and 2 and would be an attempt to amend them.

In the instant case the complaint is against section **5 (2)** of Act **13/2000** which amended article **97** of the Constitution, which I have already quoted in this judgment. I must state that I agree with the judgments of Mpagi Bahegeine and Twinomujuni JJA and especially the passage in the judgment of Twinomujuni JA where he stated, inter alia, that;

*"The above amendment section (5) (2) of Act 13/2000) which amended article 97 of the Constitution can only survive in a jurisdiction where parliament, like in United Kingdom, is supreme... In Uganda today, the amendment amounts to a coup against the sovereignty of the people and the Supremacy of the Constitution. It can not exist side by side with articles 1 and 2 in the same constitution. It contravened the two articles and Parliament alone cannot pass such amendment unless it first consults the people in a referendum in accordance with chapter 18 of the constitution. I would hold that although section 5 (2) of the Constitution (Amendment) Act 13/2000 did not expressly and specifically name articles 1 and 2 of the Constitution as being amended, yet it had the effect of repealing or varying the articles and therefore it amended them by necessary implications"*

I would add that section **5 (2) 7** Act **13/2000** further amended article **128 (1)** of the Constitution by implication, because, as the Act stands, courts cannot access minutes of evidence taken before Parliament or any committee of Parliament without first seeking leave from Parliament, which leave can be granted or withheld - thus making Parliament supreme to constitution.

I have already stated in the course of this judgment that section 15 of the National Assembly (Powers and Privileges) Act became unconstitutional on the advent of 1995 constitution in the case of **Paul Ssemogerere & Zachary Olum Vs Attorney General** (supra) by this court and therefore in contravention of articles 28, 41 and 44 (c) of the Constitution. In the instant case, by seeking to elevate provisions of section 15 of the National Assembly (Powers & Privileges) Act which had already been declared unconstitutional in **Paul Ssemogerere & Zackary Olum** (supra), into an amendment to article 97 of the Constitution, Parliament amended articles 28, 41 and 44 (c) of the Constitution by implication.

The next question is whether Parliament had powers to amend articles 1, 2, 28, 41, 44 (c) and 128 (1) of the Constitution.

There is no doubt that under article 258(1) of the Constitution, Parliament can amend any provisions of the Constitution by addition, variation or repeal in accordance with the procedure laid down in chapter 18 of this Constitution.

However, whereas the Parliament had the powers to amend those articles, it had to do so in strict compliance with the provisions of articles 259, 262 (1) and (2).

Article 259(1) specifically states that a bill for an Act of Parliament seeking to amend any of the provisions of this Constitution which include articles 1, 2, 44(c) and 128(1) shall not be taken as passed unless:-

- (a) It is supported at the second and third readings in Parliament by not less than two-thirds of all the members of parliament, and
- (b) It has been referred to a decision of the people and approved by them in referendum.

Article 262 goes further and states that;

***"(1) The votes on the 2<sup>nd</sup> and 3<sup>rd</sup> readings referred to in article 259 and 260 of this constitution shall be separated by at least fourteen sitting days of Parliament".***

***(2) A bill for the amendment of this constitution which has been passed in accordance with this chapter shall be assented to by the President only if:-***

- (a) It is accompanied by a certificate of the speaker that the provisions of this chapter have been complied with in relation to it; and***
- (b) In the case of a bill to amend a provision to which articles 259 or 260 of this Constitution applies, it is accompanied by a certificate of the Electoral Commission that the amendment has been approved at a referendum or as the case may be, ratified by the district councils in accordance with this chapter."***

Each of the 3 petitioners adduced evidence through their unchallenged affidavits. Both Zachary Olum and Juliet Reiner Kafire are members of Parliament and averred that they were in Parliament when Act 13/2000 was debated and passed.

- (i) Hon Zachary Olum's unchallenged affidavit averred that the bill was passed in two days instead of not less than 14 days prescribed by the Constitution.
- (ii) That it was not referred to the people in a referendum
- (iii) It was not accompanied by the certificate of Electoral Commission that the amendment had been approved at a referendum or as the case may be, ratified by the district councils in accordance with this chapter.
- (iv) That it was not accompanied by the certificate of the speaker of Parliament certifying that the provisions of chapter 18 had been complied with.

The respondent never refuted the above averments. The affidavit of Patricia Mutesi from the Attorney General's chambers did not claim that she attended parliament when the Bill was being debated. Clearly an omission or neglect to challenge the evidence in chief on a material or essential part by cross -examination would lead to the inference that the petitioners' averment was accepted subject to its being assailed as inherently or palpably in credible. See the case of **James Sowabiri and Another Vs Uganda (SSC) Cr. Appeal No.5 of 1990** . In the instant case, although the petitioners never averred that they saw the Bill being submitted to the President and that they never saw the Speaker's certificate stating that the provisions of chapter 18 of the Constitution had been complied with, in my view, the petitioners' unchallenged averments in their affidavits were sufficient to discharge the burden cast on them. The fact that the President assented to the Bill was not conclusive that all the formalities precedent to the passing of the Bill had been complied with.

On this point, Kato JA, as he then was, stated that:

*"I agree with him (Mr. Birije's). It is my opinion that the above provision was intended to avoid the President signing for something not legally passed by the Parliament. The issuance of a certificate is a mere procedural and administrative requirement which does not go to the root of the law making process. Since the President assented to the Act in the absence to the contrary, one is compelled to conclude that before he did so he was satisfied that all the formalities had been carried out. My holding so on this point is based on the*

*legal doctrine which states that all things are presumed to have been performed with all due formalities until it is proved to the contrary."*

With all due respect, I cannot agree that the above doctrine applies to cases where there is a supreme law clause requiring the Speaker's certificate to accompany the bill. Article 262 (2) (a) specifically makes it mandatory that

*"a bill for amendment of this constitution.....shall be assented to by the President only if:-*

*(a) it is accompanied by a certificate of the Speaker that the provisions of this chapter have been complied with in relation to it."*

The house of Lord's decision in the case of The **Bribery Commissioners Vs Pedrick Ranasinghe (Supra)** is relevant and is almost on all fours to the instant case. In that case, by section 29 of the Ceylon (Constitutional) Orders- In - Council, 1946(1) provided that subject to the provisions of this order, parliament shall have power to make laws for the peace, order and good government of the Island (4) provided that in the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of this Order in its application to the island; **provided that no Bill for the amendment or repeal of any of the provisions of this order shall be presented for the Royal Assent unless it has endorsed on it a certificate under the hand of the speaker that the number of the votes cast in favour thereof in the house of representative amounted to not less than two thirds of the whole numbers of members of the house. Every certificate of the speaker shall be conclusive for all purposes and shall not be questioned in any court of law.**

The respondent was tried and convicted for bribery by the Bribery Tribunal under the Bribery Act, 1954. During the course of trial and argument it emerged that the Act which established the Bribery Tribunal, though it received Royal Assent had not been accompanied by a certificate of the Speaker, certifying that all the requirement under the Ceylon (Constitution). Order - In - Council 1946 had been complied with.

It was submitted for the commissioners that once the Royal Assent was given and the law was enacted, the court could not go behind it but must take it as a law.

It was held that the principle that one cannot go behind an Act of Parliament does not apply to cases, where there is a supreme law clause requiring the Speaker's certificate. Therefore, in the

case of amendment and repeal of the constitution, the Speaker's certificate is a necessary part of the legislative process and any bill which does not comply with the condition precedent to the provision is and remains, even though it receives the Royal Assent, invalid and ultra vires.

Therefore orders made against the respondent who had been tried before a Bribery Tribunal on a charge of bribery were null and void and inoperative since the persons comprising the tribunal were not validly appointed to the tribunal - having been appointed pursuant to the ultra vires provisions of the Act.

In the instant case, there was no attempt by the respondent to refute appellants' argument that articles 259 and 262(1) (2) of the Constitution had not been complied with. Mr. Birije, counsel for respondent merely contended that there was no requirement for interval of 14 sitting days of Parliament between the 2<sup>nd</sup> and 3<sup>rd</sup> readings before the bill was passed.

On the averment by appellants that when submitting the Bill for Presidential Assent, there was no Speaker's certificate, certifying that the provisions of chapter 18 had been complied with, Mr. Birije, counsel for respondent submitted that there was no evidence adduced to show that the copy sent to the President did not have certificate from the Speaker. He also contended that the issuance of a certificate was more of a procedure and administrative requirement which did not go to the root of the law making process. I am not persuaded by these submission. As stated in the case of **The Bribery Commissioner (Supra)**, where there is a supreme law clause requiring the Speaker's certificate to accompany the Bill, submitting it for Presidential Assent, that certificate is not procedural and administrative requirement but rather a necessary part of the Legislative process. In my view, the absence of the certificate, accompanying the Bill, certifying that the provisions of chapter 18 had been complied with, even though it received the Presidential assent, remained invalid and ultra vires. Therefore, the stipulated number of 14 sitting days were not complied with.

Further, since section 5(2) of Act 13/2000 amended articles 1, 2, 41, 44 and 128 (1) of the constitution by implication/infection as I have already stated in the course of this judgment, and since according to clause (2) (b) of article 262 of the constitution no certificate of the Electoral Commission accompanying the Bill, certifying that the amendment had been approved at a referendum in accordance with chapter 18 of the constitution, the President's assent would not cure and give life to the Bill which was invalid ab-initio.

Consequently, in my view, section 5(2) of Act 13/2000 infringed the provisions of articles 1, 2(1) (2), 41, 44 (c) and 128 (1) of the Constitution and was therefore unconstitutional. In the result, I would hold that section 5(2) of Act 13/2000 is null and void.

I would allow this appeal and grant the reliefs sought in the petition and the costs as proposed by Kanyeihamba J.S.C

### **JUDGMENT OF TSEKOOKO. JSC:**

This appeal is against the decision of the Constitutional Court dismissing, by a majority, the appellants' petition to that Court in which the appellants had sought a number of declarations.

I have read in advance, the lead judgment prepared by my Lord Justice G.W. Kanyeihamba, JSC, and concurring judgments by my Lords the Chief Justice and A.H.Oder, JSC. I agree that this appeal ought to succeed substantially and that the declarations sought by the appellants, as set out in the lead judgment ought to be granted.

In Constitutional Petition No.3 of 1999, the 1<sup>st</sup> and the 2<sup>nd</sup> appellants challenged the validity of the enactment by Parliament of the Referendum and Other Provisions Act, 1999 on ground that the Act had been passed by Parliament without the requisite quorum stipulated in the Constitution. On 23/9/1999, the Constitutional Court summarily dismissed the petition leading to an appeal to this Court which on 31/5/2000 reversed that decision and remitted the matter to the Constitutional Court for hearing. The present respondent was the respondent in the petition. The latter court heard the petition and on 10/8/2000 granted the declarations sought and struck down the Act. There was no appeal. However, on 1/9/2000, the Government reacted by moving Parliament to enact the Constitution (Amendment) Act 2000 (Act 13 of 2000) whose effect was, inter alia, to nullify the said judgment of the Constitutional Court. Act 13 of 2000 amended Articles 88, 89, 90 and 97 of the Constitution. The amendment also affected Article **41**, among others, and introduced a new Article 257A. The appellants herein thereupon instituted a fresh petition (No. 7 of 2000) against the respondent challenging the amendment. In summary this time the appellants contended, inter alia, that: -

(a) The Act indirectly amended, inter alia, Article 41 of the Constitution. Act 13 of 2000 made Parliament Supreme over the Constitution of 1995 yet the reverse is the position. Act 13 of 2000 creates a one party state, the NRM, and eliminates other political parties.

On 10/11/2000, when the petition was called for hearing in the Court below, Mr. Deus Byamugisha, Ag. Director of Civil Litigation, objected first to the competence of the petition and secondly to the jurisdiction of the court to hear the petition. Ruling on the objection was given on 29/11/2000, overruling the first point of objection but the Court held that it had no jurisdiction " ***to declare that one part of the constitution was in conflict with the another.***" After hearing the petition subsequently, the Constitutional Court, by a majority of three to two, dismissed the petition. The appellants now appeal against the dismissal and base the appeal on six grounds which have been set out in the judgment of Kenyaihamba, JSC.

I would like to make observations on ground 6 of the appeal. For easy reference I will reproduce it and it was formulated this way:

*The Constitutional Court erred in law and fact and misconstrued the gist of the petition and the petitioners' contention when they held that a Constitutional Court would have no jurisdiction to construe part of the Constitution as against the rest of the Constitution and thereby came to the wrong conclusion.*

This ground relates partly to the court's ruling to which I have just alluded by which the court accepted Mr. Byamugisha's contention that the court had no jurisdiction to interpret Act 13 of 2000 because the Act was part and parcel of the Constitution and the Court itself cannot construe one part of the constitution against another part of the same constitution.

At the commencement of the hearing of the petition in the Constitutional Court and partly because of the earlier ruling alluded to above, the court disabled and restricted itself by framing only one issue as follows: -"***Whether the Constitutional Amendment Act No.13 of 2000 complied with the Constitutional requirements for amendment of the constitution***".

It would appear from the opening remarks in that court by Mr. Lule, who was counsel for the petitioners, that this was not the only issue which arose from the pleadings. Indeed in

his dissenting judgment, Twinomujuni, JA (at pages 2 and 3) lamented that the issues raised by the petition could have been more directly addressed if the court considered -

***"Whether the Constitution (Amendment) Act No.13 of 2000 was consistent or inconsistent) with the Constitution of Uganda".***

This shows that the pleadings raised more than one issue and indeed this is reflected in the submissions which were made in the Court below and before us.

Now whether it is a constitutional matter or an ordinary suit, it is trite that a trial court must frame all issues arising out of the pleadings so as to determine the matter, or matter, in controversy. A perusal of the pleadings in this case (petition and affidavits) shows that among the issues in controversy was consistency or inconsistency between the Act and some other parts of the Constitution. That is what needed to be clearly framed and decided upon.

Be that as it may, Mr. Godfrey Lule, SC, counsel for the appellants in this Court argued that the majority learned Justices of the Constitutional Court erred when they held that the Court had no power to interpret one part of the Constitution against another part. In a way Mr. Bireije, Commissioner for Civil Litigation, conceded this point when he agreed that the court had jurisdiction to harmonise various provisions of the Constitution provided that the right procedure of amending the Constitution had been followed Here he quite properly abandoned the position taken in the Constitutional Court by his colleague, Mr. D. Byamugisha. He however glossed over the point whether the court would have jurisdiction to harmonise the original articles of the Constitution which is the holding of the Constitutional Court.

As noted already, on 29<sup>th</sup> November, 2000, the Constitutional Court which at that time was differently composed, ruled upholding one of the objections to the petition by Mr. D. Byamugisha that the *"Court would have no jurisdiction to inquire into the question whether amending sections if they properly became part of the constitution were unconstitutional"*. Mr. Byamugisha, the then Ag. Director for Civil Litigation, had argued, during the hearing of the preliminary objection, that once an Act amending the

Constitution became law, it became part and parcel of the Constitution. Of course this last point is indisputable. However, Mr. Byamugisha's strange view suggests that once a constitution amending Act becomes law, and part of the Constitution, it acquires sanctity against interpreting its provisions against the rest of the constitution. For this strange view, Mr. Byamugisha and the Constitutional Court relied on the Indian case of **Kesavananda Vs. State of Kerala** 1654 SC. reported at paragraph 788 A.I.R and on the Ugandan\_Constitutional Petition decision in **Rwanyarare & Wegulo Vs Attorney General** .. Constitution Petition No.5 of 1999 (unreported).

Thus the Constitutional Court in its ruling administered to itself a preventive dose which in effect disabled it from considering one of the relevant issues raised by the petition and, therefore, the court abdicated its duty by declining from examining the impugned articles of the constitution in order to determine whether the complaints raised in the petition were valid, or otherwise. This is unfortunate. It is my considered opinion, and with due respect to the Constitutional Court, that **Kesavananda case** was misunderstood and, therefore, misapplied to the facts of the petition. The provisions of our constitution override that case. Clauses **(1) and (3) of Article 137 of our Constitution** are very clear. The first clause gives unlimited jurisdiction to the Court to interpret our constitution. It reads:

*"Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as a Constitutional court"*. If there was any clear answer to the doubts in the mind of the Constitutional Court as to its jurisdiction to interpret any provision of the Constitution, clause (1) is the answer. In my opinion clause (3) does not fetter in any way whatsoever the powers of the court contained in clause (1). Clause (3) reads: -"1. A person who alleges that -

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

The issue which was in the **Kesavananda case** appears to have been whether an Act of Parliament had become part and parcel of the Constitution. That was and is not the issue in

the petition giving rise to the appeal before us. Indeed nobody can dispute the fact that a Constitutional Provision introduced by an amendment of the Constitution forms part and parcel of the Constitution.

No copy of the judgment of **Kesavananda case** was availed to us. I have not been able to lay my hands on the full judgment. But passages of it are quoted in the Singaporean case of **Teo Son Lung Vs Minister for Home Affairs and others** (1990) LRC (Const.) 490. At page 504, Chua.J., quotes a passage from a judgment of one of the judges in **Kesavananda case** as follows:

*"Fundamental or basic principles can be changed. There can be radical changes in the Constitution like introducing a Presidential system of Government for a cabinet system or a unitary system for a federal system. But such amendment would in its way bring all consequential changes for the smooth working of the new systems." (Para 932).*

*Those who frame the Constitution also know that new and unforeseen problems may emerge; that problems once considered important may lose their importance because priorities have changed; that solutions to problems once considered right and inevitable are shown to be wrong or to require considerable modification; that judicial interpretation may rob certain provisions of their intended effect; that public opinion may shift from one philosophy of Government to another .... The framers of the Constitution did not put any limitations on the amending power because the end of a Constitution is the safety, the greatness and well being of the people. Changes in the Constitution serve these great ends and carry out the real purposes of the Constitution, (Para 959)".*

This passage indicates that written constitutions are not static and are liable to be amended. There is an obvious implication in this passage that courts have to interpret constitutional provisions to bring the constitution in line with current trends. Implicit in this is the real possibility that one part of the constitution can be harmonised with another part of the same constitution.

Further in para (h) of the report, Chua. J., pointed out that Malaysian Courts had declined to follow **Kesaananda** doctrine. Moreover the decision in the case itself was not unanimous which robs it of its full persuasive value.

Besides, I am of the considered view that even if the provisions of the Constitution (Amendment) Act, 2000 are part and parcel of the Constitution, its provisions as enacted constitute an Act of Parliament. That is how the Act describes itself. According to definitions in the Acts of Parliament Act and the Interpretation Act, "Act or Act of Parliament" means a law made by Parliament. That is so whether the Act amends or does not amend the constitution.

For the foregoing reasons, I think that the decision of the Constitutional Court in **Dr. Rwanyarare & Wegulo Vs Attorney General** (Petition 5 of 1999) in so far as the Constitutional Court held that it has no jurisdiction to interpret one provision of the Constitution against another represents a wrong approach to our principles of Constitutional interpretation and in my opinion that case was wrongly decided and represents a wrong view of the law which should not be followed.

Ground six ought therefore to succeed.

I agree with the minority judgment of the Constitutional Court that the appellants had in the main established their complaints as raised by the Constitutional Petition. Therefore I would allow the appeal. I agree with the orders proposed by Kanyeihamba, JSC.

#### **JUDGMENT OF ODER J.S.C.**

The appellants Paul K. Ssemogerere, Zachary Olum and Juliet Rainer Kafire, have appealed to this Court against the whole of the majority decision of the Constitutional Court, (Lady Justice L.E.M. Mukasa - Kikonyogo, DCJ, Mr. Justice CM. Kato J.A and Lady Justice C.N. Kitumba, J.A.) delivered at Kampala on 17/4/2002.

I have had the benefit of reading in draft the judgment of my learned brother, Kanyeihamba, J.S.C, and I agree with him that the appeal should succeed.

In his judgment Kanyeihamba J.S.C, set out the background to the appeal. I shall not repeat the same in this judgment.

The Memorandum of appeal sets out six grounds of appeal as follows: -

1. The learned majority Justices of the Constitutional Court erred in law and fact when they held that section 5 of the Constitutional (Amendment) Act 2000, did not amend articles 28, 41 (1) and 44(c) of the Constitution by implication and infection which Articles require amendment in accordance with Articles 259 and 262 of the Constitution.
2. The learned majority Justices of the Constitutional Court erred in law and fact when they held that section 5 of the Constitutional (Amendment) Act. 2000, did not amend articles 1, 2 (1) and (2) of the Constitution by implication and infection which Articles require amendment in accordance with Articles 259 and 262.
3. The learned majority Justices of the Constitutional Court erred in law and fact when they held that section 5 of the Constitutional Amendment Act, 2000 did not amend Articles 128 (1), (2) and (3) and 137 (3) (a) of the Constitution by implication and infection which articles require amendment in accordance with Articles 259 and 262.
4. The learned majority Justices of the Constitutional Court erred in law and fact when they held that the Petitioners/Appellants had not proved that Parliament did not follow the required procedure under Articles 259 and 262 of the Constitution when enacting the Constitutional (Amendment) Act. 2000.
- 5.
6. The learned majority Justices of the Constitutional Court erred in law when they failed to distinguish between a waiver of parliamentary procedure and non-compliance with the Constitutional Provisions under Articles 258, 259 and 262 of the constitution of Uganda.
7. The Constitutional Court erred in law and fact and misconstrued the gist of the petition and the petitioners' contention when they held that a Constitutional Court would have no jurisdiction to construe part of the Constitution as against the rest of the Constitution and thereby came to a wrong conclusion.

The appellants prayed that the appeal be allowed and that the respondent should be ordered to pay the costs here and in the court below.

Mr. G.S. Lule, S.C. and Mr. J. Balikuddembe represented the appellants and Mr. Denis Bireje, Commissioner for Civil Litigation, and Mr. Okello Oryem, Senior State Attorney, both from the Attorney General's Chambers, appeared for the respondent. Mr. Lule argued grounds 1,2,3 4, and 5 together and ground 6 separately.

In his submission, Mr. Lule criticized the majority of the learned Justices of the Constitutional Court for holding that there was no amendment of the articles mentioned in article 259 of the Constitution, and that on that ground alone the appellant's petition failed. He contended that provisions of the Constitutional (Amendment) Act 13 of 2002 (Act 13/2000) amended certain articles of the Constitution expressly, impliedly or by infection. Article 41 was amended expressly and impliedly. That amendment automatically affected articles 44, 28, 1,2,28, 128 and 137 of the constitution. However, the Constitutional Courts finding was that as Act 13/2000 did not mention those articles in its preamble, it follows that they were not amended or affected. Learned counsel contended that amendment of a constitutional article does not depend entirely on an express statement that the article is being amended. It also depends on the effect of the amending legislation on the article. It is for the Court to determine the intended meaning and effect of the amending statute. The learned counsel then referred to the decision of this Court in *Constitutional Appeal No. 1 of 1997, Attorney General Vs Major General David Tinyefuza* (unreported). Learned counsel submitted that in that case, the Court dealt with the effect of article 41 on section 121 of the Evidence Act as regards the right of access to information.

Learned counsel further submitted that all the procedures laid down in article 262 were applicable to article 41, the amendment of which affected the other articles. They were mandatory and amendments carried out without compliance with article 258 (2) (b) cannot be part of the Constitution. The Learned Counsel urged this Court to apply the decisions cited in the appellant's List of authorities submitted in this appeal. He added that the same authorities were relied on in the lower court. Some of those authorities are: *Constitutional Appeal No.1/2000 Paul Ssemogerere and Another Vs Attorney General (SCU) (unreported); The Bribery Commissioner V. Pedrick Ranasinghe (1965) A.C 172 (H.L); The Queen Vs. Big M. Drug Mart Ltd (1986) LRC (Const.) (332); and "The Constitutional Law of India" 3rd Edition, Vol.1 by H.M. Seervai.*

Learned Counsel also adopted his submission in Constitutional Petition No. 13 of 2000 regarding "colourable" legislation by which, he contended section 5 was used to amend article 41 of the Constitution. On amendment of articles of a constitution by colourable legislation, the learned counsel referred to "*The Constitutional Law of India*" (Supra).

Learned Counsel distinguished the case of *Teo Soh Lung Vs. Minister of Home Affairs and others (1990) LRC (Constitutional) 490*, relied on by the respondent, as not applicable to the instant case. Learned Counsel also referred to respondent's other authority, namely *Constitutional Petition No. 8 of 2000. The Uganda Law Society and Justine Semuyaba Vs. The Attorney General (Constitutional Court of Uganda) unreported*. He 4 pointed out that in the judgment of Hon. Lady Justice Mukasa Kikonyogo D.C.J, amendment of article 41 of the Constitution by section 5 Act 13/2000 was never addressed, but the judgment agreed with the view that section 5 amended article 257 by insertion of a new article 257 A and article 97 by insertion of new provisions thereto. The two other members of that Court agreed with that holding.

Mr. Denis Bireije opposed the appeal and supported the majority decision of the Constitutional Court. He argued against the grounds of appeal together. He submitted that the issue for decision before the Constitutional Court was whether Parliament followed the constitutional provisions in amending the Constitution by Act 13/2000. In his opinion the articles of the Constitution which were amended by Act 13/2000 were articles 88, 89 90, 97. Another amendment was by insertion of article 257A. Learned counsel contended that the petition in the Constitutional Court was that Parliament did not follow the Constitution in amending those articles but the appellants failed to produce sufficient evidence to prove that Parliament never followed the required constitutional procedure in making the amendments. Learned counsel submitted that the articles he has referred to as having been amended did not require their amendment to conform with articles 258, 259, 261 and 262 (2) (a), as contended by the appellants' counsel. Learned counsel submitted that the articles which were amended were expressly stated in the preamble of the amending statute. Those not expressly mentioned were not amended.

Learned counsel contended that article 41 was amended but he disagreed that the procedure under articles 259 was required to do so. He submitted that article 28 was not amended by implication or infection. Nor was the procedure under articles 259 and 262 (1) required to do so. Learned counsel also contended that articles 1 and 2 were not amended by Act 13/2000. Learned counsel also disagreed with the appellant's contention that by amending article 41, section 5 affected article 28 and 44, because the right to fair hearing was not affected by the amendment of article 41. He contended that the amendment of article 41 did not affect article 128, nor did it affect article 137, because people still have the right to petition under the latter. Regarding the appellant's complaints in grounds 2, 3 and 5 of the appeal that the procedure required by articles 259 and 262 (2) (a) were not complied with in passing section 5 of the Act, the respondent's learned counsel argued to the contrary. He contended that no evidence was produced by the appellants to prove that the articles in question were not complied with.

Learned counsel relied on. *Teo Soh Luna Vs. Minister of Home Affairs and others (1990) LRC (Constitution) 490.* in support of the proposition that once the correct procedure has been followed in amending the constitution, the amendments become part and parcel of the amended constitution. Learned counsel contended that article 257 (a) permits amendment of the Constitution by modification, but he contended that such an amendment can be effected only if the article to be amended is specifically mentioned in the amending legislation.

Learned counsel submitted that the Constitutional Court has powers to harmonise provisions of the Constitution, but it can do so only when the right procedure has been followed in enacting the amending legislation.

I shall consider grounds 1,2 and 3 together; grounds 4, and 5 together, and 6, separately.

The complaints in grounds 1,2 and 3 of the appeal are to the effect that the Constitutional Court erred in holding that Act 13/2000 did not amend articles 1,2 (1), (2) 28, 41 (1), 44 (c), 128 (2), (3) and 137 (3) of the Constitution.

Section 5 of Act 13/2000 amended article 97 by inter alia, introducing two clauses to that article as follows:

*"(2) Notwithstanding article 41 of this Constitution, no member or officer of Parliament and no person employed to take minutes of evidence before Parliament or any Committee of Parliament shall give evidence else where in respect of the contents of any document laid before Parliament or any such Committee, as the case may be, or in respect of any proceedings or examination held before Parliament or any such committee, without the special leave of Parliament first obtained.*

*(3) The special leave referred to in clause (2) of this article may, during a recess or adjournment of Parliament, be given by the Speaker or in the absence of the Speaker or during a dissolution of Parliament, by the Clerk to Parliament"*

In the Constitutional Court the learned Lady Justice Mukasa-Kikonyogo, D.C.J, said this:

*"I do not agree with Mr. Lule, as already pointed out, that the amendment of article 97 resulted in the amendments of articles 41 (1) and 44 of the Constitution which, he argued, blocked ordinary citizens to have access to information. I disagree with him that the said amendments were linked to other articles which had not been amended like article 137 (Supra). Counsel cited a number of authorities in support of his arguments. I had the opportunity to read them but with due respect I do not find them relevant to the instant petition."*

Two other members of that Court concurred with the learned D.C.J.

With the greatest respect, I am unable to agree with the learned D.C.J and the JJ.A in this regard, because, first, in my considered opinion, the new additions made by section 5 of Act 13/2000 to article 97 clearly affected the right of access to information guaranteed by article 41 of the constitution. Article 41 was expressly amended. They made availability of records of proceedings of Parliament, for instance, Hansard, subject to prior approval of Parliament, which approval can be granted or denied. If it is denied, the new clauses (2) and (3) of article 97 do not indicate the reasons on which Parliament may deny a citizen access to records of its proceedings. Under article 41 (1) release of Parliamentary proceedings to a litigant may only be denied if the release of such information is likely to prejudice the security or sovereignty of the state or interfere with the right to privacy of any other person. Moreover, Parliament does not yet appear to have made laws prescribing

the classes of information referred to in article 44 (2) and the procedure for obtaining access to such information. Secondly, the authorities relied on by the appellant are most relevant to the instant case. I shall refer to only three for purposes of discussing article 41. One is *Constitutional Appeal No. 1 of 1997. Attorney General Vs. Major General David Tinyefuza (Supra)*. In that case, this Court was concerned with, inter alia, section 121 of the Evidence Act and article 41 (1) of the Constitution. Section 121 provides.

*"No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of state, except with the permission of the officer at the head of the department concerned who shall give or withhold such permission as he thinks fit."*

During a trial of a petition in the Constitutional Court, The Attorney General objected to the admissibility of a certain recorded radio message from the Head of State as Commander-in - Chief of the Army to the Minister of State for Defence concerning the respondent in that appeal. The objection was based on grounds of state security under section 121. The Constitutional Court overruled the objection, which was upheld by this Court. In his judgment Wambuzi CJ. (as he then was) put the matter this way.

*"The Court (the Constitutional Court) then went on to consider section 121 of the Act together with Articles 28,41,43, 44 and 273 of the Constitution and concluded*

*'The Constitution has determined that a citizen shall have a right of access to information in the hands of the state. It has determined the exceptions in a manner that is inconsistent with the application of section 121 of the Evidence Act, it is no longer for the head of department to decide as he thinks fit. The unfettered discretion has been overturned by article 41 of the 8 constitution and now it is for the Constitutional Court to determine whether a matter falls in the exceptions in article 41 or not. And to this, the state must produce evidence upon which the Court can act. It has not done so in this instance.'*

*The objection as to admissibility was overruled and I am unable to fault the reasoning of the Constitutional Court''.*

In my own judgment in that case I said:

***"The right of access to information is new in the constitutional history of Uganda. The Evidence Act is an old vintage statute of 1909. For this and other reasons I have given I think that article 41 of the Constitution overrides section 121 of the Evidence Act. I have already referred to the views expressed on page 5260 of "Field's law of Evidence" to the effect that there is a long catena or chain of decisions in which warnings have been given by Courts of the menace which supposed privilege implies to the individual liberty and private rights and to the potency of its abuse. It is this menace which in my view, article 41 sets out to limit. The right of access to information must include the right to use such information in a Court of Law in support of a citizens case."***

I still hold the same view.

Article 97 as amended by section 5 of Act 13/2000 by introduction of clauses (2) and (3) are couched in identical terms as section 15 (1) and (2) of the National Assembly (Powers and Privileges) Act, (Cap. 249). The effect of article 41 (1) of the Constitution on section 15 (1) and (2) was considered by this Court in ***Constitutional Appeal No. 1 of 2000. Paul Ssemogerere and Zachary Olum Vs. Attorney General (Supra)***. This is another case to which the appellants referred the Court of Appeal in support of their petition.

Section 15 of the Act provided: ***"15 (1) Save as provided in this Act no member or officer of the Assembly and no person employed to take minutes of evidence before the Assembly or any committee shall give evidence elsewhere in respect of the contents of such minutes of evidence or contents of any document laid before the Assembly or any such committee as the case may be, or in respect of any proceedings or examination held before the Assembly or such committee as the case may be without the special leave of the Assembly first had and obtained.***

***"(2) The special leave referred to in subsection (1) of this section may be given during a recess or adjournment by the Speaker or, in his absence or other incapacity or during any dissolution of the Assembly, by the clerk."***

Rule 171 of the rules of procedure of Parliament, 1996 were worded in identical terms as section 15 (1) of the Act.

In that case Learned Justice Kanyeihamba, JSC, wrote the lead judgment. All the other members of the Court, except Wambuzi CJ, (as he then was) agreed with him on his conclusions on the application of section 15 (1) and (2) of the Act (Cap 249) in the light of article 41 of the Constitution. Kanyeihamba, JSC said:

*"It is my view that in the light of the provisions of article 41 (1), the argument that a citizen needs permission of parliament to use Hansard or allow members of Parliament to give evidence in Court proceedings is unsustainable. In this case, the Speaker gave what is known in administrative law as a speaking order. He disclosed that he had consulted the registers of members and used the numbers registered therein to ascertain the quorum. A speaking order is impeachable in courts of law, especially if there is evidence that it was based on a wrong principle. Consequently, since under article 41(1), information in possession of the state is freely available to a citizen except where its release would be "prejudicial to the security or sovereignty of the state or interference with the right of privacy of any person" I can find no constitutional or legal grounds to prevent the release and use of Hansard or stop members of parliament from giving evidence in courts of law..... The Attorney General did not show nor am I aware that Parliament has made the necessary law under article 41(2). In any event it would be incumbent upon the Attorney General to show that the information to be excluded as evidence in Constitutional petition No. 3 of 1999, came within the purview of the exceptions listed in clause (1) of the same article. In my opinion, while it is still a practical necessity for a litigant to write to the state or organ or agency in possession of information, once that information is obtained, with or without the co-operation of the state, or organ or agency concerned, the information is freely usable and admissible in courts of law unless it falls within the exceptions under article 41(1). Moreover, where the state refuses to release such information, the citizen entitled to receive it may take the necessary legal steps to compel its release"*

In the case of **Phato Vs Attorney General (1994), 3 LRC (Supreme Court of South Africa)** it was held that the right of access to information by an accused person was required for the exercise of his right to a fair trial within the meaning of section 23 of the Constitution of South Africa, notwithstanding that it was not essential for the exercise of the latter right in circumstances where another law already provided for an alternative

method to gain access to some, but not all, of the information sought, enabling him to defend the charges against him. A right of access to information in terms of the supreme law, the Constitution, could not be whittled away. Further more where information existed which was highly likely to be relevant, such information was 'required' within the meaning of section 23, at least in order to enable the person seeking it to exercise or protect a right to take a proper decision about it. On the facts in that case, the first applicant 'required' the information in the police docket and particularly the witness statements in order to prepare for trial.

In the instant case the effect of article 97 (2) and (3) as amended by section 5 of Act 13/2000 is to restrict the citizens' access to information in the hands of Parliament subject to the absolute discretion of Parliament to release or not to release the information. In my view the provisions of section 5, conflict with the right of access to information, guaranteed by article 41. They are, therefore, null and void.

Act 13/2000 expressly amended article 41 by the introduction of the new clauses (2) and (3) to article 97. Part of the appellant's case is that other articles of the Constitution were amended by implication or infection. These are articles 1,2(1) and (2), 28, 44 (c), 128 (1), (2) (3) and 137 (3). The respondent's contention is that these articles were not amended, just as article 41 was not amended, because the preamble to Act 13/2000 did not specifically state that they were to be amended.

Amendment of the Constitution is provided for by article 258 of the Constitution, the provisions of which are to the effect that the Constitution can only be amended if an Act of Parliament is passed for that purpose; the Act has the effect of adding to, varying or repealing any provision of the Constitution; and the Act has been passed in accordance with the provisions of Chapter Eighteen of the Constitution. To me, it follows that if an Act of Parliament has the effect of adding to, varying or repealing any provisions of the Constitution, then the Act must be said to have amended the affected article of the Constitution. The amendment may be effected expressly, by implication or by infection, as long as the result is to add to, vary, or repeal a provision of the Constitution. It is immaterial whether the amending Act states categorically that the Act is intended to affect a specified provision of the Constitution or not. It is the effect of the amendment which

matters. This view, in my opinion, is supported by the decision of the Supreme Court of Canada in *The Queen VS. Big M. Drug Mart Ltd (1986) LRC (Const)*, with which I agree.

In that case, the respondent had been charged with unlawfully carrying on the sale of goods on Sunday in Calgary, contrary to the Lords Day- Act (RSC 1970 C. L - 13) and was acquitted at the trial. The Alberta Court of Appeal dismissed the appeal and a further appeal was made to the Supreme Court in which various constitutional questions were raised, in particular, whether the Act, (1) especially section 4, infringed the right of freedom of conscience and religion guaranteed by section 2 of the Canadian Charter of Rights and Freedoms; (2) was justified by section 1 of the Charter; (3) was enacted pursuant to the criminal law power in section 97 (27) of the Constitution Act of 1867. The Attorneys - General of Canada, New Brunswick and of Saskatchewan intervened in the appeal. The appeal was dismissed, because:

- (1) Since the true, purpose of the Act was to compel the observance of the Christian Sabbath, it, especially section 4, infringed the freedom of conscience and religion guaranteed by section 2(a) of the Charter. Nor was it justified as a reasonable limit under the Charter, because, though a secular justification for a day of rest in the Canadian context could be found, it was not the motivation of the legislation.
- (2) (Per Dickson, Beetz, MacIntyre, Chouinard and Lamer, JJ): Both purpose and effect are relevant in determining the constitutionality, either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislations are animated by an object the legislature intends to achieve. This object is realised through the impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and actual effects have often been looked to for guidance in assessing the legislation's object and thus its validity.

In that case, Wilson J said:

*"While it remains perfectly valid to evaluate the purpose underlying a particular enactment in order to determine whether the legislature has acted within its constitutional authority in division of powers terms, the Charter demands an evaluation of the infringement by even intra vires legislation of the fundamental rights and freedoms of the individual. It asks not whether the legislature has acted for a purpose that is within the scope of the authority of that tier of government, but rather whether in so acting it has had the effect of violating an entrenched individual right. It is in other words, first and foremost an effects or oriented document."*

In my opinion the principles expressed by the Canadian Supreme Court in *The Queen VS. Big M. Drug Mart Ltd (Supra)* apply with equal force to the instant case.

Another important principle governing interpretation and enforcement of the Constitution, which is applicable to the instant case, is that all provisions of the Constitution touching on an issue are considered all together. The Constitution must be looked at as a whole. **In South Dakota Vs North Carolina, 192 U.S. 268 (1940) L.Ed** the U.S. Supreme Court said at page 465.

*"Elementary rule of Constitutional Construction is that no one provision of the Constitution is to be segregated from all others to be considered alone, but that all provisions bearing on a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument."*

The right to a fair hearing is protected by article 28 of the Constitution, clause (1) of which provides that in the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. Under the provisions of article 44 (c) derogation of the right to fair hearing is prohibited. Under article 128 (3) all organs and agencies of State are enjoined to accord to the Courts such assistance as may be required to ensure the effectiveness of the Courts. Parliament is such an organ of state. It should not therefore enact laws which hinder functions of Courts in dispensing justice, of which the right to fair hearing is an important aspect. In my considered opinion a litigant whose right of access to information is curtailed by the amended article 97 of the Constitution cannot enjoy the right to fair hearing under articles 28 (1) and (c) if Parliament withholds from him or her Parliamentary proceedings which he/she needs for evidence in a Court of Law.

By withholding such information from being used in a Court of law Parliament would also be violating article 128 (3) of the Constitution.

For the same reasons, a citizen's right under article 137 (3) to petition the Constitutional Court for a declaration that an Act of Parliament is inconsistent with, or contravenes, the Constitution would be rendered impossible if Parliament can deny him/her information in its possession which the citizen requires to support his/her petition for that purpose. Denial of such information would inevitably result into denial to the citizen the right to fair hearing and to violation by Parliament of its Constitutional duty under article 128 (3). Consequently the Constitutional Court's jurisdiction under article 137 (1) is affected in that where a petitioner for purposes of article 137 (3) is denied information to support his/her petition the Constitutional Court cannot give him/her a fair hearing.

In the circumstances, the amendments introduced by section 5 of Act 13/2000, which I have discussed in this judgment, are also in conflict with articles 28, 44 (c), 128 (3) and 137 (1) and (3) of the Constitution and, therefore, null and void.

In view of my finding that Act 13/2000 is in conflict with the constitution, it is my considered opinion that Act 13/2000, was a "colourable" legislation. A colourable legislation occurs where a legislature lacking legislative power or subject to a constitutional prohibition may frame its legislation so as to make it appear to be within the legislative power or to be free from the constitutional prohibition. Such a law is "colourable" legislation, meaning thereby that while pretending to be a law in the exercise of undoubted power, it is, in fact, a law on a prohibited field.

The principle of colourable legislation has been applied in some Common -wealth jurisdictions. *In Union Colliery Co. Of British Columbia Vs. Bryden (1899) AC. 580*, the Privy Council held that section 4 of the impugned Act, which prohibited China men of full age from employment in underground workings, was not a law relating to Provincial Undertakings, nor a law relating to Property and Civil Rights in the Province but was in pith and substance a law relating to naturalisation of aliens, a subject of exclusive Dominion legislative power. Accordingly S.4 was ultra vires the Provincial Legislature. In *Attorney General of Ontario Vs Reciprocal Insurers (1924) A.C 328, the* Privy Council had to consider, inter alia, an attempt by the Dominion of Canada to control contracts of insurance within a Province. The Dominion having failed to secure that control by the

Insurance Act of 1910, inserted section 508 (c) in the Criminal Code which made it an offence for any person to solicit or accept any insurance risk except on behalf of or as agent of a company duly licensed under the Insurance Act, 1917 of Canada. The Dominion contended that its power to legislate on Criminal Law was unfettered and that the impugned law was *intra vires*. Rejecting this contention the Privy Council observed that this claim was a claim to legislate every topic of exclusive Provincial Legislation by resorting to the entry on Criminal Law, and that such a claim could not be allowed consistently with the principles governing the interpretation of Sections 91 and 92 of the B.N.A Act 1869. At page 343 the Privy Council said:

*"It is one thing, for example to declare corruption in Municipal elections, or negligence of a given order in the management of railway trains, to be a criminal offence and punishable under the Criminal Code; it is another thing to make use of the machinery of the criminal law for the purpose of assuming control of municipal corporations or of Provincial railways".*

Other cases in which the principle of colourable legislation has been discussed include *Att. Gen for Alberta Vs Att. Gen for Canada (1979) A.C. 117*; *W.R. Morgan Pty Ltd. Vs Dy Commissioner of Taxation for N.S.W. (1940) A.C. 838*; and *K.C. Gajapati Narayan Deo Vs Orissa (1954) S.C.R. 1, (53) ASC. 375*. In the **Gajapati** case (supra) Mukherjea J, observed that the doctrine of colourable legislation did not involve any question of **bonafides** or **malafides** on the part of the legislature. The whole doctrine resolved itself into a question of the competency of a particular legislature to enact a particular law. The whole doctrine of colourable legislation is based upon the maxim that you cannot do indirectly what you cannot do directly. See *Constitutional Law of India, 3<sup>rd</sup> Edition, By HM. Seervai, Paragraph 3.15.*

In the instant case, Act 13/2000, in my view, was a colourable legislation, by which Parliament sought to amend articles 28, 41, 44(c), 128 and 137 (1) and (3) of the Constitution without saying so. It did indirectly what it could not do directly, without complying with the Constitutional procedural requirements. For this reason and the others I have already given in this judgment, section 5 of Act 13/2000 is in conflict with the provisions of the Constitution in question, and is null and void.

Article 1 of the Constitution provides for the sovereignty of the people and for their governance through their will and consent. In my view Section 5 of Act 13/2000 did not affect or amend article 1 of the Constitution, for it did not remove away or in any way affect the right of the people to exercise their sovereignty in accordance with the Constitution. Nor did the section affect or amend article 2 of the Constitution, which provides for the supremacy of the Constitution.

In the circumstances ground 1 of the appeal should succeed. So should ground 3. On the other hand, ground 2 of the appeal should fail.

I shall next consider grounds 4 and 5 together. The Constitution stipulates certain procedural conditions for enacting and assenting to bills intended to amend certain provisions of the Constitution. Firstly provisions of article 259 (1) state that a bill for an Act of Parliament seeking to amend provisions of articles 44 and 128 (1) shall not be taken as passed unless it is supported at the second and third readings in Parliament by not less than two-thirds of all members of Parliament; under article 261, the same procedure applies to article 41. Secondly, it has been referred to a decision of the people and approved by them in a referendum; thirdly under article 262 (1) the votes on the second and third readings required under articles 259 and 260 shall be separated by at least fourteen sitting days of Parliament; fourthly under article 262 (2) a bill for the amendment of the Constitution which has been passed in accordance with Chapter Eighteen shall be assented to by the President only if: (a) it is accompanied by a certificate of the Speaker that the provisions of Chapter Eighteen have been complied with in relation to it and (b) in the case of a bill to amend a provision to which articles 259 or 260 of the Constitution apply, it is accompanied by a certificate of the Electoral Commission that the amendment has been approved at a referendum or, as the case may be, ratified by district councils in accordance with Chapter Eighteen.

In her judgment with which other two members of that Court agreed, the learned DCJ held that there was no requirement to hold a referendum or to have approval by district councils. Such a conclusion on the part of the learned DCJ, in my opinion, is not surprising because the learned DCJ held that only articles 88, 89, 97 and 257 of the constitution were amended, and that articles 1, 2, 28, 41, 44, 128 and 137 (3) were not amended, by Act 13/2000. The learned DCJ also held that there was no requirement for spacing of 14 days between the second and third readings of the Constitution (Amendment) Bill No.16 of

2000 (Act 13/2000); that the Constitution does not provide for special procedures to be followed by Parliament when enacting Constitutional amendment Acts other than those enacted under articles 259 and 260. It only makes provision for Parliament to make its own Rules under article 94 (1): In the instant case, there was nothing to stop Parliament from applying its own Rules. The learned DCJ also held that the affidavits sworn by the 2<sup>nd</sup> and 3<sup>rd</sup> appellants did not indicate that Parliament did not comply with the correct rules of procedures. It was entitled to resort to its own rules to regulate its proceedings during the debate of Bill No.16 of 2000. Parliament is provided with powers to waive any requirement of its rules where a particular bill is considered urgent. Under rule 96 (4) a bill may be taken through all the stages in a day notwithstanding anything in those rules. The learned DCJ also held that although they were members of Parliament, the affidavits of the second and third appellants did not prove that the Speaker's Certificate under article 262 (2) was not attached to the bill when the bill was sent to the President for his assent thereto. In any case failure to attach the Speaker's Certificate to the bill would not be fatal to the validity of Act 13/2000. Issuance of the Speaker's certificate was a mere procedural and administrative requirement which does not go to the root of law making process. Similarly, none of the Constitutional amendments effected by Act 13/2000 had to be accompanied by a certificate of the Electoral Commission.

With great respect I am unable to agree with the learned *DO* and the two *JJ.A.* that the amendment effected by Act 13/2000 did not, require approval by the people in a referendum or by district councils; that the second and third readings of the amending bill did not require to be separated by 14 days; that the period of fourteen day's was a mere procedural requirement which Parliament could waive as it wished under rule 96 (4); and that the requirements for the Speaker's certificate or the certificate of the Electoral Commission were mere procedural and administrative requirements which did not go to the root of the law making process.

It is my view that the Constitutional procedural requirements for the enactment of legislation for amendment of the Constitution are mandatory conditions, which cannot be waived by Parliament as mere procedural or administrative requirements. They are conditions to be complied with. Mandatory Constitutional requirements cannot simply be waived by Parliament under its own procedural rules. It is also my considered opinion that had the learned *D.C.J* and Justices of Appeal found that Act 13/2000 amended articles 28, 41, 44, 128 and 137 (1) and (3) they would have found that the Constitutional procedural

requirements under articles 258, 259, 260(1), 262(1) and (2) were mandatory and that Parliament should have complied with them in enacting Act 13/2000.

In my considered opinion this view is supported by the decision of the House of Lords in **The Bribery Commissioner VS Dedrick Ranasinghe (1965) AC 172**. It was held in that case that a legislature has no power to ignore the conditions of law making that is imposed by the instrument which itself regulates its power to make law. This restriction exists independently of the question whether the legislature is sovereign. Such a constitution can be altered or amended by the legislature if the regulating instrument so provides and if the terms of those provisions are complied with, and the alteration or amendment may include the change or abolition of those very provisions. A legislature has no inherent power derived from the mere fact of its establishment to make a valid law by for instance, the resolution of a bare majority which its own constitutional instrument has said shall not be valid unless made by a different type of majority or by a different legislative process.

Regarding the findings in the instant case of the Constitutional Court that there was no proof that the requirement for fourteen days interval between the second and third readings of the Bill 16 of 2000 had been fulfilled; that the respective certificates of the Speaker and the Electoral Commission did not accompany the Bill to the President for his assent, the second and third appellants filed affidavits to say that the relevant procedural constitutional requirements were not complied with when Act 13/2000 was enacted. Zachary Olum, the second appellant deponed in paragraph six of his affidavit that the Bill was read for the first, second and third readings within two days only; that the Bill was not referred to the decision of the people for approval in a referendum; and that the Bill was not accompanied by respective certificate of compliance from the Speaker of Parliament and from the Electoral Commission. In her affidavit, Juliet Rainer Kafire, the third appellant, deponed in paragraph five of her affidavit that Act 13/2000 was passed by Parliament in one day, namely 31.8.2000. It was published in the Uganda Gazette on 1.9.2000 and became law the same day. The respondent's answer to the appellant's petition was supported by the affidavit of Patricia Mutesi, a State Attorney in the respondent's Chambers. Mutesi's affidavit was silent on the allegations made in paragraphs six and five respectively of the second and third appellant's affidavits' which, therefore, were not controverted. In my view, some of these were matters within the special knowledge of the

respondent. He alone knew or should have known whether the bill for the enactment of Act 13/2000 was accompanied or not by the respective certificates of the Speaker and the Electoral Commission for purposes of assent to the bill by the President. The appellants had no access to official information or materials as evidence in the possession of the respondent. By their affidavits, the appellants had made a prima facie case that the Constitutional requirements were not complied with. The burden to prove the contrary, in my opinion shifted to the respondent, because the matters in question were within his special knowledge. See section 105 of the Evidence Act. Regarding the absence of the 14 days interval the two appellants were members of Parliament and deposed to that fact from their own knowledge. It is my opinion, therefore, that the appellants proved what they alleged in their affidavits.

In ground 1 (e) of their petition, the appellants challenged the constitutionality of the new article 257 A introduced by Section 6 of Act 13/2000. The Constitutional Court did not make any decision about that ground of the petition. However, it is my opinion that I should comment on it for purposes of clarification since it relates to a procedure for passing Acts of Parliament. The provisions of the new article 257 A are to the effect that no Act or decisions passed or taken by Parliament at any time after the commencement of the Constitution using the procedure of voting by a voice vote shall be taken to be invalid by reason of the use of that procedure. It follows, in my view, that procedure is inapplicable to passing of Acts of Parliament which were or are intended to amend the Constitution where a majority of two-thirds, majority of all the members of Parliament at the second third readings are required by the Constitution. Such a procedure would require a head count to ascertain a majority of two thirds of all the members of Parliament who are entitled to vote, excluding ex-officio members, which is not possible in a voice count of *"Ayes" or Noes."*

In the circumstances, grounds four and five of the appeal should succeed.

I shall consider next ground six of the appeal. The passage of the judgment of the Lady Justice Mukasa-Kikonyogo, DO, with which two members of that Court agreed, and which is relevant to this ground of appeal reads as follows:

*"Once the correct procedure for enacting a Constitutional Amendment Act is complied with, its provisions become part and parcel of the Constitution, they cannot be challenged in this Court. This Court by a majority of 3:2 in Constitutional petition No.5 of 1999 Dr. Rwanyarare and Had Sadim Degulo VS. Attorney General held that this Court would not have jurisdiction to construe parts of the Constitution as against the rest of the Constitution. See also Kesavananda VS State of Kerala 1654 Paragraph 788 A.I.R. All that this Court could do was to determine whether the challenged Act was enacted in accordance with the procedure for enacting constitutional amendments. This petition was, hence, adjourned for hearing to determine the issue of compliance with the laid down procedure. In the recent Constitutional Petition No.8 of 2000 Uganda Law Society and Justin Semuyaba VS Attorney General, where a similar constitutional petition was heard by this Court, the unanimous holding of the court was that Parliament passed Act 13 of 2000, known as The Constitution (Amendment) Act, in accordance with the laid down procedure. The petitioners failed to prove that the procedure was not followed by Parliament. In my view, the decision to that effect is still standing as no appeal was filed against it and this Court has not reversed itself. The holding also decided Constitutional Petition No.6 of 2000 Karuhanga Chapa and 2 others VS Attorney General in the same way as a test case. When this petition came up for hearing on 18<sup>th</sup> February 2002 that decision of the Court was brought to the attention of Mr. G. Lule and Mr. Balikuddembe, learned counsel for the petitioners, but they replied that their clients' case was distinguishable from the two petitions decided. Unlike in the other petitions, they told the Court that they had evidence to prove that the laid down procedure was not followed by Parliament when enacting Act 13 of 2000."*

As I understand it, the decision of the Constitutional Court in this passage of the judgment is that the Constitutional validity of an Act of Parliament intended to amend the Constitution can be challenged only if proper procedures are not followed in the enactment process. It appears to mean that because such an Act becomes part and parcel of the Constitution it cannot be challenged that it is inconsistent with or contravenes the Constitution even if that is the perception of the petitioner. Such a decision in my view, with respect, would severely limit the jurisdiction of the Constitutional Court as provided for under article 137 of the Constitution.

Jurisdiction is defined in Mulla on the Code of Civil Procedure at page 225 as:

*"By jurisdiction is meant authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way, for its decision. The limits of this authority are imposed by statute, charter or Commission, under which the Court is constituted and may be exercised or restricted by the like means. If no restriction or limit is imposed the jurisdiction is unlimited"*

For purposes of ground six of the appeal in the instant case, the jurisdiction of the Constitutional Court to construe Acts of Parliament is set out in article 137 of the Constitution.

*"137 (1) any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court.*

(2).....

(3) *A person who alleges that- (a) an Act of Parliament..... is inconsistent with or in 24 contravention of a provision of the Constitution may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate."*

The Constitutional Court's jurisdiction to declare an Act of Parliament inconsistent with or in contravention of the Constitution goes together with the one for interpretation of the Constitution. It is unlimited. The Constitutionality or otherwise of an Act of Parliament must be construed vis-a-vis the Constitution. The Court's jurisdiction in article 137 (3) (a) must be applied together with the one in article 137 (1). In my view these provisions apply to any Act of Parliament which a person alleges is inconsistent with or contravenes the Constitution. For purposes of exercising these jurisdictions by the Constitutional Court there can be no distinction between an Act passed to amend the Constitution or an Act passed for other purposes. As long as a person alleges that an Act of Parliament is inconsistent with or contravenes the Constitution, the Constitutional Court shall and should construe the Act of Parliament in the light of the Constitutional provisions it is alleged to be inconsistent with or to contravene whether it is the former kind of Act of Parliament or the latter. For purposes of jurisdiction of the Constitutional Court under article 137 (1) and (3) (a) there can be no distinction between an Act for amendment of the Constitution and other Acts of Parliament. Whether the petition presented to the Court is to challenge the Constitutionality of an Act in the sense that the Act is allegedly null and void or that the Act was enacted in a manner which did not comply with the Constitutional procedural provisions, such as, for instance, requirements under articles 259, 261 (1) and 262 (1) and (2), the Constitutional Court has jurisdiction to make a declaration or other redress sought by the petitioner.

Any Act of Parliament intended to amend the Constitution or not, in my view remains valid as against the Constitution until its validity is successfully challenged in the Constitutional Court. To say that the Constitutional Court has no jurisdiction to entertain a petition challenging the Constitutional validity of an Act of Parliament intended to amend the Constitution as long as the relevant procedures are followed in enacting it would, with great respect, severely whittle away the jurisdiction of the Constitutional Court under article 137 of the Constitution. Moreover, there is no Constitutional provision to that effect.

In the circumstances ground six of the appeal should succeed.

In the result, this appeal should substantially succeed. I would allow it with cost in this Court and in the Constitutional Court. I would also make the Declarations proposed by Kanyeihamba JSC.

## JUDGMENT OF ODOKI, CJ

I have had the advantage of reading in draft the judgment of my learned brother, Kanyeihamba JSC, and I agree with him that this appeal should substantially succeed.

The facts giving rise to this appeal have been sufficiently outlined in the judgment of my learned brother, Kanyeihamba, JSC, and it is unnecessary to repeat them.

The appellants have filed six grounds of appeal which are set out in the judgment of my learned brother, Kanyeihamba, JSC.

The grounds of appeal raise three main issues for determination. The first is whether the Constitutional Court did not have jurisdiction to construe one provision of the Constitution against another. The second issue is whether the Constitutional Amendment Act No.13 of 2000 amended the various Articles enumerated by the appellants.

The third issue is whether the right procedure was followed in making the amendments.

With regard to the first issue which covers the sixth ground of appeal, the majority of the Court held that the Court did not have jurisdiction to construe parts of the Constitution as against the rest of the Constitution.

The learned Deputy Chief Justice Mukasa Kikonyogo in her lead judgment said,

*"When it came before this Court for the first time on 10<sup>th</sup> November 2000, Counsel for the Respondent raised two preliminary issues, one on the affidavits of the petitioners and the second of on the jurisdiction of this court. It was conceded by the petitioners that there was a difference between a Constitutional Amendment and an Ordinary Act.*

*Once the correct procedure for enacting a Constitutional Amendment Act is complied with, its provisions became part and parcel of the Constitution. They cannot be challenged in this Court. This Court by a majority of 3:2 in Constitutional Petition*

*No.5 of 1999 Dr Rwanyarare and Haji Badru Wegulo vs Attorney General, held that this Court would not have jurisdiction to construe parts of the Constitution as against the rest of the Constitution. See also Kesarananda vs State of Kerala 1654 paragraph 788 A.L.R. All that this Court could do was to determine whether the Challenged Act was enacted in accordance with the procedure for enacting Constitutional Amendments."*

The learned Deputy Chief Justice went on to say,

*"In the recent Constitutional Petition No.8 of 2000 the Uganda Law Society and Justin Semuyaba vs Attorney General where a similar Constitutional Petition was heard by this Court, the unanimous holding of the Court was that Parliament passed Act of 13 of 2000 known as the Constitution (Amendment) Act in accordance with the laid down procedure. The petitioners failed to prove that the procedure was not followed by Parliament. In my view the decision to that effect is still standing as no appeal was filed against it and this Court has not reversed itself.*

*The holding also decided Constitutional Petition No.6 of 2000 Karuhanga Chapaa and 2 Others vs Attorney General in the same way as test case."*

This opinion raises question of the role of precedent in the Constitutional Court or the Court of Appeal, and the question of harmonisation of the provisions of the Constitution. With regard to the first question, the doctrine of precedent is now constitutionalised in Article 132(4) of the Constitution, which provides,

*"The Supreme Court may, while treating its won previous decisions as normally binding depart from a previous decision when it appears to it right to do so; and all other Courts shall be bound to follow the decisions of the Supreme Court on questions of law."*

This principle is a codification of the principle enunciated in the case of Dodhi vs National & Grindlays Bank Ltd (1970) EA 195, and the House of Lords Practice Statement (Judicial Precedent) (1966) I WLR. 1234.

The doctrine of precedent requires lower Courts to follow decisions of higher Courts on questions of law. The doctrine also lays down when a Court is not bound to follow a decision of a higher Court. This means that the Constitutional Court/Court of Appeal is bound to follow decisions of the Supreme Court. As regards its own decisions, it would normally be bound by them except under the three circumstances set out in *Young vs Bristol Aeroplane Co.Ltd* (1944) K.B. 718 which was approved in *Dodhia's case* (supra) where Law JA said at p.210,

*"In Kiriri Cotton Co. Ltd vs Ranchoddas Kesharji Dewani (1958) EA 239, Sir Keneth O Cornor P, with the concurrence of other members of the Court, held following Young vs Bristol Aeroplane Co. Ltd (1944 KB 718) that the principle of stare decisis is followed by this Court, subject to the following qualifications:*

- (1) that the court is entitled and bound to decide which of two conflicting decisions of its own it will follow;*
- (2) that this court would be bound to refuse to follow a decision of its own which though not expressly overruled cannot stand with a decision of the Privy Council or of the House of Lords; and*
- (3) this court is not bound to follow a decision of its own if it is satisfied that the decision was given per incurium."*

It is clear from these authorities that the Constitutional Court was not obliged to follow its own decision if that decision was in conflict with the decision of the Supreme Court or if the decision was given *per incurium*. In my view the decision of the Constitutional Court in this case is inconsistent with the decisions of this Court in the cases of *Major General David Tinyefuza vs Attorney General*, Constitutional Appeal No.1 of 1997 (unreported) and *Paul Ssemogerere and Zachary Olum vs Attorney General*, Constitutional Appeal No.1 of 2000, (unreported). In *Major General David Tinyefuza vs Attorney General*, (supra) this Court held that Section 121 of the Evidence Act, which prevented the production in evidence of unpublished official records without the consent of Head of the Department was unconstitutional as it was inconsistent with Article 41 of the Constitution which provided for a right of access to information in possession of the State and Article 28(1) which provides for a right to fair hearing. Similarly in *Ssemogerere and Olum vs Attorney General* (supra) this Court held that Section 15 of the National Assembly (Powers and Privileges) Act which prevented any member or

officer of the Assembly to give evidence in respect of Assembly matters without the special leave of the Assembly, was in conflict with Articles 41 and 28 of the Constitution, and was therefore null and void. The provisions of Section 5 of Act 13 of 2000 amending Article 41 are, as we shall see later, a reproduction of Section 15 of the National Assembly (Powers and Privileges) Act which had been declared unconstitutional. The Constitutional Court was bound to follow these decisions of the Supreme Court, and it erred in not doing so.

The second question is one of harmonisation. The Constitutional Court was in error to hold that it did not have jurisdiction to construe one provision against another in the constitution. It is not a question of construing one provision as against another but of giving effect to all the provisions of the Constitution. This is because each provision is an integral part of the Constitution and must be given meaning or effect in relation to others. Failure to do so will lead to an apparent conflict within the Constitution.

The second issue is whether the Constitutional (Amendment) Act amended by implication or infection the various Articles specified. This issue covers grounds 1,2 and 3 in the Memorandum of appeal. The various Articles specified in the Memorandum of Appeal were Articles 1, 2 (1), 2(2) 24(c), 28, 41(1), 44(c), 128(1) (2) (3) and 137(3) (a). The petition did not allege that Section 5 of Act 13 of 2000 amended Article 1 of the Constitution by implication or infection. But the matter was argued in the Constitutional Court and in this Court. Paragraph 1(c) of the petition referred only to Articles 2 (1) (2) and 3 (2) and (4) of the Constitution. The Constitutional Court, by majority, held that these Articles were not amended, and therefore the provisions of Articles 259 and 260 of the Constitution were not applicable. Mukasa Kikonyogo, DCJ in this respect said,

*"I agree with Mr Denis Bireije that Article 259 of the Constitution is not relevant. There was no requirement for holding a referendum. The articles which were amended by Act 13 of 2000 were clearly stated as Articles 88, 89, 90, 97 and 257 of the Constitution. They did not include any of the provisions under the Article 259 and 260. Articles 1,2,28, 41,44,79(2) and 128(1) were not amended by Act 13 of 2000, expressly, impliedly or by infection as submitted by Mr Lule. In my view it would be wrong for the Court to impute unnecessary implications on the legislators without proof.*

*In any case, it would be tantamount to putting words in their mouth. The same argument can be extended to the complaints raised by counsel for the petitioners under Article 260. The Constitution (Amendment) Act did not amend any provisions of the Constitution under that Article in any way. Article 260 of the Constitution is also irrelevant."*

The learned Deputy Chief Justice held that general amendments under Article 258 did not require holding of a referendum or approval by districts. While it is true that Articles 88, 89, 90 and 97, and 257 of the Constitution were expressly stated in the Bill as the subject of amendments, and Articles 1,2,41,44,79(2) and 128(1) were not included, it does not follow that the Articles not mentioned in the Bill could not be amended by implication or by infection. Article 258(1) which provides for amendment of the Constitution clearly envisages alteration of the Constitution by "*way of addition, variation or repeal.*" The variation need not be direct but can be indirect by implication or infection. Article 257 (9) which defines amendment also supports this view. It provides:

*"in this Constitution, references to the amendment of any of the provisions of this Constitution or any Act of Parliament include references to the alteration, modification or re-enactment, with or without amendment or modification of that provision, the suspension or repeal of that provision and the making of a different provision in place of that provision."*

In this connection, I agree with the dissenting judgment of Twinomujuni JA, that an amendment may be effected expressly or by implication or infection, and that both the purpose and effect of the amendment are relevant in determining Constitutionality. In considering this point, the learned Justice, said,

*"If an Act of Parliament has the effect of adding to, varying or repealing any provision of the Constitution, then the Act is said to have amended the affected Article of the Constitution. There is no difference whether the Act is an Ordinary Act of Parliament or an Act intended to amend the Constitution. The two are treated the same under Article 137(3) of the Constitution. The amendment may be effected expressly, by implication or by infection as long as the result is to add to, vary or repeal a provision of the Constitution. It is immaterial whether the amending Act states categorically that the Act is intended to affect a specified provision of the Constitution. It is the effect of*

*the amendment that matters. It was stated in the Canadian Supreme Court case of the Queen vs Big M Drug Mart Ltd (1986) L R C 3 3 2 that,*

*"Both purpose and effect are relevant, in determining Constitutionality, either an unconstitutional purpose or an unconstitutional effect can invalidate legislation ...this validity."*

The learned Justice of Appeal went on to say,

*"If it was to be otherwise, Parliament could alter the entire Constitution, including the entrenched provisions, without following the procedure prescribed in Chapter 18 of the Constitution as long as it took care not to specify them in the Headnote of the amending Act."*

I entirely agree with those observations.

In Opolot vs Attorney General (1969) E.A. 631, the question of implied amendment of legislation was considered. The appellant who was formerly a Brigadier in the Uganda Army and Chief of Defence Staff, was discharged from the Army on October 7, 1966 and was detained under Emergency Regulations. He applied to the High Court for a declaration:-

- (a) That his discharge was invalid and that he was still a member of the Armed Forces and Chief of Defence Staff,
- (b) That the Armed Forces (Discharge) Regulations 1966 were invalid.

The application was refused by the High Court and the appellant appealed to the Court of Appeal. In dismissing the appeal, the Court of Appeal held, *inter alia*, that reference in the Armed Forces Act to "**Prime Minister**" were to be regarded as impliedly amended by the 1966 Constitution of Uganda, and the word "**President**" substituted. In this connection the Court said,

*"Finally Mr Kiwanuka submitted that the appellant was not validly discharged from the Armed Forces under the Armed Forces (Discharge) Regulations 1966, because the Defence Council which made the Regulations and which took the decision to discharge the appellant was not properly Constituted as its Chairman consisted of the President and not as required by S.11 of the Armed Forces Act, of the Prime Minister. The trial judge rejected this submission and we agree with him. At the time the decision to make the Regulations and to discharge the appellant was taken, the office of the Prime Minister no longer existed. It is clear from the 1966 Constitution that S.11 of the Armed Forces Act was to be regarded as impliedly amended by substituting for the words "Prime Minister" the word "President." The implied amendment was not affected by the omission from the Constitution (Modification of Existing Law) Instrument 1966 of any specific amendment to S.11. We consider that the Armed Forces (Discharge) Regulations 1966 were validly made by the Defence Council and that the appellant was validly discharged from the Armed Forces by the Defence Council under those Regulations, whether or not he was validly discharged by the President acting under any other powers."*

What then were the Articles which were amended by Act 13 of 2000? In my view Articles 1 and 2 of the Constitution were not amended by implication or infection. Article 1 deals with sovereignty of the people and Article 2 deals with the supremacy of the Constitution. None of the amendments purported to amend expressly or by implication these Articles. The amendments did not affect the sovereignty of the people nor the supremacy of the Constitution. The fact that any of the purported amendments were in conflict or did not comply with the requirements of other provisions did not mean that the sovereignty of the people or the supremacy of the Constitution were in any way affected. The fact that Parliament may have exceeded its powers does not mean that it intended to affect the sovereignty of the people or the supremacy of the Constitution. Sovereignty still remained with the people and the Constitution remained supreme. Any law which is inconsistent with the Constitution, still remains void to the extent of inconsistency.

As regards Article 41, which provides for the right to access to information, I am of the opinion that the Article was amended expressly by Section 5 of Act 13 of 2000 which restricted the right of access to information in possession of Parliament. Section 5

amended Article 41 by adding the following two new clauses on Article 97 of the Constitution.

***"(2) Notwithstanding Article 41 of this Constitution, no Member or Officer of Parliament and no person employed to take minutes of evidence before Parliament or any committee of Parliament shall give evidence elsewhere in respect of the contents of such minutes of evidence or the contents of any document laid before Parliament or any such committee, as the case may be, or in respect of any proceedings or examination held before Parliament or such committee, without the special leave of Parliament first obtained.***

***(3) The special leave referred to in Clause (2) of this Article may, during a recess or adjournment of Parliament be given by the Speaker or in the absence or incapacity of the Speaker or during a dissolution of Parliament, by the Clerk of Parliament."***

Article 41 is not an entrenched provision under Articles 258 and 260, and therefore Parliament had power to amend it without the requirement of a referendum or ratification by members of district councils. However, Section 5 of the Act amended Article 28 of the Constitution by implication. Article 28 provides for a right to a fair hearing. The right to a fair hearing cannot be guaranteed or exercised unless the public have access to information which they need to support their cases and causes. Courts depend in evidence to establish the truth and to substantiate claims and allegations in disputes. The right of access to information is not absolute but can be restricted on grounds of prejudice to security or sovereignty of the State or interference with the right to the privacy of any other person. Parliament must make laws to prescribe the restrictions. At present Parliament has not done so, and therefore it is incumbent on Government to prove the necessity of restricting or denying access to information.

Article 28 of the Constitution is an entrenched provision by virtue of Article 44 which prohibits derogation from the rights enumerated in that Article. The rights upon which there shall be no derogation from their enjoyment are:

- (a) freedom from torture, cruel, inhuman or degrading treatment or punishment
- (b) freedom from slavery or servitude,
- (c) the right to fair hearing
- (d) the right to an order of habeas corpus.

Rule 98 of the Rules of Parliament prohibits the introduction of Bills derogating from particular human rights and freedoms. It states:

***"No Bill, motion or amendment shall be introduced in the house which in opinion of the Speaker is likely to result in the derogation from the enjoyment of any of the a particular human rights and freedoms specified in Article 44 of the Constitution.***

By amending Article 41 in such a way that it restricted the right of to a fair hearing, Section 5 of the Act amended by infection Article 44 of the Constitution which is an entrenched provision under Article 259 2(c). Such an amendment required not only to be passed by two-thirds majority in Parliament, but also the approval of the people in a referendum. Failure to hold a referendum rendered the amendment ineffectual and void.

As regards Article 128 (1), (2) and (3) which guarantee the independence of the Judiciary and call upon the various agencies of the State to accord Courts any assistance required to ensure their ineffectiveness, I am unable to say that the amendments by implication or infection amended these provisions. There was no challenge to or conflict with these provisions, despite the attempted restriction of access to Parliamentary records.

However, as regards Article 137 of the Constitution which provides for the right to challenge the Constitutionality of an Act of Parliament or any action by any person or authority, I am of the opinion that this provision was amended by implication. This right, like the right to a fair hearing cannot be exercised effectively if the petitioner is not guaranteed the right of access to information in possession of Parliament.

The third issue was whether the correct procedure was followed in making the amendments. It will be recalled that three methods of amending of the Constitution are provided for in Articles 258, 259 and 260. According to the first method, amendments require only two-thirds majority in Parliament, under the second method, amendments require in addition to two thirds majority, approval in a referendum (Article 259 (2), and

under the third method amendments require additional ratification by district councils (Article 260), in addition to two thirds majority in Parliament.

The Bill cannot be passed unless it is supported at the second and third readings in Parliament by not less than two-thirds of all Members of Parliament. In addition Article 262 lays down procedural requirements for the amendments to be valid. It states *inter alia*.

*"(1) The votes on the second and third readings referred to in Articles 259 and 260 of the Constitution shall be separated by at least fourteen sitting days of Parliament.*

*(2) A bill for the amendment of this constitution which has been passed in accordance with this chapter shall be assented to by the President only if-*

*(a) it is accompanied by a certificate of the Speaker that the provisions of this chapter have been complied with in relation to it, and in the case of a bill to amend provision to which article 259 or 260 of this Constitution applies, it is accompanied by a certificate of the Electoral Commission that the amendment has been approved at the referendum or as the case may be, ratified by the district councils in accordance with this chapter.*

*(3) Where the provisions of clause (2) of this Article are complied with in the case of a bill to which Articles 259 or 260 of this Constitution applies, the President shall not refuse to assent to the bill"*

In 1996 Parliament made Rules to govern its procedure. Rule 96 which deals with urgent matters provides,

*"96 (1) Where the House determines upon the recommendation of the appropriate Committee of the House appointed for the purpose, that a particular Bill is of an urgent nature, that Bill may be introduced without publication.*

*(2) Copies of a Bill referred to in sub-rule (r) shall be distributed to Members and the Bill may be taken through all its stages in a day notwithstanding anything in these Rules."*

In her judgment, the learned Deputy Chief Justice said this on the issue of procedure:

*"It was the submission of Mr Lule that Parliamentary rules could not supersede those of the Constitution. I would like to point out that the Constitution does not provide for a special procedure to be followed by Parliament when enacting Constitutional Amendment Acts other than those enacted under Article 259 and 260 (supra). It only makes provision for Parliament to make its own Rules under Article 94(1). There was nothing to stop Parliament from applying its own Rules.*

*The affidavits sworn by 2<sup>nd</sup> and 3<sup>rd</sup> petitioners did not indicate that Parliament did not comply with the correct rules of procedure for enactment of Acts. Parliament has powers to waive its rules. It was entitled to resort to its own rules to regulate its proceedings during the debate of the Constitution (Amendment) Bill No.16 of 2000. It is provided with powers to waive any referendum of its rules where a particular Bill is considered urgent. Under rule 96 (4) a Bill may be taken through all the stages in a day notwithstanding anything in those Rules."*

On failure to attach Speaker's Certificate, she cited the decision in the Constitutional Petition No.8/2000 "Uganda Law Society & Justice Semuyaba Act vs Attorney General, that failure to attach the Speaker's Certificate to the Bill would not be fatal to the validity as the Act. Yet she acknowledged that:

*"The above provisions of the Constitution were intended to save the President from signing for something not legally passed by Parliament. It was the intention of the legislators to render the law passed by Parliament void. To them the issuance of a certificate were procedural and administrative requirement which does not go to the root of the law making process."*

The learned Deputy Chief Justice quoted the doctrine of *omnia praesumuntur rite et solemniter acta donee probetur in contrarium* (all things are presumed to have been

performed with all the formalities **until it is** proved to the contrary). She observed in this connection that the petitioner had the burden of proof which was not discharged.

***"It is true that the petitioners filed sworn evidence but in my view it does not add much to their petition. I am unable to find satisfactory evidence to substantiate the allegations made."***

The learned Deputy Chief Justice concluded:

***" I do not agree with Mr Lule as already pointed out the amendment of Article 97 resulted in the amendment of Articles 41 (1) and 44 of the Constitution which he argued blocked ordinary citizens to have access to information. I disagree with him that the said amendments were linked to other Articles which had not been specifically amended like Article 137 (a) (supra)."***

The learned Deputy Chief Justice also held that the required spacing laid down by Article 262 of 14 days between the 2<sup>nd</sup> and 3<sup>rd</sup> readings was not applicable to the Bill No.16 of 2000. She concluded,

***"The failure to observe the 14 days period stipulated under Article 262 (1) of the Constitution in my view, was not applicable to Bill No.16 of 2000. All that is required for the amendments under 258 and 261 of the Constitution is the support at 2<sup>nd</sup> and 3<sup>rd</sup> readings of not less than two thirds of all the members of Parliament which was not disputed in this petition."***

***There was no requirement of spacing at any stage of Bill No.16 of 2000 as it is contended for the petitioners."***

I am unable to agree with those conclusions. Parliament has the power to make Rules of Procedure to govern its business, but those Rules had to be consistent or *intravires* the Constitution. Parliament cannot change provisions of the Constitution through its Rules. It can only make Rules to implement the provisions of the Constitution. Therefore in making amendments the correct procedure laid down in Articles 258 to 262 had to be strictly complied with. Those provisions could not be waived by the Rules. In the present

case, the mandatory provisions relating to entrenched provisions were not complied with. These provisions require separating the second and third readings of the amendment Bill by at least 14 sitting days of Parliament, and the holding of a referendum or ratification by district councils in specified cases.

The Uganda Constitution is therefore a rigid one as it cannot be amended easily. Although it is not cast in stone, it is intended to serve not only the present generation but the generations yet to come.

The failure to produce a Certificate of the Speaker and a Certificate of the Electoral Commission which accompanied the Bill was fatal to the amendment process where these certificates were required. Once the petitioner alleged that the Certificates were not attached, it was incumbent upon the Respondent Attorney General to show that the Certificates had been attached to the Bill. It was a fact within the special knowledge of the Attorney General. The Attorney General failed to do so. The presumption that such certificates existed was rebutted by the allegations made by the petitions which were not seriously challenged. In the result I would hold that Section 5 of Act 13 of 2000 was void for having not been enacted in accordance with the provisions of the Constitution.

In paragraph 1 (e) of the petition, the Constitutionality of Section 3 of Act 13 of 2000 which introduced a new Article 257 A in the Constitution was challenged for being inconsistent with Articles 88 and 137 (1) and (3) of the Constitution on the ground that they provide for a procedure where Members of Parliament may without a quorum vote on any question proposed for a decision of Parliament by using a voice vote of "**Ayes**" and "**Noes**" which by reason of the amendment cannot be subjected to the scrutiny of the Courts when it is the duty of the Courts to interpret and protect the Constitution under Article 128 (1), (2) and (3) of the Constitution and Clause 1 of the National Objectives and Directive Principles of State Policy.

This ground was not argued in the Constitutional Court. The Court therefore did not pronounce itself on whether the procedure of voting by "**Ayes**" and "**Noes**" was in conflict with the provisions of the Constitution. The issue seems to have been raised in this Court in ground 5 of the Memorandum of Appeal. This ground complains that the learned majority Justices of the Constitutional Court erred in law when they failed to

distinguish between waiver of Parliament procedure and non-compliance with the Constitutional provisions under Articles 258, 259 and 262 of the Constitution. Be that as it may, I shall briefly, comment on the issue because of its importance.

Section 6 of the Constitution (Amendment) Act 2000 amended the

Constitution by adding Section 257 A which provided:

*"Subject to Article 92 of this Constitution -*

- (a) no Act, resolution or decision passed or taken or purported to have been passed or taken by Parliament at any time after the commencement of this Constitution using the procedure of voting by a voice vote namely, by the voices of "Ayes" for those in favour of the question and "Noes" for those against the question shall be taken to be invalid by reason of the use of that procedure;*
- (b) no Act passed or purported to have been passed by Parliament at any time after the commencements of this Constitution shall be taken to be invalid by reason of the fact that the bill for the Act was not discussed and recommendations made on it to Parliament by a Standing Committee."*

The declared object of this amendment was to ratify certain past acts relating to procedure of Parliament. This is clear from the long title to the Act and the marginal note to the Article which states, *"Ratification of certain acts relating to procedure of Parliament."* This provision was not intended to provide a procedure for passing future amendments to the Constitution. It was a validating provision. I am unable to say that this provision is in conflict with Articles 88 and 137 (1) and (3) of the Constitution.

In my opinion however, the procedure provided in Article 257A does not apply to the amendment of the Constitution where a two-thirds majority of all Members of Parliament with voting rights is required to pass such an amendment. The procedure of voting by *"Ayes"* and *"Noes"* is incapable of providing accuracy and certainty that the necessary numbers of Members of Parliament required to pass such important legislation have been obtained. The procedure may be applicable in deciding questions where only a simple majority of Members of Parliament present and voting is required, in non-contentions matters, as provided under Article 89 (1) of the Constitution.

In the result this appeal should partially succeed. I would hold that ground two should fail, ground three should partially succeed, and grounds 1, 4, 5 and 6 should succeed.

In view of the fact that the appeal has substantially succeeded, I would grant the appellants the costs in this Court and Courts below. I would allow a certificate for two Counsel.

As the other members of the Court substantially agree with the judgment of Kanyeihamba JSC, and the orders he has proposed, this appeal is allowed with declarations and orders as set out in the judgment of the learned Justice of Supreme Court.

### **JUDGMENT OF KANYEIHAMBA, J.S.C.**

The background to this appeal is as follows: -

Sometime in 1999, Paul K. Ssemogerere and Zachary Olum petitioned the Constitutional Court in constitutional petition No. 3 of the same year seeking a declaration that the Referendum and Other Provisions Act of 1999 which was passed by Parliament on 1<sup>st</sup> July, 1999 was null and void on the ground that Parliament had passed it without a quorum. The Constitutional Court dismissed the petition as incompetent and decided that it had no jurisdiction to entertain the petition. The petitioners appealed to this court by way of Constitutional Appeal No. 1 of 2000. On May 31<sup>st</sup>, 2000, we delivered judgment in which we allowed the appeal and held that the Constitutional Court had jurisdiction to decide whether or not the Referendum and Other Provisions Act was passed in accordance with the provisions of the Constitution. We directed that the Constitutional Court should hear the petition on its merits.

Following our judgment in that appeal, the Constitutional Court heard Constitutional Petition No. 3 of 1999 between the same parties and delivered its judgment on 10<sup>th</sup> August, 2000. In that judgment, the Constitutional Court declared null and void the Referendum and Other Provisions Act No. 2 of 1999 which had been passed by

Parliament without the requisite quorum and in disregard of the Constitutional provisions applicable. As a result of that judgment, Parliament passed the first amendment to the 1995 Constitution, namely the Constitution (Amendment) Act No. 13 of 2000. It was introduced in Parliament, debated, passed and received the Presidential Assent on the same day, namely the 31st of August, 2000.

The three appellants, Messrs Paul Ssemogerere, Zachary Olum and Ms. Juliet Rainer Kafire, filed a constitutional petition against the Attorney General challenging, amongst other things, the constitutionality of the Constitution (Amendment) Act No. 13 of 2000.

The petitioners, filed their petition in the Constitutional Court under Article 137 of the Constitution. In the petition, they, *inter alia*, challenged the validity of the Constitution (Amendment) Act 13 of 2000. The petition was supported and opposed by several affidavits. The petition contained several grounds and prayers. However, the Constitutional Court, having held that it was bound by its previous decisions on similar matters, declared by a majority that it had no jurisdiction to interpret one provision of the Constitution against another or others. It decided that it could only hear one ground which was framed by the Court itself, namely, whether Act 13 of 2000 was passed in compliance with the procedural requirements for the amendment of the Constitution. In consequence, by a majority of three to two, the Constitutional Court dismissed the petition and held that the Constitution (Amendment) Act 13 of 2000 had properly amended articles 88, 89, 90, 97 and 257 which were specifically enumerated in the long title to the amending Bill. The Court further held that the Act had not amended any other Articles of the Constitution as alleged by the petitioners. The appeal before this Court is against the judgment of the majority learned Justices of the Constitutional Court.

The Memorandum of Appeal in this Court contains six grounds which are framed as follows: -

*1. The learned majority Justices of the Constitutional Court erred in law and fact when they held that Section 5 of the Constitution (Amendment) Act 2000 did not amend Articles 28, 41(1) and 44(c) of the Constitution by implication and infection which Articles require amendment in accordance with Articles 259 and 262 of the Constitution.*

*2. The learned majority Justices of the Constitutional Court erred in law and fact when they held that Section 5 of the Constitution (Amendment) Act 2000 did not amend Articles 1 and 2(1) and (2) of the Constitution by implication and infection, which Articles require any amendment to be in accordance with Articles 259 and 262.*

*3. The learned majority Justices of the Constitutional Court erred in law and fact when they held that Section 5 of the Constitution (Amendment) Act, 2000 did not amend Articles 128(1) (2) and (3) and 137(3) of the Constitution by implication and infection - which Articles require amendment in accordance with Articles 259 and 262.*

*4. The learned majority Justices of the Constitutional Court erred in law and fact when they held that the Petitioners/Appellants had not proved that Parliament did not follow the required procedure under Articles 259 and 262 of the Constitution when enacting the Constitution (Amendment) Act 2000.*

*5. The learned majority Justices of the Constitutional Court erred in law when they failed to distinguish between a waiver of Parliamentary procedure and non-compliance with the Constitutional Provisions under Articles 258, 259 and 262 of the 1995 Constitution of Uganda.*

*6. The Constitutional Court erred in law and fact and misconstrued the gist of the Petition and the petitioners' contention when they held that a Constitutional Court would have no jurisdiction to construe part of the Constitution as against the rest of the Constitution and thereby came to a wrong conclusion.*

Mr. Lule, S.C. and Mr. Balikuddembe represented the appellants and Mr. Bireije, Commissioner for Civil Litigation assisted by Mr. Okello Oryem, Senior State Attorney, both from the Attorney General's Chambers, appeared for the respondent.

Mr. Lule, for the appellants argued grounds 1, 2, 3, 4 and 5 together and ground 6 separately. He submitted that the appeal had arisen because of the failure by the majority learned Justices of Appeal to resolve several allegations brought before them including the allegation that the enactment of the Constitution (Amendment) Act 13 of 2000 did not

comply with the constitutional provisions for amending certain provisions of the 1995 Constitution and that some provisions of that same Act contravene or are at variance with several provisions of the 1995 Constitution.

Mr. Lule contended that Chapter 18 of the Constitution prescribes in Articles 258, 259, 261 and 262 the procedure which an amendment of the Constitution must follow. Counsel contended further that the Constitution classifies those provisions into three groups each of which requires its own special procedure that Parliament ignored when enacting Act 13 of 2000. He pointed out those provisions with which Parliament did not comply. I will be discussing them in this judgment.

Mr. Lule contended that the majority of the Justices of the Constitutional Court erred in holding that only those provisions of the Constitution which were expressly mentioned by the Act were amended. Counsel contended that whether or not a provision of a constitution is amended depends on the purpose and effect of the purported amending instrument. In law, a provision can be amended by implication or by infection. In Mr. Lule's view, even though not specifically mentioned in Act 13 of 2000, the reading of its sections indicate clearly that Articles 1, 2(1), 2(2), 28, 41(1), 44(c), 128 (1), (2), (3) and 137 (3)(a), were all amended either by implication or infection.

It was also Mr. Lule's contention that by amending Article 41, the Constitution (Amendment) Act infected Article 44(c) which prohibits any derogation from the enjoyment of the right to a fair hearing. Counsel further contended that by re-enacting Article 41 and adding on it two more clauses, Parliament not only diluted that Article's original authority, but amended it without following the procedural rules required of it by the Constitution.

Counsel submitted that previously, both this Court and the Constitutional Court had held Section 15 of the National Assembly (Powers and Privileges) Act, Cap 249 inoperative in so far as it was in conflict with the provisions of Article 41 and yet, the Constitution (Amendment) Act 13 of 2000 had restored the provisions of that earlier Act which had also been held to be in conflict with the constitutional right to a fair hearing. Counsel

contended that the necessity to seek leave from Parliament to release information from therein or to require a member of Parliament to give evidence, adversely affects the provisions of Article 41.

Mr. Lule contended that if Parliament were to effectively amend the provisions of the Constitution it had to strictly follow the procedures and conditions prescribed by the Constitution itself and therefore the majority Justices of the Constitutional Court erred in law in holding that such procedures and conditions are internal to Parliament and failure to follow them cannot affect the legislation made by that august house. In Counsel's opinion these constitutional requirements are mandatory and Parliament cannot do indirectly what it is prohibited from doing directly. In Counsel's view, for Parliament to do so would result in colourable legislation.

On ground 6, Mr. Lule contended that the majority learned Justices of the Constitutional Court erred in law in holding that they had no jurisdiction to construe one part of the constitution as against another or the rest of it. Counsel contended that the appellants had presented convincing evidence in their respective affidavits. In Counsel's view, their affidavits dealt with matters of which they had personal knowledge since two of them are Members of Parliament and had been present when the Constitution (Amendment) Bill went through its various stages in Parliament. Mr. Lule pointed out that on the other hand, the affidavit in support of the respondent's case was by a State Attorney who was not a Member of Parliament.

Counsel cited the cases of **Paul Ssemogerere and Zachary Olum v. The Attorney General**, Constitutional Appeal No. 1 of 2000, (S.C), (unreported), and **Paul Ssemogerere and Zachary Olum v. The Attorney General**, Constitutional Appeal No. 3 of 1999, (Constitutional Court), (unreported), **Major General Tinyefuza v. The Attorney General**, Constitutional Appeal No. 1 of 1997 (S.C), (unreported), **The Queen v. Big M. Drug Mart Ltd.** [1986], LRC, 332, **H.M. Seervai on the Constitutional Law of India** and **Teo Soh Lung v. Minister of Home Affairs and Others**, [1990], LRC in support of his submissions.

For the respondent, Mr. Bireije supported the majority judgment of the Constitutional Court. He contended that Parliament had correctly followed the right procedure when enacting Act 13 of 2000. Counsel contended that the only issue before the Constitutional Court for determination was whether Parliament had complied with the relevant constitutional provisions when amending articles 88, 9, 90 and 97 and in creating a new article 257A. He further contended that the petitioners had failed to produce evidence to prove their allegation that Parliament had not followed the correct procedure. In Counsel's view, the provisions which were the subject of the amendment required conformity with articles 258, 261 and 262(2)(a) of the Constitution and Parliament fully complied with these provisions. Counsel contended further that the amendments effected by Act 13 of 2000 did not require compliance with article 262(b), as claimed by counsel for the appellants. It was Mr. Bireije's further contention that all the constitutional provisions which Act 13 of 2000 affected had been clearly identified and expressly stated in the amending bill and consequently those other provisions named by the appellants as having been amended were not amended since the latter were not specifically named.

Counsel contended that the amendment did not in any way affect article 137 as alleged in the petition because even today people continue to enjoy the right to petition Court if they claim that any of their constitutional rights have been violated or threatened. Mr. Bireije conceded that the Constitutional Court has jurisdiction to harmonise various parts of the Constitution but contended that in this particular case, the Court was only concerned with one issue, namely whether Parliament had enacted Act 13 of 2000 in accordance with the constitutional procedure applicable for this kind of legislation. It was counsel's contention that Parliament had correctly complied with that procedure. He cited the cases of **Uganda Law Society and Justine Semuyaba v. Attorney General**, Constitutional Petition No. 8 of 2000, (Const. Court), (unreported), and **Dr. Rwanyarare and Haji Badru Wegulo v. Attorney General** (*infra*) in support of his submissions.

I will first consider the issue raised in ground 6 of this appeal which I regard as of a preliminary nature and on which the Constitutional Court made a finding. By a majority, the Constitutional Court held that it had no jurisdiction to consider and make a pronouncement on one part of the Constitution in relation to any other or more parts of the same Constitution. In her judgment, Mukasa-Kikonyogo, learned D.C.J., stated,

*"Once the correct procedure for enacting a Constitutional Amendment Act is complied with, its provisions become part and parcel of the Constitution. They cannot be challenged in this Court. This Court by a majority of 3 to 2 in Constitutional Petition No 5 of 1999, Dr. Rwanyarare and Haji Badru Wegulo v. Attorney General, held that this Court would not have jurisdiction to construe parts of the constitution as against the rest of the Constitution ... All that this Court could do was to determine whether the challenged Act was enacted in accordance with the procedure for enacting constitutional amendments"*

Re-echoing the same view, Kato, J.A., as he then was, observed,

*"When the petition came up for hearing on 10/11/2000, a preliminary objection was raised by Mr. Deus Byamugisha, Ag. Director for Civil Litigation on behalf of the respondent. In the objection, he challenged the jurisdiction of the Court to hear the petition since the petitioners were asking the Court to declare part of the Constitution to be inconsistent with another part. The Court ruled that it had no power to declare one article of the Constitution inconsistent with another, but it could deal with the question as to whether or not a correct procedure was followed when Act 13 of 2000 was passed."*

In her concurring judgment, Kitumba, J.A. said,

*"It is clear from the Constitution (Amendment) Act that the articles of the Constitution which Parliament amended were specified and are articles 88, 89, 90, 97 and 257. It is not the duty of this Court to look into the effect or implication of those amendments as doing so would be trying to interpret one constitutional provision against another. This Court declined to do that. See James Rwanyarare and Haji Badru Wegulo v. Attorney General, Constitutional Petition No. 5 of 1999 and this Court's ruling in the instant petition on 29<sup>th</sup> November, 2000."*

I note that in the judgments of the majority Justices of the Constitutional Court, great reliance was placed on the decisions of that same court in **Dr. Rwanyarare and Wegulo v. Attorney General**, Constitutional Petition No. 5 of 1999, (Const. Court), (unreported), **Uganda Law Society and Justine Semuyaba v. Attorney General**, Constitutional Petition No. 8 of 2000, (Const. Court), (unreported), **Karuhanga Chapaa and Two Others v. Attorney General**, Constitutional Petition No. 6 of 2000, (Const. Court), (unreported). It is also evident from both the record of proceedings and the judgments of the Constitutional Court that other authorities including binding ones from this Court were cited by Counsel for the appellants. In these other authorities such as **Major General Tinyefuza v. Attorney General**, (*supra*), **Paul Ssemogerere and Zachary Olum v. Attorney General**, (*supra*) and **Ismail Serugo v. Kampala City Council and Another**, Constitutional Appeal No. 2 of 1998, (S.C), (unreported), judicial interpretation of constitutional instruments and other legal documents was extensively and, in my opinion, exhaustively examined, explained and pronounced upon by this Court. Other leading authorities were cited and relied upon by this court. Moreover, in guiding the Constitutional Court, some of these authorities were cited by Counsel in favour of the appellants' petition.

The record of proceedings before the Constitutional Court indicates quite clearly that counsel for the appellants made submissions on how constitutional amendments are interpreted by courts. Thus, Mr. Lule, lead counsel for the appellants in the Constitutional Court submitted,

*"Constitutional Appeal No. 1 of 2000 at pp.32 -Article 41 was held to be linked with Article 44 by Hon. Wambuzi, C.J. at pp.15 of his judgment. He linked various Articles - Amendment of one affects others. Hon. Tsekooko's, pp. 7 and 8, Hon. Karokora's p.7 and 9, Hon. Mulenga's pp.15 and 19, Hon. Kanyeihamba's pp.10, 11 and 14. Hon. Oder pp.5 and 10. I submit Articles 41 and 44, 128 and 28(1) are all linked."*

Counsel for the appellants cited additional authorities from the Commonwealth and other jurisdictions such as **The Bribery Commissioner v. Pedrick Ranasinghe** [1965] A.C. 132 **Phato v. Attorney General of South Africa** (1999) 3 LRC 587. **The Queen v. Big**

**M. Drug Mart**, LRC (1986) 332. With great respect, I do not agree with the learned DCJ that all the authorities cited were irrelevant.

With great respect, the majority of the learned Justices of the Constitutional Court do not appear to have taken into account counsel's submissions and relevant authorities cited to that court. The approach they adopted is almost tantamount to taking a maiden voyage into the mystery of interpretation.

The view of the majority learned Justices of the Constitutional Court that once Parliament has passed a constitutional amendment correctly that amendment becomes part of the constitution and thereafter cannot be questioned in a court of law is, to say the least, a negation of Article 137(3)(a) which provides that *"an Act of Parliament or any other law or anything in or done under the authority of any law is inconsistent with or in contravention of this constitution may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate."*

In my view, an Act of Parliament which is challenged under Article 137(3) remains uncertain until the appropriate court has pronounced itself upon it. The Constitutional Court is under a duty to make a declaration, one way or the other. In denying that they had jurisdiction to make a declaration on this petition, the learned majority Justices of the Constitutional Court abdicated the function of that court.

Only the dissenting learned Justices of the Constitutional Court found it necessary to refer to these other authorities. Thus, Twinomujuni, J.A., observed in his judgment,

*"Following its earlier decisions and those of the Supreme Court of Uganda in Tinyefuza v. Attorney General, Constitutional Case No. 1 of 1996, Attorney General v. Tinyefuza, Constitutional Appeal No. 1 of 1997 and Ssemogerere and Olum v. Attorney General,*

*Constitutional Appeal No. 1 of 2000, this Court held that: -*

**(a)** *Section 15 of the National Assembly (Powers and Privileges) Act contravened Article 41 of the Constitution.*

**(b)** *Section 15 of the National Assembly (Powers and Privileges) Act contravened Article 28(1), 41 and 44 (c) of the Constitution.*

*It was a result of these decisions that Paul Ssemogerere and Hon. Zachary Olum were able to obtain the evidence that enabled them to succeed in Constitutional Petition No. 3 of 1999."*

Justice Mpagi-Bahigeine, J.A., the other dissenting learned Justice of the Constitutional Court referred to those same binding and leading authorities including **The Attorney General v. Major General David Tinyefuza** (*supra*), **Paul Ssemogerere and Another v. Attorney General** (*supra*) and **The Queen v. Big M. Drug Mart Ltd.**, (1986) LRC, 332, in her judgment.

In the case of **Tinyefuza v. Attorney General** (*supra*), the petition was considered by the Constitutional Court differently constituted from that which heard this appeal and on the constitutional interpretation, Manyindo, D.C.J, as he then was, observed,

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

The other learned Justices of the Court, Ag. Justice Okello, Ag. Justice Mpagi-Bahigeine, Ag. Justice Tabaro and Ag. Justice Egonda-Ntende agreed or expressed the same views.

Guidance as to how to interpret a constitutional instrument in relation to other documents including those which are not specifically mentioned by that instrument, may be discerned from Article 273 of the Constitution. It provides,

*"273(1) subject to the provisions of this article, the operation of the existing law after the coming into force of this Constitution shall not be affected by the coming into force of this Constitution, but the existing law shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution."*

This provision shows quite clearly that provisions of the Constitution or any other law do not have to be specifically mentioned to be amended by implication or infection. I am therefore not persuaded by the arguments of respondent's counsel that if constitutional provisions are not specifically mentioned in an amending bill they cannot be held to have been amended. This argument is not founded in logic or precedent. It attempts to clothe Parliament with an apparent authority to do what it is not permitted to do by the Constitution with the result that what it enacts has the appearance of a law, but it is a law which has no substance to it. This is what the learned lead counsel for the appellants called colourable legislation. Curiously however, this assertion managed to find comfortable accommodation in the judgments of some of the learned Justices of the Constitutional Court.

In the Canadian Supreme Court case of **The Queen v. Big M. Drug Mart Ltd.** (*supra*) at p332, it was said,

*"Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realised through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate*

*impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity."*

In **Smith Dakota v. North Carolina**, 192 US 268(1940) the U.S. Supreme Court expressed the opinion that:

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

When a Court ignores or overlooks a binding precedent and decides a case as if that precedent does not exist, its decision is said to be a decision *per incurium*. I agree with Twinomujuni, J.A., where he laments in his dissenting judgment that in the Constitutional Court,

*"We appear to be bent on adjudicating this Court out of existence by declining to exercise jurisdiction conferred expressly or by implication by Article 137(3)."*

In my opinion, the majority of the Justices of the Constitutional Court were in error and their decision, in so far as it holds that that Court has no jurisdiction to adjudicate on a provision of the Constitution in relation to others, is a decision *per incurium*. In this context, it is my view that petition 5 of 1999, **Dr. James Rwanyarare and Haji Badru Wegulo v. The Attorney General**, and Petition No. 8 of 2000, **The Uganda Law Society and Another v. The Attorney General**, were wrongly decided. Ground six of this appeal therefore ought to succeed.

I will next consider and resolve grounds 1, 2, 3, and 4. These grounds relate to the contention by the appellants that the Constitutional Court erred in holding that Act 13 of 2000 did not amend Articles 1, 2(1), (2), 28, 41(1), 44(c), 128(2), (3) and 137(3) of the Constitution and that even in relation to those Articles it intended to amend, Parliament did not comply with the provisions of the Constitution.

In order to resolve this matter, it is necessary to examine what is meant by amending the Constitution, peruse the provisions of the Constitutional (Amendment) Act 13 of 2000, and then decide whether or not its provisions had the effect of amending the Articles and clauses of the Constitution which have been enumerated above, either directly, indirectly or by infection as contended by the appellants.

I find the meaning of "Amendment of the Constitution" as ably set out in the dissenting judgment of Twinomujuni, J.A., to be most persuasive. The learned Justice of the Constitutional Court said,

***"The meaning of this phrase is to be found in Article 258 of the Constitution. It states that the Constitution can only be amended if;***

***'(i) An Act of Parliament is passed.***

***(ii) The Act has the effect of adding to, variation (sic.) or repealing any provision of the Constitution.***

***(iii) The Act has been passed in accordance with Chapter Eighteen of the Constitution.'***

***If an Act of Parliament has the effect of adding to, varying or repealing any provision of the Constitution, then the Act is said to have amended the affected article of the constitution. There is no difference whether the Act is an ordinary Act of Parliament or an Act intended to amend the Constitution. The amendment may be effected expressly, by implication or by infection, as long as the result is to add to, vary or repeal a provision of the Constitution. It is not material whether the amending Act states categorically that the Act is intended to affect a specified provision of the Constitution. It is the effect of the amendment that matters."***

The Constitution (Amendment) Act 13 of 2000 which was enacted, assented to and commenced on the 31st day of August, 2000, is brief and contains six sections. The long title to the Act reads as follows:-

***"An Act to repeal and replace article 88 of the Constitution and make provision in relation to quorum; to amend article 89 of the Constitution to provide for the manner of ascertaining the majority of votes cast on any question; to repeal and replace article***

*90 of the Constitution; to recognise the role of the Committee of the Whole House in the passing of Bills and to make provision in relation to the functions of committees of Parliament; to amend Article 97 of the Constitution to protect the proceedings of Parliament from being used outside Parliament without the leave of Parliament; and to insert a new Article 257A to ratify certain past acts relating to procedure."*

Section 1 of the Act prescribes the short title to the Act. Sections 2-5 contain provisions which attempt to amend or would have the effect of amending existing provisions of the Constitution. Section 6 creates an additional clause to the Constitution. On the face of it, Act 13 of 2000 shows that Parliament expressly attempted to amend articles 41, 88, 89, 90, 97 and 257 of the Constitution. Two questions to be answered are whether any other constitutional provisions were amended by implication or infection and whether all the amendments whether express, implied or by infection, were passed in accordance with the procedure prescribed by the Constitution.

I will first consider whether each of the provisions listed in the grounds of appeal was amended in any of the ways mentioned and if so whether the procedure prescribed by the Constitution for amending it were adhered to by Parliament. The appellants deponed and their counsel submitted that Section 5 of Act 13 of 2000, amended Articles 1 and 2(1) and (2), 128(1), (2) and 137(3)(a) of the Constitution. The respondent contended that since none of these Articles and clauses were specifically mentioned in the amending Act, they were not amended. Section 5 provides as follows:

*"Article 97 of the Constitution is amended -*

**(a)** *By renumbering the existing article as clause (1) of that article; and*

**(b)** *By inserting immediately after the new clause (1) the following new clauses,*

**(2)** *Notwithstanding article 41 of this Constitution, no Member or Officer of Parliament and no person employed to take minutes of evidence before Parliament or any Committee of Parliament shall give evidence elsewhere in respect of the contents of such minutes of evidence or the contents of any document laid before Parliament or any such committee, as the case may be, or in respect of any proceedings or*

*examination held before Parliament or such committee, without the special leave of Parliament first obtained.*

(3) *The special leave referred to in clause (2) of this article may, during recess or adjournment of Parliament be given by the Speaker or in the absence or incapacity of the Speaker or during a dissolution of Parliament, by the Clerk to Parliament."*

In my view, the enactment of section 1 of Act 13 of 2000 *per se*, does not affect or amend the provisions of Article 1 of the 1995 Constitution since in enacting the Act, Parliament believed it was exercising the sovereignty of the people as their representative body. The enactment was not an attempt to oust the sovereignty of the people even if Parliament may have been mistaken in doing what it did.

On the other hand, Section 5, in so far as it prescribes new clauses (2) and (3) of Article 97 which are intended to restrict a citizen's unhampered "access to information in the possession of the state or any other organ or agency of the State" when the Constitution of Uganda in Article 41 guarantees and entrenches that right, is not only in conflict with that same article but constitutes a blatant attempt to clothe Parliament with supremacy which in Uganda lies in the majesty and sanctity of the Constitution.

Regarding the right of a citizen to access to information in the possession of the State, my learned brother, Mulenga, J.S.C. expressed a view in **Paul K. Ssemogerere, Zachary Olum and Juliet Rainer Kafire v. The Attorney General**, Const. Appeal No. 1 of 2002, (*supra*), with which I agree entirely. The learned Justice said,

*"Whereas under s.121 of the Evidence Act the state had unfettered discretion whether or not to release an official document on grounds of national security, Article 41 of the Constitution recognises the citizen's right of access to any information in the possession of the state except where release of such information is likely to prejudice state security or sovereignty. Consequently, the court has become the arbiter between the citizen who desires to access such information and the state which may want to protect the information from release."*

Consequently, in my opinion, in so far as section 5 of Act 13 of 2000 purports to restrict that access unconstitutionally, it conflicts with the Constitution and therefore, is null and void.

Under Article 28(1), a person is entitled to the right of a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. Consequently, by subjecting that right to the exigencies of Parliament and the whimsical discretion of its personnel, Section 5 attempts to amend Article 28(1) by implication and Article 44(c) by infection. Article 128 prescribes and guarantees the independence of the Judiciary. In my view, the provisions of Act 13 of 2000, while not affecting that independence, whittle away the importance of Article 28(3). Clause 3 of Article 28 enjoins all organs and agencies of the State which include Parliament, Members of Parliament, the Speaker and the Clerk of Parliament to accord to the Courts such assistance as may be required to ensure the effectiveness of the Courts. By giving Parliament, the Speaker and the Clerk of Parliament the sole discretion as to who and what may assist the Court and when, the function of the Courts to administer justice fairly, speedily and impartially would be so severely restricted by the provisions of Act 13 of 2000 as to be rendered illusory. Similarly, in so far as Section 5 of Act 13 of 2000 restricts the right of Members of Parliament and the use of

Hansard and other Parliamentary records to assist petitioners, the Constitutional Court and other courts to proceed effectively, the provisions of Article 137(3) and those others guaranteeing the administration of justice would be amended by infection.

I now turn to the second issue of procedure. It is to be appreciated that all the provisions of the Uganda Constitution are entrenched. Not a single provision of the Constitution may be altered without following a special procedure. The easiest and simplest of these procedures is an amendment by Parliament alone when the sole purpose of the bill is to amend the Constitution and the measure is supported on the second and third readings in Parliament by not less than two-thirds of all Members of Parliament in accordance with the provisions of Article 261. In relation to bills amending articles prescribed in Articles 259 and 260, a period of at least 14 days must lapse between the 2<sup>nd</sup> and 3<sup>rd</sup> reading of the bill. The Constitution is silent as to what period of time must lapse between the second and third readings of a bill of this kind. However, whether passed under Article 261 or

under Articles 259 or 260, the bill cannot be assented to by the President unless it is accompanied by a certificate of the Speaker that the provisions of Chapter Eighteen of the Constitution have been complied with. Regarding bills passed under Article 259 and 260, there is a further requirement that they be accompanied by a Certificate of the Electoral Commission signifying that the amendment has been approved at a referendum or, as the case may be, ratified by the district councils, in accordance with the provisions of Chapter Eighteen.

In **Major General Tinyefuza's** case (*supra*), I cited the famous statement of Sir Owen Dixon which he expressed in 1965 in the Law Quarterly Review, 590 at 604 thus,

***"The law existing for the time being is supreme when it prescribes the conditions which must be fulfilled to make a law but the question of what may be done by the law so made, Parliament is supreme over the law"***,

and then concluded that if Parliament is to successfully claim and protect its powers and internal procedures it must act in accordance with the constitutional provisions which determine its legislative capacity and the manner in which it must perform its functions.

Sir Owen was of course describing situations in countries such as the United Kingdom where Parliament and not the Constitution used to be supreme. In Uganda, it is in the people and the constitution that sovereignty resides. However, even in the United Kingdom before the creation of the European Union of which that country is a member, it was always emphasized that Parliament was obliged to obey the constitutional rules which were prior to the exercise of its sovereignty.

In the case of **Stockdale v. Hansard** (1839) 9 Ad & E I, the House of Commons which is the elected chamber of the British Parliament passed a resolution authorising the printing and publication of *Hansard* which contained defamatory statements against the plaintiff. The plaintiff brought a suit against the printers and publishers of *Hansard* who were then directed by the House of Commons to plead in defence that they had printed and published *Hansard* under the express orders of the House of Commons and that that House was the sole judge of its privileges and immunities and therefore *Hansard* should

not be questioned in any court of law. The High Court of England rejected that defence on the ground that no resolution of the House of Commons alone could oust the jurisdiction of the courts since for any law to be validly passed in the United Kingdom, a legislative bill must be supported by both the House of Commons and the House of Lords and be assented to by the Monarch. These requirements constitute the formula for making law in that Kingdom and cannot be waived.

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

*"The term 'constitutional government' is apt to give the impression of a government according to the terms of a constitution. There are indeed many countries in the World to-day with written constitutions but without constitutionalism. A constitution may also be used for other purposes than a restraint upon government. It may consist to a large extent of nothing but lofty declarations of objectives and a description of the organs of government in terms that import no enforceable restraints. Such a constitution may indeed facilitate or even legitimise the assumption of dictatorial powers by the government. Indeed, it is not an exaggeration to conclude that for many countries, a constitution is nothing more than a proclamation of what governments are entitled to do, and often do, to restrain the liberty of citizens or deprive them of proprietary interests. In a number of developing countries, constitutions are perceived by those in power, not as protectors of human rights and the liberties of the individual but as instruments for legitimising the exercise of power. For the opponents of these rulers, constitutions are understood in terms of the government's legitimacy to exercise arbitrary power, to impose unreasonable laws, arrest and detain persons whose guilt is often highly suspect, to impose restrictions on certain freedoms and rights and to do whatever the ruling oligarchy deems necessary and in the interest of society."*

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

**"WE THE PEOPLE OF UGANDA**

*Recalling our history which has been characterised by political and constitutional instability,*

*Recognising our struggles against the forces of tyranny, oppression and exploitation, Committed to building a better future by establishing a socio-economic and political order through a popular and durable national Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress,*

*Exercising our sovereign and inalienable right to determine the form of governance for our country, and having fully participated in the Constitution-making process,*

*Noting that a Constituent Assembly was established to represent us and to debate the Draft Constitution prepared by the Uganda Constitutional Commission and to adopt and enact a Constitution for Uganda, Do HEREBY, in and through this Constituent Assembly solemnly adopt, enact and give to ourselves and our posterity, this Constitution of the Republic of Uganda, this 22<sup>nd</sup> day of September, in the year 1995, FOR GOD AND MY COUNTRY."*

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

With the greatest respect, I disagree with the views of the majority of the learned Justices of the Constitutional Court which they expressed in their respective judgements. Thus, Mukasa-Kikonyogo, learned D.C.J, said,

*"There was nothing to stop Parliament from applying its own Rules' in amending the Constitution,"* Kato, J.A. reiterating what he had said in the earlier case of **Uganda Law Society and Justine Semuyaba v. The Attorney General of Uganda**, (*supra*), observed,

***"The issuance of a certificate is a mere procedural and administrative requirement which does not go to the root of the law making process.***

***The burden was upon the petitioners to adduce evidence to prove that the act complained of was done without compliance with the required procedure. The burden has not been discharged."***

Kitumba, JA., concurring, remarked,

***"Regarding the absence of the certificate of compliance from the Speaker of Parliament as required by Article 262, (2) (a), I agree with Mr. Bireije's submissions that absence of the certificate is not fatal."***

In my opinion, the requirements of Chapter Eighteen are mandatory and cannot be waived, not even by Parliament. Consequently, and with the greatest respect, the majority of the learned Justices of the Constitutional Court erred in law in holding that those provisions could be waived and that in any event, they were not essential to validating any constitutional amendment. Be that as it may, it is apparent that Parliament failed to comply with the Constitutional provisions when attempting to amend by implication or infection Articles 2(1), 28, 41(1), 44(c), 128(2), (3) and 137(3). Any amendments to Articles 2(1), 44 and 128 need to be referred to a decision of the people for approval by them in a referendum. The amendment of the Articles 28, 41(1) and 137(3) need to be passed by two-thirds majority on each of the second and third readings of the bills. Thereafter, a bill must be accompanied by the certificate of the Speaker to the effect that it has been passed in accordance with the provisions of Chapter Eighteen. Since the respondent has persistently denied that any of these Articles and clauses were amended, the Attorney General was hardly in a position or mood to show that these provisions were properly amended and indeed, in my opinion, he failed to do so.

Regarding the provisions which the respondent admits to have been expressly amended, namely Articles 88, 89, 90 and 97, it is my view that their amendment failed to comply with the provisions of the Constitution in that the bill effecting their amendment should have been accompanied by a certification by the Speaker of Parliament indicating that the bill had complied with the provisions before the Presidential Assent. In my opinion since the respondent failed to prove that the Constitution was complied with, the amendment failed to become an Act of Parliament and consequently, cannot be regarded as part of the Constitution.

I will finally consider and determine ground 5 of the appeal. It was contended on behalf of the appellants that the majority of the learned Justices of the Constitutional Court erred in law when they failed to distinguish between a waiver of Parliamentary procedure and non-compliance with the Constitutional provisions under Articles 258, 259 and 262 of the 1995 Constitution. Counsel for the respondent advanced submissions which were in favour of the decision of the majority Justices of the Constitutional Court. I dealt with certain aspects of this ground when determining the other grounds of this appeal. It can never be over-emphasized that whereas Constitutional provisions may be amended constitutionally, they can never be waived at all.

I respectfully disagree with all the three views of the majority Justices of the Constitutional Court which I alluded to earlier on in this judgment. Those views are not founded in our constitutional law or precedent since 1995. They constitute an error in law and fact. With great respect, the onus of proving that a bill is accompanied by the Speaker's certificate should always be on the Attorney General whenever he is a party to proceedings for it is he or she who has special knowledge of the fact in accordance with the provisions of section 105 of the Evidence Act.

I regard all the amendments contained in sections 2, 3, 4 and 5 of the Constitution (Amendment) Act 13 of 2000 as merely intended to prescribe internal rules of procedure in Parliament and its committees. They might as well have been prescribed by ordinary legislation or even rules of Parliament. However, in so far as they are intended to be substitutes for the present constitutional provisions in Articles 88, 89 and 90 and were not enacted in accordance with the procedure prescribed by the Constitution, they are null and void.

The appellants' petition before the Constitutional Court contained, *inter alia*, complaint 1(e) which was framed as follows:

***"Section 3 introducing a new provision (1) and section 6 introducing a new provision 257A of the Constitution (Amendment) Act 2000, are unconstitutional for being inconsistent with Articles 88 and 137, particularly of clauses (1) and (3) of the Constitution in that the sections do not only provide for the imaginary past violations of the Constitution in matters of formal procedure but they also lay a foundation for future violations too, where the members of Parliament may, without a quorum, vote on any question proposed for a decision of Parliament by using a voice vote of "Ayes" and "Noes" which, by reason of the amendments cannot be subjected to the scrutiny of courts when it is the courts' solemn duty to interpret and protect the Constitution under the unamended Article 128(1), (2) and (3) of the Constitution and clause 1 of the National Objectives and Directive Principles of State Policy."***

This complaint is reproduced in each of the judgments of the learned Justices of the Constitutional Court. However, none of the learned Justices makes a decision on the matter. The reason for this is easily discernible from what transpired in that court. At the commencement of the hearing of the petition and on the submissions of counsel for the respondent, the court ruled that it had no jurisdiction to enquire into the alleged unconstitutionality of the Constitution (Amendment) Act of 2000 and that the only jurisdiction it had was to determine whether that Act had been passed in accordance with the procedure laid down in the Constitution. It is thus apparent that the Constitutional Court declared itself incompetent to adjudicate on that complaint. In my view, this court must therefore pass judgment on that part of the petition for a number of reasons.

First since the Constitution excludes *ex-officio* members of Parliament from voting, the methodology of the "Ayes" and "Noes" does not ensure that those non-voting members are excluded from voting. Secondly and perhaps more significantly, Articles 259(1) and 261 provide, *inter alia*, that a bill for an Act of Parliament seeking to amend any of the provisions of the Constitution shall not be taken as passed unless it is supported at the

second and third readings by the votes of not less than "two thirds of all members of Parliament". This contrasts with the provisions of Article 89 which prescribe the procedure for passing ordinary bills and making other decisions. It is provided there that except as otherwise prescribed by the Constitution or any law consistent with it, any question proposed for decision of Parliament shall be determined by a majority of votes of the members "present and voting".

For the foregoing reasons, I regard Article 257A referred to in section 6 of the Constitution (Amendment) Act of 2000, to be superfluous and of no constitutional or legal consequences.

I am constrained to state in the clearest of terms that the procedural rules and mode of ascertaining majorities for effecting constitutional amendments are not found in the Constitution (Amendment) Act 13 of 2000 but in the provisions of the Uganda Constitution of 1995 itself. It is evident therefore that the two thirds majority of all members of Parliament required for the second and third readings of a bill to amend the constitution cannot be ascertained by voice voting under the parliamentary practice of using shouts of "Ayes" or "Noes" to indicate consent or dissent, respectively. In my view, for constitutional amendment, the voting in Parliament should be determined by the head count of members in favour of and against the amendment at the second and third reading by lobby division or such other mode as can ascertain that the supporters of the amendment are two thirds of the total number of Members of Parliament. In my opinion, it is the strict observance of the constitutional rules of procedure for determining the will of the majority in Parliament that will create and nurture a culture of belief in Ugandans that they are truly and democratically represented and governed.

For these reasons, I would allow ground 5 of the appeal.

All in all, I would allow this appeal. I would make the following declaration and orders:

1. That the Constitution (Amendment) Act 13 of 2000 is unconstitutional and should be struck down as null and void.

2. I would award costs to the appellants in this court and in the Constitutional Court.
3. I would certify two counsel for the appellants.

*Dated at Mengo this 29th January 2004.*