MINISTRY OF INTERNAL AFFAIRS

NATIONAL BUREAU FOR NGOs

PRESS RELEASE

Friday 28th April, 2023

THE CONSTITUTIONAL COURT IN UGANDA DISMISSES PETITION CHALLENGING PROVISIONS OF SECTION 44 OF THE NGO ACT, 2016

On 27th April 2023, the Constitutional court dismissed Constitutional Petition No. 20 of 2019 filed by Centre for Public Interest Law (CEPIL) against the Attorney General that sought to challenge the constitutionality of section 44(a), (b), (c), (e), (g) and (h) of the NGO Act, 2016 which CEPIL perceived to be inconsistent with Articles 8A, 21(1) and (2), 29(1)(a) and (e), 38(2) and 43(2)(c) of the constitution. The court found that the impugned provisions of Section 44 of the NGO Act, 2016 were not unconstitutional but rather demonstrably justifiable in a free and democratic society.

The NGO Bureau welcomes and expresses its gratitude for the ruling, acknowledging the importance of both the Government and NGOs in the country's development while emphasising the significance of regulating and enabling the sector. The NGO Bureau urges all NGOs to adhere to the laws governing the sector to ensure compliance.

FOR GOD AND MY COUNTRY

Okello Stephen
EXECUTIVE DIRECTOR

THE REPUBLIC OF UGANDA

THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Madrama, Kibeedi, Mugenyi & Gashirabake, JJCC)

CONSTITUTIONAL PETITION NO. 20 OF 2019

BETWEEN

CENTRE FOR PUBLIC INTEREST LAW (CEPIL) ..... PETITIONER

AND

THE ATTORNEY GENERAL ..... RESPONDENT

JUDGMENT OF MONICA K. MUGENYI, JCC

A. Introduction

1. This Petition was lodged by Centre for Public Interest in Law (CEPIL) ('the Petitioner'), a private entity that was supposedly incorporated to promote the rule of law and constitutionalism in Uganda, under Articles 137(1), (2), (3) and (4) of the Constitution and the attendant Constitutional Court (Petitions and References) Rules, 2005. The Petitioner challenges the constitutionality of section 44(a), (b), (c), (e) and (g) of the Non-Governmental Organisations Act, 2016 for its perceived inconsistency with Articles 8A, 21(1) and (2), 29(1)(a) and (e), 38(2) and 43(2)(c) of the Constitution. The Petition is supported by the affidavit of Mr. Francis Obonyo, the Petitioner's Programme Officer, that was lodged in this Court on 2nd October 2019.

2. The Petition is opposed by the office of the Attorney General ('the Respondent'), whose Answer to Petition denies the presentation of any question for constitutional interpretation or any infringement of the cited constitutional provisions by the impugned statutory provisions. The Answer to the Petition is supported by the affidavit of Mr. Stephen Okello, the then Interim Executive Director of the National Bureau for Non-Governmental Organsations under the Ministry of Internal Affairs, which affidavit was lodged in this Court on 5th December 2019.

3. At the hearing, the Petitioner was represented by Mr. Jude Byamukama and Dr. Busingye Kabumba; while Mr. Richard Adrole, a Principal State Attorney, appeared for the Respondent.

B. Petitioner's Case

4. The Petitioner is aggrieved by harassment by State agencies of Non-Governmental Organisations (NGOs) and related civic organisations that undertake advocacy work in the areas of rule of law, constitutionalism, electoral democracy, development and human rights under the pretext that they are engaged in partisan activities that are prohibited by the NGO Act, 2016. Section 44(g) of the Act, which prohibits the engagement by NGOs in partisan activities is thus contested for being inconsistent with Articles 8A, 21(1) and (2), 29(1) (a) and (e), 38(2) and 43(2)(c) of the Constitution.

5. The same provision, as well as sub-sections (a), (b), (c) and (e) of section 44, are additionally considered to be inconsistent with Articles 8A, 21 and 38(2) of the Constitution insofar as they impose unnecessarily burdensome, discriminatory and unconstitutional restrictions on NGOs' operations without corresponding restrictions in respect of other corporate entities that are incorporated under the Companies Act, 2012 and Registered Trusts. It is further alleged that NGOs engaged in activities directed towards supporting the Government are not similarly labelled 'partisan' and continue with their activities unabated.

6. The foregoing restrictions, which purportedly place NGOs under the control and interference of political appointees of State agencies, are challenged for infringing NGOs' constitutionally guaranteed autonomy and right to influence government policies by peaceful means. The prohibition against partisan activities is particularly questioned for impeding civic organisations' autonomy as guaranteed under Article 8A; as well as infringing upon their rights and freedoms under Articles 21(1) and (20, 29(1) and 38(2) of the Constitution.

7. Meanwhile, the affidavit in support of the Petition essentially regurgitates the averments in the Petition, attesting to the determination of Government agencies to clamp down on NGOs since the enactment of the NGO Act.

8. The Petitioner seeks the following remedies:

   (a) A declaration that section 44 (a), (b), (c), (e), (g) and (h) of the Non-Governmental Organisations, 2016 are unconstitutional and therefore null and void.

   (b) An order nullifying and expunging the said section 44 (a), (b), (c), (e), (g) and (h) from the Non-Governmental Organisations Act.

   (c) Costs of the Petition.

C. **Respondent's Case**

9. Conversely, it is the Respondent contends that the Petition does not disclose any question for constitutional interpretation, and the impugned statutory provision are

not inconsistent with the Constitution, as pleaded or at all. The affidavit evidence deposed on the Respondent's behalf attests to the procedures in section 44 of the NGO Act being regulatory in nature and are necessary for the proper management and regulation of NGOs in the country, but do not bar or hinder their operations. It is further averred that section 44 would be judiciously implemented and is consistent with Article 43 of the Constitution that limits the enjoyment of rights and freedoms in the interest of the public.

D. **Issues for Determination**

10. The Petition was argued on the basis of the following issues:

    I. Whether the Petition raises questions for constitutional interpretation.

    II. Whether section 44(a), (b), (c), (e), (g) and (h) of the Non-Governmental Organisations Act violate Articles 8A, 21, 29 and 38 of the Constitution.

    III. What are the remedies available.

E. **Determination**

11. The issues for determination shall be considered as framed by the parties.

Issue No. 1: *Whether the Petition raises questions for constitutional interpretation.*

12. The Petitioner acknowledges that this Court had adjudicated a related petition in **Human Rights Network & Others v Attorney General, Constitutional Petition No. 5 of 2009**, but contends that the said petition was grounded in the now defunct Non-Governmental Organisations Registration Act, Cap. 113 that has since been replaced with the Non-Governmental Organisations Act, 2016, which is the subject of the present Petition.

13. It is argued that the Petition discloses a cause of action under Article 137(3)(a) of the Constitution, and what would amount to a cause of action under that constitutional provision was determined in Raphael Baku & Another v Attorney General, Constitutional Appeal No. 1 of 2003 as follows (per Kanyeihamba, JSC):

> In a number of cases such as *Attorney General v. Major General David Tinyefuza, Constitutional Appeal No. 1 of 1997(S.C.) and Serugo v. Kampala City Council,*

> *Constitutional Appeal No. 2 of 1998 (S.C.)* this court has expressed the view that in constitutional petitions brought under Article 137(3) of the Constitution, a cause of action is disclosed if the petitioner alleges the act or omission complained of and cites the provision of the Constitution which has been contravened and prays for a declaration.

14. In this case, the Petitioner relies on the averments in paragraphs 4 to 9 of the affidavit in support of the Petition, which state the inconsistencies between the impugned provisions of the NGO Act and the invoked constitutional provisions, and seeks declarations to that effect. It is thus considered to disclose a cause of action and present questions for constitutional interpretation.

15. Conversely, the Respondent relies on this Court's observation in **Jude Mbabali v Edward Kiwanuka Sekandi, Constitutional Petition No. 28 of 2012** that not every constitutional violation must end up before the Constitutional Court, to argue that the Petition before us neither raises a question for constitutional interpretation nor discloses a cause of action, and no evidence had been adduced in support of the allegations of fact made therein.

16. The foregoing view is roundly dismissed in a rejoinder by the Petitioner that essentially reiterates the contention that to the extent that section 44(a), (b), (c), (e), (g) and (h) are considered to be inconsistent with Articles 8A, 21(1) and (2), 29(1)(a) and (e), 38(2) and 43(2(c), a cause of action had been disclosed.

17. With tremendous respect, I shall not belabour this issue. I think it is abundantly clear that the Petition does raise numerous questions for constitutional interpretation that can be summed up as whether the special obligations highlighted under section 44 of the NGO Act are consistent with the cited constitutional provisions. I therefore find no merit in *Issue No. 1*.

Issue No. 2: *Whether section 44(a), (b), (c), (e), (g) and (h) of the Non-Governmental Organisations Act violate Articles 8A, 21, 29 and 38 of the Constitution.*

18. It is the Petitioner's contention that the impugned provisions of the NGO Act derogate on NGOs' autonomy and independence as underscored in Objective II(v) and (vi) of the Constitution's national objectives and directive principles of state

policy ('the National Objectives'); the freedom of speech, expression and association of NGOs as juridical persons as articulated in Articles 29(1)(a) and (e), and their right to participate in peaceful activities to influence government policies as delineated in Article 38(2) of the Constitution.

19. The impugned provisions are opined to be discriminatory in contravention of Article 21 insofar as the restrictions therein do not extend to private companies and Trusts which in principle enjoy similar legal status as NGOs. The prohibition in section 44(g) against engagement in partisan politics is particularly opined to be unjustifiable in a free and democratic society contrary to the dictates of Article 43(2)(c) of the Constitution.

20. The impugned provisions of the NGO Act are reproduced alongside the invoked constitutional provisions below.

Section 44 of the NGO Act: *Special obligations*

An organisation shall –

(a) not carry out activities in any part of the country, unless it has received the approval of the DNMC and Local Government of that area and has signed a memorandum of understanding with the Local Government to that effect;

(b) not extend its operations to any new area beyond the area it is permitted to operate unless it has received a recommendation from the Bureau through the DNMC of that area;

(c) co-operate with local councils in the area of its operation and relevant DNMC and SNMC;

(d) .....

(e) restrict its operations to the area of Uganda in respect of which it is permitted to operate;

(f) .....

(g) be non-partisan and shall not engage in fundraising or campaigning to support or oppose any political party or candidate for an appointive office or elective political office, nor may it propose or register a candidate for elective political office; and

(h) have a memorandum of understanding with its donors, sponsors, affiliates, local and foreigner partners, if any, specifying the terms and conditions of ownership, employment, resources mobilised for the organisation and any other relevant matter.

Constitutional Provisions

Article 8A: *National interest*

(1) Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives and directive principles of state policy.

(2) **Parliament shall make laws relevant for purposes of giving full effect to clause (1) of this Article**.

Article 21(1) & (2): *Equality and freedom from discrimination*

(1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.

(2) Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

Article 29(1)(a) & (e): *Protection of freedom of conscience, expression, movement, religion, assembly and association*

(1) Every person shall have the right to –

(a) Freedom of speech and expression which shall include freedom of the press and other media;

(b) .....

(c) .....

(d) .....; and

(e) Freedom of association which shall include the freedom to form and join associations or unions, including trade unions and political and other civic organisations.

Article 38(2): *Civic rights and activities*

(1) .....

(2) Every Ugandan has a right to participate in peaceful activities to influence the policies of government through civic organisations.

Article 43(2)(c): *General limitation on fundamental and other human rights and freedoms*

(1) In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.

(2) Public interest under this article shall not permit –

(a) .....

(b) .....

(c) **Any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.**

21. Conversely, the Respondent contends that the impugned statutory provisions are intended to ensure that NGOs do not pursue objectives that are contrary to public policy, to wit the Constitution and other laws, and undertake their activities in the geographical areas of their registration. It is argued that section 44 of the NGOs Act does not interfere with NGOs' independence as pursuant to their registration they are free to pursue their declared objectives. The proscription against NGOs' engagement in partisan political activities is opined to prevent organisations that are regulated under one legal regime undertaking activities that ensue under another regulatory regime, the Political Parties and Organizations Act, 2005. Nonetheless, the Petition is considered to fall short on proof NGOs harassment on account of engaging in partisan activities.

22. Learned State Counsel relies on the definition of discrimination in **Hon. Lt (Rtd) Saleh Kamba v Attorney General, Constitutional Petition No. 38 of 2012** to argue that the allegation of discrimination raised by the Petitioner does not fall under Article 21 of the Constitution. In that case it was held:

> "To discriminate" for purposes of Article 21 of the Constitution is to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, or religion, social or economic standing, political opinion or disability.

23. It is argued, in any event, that the rights delineated in Articles 21, 29 and 38 are not non-derogable rights within the confines of Article 44 of the Constitution, and

can be curtailed in the public interest as stipulated under Article 43(2) of the Constitution. This position is supported by the observation in **Charles Onyango Obbo & Another v Attorney General (2004) UGSC 81**[1] that '**subject to clause 2 (of Article 43), any law that derogates from any human right in order to prevent prejudice to the rights or freedoms of others or in public interest, is not inconsistent with the constitution**.'

24. It is the Respondent's contention that insofar as the absence of NGOs' regulation was in **Human Rights Network & Others v Attorney General, Constitutional petition No. 5 of 2009** adjudged to go against the values, norms and aspirations of the Ugandan people, the NGO Act is necessary for the good governance of the country and section 44 is, to that extent, demonstrably justifiable in a free and democratic society.

25. By way of reply, the Petitioner maintains the contention that the impugned provisions are prohibitive rather than regulatory given that NGOs cannot pursue their objectives in a given locality without subjecting themselves to the whims of local government authorities and the NGO Bureau. Citing Article 8A of the Constitution and this Court's decision in **Nathan Nandala Mafabi & Others v Attorney General, Constitutional Petition No. 46 of 2012**, it is argued that the autonomy and independence of any legal person cannot be undermined for no justifiable reason. That position is buttressed by the observation in **Human Rights Network Uganda & Others v Attorney General, Constitutional Petition No. 56 of 2013** where it was observed (per Kakuru, JCC):

> Whereas a law may appear to serve a legitimate and lawful purpose on the face of it, its implementation may go beyond the limitation prescribed under Article 43(2)(c). In other words, a law may be constitutional but its implementation may not.

26. The Petitioner cites section 44(h) of the NGO Act, which requires the disclosure by NGOs of their financial donors, sponsors etc, to illustrate the unconstitutionality of an outcome where there is no guarantee of third-parties' confidentiality. even more importantly, it is opined, there is no corresponding obligation upon other legal

[1] Also cited as **Constitutional Appeal No. 2 of 2002**.

persons such as trusts, companies etc that supposedly enjoy the same legal status as NGOs.

27. Finally, citing section 2(2)(b) and (c), (3) and (4) of the Political Parties and Organizations Act, it is argued that the Respondent cannot seek refuge under that Act given that activities that influence public opinion and government action cannot be construed as partisan activities. The cited provisions are reproduced for ease of reference.

> **(1)** .....
> **(2) The definition of 'political organisation' in subsection (1) shall not include the following –**
> **(a)** .....
> **(b) pressure groups;**
> **(c) civic organisations;**
> **(d)** .....
> **(3) For the purposes of this section, a pressure group is a group of people that actively tries to influence public opinion and government action.**
> **(4) For the purposes of this section, a civic organisation is an organisation registered as such under the laws of Uganda.**

28. In my estimation, this Petition is broadly about the contradictions inherent in the role of NGOs in national governance and development *vis-à-vis* their domestic regulation under the NGO Act. It thus pits the objective of the NGO Act against the constitutional corporate rights of NGOs. A generic definition of NGOs would be useful for a better understanding of their function in national governance, the effect of the NGO Act on this function and the constitutionality of this effect.

29. NGOs were historically recognised under Article 71 of the United Nations (UN) Charter in the following terms:

> **The Economic and Social Council may make suitable arrangements for consultation with nongovernmental organizations which are concerned with matters within its competence**.

30. As such, NGOs compliment States' reporting procedures in respect of steps taken towards the realisation of their international obligations, particularly with regard to social and economic rights which are implemented on an incremental, progressive

basis. To that extent, they are partners with the UN multilateral system in holding states to account on their international obligations.

31. The Uganda Constitution does similarly acknowledge the role of NGOs in development and governance, Article 38(2) succinctly underscoring the right of every Ugandan to '**participate in peaceful activities to influence the policies of government through civic organisations**.' Indeed, the contribution of NGOs to national development is captured as follows in '*The National NGO Policy: Strengthening Partnerships for Development, 2010, p. 14*,' which illuminates the policy direction for the NGO sector and arguably laid the basis for the enactment of the NGO Act, 2016:

> NGOs have been major contributors to Uganda's social, economic and political development. Their contribution is evident in the Social Development Sector (SDS) including education, health, water and sanitation, environmental management, infrastructure development and a host of other important areas that impact the quality of life of Ugandans. Humanitarian and relief-oriented NGOs continue to make vital contribution to emergency management efforts in different parts of the country, supplementing the work of Government. On the other hand, NGOs engaged in policy advocacy work have variously contributed to the country's evolving democratic processes, human and gender rights, conflict resolution and peace building, good governance and accountability in public office, among other challenges, by keeping the spotlight on policy and behavioral issues that shape the character and direction of national development, including championing participatory development.

32. This is the contextual background to the NGO Act, the long title to which *inter alia* underscores its purpose as an Act that is intended '**to strengthen and promote the capacity of Non-Governmental Organisations and their mutual partnership with Government**,' while section 4 of the Act espouses the following objectives of the Act:

> (a) **establish an administrative and regulatory framework within which organisations can conduct their affairs;**
> (b) **promote and require organisations to maintain high standards of governance, transparency and accountability;**
> (c) **promote a spirit of cooperation, mutual partnership and shared responsibility between the organisations sector, the Ministries,**

Departments and Agencies of Government and other stakeholders dealing with organisations;

(d) **provide the development of strong organisations and to facilitate the formation and effective function of organisations for public benefit purposes;**

(e) **promote and strengthen the capacity of the organisations sector that is sustainable and able to deliver services professionally;**

(f) **promote the development of self-regulation among organisations;**

(g) **provide an enabling environment for the organisations sector;**

(h) **strengthen the capacity of the Bureau; and**

(i) **promote and develop a charity culture that is voluntary, non-partisan and relevant to the needs and aspirations of the people of Uganda.**

33. Section 4(a), (c) and (e) of the Act would appear to underscore the recognition that the State and NGOs are co-participants in the delivery of public services to the people of Uganda, and the efficacy of that partnership would of necessity require a degree of regulation and standardisation of the activities of NGOs for the benefit of the people they seek to serve.

34. Against that background, NGOs are defined in in section 3 of the Act as organisations set up as private voluntary groupings of individuals or associations '**established to provide voluntary services to the community or any part, but not for profit or commercial purposes**.' That definition is supplemented by the intention in section 4(i) of the Act to engender '**a charity culture that is voluntary, non-partisan and relevant to the needs and aspirations of the people of Uganda**.' These statutory provisions thus designate NGOs in Uganda as voluntary, charitable, non-profit and non-partisan organisations that operate in accordance with the needs and aspirations of the Ugandan people. That definition is in augmented by the character of NGOs in Uganda as spelt out in *The National NGO Policy, pp. 13, 14* as follows:

> NGOs have their roots in voluntarism and philanthropy i. e. they were founded by individuals or groups of people desirous of serving the needs of the poor and marginalized groups in society. A central strength and distinguishing feature of NGOs is additionality, **their ability to mobilize and bring in additional financial, technical and sometimes political resources to complement the efforts of the State. Globally, NGOs bring in as much money as what the large multi-lateral**

> **development agencies can mobilize annually**. The majority of NGOs in Uganda are small, fragmented and Community Based Operators. **The sector also tends to be characterized by independent, vibrant and flexible easy entry easy exit often with limited and selected ownership, funding, scope of operations and target beneficiaries**. .... The NGO sector in Uganda is highly donor dependent. Most NGOs in Uganda access funds from external donors either directly or through international NGOs (INGOs) with operations in the country. **High donor dependence highlights the fragility of the local NGO sector and weak sustainability of its program activities**. *(my emphasis)*

35. Can it then be suggested, as I understand the Petitioner to do, that the regulation of such fragile, vulnerable (donor-dependant) organisations that are susceptible to external/ foreign sponsors' influence over their operations is unconstitutional and/ or not demonstrably justifiable in a free and democratic society? I would respectfully think not.

36. As I delve into the merits of this issue, I am constrained to state from the onset that I am alive to the doctrine of *stare decisis* that binds courts of law to adhere to their previous decisions save in exceptional cases where a previous decision is distinguishable; was over-ruled by a higher court on appeal or was arrived *per incuriam* without taking into account a law in force or a binding precedent. In the absence of such exceptional circumstances, a panel of an appellate court is bound by previous decisions of other panels of the same court. See **Attorney General v. Uganda Law Society (2009) UGSC 2**.[2]

37. The constitutionality of NGOs' regulation was earlier broached by this court in **Human Rights Network & Others v Attorney General, Constitutional Petition** (supra), to which we were referred by learned State Counsel. In that case, the requirement for NGOs to register and secure permits prior to being legally recognized, and (at the time of registration) declare their geographical area of operation were opined to limit freedom of association in Article 29(1)(e), as well as Articles 8A and 38(2) of the Constitution insofar as they inhibit NGOs' formation

[2] also reported as Constitutional Appeal No. 1 of 2006

and operations, and render the them susceptible to the whims of the NGO Board. It was unanimously held:

> The thrust of the Petition appears to be that NGOs should operate without any restrictions or limitations. There is no such absolute freedom of Association under the Constitution. That status quo is necessary for the good governance of the Nation. As a matter of fact, if no regulation was put in place to govern the operations of NGOs in particular and other organisations in general, this would be against the values, norms and aspirations of the people of Uganda. The necessity of registration is to enable Government to assess the objectives of the NGO and to ascertain whether the activities that are intended to be carried out are lawful. It is also important to monitor and ensure that NGOs do what they set out to do in the geographical areas of their registration. In short, the regulation is merely to operationalise, monitor and ensure that the objectives of civil society organisations are not contrary to the Constitution and to protect the NGOs in their lawful activities.

38. With regard to Article 8A, it was held:

> The above article commands that Uganda shall be governed based on principles of national interest and common good enshrined in the National Objectives and Directive Principles of State Policy. The above article applies to NGOs to ensure they are run basing on the principles of national interest and common good. ... In the instant case, registration procedures are within the confines of the law and the (sic) matter of registration rather than a bar or hindrance to the operations of NGOs.

39. The court did also address the limitation of rights in Article 43(1) of the Constitution to avoid prejudice to other people's human rights or in the public interest, observing that '**since activities of NGOs affect the community at large, their legal rights and liabilities must be regulated**,' before concluding as follows:

> Both Kenya and Tanzania, our partner states in the East African Community (EAC) have similar provisions in their respective NGO Acts. They provide for administration and coordination of NGOs and the procedure for their registration. This is not a mere coincidence. It is a purposeful coincidence to entrench the tenets of democracy which is, *inter alia*, about checks and balances. More so, the strength of the democracy is defined by its accountability to the people.

40. Although the contestation in that case was the requirement for NGOs registration under the NGO Act, Cap. 113 as amended by the NGO Act, 2006, both of which

have since been replaced by the NGO Act, 2016; the attendant issues therein as to the limitation to freedoms and rights, restriction of NGOs to the geographical areas indicated at registration and the import of the National Objectives that ought to inform this Court's interpretation of the Constitution are similarly in contention in the present case. I do therefore abide the principles laid down in that case insofar as they apply to the matter before us presently.

41. Turning to the issue under consideration, I take due cognizance of the well settled rule of harmony, completeness and exhaustiveness in constitutional interpretation that the Constitution shall be construed as an integral whole with no one provision destroying another but each sustaining the other. See **David Welsey Tusingwire v Attorney General (2017) UGSC 11**.[3] Indeed, all provisions bearing on a particular issue ought to be construed together to give effect to the purpose of an impugned legislation. See **Uganda Law Society v Attorney General (2020) 4**.[4] It is on that basis that the contestations before the Court presently shall be interrogated.

42. With regard to the alleged inconsistency of section 44(a), (b), (c), (e), (g) and (h) of the NGO Act with Article 8A and Objectives II(v) and (vi) and V of the National Objectives espoused in the Constitution, my understanding of Article 8A is that it gives traction to the justiciability of the National Objectives, so that any inconsistency with the Objectives would translate into a constitutional violation. With that in mind, I do abide the observation in **Human Rights Network & Others v Attorney General** (supra) that the relevance of Article 8A to NGOs is '**to ensure that they are run basing on the principles of national interest and common good**.'

43. In this case, I do not find Objective V(i) as invoked by the Petitioner to be applicable to NGOs as they are not set up by or charged by the State to protect and promote human rights. This provision, in my view, relates to governmental human rights agencies. On the other hand, Objective II(v) enjoins all civic associations aspiring to manage or *direct* public affairs to '**conform to democratic principles in their**

[3] Also reported as *Constitutional Appeal No. 4 of 2016*
[4] Also reported as *Constitutional Petition No. 52 of 2017*

internal organisations and practice.' This constitutional prerogative is clearly addressed as one of the objectives of the impugned Act in section 4(b), (d) and (e) of the Act. It seems to me that ensuring the adherence by NGOs of that constitutional governance standard would necessitate some degree of regulation as reflected in section 4(a). The entity set up for that purpose is the NGO Bureau referred to in sub-section (h). It would therefore be within that context that the autonomy and independence referred to in Objectives II(vi) and V are construed. They read as follows:

> Objective II(vi)
> **Civic organisations shall retain their autonomy in pursuit of their declared objectives**.
>
> Objective V(ii)
> **The State shall guarantee and respect the independence of nongovernmental organisations which protect and promote human rights**.

44. I take the view that the retention of autonomy by civic organisations and, more specifically, the guarantee by the State of NGOs' independence should not negate the corresponding constitutional responsibility upon the State to spearhead and engender national development. This duty upon the State is derived from Objective XI(i), which obligates the State to legislate measures directed at entrenching equal development opportunities. It reads:

> **The State shall give the highest priority to the enactment of legislation establishing measures that protect and enhance the right of the people to equal opportunities in development**.

45. Against the backdrop of the State and NGOs as partners in national development, the legislation envisaged under Objective XI(i) above would undoubtedly call for some form of oversight or coordination by the State in order to avert inequitable development initiatives in the NGO sector. To that end, Objective XII unequivocally advocates an integrated and coordinated planning approach, clause (ii) thereof enjoining the State to '**take necessary measures to bring about balanced development in the different areas of Uganda**.'

46. The foregoing National Objectives resonate with the right to development espoused in the UN Declaration on the Right to Development, Article 2(3) of which grants states the right, as well as duty to '**formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom**.' Consequently, as entities that seek to hold governments accountable for their international obligations, NGOs ought to recognise that to the extent that the UN Declaration of the Right to Development places the ultimate responsibility for the right to development upon states parties, they would inevitably coordinate the national development agenda, including providing regulatory oversight to NGOs' initiatives in that area as required.

47. In any case, though recognised internationally, NGOs are a creature of domestic legislation. An emerging global wave of relatively more stringent domestic regulatory regimes would appear to be informed in part by connotations of non-accountability and non-transparency in the internal governance of NGOs themselves. This is acknowledged in a scholarly article, *Jedele, Casey (2020), "Domestic Restrictions on Non-Governmental Organisations and Potential Protections through Legal Personality: Time for a Change?," Chicago Journal of International Law: Vol. 21: No.1, Article 4, p. 121*, in which human rights abuses linked to World Wildlife Fund, a US-based NGO, are opined to have raised concerns about '**NGO accountability and transparency, especially in light of recent scandals related to international NGOs such as the World Wildlife Fund**.'

48. The same article proposes that one of the challenges to NGOs' quest for international legal personality is the fact that such personality would include their *right to be sued*, a dynamic that some NGOs are inexplicably hesitant to embrace.[5] It is posited:

> It is important to remember that NGOs are "not by necessity altruistic and not always a force for good." This is not a bar against legal personality in itself; individuals, states,

[5] Ibid. p. 144.

corporations, and other entities with legal personality are not necessarily a force for good either. However, the possibility of bad actors raises questions for legitimacy and accountability that must be addressed when considering the rights and duties that would be inherent in granting legal personality to NGOs. Jurij Daniel Aston, University of Bonn, has argued that:

> **NGO representatives are at most . . . only accountable to the members of the NGO on whose behalf they are acting. To put it bluntly, if a society does not want the government it has elected to advocate certain positions, it can vote it out of office. This system of democratic control does not function with respect to NGOs, though. There is no *contrat social* between society and NGOs.**
>
> **The lack of democratic control of NGOs suggests that a central registry that can track NGO funding or activities on the ground may be a necessary requirement .... Indeed, NGOs are no strangers to reporting requirements. Even under the current** (international) **legal framework, once an NGO gains consultative status with ECOSOC, it is "under an obligation to submit every four years a report on its activities, the so-called quadrennial report**." *(my emphasis)*

49. The foregoing article highlights two fundamental issues. First, unlike governments that have a social contract with the people on the basis of which they are elected, held to account and possibly un-elected; NGOs are not accountable to the communities they operate in and tend to pursue pre-determined, possibly self-serving agendas that might not necessarily resonate with national development programs or the values and aspirations of the people. It is this lacuna that necessitates the second issue highlighted in the article, to wit, the regulation, tracking of NGO funding etc. More importantly, if ECOSOC (with which NGOs simply enjoy consultative status under Article 71 of the UN Declaration) can require them to submit quadrennial reports on their activities; is it as unforeseeable or unwarranted as the Petitioner would have us believe that the states within which NGOs operate (which are internationally and constitutionally responsible for the development, security and stability of their countries) would need to exercise more intentional scrutiny to avert any related threats or risks?

50. I do recognise that there have been initiatives in sub-Saharan Africa geared at NGOs' self-regulation, and indeed the Ugandan NGO Act does provide for such

self-regulation. However, a research article on the effectiveness of self-regulation in twenty (20) African countries paints a dismal picture. It is observed:[6]

> Self-regulation in Africa falls into three types: national-level guilds, NGO-led clubs and voluntary codes of conduct. Each displays significant weaknesses from a regulatory policy perspective. National guilds have a broad scope, but require high administrative oversight capacity on the part of NGOs. Voluntary clubs have stronger standards but typically have much weaker coverage. Voluntary codes are the most common form of self-regulation, but have the weakest regulatory strength.

51. Against that background, it does become apparent that the inevitability of NGOs' domestic regulation *per se* is fairly well settled. The independence they enjoy would of necessity ensue within the confines of Objective II(v) with regard to their internal governance, as well as the constitutional right of the State under Objective XII to spearhead and coordinate equitable and balanced development. I therefore find no violation of Article 8A of the Constitution.

52. The Petitioner additionally challenges the constitutionality of the impugned provisions of section 44 of the NGO Act for their perceived violation of freedom of speech, expression and association, as well as the right of participation in peaceful activities to influence government policies, as articulated in Articles 29(1)(a) and (e), and 38(2) of the Constitution. The restrictions in those statutory provisions are considered unjustifiable in a free and democratic society in contravention of Article 43(2)(c) of the Constitution.

53. I am aware of the Supreme Court decision in **Attorney General v Salvatori Abuki, Constitutional Appeal No. 1 of 1998** that '**a statutory provision can be declared unconstitutional where its purpose and effect violates a right guaranteed by an Article of the Constitution**.' Nonetheless, insofar as the rights and freedoms espoused in Articles 29(1)(a) and (e) and 38(2) are not envisaged as non-derogable rights under Article 44, they are susceptible to the limitation delineated in Article 43(1) of the Constitution as follows:

---

[6] See *Gugerty, Mary Kay (2008), "The effectiveness of NGO self-regulation: theory and evidence from Africa", Public Administration and Development Journal: Vol. 28, Issue 2, pp 105 – 118, (Online Abstract).*

> **In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.**

54. Furthermore, it is trite law that the burden of proof in constitutional petitions lies with the petitioner, who is under a duty to establish a *prima facie* case that a fundamental right has been contravened. It is only after this has been established that the burden of proof would shift to the respondent to rebut or justify the limitation. See **Charles Onyango Obbo & Another v Attorney General** (supra).

55. The enjoyment of rights to the prejudice of others is a question of fact that was not pleaded in this case. However, the limitation of rights in the public interest is a matter of law that is defined in clause (2) of Article 43 to negate political persecution, detention without trial and such limitations as are '**acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution**.' Political persecution and detention without trial have not been cited in this case and, in any case, would be clear questions of fact. Conversely, what would to amount to acceptable limitation in a free and democratic society or under the Constitution has evolved as a question of law that is clarified in numerous international instruments and a plethora of case law.

56. Applicable case law has construed that constitutional provision to suggest that any law that derogates from a derogable human right in the public interest is not inconsistent with the Constitution. See **Charles Onyango Obbo & Another v Attorney General** (supra). The determination as to whether a right's limitation is justifiable in a free and democratic society so as to be in the public interest was clarified in that case as follows (per Mulenga, JSC):

> In other words, such limitation, however otherwise rationalised, is not valid unless its restriction on a protected right is acceptable and demonstrably justifiable in a free and democratic society. The Co-existence in the same constitution, of protection and limitation of the rights, necessarily generates two competing interests. On the one hand, there is the interest to uphold and protect the rights guaranteed by the Constitution. On the other hand, there is the interest to keep the enjoyment of the individual rights in check, on social considerations, which are also set out in the

Constitution. **Where there is conflict between the two interests, the court resolves it having regard to the different objectives of the Constitution**. *(my emphasis)*

57. The Supreme Court thus correctly points this Court to the National Objectives encapsulated in the Constitution when faced with conflicting constitutional interests. Needless to state, the Supreme Court's approach has binding force on this Court.

58. In this case, as a subject of international law, the Ugandan State has a right and duty under Article 2(3) of the UN Convention on the Right to Development to formulate national development policies directed at the well-being of its citizenry. Such national policies often find expression in laws enacted for that purpose. The need for such a state-driven integrated approach to national development issues is domesticated under Objectives XI and XII(i) of the Constitution, the provisions of which I reproduce in their entirety below.

> Objective XI(i): *Role of the State in development*
>
> **The State shall give the highest priority to the enactment if legislation establishing measures that protect and enhance the right of the people to equal opportunities in development.**
>
> Objective XII: *Balanced and equitable development*
>
> **(i) The State shall adopt an integrated and coordinated planning approach.**
> **(ii) The State shall take necessary steps to bring about balanced development of the different areas of Uganda and between the rural and urban areas.**
> **(iii) The State shall take special measures in favour of the development of the least developed areas.**

59. Consequently, as Non-State actors in a state-driven national development agenda, the operations of NGOs' would inevitably attract some measure of coordination and oversight by government pursuant to its international and constitutional obligations.

60. Indeed, international conventions and other international instruments to which a country is party have been recognized as instructive antecedents of the bill of rights

in a constitution and may be referred to in order to clarify constitutional rights, as well as give full effect thereto. See **CEHURD & Others v Attorney General (2020) UGCC 12**[7] and **Mitu-Bell Welfare Society v Kenya Aiports Authority & Others, Petition No. 3 of 2018 (2021) eKLR**.

61. To that extent, Articles 19(3) and 22(2) of the International Covenant on Civil and Political Rights (ICCPR) are instructive on the permissible limitation of the freedoms of expression and association. The pertinent provisions thereof are reproduced below.

> Article 19
>
> (1) .....
> (2) **Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.**
> (3) **The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:**
> (a) **For respect of the rights or reputations of others;**
> (b) **For the protection of national security or of public order (ordre public), or of public health or morals.**
>
> Article 22
>
> **(1) Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.**
> **(2) No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.**

[7] Also cited as *Constitutional Petition No. 16 of 2011*.

62. The UN Human Rights Committee (the body of independent experts that monitors implementation of the ICCPR by its states parties) did in **HRC, Ramanovsky v Belarus (2015) para. 7.2** construe the limitation on freedom of association in Article 22(2) as follows:

> Any restriction on the right to freedom of association must cumulatively meet the following conditions: (a) it must be provided by law; (b) may only be imposed for one of the purposes set out in paragraph 2 (of ICCPR Art. 22); and (c) must be 'necessary in a democratic society' for achieving one of these purposes.

63. Summed up as the principles of legality, legitimacy and proportionality, these principles have since been adopted as a useful guide to the interrogation of rights' restriction. In **Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & 10 Others, Consolidated Petition No. 628 & 630 of 2014 & 12 of 2015**, as cited with approval by this Court in **Centre for Public Interest Law (CEPIL) & Others v Attorney General (2021) UGCC 12**,[8] the Constitutional Court of Kenya was faced with the question of the constitutionality of rights limitation as encompassed in Article 24(1) of the Constitution of Kenya, which is materially similar to Article 43(2) of the Ugandan Constitution. The court relied upon the Canadian Supreme Court decisions in **R v David Edwin Oakes (1986) ICSR 103** and **R v. Big Drug Mart Ltd (1985) ISCR 295** to observe as follows:

> We are also guided by the test for determining justifiability of a rights limitation enunciated by the Supreme Court of Canada in the case of **R v Oakes (1986) ICSR 103** to which CIC has referred the Court. The first test requires that the limitation be one that is prescribed by law. It must be part of a statute, and must be clear and accessible to citizens so that they are clear on what is prohibited. Secondly, the objective of the law must be pressing and substantial, that is it must be important to society: see **R v Big Drug Mart Ltd (1985) ISCR 295**. The third principle is the principle of proportionality. It asks the question whether the State, in seeking to achieve its objectives, has chosen a proportionate way to achieve the objectives that it seeks to achieve.

64. I consider it necessary to reproduce in some measure of detail the decision in **R v Oakes** (supra) given the vitality of the limitation of rights to the determination of the

[8] Also cited as *Constitutional Petition No. 9 of 2014*.

Petition before us. Like Article 43(2) of the Ugandan Constitution, section 1 of the Canadian Charter of Rights and Freedoms encapsulates both rights and freedoms, and the parameters within which limitations on those rights and freedoms may ensue. Consequently, faced with an application challenging the constitutionality of a provision of the Canadian Narcotic Act, it was held (per Dickson, CJ):

> The onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of s. 1 that limits on the rights and freedoms enumerated in the Charter are exceptions to their general guarantee. ... To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": (**R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 at p. 352**). The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": (**R. v. Big M Drug Mart Ltd., supra, at p. 352**). Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups.

65. Returning to the matter before us, in terms of the legality principle, the contested restrictions in section 44 of the NGO Act are indeed quite succinctly articulated in that law, which is certainly accessible to NGOs. In that respect, far from being vague, the provisions of section 44 (a), (b), (c) and (e) are quite clear on requiring NGOs to clarify their localities of operation; secure the consent of the regulatory regime prior to their operating therein; restrict NGOs to the demarcated areas and urge their cooperation with local authorities therein. Section 44(g) and (h) are similarly clear on NGOs being non-partisan and disclosing by memorandum of understanding their terms of engagement with their external partners or sponsors, specifically details of the terms of ownership, employment, funding and related matters.

66. The question becomes whether those statutory provisions meet the legitimacy and proportionality tests espoused in **R v Oakes** (supra) so as to fall within the ambit of justifiable limitations in a free and democratic society. The legitimacy test basically posits that the objective of the limitations should be of sufficient importance to warrant over-riding a constitutionally guaranteed right or freedom in a free and democratic society. The test in that regard is whether such objective is pressing and substantial.

67. The restriction of NGOs to the geographical areas of coverage in which they are authorized to operate pursuant to section 31(1) and (5)(d) of the Act was addressed in **Human Rights Network & Others v Attorney General** (supra) as follows:

> **It is also important to monitor and ensure that NGOs do what they set out to do in the geographical areas of their registration**. In short, the regulation is merely to operationalise, monitor and ensure that the objectives of civil society organisations are not contrary to the Constitution and to protect the NGOs in their lawful activities. *(my emphasis)*

68. In the absence of good reason therefor, I am not at liberty to depart from that decision of this Court but do in any case abide the reasoning behind it. Additionally, in my view, the requirements in section 44 (a), (b), (c) and (e) for NGOs to secure the consent of the regulatory regime prior to operating in any locality and cooperate with local authorities therein bespeak national security, stability and public order considerations as outlined in Article 22(2) of the ICCPR and National Objective III of the Constitution. The nature of the risks to national security and public order is such that it would be gravely imprudent for a state party to await the manifestation of the conceived dangers in order to demonstrate to a court of law that legal limitations to a right or freedom are justified. To the extent that Objective III(v) of the Ugandan Constitution echoes the permissible limitations to freedom of association under the ICCPR by obligating the Ugandan State to '**provide a peaceful, secure and stable political environment**,' erring on the side of regulatory caution is justifiable, in my view, provided that the laws formulated as limitations are not vague as to the scope of their restrictions or unduly burdensome.

69. Given the incidence of some human rights violations by NGOs themselves, as illustrated by the *World Wildlife Fund* case referred to earlier in this judgment, the records of an NGO's area of operation would be a matter of significant interest to their regulatory regime. The constitutional duty upon the State to coordinate balanced and equitable development efforts, as well as the need to avoid the concentration of such efforts in specific areas would lend further credence to the highlighted provisions of section 44 of the NGO Act. To the extent that the limitations under section 44 (a), (b), (c) and (e) seek to avert real risks, they do target a pressing and substantial issue and are justifiable in a free and democratic society.

70. In terms of the proportionality test, I find nothing extraordinary about NGOs securing the consent of their regulatory regime prior to operating in any locality; the restriction of their operations to the approved area or the requirement for them to cooperate with the local authorities therein. Not only does this avert the duplication of NGOs' activities in the same localities with little or no presence in other areas; it would underscore due ownership of their programs by the communities within which they operate. As was aptly observed in *Bloodgood, Elizabeth A, Trembley-Boire, Joannie & Prakash, Asem (2014), "National Styles of NGO Regulation," Nonprofit and Voluntary Sector Quarterly, Vol. 43(4), p. 733*, '**NGOs are not independent of the state, as the phrase nongovernmental suggests. Rather, their emergence and functioning is influenced by macropolitical institutions of the state. ... While NGOs can shape policies and institutions, they are also shaped by broader state–societal arrangements**.'

71. Turning to the invoked freedom of expression and association as encapsulated in Article 29(1)(a) and (e), and the right to peacefully influence government policies under Article 38(2) of the Constitution; these freedoms and right are restricted under section 44(g) of the Act, which forbids NGOs from partisan activity or engagement in partisan political activities. Again, the question is whether the objective of this restriction is of sufficient importance to warrant over-riding the stated right and freedoms and, secondly, whether it meets the proportionality test that was espoused in **R v Oakes** (supra) as follows (per Dickson, CJ):

> There are, in my view three important components of a proportionality test. First the measures adopted must be carefully designed to achieve the objectives in question. They must not be arbitrary, unfair or based on irrational considerations. In short they must be rationally connected to the objective. Secondly, the means even if rationally connected to the objective in the first sense should impact as little as possible the right or freedom in question. Thirdly there must be a proportionality between the effects of the measures which are responsible for limiting the charter, right or freedom and the objective which has been identified as of sufficient importance.

72. That test was adopted by the Supreme Court in **Dimanche Sharon & Others v Makerere University (2006) UGSC 210**.[9] In that case, the apex court observed that it was always necessary to determine whether a statute's legislative objective was sufficiently important to justify limiting a fundamental right, proposing that '**the courts have to strike a balance between the interest of** (the) **freedom and social interest** (and) **fundamental rights should not be suppressed unless there are pressing community interests, which may be endangered**.'

73. Neither the term '*partisan*' nor 'non-partisan' are defined in the NGO Act so as to engender a better understanding of the objective that underlies the restriction in question. However, the Merriam-Webster dictionary defines the term as '**a firm adherent to a party, faction, cause or person especially one exhibiting blind, prejudiced and unreasoning allegiance**,' while the same term is defined in the Oxford dictionary as '**a strong supporter of a party, cause or person**.' The term '*non-partisan*' is more specifically defined by the Oxford dictionary as '**not biased or partisan, especially towards any political group**,' giving the example of senior civil servants that are non-partisan and serve ministers irrespective of politics.

74. Drawing from those definitions, it seems to me that section 44(g) of the NGO Act has a to-fold effect: on the one hand, it calls for the neutrality of and the absence of bias by NGOs towards any political group, cause or person and, secondly, prohibits '**fundraising or campaigning to support or oppose any political party or candidate for an appointive office or elective political office, nor may it propose or register a candidate for elective political office**.' It thus becomes

[9] Also cited as *Constitutional Appeal No. 2 of 2004*.

apparent that the provision urges political neutrality in the execution of NGOs mandate, explicitly prohibiting their sponsorship of political parties or candidates.

75. I do take cognizance of a common trend among NGOs to channel their operations to specific focal areas, for instance in the health, environmental, education, human rights or rule of law sectors. So that, an NGO that is skewed to environmental issues would inadvertently seek to influence political parties' and/ or candidates' positions on those issues. However, in my view, that is not the sort of activity that is proscribed by section 44(g) of the Act. It seems to me that the sort of political engagement that is prohibited under that statutory provision is bias towards and sponsorship of one party or candidate as opposed to others. In that sense, an NGO that wishes to have its area of competence placed on the political agenda ought to demonstrate political neutrality by transparently engaging all political parties on the subject.

76. The rationale behind this statutory provision is not entirely unforeseeable. Insofar as NGOs are co-partners with government in national development, their engagement in partisan politics would undermine the levels of mutual trust required to contribute to the national development agenda. Furthermore, given that the target communities in which they operate are partisan, non-neutral NGOs would polarize the communities and impede the efficacy and outreach of their operations; in turn unravelling the very mischief that the NGO Act seeks to address, namely, '**to provide a conducive and an enabling environment for the Non-Governmental Organisations sector**.' Given the financial resource constraints that characterize developing countries such as Uganda, NGOs supplementation of the government's national development agenda is of immense importance. In that respect, abiding the proposition in **Dimanche Sharon & Others v Makerere University** (supra), the communities' socio-developmental interests significantly outweigh NGOs' freedom of association. In order to mitigate the dangers of partisan NGOs to development initiatives, the limitation of the freedom of association and expression is warranted and justifiable.

77. In any case, I find no reason to believe that NGOs are unable to influence government policy as politically neutral entities. Stated differently, NGOs' ability to

influence government policy is not necessarily dependent on their being politically skewed in favour of one party or another. If anything, in my view, their neutrality might enhance the credibility of their engagement with the government and other stakeholders. I therefore find no violation of Article 38(2) of the Constitution.

78. The proscription in section 44(g) does not completely annihilate NGOs' freedoms of expression and association either. Although they are prohibited from the nature of political engagement proscribed thereunder, there is ample provision for such engagement albeit under a different legal regime within the Political Parties and Organisations Act, 2005. Indeed, distinguishing political organisations from political parties, section 2(1) of that Act defines the former as '**any free association or organisation of persons the objectives of which include the influencing of the political process or sponsoring a political agenda, whether or not** (they) **seek to sponsor or offer a platform to a candidate for election to a political office or to participate in the governance of Uganda at any level**.' Under that Act, individuals that are unable to engage in politically partisan activities under the NGO Act are at liberty to exercise their freedom of association and expression to so engage under the Political Parties and Organisations Act.

79. I would therefore agree with learned State Counsel that the activities of political organisations need not be replicated by NGOs that operate under a different regulatory regime. The prohibition in section 44(g) of the NGO Act would appear to be designed to entrench conditions favourable to the realisation of the right to development as required of the Ugandan State under Articles 3(1) of the UN Declaration on the Right to Development, within the confines of a peaceful, secure and stable political environment as prescribed in Objective III(v) of the Constitution.

80. Not only is national unity and stability the main thrust of Objective III of the Ugandan Constitution, Article 5 of the Universal Declaration on the Right to Development underscores the role of the state in its peoples' self-determination insofar as it mandates states to take '**resolute steps to eliminate .... foreign interference and threats against national sovereignty, national unity and territorial integrity**.' Indeed, concern has been expressed about the potential risk to states of NGOs' activities. Thus, in *Lage, Delber Andrade & Brant, Leonardo N. C, "The*

Growing Influence of Non-Governmental Organisations: Chances and Risks", III Anuario Brasileiro de Dereito Internacional, Vol. 1, p.82, it is opined that '**the lack of control mechanisms and accountability, as well as the degree of openness to participation by groups from civil society within the NGOs themselves, are pointed to as relevant elements characterizing a legitimacy crisis**.'

81. NGOs' openness to participation of and/ or funding from other civil society groups is problematic to the extent that it introduces external dynamics to their operations, whereby resources extended to them could be tied to the interests of external forces rather than those of either their intended beneficiaries or the host states within which they operate. That is the dynamic that section 44(h) seeks to address in the requirements thereunder in relation to NGOs' donors, sponsors, affiliates, local and foreign partners. In my view, these are typical disclosure requirement intended to avert NGOs engagement in financial or other dealings with international criminal outfits such as terrorist organisations or money laundering and drug dealing cartels. They are in tandem with Article 3(1) of the Universal Declaration on the Right to Development that bestows upon states '**the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development**,' which imperative is reflected in Objective III(v) of the Ugandan Constitution that obligates the State in Uganda to '**provide a peaceful, secure and stable political environment which is necessary for economic development**.'

82. Limitations to the freedoms of expression and association were in **Human Rights Network & Others v Attorney General** (supra) addressed in broad terms as follows:

> **Both Kenya and Tanzania, our partner states in the East African Community (EAC) have similar provisions in their respective NGO Acts. They provide for administration and coordination of NGOs** and the procedure for their registration. This is not a mere coincidence. It is a purposeful coincidence to entrench the tenets of democracy which is, *inter alia*, about checks and balances. **More so, the strength of the democracy is defined by its accountability to the people**. *(my emphasis)*

83. With specific regard to section 44(h) of the Ugandan Act, similar disclosure requirements with regard to NGOs' external links have been legislated by the more developed societies such as the United States (US) and United Kingdom (UK). The Foreign Agents Registration Act (FARA) is a US disclosure statute that requires persons and organizations domiciled in the US but serving as agents of foreign principals with regard to specified activities to make periodic public disclosure of activities, funds received and disbursements in respect of those activities. This is relayed in *'Non-Governmental Organizations (NGOs) in the United States: Fact Sheet' (2021), Bureau of Democracy, Human Rights and Labour* as follows:

> **The general purpose of the Act is to ensure that the American public and its lawmakers know the source of certain information intended to sway U.S. public opinion, policy, and laws, thereby facilitating informed evaluation of that information by the government and the American people**. The Act requires any person or organization (U.S. or foreign), that is an agent of a foreign principal, to register with the Department of Justice if engaged in the U.S. in certain defined activities, and to disclose the foreign principal for which the agent works, the activities conducted, as well as receipts and disbursements in support of those activities. **Foreign principals can include governments, political parties, a person or organization outside the United States (except U.S. citizens), and any entity organized under the laws of a foreign country or having its principal place of business in a foreign country. An agent of a foreign principal is any person who acts within the United States "as an agent, representative, employee, or servant, or any person who acts in any other capacity at the order, request, or under the direction or control of a foreign principal or of a person, any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal," and who engages in certain political or quasi-political activities**. *(my emphasis)*

84. Clearly, the US and the EAC sister states are in agreement on the need to hold NGOs accountable to the source of information they wish to influence public policy and opinion. The broadly defined '*foreign principal*' and '*agent of a foreign principal*' under the US FARA lends credence to similar (albeit possibly less far-reaching) pre-requisites under section 44(h) of Uganda's NGO Act.

85. In the same vein, the Charity Commission (CC) – the NGO regulatory entity in the UK – ensures that NGOs comply with their legal obligations and possesses '**wide-ranging powers to investigate, freeze assets, remove trustees or managers, appoint interim staff or restrict NGO's transactions**.'[10] According to *Kelly, L. (2019), 'Legislation on non-governmental organisations (NGOs) in Tanzania, Kenya, Uganda, Ethiopia, Rwanda and England and Wales,' K4D Helpdesk Report, Brighton, UK: Institute of Development Studies, p. 17*, the CC increasingly '**requires information on funding or income from 'overseas governments or quasi-governmental bodies, charities and NGOs' (*Charity reporting and accounting: the essentials (CC15b)*, 2013). It also asks for information on other overseas sources of income, which is voluntary until 2019**.'

86. I have endeavoured to illustrate in the foregoing discourse that the requirements in the impugned statutory provisions are necessary and proportionate to the risks posed by NGOs operations, and are legally justified by the cited provisions of the Universal Declaration on the Right to Development and the Uganda Constitution. Their being non-partisan would not obviate NGOs' right to influence government policy under Article 38(2) albeit in a neutral manner, and neither erodes nor renders illusory the freedoms of expression and association espoused in Article 29(1)(a) and (e) of the Constitution. I am satisfied, therefore, that section 44(a)(b)(c)(e)(g) and (h) of the NGOs Act are justified restrictions in a free and democratic society to the freedoms of expression and association articulated in Article 29(1)(a) and (e), and right to influence government policy under Article 38(2) of the Constitution.

87. With regard to the alleged discrimination against NGOs on that basis, I am alive to the provisions of Article 21(3) of the Constitution that define the term '*discriminate*' as according '**different treatment to different persons attributable only or mainly to their respective descriptions**' under the parameters delineated in that constitutional provision. It is not readily apparent in this case on what basis such discrimination would arise. In any case, to my mind, the manifestation of discrimination would presuppose that the Trusts and private companies complained of by the Petitioner undertake the functions of NGOs but different

[10] See *Piper, A. M., Reed, P. & James, E. (2018), 'Charitable Organizations in the UK (England and Wales): Overview.'*

treatment is extended to them on account of their differential corporate status. That scenario has not been demonstrated before us. I therefore find no violation of Article 21 of the Constitution.

88. In the result, I am satisfied that section 44(a), (b), (c), (e), (g) and (h) of the Non-Governmental Organisations Act does not violate Articles 8A, 21, 29 and 38 of the Constitution, and would accordingly resolve *Issue No. 2* in the negative.

Issue No. 3: *Remedies.*

89. Having held as I have on the preceding issue, this Petition would substantially fail. Accordingly, I would decline to grant the declarations and orders sought by the Petitioner.

90. I do, nonethless, consider this a public interest litigation and would therefore depart from the general rule in section 27(2) of the Civil Procedure Act, Cap. 71 that costs follow the event. costs, to order each party to bear its own costs.

F. **Conclusion**

91. The upshot of my judgment is that I would dismiss this Petition and order each party to bear its own costs.

Dated and delivered at Kampala this 27th **day of** April**, 2023.**

Monica K. Mugenyi

Justice of the Constitutional Court

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

[*Coram: Egonda-Ntende, Madrama, Mugenyi, Kibeedi & Gashirabake, JJCC*]

Constitutional Petition No. 20 of 2019

BETWEEN

Centre for Public Interest Law==========Petitioner

AND

Attorney General==========Respondent

JUDGMENT OF FREDRICK EGONDA-NTENDE, JCC

Introduction

[1] I have had the opportunity of reading in draft the lead judgment by my sister, Mugenyi, JCC, with whom, my brothers and sisters, agree, that this petition must fail as the impugned provisions of the Non-Governmental Act, Act No.5 of 2016, (hereinafter referred to as the Act) are a justifiable limitation on the fundamental rights of the Non-Governmental Organisations, (hereafter referred to as NGOs). I am unable to agree in part and I set out my reasons below.

[2] The facts and submissions of the parties to this petition have been well set out in the lead judgment and I will not repeat them save for where it is necessary to establish direction of travel.

[3] The petitioner is challenging the constitutionality of the provisions of section 44 (a), (b), (c), (e), (g) and (h) of the Act for contravening or being inconsistent with articles 8A, 21, 29 (1) (a) and (e), 38 (2), and 43 (2) (c) of

the Constitution. The main thrust of this opinion is in respect of section 44 (g) of the Act.

[4] The Act creates what it calls special obligations under section 44 of the Act.

[5] It was contended for the petitioner that this provision restricts its rights, *inter alia*, of freedom of expression and the media under article 29 (1) (a) of the Constitution and the right of civic organisations to influence goverement policy under article 38 (2) of the Constitution. The respondent's answer is simply that the impugned provisions are not inconsistent and or in contravention of the provisions of the Constitution. It may be helpful to set out a portion of their answer in verbatim.

> '3. In specific response to paragraph 1 (b) of the Petition, the Respondent contends that the provision of Section 44 (g) of the Non-Governmental Organisations Act No. 5 of 2016, which prohibits NGOs from engaging in partisan activities, is not inconsistent and / or in contravention with Article 8A, 21 (1) and (2), 29(1) (a), (e), 38 (2), Article 43 (2) (c) of the Constitution of the Republic of Uganda.
>
> 4. In specific response to paragraph 1(c) of the Petition, the Respondent contends that the provision of Section 44 a, b, c, e, g and h of the Non-Governmental Organisations Act No. 5 of 2016 is not inconsistent and / or in contravention with Article 8A, 21 and 38 (2) of the Constitution of the Republic of Uganda.'

[6] The rest of the answer to the petition are denials of the contents of paragraphs 1 and 2 of the petition. The last paragraph of the answer to the petition is that the affidavit of Stephen Okello, the Interim Executive Director of the National Bureau for Non-Governmental Organisations in the Ministry of Internal Affairs is annexed to the petition in support of the answer.

[7] The said affidavit regurgitates parts of the answer to the petition and adds on the following:

'6. That I know that the procedures enshrined in Section 44 guide and regulate the operation of NGOs rather than barring or hindering their operations.

7. That I am advised by Attorneys from the Attorney General's Chambers whose I advise I verily believe to be true that Section 44 of the Non-Governmental Organisations Act No. 5 of 2016, is consistent with Article 43 of the Constitution of the Republic of Uganda which limits the enjoyment of the rights and freedoms in the interest of the public.

8. That I know that the provisions of Section 44 of the Non-Governmental Organisations Act No. 5 of 2016, are for the proper management and regulation of the NGOs in the country.'

Analysis

[8] From the foregoing it is clear that the respondent is asserting that there are indeed limitations on the fundamental rights and freedoms on account of firstly the need to manage and regulate operations of the NGOs. Secondly that these limitations are necessary in the interest of the public. Given this stance of the respondent it would follow that the burden of proof is upon the respondent to justify such limitations (impugned provisions) as are now placed on the fundamental rights and freedoms. See Charles Onyango Obbo and Anor v Attorney General [2004] UGSC 81.

[9] Where article 43 of the Constitution is called in aid to allow the limitation to the fundamental right or freedom the court must engage in a limitation analysis starting with the criteria laid down therein. Does the enjoyment of the fundamental right or freedom prejudice the fundamental rights and freedoms of other persons or the public interest? If the answer is in the affirmative, is the limitation acceptable and demonstrably justifiable in a free and democratic society, or is it provided by the Constitution?

[10] Mulenga JSC, in Charles Onyango Obbo and Anor v Attorney General (supra) formulated the limitation analysis in the following words,

> 'The provision in clause (1) is couched as a prohibition of expressions that "prejudice" rights and freedoms of others and public interest. This translates into a restriction on the enjoyment of one's rights and freedoms in order to protect the enjoyment by "others", of their own rights and freedoms, as well as to protect the public interest. In other words, by virtue of the provision in clause (1), the constitutional protection of one's enjoyment of rights and freedoms does not extend to two scenarios, namely: (a) where the exercise of one's right or freedom "prejudices" the human right of another person; and (b) where such exercise "prejudice" the public interest. It follows therefore, that subject to clause (2), any law that derogates from any human right in order to prevent prejudice to the rights or freedoms of others or the public interest, is not inconsistent with the Constitution. However, the limitation provided for in clause (1) is qualified by clause (2), which in effect introduces "a limitation upon the limitation". It is apparent from the wording of clause (2) that the framers of the Constitution were concerned about a probable danger of misuse or abuse of the provision in clause (1) under the guise of defence of public interest. For avoidance of that danger, they enacted clause (2), which expressly prohibit the use of political persecution and detention without trial, as means of preventing, or measures to remove, prejudice to the public interest. In addition, they provided in that clause a yardstick, by which to gauge any limitation imposed on the rights in defence of public interest. The yardstick is that the limitation must be acceptable and demonstrably justifiable in a free and democratic society. This is what I have referred to as "a limitation upon the limitation". The limitation on the enjoyment of a protected in defence of public interest is in turn limited to the measure of that yardstick. In other words, such limitation, however otherwise rationalised, is not valid unless its restriction on a protected right is acceptable and demonstrably justifiable in a free and democratic society.

The co-existence in the same constitution, of protection and limitation of the rights, necessarily generates two competing interests. On the one hand, there is the interest to uphold and protect the rights guaranteed by the Constitution. On the other hand, there is the interest to keep the enjoyment of the individual rights in check, on social considerations, which are also set out in the Constitution. Where there is conflict between the two interests, the court resolves it having regard to the different objectives of the Constitution.

As I said earlier in this judgment, protection of the guaranteed rights is a primary objective of the Constitution. Limiting their enjoyment is an exception to their protection, and is therefore a secondary objective. Although the Constitution provides for both, it is obvious that the primary objective must be dominant. It can be overridden only in the exceptional circumstances that give rise to that secondary objective. In that eventuality, only minimal impairment of enjoyment of the right, strictly warranted by the exceptional circumstance is permissible. The exceptional circumstances set out in clause (1) of Article 43 are the prejudice or violation of protected rights of others and prejudice or breach of social values categorised as public interest. In Rangarajan vs. Jagjivan Ram and Others; Union of India and Others vs. Jagvan Ram and Others (1990) LRC (Const.) 412, the Supreme Court of India put the point this way, at p.427 –

"*There does indeed have to be a compromise between the interest of freedom of expression and social interest. But we cannot simply balance the two interests as if they were of equal weight. Our commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or farfetched. It should be proximate and (have) direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interests. In other words the expression should be inseparably locked up with the action contemplated like the equivalent of a 'spark in a powder keg'.*"

I agree with the proposition that the freedom of expression ought not to be suppressed except where allowing its exercise endangers community interest. It is in that context

> that I have to consider whether section 50 is a valid limitation under the Constitution.'

[11] The foregoing approach espoused by Mulenga, JSC, shall guide my limitation analysis in this particular case.

[12] I will first deal with what I see as the gravamen of this action which is that section 44 (g) of the Act is inconsistent with and contravenes the rights of NGOs to the fundamental rights and freedoms of expression under article 29 (1) of the Constitution and 38 (2) which recognises the right of every Ugandan to participate in peaceful activities influencing policies of Government through civic organisations.

[13] The respondent submitted that these rights are not non-derogable and that derogation is permitted under article 43 of the Constitution. I will set out verbatim the relevant submissions of the respondent in this regard.

> 'Lastly, in response to the Petitioner's contention that section 44 (g) of the Act, that prohibits NGOs participation in partisan affairs, violates the provisions of article 38 (2) of the Constitution, the Respondent submits that Uganda has a dedicated law that regulates and provides for registration of associations that participate in political partisan affairs. This is called the political parties and Organisations Act No. 18 of 2005. The Long title to this Act states that, "the Act makes provisions for regulating the financing and functioning of political parties and organisations, their formation, registration, membership and organization under Articles 71, 72 and 73 of the Constitution. We submit that the Legislature's intention in enacting the NGO Act is entirely different from Political Parties and Organisation Act. It can be discerned that the mischief Parliament intended to cure is clear to see that is **to prevent NGOs under section 44 of the Act to engage in non-partisan politics that is regulated under a different legal regime** and does not make the impugned section unconstitutional as alleged.

> Additionally, my Lords, the Petitioner has not adduced laid any evidence to prove to this honourable court that the various state agencies have, since the passage of the NGO Act 2016 consistently harassed, unabated, numerous NGOs and related civic organisations particularly those involved in Advocacy work in areas of the rule of law, constitutionalism electoral democracy, development and human rights on the grounds allegedly that they are involved in partisan activities. In the absence of the such this evidence, it is inconceivable that this Court can find that the impugned provisions of the law is unconstitutional as alleged.
>
> It is therefore Respondent's submissions that this honourable Court finds that section 44 of the Act is no inconsistent with and or in contravention of the Articles 8A, 21, 29 and 38 of the Constitution."

[14] I have some difficulty in following the respondent's arguments that the mischief Parliament intended to be cured in enacting the NGOs Act was **to prevent NGOs from engaging in non-partisan politics** which is regulated under a different legal regime. I suppose the author must have intended to say that mischief was to stop NGOs from engaging in partisan political activity rather than in non-partisan political activity.

[15] It is pertinent to set out the provisions of section 44 of Act.

> **'44. Special obligations**
> An organisation shall—
> (a) not carry out activities in any part of the country, unless it has received the approval of the DNMC and Local Government of that area and has signed a memorandum of understanding with the Local Government to that effect;
>
> (b) not extend its operations to any new area beyond the area it is permitted to operate unless it has received a recommendation from the Bureau through the DNMC of that area;

(c) co-operate with local councils in the area of its operation and relevant DNMC and SNMC;

(d) not engage in any act which is prejudicial to the security and laws of Uganda;

(e) restrict its operations to the area of Uganda in respect of which it is permitted to operate;

(f) not engage in any act, which is prejudicial to the interests of Uganda and the dignity of the people of Uganda;

(g) be non-partisan and shall not engage in fundraising or campaigning to support or oppose any political party or candidate for an appointive office or elective political office, nor may it propose or register a candidate for elective political office; and

(h) have a memorandum of understanding with its donors, sponsors, affiliates, local and foreigner partners, if any, specifying the terms and conditions of ownership, employment, resources mobilised for the organisation and any other relevant matter.'

[16] Section 44 (g) of the Act requires NGOs firstly to be non-partisan. Secondly it prohibits NGOs from fundraising or campaigning to support or oppose any political party for an appointive office or elective political office. Neither may it propose or register a candidate for elective political office. No substantive provision of the Political Parties and Organisations Act is referred to at all.

[17] Section 2 (2) of the Political Parties and Organisations Act expressly provides that political organisations shall not include civic organisations. It provides,

'(2) The definition of 'political organisation' in subsection (1) shall not include the following—
(a) the movement political system referred to in

article 70 of the Constitution;
(b) pressure groups;
(c) civic organisations;
(d) news media organisations registered with the Media Council in accordance with the Press and Journalists Act.
(3) For the purposes of this section, a pressure group is a group of people that actively tries to influence public opinion and government action.
(4) For the purposes of this section, a civic organisation is an organisation registered as such under the laws of Uganda.

[18] It would follow that civic organisations are not regulated by the Political Parties and Organisations Act. That Act regulates only political parties and organisations which, I assume, are registered by the Electoral Commission under that Act. NGOs are not regulated by that Act whatsoever. I am unable to follow the argument that political activities are regulated by one legal regime and therefore it is proper for the NGO Act to proscribe NGOs from engaging in partisan political activity.

[19] NGOs, which can be properly classified as civic organisations, are excluded from the definition of a political organization under the Political Parties and Organisations Act. So NGOs are not regulated by the Political Parties and Organisations Act. In fact that explains why the impugned provision is found in the NGO Act rather than the Political Parties and Organisations Act.

[20] The question before this court is whether the impugned provisions are consistent with the Constitution. The reference to Political Parties and Organisations Act is diversionary and provides no help to explain the impugned provisions *vis a viz* the Constitution. It is pertinent at this stage to set out the relevant provisions of the Constitution. Article 29 states in part,

> **'29. Protection of freedom of conscience, expression, movement, religion, assembly and association**

(1)Every person shall have the right to—

(a) freedom of speech and expression which shall include freedom of the press and other media;
(b) freedom of thought, conscience and belief which shall include academic freedom in institutions of learning;

(c) freedom to practise any religion and manifest such practice which shall include the right to belong to and participate in the practices of any religious body or organisation in a manner consistent with this Constitution;

(d) freedom to assemble and to demonstrate together with others peacefully and unarmed and to petition; and

(e) freedom of association which shall include the freedom to form and join associations or unions, including trade unions and political and other civic organisations.

[21] Article 38 (2) states,

'38. Civic rights and activities

(1) Every Uganda citizen has the right to participate in the affairs of government, individually or through his or her representatives in accordance with law.

(2) Every Ugandan has a right to participate in peaceful activities to influence the policies of government through civic organisations.'

[22] The Oxford Dictionary of English at page 1283, defines partisan as a noun, **'1. a strong supporter of a party, cause or person. 2.a member of an armed group formed to fight separately against an occupying force, ... adjective.....'prejudiced in favour of a particular cause.'**

[23] It would follow that to be non-partisan would be not to be any of the above.

[24] By requiring NGOs to be non-partisan it compels NGOs not to support a party, cause or person or policies espoused by such parties, causes or people. It would follow that their right and or freedom to freely express themselves is inhibited on matters in which they have an interest if there are of a political nature. They are required not to be critical of political actors and their policies. Nor can they express particular support for policies presented by one or more political parties. This contravenes their fundamental rights and freedoms under articles 29 (1) and 38 (2) of the Constitution.

[25] I can understand the prohibition to support particular candidates or to campaign for particular candidates in the political fray which ever political party or independent of any political party such candidates may belong to. What I can not fathom is why they cannot discuss and offer their views on the political programmes of political parties or independent candidates. Or why they should be restricted from influencing policies of government.

[26] Article 43 of the Constitution provides general limitations to chapter 4 rights and freedoms. It states,

> **'43. General limitation on fundamental and other human rights and freedoms**
>
> (1) In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.
> (2) Public interest under this article shall not permit—
>
> (a) political persecution;
>
> (b) detention without trial;
>
> (c) any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.'

[27] It is not suggested by the respondent that the enjoyment of rights and freedoms enshrined under articles 29 (1) and 38 (2) of the Constitution by NGOs prejudices the rights and freedoms of other people. It leaves one leg of the first permissible limitation and that is whether or not exercise of such rights and freedoms 'prejudices' the public interest. In fact this is what is expressed by the supporting affidavit, paragraph 7 already quoted above which asserts that section 44 is permissible limitation under the article 43 of the Constitution 'in the interest of the public.'

[28] Unfortunately the deponent did not proceed further to particularise or state what was the public interest that was intended to be protected by imposing this limitation.

[29] The approach under the 1967 Constitution was for each right and or freedom set out in the bill of rights for exceptions permissible to be set out usually with the following words,

> 'is necessary in the interest of defence, public safety,public order, public morality, public health, town and country planning or the development or utilisation of any property in such manner as to promote the public benefit'.

[30] The foregoing was the case for article 13 in relation to property.

[31] Similar phraseology was adopted in regard to the right and freedom of expression under article 17 which provided an exception in the following words,

> 'is reasonably required in the interests of national economy, the running of essential services, defence, public safety, public order, public morality or public health;'

[32] The International Covenant for Civil and Political Rights in article 12 (3) provides a general limitation to rights and freedoms provided under that

convention which may be instructive in defining what would amount to public interest.

> '3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.'

[33] The 1995 Constitution chose to provide for a general limitation with general rather than specific parameters as was the case under the 1967 constitution and the International Covenant of Civil and Political Rights. Nevertheless the specific parameters provided by both the 1967 constitution and the International Covenant on Civil and Political Rights are useful pointers as to what would amount to public interest. Public interest could be taken to mean without exhausting the list, interests of the national economy, the running of essential services, defence, public safety, public order, public morality or public health or the environment.

[34] The respondent in asserting public interest does not suggest that the affected interests are any of the following, public safety, public order, public morality, public morality, the environment, national economy, or the running of essential services. Neither does he suggest any other.

[35] I am left with only one conclusion that the respondent has failed to discharge the burden placed upon it to justify this limitation in terms of public interest as claimed in the supporting affidavit. The impugned provision has nothing to do with the national economy, the environment, public safety, public order, public morality or the running of essential public services.

[36] The respondent has failed to move past the first threshold of whether the limitations in the impugned provisions are in the public interest. The respondent in my view did not offer any argument or material upon which it is possible to evaluate whether the limitations under the impugned provisions

are demonstrably justifiable in a free and democratic society. It is therefore unnecessary to explore whether such limitation is demonstrably justifiable in a free and democratic society, which Mulenga, JSC, referred to in Charles Onyango Obbo and Anor v Attorney General (supra) as the limitation upon limitation.

[37] For the foregoing reasons I would hold that section 44 (g) of the Act contravenes and is inconsistent with articles 29 (1) and 38 (2) of the Constitution.

[38] With regard to the other provisions of section 44 (a), (b), (c) (d), (e), and (h) of the Act, I agree that these may pass constitutional muster as they are essentially regulatory.

Decision

[39] As Madrama, Kibeedi and Gashirabake agree with Mugenyi, JCC, this petition is disposed of in the terms proposed by Mugenyi, JCC.

Dated, signed and delivered at Kampala this 27th day of April 2023

Fredrick Egonda-Ntende
Justice of the Constitutional Court

THE REPUBLIC OF UGANDA,

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(CORAM; EGONDA NTENDE, MADRAMA, KIBEEDI, MUGENYI AND GASHIRABAKE, JJCC/JJCA)

CONSTITUTIONAL PETITION NO. 020 OF 2019

CENTRE FOR PUBLIC INTEREST LAW (CEPIL)} ..... PETITIONER

VERSUS

ATTORNEY GENERAL} ..... RESPONDENT

JUDGMENT OF JUSTICE CHRISTOPHER GASHIRABAKE , JCC/JA

I have read in draft the Judgment of my learned sister Hon. Lady Justice Monica K. Mugenyi, JCC/JA.

I concur with the Judgment and the orders proposed and I have nothing useful to add.

Dated at Kampala the 27th day of April 2023

Christopher Gashirabake

Justice Constitutional Court/Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Madrama, Kibeedi, Mugenyi, & Gashirabake, JJCC)

CONSTITUTIONAL PETITION NO. 20 OF 2019

BETWEEN

CENTRE FOR PUBLIC INTEREST LAW :: PETITIONER

AND

ATTORNEY GENERAL :: RESPONDENT

JUDGMENT OF MUZAMIRU MUTANGULA KIBEEDI, JCC

I have read in draft both the Lead Judgment of my Sister, Mugenyi, JCC and the partial dissenting judgment of my brother, Egonda-Ntende, JCC. The lead judgment has set out the background facts and the arguments of counsel which grants me the freedom to plunge directly into resolution of the allegations raised in the petition.

I agree that the Petition should be resolved in the terms proposed by Mugenyi, JCC, based on the detailed reasons given in the lead judgment save the single aspect of applicability of the Political Parties & Organisations Act (PPOA) to Non-Governmental Organisations (NGOs) seeking to participate in partisan political activities. In that aspect only, I agree with the observations of Justice Egonda-Ntende, JCC that PPOA does not regulate NGOs seeking to participate in partisan political activities.

The aforesaid notwithstanding, I have thought it fit to give an additional perspective to the one and only aspect of the petition in respect of which the court has not been able to generate consensus, namely : the constitutionality of section 44(g) of the NGO Act to the extent to which it bars NGOs from participating in non-partisan political activities in light of article 29 (1) of the Constitution which guarantees freedom of conscience, expression and association and article 38 of the Constitution which guarantees Civic rights and activities of every Ugandan.

In my view, resolution of the complaint requires the court to harmonise the provisions of articles 29(1) and 38 of the Constitution. This is in accordance with one of the rules of Constitutional interpretation, namely: the rule of harmony, the rule of completeness and exhaustiveness. see: ***P. K. Ssemwogere and Another v. Attorney General Constitution Appeal No I of 2002 (SC).***

A review of both articles reveals that the right of NGOs or civic organizations to influence the affairs and policies of government is specifically provided for by article 38 of the Constitution thus:

> ***"38. Civic rights and activities***
>
> (1) *Every Uganda citizen has the right to participate in the affairs of government, individually or through his or her representatives in accordance with law.*
>
> (2) *Every Ugandan has a right to participate in peaceful activities to influence the policies of government through civic organisations." [Emphasis added]*

My understanding of article 38 of the Constitution is that the civic rights and activities conferred by article 38 are exclusive to only Ugandan citizens. As such, non-Ugandans, whether acting individually or through civic organistations (NGOs), do not derive their right to engage in civic rights and activities from article 38 of the Constitution. The relevance of the distinction between Ugandan NGOs and non-Ugandan NGOs or civic organisations becomes pertinent since the NGO Act provides for different types of NGOs which include *"foreign"* NGOs, *"International"* NGOs and "*Regional"* NGOs.

Second, where the Ugandan citizens seek to exercise their civic rights and activities through "*civic organisations"* (also known as "NGOs" under the NGO Act), instead of exercising such rights as individuals, the mandate of such NGOs as expressly set out in article 38(2) is for purposes of "***influencing the policies of government"***. The operative word from the said article is "***government***". The term "*government*" is defined by article 257 (10) (I) of the Constitution to mean "*the government of Uganda*".

In the above context, it is my view that the requirement by section 44(g) of the NGO Act for NGOs not to be partisan resonates well with the mandate of the NGOs which is aligned by the Constitution itself to influencing the polices of the "government of Uganda" at any given time. Such a government is the one which, at any given time, is the one in charge of the welfare and destiny

of all Ugandans irrespective of their political and other partisan background and composition. To that extent, I agree that the requirement by Section 44 (g) of the NGO Act for the NGOs to be non-partisan is in compliance with article 38(2) of the Constitution.

For the sake of emphasis, section 44 (g) of the NGO Act provides:

> *"An organisation shall ... be non-partisan and shall not engage in fundraising or campaigning to support or oppose any political party or candidate for an appointive office or elective political office, nor may it propose or register a candidate for elective political office."* [Emphasis added]

On the other hand, article 29(1) of the Constitution provides inter alia, for the right to freedom of expression thus:

> ***29. Protection of freedom of conscience, expression, movement, religion, assembly and association***
>
> (1) ***Every person*** *shall have the right to—*
>
> (a) *freedom of speech and expression which shall include freedom of the press and other media;*
>
> (b) *freedom of thought, conscience and belief which shall include academic freedom in institutions of learning;*
>
> (c) *freedom to practise any religion and manifest such practice which shall include the right to belong to and participate in the practices of any religious body or organisation in a manner consistent with this Constitution;*
>
> (d) *freedom to assemble and to demonstrate together with others peacefully and unarmed and to petition; and*
>
> (e) *freedom of association which shall include the freedom to form and join associations or unions, including trade unions and political and other civic organisations."* [Emphasis added]

My understanding of the above provision is that, in as far as the right of expression and association is concerned, its provisions generally apply to "*every person*". The term "*every person*" is wide enough to include natural persons, whether Ugandan citizens or not, and Civic Organisations and other corporate bodies, whether Ugandan or not. This is by virtue of the interpretation of the word "*person*" in the general interpretation provisions of the Constitution namely, article 257(10) (a) of the Constitution, in the terms below:

> *"In this Constitution, unless the context otherwise requires ... words referring to natural persons include a reference to corporations."*

In the context of the right of NGOs (civic organisations) to exercise their freedom of expression guaranteed under article 29 (1) (a) of the Constitution and the freedom to engage in partisan political activities, it is my view that such exercise should not be interpreted in such a way as to lead to a breach the mandate of such NGOs as expressly set out in article 38(2) of ***"influencing the policies of government"***. And, as I have already stated when analysing article 38 of the Constitution, the requirement of section 44 (g) of the NGO Act for the NGOs to be non-partisan keeps the NGOs in their right constitutional space while exercising their freedom of expression.

My reasoning is further backed by the principle of statutory interpretation embedded in the latin maxim *"generalia specialibus non derogant"*. Under this principle, where there is a "conflict" between a statute providing for a specific subject and another statute of a general nature or application in respect of the same subject, then precedence is given to the provisions of the specific statute over the general statute. Justice Griffith of the Court of Appeal of Ontario stated the maxim in ***R. Vs. Greenwood, [1992] 56 O.A.C. 321 (CA) (https://ca.vlex.com/vid/r-v-greenwood-680976213)*** in the following terms:

> *"The maxim generalia specialibus non derogant means that, for the purposes of interpretation of two statutes in apparent conflict, the provisions of a general statute must yield to those of a special one."*

The above rule which was originally used to harmonise the apparent "conflict" between different statutes has since been extended to harmonise the "conflicting" provisions within the same statute in order to create internal harmony within the statute. The Supreme Court of India in the case of *J.K. Cotton Spinning & Weaving Mills Co. Ltd. v. State of U.P., (1961) 3 SCR 185* (https://indiankanoon.org/doc/790887/) stated that not only does this rule of construction resolve the conflicts between the general provision in one statute and the special provision in another, it also finds utility in resolving a conflict between general and special provisions in the same legislative instrument too. The court observed thus:

> *"9. ... we reach the same result by applying another well known rule of construction that general provisions yield to special provisions. The learned Attorney-General seemed to suggest that while this rule of construction is applicable to resolve the conflict between the general provision in one Act and the special provision in another Act, the rule cannot apply in resolving a conflict between general and special provisions in the same*

legislative instrument. This suggestion does not find support in either principle or authority. The rule that general provisions should yield to specific provisions is not an arbitrary principle made by lawyers and Judges but springs from the common understanding of men and women that when the same person gives two directions one covering a large number of matters in general and another to only some of them his intention is that these latter directions should prevail as regards these while as regards all the rest the earlier direction should have effect. In Pretty v. Solly (quoted in Craies on Statute Law at p.m. 206, 6th Edn.) Romilly, M.R., mentioned the rule thus:

> *"The rule is, that whenever there is a particular enactment and a general enactment in the same statute and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply."*

The rule has been applied as between different provisions of the same statute in numerous cases some of which only need be mentioned: De Winton v. Brecon, Churchill v. Crease, United States v. Chase and Carroll v. Greenwich Ins. Co. Applying this rule of construction that in cases of conflict between a specific provision and a general provision the specific provision prevails over the general provision and the general provision applies only to such cases which are not covered by the special provision, we must hold that clause 5(a) has no application in a case where the special provisions of clause 23 are applicable."

The above decision is highly persuasive and very useful in guiding this court discharge its mandate to harmonise the "prima facie" conflicting rights granted to civic organisations by articles 29(1) and 38(2) of the Constitution. In my finding, Article 38(2) of the Constitution being the specific provision as far as the civic rights and activities of NGOs are concerned overrides the more general provision of article 29(1) of the Constitution with regard to the scope of freedom of expression and civic rights and activities of NGOs with the result that their freedom of expression must relate to ""***influencing the policies of government***".

In conclusion, I would agree with the orders proposed by my sister, Mugenyi, JCC in the lead judgment.

Delivered and dated at Kampala this 27th day of April 2023.

.....

MUZAMIRU MUTANGULA KIBEEDI
Justice of the Constitutional Court

THE REPUBLIC OF UGANDA,

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(CORAM; EGONDA NTENDE, MADRAMA, KIBEEDI, MUGENYI AND GASHIRABAKE, JJCC/JJCA)

CONSTITUTIONAL PETITION NO. 020 OF 2019

CENTRE FOR PUBLIC INTEREST LAW (CEPIL)} ..... PETITIONER

VERSUS

ATTORNEY GENERAL} ..... RESPONDENT

JUDGMENT OF JUSTICE CHRISTOPHER GASHIRABAKE , JCC/JA

I have read in draft the Judgment of my learned sister Hon. Lady Justice Monica K. Mugenyi, JCC/JA.

I concur with the Judgment and the orders proposed and I have nothing useful to add.

Dated at Kampala the 27th day of April 2023

Christopher Gashirabake

Justice Constitutional Court/Justice of Appeal