

# The Legal Foundations of Federalism

## 1. Introduction

In our previous discussions of federalism and its relevance to Uganda we pointed out that democracy cannot coexist with state terrorism. State terrorism is a consequence of the abuse political power under a dictatorship when the security agencies are used purposely to achieve political goals rather than to ensure the security of the citizens. Under Obote the special force wreaked havoc during the Nakulabye incident in 1964 in which 8 people, including a child, were brutally shot dead by Obote's terrorist special force without advancing any security objectives but instead blindly pursuing political objectives.

During the Mengo crisis of 1966 thousands of people in the Lubiri, Kabaka's palace, were slaughtered by a brutal Ugandan army on Obote's orders after he unilaterally abrogated the 1962 constitution and usurped presidential powers through a coup d'état. The purpose of the attack was to pursue and achieve political goals. For example, innocent victims of state terrorism in the Mengo crisis were transported to Luzira prison to be buried while some of them were still alive for the sole objective of ruthlessly displaying the invincibility of Obote's army against his political opponents in Buganda.<sup>1</sup>

Under Idi Amin the State Research Bureau and the National Safety Unit killed thousands of people who were made to "disappear" without a trace including the Chief Justice of Uganda, Benedict Kiwanuka, who was kidnapped from his chambers at the High Court. Archbishop Luwum and Vice Chancellor of Makerere University, Frank Kalimuzo, were murdered by the SRB in cold blood. Amin's use of the SRB and the NSU were purely political—to hold on to political power for life.

Under Museveni, in spite of the existence of the Security Organizations Act, 1987, enacted at the recommendation of the Uganda Constitutional Commission supposedly to end state terrorism by security agencies created by executive orders under Obote and Idi Amin did not end state terrorism. For example, many people were locked up and died in train wagons in Teso in 1987 at the hands of NRM security agencies. In 2009 during the Bugerere riots thousands of innocent people in Buganda were denied their rights to protest the unlawful refusal by Museveni to allow Kabaka Mutebi to visit Bugerere, one of the counties of Buganda. Thousands were slaughtered by the security agencies under the orders of the NRM regime. Hundreds of people, including Kalundi Serumaga, a journalist, were tortured in safe houses. Torture of members of the opposition is a routine practice under NRM regime.

Most recently many members of the opposition and supporters of Kyagulanyi mysteriously disappeared without a trace during the campaigns of the most recent elections of January 2021. Others like MPs Segirinya and Ssewanyana were falsely charged with murder in Masaka located very far from their constituencies in greater Kampala just as Dr. Besigye was corruptly and falsely charged with murder and treason in 2005 by Justice Byamukama then an employee in the DPP's office.

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<sup>1</sup> Uganda, *The Report of the Commission of Inquiry into Violations of Human rights: Findings, Conclusions and Recommendations*, 1994, verbatim testimony of Sentamu, Senior Superintendent of Prisons and Regional Commander of Buganda region at the time, pp. 86—88. This case exemplifies the essential horrible elements of state terrorism.

The inevitable conclusion we have reached is that from independence in 1962 to the present Ugandans have lived under state terrorism perpetrated by the regimes in power. Ugandans continue to live under state terrorism under the NRM regime headed by Museveni. State terrorism occurs when the security agencies are permitted, ordered or intentionally deployed by the leaders to achieve political objectives rather than protecting and ensuring the security of the citizens. State terrorism in Uganda must stop. There is no difference between the regimes of Milton Obote, Idi Amin and Yoweri Kaguta Museveni. The only solution to the scourge of state terrorism is a federal system of government. The central government is the sole perpetrator of state terrorism.

We pointed out in our previous presentations that federalism is the most effective solution to end state terrorism in Uganda because federalism will introduce new autonomous political and security structures which are legitimate and close to the people, separate from the central government and governed under autonomous police powers and state authorities which are separate from a repressive the central government. In addition, a federal system will introduce new economic infrastructure of economic federalism whereby the people will manage their resources efficiently at the local level exercising their legal rights to democracy and self-determination guaranteed by international law.

## 2. Right to Democracy

The right to democracy is now guaranteed by international law. The right to democracy is the legal foundation for the people to demand a federal system of government. The people of Uganda are not demanding a right to democracy to fall from the blue sky. The right to democracy was established by the provisions of the Universal Declaration of Human Rights, (UDHR), 1948, and the International Covenant on Civil and Political Rights, (ICCPR) 1966. These international instruments established human rights norms that guarantee a right to democracy. The ICCPR was ratified by Uganda in 1987 and is now part of both international customary law as well as treaty obligations binding on Uganda to respect the rights of Ugandans to democracy and by logical extension to a federal system of government.

Article 21 of the UDHR<sup>2</sup> and article 25 of the ICCPR,<sup>3</sup> read together, have, according to Thomas M. Franck's authoritative publications as a prominent international law scholar and source of international law, given rise to a general, universal right of all people to claim "a right to democracy."<sup>4</sup> Thomas M. Franck in his article published in *American Journal of International Law*, in 1992, pointed out that "The entitlement to democracy in international law has gone through both a normative and a customary evolution. It has evolved both as a system of rules and in the practice of states and international organizations. This evolution has occurred in three phases. First

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<sup>2</sup> Article 21(1) Everyone has the right to take part in the Government of his country directly or through freely chosen representatives.

Article 21(2) Everyone has a right of equal access to public service in his country.

Article 21(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

<sup>3</sup> Article 25 Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

<sup>4</sup> Thomas M. Franck, "The Emerging Right to Democratic Governance," *American Journal of International Law*, vol. 86, No. 1, January 1992, pp. 46—91

came the normative entitlement to self-determination. Then came the normative entitlement to free expression as a human right. Now we see the emergence of a normative entitlement to a participatory electoral process,”<sup>5</sup>

These obligations are binding on all states which are members of the international community. The rights they confer directly on the people include the rights to assemble, associate, expression in various forms, to participate in free and fair elections, to be effectively represented in government and guarantee freedom from torture, intimidation or state terrorism practised in Uganda by the state through UPDF, Uganda Police and the intelligence agencies.<sup>6</sup> The violation of law by these state agencies in Uganda is best crudely exemplified by the seizure of the High Court by armed agencies twice on November 16, 2005, and March 1, 2007. During these two sad and traumatic episodes the High Court was seized by armed the state agencies which committed brutal acts of torture on bailed prisoners inside the High Court. If state agencies could do that in daylight with the approval of the Head of State by torturing bailed prisoners at the High Court one does not need extraordinary powers of imagination to understand what goes on during the night in the so-called “safe houses” where young men are castrated and some have their nails extracted from their fingers! These cruel acts of the Ugandan state agencies are extensively documented.

In order to put the emergence of the right to democracy in perspective we have to remember that the article quoted above was written by Thomas M. Frank three decades ago. Many changes have swiftly taken place under international law since then leading us to the inevitable conclusion that the right to democracy has now been firmly and fully established under international law.

Besides the recognition of universal jurisdiction for torture by the House Lords, now the Supreme Court of UK, in Pinochet’s case in 2008 and the international promulgation of the Statute of Rome in 2003 all developments point to the full evolution and maturation of the right to democracy. On the basis of the existence of the right to democracy the people of the world, especially the oppressed Ugandans, have a right to regime change if the regime is oppressive, illegitimate and routinely violates the people’s human rights and their right to democracy guaranteed by international law. Moreover, the justification for the civil war in Luwero triangle was to restore democracy in Uganda.

The existence of a right to democracy necessarily implies an obligation on part of the state to strictly protect political freedom, that is, freedom of expression and assembly, and, more specifically, a general obligation on part of the state to insure and conduct a regular, free and fair electoral process in order for the state to enforce and the people to enjoy the right to democracy. Uganda under the NRM regime has defaulted several times on its international obligation to conduct free and fair elections. International observers have consistently concluded that the state under NRM has failed in its obligation to conduct free and fair elections.

For example, the elections of 1996 and 2001, conducted under the movement system, were found not to be free and fair for four main reasons. First, there was violence, harassment and intimidation of the voters and the leaders of the opposition by the state armed forces and intelligence agencies. Second, there were many irregularities committed by the Electoral Commission, such as disfranchising voters whose names were missing or illegally removed from the voters’ roll. Third, there was extensive bribery of the voters, or what international election observers characterized as “commercialization” of the electoral process, especially by state agents

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<sup>5</sup> Id. at p. 90.

<sup>6</sup> The Internal Security Organization (ISO), the External Security Organization (ESO) and the Chieftaincy of Military Intelligence (CMI).

and leaders who supplied money and scarce commodities to poor voters in order to win their votes threw bribery and corruption.

Lastly, there was no level playing field during the elections because the NRM incumbent's campaign was illegally financed by unlimited state funds. There was no distinction between the state and NRM. Separation of political parties from the state is required under a democratic political system. The opposition, however, had no matching funds and, due to suppression of political freedom under the movement system, had no opportunity to raise money from the impoverished supporters or any other source because of Article 269 of the 1995 constitution which prohibited political activities "interfering" with the movement system. Unfortunately, the situation did not improve after the movement system was abolished in 2005.

The international observers noted that the same factors which had plagued the electoral process under the movement system persisted in the elections of 2006, 2011 and 2016. In their report of February 23, 2006, for example, the Commonwealth Observer Group concluded that "the environment in which the elections were held had a number of negative features which meant that the candidates were not competing on a level playing field" because of the "failure to ensure a clear distinction between the ruling party and the state, the use of public resources to provide an advantage to the ruling party, the lack of balance in media coverage ... the harassment of the main opposition Presidential candidate, the creation of a climate of apprehension amongst the public and opposition supporters as a result of the use of the security forces, and the alleged use of financial and material inducements." These factors pointed out by the Commonwealth Observer Group have continued to prevent the elections in Uganda from being free and fair.

In their report of February 18, 2011, the Commonwealth Observer Group reached a similar verdict: "Our main concerns were about the overwhelming lack of a level playing field, abuse of incumbency and the 'commercialization of politics.' As a result, the 2011 elections in Uganda did not fully meet national, regional and international standards for democratic elections." The situation in 2016 was far worse than in the previous elections. The Supreme Court did not nullify the 2016 election for obvious reasons of corruption in the judicial system. Not surprisingly, similar problems existed in the most recent 2021 election. In fact, one of the petitioners, (Boby Wine) Kyagulanyi, who initially challenged the validity of the election results, withdrew his petition from the Supreme Court contesting the results of the election for the obvious reasons of corruption in the judiciary and the Supreme Court.

The only effective solution to this problem is regime change and the exercise of the people their right to democracy guaranteed under international law through self-determination. In addition to all these electoral problems which are inconsistent with the right of the people to democracy is to get rid of the political ghost of torture by state agencies which is always present in all detention centers in Uganda, especially during the elections.

### **3. Torture Violates the Right to Democracy**

Article 24 of the constitution provides that "No person shall be subjected to any form of torture, cruel, inhuman or degrading treatment or punishment." There is no derogation from the enjoyment of freedom from torture, cruel, inhuman, or degrading treatment or punishment under the constitution of Uganda.<sup>7</sup> In practice these constitutional provisions mean nothing under the NRM regime. In 2012 the Prevention and Prohibition of Torture Act was enacted "to give effect to the obligations of Uganda as a State Party to the United Nation's Convention against Torture and

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<sup>7</sup> Article 44(a) of the 1995 constitution.

Other Cruel, Inhuman or Degrading Treatment or Punishment and other related matters.”<sup>8</sup> The UN Convention against Torture was adopted by the UN General Assembly on December 10, 1984. It was ratified by Uganda on June 27, 1987. The UN Convention against Torture was domesticated as a law of Uganda in 2012. It constitutes an important part of the right to democracy under the laws of Uganda. But torture by UPDF, the Police and the intelligence agencies goes on and continues in Uganda. This includes torturing members of Parliament illegally arrested during political campaigns. This state terrorism is deliberately done for political reasons to cripple political campaigns of the members of the opposition.

Torture means “any act or omission, by which severe pain or suffering whether physical or mental, [which] is intentionally inflicted on a person by or at the instigation of or with the consent or acquiescence of any person whether a public official or other person acting in an official or private capacity.” Under both the UN Convention against Torture and the Rome Statute, also domesticated in Uganda, an order from a superior officer or public authority is not a defense from a charge of torture. A person who refuses to implement an order to torture cannot be punished under the laws of Uganda. All commanders of the police and the army, including the Head of State, are liable for all acts of torture that are committed in Uganda today. Torture as practiced by the security agencies under NRM violates the right to democracy guaranteed by international law. The solution to this problem is for the citizens of Uganda to use their right to democracy and demand self-determination through a federal system of government.

#### **4. The Right to Self-determination and Federalism**

Articles 1 of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Political and Civil Rights provide that “All peoples have the right of self-determination. By virtue of the right they determine their political status and freely pursue their economic, social and cultural development.” The right to self-determination is the foundation for the right to a federal system of government. Ugandans have a right to demand a federal system of governance. It is part of the right to democracy which should be enjoyed by all Ugandans. Under a federal system the people will preserve and be in charge of their cultural institutions, the federal state economy and an appropriate or equitable taxation system to fund their economic activities, stimulate development and ensure justice for all Ugandans. This is what we call Economic federalism. The details of economic federalism will be outlined in our next discussions by looking at the different federal systems.

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<sup>8</sup> Long title.