

**THE REPUBLIC OF UGANDA,  
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA  
(CORAM; EGONDA NTENDE, MUSOKE, MADRAMA, MUGENYI,  
GASHIRABAKE, JJCC/JJCA)**

**CONSTITUTIONAL PETITION NO 39 OF 2017**

- 10      1. THE FOUNDATION FOR HUMAN RIGHTS  
INITIATIVE}  
2. LEGAL AID SERVICE PROVIDERS  
NETWORK UGANDA} ..... PETITIONERS

**VERSUS**

- 15      1. THE ATTORNEY GENERAL OF UGANDA}  
2. ELECTORAL COMMISSION} ..... RESPONDENTS

**JUDGMENT OF JUSTICE CHRISTOPHER MADRAMA IZAMA, JCC**

20      The first petitioner is an independent, non-governmental organisation registered under The Non-Governmental Organisations Act, 2016 as a national human rights organisation aiming to enhance the knowledge, respect and observance of human rights and to promote constitutionalism, rule of law and good governance in Uganda. The second petitioner is a non-governmental organisation registered under the Non - Governmental Act, 2016 as a national network of legal aid service providers with the aim of  
25      providing a platform for effective networking and collaboration to enhance legal aid service delivery and access to justice for the most vulnerable and marginalised people in Uganda.

30      The petitioners lodged this petition against the first and second respondents because they state that they believe that there are matters which are inconsistent with and in contravention of the provisions of the Constitution of the Republic of Uganda and International Covenants and Declarations to which Uganda is a party. The petitioners averred that:

- 5 (a) Section 12 (a) and (b) of the Local Government (Amendment), Act No 16 of 2015, in providing for election of village or cell council and parish council by means of lining up behind a nominated candidate, their representatives, portraits or symbol is in contravention of and inconsistent with article 1 (4) and 59 (1) (3) and (4) of the Constitution of the Republic of Uganda 1995 as amended.
- 10 (b) Section 12 (a) and (b) of the Local Government (Amendment) Act, Act No 16 of 2015, in providing for elections of village or cell council and parish ward council by means of lining up behind the nominated candidate, their representatives, portraits or symbol is in contravention of and inconsistent with articles 1 (4) and 21 and 33 (1), (2), (4) and (6) of the Constitution of the Republic of Uganda 1995 as amended.
- 15 (c) Section 12 (a) and (b) of the Local Government (Amendment) Act, Act No 16 of 2015, in providing for elections of village cell council and parish ward council by means of lining up behind the nominated candidate, their representatives, portraits or symbols is in contravention of an inconsistent with article 35 of the Constitution of the Republic of Uganda 1995 as amended.
- 20 (d) Section 12 (a) and (b) of the Local Government (Amendment) Act, Act No. 16 of 2015, in providing for elections of village or cell council and the parish ward council by means of lining up behind the nominated candidate, their representatives, portraits or symbol is in contravention of and inconsistent with article 68 (1) of the Constitution of the Republic of Uganda, 1995 as amended.
- 25 (e) Section 12 (a) and (b) of the Local Government (Amendment) Act, Act No 16 of 2015 in providing for elections of village on cell council and parish ward council by means of lining up behind the nominated candidate, their representatives, portraits or symbol is in contravention of and inconsistent with article 79 (1) of the Constitution of the Republic of Uganda 1995 as amended.
- 30 (f) That the Electoral Commission Guidelines 2017 which provide for the electoral polling process are inconsistent with and contravene
- 35



5 articles 1 (4), 45, 59, 61 (e) and (f), 64, 72 (4), 29 (1) (a) and (e) of the Constitution of the Republic of Uganda as amended.

- (g) That section 12 (a) and (b) of the Local Government (Amendment) Act, Act No 16 of 2015, in providing for elections of village of cell council and the parish ward council by means of lining up behind the nominated candidate, representatives, portraits or symbol is in contravention of and inconsistent with article 45 of the Constitution of Uganda, 1995 as amended in that both the Local Government (Amendment) Act, Act No 16 of 2015 and the Electoral Commission Guidelines are inconsistent with and in contravention of various other rights granted by several International Instruments to which Uganda is signatory.

The petitioners referred to the Preamble to the Constitution for the history of Uganda which had been characterised by political and constitutional instability. That the Constitution now requires the Electoral Commission to ensure that free and fair elections are held and to compile, maintain, revise and update the voters register and hear and determine election complaints arising before and during polling. Further the Constitution vests in the High Court jurisdiction to sit on appeal from decisions of the Electoral Commission arising from complaints arising before and during polling. In pursuance of the constitutional mandate the Electoral Commission has compiled an electronic voters register meaning that the roll for every village can be extracted and displayed throughout the country to allow for objections to be raised as well as an update of the register. Further that the register provides for date of birth thereby ensuring that only citizens and persons of majority age participate in all elections including village and parish elections.

Petitioners assert that the Electoral Commission has issued Guidelines for the 2017 elections and provided that:

- (i) It will constitute parish/Ward complaints committee to handle election complaints arising from election activities for election of village chairperson, village women committees, and parish/Ward

5 and chairperson women councils. The composition of the committees is; "parish/Ward electoral official, village election officials, sub- County election official as chair and parish election officials. These offices are unknown to the Constitution, Electoral Commission Act, Local Government Act, or the National Women's Council Act.

10 (ii) The Guidelines for LC 1 and LC II election on the footing they provide for voters to assemble between 7 AM and 8 AM, receive a voter education and sensitisation on the polling process between 8 AM and 9 AM, identify candidates between 9:10 AM and 9:30 AM, verify voters between 9:30 AM and 10:30 AM, position candidates between 10:30 AM and 10:50 AM, lining up behind candidates between 11 AM and 12:20 AM, count voters between 11:20 AM and 11:40 AM and allows results between 12:10 and 12:20 PM.

20 (iii) The Guidelines provide for election of chairperson, vice chairperson, Secretary, publicity secretary and secretary for finance by lining up between 11:10 AM and 12:55 PM, inclusive of declaration of results. It is not possible that all these positions can be filled through a credible process as they are too many positions and it would be impractical to fill them in the limited time.

The petitioners assert that the Guidelines do not provide the basic tenets of a free and fair elections such as display of voters' register, updating of the register, management of the electoral process, voter verification, campaigns by candidates, transparency in accounting and announcing of winners, complaints before, during and after polling. Further the Electoral Commission shall not use the electronic voters register. This means that the Elections will be conducted without a verifiable register. In addition, far more resources are being expended on compiling of a fresh register for the purposes of the LC elections yet in fact a lot of resources have in the past been spent on compiling and updating a national voters register. This leads to wastage of resources and results in disenfranchisement of those



5 persons who may not be on the new and subsequent manual register. Further the petitioner stated that the Local Government (Amendment) Act No. 16 of 2015 and the said Guidelines provide for those willing to take part in the election as opposed to ensuring that all who wish to vote registered.

The petition is supported by the affidavit of Dr. Livingstone Sewanyana.  
10 Further the petitioners seek the following declarations:

- 15 (a) That sections 12 (a) and (b) Local Government (Amendment) Act, cap act Number 16 of 2015, in providing for elections of the level of cell council and parish ward council by means of lining up behind the nominated candidate, their representatives, portraits or symbol is in contravention of an inconsistent with articles 1 (4), 21, 33, 35, 59 (1) (3) and (4), 68 (1) and 79 (1) of the Constitution of the Republic of Uganda and are thus null and void.
- 20 (b) That any actions conducted under the impugned provisions of section 12 (a) and (b) of the Local Government (Amendment) Act, Act No. 16 of 2015 are void ab initio and of no legal effect.
- (c) That the court grants and issues such consequential orders as follow from and are necessary to give effect to the declarations sought in (a) and (b) above.

Dr. Livingstone in an affidavit dated 31 October 2017 supports the averments  
25 of the petitioners with an affidavit that does not add much to the averments in the petition but only confirms them on oath.

The first respondent opposed the petition and averred in the answer to the petition that section 12 (a) and (b) of the Local Government (Amendment) Act, Act No. 16 of 2015 which provides for elections of village of cell council  
30 and the parish ward council by means of lining up behind the nominated candidate, their representatives, portraits or symbol is not in contravention of or inconsistent with articles 1 (4), 59 (1) (3) and (4), 21, 33 (1), (2), (4) and (6), 35, 68 (1), 79 (1), 45, 59, 61 (e) and (f), 64, 72 (4), 29 (1) (a) and (e) of the Constitution of the Republic of Uganda.

5 The first respondent admits that the Electoral Commission issued  
Guidelines for the conduct of elections of village or cell council and parish  
ward councilors. Further that the rights of the petitioners as guaranteed  
under the 1995 Constitution of the Republic of Uganda have not been  
violated. The respondent asserts that the petitioner's rights would not in any  
10 way be prejudiced by the dismissal of the petition and that the petitioners  
are not entitled to the declarations and orders sought in the petition.

The answer to the petition is supported by the affidavit of Mr. Allan Mukama,  
State Attorney in the Attorney General's Chambers. The affidavit primarily  
states that the matters stated by the petitioners as being inconsistent with  
15 provisions of the Constitution are not inconsistent with or in contravention  
of the Constitution of the Republic of Uganda 1995.

Similarly, the second respondent in their answer to the petition opposed the  
petition and primarily advanced that the matters complained of by the  
petitioners which they assert are inconsistent with the petition are not  
20 inconsistent with the provisions of the Constitution of the Republic of  
Uganda. Further that the Guidelines issued by the second respondent do not  
in any way negate, the provisions of the Constitution in any respect. They  
assert that owing to the need to have the said election conducted with a  
huge budgetary cost, the Parliament of Uganda refined the legal and  
25 procedural framework in which elections could be practically conducted.  
Further the second respondent asserted that the LC 1 and LC 2 women  
councils and community elections were last held in the year 2001 and it is  
now approximately 16 years without those elections being held again due to  
the lack of enabling laws and inadequate funds all of which are now  
30 available. In further reply, they assert that owing to the period that the  
second respondent was unable to conduct the said elections, many issues  
arose that necessitated the said elections to be urgently organised and  
conducted. In the premises, the second respondent asserts that the petition  
lacks merit and this court should be pleased to dismiss it with costs.



5 The affidavit in support of the answer to the petition deposed to by Abu Baker Kayondo and confirms the averments of the second respondent on oath.

At the hearing of the petition learned counsel Mr. Wandera Ogalo appearing jointly with learned counsel Mr. Robert Kirunda represented the Petitioners while the learned state attorney Mr. Alan Mukama represented the respondents. With leave, the court was addressed in written submissions and judgment was reserved on notice. The petitioners addressed the court in joint written submissions while the first and second respondents addressed the court in separate written submissions.

### 15 **Submissions of the counsel**

The petitioner's counsel split the petition into four issues as follows:

1. Whether elections by means of lining up as provided in section 12 (a) and (b) of the Local Government Act is inconsistent with and in contravention of articles 1 (4) 8A, 21, 33, 35, 59 (1), (2) and (3), 61 (a), (e), (f) and (g) and 68 (1) of the Constitution.
2. Whether section 12 (a) and (b) of the Local Government Act is inconsistent with article 79 (1) of the Constitution.
3. Whether the Electoral Commission Guidelines 2017 are inconsistent with and in contravention of articles 1 (4), 28, 29 (1) (e), 45, 59, 61 (a), (e) and (f), 64 (1) and 65 of the Constitution.
4. The remedies available.

#### **Issue 1:**

**Whether elections by means of lining up as provided for in section 12 (a) and (b) of the Local Government Act is inconsistent with and in contravention of articles 1 (4) 8A, 21, 33, 35, 59 (1), (2) and (3), 61 (a), (e), (f) and (g) and 68 (1) of the Constitution.**

The petitioners counsel submitted that previously section 111 of the Local Government Act 1997 provided that all elections at local government and administrative unit levels shall be by secret ballot using one ballot box for

5 all candidates at each polling station. 18 years later, the law was amended  
by making an exception of village and parish elections so that they do not  
need to use the ballot box. The law provided that election of village cell  
council and parish or Ward council chairperson shall be by the electorate  
lining up behind the candidates nominated for the office, their  
10 representatives, portraits or symbols.

The petitioners contend that in terms of article 1 (4) of the Constitution, the  
people of Uganda shall express their will and consent on who should govern  
them and how they should be governed through free and fair elections.  
Similarly, under article 61 (1) (a) of the Constitution, one of the functions of  
15 the Electoral Commission is to ensure the conduct of free and fair elections.  
The phrase "free and fair elections under article 1 (4) of the Constitution was  
considered in **Kwizera Eddie vs Attorney General** the court also cited with  
approval its own decision in **Dr. Kizza Besigye vs Yoweri Kaguta Museveni**  
and highlighted inter alia that free and fair elections should have an  
20 atmosphere free of intimidation, bribery, violence, coercion or anything  
intended to subvert the will of the people and the procedure should  
guarantee the secrecy of the ballot. The petitioners emphasised the secrecy  
of the ballot. They contend that the Supreme Court and the constitutional  
court variously held that the secrecy of the ballot is a component of free  
25 and fair elections. In the premises, the petitioners' counsel submitted that  
the amendment of the Local Government Act to remove the requirement for  
secret ballot is unconstitutional and inconsistent with article 1 (4) of the  
Constitution of the Republic of Uganda.

The petitioners contend that the amendment further violates article 33 of  
30 the Constitution which requires the state to protect women and their rights  
taking into account their unique status and natural maternal functions in  
society and that by requiring people to line up, this did not take care of the  
unique status and maternal functions of women. They contend that with  
secret ballot, there is a choice of when to go to cast a vote while lining up  
35 is scheduled for a particular time and requires the voter to be present from  
7 AM to 2 PM. The petitioners contend that Parliament ought not to have



5 enacted a law that does not give women a chance considering their unique status and natural maternal functions and therefore women were disenfranchised by the scheduling of elections in the aforesaid manner in breach of article 33 of the Constitution of the Republic of Uganda.

10 The petitioners rely on **Mifumi Uganda and 12 Others vs Attorney General and Kenneth Kakuru** where the Supreme Court emphasised that Uganda is a signatory to all major human rights conventions which require it to put in place laws and measures that prevent discrimination and perpetuate inequality. This include the Convention on the Elimination of all Forms of Discrimination against Women which obligates Uganda to take necessary  
15 measures in relation to the rights of women. The petitioners also rely on **Uganda Law Society Vs Attorney General Constitutional Petition No 2 and 8 of 2002**. Further, that article 7 of the Convention on the Elimination of all Forms of Discrimination against Women requires the state to take all appropriate measures to ensure that women and men are on equal terms  
20 with men in respect of the right to vote in elections. They contend that there can be no equal terms between men and women when the process does not take into account the maternal functions of the woman which in this case is through secret ballots.

25 The petitioners further contend that article 35 of the Constitution enjoins the state to protect the rights of persons with disabilities and the state is required to protect their right to respect and human dignity and to enact laws that are appropriate for the protection of persons with disabilities. He relied on **Centre for Health and Human Rights and Another vs the Attorney General of Uganda; Constitutional Petition No 64 of 2011** where the  
30 constitutional court held that the state and society have obligations to take appropriate measures to realise the full mental and physical potential of persons living with disabilities. This cannot be realised if their dignity is not upheld. The petitioners further rely on the General Comment No 3 (2016) on Article 6 of the Convention on the Rights of Persons with Disabilities which  
35 defines multiple discrimination as "a situation where a person can

5 experience discrimination or two or several grounds, in the sense that discrimination is compounded or aggravated”.

Further in the General Comment Number 20 (2009) on the International Convention on Economic Social and Cultural Rights, nondiscrimination is addressed and in article 2 (2), direct discrimination is defined as less  
10 favourable or detrimental treatment of persons with disabilities while indirect discrimination occurs when a practice, rule, requirement or condition is neutral on its face, but impacts disproportionately upon persons with disabilities, unless that practice,, requirement or condition is justified.

The petitioners’ counsel submitted that there are different kinds of disability  
15 such as persons with hearing disability and that such persons are likely to miss verbal instructions issued on polling days where voting is by lining up. Secondly, the respondent’s Guidelines do not indicate in any way that provision has been made for sign language interpretation at the polling stations. Further, persons with visual impairments likely to be unattended  
20 to at the polling stations and the Guidelines do not have in place any measures to take care of them. Further persons who otherwise are physically impaired and are unable to stand for considerable periods of time may be constrained and would avoid voting by lining up behind their candidates of choice and this is particularly because of standing up for long  
25 hours. In the premises, persons with disabilities will elect not to participate in the electoral process. Counsel further submitted that such voters will be exposed to the inconvenience of having to rely on minders and will be exposed to the risk of manipulation of their votes.

The petitioners further submitted that article 61 (e) of the Constitution of the  
30 Republic of Uganda which requires the Commission to compile, maintain, revise and update the voters register was infringed. They contend that section 12 (c) and (b) of the Local Government Act provides for lining up for elections thereby negating the constitutional obligation on the second respondent to compile, maintain and update the voters register. They relied  
35 on **Kasozi Robinson and others vs Attorney General and Electoral Commission (Consolidated Petitions)** where the court held that article 61 (e)



5 of the Constitution requires the Electoral Commission to obtain the voters register and not voters register. That a voter, whether under adult suffrage, or under any other mechanism or procedure set up by Parliament may be registered on the voters' register. There is no requirement for separate registers for each interest group and that this information would  
10 presumably have to be captured in the voters' register maintained by the Electoral Commission. By providing for conducting national wide elections by way of lining up, Parliament absolved the second respondent from compliance with article 61 (a) because in national wide elections it will not require the second respondent to carry out its constitutional obligations and  
15 Parliament had no power to suspend the operation of article 61 (a) of the Constitution. Counsel further submitted that the situation is aggravated when read together with Guideline 5 (b) by which the second respondent sets up registers unknown to the Constitution and which it had no authority to do.

20 In terms of article 68 (1) of the Constitution, the petitioners submitted that it requires that at public elections, voting shall be by secret ballot using one ballot box. The provision is subjected to article 68 (6) which empowers Parliament to exempt any public election from the requirement of secret ballot. The petitioners counsel submitted that articles 1 (4) and 61 (a) of the  
25 Constitution provide for free and fair election and secrecy of the ballot is an ingredient of a free and fair election. They submitted that there appears to be some inconsistency within the two substantive provisions of the Constitution under article 1 (4) and 61 (a) on the one hand and the procedural power given to Parliament under 68 (6) of the Constitution. The petitioners  
30 maintained that because there is a conflict between these two provisions, preference should be given to article 1 (4) and 61 (a) which was enacted by the Constituent Assembly rather than to laws enacted by Parliament under article 68 (6) of the Constitution.

The petitioners counsel further submitted that in such cases, a restrictive  
35 interpretation should be given to the enabling constitutional provision. This is because there are many types of public elections in Uganda. These

5 include elections for the representation of the family, youth, workers, persons with disabilities to Parliament, elections of women representatives to councils, elections of the special interest groups, councilors, election of chairpersons of councils, local Council elections et cetera. The petitioners counsel emphasised that there is an important distinction between public  
10 elections and election by the electoral colleges. They submitted that where election is by adult suffrage, it should be by secret ballot. They submitted that article 68 (6) of the Constitution should be given a restrictive interpretation, by holding that it applies only to those public elections where voters themselves are elected or appointed to form electoral colleges.

15 The petitioners' counsel submitted that the history of the constitutional provision has to be taken into account in interpreting it and that in the draft constitution submitted to the Constituent Assembly, clause 93 which is now article 68 of the Constitution has remained the same except in one respect. The draft constitution ended with clause 5 and does not have the equivalent  
20 of article 68 (6) of the Constitution and it did not therefore have a provision empowering Parliament to exempt public elections from the secret ballot process. Counsel further submitted that the clause was introduced in the plenary session and not by the Odoki Commission.

Further, the petitioners contend that article 8 A of the Constitution provides  
25 that the state shall be based on Democratic principles which empower and encourage the active participation of all citizens at all levels in their governance. They submitted that a basic democratic principle requires the secrecy of the ballot ensuring that a voter's choice remains anonymous thereby forestalling attempts to influence the voter by intimidation,  
30 blackmailing or potential vote buying. It follows that the principle of democratic governance is contravened contrary to article 8 A of the Constitution where no secret ballot is provided for. Counsel further relied on **Sekikubo and Others Vs Attorney General and others; Constitutional Appeal No 01 of 2015 [2015] UGSC 19** (30 October 2015) which settled the  
35 application of democratic principles using article 8A.



5 The petitioner's counsel further relied on the decision of the Supreme Court of India in **Writ Petition No 161 of 2004** where the court held inter alia that:

10 "Free and fair election is the basic structure of the Constitution and necessarily includes within its ambit of the right of an elector to cast his vote without fear of reprisal, duress or coercion, protection of identity and affording secrecy is therefore integral to free and fair election... Giving right to a voter to vote for any candidate while protecting his right of secrecy is extremely important in a democracy" at pages 44 – 45.

In the premises, the petitioner submitted that lining up is inconsistent with Article 8A of the Constitution.

15 Further, the petitioner's counsel submitted that article 45 the Constitution provides that the fundamental human rights and freedoms specifically mentioned in chapter 4 do not exclude others not specifically mentioned and this has the effect of importing rights in International Conventions into the Constitution. In the premises, the right of secrecy in casting votes  
20 include that set out in the International Covenant on Civil and Political Rights under article 25, article 21 (3) of the Universal Declaration of Human Rights [1948], and article 29 (a) (ii) of the UN Convention on the Rights of Persons with Disabilities [2006]. The petitioners' counsel further argued that the constitutional court and the Supreme Court have variously relied on  
25 international instruments and international law in the enforcement of fundamental rights and freedoms and in the interpretation of the Constitution under article 137 of the Constitution of the Republic of Uganda. These decisions include that in **Attorney General vs Susan & Constitutional Appeal No 6**, (RTD) **Dr. Kizza Besigye vs Yoweri Museveni Kaguta and Electoral Commission; Election Petition No 1 of 2001** where article 1 (4) of  
30 the Constitution was held to incorporate principles enshrined under article 21 the Universal of Human rights and 25 of the ICCPR for the principle of freely chosen representatives.

35 The petitioners' counsel submitted that the provisions of the International Conventions cited above were that free and fair election shall be conducted by secret ballot or through such means as would guarantee the secrecy of

5 the voter's choice. Counsel submitted that voters cannot freely express their will in elections if the elections are not held by secret ballot. Further the international instruments referred to were ratified by Uganda and the secrecy of the vote is treated as a right of the voter and the duty upon the state. In the premises enacting a law which is directly inconsistent with the  
10 secrecy of the vote, violates article 45 of the Constitution as well.

In reply, the first respondent's counsel submitted that the petition challenges the act of voters lining up behind a nominated candidate, their representative, portraits or symbols in the village or cell council and parish/ward council elections. The petitioners assert that the method  
15 described of election contravenes articles 1 (4), 21, 33, 35, 45, 59 (1) (3) and (4), 68 (1) and 79 (1) of the Constitution of the Republic of Uganda and is therefore null and void. They also challenge the Electoral Commission Guidelines 2017 for contravention of articles 1 (4), 45, 59, 61 (e) and (f), 64, 72, (4), 29 (1) (a) and (e) of the Constitution of the Republic of Uganda.

20 The first respondent's counsel submitted that the Constitution empowers Parliament of Uganda to enact a law exempting any public election from the requirement of secret ballot other than the Presidential and Parliamentary elections under article 68 (6) of the Constitution. It follows that a law which was enacted under section 12 (a) (b) of the Local Government Act as  
25 amended is meant to give effect to articles 60, 62, 67 and 206 of the Constitution. Further article 68 (6) was considered in **Rubaramira Ruranga vs Electoral Commission and Attorney General Constitutional Petition No 21 of 2006**. The petitioners challenged the method of voting of women's councilors and sought to have cancelled the elections under the regulations  
30 by lining up behind the candidate of choice. The petitioner had also contended that such lining up contravened article 1 (4) of the Constitution which inter alia provides for the holding of regular, free and fair elections. The court found that because the elections did not relate to presidential or parliamentary elections, they are exempted and to that extent there was no  
35 merit to the complaint. For the same reason, the decision cited by the petitioners of **Dr. Kizza Besigye vs Yoweri Kaguta Museveni; Election**



5 **Petition No 1 of 2001** is distinguishable because what was under contention was that presidential election conducted under article 103 (1) of the Constitution which specifies that it shall be by secret ballot. The Supreme Court further found that the concept of a free and fair elections was not defined and sought to give some of the elements of a free and fair elections  
10 which include sufficient time to be given for both stages of the elections, nominations, campaigns, voting and counting of votes and the right of candidates to be allowed to stand for elections and citizens to vote for candidates of their choice. There must be publication of election law and Guidelines within time as well as fairness and transparency in all stages of  
15 the electoral process. They concluded that for an election has been fair, one has to consider the entire process of the election which begins with the electoral laws that govern all aspects of the election. The observation of the fundamental rights and freedoms of the individual during the electoral processes at all times is also an important aspect of free and fair elections.  
20 Further it entails giving equal opportunity to all candidates to access the electorate as well as giving the electorate the right to choose between the competing candidates.

The first respondent's counsel submitted that the meaning of a free and fair election has to be inferred from the circumstances and it cannot strictly be  
25 put down to the secrecy of the ballot. The respondents counsel also submitted that elections by lining up do not fetter the right of the people to determine how they shall be governed. In the premises, the learned Attorney General's counsel submitted that the court should find that section 12 of the Local Governments Act which provides for elections by lining up  
30 behind the candidate, does not infringe the cited constitutional provisions.

With reference to the contention that election by means of lining up is inconsistent with or in contravention of articles 8 A, 21, 35, 33, 59 (1) (3) and (4), 61 (a), (e), (f) and 68 (1) of the Constitution of the Republic of Uganda, article 8 A provides that Uganda should be governed based on principles of  
35 national interest and common good enshrined in the national objectives and directive principles of state policy. Secondly, article 21 provides for equality

5 and freedom from discrimination. Thirdly article 33 sets out the rights of women. The first respondents counsel submitted that the petitioner's contention that requiring anyone to lineup did not take into account the unique status and maternal functions in society is a misunderstanding of the import of the quoted provisions of the Constitution. He contended that  
10 there is no evidence adduced by the petitioners to show how lining up affects the unique status and maternal functions of women.

According to the Electoral Commission Guidelines for Election of Village and Parish/Ward Administrative Units 2017, guideline 14.0 provides for lining up which is supposed to last for only 1 and ½ hours. Within this time, any  
15 person, women inclusive can afford to participate. Further voting by lining up does not violate the unique status and maternal functions of women and is therefore not inconsistent with or in contravention of articles 8 A, 21 and 33 of the Constitution.

In terms of article 35 of the Constitution which provides for the rights of  
20 persons with disabilities, the first respondent's counsel submitted that the Electoral Commission always makes provisions for persons with disabilities to be assisted, where necessary, in the voting process. The allegation that by voting by lining up, their interest will not be taken into account is mere conjecture and is not backed by any evidence.

25 In terms of article 61 (e) of the Constitution which provides that the Electoral Commission shall compile, maintain, revise, and update the voters register, the contention of the petitioners that section 12 of the Local Government Act, negates the constitutional obligation to compile, maintain, revise and update the voters register is not true. Lining up for voting does not bar the  
30 Electoral Commission from its duty to compile, maintain, revise and update the voters register. The first respondent's counsel submitted that firstly it is not true that the elections for village councils and parish councils are carried out without a register. Secondly guideline 5.0 (b) of the Electoral Commission Guidelines provides that the Electoral Commission shall  
35 designate a period during which village residents were registered to participate in the administrative unit Council elections. The Guidelines



- 5 provide for two registers for the registration of residents. The first register is the village council register for purposes of electing the village chairperson and approval of members of the village executive committee while the second register is the village women's Council register for purposes of electing the village women's committee.
- 10 The first respondent's counsel pointed out that the village and the council and Parish Council elections are restricted to residents in the specific village Council or Parish council unlike parliamentary and presidential elections where a resident in one specific village may vote from another village where they are registered to vote. It follows that as a matter of
- 15 necessity, the second respondent has to compile registers for residents of various villages and parishes who are eligible to vote in those villages by virtue of being residents in that area and of voting age.

With reference to article 68 (1) which provides for public election or referendum voting to be by secret ballot using one ballot box at each polling

20 station for all candidates, the second respondent's counsel relied on article 68 (6) where Parliament is permitted to exempt any public election other than presidential or parliamentary elections from the requirements for a secret ballot. The first respondent's counsel emphasised that article 68 (6) of the Constitution is very clear that Parliament may exempt any public

25 election other than presidential or parliamentary elections from the requirements of vote by secret ballot. Counsel prayed that the language used in article 68 (6) be construed in its natural and ordinary sense according to the decision of the Supreme Court in **David Wesley Tusingwire vs Attorney General; SCCA No 04 of 2016**. Counsel also relied on **P.K Semwogerere and others vs Attorney General; Constitutional Petition No 1**

30 **of 2001**. Further, that the power of Parliament to exempt the public election from the requirement of a secret ballot is in tandem with article 79 (1) of the Constitution which permits Parliament to make laws on any matter for the peace, order, development and good governance of Uganda.

5 The second respondent's counsel prayed that the court should apply the rule of harmonisation in the interpretation of article 68 (6) so that it is read in harmony with other provisions of the Constitution.

10 In further reply, to issue 1, the second respondent's counsel submitted that Parliament enacted a law to remove the necessity of the secret ballot. That section 111 (2) of the Local Government's Act (as amended) was enacted pursuant to article 68 (6) of the Constitution and expressly stipulates that Parliament may by Law exempt any public election other than a presidential or parliamentary election, from the requirements of clause (1) which provides that public election shall be held by secret ballot. Counsel  
15 reiterated the submissions of the first respondents counsel that the law envisages secret ballots for presidential, and general parliamentary elections and other elections may be exempted.

20 I have carefully considered the written submissions of the respondent's counsel which reinforce the submissions of the first respondents counsel on the question of whether voting by lining up under the impugned law violates the freedom to have a free and fair elections. The submissions in the main repeat the first respondent's submissions and I do not need to refer to them.

25 With regard to the constituent assembly debates, the second respondent's counsel submitted that the history of the report to the constituent assembly need not be adopted as courts have no jurisdiction to rewrite unequivocal and unambiguous constitutional provision with the aid of constituent assembly debates.

30 Several other submissions regarding the rights of women, the right for persons with disability et cetera are already contained in the submissions of the first respondents counsel and I do not need to regurgitate them in the second respondent's address to this court.

## **Issue 2.**



5 **Whether section 12 (a) and (b) of the Local Government (LGA) is inconsistent with article 79 (1) of the Constitution.**

10 The petitioners' counsel submitted that the Constitution vests power in Parliament to make laws on any matter for the peace, order, development and good governance of Uganda. The question which arises is whether in making a law requiring voting by lining up, it is for the peace, order and good governance of Uganda. The petitioners contend with reference to the affidavit in support of the petition of Dr. Livingstone Sewanyana that there is evidence that lining up increases chances of undue influence, threats and sanctions, and undermines gender equality and restricts freedom of opinion and choice. It increases social tensions in the family and amplifies the likelihood of voter bribery and is inconsiderate to persons with disabilities. The evidence shows that the peace, order and good governance are negated if the secrecy of the vote is undermined. They contend that this evidence has not been challenged by the respondents and ought to be believed by the court. In the premises, the petitioners reiterate earlier submissions in respect to the breach of article 8 A of the Constitution and added that section 12 (a) and (b) of the LGA is likewise inconsistent with article 79 (1) of the Constitution.

25 In reply to issue 2, the first respondent's counsel submitted that article 29 (1) is about the power of Parliament to make any laws for the peace, order, development and good governance of Uganda. The second respondent indicated that elections for lower administrative units were last held in the year 2001 and at the time of filing the petition had not yet been held for approximately 16 years due to inadequacy of funds. There was an urgent need to hold the said elections. To make the holding of elections possible, Parliament exercising its mandate under article 79 (1) and article 60 (6) of the Constitution, exempted the election of village councils and parish councils, from the secret ballot requirement. Counsel contended that making provision for lining up was for the peace, order and good governance of Uganda.

5 Further the second respondent's counsel submitted that the long period taken without holding elections had to be cured by making the necessary changes to enable the holding of the elections. In the premises, the enactment of the law for lining up behind a candidate was consistent with article 79 (1).

10 In reply I have carefully considered the submissions of the second respondent's counsel and the question of whether the impugned law is inconsistent with article 79 (1) of the Constitution and the submission in the main is similar to that of the first respondents counsel and I do not need to repeat it. The second respondent's counsel relied on the decision of the  
15 Supreme Court of India in **Hamdarddawa Khana vs Union of Indiana Air [1960] 554** where the Supreme Court inter alia stated that:

20 "... In examining the constitutionality of a statute it must be assumed that the Legislature understands and appreciates the need of the people and the law it enacts are directed to problems which are manifest by experience and the elected representatives assembled in the Legislature enact laws which they consider to be reasonable for the purpose for which they are enacted.

The second respondent's counsel submitted that the enactment of section 12 (a) and (b) of the Local Government (Amendment) Act, 2015, was well within the parliamentary mandate under article 79 (1) of the Constitution.

25 **Issue 3.**

**Whether the Electoral Commission Guidelines 2017 are inconsistent with and in contravention of articles 1 (4), 28, 29 (1) (e), 45, 59, 61 (a) (e) and (f) 64 (1) and 65 of the Constitution.**

30 In terms of the provision for free and fair elections under article 1 (4), the petitioners rely on **Eddie Kwizera vs Attorney General** (supra) for the principles to ensure free and fair elections which include (a), sufficient time given at all stages of elections, nominations, complaints resolution, voting and counting of votes (b) election procedures should guarantee the secrecy of the ballot, accuracy of counting and announcement of results and (c) the



- 5 Electoral Commission must consider and determine election disputes speedily and fairly.

The petitioners' counsel submitted that the second respondent issued Guidelines for the elections of 2017, which Guidelines show that the registration of voters, display of the voters' register, raising of complaints,  
10 resolution of conflicts, nomination of candidates, and those of candidates by political parties, declaration of nominated candidates and campaigns shall be carried out within two days. Secondly voting itself was allotted time of 1 ½ hours. Thirdly, endorsement of candidates by political parties means that primaries will be held by political parties. The time provided does not take  
15 this into account.

Further, the petitioners' counsel submitted that the procedure in the Guidelines do not guarantee the secrecy of the ballot. Voters are required to publicly state by way of lining, the candidate of their choice. Counsel reiterated the importance of the secrecy of the vote and submitted that by  
20 failing to guarantee secrecy of the votes, the Guidelines contravene an important component of a free and fair elections and therefore violate articles 1 (4), 8 A and 61 (a) of the Constitution. They contend that the Guidelines do not guarantee the accuracy of the counting. That there is no guarantee to ensure accuracy in the counting. Further that there has to be  
25 transparency in the counting method, a mechanism which guarantees that the counting is accurate such as literacy. Further that in Parliamentary/Presidential Elections, the marking of the ballot, counting and adding by the presiding officer guarantees accuracy. However, with lining up behind a candidate, this is not possible. They further submitted that  
30 free and fair elections have another component which the Guidelines do not provide for which is that the Electoral Commission must consider and determine election disputes speedily and fairly.

Further Guideline 6.0 provides for display of the register at the village level. It invests in the village election officer the duty of recording complaints and  
35 forwarding them to the parish complaints committee to resolve. A dispute normally has two parties; the complainant and the respondent. They

5 contend that determination involves hearing the parties. The second respondent discards that. They wondered how a parish committee would resolve the dispute without hearing the parties? He wondered what would happen if the complaint is against the very election officer who is vested with the power to record and forward the complaint. It follows that the  
10 principle of free and fair elections is violated.

Further, the Electoral Commission is the Body entitled to determine complaints. The village election officers and parish complaints committee are unknown to the Electoral Commission. There is no explanation as to where these officials come from. Who appoints them and under what  
15 criteria? They are not the Commission and cannot therefore determine complaints. It is not even stated what happens after a parish committee resolves the complaint within which time. The petitioners counsel submitted that what is provided for in the Guidelines does not amount to determination of disputes by the Electoral Commission. Further the Guidelines do not  
20 provide for grounds upon which nomination may be invalidated and the process for lodging complaints for dispute resolution. There is no provision for complaints. The petitioners rely on article 28 (1) of the Constitution which provides that in determining Civil Rights and obligations, a person is entitled to a fair and public hearing before an impartial tribunal established by law.

25 The petitioners submitted that the second respondent has created the parish complaints committee as the tribunal/body to resolve election complaints through Guidelines. The Constitution requires that such bodies are established by law. Guidelines are not the law and therefore the provisions violate article 28 (1) of the Constitution as they do not provide for  
30 a public hearing as required.

The respondent's counsel also submitted that the Guidelines creates various offices. That article 65 of the Constitution empowers the Electoral Commission to appoint officers and employees of the Commission in consultation with the Public Service Commission. The Commission has  
35 created offices and will appoint employees without consultation with the



5 Public Service Commission thereby contravening article 65 of the Constitution.

In relation to Guideline 5 (a) (d), the village official is the registration officer and has the duty to display the register he or she compiled, to receive complaints thereof, transmit complaints to the parish complaints  
10 committee, verify the voters on polling day, carry out voter education, counting votes, declare results and preside over the nomination and approval of the executive committee members.

The petitioners' counsel further submitted that investing all these powers in one individual negates the essence of free and fair elections as it  
15 removes any safeguards that are ordinarily built in the process to ensure transparency. The petitioners contend that one cannot be responsible to decide who goes on to the register of voters, receive complaints in respect of that decision, be responsible for processing a complaint against his or her decision, verify the register he or she compiled to determine who votes,  
20 count the votes and declare results. He submitted that there is no transparency in such a process

They contend that it violates the concept of free and fair elections enshrined under article 1 (4) and 8A of the Constitution. Other similar powers are vested in the Parish Election Official under section 5 (a) (c) of the Guidelines  
25 and therefore it is equally flawed for the same reasons.

The petitioners also state that Guideline 10.0 (g) provides that a parish election official has authority to refuse to nominate a candidate. They contend that the guideline does not provide opportunity to such a candidate to appeal in contravention of article 61 (1) (f) of the Constitution which  
30 creates an obligation on the second respondent to hear and determine election complaints. In addition, there is no independent tribunal to hear and determine the complaints in violation of article 28 (1) of the Constitution. Further the right exercisable under article 64 (1) of the Constitution was extinguished by the Guidelines and is therefore inconsistent with the said  
35 article.