A CRITICAL ANALYSIS OF THE DOCTRINE OF SEPARATION OF POWERS AS PRACTICED IN UGANDA.

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1153-01024-02039

A RESEARCH SUBMITTED TO THE SCHOOL OF LAW IN PARTIAL FULFILMENT FOR THE REQUIREMENTS FOR THE AWARD OF BACHELOR OF LAWS OF KAMPALA INTERNATIONAL UNIVERSITY

JUNE, 2019
DECLARATION

I declare that this research work entitled "a critical analyses of the doctrine of separation of powers as practiced in Uganda." is my original work and has not been submitted for any award at any academic institution.

Student

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Signature

DATE

28 JUNE, 2019
APPROVAL

I have approved the mentioned final year report to be presented as a partial requirement for the acquisition of Bachelor of Laws Degree of Kampala International University

(SUPERVISOR)

Mr. Baraka Samuel

Signature

Date

28/06/2019
DEDICATION

I also dedicate this work to my Mother miss Nassaka Agnes and my Mr Mukasa Patrick and the entire family for the support, love and care they have given me throughout my studies.
ACKNOWLEDGEMENT

I wish to thank the almighty God for giving me the strength and courage to pursue this project. Let me also acknowledge the immense support and assistance rendered by my supervisor Mr Barraka Samuel who was available at all times to guide me throughout the project.

I also wish to express my sincere gratitude to my family members more especially my mother Miss. Nasaaka Agnes

I wish to acknowledge the contribution of my friends and classmates at Kampala International University special mention is made of Wasswa Benard, and Ssepagala Allan who provided moral support and advice throughout the project. May the almighty God bless you.
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<tr>
<td>NRC</td>
<td>National Resistance Council</td>
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<tr>
<td>FDC</td>
<td>Forum For Democratic Change</td>
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<td>NRM</td>
<td>National Resistance Movement</td>
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<td>UHRC</td>
<td>Uganda Human Rights Commission</td>
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<td>UCB</td>
<td>Uganda Commercial Bank</td>
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<td>PRA</td>
<td>People Redemption Army</td>
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<td>East African Community</td>
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ABSTRACT

This was a study on the analysis of the doctrine of separation of powers as practiced in Uganda. Separation of powers is the division of governmental authority into three branches of government of; legislature, executive and judiciary. Each with specified duties on which neither of the other branches can encroach, to guard against tyranny. The origins of the doctrine can be traced as far as ancient Greece. It was made popular much later by French philosopher Charles de Montesquieu in 1748 in his work "the Spirit of the Law"

The researcher sought to analyse the, extent at which the doctrine has been adhered to, the practicability and relevance, its legal framework, whether the doctrine is desirable in Uganda and to evaluate the extent at which it has been practiced. The study was conducted through both qualitative and quantitative research, both primary and secondary data collection methods were used.

In the final analysis, it was found that, there was interference of the branches into the functions of the other branches of government, none of the branches was found to be operating in isolation, at a lesser extent, the separation of powers was found to be practiced. The researcher concluded that none of the three branches of legislature, executive or judiciary is purely independent since there is no pure separation of powers in Uganda but rather a system of checks and balances. It was recommended that the government should ensure that there is strict observance of the principles of the constitution, the public doesn’t lose confidence in the government, the executive should desist from criticising the judiciary in the eyes of the public, all of which will enable the observance of the doctrine in order to ensure good governance.
CHAPTER ONE
GENERAL INTRODUCTION

1.0 Introduction

A constitution literally means a body of laws which are supreme within a given locality upon which all other laws are based.

"By constitution, we mean whenever we speak with exactness and propriety that assemblage of laws, institutions and customs derived from certain principles of reason directed to certain fixed objects of public good that impress governed ... we call this good government when... the whole administration of public affairs I widely pursued with strict conformity to principles and objects of the constitution"1

This being the nature of the constitution, it means quite clearly that its quite fundamental in the administration of the country, as it forms the basis of government, it is only fitting that it should contain all the basic and fundamental provisions, as the fact, in a constitution, some provisions are firmly entrenched while others are not so firmly entrenched.

The constitution of Uganda contains a provision whose effect is that the constitution is the supreme law of the land and it is from it that other laws derive their legitimacy and that any other law that is in contravention is void to the level of its inconsistency2

The most important provisions of the constitution are those that define, describe and delimit the functions of government. All powers and authority of the government and its organs derive from the constitution.3 All authority in the state emanates from the people of Uganda, and the

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1 The 1995 constitution of the republic of Uganda,
2 supra Article 2
3 supra Article 1(3),
people of Uganda shall be governed through their will and consent. The constitution further provides that power belongs to the people and will be exercised in accordance with the constitution., Governments have a duty to observe rule of law arising from the fact that people place themselves in the hands of governments and consent to be governed according to the law, government should therefore carry out its function and duties in light of peoples wishes and expectations.

It has been contended by word wide scholars that good governance can only be realized if the powers of government are divided into three separate distinct organs. Their powers must be clearly spelled out and comprehensively streamlined. Separation of powers instances are that: that one member of the organ should not be allowed to belong to another organ, one organ should not perform the duties of another organ and no single organ should be in position to influence any of the remaining two.

The functions of these organs of the government are provided for under the constitution. The legislature organ has a duty to make laws, the Executive is concerned with the administration and formulation of policies and, the Judiciary is concerned with the administration of justice. The rational for separation of power is to check the excesses of power resulting into abuse of powers.

Separation of powers was developed from the Ancient Greek and came into wide spread use by the Roman public as part of the un modified constitution by the Roman public society. It was also coined by Montesquieu, an ancient French social and political philosopher in his

\[4\supra\text{Article1(2)}\]
\[5\supra\text{article 79}\]
\[6\supra\text{article 99}\]
\[7\supra\text{article126}\]
publication “spirit of laws” is considered one of the greatest work in political history. The practice of separation of powers, function of the three organs, the inter relation between them and conflict that arises in the course of execution of their functions is the backdrop of this study.

1.2 Background of the Study

Separation of powers. The division of governmental authority into three branches of government. The legislature, executive and judiciary. Each with specified duties on which neither of the other branches can encroach. These are is also a concept of checks and balances by which people are protected from tyranny. this operates in a way the one organ will check the exercise of the powers of another organ of government for example where an organ of government acts ultra vires or uses powers not conferred upon it by the constitution.

Separation of powers means that the three arms of the government should be kept in three separate compartments for the separation of powers to be recognized and maintained. Persons or agencies belonging to one organ should not hold posts in another organ. For instance, a member of the legislature should not be a member of the executive or the judiciary at the same time or vice versa. An organ or its agents should not exercise the functions of one or both of the remaining two organs, an organ should not have power to control one or the remaining organs. Thus the executive alone should not be in position to control the legislature and the judiciary. The rational for separation of powers is to guard against abuse of authority.

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8 www.ncis.org/default.aspx.
9 Black’s law dictionary 8th Edition pg. 1396
10 supra Article 79, 99 and 126
11 GW kanyelamba constitution and political history pg. 289.
Among the objectives that resulted into the promulgation of the 1995 constitution was the need to recognize the democratic divisions and responsibilities among state organs of legislature, executive and judiciary and to create viable checks and balances between them.

This study is geared towards providing a comprehensive and a current critical analysis of the concept of separation of powers, its merits and demerits, the extent to which Uganda has complied with the concept, and how the concept is being practiced in Uganda.

The origins of the doctrine of the separation of powers can be traced back as far as ancient Greece. It was made popular much later by French philosopher Charles de Montesquieu in 1748 in his work *L’Esprit des Lois (the Spirit of the Laws)*. He wrote that a nation’s freedom depended on the three powers of governance, legislative, executive and judicial each having their own separate institution.

Since that time this principle has been widely used in the development of many democracies, thus placing the doctrine of separation of powers at the heart of constitutional governance.

Human government is a manmade institution starting from the days of the mighty hunter, Nimrod. The numerous nations in our deficient world are all ruled by some sort of government. No matter how the function of governing is executed each one encompasses three aspects which operate in accordance with the principal of administering, legislating and adjudicating.

Even in the excessively dictatorial countries of the world, Government structure subscribes to these three branches of rule. There is no alternative unless people support the cruel utopia of anarchism or the quirky aberration of the sharia law.\(^{12}\)

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\(^{12}\) Hon Dr. Minia Matembe (Paper presented during the First National Conference on the Constitution).
The doctrine of separation of powers separates the organs of the state into three branches: legislature, executive and Judiciary. Under this doctrine, the power to govern is distributed among these three organs to avoid one group having all the power. The legislature makes the laws, the executive enforces the laws and the judiciary interprets them and adjudicates over controversies. The powers and functions of each are separate and are carried out by separate personnel. The object of separation of powers is to develop mechanisms to prevent power being over concentrated in one arm of government.

However no single organ is able to exercise complete authority but they are interconnected in the execution of their duties, each being interdependent on the other. Power thus divided, should prevent absolutism (as in monarchies or dictatorships where all branches are concentrated in a single authority) or corruption arising from the opportunity unchecked power offers.

Uganda constitution provides for the principle of separation of powers. It creates each of the three organs of the state and demarcates powers and responsibilities among these organs as well as providing checks and balance among them. Under the system of checks and balances, each branch acts as a restraint on the powers of the other two. The application of this principal guarantees constitutionalism and the rule of law while promoting and protecting human rights of the governed.

However you cannot have a complete separation of powers because some of the roles of the Parliament, the Executive and the Judiciary overlap. For example, ministers who belong to the Executive are also members of Parliament. High Court Judges are appointed by the President and approved by Parliament. Therefore, none of the organs exercises complete authority on its own.
The NRM government is credited with the restoration of constitutional order in Uganda and this can be traced from the spirit of the Odoki Commission, the Constitutional Assembly debates and the promulgation of the 1995 Constitution of the Republic of Uganda, which is largely celebrated as one of the best Constitutions in Africa.

However, Uganda faces a crisis of legitimacy and credibility on a number of issues arising from failure to fully implement the Constitution. There is failure to uphold the doctrine of separation of powers which has led to failure to fight corruption, violations of civil/political rights, cases of unlawful detentions, unfair trials and torture. Around the country, people have continued to suffer extreme poverty, social injustice, fear, intimidation and harassment. The constitutional order has since the removal of the presidential term limit long been overthrown and replaced by militarism and monetization of elections. All as a result the failure by the stakeholders to uphold the provisions of the constitution as to be illustrated in this paper in detail.

The letter of the constitution by itself is neither enabling nor constraining. For constitutional provisions to operate meaningfully and effectively institutional and cultural apparatus to implement, enforce and safeguard the constitution must be in place. The rule of law is one key component of the constitution’s implementing and safeguarding apparatus. An independent judiciary and the notion of the supremacy of law all work together to ensure that the letter and spirit of the constitution are honored in the workings of a constitutional government. Unfortunately, in Uganda it is rule by law rather than the rule of the law which operates, therefore, in Uganda we have a constitution without constitutionalism.
1.3 Statement of the Problem

The 1995 constitution emphasizes that power belongs to the people who shall exercise it in accordance to the constitution, All power and authority of the government and its organs derive from the constitution, it is imperative that the government carries out its functions and duties in light of peoples wishes and expectation. There must be in place a government whose duties and functions are clearly laid down such that the ultimately, the people may be governed in such a way that may lead to their benefiting of peace, democracy and good governance all of which can be achieved through strict compliance to the principle of rule of law

Separation of powers as one of the standard measures for establishing whether there is rule of law in a given state. When there is no adherence to rule of law, it mean that the arm of the government is not exercising their function independent of each other as the constitution prescribes.

In Uganda today separation of powers is provided for in The 1995 Constitution of the Republic of Uganda and it clearly names the function of the governmental bodies such as the legislature, the judiciary, and the Executive, all have very distinct functions from each other and officials in these governmental bodies are have knowledge about these powers and limitation of these powers, the need to let the other two organs of the government to be independent as it is clearly provided for under the constitution.

However, government organs in Uganda have intentionally blindfolded themselves about the provisions of the constitution which concern with the separation of function of governance most especially where one of the government body has interest in the issue at hand. They have continued to usurp the power of the other two bodies of government and in many occasions, it

13 1995 Constitution of the Republic of Uganda, Article 1
is claimed that they are exercising what is known as checks and balances, this has left the whole idea of separation of powers in Uganda to be doubted, its practicability to Uganda is in question as the two organs have confirmed to be influenced by the Executive[^14] which claim to derive absolute powers from the constitution. It is from this perspective that the research is going to illustrate the extent at which the doctrine of separation of powers is practiced in Uganda and provide solutions and recommendations aimed at achieving the doctrine of separation of powers in Uganda.

1.4 Hypothesis

a) The doctrine of separation of powers in Uganda is more of an ideal than a reality, as practiced in Uganda, the principles of the constitution such as peace, order, democracy and good governance can be realized when the three organs of the government work closely and corporate other than working in isolation.

b) The framers of the constitution of Uganda simply concerned themselves with simply defining the roles, duties and the functions of various organs without taking into consideration the need to cater adequately and comprehensively of separation of powers

1.5 Objectives of the Study

1.5.1 General Objectives

a) To analyze the doctrine of separation of powers as practiced in Uganda.

[^14]: Tinyefunza v Attorney general constitutional petition No. 6 of 1999
1.5.2 Specific Objectives

a) To examine the applicability of the doctrine of separation of powers to the present Uganda.

b) To display how each organ of the government has permitted other organs to operate within the spheres of influence and knowledge as it also works within its spheres of influence and knowledge.

c) To illustrate whether there is knowledge and consent from the other two that there is mutual respect and how it has promoted the constitutional principles such as democracy, justice and freedom which are fully enjoyed where the government organs comply to the concept.

d) To demonstrate how failure to achieve this harmonious relationship has resulted into injustices, tyranny and oppression

e) To provide for broader spectrum in which the doctrine can be looked at so that it is better understood and appreciated by those who had misconceptions about what it is and what it embeds.

f) To show that a strict separation of powers is not a reality and neither is it desirable and this effect stresses the need for inter organ functioning with a view of providing a system that will provide checks and balances where by each powers is conscious about interfering in the affairs of the other.

g) To illustrate that the 1995 constitution does not adequately pride for the doctrine, nor does it put in place a comprehensive system for providing for checks and balances. Hence the need to revisit some of its provisions and replace them or re enforce them with a view of providing a system that will enhance the realization of peace, democracy, order and good governance.
h) To remind scholars in Uganda about the aims of a well-organized government in Uganda.

i) To find out the public opinion about the applicability of the doctrine.

j) To identify the gaps in research that the previous researchers did not cover and bridge them.

k) To find out how the doctrine has been upheld under the multiparty system.

l) To make recommendations through which the essence of the doctrine may be realized.

1.6 Significance of the Study

a. The research will avail the necessary information about an evaluated extent at which the stakeholders have observed their duty to uphold the principles of the constitution such as democracy, and rule of law as an effective mechanism that enhances effective governance of the state.

b. The research will guide the policy makers and law makers like the parliament in making the laws to ensure understanding of the importance and observation of the doctrine of separation of powers.

c. The research is important in a way that different government organs will know their limits in adjudicating matters of interest.

d. The research will assist academicians as well as researchers interested in the principles of constitutionalism as and democratic governance.

1.7 Research Methodology

The study is going to be conducted through both qualitative and quantitative research. References are going to be made to both primary and secondary sources.
1.7.1. Primary Sources

These will include oral interviews with the law student students, Lecturers among other stakeholders.

1.7.2. Secondary Sources:

These include inter alia, textbooks, articles, statutes, and newspapers and case notes. These besides provide ample and useful, materials, also help to evaluate the primary data collected from the research.

An analysis of other countries especially Britain and United States will be made in order to portray how the doctrine of separation of powers works under the two different systems of parliamentary and presidential democracy.

This was considered relevant because Uganda pursues a blend of two types of democracy. Study of these will be used to check the necessary checks and balances and other constitutional measure that function to provide for good governance.

1.8 Literature Review

The doctrine of separation of powers was adopted in the by the Annapolis convention of 1787. Not to promote efficiency but to preclude the exercise of arbitrary powers. The purpose was not to avoid friction, but, by means of inevitable friction incident to the distribution of government powers among the departments, to save the people from autocracy.

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15 Black's law dictionary 8th Edition pg. 1396
16 Justice Louis Brandeis (as quoted in Roscoe pound the development of constitutional guarantees of liberty (1957) 92
“Although in political theory, much has been made of the vital importance of separation of powers. It is extraordinarily difficult to define precisely each particular power. In an ideal state, we might imagine a legislature which had supreme and exclusive power. To particular cases, courts whose sole function was to make binding orders to settle disputes between individuals which were brought before them by applying these rules to the facts which were found to exist. An administrative body which carried out the business of government by issuing particular orders or making decisions of policy within the narrow confines of rule of law that it could not change. The legislature makes the law, the executive executes, and the judiciary construes the law.17

The eminent Greek scholar and philosopher, Aristotle made an attempt to classify the organs of government and describe their functions. He wrote;

“All states have three elements, that which deliberates about public affairs, that which is concerned with magistracies and that which is the judicial power” that ministers should not sit in parliament. That one organ of government should not exercise the functions of another. For example, the executive should not have legislative powers.

It should be noted that the above definition does not fit well in our situation where the system of checks and balances is in operation.

H.W Wade and C.F Forsyth looked at separation of powers to mean in strict form, that one organ is not supposed to exercise the duties of the other. They indicated that the doctrine of separation of powers in strict form is impracticable and therefore undesirable18

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David Fourkes stated that, in every government, there are three sorts of power that ensure that liberty of the subject power ought to be in the separate institutions, for the same man or body to exercise those powers, that of enacting laws, exercising the public resolutions and of trying cases of individuals. Even if it is easy to point out examples of functions which are clearly legislative, clearly administrative, or clearly judicial, it is not easy to draw theoretical line between them to isolate one concept from others or in many cases to distinguish between them in practice. It should however be noted that David Forkes fails to envisage the problems that arise from complete separation of powers.

According to Peter Leyland, when the legislative and executive powers are fused in the same person or the same body of magistracies, there can be no liberty. There will be an end to everything where the same man, the same body whether of the noble's or of the people is to exercise those three powers, that of enacting laws, that of executing the public resolutions and that of trying the cases of individuals.

Peter Leyland described the doctrine as a political theory to prescribe what ought to happen in relation to the distribution of powers within a constitution. Essentially, he suggests that abuse of powers will be limited by distributing different functions to the three organs but he failed to take into account the pure separation of powers which may lead to unworkable type of government.

Aristotle first mentioned the idea of a mixed government or hybrid government in his work *Politics* where he drew upon many of the constitutional forms in the city states of ancient Greece.

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In the city states of Ancient Greece. In a Roman republic. The Roman senate showed an example of a mixed government according.\textsuperscript{21}

John Calvin (1509-1564) favored a system of government that divide a political power between democracy, and aristocracy or mixed government. Calvin appreciated the advantages of democracy, stating “it is an invaluable gift if God allows a person to elect their own government and magistrates”.\textsuperscript{22}

In order to reduce the danger of misuse of political power. Calvin suggested setting up several political institutions which should complement and control each other in a system of checks and balances. In this way, Calvin and his followers resisted political absolutism and furthered the growth of democracy. Calvin aimed to protect the rights and well-being of ordinary people.\textsuperscript{23}

Montesquieu, the and the triparty system. It is commonly ascribed to French Enlightenment political philosopher Baron de Montesquieu, although he did not use such a term. In reality, he referred to distribution of powers. In \textit{The spirit of the law} 1748) Montesquieu described the various forms of distribution of political power among legislature, an executive, and a judiciary. Montesquieu’s approach was to present and defend a form of government which was not excessively centralised in all its powers to a single monarch or similar ruler, form of government known as “aristocracy”.

He based this model on the constitution of the Roman Republic and the British constitution system. Montesquieu took the view that the Roman Republic had powers separated so that no


\textsuperscript{22} Quoted in Jan Weerda, \textit{Calvin, in Evangelicals Socialization}, Third Edition (1990), Stuttgart (Germany), col. 210


14
one could usurp complete power. In the British constitutional system, Montesquieu discerned a separation of powers among the monarch, parliament and the courts of law.

“In every government there are three sorts of power, the legislature, the executive in respect to things depend on the civil law. By virtue of the first, the prince or magistrate enacts temporal or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, send or receives embassies, establishes the public security and provides against invasion. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the others, simply, the executive power of the state.”

Montesquieu argues that each power should only exercise its own functions, its powers, it is quite explicit here, when the legislature and the executive powers are united in the same person, or in the same body of magistrate, there can be no liberty, because apprehension may arise. Lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again there is no liberty if the judiciary power be not separated from the legislative and executive, were it joined with the legislative, the life and liberty of the subject would be exposed to the arbitrary control, for the judge might behave with violence and oppression.

There would be an end to everything, were the same man or the same body whether of the nobles or the people to exercise those three powers, that enacting laws, that of executing the public resolutions and of trying the causes of individuals.

Separation of powers requires a different source of legitimization, or a different act of legitimization from the same source, for each of the separate powers. If the legislative branch appoints the executive and judicial powers, as Montesquieu indicated, there will be no
separation or division of its powers, since the power to appoint carries with it the power to revoke.

The executive power ought to be in the hands of a monarch, because this branch of government, having need of dispatch, is better administered by one than by many; on the other hand, whatever depends on the legislative power, is oftentimes better regulated by many than by a single person. But, if there were no monarch, and the executive power should be committed to a certain number of persons, selected from the legislative body, there would be an end of liberty, by reason the two powers would be united, as the same persons would sometimes possess, and would be always able to possess, a share in both.

Montesquieu did actually specify that the independence of the judiciary has to be real, and not merely apparent.\(^{25}\)

The judiciary was generally seen as the most important of the three powers, independent and unchecked,\(^{26}\) while also likely to claim to be the least dangerous one.\(^{27}\)

Checks and balances is the principle that each of the Branches has the power to limit or check the other two and this creates a balance between the three separate powers of the state, this principle induces that the ambitions of one branch prevent that one of the other branches becomes supreme, and thus be eternally confronting each other and in that process leaving the people free from government abuses.

\(^{25}\) Przeworski 2003, p.26

\(^{26}\) Przeworski 2003, p.13

\(^{27}\) Przeworski 2003, p.2
Emmanuel Kant was an advocate of this, noting that "the problem of setting up a state can be solved even by a nation of devils" so long as they possess an appropriate constitution to pit opposing factions against each other.²⁸

Checks and Balances are designed to maintain the system of separation of powers keeping each branch in its place. This is based on the idea that it is not enough to separate the powers and guarantee their independence but to give the various branches the constitutional means to defend their own legitimate powers from the encroachments of the other branches.²⁹

They guarantee that the powers of the state have the same weight (co-equal), that is, to be balanced, so that they can limit each other, avoiding the abuse of state power. The origin of checks and balances, like separation of powers itself, is specifically credited to Montesquieu in the Enlightenment (in The Spirit of the Laws, 1748), under this influence was implemented in the 1995 constitution of the Republic of Uganda.

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1.9. Knowledge Gap

It is clear beyond any shadow of doubt that so many researchers such a professor GW. Kanyeihamba, scholars such as Montesquieu, who in his book, “Spirit of the law” clearly illustrated how the organ of government should not interfere into the functions of other organs. Montesquieu’s research covered the need for separation of powers as a solution to solve the political problems that came with the French monarch system. However as the concept of separation of powers doesn’t operate in a vaccum, it is applied to and by government systems, separation of powers will suit different government systems differently. And to some government systems pure separation of powers is not possible but there exists what is known as checks and balances, this is important to note but the previous researchers did not write about it. The applicability and practicability of the concept of separation of powers to different governmental system, this research geared to bridge that gap.

1.10. Scope of the Study.

The research will cover Uganda’s independence and post-independence periods though specific concern is on periods 1995 to present.

The year 1995 witnessed a new phenomenal in Uganda, the promulgation of the 1995 constitution of Uganda. The following year 1996 witnessed the flustered direct presidential
election and execution of members of parliament no along party lines but on individual merit.

Also the president appointed judges as part of the judiciary.

The research is going to delve on the extent to which the separation of powers has not been adhered to by the executive influencing the other branches of government from 1995 to date and to see what challenges have taken place. The research will focus on the decided cases and the written materials in this period.

The research is going to be conducted within Kampala, Uganda most especially within Kampala International University premises and sources to include Kampala International University library, E-Resource, Makerere University Library, Law Development Center Library among others.

The research is going to be carried out between the month of April and July.
CHAPTER TWO

CONCEPTUAL FRAMEWORK OF THE STUDY

2.1. Introduction

Historically, the powers of government had always been in the same lands. It is only when governmental activities increased requiring specialized knowledge and sophisticated operation that the need for separation of powers arose.

The protection of the citizen against misuse of power by the state itself is, the first instance, secured when the functions of the government, are kept separate and when the legislative power, the most awesome power of the state, rests in the final analysis with the people. It may therefore be attributed to them that a just government should have three distinct branches, each independent and supreme in its own proper function - the legislative, the executive and the judiciary.

The principle of separation of powers goes to the very heart of constitutional government which is to structure political institutions with the requisite powers and independence to make such judgments that respect the equal rights of the free people, while at the same time promoting the public good. Montesquieu for instance, not only isolated the judiciary as a politically independent power, but also regarded its absolute independence as the key to liberty. For him, the judicial power took center stage in constitutional scheme that stressed the fundamental rights of a free people and constraints on the political excesses of an elective despotism of cabinet government.

31 See Ssekaana Musa; Public Law in East Africa. Law Africa Publishing (K) Ltd, 2009 p.20.
Separation of powers. The division of governmental authority into three branches of government\textsuperscript{33}. The legislature, executive and judiciary\textsuperscript{34}. Each with specified duties on which neither of the other branches can encroach. These are also a concept of checks and balances by which people are protected from tyranny. This operates in a way the one organ will check the exercise of the powers of another organ of government for example where an organ of government acts ultra vires or uses powers not conferred upon it by the constitution.

2.2 Meaning of Separation Of Powers

Separation of powers is the division of governmental authority into three branches of government namely legislative, executive and judicial each with specified duties of which neither of the other branches can encroach. The constitutional doctrines of checks and balances is a system by which people are protected against tyranny.\textsuperscript{33}

Separation of powers means that the three arms of the government should be kept in three separate compartments for the separation of powers to be recognized and maintained. Persons or agencies belonging to one organ should not hold posts in another organ. For instance, a member of the legislature should not be a member of the executive or the judiciary at the same time or vice versa. An organ or its agents should not exercise the functions of one or both of the remaining two organs, an organ should not have power to control one or the remaining organs. Thus the executive alone should not be in position to control the legislature and the judiciary. The rational for separation of powers is to guard against abuse of authority.\textsuperscript{36}

\textsuperscript{33} Black's law dictionary 8\textsuperscript{th} Edition pg. 1396
\textsuperscript{34} supra Article 79, 99 and 126
\textsuperscript{35} Bryan A. Garner: Black's Law Dictionary, 8\textsuperscript{th} Edition, West Publishing Co. 2004 p.1396
\textsuperscript{36} GW kunyeihamba constitution and political history pg 289
The doctrine of the separation of powers was adopted not to promote efficiency but to preclude the exercise of arbitrary powers. The purpose was not to avoid fiction, but by means of the inevitable, fiction incident to the distribution of the governmental powers among three departments to save people from autocracy.37

Professor Kanyelhamba JSC in the case of Attorney General V David Tinyenfuza38 stated in support of the doctrine of separation of powers that

“The doctrine of separation of powers demands and ought to require that unless there is the clearest case calling for intervention for the purpose of determining constitutionality and legality of actions or the protection of liberty of an individual which is presently or eminently threatened, the courts must refrain from entering arenas not assigned to them by the Constitution or laws of Uganda. It can be over emphasized that it is necessary in a democracy that courts refrain from entering areas of dispute best suited for resolution by other government agencies. The courts should intervene only when those agencies have exceeded their powers or acted unjustly causing injury thereby”.

Separation of powers is the only assurance that people are the ultimate rulers for no one person, group or class of people is virtuous enough to rule a lone, and man’s tendency to evil makes democracy necessary.

The doctrine of separation of powers is seen as a means of fostering democracy, justice and liberty in the land. It’s a catalyst for judging free societies and a reminder that, ideally, the

38 Supreme Coup Constitutional Appeal number 1 of 1997 (U)
powers of government should be separated and kept under guard if they are to be exercised justly and in a transparent manner.\textsuperscript{39}

The court of Appeal of Kenya has also noted in support of the concept of separation of powers that\textsuperscript{40}

"Any finding which purports to encroach on a decision of parliament which is made with in its constitutional territory or mandate would also be unconstitutional and the other judicial bodies should be the fore front of avoiding any possible constitutional conflicts in all their undertakings. Both Executive and Parliament do have monopoly on issues of policy and a respectable interplay is encouraged in view of parliament's role in terms of acting as a check on any excess of the Executive and also its watchdog role. Our view is that executive decisions and polices except where they are reviewable under judicial review jurisdiction of the court are in the province of the Executive and Parliament and not the province of the courts not to mention commissions and tribunals".

So, the separation of powers is considered the centrepiece of modern constitutionalism; and no state can fulfil its genuine task of the realization of right and the protection of freedom if it does not adhere to the principle of separation of powers as an indispensable basis of its constitution.

\textsuperscript{39} Justice Dr. G.W. Kanyeihamba Constitutional and Political History of Uganda from 1894 to the resent. Centenary Publishing House Ltd Namirembe, 2002 P.30.

\textsuperscript{40} R V Judicial commission of Inquiry into Golcenberg Affairs and others exparte George Saitoti (200) e KLR 37. See also Republic V Registra of societies and others ex-parte Kenyatta and others. Miscellaneous civil application number 747 of 2006.
2.3.1 Historical Development of the Concept

The separation of powers concept was first originated in ancient Greece and became widespread in the Roman Republic as part of the initial Constitution of the Roman Republic. The Aristotle (384-322 BC) in his book “The Politics” stated that: “There are three elements in each constitution in respect of which every serious lawgiver must look for what is advantageous to it; of these are well arranged, the constitution is bound to be well arranged, and the differences in constitutions are bound to correspond to the differences between each of these elements. The three are, first, the deliberative, which discusses everything of common importance; second, the official; and third the judicial element.”

At the time of Edward I reign (1272-1307) the separation of powers was emerged in England, with the appearance of Parliament, the Council of King and the courts. Baron Montesquieu, French Enlightenment political philosopher, how lived in England from 1729-1731 promote the concept of “Montesquieu’s tripartite system”. This term describe the division of political power into executive, the legislature, and a judiciary. Baron Montesquieu ascribed this model to the British constitutional system, “a separation of powers among the monarch, Parliament, and the courts of law.” However this was misleading because Untied Kingdom had close connection of executive and legislature. Baron did specify in his book “De l’Spirit des Lois” that “the independence of the judiciary has to be real and not apparent merely”. “When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty...Again; there is no liberty if the power of judging is not separated from the legislative and executive. If it were joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; because the judge would then be the legislator. If it were joined to the executive power, the judge might behave with violence and oppression. There would be and end to everything, if the same man, or the same body,
whether of the nobles or the people, were to exercise those three powers, that of enacting laws, that of executing public affairs, and that of trying crimes or individual causes

2.3.1. Montesquieu’s view on separation of powers

Long before the French revolution, a Frenchman, Baron de Montesquieu travelled to England and came to the conclusion that the English were not ruled as oppressively as the French. That they enjoyed the rights and freedoms and yet this did not cause social disarming. He observed how the English system worked; he found that the English system of government involved three organs, that is; The commons, the house of parliament, and the judiciary. He came to the conclusion that the system worked because property balance had been struck between the powers and sanctions of the three organs of government.

His conclusion set down in his book “the spirit of the law,” he championed the theory that in order to protect the individual against an oppression system of government, there must be separation of powers of the three organs of the government, that is the judiciary, the executive, and the judiciary.

Montesquieu further observed that the legislature must be restricted to function of making laws and no more. The executive must implement the law. The judiciary must preside over dispute resolution distinctively and at the same time, as each organ performs its functions, it must do so without interference from the other organs. He argued that when the executive and legislative functions are united in the same person or body of persons, there can never be freedom because as the legislature, the person or organ will make tyrannical laws and then as executive proceed to enforce them ruthlessly.
Further, he argued that there can be no liberty if the judicial powers are not separated from legislative powers. That the fusion of the two would expose the citizens to arbitrary control. Montesquieu therefore proposed that there should be separation of powers, meaning:

1. That the same persons must not man more than one organ of government.
2. That one organ of government should not be controlled or interfered with by another in the exercise of its functions.
3. That no organ of government should exercise functions allocated to another, hence the executive should not make laws or entertain disputes, the legislature should not enforce laws and the judiciary should not participate in enacting laws.

He also advocated for a system of checks and balances as a means of preventing abuse of power. Parliament according to him would check the executive by making laws on which it operates and the judiciary would check the process of legislation through judicial review and the doctrine of inconsistence. He further observed that no organ of the government can perform in isolation its functions but rather, the organs of the government are interdependent to each other. As practiced in Uganda for example, the executive appoints ministers who are approved by the parliament and also appoints the court Judges with the help of the judicial service commission.

2.3.2 Analysis of Montesquieu Doctrine

After Montesquieu had written his book, various scholars denied that there was indeed separation of powers in England. Indeed, looking at the English system, there is no separation of powers in its absolute sense.
De-smith argues that "there is no and never has been a strict separation of powers on the English Constitution"\textsuperscript{41}

The Queen as head of state at the same time participates in legislation because for a bill to become law, she must give it royal assent. She also issues statutory proclamations known as Orders in council. The Queen also participates in the work of the judiciary by exercising the prerogative of mercy in favour of persons convicted of capital offences.

As far as parliament is concerned, the members of the two Houses of parliament do not concern themselves only with the making of laws. Parliament is for example empowered to address a petition to the Queen against any public officer who acts contrary to his powers. In doing this, they make a decision on the basis of facts and law, i.e. they act in a judicial way. Secondly, the committee of parliament which deals in privileges in a way exercises executive power.

Moreover, to be a minister in the UK one must be a member either of the House of Commons, i.e. lower House of Lords, i.e. Upper House hence ministers as individuals play both legislative and executive roles.

The judiciary also participates in legislative business. Firstly, the Rules Committee of the Judiciary is empowered to make rules to guide court. Secondly, Through the doctrine of precedent, courts of record namely the High Court, the court of Appeal, House of lords and the privy council make law, i.e. case law and indeed have developed a whole body of law, namely, the common law and equity. Some branches of the law of England are constituted almost entirely by case law/ common law and equity with virtually no legislation.

Hence in England, there is no separation of powers strictly so called; instead there is a blending of roles. Indeed A.V Dicey argue that to achieve justice and guarantee human freedoms, what

\textsuperscript{41} De-Smith, S.A. The New Common Wealth and its Constitution 1964 London Pengium Ch 2
is desirable is not separation of powers but merely independence of the judiciary and other organs that separation of powers is an important concept.\textsuperscript{42}

2.4.1. The three Arms of Government.

2.4.2 The Executive.

Executive power in political system plays very vital role and it is a branch of the state which has sole authority and responsibility in administration of the state bureaucracy, moreover to implement the statutes and laws as created by the legislature and interpreted by the judicial system. The division of power into three subdivisions is essential to the democratic value of the separation of power. In the Republic Uzbekistan the executive is the Cabinet of Ministers. President is responsible for the formation of the Cabinet of Ministers; however, under the proposal of the President the candidacy of Prime Minister shall be considered and approved by both chambers Oliy Majlis. Moreover, the head of the government of the Republic of Karakalpakstan is a member of the Cabinet of Ministers too.

The role of Cabinet of Ministers is to provide for effective existence of economy, social sphere, law execution and other resolutions by Oliy Majlis, decrees, statutes and orders issued by the President of Uzbekistan. Additionally, according to modern legislature, Cabinet of Ministers also have a right to issue orders and resolutions which has a binding force for execution on the whole territory of the republic of Uzbekistan by all bodies, enterprises, organizations, citizens, authorities and institutions.

In UK the executive branch formulates policy and is responsible for its execution. The head of executive branch in United Kingdom is the Queen. This branch consists of the Prime Minister, the Cabinet of Minister and the Ministers but in contrast to Uzbekistan, ministers of the Crown

\textsuperscript{42} Professor A.V Dicey The Law of the Constitutional London Macmillan Publishers 1998 P39
are elected members of House of Parliament, Commons or Lords, whereas in Uzbekistan Ministers are elected by President and approved by Oliy Majlis. Nevertheless we can see that the role of separation of powers in executive branch plays a significant role in monitoring the political system.

2.4.3. The Legislature

The legislature can be expressed as a deliberative body with the power to amend, pass and abolish laws. The law which was created by a legislative body is called legislation or statutes. Moreover the legislature has an exclusive authority to raise taxes and adopt budget.

In Republic of Uzbekistan the highest state representative body of legislature is Oliy Majlis. Olly Majlis consists of two members the Legislative Chamber (Lower House) and the Senate (Upper House). The main responsibilities of two Chambers are; “to adopt the Constitution of the Republic of Uzbekistan; to introduce amendments and addenda into Constitution; to pass and introduce amendments and addenda to Constitutional and other laws; to pass resolution on holding a referendum and setting its date; set main directions of both domestic and foreign policies and pass the state strategic programs; to define the structure and powers of legislative, executive, and judicial branches of power; to approve resolutions on adding new state structures into the Republic of Uzbekistan and cancel them; to pass the State budget and monitor its execution; to institute state awards and ranks; to form the Central Election Committee; to review and approve the candidacy of the Prime Minister proposed by President; to ratify and denounce international treaties.” [1]

In UK the Parliament has a legislative supremacy and crucial power over all political bodies in the UK. The Queen in Parliament is the sovereign law making body. However there are three bodies such as the Queen, the House of Lords and the House of Commons. According to Diceyan theory of parliamentary sovereignty, Parliament can produce or abolish any law they
want with a simple majority of votes of the House of Commons’ members. There is no special procedure in British constitution which states that an Act of Parliament can be legally invalid. However if the statute was established and approved by Parliament, nobody can change it, even constitution of UK, because we face here with the pure Parliament sovereignty conception. Additionally Diceyan theory expressed “there is no higher form of law than the will of Parliament.” Whereas in Uzbekistan Oliy Majlis and President can abolish any law in accordance with constitutional values. However the monitoring of political system through the legislature branch is central for separation of power.

### 2.4.4 The Judiciary

The judiciary branch has its own implementation in political system of the country. It interprets and applies the law in accordance with constitutional and democratic values. Moreover, judiciary provides a system for the resolution of disputes in accordance with civil and common law traditions. In Uzbekistan which follows the traditions of civil law countries, the judiciary generally does not create law or enforce law, but interprets law and applies it to the facts of each case, whereas, in United Kingdom which follows the common law tradition judges can make law with their judgments.

In Uzbekistan the judicial power of political system consists of Constitutional Court, Supreme Court and Supreme Economic Court, Supreme and Economic Courts of the Republic of Karakalpakstan, as well as town, district and economic courts. It is independent from legislature and executive branches. [2] Supreme Court of Uzbekistan has the highest position in judicial body on criminal, civil and administrative legal cases. Its decisions are final and have binding force for execution on the territory of Uzbekistan. In contrast to Uzbekistan, in England the judicial functions are overlapping to some extent between parliament and the executive, because of the office of Lord Chancellor.
Many legal scholars think that the office of Lord Chancellor is a violation of the doctrine of separation of power. According to Martinez, the Lord Chancellor is a head of the judiciary and is formally recognized as President of Supreme Court, Court of Appeal, High Court and Crown Courts, and the country courts. However the Lord Chancellor is a member of executive: he is a senior member of Cabinet Minister. In spite of everything the Lord Chancellor contrives to join both memberships (judiciary and executive). Moreover it allows political system run smoothly and effectively.

2.5.1 The Concept of Checks and Balance

No modern state exercises pure separation of powers rather what is in place as a practical aspect is the system of checks and balances which is a modification of the doctrine of separation of powers.

In the words of Thomas Jefferson “checks and balances are our only security for the progress of mind as well as security of body.”

The doctrine of checks and balances is designed to ensure that each organ of the government enjoys a balanced relationship with the other organ and that none of the organs is capable of exceeding its powers under the constitution, each organ should have capacity to impose restrictions on the others should they act beyond or abuse their Constitutional powers and ultimately censure and correct them if they have done so.

There is a valid argument by Professor G.W Kanyeihamba that even the British Constitution does portray the pure doctrine of separation of powers neither in theory nor in practice.

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43 John Waligo: Separation of Powers, Fountain Publisher, Kampala 1997 P.2
Montesquieu or those who interpreted his ideas were mistaken about the British Constitution.\textsuperscript{46}

But it has been observed by constitutional writers for instance Bull. C. Vice that it was not Montesquieu who was mistaken but his scholar's.\textsuperscript{47} Montesquieu simply meant that there should be reasonable corporation between the three arms of government.

According to Professor G.W Kanyeihamba,\textsuperscript{48} there are activities that do not adhere to the doctrine of separation of powers. That is to say, certain law may require the knowledge of technician or an administrator before it is made. It is right to say that what Montesquieu had in mind was not separation of powers but rather checks and balances where one organ of government would not usurp the authority assigned to another organ. Professor Kanyeihamba further argues that if the concept of separation of powers is strictly adopted, then things would be unworkable, undesirable and public administration would be rigid.\textsuperscript{49}

2.6. Separation of powers in other jurisdictions.

2.6.1 Separation of powers under the French system

The doctrine of separation of powers became a definite political philosophy in 18\textsuperscript{th} century Europe. It was incorporated in the constitutions of revolutionary France. To date, France has a parliamentary system but the influence of the doctrine has created a situation whereby the ordinary courts are precluded from reviewing the actions of administrative officers and the enactment passed by parliament.

\textsuperscript{46} Supra note 7 at 299
\textsuperscript{47} Supra note 7 at 300
\textsuperscript{48} Supra note 7 at 301
\textsuperscript{49} Ibid
2.6.2 Separation of Powers under the Constitution of the United States of America

The US Constitution goes further than any other in applying the doctrine. Under the Constitution, the executive power is vested in the two houses of congress, i.e. the President and his cabinet are not answerable to congress but to the people through elections. The President holds office for a fixed term renewable only once.

The president need not be a member of the political party that has the majority members of congress. The President and cabinet cannot initiate Bills and push them through congress.\(^{50}\)

But even in the US, separation of powers is not complete. The three organs are connected by a system of checks and balances. This system was justified by James Madison that one branch must not have the whole of another branch vested in it nor obtain control of another branch.\(^{51}\)

To him, there was a danger in a republican system that the legislature would try to encroach on other organs posing as representatives of the people. This has been prevented through in built controls such as, the president has powers to veto measures passed by congress but his veto may be overridden by 2/3 of both Houses of congress.

The President is also empowered to negotiate treaties but the treaty must be ratified by 2/3 of the Senate before it becomes binding. In the case of Immigration and Naturalization Service vs. Chadha,\(^{52}\) the Supreme Court of the US held that Congress had no power to veto executive acts of the president.

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\(^{50}\) Supra note 1 at Ch 3

\(^{51}\) Supra note at 9 P3

\(^{52}\) (1993) The Supreme Court of US
However, the senate is empowered to refuse senior appointments made by the President. More importantly, Congress is empowered to censure and even remove the President through the process of Impeachment.

The judges including justices of the Supreme Court who are appointed for life can nevertheless be removed through Impeachment. The supreme court of the US conferred on itself the power of judicial review of legislation. For decades, it was argued that they did not have such power under the Constitution but the Supreme Court consistently insisted that such power was implied by the Constitution.

2.7. Conclusion

concerning the pure independence of the country the doctrine of separation of powers globally took a control over political system of each country. Unsurprisingly most people believe that the concept of separation of powers is a central in governing the political system of country. Historical development of this concept shows us the significance of the separation of powers expressed by Aristotle in his book “The Politics” and Baron Montesquieu, French Enlightenment political philosopher in his concept of “Montesquieu’s tripartite system”. However, all three branches the legislature, executive and judiciary constitute the powerful ideology of effective political system in the country. The importance of separation of power can be seen, in monitoring the political system and advocate new measures when the rights of people are threatened. Doubtless the separation of powers is a decision for the process of devising the protection of the liberty and rights of the people.
CHAPTER THREE

THE LEGAL FRAME WORK OF THE DOCTRINE OF SEPARATION OF POWERS

3.1 Introduction

The origin of the doctrine of separation of powers has been credited to French Enlightenment political philosopher Baron de Montesquieu. Montesquieu described division of political power among an executive, a legislature, and a judiciary. He based this model on the British constitutional system, in which he perceived a separation of powers among the monarch, Parliament and the courts of Law.

The opposite of separation of powers is fusion of powers and this is what characterised Uganda before the signing of the enactment of the 1902 Orders in Council. In light of this, it can be argued that the Order in Council introduced the doctrine of separation of powers to Uganda. However, it can only be said to have attempted to introduce this doctrine in Uganda because in reality, it did not respect the doctrine of separation of powers. The legislative and executive powers were vested in one person, i.e. the Commissioner. The Commissioner was the chief administrator of the Protectorate on behalf of the Her Majesty. Whilst the 1902 Orders in Council provided for him as a Commissioner, later in 1920, his title was modified to ‘Governor’. It was another step in strengthening their grip in the Protectorate.

Article 8-1053 empowered the Commissioner to make laws for peace, order and good governance. In 1920 however, legislative power was placed in the hands of the Legislative Council and even then, it was only made up of Europeans. Imperative to note is that the 1902 Orders in Council did not separate legislative and executive powers. It however did introduce

53 1902 Uganda Orders-in-Council
the idea of the three arms of government, an ideal that the Protectorate realised in 1920 when another Order in Council was promulgated.


3.2.1 The legislature chapter six: ARTICLE 77.

Parliament is established under art 77. it provides that, there shall be a parliament whose term shall be five years from the date of its first sitting after a general election. The legislature most closely represents the interests of a larger population Under the 1995 constitution; And although there was some confusion, numerous court decisions have reaffirmed the supremacy of the constitution which supremacy binds every institution including parliament. Under the 1995 constitution, parliament is supreme in the sense that it has the law making power and that power is conferred by Art 79. The power to make laws is subject to certain limitation, this power is Geographical. Parliament makes laws governing every individual in Uganda subject to certain exceptions of immunities.

Parliamentary power Limitations include; Public policy, Which is particular consensus the government has arrived at in Uganda. It must make laws in consultation with the public at large and in particular with affected stake holders, It has to take in to account public opinion which is not always progressive, parliament is also prohibited from making retrospective legislation.

Parliamentary powers and privileges, Under English common law because of the supremacy of parliament. Parliament was regarded as privileged institutions and certain unlike powers, which powers and privileges are supposed to help members of the body, carry out their legislative function. Uganda inherited those out. There are two basic privileges and they derive from Art 97, the national assembly powers and privileges Act and in the case of Tinyefunza v the AG these privileges include; Freedom from arrest or molestation while caring out
parliamentary functions or on the premises of parliament. Members of parliament enjoy absolute freedom of speech before discussions and debates in parliament, subject to only limitations, Parliamentary rules of procedure into the subject, language the hansers are privileged too considering the case of Onana v Abumayanja. The subjudice rule, matters before court are not supposed to be commented about, The hansers are privileged as well.

The Composition of Parliament is provided for under ARTICLE 78, The constitution provides that the Parliament shall consist of members directly elected to represent constituencies, one woman representative for every district and such numbers of representatives of the army, youth, workers, persons with disabilities and other groups as Parliament may determine. the Vice President and Ministers, who, if not already elected members of Parliament, shall be ex officio members of Parliament without the right to vote on any issue requiring a vote in Parliament.

The functions of Parliament are provided for under ARTICLE 79, Parliament has power to make laws on any matter for the peace, order, development and good governance of Uganda. Except as provided in the Constitution, no person or body other than Parliament has the power to make provisions having the force of law in Uganda except under authority given by an Act of Parliament. it must protect the Constitution and promote the democratic governance of Uganda.

3.2.2 The Executive Chapter Seven

ARTICLE 98, provides that the President of Uganda shall be the Head of State, Head of Government and Commander-in-Chief of the Uganda Peoples’ Defence Forces and the Fountain of Honour. While holding office, the President shall not be liable to proceedings in any court, Civil or criminal proceedings may be instituted against a person after ceasing to be President, in respect of anything done or omitted to be done in his or her personal capacity.
before or during the term of office of that person; and any period of limitation in respect of any such proceedings shall not be taken to run during the period while that person was President.

ARTICLE 108 provides that the president with the approval of the parliament shall appoint a vice president. ARTICLE 109 in the absence of the President, if the President dies, resigns or is removed from office under the Constitution, the Vice President shall assume the office of President until fresh elections are held. Whenever the President is for any reason unable to perform the functions of the office of President, the Vice President shall perform those functions until the President is able again to perform those functions.

Where the President and the Vice President are both unable to perform the functions of the office of the President, the Speaker shall perform those functions until the President or the Vice President is able to perform those functions or until a new President assumes office.

ARTICLE 111 provides for the Cabinet which consist of the President, the Vice President and such number of Ministers as may appear to the President to be reasonably necessary for the efficient running of the State. The functions of the Cabinet are; to determine, formulate and implement the policy of the Government and to perform such other functions as may be conferred by the Constitution or any other law.

ARTICLE 113 provides for Cabinet Ministers who are appointed by the President with the approval of Parliament from among members of Parliament or persons qualified to be elected members of Parliament and ARTICLE 114 provides for Other Minister, the President may, with the approval of Parliament, appoint other Ministers to assist Cabinet Ministers in the performance of their functions. Under ARTICLE 119, The Attorney General is provided for
who is a Cabinet Minister appointed by the President with the approval of Parliament. A person is not qualified to be appointed Attorney General unless he or she is qualified to practice as an advocate of the High Court and has so practiced or gained the necessary experience for not less than ten years. The Attorney General is the principal legal adviser of the Government.

ARTICLE 120 provides for the Director of Public Prosecutions who is appointed by the President on the recommendation of the Public Service Commission and with the approval of Parliament. A person is not qualified to be appointed Director of Public Prosecutions unless he or she is qualified to be appointed a judge of the High Court. The functions of the Director of Public Prosecutions are; to direct the police to investigate any information of a criminal nature and to report to him or her expeditiously, to institute criminal proceedings against any person or authority in any court with competent jurisdiction other than a court martial to take over and continue any criminal proceedings instituted by any other person or authority, to discontinue at any stage before judgment is delivered, any criminal proceedings to which this article relates, instituted by himself or herself or any other person or authority, except that the Director of Public Prosecutions shall not discontinue any proceedings commenced by another person or authority except with the consent of the court.

3.2.3 THE JUDICIARY

The exercise of judicial power is provided for under ARTICLE 126. The Judicial power is derived from the people and is exercised by the courts established under the Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people. In adjudicating cases of both a civil and criminal nature, the courts must, subject to the law, apply the following principles of justice to be done to all irrespective of their social or economic status, justice not to be delayed, adequate compensation to be awarded to victims of
wrongs, reconciliation between parties to be promoted and substantive justice to be administered without undue regard to technicalities.

ARTICLE 128, Independence of the judiciary, this is to the effect that while courts are exercising judicial power, the courts are to be independent and must not be subject to the control or direction of any person or authority. This means that the courts shall not be influenced, controlled or be subjected to any forces from the executive and the legislature. This article aimed at separating the judiciary from the rest of the governmental organs.

ARTICLE 129, provides for the judicial power of Uganda which is exercised by the courts of judicature which consist of the Supreme Court of Uganda, the Court of Appeal of Uganda, the High Court of Uganda and such subordinate courts as Parliament may by law establish, including qadhis' courts for marriage, divorce, inheritance of property and guardianship, as may be prescribed by Parliament.

3.3 Executive and Parliament

Article 91 (1) of the 1995 Constitution of the Republic of Uganda provides that; subject to the provisions of this constitution, the power of parliament to make laws shall be exercised through bills passed by parliament and assented to by the President. Bills passed by the parliament can only become law when assented to by the president as provided for under Article 91 (8). In that context, the constitution recognizes a close co-operation between the executive and parliament in the making of the laws.

Furthermore, by an Act of Parliament; legislative powers may be conferred on other bodies, for example, upon ministers, governmental department and local government. While subordinate Legislation of this kind is made under the authority of an Act, it follows that not all new Legislation is directly made by Parliament. Most bills are prepared for Parliament by
the government, which is also responsible for supervising their passage through Parliament and for implementing the new Act once they have received the President's assent. The executive therefore participates actively, and often decisively, in the process of legislation.

It should however be noted that there is a lot of lobbying by the executive in Parliament. In Uganda legislative system, lobbying, has turned out to be giving of bribes to some members of parliament to see that the will of the executive materializes in to law. This position is suggestive that there is undesired control of Parliament by the executive which conflicts with the principle of separation of powers.

Many public offices which are specifically provided for by the constitution can only be occupied by persons proposed by the appointing authority but approved by parliament. For instance Article 108 (2) provides that the President shall, with the approval of parliament by a simple majority, appoint a Vice President.

Article 113 (1) provides that cabinet ministers shall be appointed by the President with the approval of parliament from among members of parliament or persons qualified to be elected members of parliament. Furthermore, Article 114 (1) of the Constitution empowers the president to appoint other ministers but not exceeding 21 in number to assist cabinet ministers in the performance of their functions with the approval of parliament.

Other senior appointments by the president that requires parliamentary approval include appointment of the Governor of Bank of Uganda, Deputy Governor and members of the Board of Bank of Uganda.54

The appointment of the Auditor General under Article 63 and chairperson, Deputy and members of the Public Commission and Education Service Commission under Article 65 and

54 Article 61 of the 1995 Constitution of the Republic of Uganda
67 of the Constitution respectively also requires parliamentary approval, in that context, pure Separation of Powers is impossible if the government is to carry out its duties.

Under Article 124 of the 1995 Constitution, the president is vested with power to declare a state of war. Article 124 (1) provides that the President may, with the approval of parliament, given by a resolution supported by not less than two-thirds of all members of parliament, declare that a state of war exists between Uganda and any other country.

It should therefore be noted, that there is no pure separation of powers in the constitution instead what is envisaged therein is a systematic co-operation in the performance of duties by the organs of the government.

Article 118 empowers parliament to move a vote of censure against any minister on any of the grounds contained therein namely; abuse of office, misconduct or misbehaviors, physical or mental incapacity, Mis-management or incompetence.

Article 118 (2) provides that once a censure is passed against a minister, the President shall unless the minister resigns take appropriate action in the matter. In that regard therefore, the executive at times intrudes into the functions of the parliament.

Whereas the President is not Member of Parliament either fully or in an ex official capacity. Article 101 requires him to address parliament on the state of the nation at the beginning of each session and from time to time on any matter of public importance. This is intended to ensure that the executive accounts to parliament in its capacity as a body of representatives of people.

3.4 Judiciary and Parliament.

The judiciary is granted powers to be independent from any person's direction or authority as provided under Article 128 (1) of the Constitution.
As far the judiciary is concerned, the Chief Justice, Deputy Chief Justice and principle Judge and the Justice of the Supreme Court and judges of the High Court are all appointed by the President On the advice of Judicial Service Commission and the approval of parliament. This heavily shows that pure separation of powers is not in operation in Uganda.

Parliament is also controlled by the judiciary in performance of its constitutional duty of law making. This is done through what is called judicial review and on a number of occasions courts have nullified some Acts of parliament on ground that they are unconstitutional.55

3.5 Judiciary and Executive

Uganda after independence went through a series of military governments. Neither parliament nor court had powers to question the decision of the executive. And if the courts rendered illegal activities of the executive, such decisions were not adhered to.

In the case of Thingira & others Vs. Uganda.56 The applicants, cabinet ministers in the first Obote government had been arrested at gun point while in a cabinet meeting. No charges were preferred against them. They therefore successfully applied for the writ of Habeas corpus. Shortly after the decision of the court, the ministers were re-arrested and taken to part of Uganda where emergency regulations were in force thereby taking their case out of the ordinary jurisdiction of the courts.

In another incident, state agents of the Amin’s regime warned Ben Kiwanuka, then Chief Justice of Uganda not to show mercy to an accused person. The learned chief justice found that

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55 See the case of Salvatory Abik and Another vs. Attorney General. Constitutional case number I of 1997

the alleged offence was a minor one which was bailable. He granted bail. He had been previously warned not to be soft on criminals by the then ruling government.

Thereafter, the Chief Justice was arrested and manhandled in his own chambers by unidentified security men who forcefully took him from the court and drove him away. He was never seen alive again but it’s is believed that he perished at the hands of the so-called state security agents on the orders of Idi Amin.57

In Uganda, the executive is given a lot of powers to interfere with the activities of the judiciary. The president as the head of the executive is granted powers under the constitution to appoint the judges into the judiciary and he also appoints members of the Judicial Service Commission.

In the case of Dr. Kiza Besigye Vs President Yoweri Kagutta Museveni and Electoral Commission58, the petitioner challenged the elections on grounds that it was not free and fair as required by the constitution. Two Justices of the Supreme Court dissented, the president inquired to know the names of those who ruled against, him. Such constant threat against judicial officials after government has lost a case prejudices the independence of the judiciary and the concept of separation of powers in general.

The frame work of the doctrine of separation of powers can majorly be traced in the 1995 constitution, although not stated anywhere, there is an intrinsic ranking in the branches of government. The constitution is however more concerned about the status of parliamentary supremacy in light of the reaffirmation of constitutional supremacy. This explains why in the order of branches in the 1995 constitution, there is the legislature first, chapter 6 followed by the executive in chapter 7 and the judiciary in 8.

58 Election Petition number I of 2001
CHAPTER FOUR

RESEARCH FINDINGS ON THE DOCTRINE OF SEPARATION OF POWERS IN UGANDA

4.1 Introduction

The separation of powers is a fundamental pattern for governance of Uganda. When we hear the term separation of powers we immediately understand that it consists of three branches in Uganda. The separation of powers is a pure model of democratic societies and it consists of executive, the legislature and judiciary branches. The separation of government responsibilities into different branches commonly limits them from exercising the fundamental functions of each other. The reason is to stave off the concentration of power on one branch and to diversify the government’s liabilities.

The doctrine of separation of powers was originally developed as a means of preventing tyranny in the belief that concentrating power in one individual tends to be corrupting and to result in dictatorship. The solution was to demarcate state organs and define their powers so that each organ maintains a check upon and balances the other.\(^{59}\)

In Uganda, there have been attempts by the legislature to have pure separation of powers. However this attempt was defeated when a motion seeking to separate parliament from the executive suffered defeat in parliament. The gist of the motion was to have the executive purely separated from the activities of the parliament.\(^{60}\)

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\(^{60}\) Hon Ekomolot Onapita and Mugisha Muntu tabled a bill titled Constitutional (Amendment) Bill in 2000 and sought to amend Article 113 of the constitution by requiring an individual to be only a member of one organ of government the Bill was defeated as it ignored the principle of parliamentary representation.
4.2 Separation of Powers as practiced in Uganda.

The year 1995 witnessed a new phenomenal in Uganda, the promulgation of the 1995 constitution of Uganda. The following year 1996 witnessed the flustered direct presidential election and execution of members of parliament no along party lines but on individual merit. Also the president appointed judges as part of the judiciary.

The year 1996-1997 witnessed presidential elections that were ridged. This was seen in the case of Rwanyarare v Attorney General\textsuperscript{61}

The period of 1997 also witnessed the case of Tinyefunza vs Attorney General. This showed the influence put on the judiciary by the executive to decide in its favor. The period 1998-2000 witnessed the debate on referendum and finally in 2000, it was passed as the referendum act which became law, here we witnessed the influences of the executive on the legislature which was later challenged by ssemwogere and Zachiary olum v Attorney general\textsuperscript{62}

Also the constitutional amendment of 2000 showed the influence of the executive on the legislature. In addition, in the case of Masala Musene and three others v Attorney General\textsuperscript{63} constitutional petition, Twinomugisha J.A. on his part cited examples, where, after passing a judgment, it is followed by threats, to fix or sort out the biased judges, to investigate the corrupt judges this clearly exposed the influence of the executive on the judiciary and yet separation of powers and rule of law emphasize the independence of the judiciary. And these two principles form the bedrock of the doctrine.

\textsuperscript{61} Constitutional MISC no 85 of 1995 (constitutional case no1 of 1995)
\textsuperscript{62} Supra
\textsuperscript{63} constitutional petition no5 of 2004
In The Uganda law society vs Attorney General. The doctrine was held to have been blatantly violated. In this heat, on November 19th 2005, three was an NRM national delegates conference which turned Yoweri Kaguta Museveni as the unopposed party chairman and presidential candidate. He in an unprecedented speech threatened the judiciary that he will not hesitate to fire judges who unjustly issue eviction orders.

Furthermore, state minister for information and communication technology was convicted by Masaka Grade I magistrate but then the Executive interfered.

The word ‘constitution’ has no precise definition. According to Professor K. C. Where, in the widest sense, it refers to the whole system of government of a country, the collection of rules that establish and regulate or govern the government. In the narrow sense it refers to a document having legal sanctity and setting out the frame work and the principal functions of the organs of the government: It also declares the principle by which those organs must operate. Such a document must also embody specific values and customs by which the citizens have agreed to be governed.

The doctrine of separation of powers in Uganda’s legal system a view phenomenon. The concept was captured in the 1967 Constitution of the Republic of Uganda. The Constitution had clearly defined demarcation in the powers of the three organs however; much of it was abrogated during the Idi Amin’s regime.

The 1995 Constitution of the Republic of Uganda to a great extent provides for separation of powers, however the constitution, does not provide for pure separation of powers rather it

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66 Idi Amin quashed the powers of the then legislature of making laws and started ruling on decrees. The judiciary also lost its powers of adjudication.
provides for checks and balances. This implies that the three organs of government work closely with each other but with reasonable independence from each other.

The constitution is built on the principle of constitutionalism, which means that the use of governmental powers, a process that is essential to the realization of the values of society, should be controlled in order that it should not itself be destructive of the values it was intended to promote. Constitutionalism also entails that the citizens must consent to be governed by the assemblage of institutions, rules, values and customs they have voluntarily put in place. In other words, constitutionalism is a commitment to be governed by the constitution. The constitution is for the people the people who elect their leaders with a duty to represent them. It is this power vested in the governmental organs such as the parliament, the executive and the judiciary that is exercised in accordance with the aspirations of the people.

Article 77 of the Constitution of the Republic of Uganda establishes the parliament and Article 79 gives it the power to make laws. Article 79 (2) of the Constitution of the Republic of Uganda provides that except as provided in the constitution, no person or body other than parliament shall have power to make provisions having the force of law in Uganda except under authority conferred by an Act of parliament. This in effect prohibits the making of decrees and legal notices but allows delegated legislation. For instance the local councils as portrayed in the Local Government Act are entrusted with the responsibility of enacting Ordinances and bye laws. It should be noted therefore that except where an Act of parliament confers on someone power, parliament is the only institution vested with power to make laws.

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67 Supra note 1 at 287
Under Article 99 (1) of the Constitution of the Republic of Uganda 1995, executive authority of Uganda is vested in the President who is required to exercise it in accordance with the constitution and laws of Uganda.

The President exercises his executive authority both personally and through delegates namely, the Vice President, whose office is established under Article 108 and the cabinet under Article 111 of the Constitution. In that context, powers vested in executive should not be practiced by other organs.

In the case of Attorney General V. Tinyefuza, the respondent sought to resign from the army on the ground that having been appointed a Senior Presidential Advisor, he had ceased to be a member of the armed forces and he further argued that the refusal to accept his resignation constituted a violation of his rights of freedom from forced labour guaranteed under Article 25 (III) of the 1995 Constitution. On appeal before the Supreme Court, the issue was whether the respondent had a cause of action. A number of justices of the Supreme Court had different views on the matter.

Karookora J. was of the view that the appointment was within the realm of government policy and in effect part of the executive function not the judiciary save where such a policy is illegal or violates rights of individuals.

Wambizi CJ's view was that deciding on status of Tinyefuza's employment was within the sphere of executive prerogative.

Kanyeihamba J. view was one of detailed examination of separation of powers. He inter-alia stated that, issues pertaining administrative decisions in particular on military appointments are with in the exercise of executive discretion and in effect outside the jurisdiction of courts.

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69 Constitutional Appeal No. of 1997.
Consequently, the three justices Wambuzi C.J, Kaiookora J, and Kanyeihaiiba J, deemed that it was not a matter for the courts to deal with and held that the subject matter of Tinyefuza’s appointment fell within the scope of executive powers and was therefore a political question where the courts had no power to intervene thus emphasizing a clear separation of powers between the executive and the judiciary.

Article 126 (1)\textsuperscript{70} provides that judicial power is derived from the people and shall be exercised by the courts established under the constitution and in the name of the people and in conformity with the law and with the values, norms and aspirations of the people. The more importantly, Article 128 guarantees independence of the judiciary from any person or authority. This constitutional provision' creates separation of powers between the judiciary and other arms of government.

Authority in most democratic counties suggests that there are three elements to indicate that the judiciary is independent and separate from other arms of government. These elements include security of tenure, financial remuneration of judicial officers and finally the independence of the judiciary\textsuperscript{71}

The judiciary in Uganda has demonstrated in certain instances that it is independent and separate from other arms of the government. In the case of \textit{Kizza Besigye Vs Y.K. Museveni and Electoral Commission}.\textsuperscript{72} The petitioner dragged the respondents to the court on various allegations of impropriety and breach of electoral laws. The petitioners contended that the polls were raged and therefore the elections were not free and fair. In my opinion, the judiciary

\textsuperscript{70} The 1995 Constitution of the Republic of Uganda.


\textsuperscript{72} Election petition number 1 of 2001
exhibited a high level of independence and self-confidence when out five judges of the Supreme Court, two ruled against the sitting President.

The provisions of the 1995 constitution laying out the composition of the three arms of the government make a deliberate attempt to enshrine separation of powers. Hence the executive is comprised of the president and cabinet ministers, the legislative is comprised of directly elected women representatives from each District, representatives of the army, youth, workers, persons with disabilities and such other representatives of special groups.

4.3.1 The Legislative function.

The legislature makes the laws; it passes the law and amends the existing laws and repealing the obsolete laws with or without replacement. Ordinarily the legislative function is carried out by what a central legislature by whatever name called for example parliament, national assembly, Duma, chamber of deputies, congress among others.

In Uganda, the legislative council was replaced with the national assembly from 1962-1971, the national consultative council, national resistance council in 1986 and now a parliament. All these were legislatures. 73

The judiciary has functions such as passing laws for the good governance of Uganda. Provide by giving legislative sanctions and acquisition of loans, the means of carrying out the work of government, to scrutinise government policy and administration, to discuss matters of political interest usually highlighted in the president's state of nation address. To vet the appointments by the president under the constitution or any enactment74

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73 Mutilowa P.M. Uganda since independence, Kampala, Fountain Publishers 1993, Ch. 2.
74 www.parliament of Uganda. go.ug/page/ functions-parliament
However, as practiced in Uganda, there are numerous instances when the functions of the Legislature are exercised by other organs of the government and this has undermined the 21st century constitutional principles, where there is growing interest more than before in issues related to democracy and good governance. As these is a fundamental requirement for a sustainable development.

Parliament has a critical role in promoting democracy and good governance. As democratically elected representatives of the people, members of parliament have a task to govern people, for the people and by the people.

Parliament derives its powers directly from the consent of the people expressed through periodic elections and therefore it is to implement the will of the people among other functions.75

Parliament does not operate in the vacuum; its function is shaped very mainly by country context.76 From post-independence political history to new multiparty system, political governance has impacted on parliamentary works. It should be noted that for parliament to efficiently perform its duties, it should be protected against any sort of interferences especially from the executive.77

Since 1996, Ugandan parliament has seen its powers interfered with and undermined by technically and tactfully by the executive. This has affected its performance and reference.

From the infamous five million pay-out to members of parliament to lift the presidential term limits in 2005, The numerous caucusing of the ruling party members of parliament to change parliament position, “TOGIKWATAKO” meaning, that MPs should not touch on the provisions of the constitution mainly article 102 (b), where the executive influenced the

75 1995 constitution of Uganda, chapter 1.1
76 Hudson and Wren 2007 Pg. 81
77 GW Kanyeihamba, Constitutional and political History. Law Africa 2nd Edition. Pg. 267
decision of the parliament to lift the age limit for presidential candidates. The executive has also influenced the parliament to pass laws that are aimed at suffocating the opposition of parties such as The Public Order Management Act.

The executive and the president in particular has literally taken over the role of parliament. With majority representation in parliament, the NRM party chairman uses his force to influence the decisions of the party and threatens to whip any member who dare challenges the agreed position in parliament. In 2013, three members of parliament who were rebel MPs, Theodel Sekikubo (Lwemiyaga), Barnabas Tinkasimire (Buyaga county), MuhammadNsereko (Kampala Central) and Wilfred Ntwagaba (Ndorwa county East) almost lost their parliamentary seats until when the constitutional court dismissed the case filed by NRM. Although the MPs won the case, their fall out with the party acted as a deterrent to the critical of their inter party politics.

In march 2019, the same rebel MPs were blocked from attending the NRM parliamentary caucus retreat in Kyankwanzi.\(^7^8\) The president has also used executive rewards, favours to compromise the effectiveness of the parliament.

The constitution grants the president powers appoint ministers,\(^7^9\) currently, more than 95% of the ministers are appointed from the members of the parliament. This commits part of parliament to the executive and makes it impossible for such members to perform their oversight role.

The other effect is that MPs are appointed as ministers, they refrain themselves from being critical of their executive as they anticipate executive favour to be appointed as ministers.

\(^7^8\) [Softpower.ug/kyankwanzi-ressolutions-did-not-address-key-issues-NRM-rebel-MPs](http://www.softpower.ug/kyankwanzi-ressolutions-did-not-address-key-issues-NRM-rebel-MPs)

\(^7^9\) Article 113 of the 1995 constitution
President Musevene has mastered the game by leaving several cabinet posts vacant to draw most MPs in waiting and by favor, this has impacted on the parliamentary performance.

In conclusion therefore, parliament has a task to free itself from executive centrals and abuses. Through the powers granted by the constitution, to approve all executive appointments, making and reviewing of the laws including those that govern the executive. It is there for important to not that good governance can only be possible under accountable political system where the parliament enjoys authority, autonomy, and independence to perform its legislative responsibilities.

4.3.2 The Executive Function

The power of the executive branch is vested in the president of Uganda who also acts as a head of state and commander in chief of the armed forces. The president is responsible for implementing and enforcing the laws written by parliament, provision of social services and regulation of the private sector to prevent excesses, defence, fiscal and micro control, the president also appoint the cabinet. The vice president is also part of the executive Branch and ready to assume the presidency should need arise. The executive also makes sure that other government organs are facilitated. The executive power is normally exercised by the King, Prime minister, chancellor and usually assisted by cabinet ministers in addition some executive roles are carried out by local and administrative units, the civil and the armed forces among others.

The executive doesn’t pass laws or interpret them. Instead, the executive enforces the law as written by the legislature and interpreted by the judiciary. The executive can be the source of

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80 Article 98 of the republic of Uganda
certain types of laws such as decrees or executive orders. The executive arm of the government is given such powers by the constitution.

Good governance can only be realised when the executive arm of the government doesn’t usurp the powers of other arms of government. In Uganda, the executive under the leadership of President Yoweri Museveni has continued to interfere into the functions of other government organs.

An article by Oloka onyango in the new vision of 14th March 2007 titled “President Museveni wrong on the judiciary. He claims that whereas it was correct for him to say that the independence of the judiciary granted by constitution is fully respected, and strictly followed by the executive. It was erroneous to add that similar respect should be accorded to the executive in its exercise of its duties.

The rule is that courts have no jurisdiction over matters which are within the constitution and legal powers of the legislature and the judiciary, however, the president of Uganda abuses his powers with the assistance of his majority NRM party parliament. He overlaps his authority and this undermined the authority of the other arms of the government. For instance, the power to political appointments which he is supposed to share with other organs such as the parliament and the judicial service commission, for example in the case of Hon. Ayidah Nantaba, the Case of Hon. Aronda Nyakayirima and the case of Justice Odoki.

The president kept craving for the time when he would liberate the judiciary by appointing judges who are carders of the movement party and those movement carders have failed to administer justice independently.
4.3.3 The Judicial Function

This is a system of courts that interprets and applies the law in a country or an international community.\(^2\) It can also be thought of as a mechanism for resolving disputes.\(^3\) Under separation of powers, the judiciary generally does make statutory law which is the responsibility of the legislature or enforce the law which is the responsibility of the executive, but rather interprets the law and applies it to the facts in the case. However, in some countries like Uganda, the judiciary does make common law.\(^4\)

In Uganda, the judiciary has the power to change the laws through the process of judicial review.\(^5\) The judicial function also interprets law to determine what rights, duties or powers arise therefrom. It involves the application of the law to factual situations and articulate rights and remedies. This power is exercised by the courts. In Uganda however, there are other alternative means to resolve disputes outside courts of law.\(^6\)

It should be noted that even in a republican or democracy, some organs of the executive for example local authorities have been given judicial or quasi-judicial function or powers. Likewise, under the alternative dispute resolution arrangements, non-court bodies may be empowered to apply law to facts and in so doing settle disputes before them. For example in Arbitration, Mediation and Conciliation.

The constitution of Uganda provides that the exercise of judicial powers shall be independent and shall not be subject to any power and control or direction of any person or authority. That no authority shall interfere with the courts or judicial officers in the exercise of their functions.

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\(^3\) Article 126(2)

\(^4\) The decision in Suzan kigula's case


\(^6\) The Arbitration and conciliation Act cap 4) empowers the disputes to be settled outside courts disputes to be settled outside courts of law.
In Uganda today, different organs of the government most especially the executive have continued to undermine the independence of the judiciary.

The chief justice Benjamin Odoki described the influence by the executive arm of the government on the independence of the judiciary, noting that the intrusion has been in the states refusal to obey and enforce decisions of the courts of law.

4.4 A Critique of the organs of government under the 1995 constitution

In an ideal constitutional and democratic government, the Parliament, Executive or the Judiciary should be able to perform their functions without any undue interference. The parliament is responsible for representing and rewarding people's views, it is also responsible for making and passing the laws that governs the country. The executive is responsible for managing and doing the necessary for the welfare of the country as per the ministries and the judiciary is responsible for enforcing the law as made by the parliament. However there is ample evidence to show that in Uganda the powers of each organ have been interfered with and undermined. The legislature and judiciary have always fallen victim of the undermine of separation of powers by these by the executive this is well discussed below.

Consequently, Parliament unlike the Judiciary has developed a dangerous political syndrome in complying with most of the demands of the executive. The above position is exemplified by a number or enactments such as the Referendum and Other Provisions Act or [99. This was followed by the 2000 Referendum that was objected by the majority opposition groups arguing that it amounted to a violation of fundamental human rights both at National and international

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87 Article 128
88 Daily monitor March, 2005
level. The referendum was objected strongly by the opposition on grounds that there was no fairness and no freedom therefore the results were not valid.

The constitutional (amendment) Act 13 of 2000 was also a result of the executive pressure on the Legislature causing it to disregard the requisite Procedures: the constitutional (amendment) Act no. 1/2000 was nullified by the Supreme Court consequently.

Further in 2002, the Parliament was made to enact the Political Parties and Organization Act (PPOA) that was also criticized for infringement on the rights and freedoms of the people. Various mechanisms were ensured to restrict operation of opposition political parties. The above are some of the extreme examples making a simple point that; there has been a systematic undesired control over the parliament by the Executive.

Regarding the Judiciary, the Executive has always expressed its unwillingness to respect the rulings against its wishes. According to the Chief Justice of Uganda, an independent and impartial Judiciary is important for courts in democratic countries lean in favor of the liberty of the individual when applying and construing rules and policies that are vague or harsh while justifying public policies r acts. He added that if is the best—suited branch to protect and strengthen the rule of law: though there have been threats emanating from the Executive generally and against individual judge. This undermines the rule of law. This was witnessed with case of Besigye V. Museveni, whereby the President expressed dissatisfaction against the two Justices who dissented. In almost all the cases where the government has lost, such sentiments as ‘the do not know what they are doing have been common.

89 PK Semogerere; Friday, Monitor 1999; Article 20(1) of the Universal Declaration of Human Rights of 1948 and 43 of the 1995 constitution which provide for the rights of freedom of peaceful assembly.
89 Sam N/aba Oh BBC World Africa, Wednesday.
91 Section 7 of the PPOA restricted the activities of such parties t 4a, not National Level.
92 Hon. Benjamin Odoki
93 Hon. Justice Benjamin Odoki, the rule of Law in Uganda: today. (Jonte4nporaly challenges. An address on lawyers’ day at Uganda Christian University, 251Jl Nov 2005 V Presidential Election Petition No. 1 of 2001.
Thus, the above presents a consistent attempt by the strong Executive to water down the aforementioned essence of separation of powers. This has persisted over the years to date especially with the emergence of the controversial political transition of separation of powers.

4.5 The challenges of power during the political transition

It has been shown that the Judiciary, unlike the Legislature has on various occasions defended the Constitution and endeavored to uphold the Rule of Law. As a result, the Executive sought to devise means through which the Judiciary had to be contained. This culminated into the Kyankanzi Conference of March 2003 whose proposals, were to the effect that the President should have power to appoint and remove Judges without the current procedures. It also proposed that Judges should be appointed on contract terms. This would compel them to always dance to the tune of the Executive so as to secure reappointments. This was a clear attempt to demoralize the judiciary; with such proposals one would be joking to expect the Judiciary to still be independent hence the negation of separation of powers.

The Movement Government has been trying to democratize Uganda in a manner that may be referred to as turning the pages without closing the book. Democratic governance presupposes peaceful and constitutional change of Government that Ugandans after 44 years of independence are still yearning to realize.

The year 2003 presented one of the major challenges to the 1995 Constitution in respect of its provision for term limits. Thus the Parliament was pressurized to accept the amendment and this involved payment of five million to the Movement Members of Parliament-which was disguised as facilitation. This is because the members who were known to be on the opposition side were not considered for the, alleged facilitation
The dominance of the Movement coupled with the absence of credible opposition groups has always made it possible for the Executive to force through controversial policies and legislations such as the Kisanja Bill, Privatization of CB and the deployment of troops, in Constitution. The general opinion is that the political leaders have lacked political will to serve Ugandans. For instance, the failure of the Parliament to foresee the dangers of overstaying in power has been a regrettable concern of many Ugandans. In view of Uganda’s constitutional history, it cannot be said that a conscious and independent Parliament could have passed the third term Bill. Consequently Separation of powers has lost value which accounts for the present standoff between the organs.

As earlier mentioned the Independence of the Judiciary is an important aspect of Separation of powers. However political realities such as unwillingness to handover political power could not spare the might of the Judiciary and the rule of law; the administration of justice as highly interfered with by the Executive. At one time the president stated that the accused Dr. Besigye having been lawfully brought to court should prove his innocence.

This was a message to the courts that the accused was guilty yet he had not been tried and found guilty by the court. This explains why the Government was reluctant to accept the ruling of court granting the accused bail.

The major concern lies in the failure of the Executive to respect the decisions of court.

The accused were granted bail by the High Court but rearrested by the armed militia also known as the Black Mamba. This was a blatant violation of Human Rights and perhaps it is what Montesquieu was talking about; by that time the Executive desired to exercise all the

94 Dr. Byesigye was a presidential candidate fare FDC and was arrested on charges of rape and treason. However the public opinion suggested that the arrest was political with intention of clipping his wings.
95 Dr. Byesigye was the 14 people Redemption Army (PRA) Suspect was rated bail on 16 Nov. 2005.
powers of government which would usher in tyrannical rule, hence no Rule of law. One army operative Gen. David Tinyefuza accused Judges of always siding with offenders. According to Justice Kanyeihamba, in his book, Comentaries on Law, Politics and Governance, he appeared on Television with an angered face typical of a feared terrorist when he questioned the authority of Judges and slated that they have no power to order the army and that the army would not accept the business of being ordered by them.

In hand with that, the Principal Judge James Ogola had strongly condemned the assault on the Judiciary by which the General said the following:

"Who appointed him? Did the Principal Judge you are talking about go through a ballot? Did he come here by accident? We have given them power but they should not order us about."

The best interpretation of this comment by a member of the Executive is to the effect that, the Judiciary, in performance of its functions is subject to the control of the Executive against Article 128 of the Constitution. The view that the Judges have no power to order the army and this implies that the rule of law means nonsense because this would mean that they are above the

It is also surprising to note that the PRA suspects were in detention in disregard of court decisions. On the 1st Jan 2007 the government lodged an application for cancellation of bail of the suspects following the debate of the court rulings. The Chairman of the Legal Committee of Parliament wondered if the cabinet would nullify the court’s decision and it was

96 Solomon Muyita and Peter Nyanzi: Besigye Ruling angers Tinyefuza, the Daily Monitor Friday Feb, 3rd 2006 PP1-2.
99 In Col Dr. Besigye and others Attorney General Const. Petition Mo. 12 of2006. The court ruled out that the trial of the PRA suspects in the General court Martial is unconstitutional and ordered for their release. However, this order was disregarded at the order of the executive. On 12th January 2007 the court again ruled against the continued detention of the suspects.
100 The Daily monitor Jun 31’ 2007 the AG appeared before the Parliamentary legal committee noted that the cabinet would discuss the matter.
101 Mr. Peter Vyombi, he is also a member of Parliament for Nakasongola county.
observed that the matter affects the independence of the Judiciary and added that one arm of Government is deliberately refusing to comply with the Orders of another arm.\footnote{Ibid.}

The message in this is that the cherished system of administration of justice in Uganda has been tampered with since the rights of the people such as liberty are no longer protected by the courts.

The public believes that there is urgent need to reorganize the NRM leadership in order to revive the spirit, character and love for Uganda. Various events have been witnessed which show that if the constitutional principles such as separation of powers on which the importance of the Judiciary depends, a time will come when Judges will be arrested like it happened in the regime Idi Amin.\footnote{Ben Kiwanuka the chief Justice was arrested from his office and has never been seen again.}

One of the lawyers for the PRA suspects posed a question

"What is the remedy for people whose rights are being infringed against as a result of an unconstitutional action of a public authority if that authority will not respect the decisions of the constitutional court and the Supreme Court?\footnote{Diwidi Mpanga.}

He also asked whether or not the Constitution is still supreme and finally warned that taking short cuts through the Constitution and bending the rule of law are a sure source of Constitutional instability, tyranny, oppression and exploitation.\footnote{Ibid.} In other words it is the Executive that is supreme hence certain means should be ensured by the Parliament and the Judiciary through which proper checks and balances may be realized to prevent dictatorship.
4.6. Conclusion

The concept of separation of powers is a crucial determinant of rule of law and constitutionalism in a given country. However, as already noted in the preceding chapters, the concept is undesirable and unpractical since if it is to be adhered to, it will lead to political stalemate. Uganda like other African countries must embrace instead the concept of checks and balances which is practical and instrumental in the forward movement of a country. The three arms of government can only function under a close harmonious relationship with each
CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.0 Introduction

This chapter presents the conclusion and recommendations. The chapter envisages what should be done in a bid to realize the fruits of separation of government powers.

5.1 Conclusions

Separation of powers in Uganda is adequately provided for under the law of Uganda as it has been clearly illustrated in the previous chapters, that the three arms of the government, that is, the executive, the legislature and the judiciary should not interfere into the functions of one or the other two Branches of government. However, from the findings of this study, it has been observed that there is interference of the Executive governmental organ into the functions of the judiciary and the legislature, the study has also revealed that there are instances where non-interference of the judiciary into the functions of both the executive and legislature is non-bearable.

From the research findings, it can be concluded that at a smaller extent, the interference of the Executive into the functions of the Judiciary and legislature is desirable whereas the interference of the judiciary into the functions of the executive and the legislative arm of government has been observed to be desirable to a larger extent. The legislature also interferes into the functions of the executive and the Judiciary. Thus the conclusion drawn from this study is that in Uganda, there is no complete and pure separation of powers, the provisions of the 1995 constitution of the republic of Uganda on the doctrine clearly defined the boundaries of each Branch but did not put into place an enforcement mechanism to check the excess of powers and in case an organ exercises power and authority not conferred upon it by the law.
The study has also proven that implementation of the doctrine of separation of powers in Uganda as is written in the book, is as impracticable as restoration of conjugal rights. This is because the powers granted by the constitution to each body overlap to the other two organs. The study has also showed that no government organ can work in complete isolation of its self, distancing its self from the other two organs of government. This is because separation of powers is a tree which does not bear enough fruits for the smooth running the country. And strict adherence to it cause monopolistic and bureaucratic tendencies in governmental bodies, leads to abuse of the absolute powers granted to a specific arm of government when such powers go unchecked, resulting into non transparency, increased rates to corruption and misuse of the public founds by the governmental organs.

In nutshell, the three arms of government cannot operate in isolation and in Uganda, there is no complete and pure separation of powers rather, there is an interplay of the three arms of government as the three branches of government, basing on the research finding and observations, are in close consultation with each other where the judiciary is in a close and harmonious relationship with the legislature. For example, the legislature makes the laws which are interpreted by the judiciary, the executive arm of government is the overall body acting like an umbrella to protect both the legislature and the judiciary. For example, the president who heads the state, at the same time is the commander in chief of the Armed forces of Uganda, he appoints the speaker of parliament, with assistance and consultation from the judicial service commission, and he appoints the judges and also appoints his cabinet ministers from the members of parliament. Therefore, for monitoring the functions and operation of government bodies and prevention of abuse of authority, it has been concluded that pure separation of powers is not practicable and thus not practiced in Uganda, but there is what is known as checks and balances, which is slightly different from the pure separation of powers.
where an organ of government is allowed to work closely with the other two branches of government for the smooth running of the country.

5.2 Recommendations

From the earlier discussion, it is clear that the organs of government have been publicly undermining one another and this makes the public to lose confidence in their operations. Members of the executive were quoted blaming the judiciary before the public. The president is on record to have condemned the Judiciary as biased, unprofessional, anti-NRM and this undermines the people’s confidence in it.

5.2.1 Recommendations to the executive

The Executive should desist from, criticizing the Judiciary and instead find ways to strengthen it by providing all the necessary facilitation to ensure its effectiveness.

The executive’s interference in other organs makes them weaker and unable to do their work effectively.

The researcher recommends that the executive should strictly respect the independence of the other organs so as to give them a chance to do their work effectively. This is so for its interference has paralyzed other organs i.e. the judiciary and legislature.

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5.2.2 Recommendations to the judiciary

The Judiciary needs to be stronger to be able to take decisions that would compete other organs to respect and observe the Constitution. The (Thief Justice Benjamin Odoki commenting on
the independence of the Judiciary noted that qualified members of high moral authority and integrity should be appointed as judicial officers to reduce ineffectiveness of the Judiciary. He argues that such persons would not simply succumb to the whims of the Executive. The challenge however is that the present practice of appointing judicial officers by the President leaves little chance for confident Judges who would disregard undue influence and intimidation.

Therefore the Independence of the Judiciary which is inter alia a major aspect of the Principle of Separation of Powers may better be realized where the Judiciary is self-regulatory. A strong Judicial Service Commission should be set and provided for in the Constitution to select the most qualified persons through a much more open and critical process. The Commission should take into consideration such persons antecedents, therefore the performance of the function entailed as well as the need to ensure the absence of direct political influences on the selection of such persons. The Commission should also be responsible for removal and promotion of such persons all of which would be based on competence and proper accountability.

The members of the Judiciary should object to any attempt to compromise Independence. The researcher considers the suspension of judicial work as most appropriate response to the Court raid of 1st March 2007 (supra).

It should be noted that judicial power has for long been subject to the Executive pleasure and pressure as a result of the presidential power to appoint the Judges. It is for such pleasure that the Judiciary has been extremely unwilling to upset the Government in the event of the abuse of its Independence.

Thus the researcher recommends that such actions as suspension of judicial work as a measure towards ensuring optimum respect for the Judiciary. The rationale behind such an action would be to compel the Executive to account to the people for the failure of Justice in the Country.
However this should not be misunderstood as fostering the suffering of the people who in the event of suspension would suffer an injustice. In hand with the above the researcher recommends resignation of judicial officers in cases of persistent blatant violations of the rule of law. it should be noted that the breakdown of the rule of law cannot be disassociated with the abuse of human rights. Thus in some cases resignation may represent a protest against abuse of people’s rights. However in developing Countries this aspect seems impracticable because politicians and other public or civil servants are unwilling to lose their jobs since selfish interests over ride public interest.

Suffice it to mention that if the Chief Justice had resigned, it would have better signified the desired patriotic response to blatant attacks on the rule of law and a clear protest against the abuse of the rights of the suspects who were granted bail. This would paint an unpleasant record on the Government and this may act as an effective check on the exercise of power by the Executive upon the matter becoming an international concern.

Recording the difficulty surrounding the enforcement of findings of courts, there is need to provide for mechanisms through which the judiciary may independently enforce certain decisions.

Regarding the difficulty surrounding the enforcement of findings of the courts, there is need to provide for mechanisms through which the Judiciary may independently enforce certain decisions.

5.2.3 Recommendations to the legislature

According to the research in Uganda most of the members of the parliament are also members of the executive
This has made it very difficult for the members to realize the independence of the two should be completely separated by recruiting different people. The members of parliament should not be part of the executive. This independence will lead to the realization of separation of powers. The legislature should also be strong in the way that it does not stand or entertain being corrupted and interfered. Their point can be driven through strikes, boycotting and also using the law.

Earlier, observations also pointed out that the ruling Party dominates the Parliament and this makes it easier to interfere with functions of Parliament. Among the causes for this is the fact that the members of Parliament and the President are elected at the same time. Under this current position the people are always more concerned about the presidential elections and therefore have no opportunity to make independent choices of their representatives. Thus, it is desirable for the election of the President and the Members of Parliamentary to be conducted separately in order to enable the people to properly scrutinize the parliamentary candidates.

5.2.4 Recommendation to the press

Furthermore, the press is described as the fourth estate because of its considerable influence over the public opinion which it wields by distributing facts and opinions about the various branches of the Government. Such opinion in turn indirectly influences the branches of Government by expressing public sentiment with respect to pertinent issues.

In light of this position, the press in Uganda should play a more active role in order to ensure public awareness of all the actions taken by the main organs of Government. The public should be informed of the dangers of interference with the functions of the Judiciary since, in absence of an independent Judiciary and Parliament. The rights and freedoms of the people would be at stake. However the press should not do the publication in order to entice unfair protest against the government.
The public should strongly condemn any abuse of power in order to uphold the rule of law. In a word, only sense and patriotism of our leaders can save Uganda from disintegrating into a civil strife leading to political instability and insecurity that the people hoped to get rid of by adopting the famous 1995 Constitution of the Republic of Uganda.

The above are some of the recommendation that need to be embraced in Uganda if the country is to adhere to the concept of separation of powers, a concept which is fundamental to the organization of a state and to the concept of constitutionalism.

5.3 Conclusion

The doctrine of separation of powers no longer bears the meaning that the early writers conceived of. In the context of the times, then, the doctrine addressed the legitimate concern of the day, which was the fear of the arbitrary rule.  

In today’s world, it is submitted that the new meaning of the doctrine may be stated in three senses.

First, the doctrine helps us to appreciate that in the complexities of modern government, there can only be shared powers among separate and quasi-autonomous yet interdependent state organs for good governance. Secondly, the doctrine helps us to appreciate the truism that the system of government which we operate works on the assumption that there is a core function which can be classified as legislative executive and judicial and that those core functions belong to their respective branches or organs.

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Thirdly the doctrine helps us recognize that government involves the blending of the respective powers of the principle organs of the state.

Experience shows that we cannot have watertight compartments in government. The absence of the doctrine thus enables us to apply its philosophy to pragmatic legal setting of the working of the government.

The relevancy of the doctrine of separation of powers and its importance cannot be underestimated as we have rightly seen in chapter three in various provisions and cases. Therefore it's expected that all the three organs of government should act in accordance with advice from other though there is no strict law compelling them to do so.

It can be concluded that there is no ideal ready made system of separation of powers which Uganda can adopt rather what is in place is system of checks and balances fit to our situation and built on lessons learnt from our history, culture and political constitutional crisis. In the meantime, one can conclusively assert that the doctrine of separation of powers in Uganda is indeed vibrant but in form of checks and balances and that one can only hope and pray that where they are still glaring inadequacies of ineffective checks and balances, perhaps one day these will be ameliorated especially bearing in mind that now, there is an ongoing constitutional review commission soliciting for reconsideration.
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