CONSTITUTIONAL INTERPRETATION: ACRITICAL ANALYSIS OF THE ROLE OF THE CONSTITUTIONAL COURT IN UGANDA

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DECLARATION

I Ndagano.Winfred.Magembe hereby declare that this is my original work and to the best of my knowledge, it has never been submitted to any University by anybody else or institution for a degree award.

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Researcher:

Date ....5th/Dec/2013.....

APPROVAL

This research dissertation has been submitted for examination with my approval as a university supervisor.

Signed .....

Counsel Wandera Ismail

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Date 05-12-2013 .....

DEDICATION

I have dedicated this work to my beloved parents Mr. Godfrey and Beatrice Wanumi and to my brothers Dennis, Fred and sister Annet plus all my friends and all those who have been their ever since I joined KIU. God bless you.

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I acknowledge that my success is due to the Almighty God who has enabled me to produce this work and the entire course at large.

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CHAPTER ONE

1.0 General introduction

Uganda is a landlocked country located in East Africa. The country is a republic and achieved this status on 9th, October 1962 when the country attained independence from British colonial rule. Uganda had been a protectorate of the United Kingdom from 1894 to 1962. Since 1962, Uganda has had 6 presidents and suffered political instability and turmoil. Currently, President Yoweri Kaguta Museveni is the President of Uganda. He came into power in 1986 after an armed struggle against the regimes of the late Apollo Milton Obote and Gen. Tito Okello Lutwama. In 1996, presidential elections were held and Museveni was elected as president. He won the subsequent elections held in 2001, 2006 and the recent elections held in February 2011.[1]

The 1995 Constitution established Uganda as a republic with an executive, legislative and constitutional branch. The three branches operate as follows; the Executive branch Cabinet. The Executive branch is headed by the President who is assisted by the Vice President, the Prime Minister and Cabinet Ministers. The constitutional court is formed by the various courts of judicature, which are independent of the other arms of government. They include the Supreme Court, Court of Appeal that also sits as the constitutional court, High Court of Uganda and other subordinate courts.

The Parliament is the legislative arm of the government which consisting of members of Parliament. The roles and powers of each of the Government arms are enshrined and spelt out in the Uganda Constitution 1995.[2]

Given that Uganda was a British colony, the English legal system and law are predominant in Uganda. Uganda's legal system is based on English Common Law and African customary law. However, customary law is in effect only when it does not conflict with statutory law. The laws

[1] **Section 16 Judicature Act 1996**

[2] **chapter 8 Uganda Constitution 1995**

applicable in Uganda are statutory law, common law; doctrines of equity and customary law are applicable in Uganda. These laws are stipulated by the Judicature Act.[3]

1.1 Background of the study

The Constitution is the constitutional law in Uganda and any law or custom that is in conflict with it is null and void to the extent of the inconsistency. Uganda has adopted 3 constitutions since her independence. The first was the 1962 constitution which was replaced by the 1967 constitution. In 1995 a new constitution was adopted and promulgated on October 8, 1995. The constitution provides for an executive president, to be elected every 5 years. Parliament and the judiciary have significant independence and wield significant power. Formerly, the constitution limited the president to two terms. However, in August 2005, the constitution was revised to allow an incumbent to hold office for more than two terms. [4]

The constitutional Court is next in hierarchy of courts and handles constitutional matters and matters requiring constitutional interpretation. The High Court of Uganda has unlimited original jurisdiction. Subordinate Courts include Magistrates Courts, and Local Council Courts, courts for marriage, divorce, inheritance of property and guardianship and tribunals such as those established under the Land Act (Cap 227), Communications Act (Cap 106) and Electricity Act (Cap 145) and Tax Appeals Tribunal Act.

1.2 Statement of the problem

Due to the fact that in January 2004, the Supreme Court declared that the ***Constitution (Amendment) Act No. 13 of 2000*** (Current Constitutional Events) was null and void because it was passed in total disregard of the Constitution, the ruling caused a lot of excitement among opposition members of Parliament and among the legal fraternity. As started by the petitioners' lawyer, the Supreme Court ruling was a **"landmark"** judgement, notable not just for its ruling on parliamentary voting procedures, but because it reaffirmed the Judiciary as protector of human rights and a bulwark against executive impunity acting in cahoots with the legislature.

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[3] **The Uganda Law Reform Commission was established in 1990 by the Uganda Law Reform Commission Statute 1990, replacing the Law Reform/Revision of the Ministry of Justice, which had been set up administratively in 1975. The task of the commission is to reform and revise the laws of Uganda**

[4] **Constitution of 1995; S.I. 354/1995; Act 13/2000; Act 11/2005; Act 21/2005.**

There are number of other cases where the Constitutional Court has shown a reluctance to be radical and rule in favour of the promotion of human rights rather than preserve the status quo. Fortunately, many of its conservative judgments have been over turned on appeal to the Supreme Court. Most recently, the Constitutional Court dismissed a petition brought by opposition Members of Parliament challenging the constitutionality of the **Constitution Amendment Bill 2005** because of its omnibus character. Thus it forced the researcher to carry out investigations on the contribution of the judiciary to the amendment of the Ugandan constitution and if need arise challenges that it faces can be overcome.

1.3 Significance of the study

The research will be significant in the following ways;

The study will enable policy makers to realize the need to check the on the contribution of the constitutional court to the interpretation of the Ugandan constitution. For the researcher, the study will help get more information accordance to the topic of study and if need arise I can use it for further research. It will assist the Ugandan community to investigate on how the constitution court performs in accordance to the constitution.

1.4 Objectives of the study

1.4.1 General objective

The general objective of this study was to examine the role of the constitutional court in Uganda.

1.4.2 Specific objectives

This study was specifically designed to:

i) Identify the key features of the Ugandan constitution.

ii) To establish the necessary requirements for a stable and effective constitution in modern Uganda.

iii) To find out the features of the constitutional court in Uganda.

iv) Effectiveness of the constitutional court in Uganda.

1.5 Research Questions

Here is a set of the research questions in order to identify the parameters of the research needed to address the hypothesis, which are as follows;

i) What are the key features of the modern Ugandan constitution?

ii) What are the necessary requirements for a stable and effective constitution in modern Uganda?

iii) What are the features of the constitutional court in Uganda?

iv) What is the effectiveness of the constitutional court in Uganda?

1.6 Hypotheses

i) What are the key problems and imperfections in the modern Ugandan Constitution?

ii) What could be the reforms to improve the constitution in order to give modern Uganda a stable and more effective constitutional settlement?

1.7 Scope of the study

Content scope

The subject matter in this report was on the constitutional court and its interpretation of the Uganda constitution.

Geographical scope

The geographical scope was the constitutional court in Kampala district of Uganda.

1.8 Literature review

The literature review below shows how different scholars understood their interpretation of the constitution which helped the researcher to get more crew on the topic in question as seen below;

According to JUSTICE SCALIA the author of the article entitled "*Constitutional Interpretation*" discusses how one does not need to be a lawyer to understand the constitution.

To him initially, the Court began giving terms in the text of the Constitution meaning that they didn't have when they were adopted for example, the First Amendment, which forbids Congress to abridge the freedom of speech and according to him this did not mean that Congress or government could not impose any restrictions upon speech. Libel laws, for example, were clearly constitutional and nobody thought the First Amendment was ***carte blanche*** to libel someone. But in the famous case of ***New York Times v. Sullivan***, the Supreme Court said, "But the First Amendment does prevent you from suing for libel if you are a public figure and if the libel was not malicious" that is, the person, a member of the press or otherwise, thought that what the person said was true hence to him the constitution can be changed with in a short period of time.[5]

Again Keith E. Whittington Professor of Politics in his book Constitutional Interpretation argues that reconsiders the implications of the fundamental legal commitment to faithfully interpret our written Constitution. Making use of arguments drawn from American history, political philosophy and literary theory, he examines what it means to interpret a written constitution and how the courts should go about that task. [6]He concludes that when interpreting the Constitution, the judiciary should adhere to the discoverable intentions of the Founders.

Cass R. Sunstein Winner of the 2009 PROSE Award in Law & Legal Studies, Association of American Publishers proposes a bold new way of interpreting the Constitution, one that respects the Constitution's text and history but also refuses to view the document as frozen in time.

Statement by **Louis Fisher**, appearing before the House Committee on the Budget, *"Line-Item Veto Constitutional Issues"* (PDF, 236KB), June 8, 2006, says that it is possible to write legislation giving the President a form of item-veto authority that satisfies the standards set forth in **Clinton v. City of New York** (1998). However, Members of Congress have an independent and non-delegable obligation to protect their institutional rights, duties, and prestige. The item-veto proposal before the committee damages the prerogatives of Congress by signaling to the public that lawmakers cannot properly conduct their constitutional duties over federal spending.

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[5] **Political Theory (April 2005)**

[6] **ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 47 (1997). For a discussion, see Post and Siegel, *supra* note 6, at 25.**

Moreover, no evidence supports the view that that the President is more responsible on fiscal affairs, either on aggregate amounts or particular projects.[7]

Louis Fisher in his book ***Interpreting the Constitution argues that more than What the Supreme Court Says***" (PDF, 108KB), Extensions, fall. In a democratic society, questions of constitutional law require a political dialogue that involves all three branches of the national government, all fifty states, and the general public. If the meaning of the Constitution depended solely on unelected judges, popular sovereignty would be undermined and replaced by judicial, hyper-technical interpretations increasingly alien to the public. There is no historical support for the view that judges are better positioned to safeguard minority and individual rights. Mutual respect among the branches and between the branches and the public provide continuing legitimacy and life to the Constitution.

Barber and Fleming provide us with a scholarly overview of the entire field of constitutional theory. That alone would be worth praising, especially since they do it at a reasonable length and in an understandable writing style. They also weave a sophisticated critique of common approaches to constitutional interpretation into their survey. The result is an illuminating way into considerations concerning our basic law that is accessible and interesting to both specialists and students. [8]

1.9 Research Methodology

This dealt with the type of research design, scope, the description of the population, the sample and sampling procedures, data collection procedures, data quality control measurements and data analysis procedures.

1.9.1 Research design

The research was carried out using a case study where information was obtained systematically using interview schedules and questionnaires.

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[7] **H. Jefferson Powell, a community built on words: the constitution in history and politics 207 (2002).**

[8] **Kramer, *supra* note 1, at 201.**

1.9.2 Area of study

The study was carried out entirely in Kampala district taking the constitutional court as the specific region that the research based.

1.9.3 Sample size and selection

In order to get the sample from a population of 60 where by 30 were members from the **constitutional court**, 10 members from Kampala capital city Authority executive committee and 20 local people in Kampala. For easier and practical study, all these groups were randomly divided into three categories where every body was represented. This is because members from same region tend to exhibit similar attitudes and characteristics.

1.9.4 Data collection methods

With an authority letter from the department of law that service as an introduction to various respondents, the researcher proceeded to the field to carry out research. Data collection was from two main sources; primary and secondary. Secondary sources included relevant documents and reports. Primary sources collected data from selected respondents. Primary data was gathered using the following instruments:

1.9.5 Data collection instruments

The questionnaire

The semi-structured questionnaire was the main instrument of the study administered to the selected groups of people. The researcher used this method because of its ability to gather information from respondents within a short time as supported by Gupta (2000). Moreover, respondents were given time to consult records to ensure that sensitive questions are truthfully answered (Bukenya 2008:12-30).

Structured interviews

Interviews were administered to the constitutional court members, Kampala residents and Kampala capital city authority members since it was the region in which the constitutional court is located. Structured interviews were designed in such a way that more specific and truthful answers related to the topic of study are got. Interviews were preferred because according to

Smith (1997), they provide solutions to problems and obtain detailed information on the issue since they are conducted personally and are through face to face.

1.9.6 Data collection procedure

With an authority letter from the Head of Department for Law that served as an introduction to various respondents, the researcher proceeded to the field to carry out the research. The researcher used three different data collection procedures. Questionnaires (both open ended and close ended) were distributed to the respondents personally and were different. The researcher carried out the oral interviews personally. The respondents were divided into groups and prepared questions were presented for free discussion.

1.9.7 Measurements

Instruments to be employed included open-ended and close-ended questionnaires and interviews.

1.9.8 Data quality control

Well constructed research instruments with the assistance of experts in the field of research were used. The information obtained through questionnaires was crosschecked by observing whether the behavior patterns match with what the respondents filled in the questionnaires.

1.9.9 Data analysis procedures

The collected information was put together, tabulated and summarized using average scores and graphs. Information then was interpreted accordingly to justify the contribution of the constitutional court to the interpretation of the Ugandan constitution with the case study of the constitutional court.

1.9.10 Anticipated problems

i) Question avoidance arose in the answers since some of the respondents were afraid to speak the truth.

ii) Language barrier was another problem since some people in Kampala could not appreciate the English used in the constitution hence there was always need for more time to interpret and explain to them what the constitution means.

CHAPTER TWO

AN OVERVIEW OF THE CONSTITUTIONAL COURT

2.0 The Constitutional Court

Article 137 establishes the constitutional court as the court charged with the interpretation of the Constitution. Furthermore, a person who alleges that an Act of Parliament or any other law or anything done or omitted under the authority of any law any act or omission by any person or authority, is inconsistent with or in contravention of a provision of the Constitution, may petition the constitutional court for a declaration to that effect and for redress where appropriate. Where upon determination of the petition the constitutional court considers that there is need for redress in addition to the declaration sought, the constitutional court may grant an order of redress or refer the matter to the High Court to investigate and determine the appropriate redress 9[21]. When sitting as a constitutional court, the Court of Appeal consists of a bench of five members of that court[10].

2.1 Role played in interpretation of the Constitution

This Court is established by the Constitution to interpret any question of the Constitution. When deciding cases as a Constitutional Court, it sits with a bench of five judges. This Court may if there is need for redress grant an order for redress or refer the matter to the High Court to investigate and determine the appropriate redress. The historical factors played an important role in the development of a distinctive constitutional settlement in Uganda; there will be some ground rules applicable to resolving conflicts among the people and organizing their relationship with state. These rules will be the principle of consensus, Islamic Shari'a law, customary basis and the principle of justice. [11]

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[10]Article 137 of the Constitution of Uganda

[11] **Dionne, E. J., Jr., and William Kristol, eds. *Bush v. Gore: The Court Cases and the Commentary.* Washington, D.C.: Brookings Institution, 2001.**

These rules have its impact on the formulation of the constitution of 1962 which has to depend on sources such as the constitutional document and its complementary laws; constitutional conventions; explanatory memorandum for the constitution, which illustrates the meaning of the text in the constitution and what the constitutional legislator meant by it, and constitutional court jurisdictions, which will be considered the basis of the constitution in cases where there will be no constitutional text to regulate them. All these sources have made the Uganda constitutional law distinctive and different. Also there is a characteristic in the features of the Uganda constitution, such as, some of established conventions bases existed alongside the written constitution, because the Uganda Constitution will be presented relatively recently; it also is based upon the realities of the country.[12]

However, the objective of this chapter is to identify whether the features of the Uganda constitution meet the main requirements for a stable and effective constitution. In order to reach our objective, we ought to study the general theory of constitutional law; to examine the sources of the Uganda Constitutional rules; and then to identify the key features of the Uganda constitution in order to define its position in relation to the general theory of constitutional law and the political system.[13]

2.2 Principles of Interpretation of the Constitution

This court in this matter is called upon, in resolving the framed issues, to interpret the Constitution vis-à-vis provisions of the Inspectorate of Government Act No.5 of 2002 and the Magistrates Courts Act, cap.16. It is, therefore, important to consider some principles applicable in interpreting the Constitution, relevant to this case before proceeding to determine the framed questions/issues. The 1st National objective and Directive Principles of state policy provides:

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[12] **Perry, Michael J.** ***The Constitution, the Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary.*** **New Haven, Conn.: Yale University Press, 1982.**

[13] Ibid Constitution

2.3 Implementation of objectives

The following objectives and principles shall guide all organs and agencies of the state, all citizens, organisations and other bodies and persons in applying or interpreting the Constitution or any other law and in taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society."

Hence, the national objectives and directive principles of State policy guide the courts in applying and interpreting the Constitution. The interpretation of the Constitution must be therefore in such a manner that promotes the national objectives and directive principles of State policy.

The principle of harmonization goes hand in hand with the broad approach to interpreting the Constitution. Where there are several articles that conflict with each other in the same constitution, it is the duty of the court to give effect to the whole constitution by harmonizing its provisions.

> In ***TINYEFUNZA VS. THE ATTORNEY GENERAL: CONSTITUTIONAL APPEAL NO.1 OF 1997,*** the Uganda Supreme Court adopting the decision of the US Supreme Court in ***SMITH DAKOTA VS NORTH CAROLINA 192 V 268 [1940],*** held:
>
> ***"the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramount of the written Constitution."***

2.4 Constitutional Challenges

In order to under-pin the democratic measures provided for by the Constitution of 1995 and hold the Ugandan government accountable to the standards defined in the Constitution and in its regional and international treaties, a further powerful and influential civil society has to be further strengthened. Democratic deficits are also mentioned regarding the frequent use of constitutional amendments. In a newspaper article Emmanuel Kitamirike, Executive Director of

the Uganda Youth Network, alleges that "the NRM [14]government has rendered the Constitution at par with ordinary legislation and exploited its numbers to reinforce the widely acclaimed idea of an omnipotent Executive and a rubber stamp Legislature that regards the Constitution as a mere instrument for the entrenchment of personal rule." He adds that "if the NRM government does not check its constitutional amendment appetite, we are likely to dent constitutionalism and good governance thereby reversing the democracy dividends being experienced."

In a ruling delivered on February 1, 2011, the Constitutional Court held that a Members of Parliament elected as party flag bearer cannot stand for election on another party's ticket or as independents without first resigning his seat. The same applies to a Member of Parliament elected as an independent who seeks to switch to a political party. The ruling sent 78 Members of Parliament out of Parliament. The ruling has its basis in article 83 of the Constitution which states that:

"A member of Parliament shall vacate his or her seat in Parliament (a) if that person leaves the political party for which he or she stood as candidate for election to Parliament to join another political party or to remain in Parliament as an independent, or (h) if, having been elected to parliament as an independent candidate that person joins a political party."

In light of the Kampala's vote for mayor in March 2011, lawyers debated the question as to whether **article 83** strictly deals with MPs seeking to stand for reelection to Parliament or whether the article applies even when Members of Parliament are contesting for other offices, and in the latter case affecting two mayoral race aspirants like **Michael Mabikke and Erias Lukwago**. The strict interpretation seems to have taken precedence since Lukwago was elected the mayor of Kampala in March 2011[15].

The International Bar Association in its Human Rights Institute Report from 2007 observes "real threats to judicial independence in political cases". The organization states that although

[14] Constitution of Republic of Uganda

[15] Ibid Article 131

"Uganda's current government is to be commended for bringing a degree of peace and stability judging the Government by the poor standards of previous regimes is not the proper benchmark against which to assess its performance." The threat of the President to suspend judges even though not having the constitutional power to do so and the intimidation of individual members of the judiciary would go beyond the legitimate criticism of court decisions and suggest executive control over the courts[16].

In 2005 and 2007, government forces in and around the High Court further increased the climate of fear in the Judiciary. The lack of resources and infrastructure puts further strains on the judicial system in Uganda. Moreover, the procedure for appointments of candidates for judicial offices in the IBAHRI's opinion lacks transparency. The use of military courts to try civilians is a further matter of concern. Also, so called 'safe houses', special detention centers are reported to still be in use, thereby infringing a range of fundamental rights guaranteed by the Constitution, including the right to personal liberty **(article 23),** the prohibition of inhuman treatment **(article 26),** the right to a fair hearing **(article 28).**

2.5 Ruling of the court

Article 137 of the constitution

The petitioners **Raphael Baku and Obiga Kania** filed separate constitutional petitions seeking declarations under the provisions of **Article 137** of the constitution of Uganda 1995. They are asking this court to make the following declarations; that **section 67(3) of the Parliamentary Elections Act** (Act 08/2001) hereinafter called the Act is inconsistent with **Article 140** of the Constitution of the Republic of Uganda, 1995 and therefore null and void *2.* That section 67(3) of the Act infringes on the petitioners rights under the constitution of the Republic of Uganda, 1995. It was the petitioner's prayers that orders be made declaring the petitioners right to appeal to the Supreme Court.

The facts which led to the institution of these petitions can be summarized as follows; the petitioners were candidates who contested in the Parliamentary Elections that were held

[16] Black's law Dictionary,356

throughout the country on the 26th day of June 2001. They lost, being dissatisfied with the outcome of those elections, they filed election petitions in the High Court Registry at Gulu. On the 23/01/2002, the High Court (Kania J.) dismissed the petition of Baku Raphael Obdura and on the 24/01/2002; the same Court (Aweri Opio J.) dismissed the petition of Obiga Kania. They both filed appeals to the Court of Appeal which were dismissed with costs. It is the dismissal of those appeals that has given rise to the instant petitions[17].

When the matter came before us, for hearing, learned counsel for the respondents raised preliminary objections and this ruling is meant to determine the issues raised. Mr Paul Kiapi learned counsel for the first respondent, submitted that the crux of the matter in this petition is whether **section 67(3) of the Parliamentary Elections Act** (Act 08/01) is inconsistent with **Article 140 of the 1995 Constitution.** It is also claimed that the section infringes the rights of the petitioners under the Constitution. Counsel submitted that the first respondent is not a proper party to the petition. He pointed out that the petition is seeking declarations that a legislation made by the sixth Parliament is unconstitutional. He farther submitted that under **Article 91** of the Constitution power to make laws is given to Parliament and the first respondent had no role to play in the enactment of the legislation[18].

The second objection raised by counsel is that the petition does not present any question requiring the interpretation of the constitution. He claimed that the petitioner(s) have not shown how any rights accruing to them have been infringed requiring the intervention of this court. He prayed that we uphold the objections and strike out the petition[19].

A petition brought under this provision (**Article 137(3)**) in my opinion, sufficiently discloses a cause of action, if it describes the act or omission complained of, and shows the provision of the constitution with which the act or omission is alleged to have been contravened by the act or

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[17] Section 32 Ibid

[18] Section 4 of the Magistrates Court Act Cap.16

[19] Article 126 of The Constitution

omission and prays for a declaration to that effect". According to the above pleadings the petitioner is alleging that an Act of Parliament is inconsistent with the provisions of the 1995 Constitution. This means that the petition is based on the first limb of **Article 137(2)** which states that: ***"A person who alleges that an Act of Parliament or any other law or anything in or done under the authority of any law; is inconsistent with or in contravention of a provision of this Constitution, may petition the Constitutional Court for a declaration to that effect, and redress where appropriate."***

Counsel for the first respondent submitted that there is nothing for us to 10 interprets in this petition. On the other hand, Counsel for the petitioner maintained that his client is an aggrieved party and therefore has a cause of action. In order to resolve the issue, regard must be had to the pleadings. The petitioner is alleging that on 17th May 2002 he lost an appeal in the Court of Appeal and could not proceed to the Supreme 15 Court because of section 67(3). In order for the petitioner to succeed, he had to show by his pleadings that the **act of losing an appeal on the 17th May raises a matter for constitutional interpretation.** We are saying so, because the petitioner claims that the cause of action accrued to him on that day and not on the 20th April 2001 when the Act came into 20 forces. In our view, the act of losing an appeal per se does not call for the interpretation of the Constitution. Admittedly; the petitioner is an aggrieved party because lost an appeal. This alone is insufficient.

He pointed out that **Article 137(3)** of the Constitution, allows a person who alleges that an Act of Parliament or any other law is inconsistent with the provisions of the Constitution to petition the Constitutional Court for redress. It was his contention that the petitioner(s) have proceeded under **Article 137(3)** (a) alleging that **section 67** Parliamentary Elections Act is inconsistent with **Article 140** of the Constitution. He pointed out that this is pleaded in paragraph 2(c) of the petition. On the issue of limitation, counsel submitted that the petition is not time-barred.

CHAPTER THREE

A CRITICAL ANALYSIS OF THE ROLE OF THE CONSTITUTIONAL COURT IN THE INTERPRETATION OF THE CONSTITUTION MATTERS

3.0 Introduction

Before the British and Germans contended for control over the territory, Uganda had three different indigenous political systems: the Hima caste system, the Bunyoro royal clan system and the Buganda kingship system. In 1894, the British succeeded in establishing a protectorate and made the Buganda, also called the people of Buganda, administrators competent to collect taxes. A British-style high court of Uganda and an appeals court for all eastern African protectorates were established in 1902. At the same time, a special commissioner was installed to perform executive, legislative and judicial powers. In 1955, a constitutional monarchy with a ministerial government based on the British model and in 1957 political parties emerged and direct elections were held.

Uganda became an independent Common wealth nation on **October 9, 1962** under a constitution much influenced by the British. The constitution distributed powers between the centre and the regions, albeit disproportionately. The Buganda kingdom was given more powers at the expense of the other three kingdoms, namely the Ankole, Toro and Bunyoro, and the other districts. The powers granted to the four kingdoms also hand capped the Parliament, which was elected by direct universal suffrage, except for parliamentarians from Buganda who were indirectly elected through the Council of Buganda. Apart from the periodically elected Parliament, the constitution provided for a Cabinet, drawn from and responsible to Parliament, and defined the powers of major government organs, civil service and judiciary. One year later, an amendment introduced a ceremonial President to replace the Governor General as a head of state and Kabaka Mutesa became the first elected president on 9 October 1963.

The **1962** constitution was abrogated by **Prime Minister Milton Obote in 1966**, who declared himself President under an **Interim Constitution of 1966**. The Parliament was constituted into a Constituent Assembly and given a mandate to draft a new constitution for Uganda. On **September 8, 1967**, the new constitution came into force. It extended the life of the Parliament,

declared the President then in office the President of Uganda for a term of 5 years. Other major changes by this constitution were the abolishment of the kingdoms and the introduction of a more centralized system of government. The election of Members of Parliament remained by direct universal suffrage across the entire country but the President was now elected indirectly by the Parliament. Although the system of government had some democratic semblance, democratic principles were hardly observed in practice and Obote ruled basically with army support. Shortly after the constitution of 1967, a state of emergency was declared and Uganda slowly shifted to one-party-rule under the Uganda People's Congress.

In 1971, General Idi Amin Dada seized power. Amin ruled the country through constitutional decrees and used the army as the main instrument of government. In 1979, Amin too, was overthrown by a combination of Ugandan and Tanzanian forces. In the following years, the Ugandan military continued to participate actively in Ugandan political processes. In 1985 Obote was again elected president, but only to be deposed a year later by the Tito Okello Lutwa regime which was also later overthrown by the National Resistance Army a rebel movement that had been fighting the Obote regime since 1981.

On 21 December 1988 the National Resistance Council (NRC) enacted Statute No.5 of 1988 which established the Uganda Constitutional Commission and gave it responsibility to start the process of developing a new Constitution. The mandate of the Commission was to consult the people and make proposals for a democratic permanent constitution based on national consensus. In its final report of December 1992, the Commission stated that the majority of Ugandans preferred a Constituent Assembly directly elected by the people in order to be as full representative as possible and provide greater legitimacy. It proposed that an Assembly should be composed mainly of directly elected delegates plus representatives of some interest groups. The proposal was accepted by government and thus the Constituent Assembly consisted of 284 delegates elected by universal suffrage representing 214 electoral areas designated plus additional representatives of specific stakeholders. Nevertheless, some people feared that the delegates to the Constituent Assembly might tailor the constitution to suit their future political ambitions.

The elections to the Constituent Assembly took place in March 1994. Every registered voter who did not have a criminal record and could afford the required nominators and financial deposit was able to run for office. Apart from the decisions relating to national language, land, federalism and the political system, all provisions of the draft constitution were reached by consensus. The land question in Uganda emerged when the British took land away from the communities and gave it to a few individuals and was not resolved by the Constituent Assembly. The debate about the political system, on the other hand, was rooted in the bad experience of Ugandans with political parties in the post-independence era. On this basis, a "no party" politics, also known as "movement politics", was proposed. In this system, no one is denied the right to run for any political office of his or her choice. The stress is on personal merit and political parties are permitted to exist but are forbidden from electoral campaigning and sponsoring candidates. Movement politics were strictly opposed by multiparty supporters. As a compromise, the movement type of governance was agreed to be extended for another 5 years but at the end of 3 years a public debate should be held and after 4 years, the people of Uganda should choose between the two systems in a referendum. On the whole, the constitution making process in Uganda was highly participatory and an exercise to reconcile the society, reinstitute democracy, the rule of law and to place limits on misuse of state power.

3.1 Constitutional interpretations

3.1.1 Article 129. The courts of judicature.

The judicial power of Uganda shall be exercised by the courts of judicature which shall 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. The Supreme Court, the Court of Appeal and the High Court of Uganda shall be superior courts of record and shall each have all the powers of such a court. Subject to the provisions of this Constitution, Parliament may make provision for the jurisdiction and procedure of the courts.

3.1.2 Article 137 expresses questions regarding the interpretation of the Constitution.

Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court. When sitting as a constitutional court, the Court of Appeal shall consist of a bench of five members of that court. A person who alleges that; an Act of Parliament or any other law or anything in or done under the authority of any law; or any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the constitutional court for a declaration to that effect, and for redress where appropriate. Where upon determination of the petition under clause (3) of this article the constitutional court considers that there is need for redress in addition to the declaration sought, the constitutional court may grant an order of redress; or refer the matter to the High Court to investigate and determine the appropriate redress.

Where any question as to the interpretation of this Constitution arises in any proceedings in a court of law other than a field court martial, the court may, if it is of the opinion that the question involves a substantial question of law; and shall, if any party to the proceedings requests it to do so, refer the question to the constitutional court for decision in accordance with clause (1) of this article. Where any question is referred to the constitutional court under clause (5) of this article, the constitutional court shall give its decision on the question, and the court in which the question arises shall dispose of the case in accordance with that decision. Upon a petition being made or a question being referred under this article, the Court of Appeal shall proceed to hear and determine the petition as soon as possible and may, for that purpose, suspend any other matter pending before it.

Regarding interpretation of the constitution; Article 137 brings out several circumstances under which constitutional court can be fully understood with its interpretations;

Taking an example of the constitutional petition no.28/10(reference) between Andrew Kibaya: petitioner/applicant and Uganda: respondent ruling of the court. This is a constitutional reference sent to this court by the Magistrate Grade One sitting at Buganda Road Court. It was sent under the provisions of Article 137(5) of the Constitution which provides as follows;

"Where any question as to the interpretation of the Constitution arises in any proceedings in a court of law other than a field court martial, the court may if it is of the opinion that the question involves a substantial question of law; and shall if any party to the proceedings requests it to do so, refer the question to the constitutional court for decision in accordance with clause (1) of this article.

The background to this reference is that the petitioner/applicant is a practicing Advocate with a firm of lawyers in town. He carried out a number of transactions involving executions of mortgages, power of attorney and the registration of the same documents with the land registry. One of the persons on whose behalf the said transactions were allegedly carried out denied having authorized the transactions involving his land comprised in Mailo Register Mawokota Block 266 Plots 198 and 186 at Kayabwe. He filed a suit in the High Court challenging the transactions. He also lodged a complaint with the Law Council against the conduct of the petitioner as an advocate.

The matter was also reported to the police who carried out their own investigations. On 21st October 2009 the petitioner was arraigned with 11 counts. Three of the counts charged him with uttering false documents two counts for obtaining registration by false pretences and six counts related to holding out as an advocate and preparing instruments while not qualified. The petitioner was availed a number of documents by the prosecution by way of advance disclosure and in preparation for his trial. On receipt of these documents, the petitioner was of the view that the said documents exonerated him at least on some of the counts which he wanted dismissed forthwith by the trial court without any hearing. A request was therefore made by counsel for the petitioner for the interpretation of the following articles of the Constitution- **Articles 28, 120(5), 126(1) and 126(2).**

The following question was accordingly framed for our determination; "Whether in the plain , natural and true meaning of **Articles 28, 44 (c), 120(5), 120(6),126(1) and 126(2)** of the Constitution, a court seized of a criminal matter, has the power to take cognizance of documents served on an accused by the prosecution, by way of advance disclosure, to make a finding that the prosecution amounts to an abuse of legal process and a violation of the accused's right to a

fair trial and if so whether such court on making such a finding has the power to summarily dismiss the charges levied against the accused."

We have perused the record of the proceedings of the lower court which were sent to this court for purposes of this reference. There is nothing on record to show that the documents that were served on the applicant/petitioner as advance disclosure were also on court record. The court had not received them as exhibits under the normal rules of admission of documents. **Article 137(5)** of the Constitution is very clear in its wording. Before a question can be framed and sent to this court for determination it must arise out of the proceedings and its determination must be done before the issues raised in the case are disposed of by the trial court. The question or questions must arise in the proceedings directly or by necessary implication.

The proceedings before the original court must show that a question as to the interpretation of the Constitution has arisen and the hearing of the case cannot proceed before the question is determined. This should be evident from the record of proceedings. The articles of the constitution which were cited in this reference did not arise out of the proceedings. Whereas the defence cited the said articles in the submissions the prosecution was not afforded an opportunity to make any reply. Moreover we think that a court which is being requested for a reference must make a judicial decision after being satisfied that the interpretation of the Constitution is required.

According to the record of proceedings on 17/06/2010 when the parties were before court, counsel for the applicant/petitioner made lengthy submissions claiming that under **Articles 28, 120(5), 126 (1)(2)(e)** of the Constitution, the trial court had the power to dismiss the charges against the accused summarily without further hearing of the matter. He further claimed that the dispute between the accused and the complainant was a civil one and not criminal.

After his submissions he requested for a reference. Counsel for the prosecution applied for an adjournment to enable the prosecution make a reply to the matters that had been raised. The application for adjournment was opposed by counsel for the accused. The trial court then said: "The law is very clear that in case of any trial before any court of competent jurisdiction. An application is made that the matter be referred to the Constitutional court for interpretation of

certain article. The court has no alternative but to stay proceedings and forward the file to the Constitutional Court for interpretation. Court proceedings stayed file forwarded to the Constitutional Court for interpretation.

With respect to the learned magistrate, he did not make a considered decision whether the interpretation of the Constitution had arisen in the proceedings or not. He shirked his obligation. He could only have taken that decision after listening to the reply by the prosecution and evaluating all the facts before him. We consider this reference to be one of those or a category which the lower courts have been sending to this court routinely without first considering whether a question for constitutional interpretation has arisen in the proceedings or not. It is accordingly dismissed with costs. The file is returned to the lower court to commence the trial of the applicant/petitioner forthwith.

Article 137 (3) vests in the Constitutional Court powers to make a declaration as to any inconsistence or contradiction of any law or act with a provision of the Constitution. The learned trial Judge usurped the powers of the Constitutional Court. Learned Principal State Attorney, pointed out that **section 15 (1)** (b) involves a substantial question of law and in view of its importance could not be dealt with so casually. The Judge ought to have referred the question to **the Constitutional Court for its decision on the matter.**

Under **Article 137 (5)** of the Constitution if any question arises as to the interpretation of the Constitution in a court of law, (Which includes this Court), the court may, if it is of the opinion that the question involves a substantial question of law, refer the question to the Constitutional Court for decision in accordance with clause (1) of **Article 137.** It is the Constitutional Court to determine any question with regard to interpretation of the Constitution. But where the question is simply the construing of the existing law with such modification, adaptations, qualifications and exceptions as to bring such law into conformity with the Constitution, in my view, this may be determined by the court before which such a question arises.

An Act of Parliament which is challenged under **Article 137(3)** remains uncertain until the appropriate court has pronounced itself upon it. The Constitutional Court is under a duty to make "declaration", one way or the other. In denying that they had jurisdiction to make a declaration

on this petition, the learned majority Justices of the Constitutional Court abdicated the function of the court." His Lordship Justice Oder, JSC concurred in the following terms;

> **"The Constitutional Courts jurisdiction to declare an Act of Parliament inconsistent with or in contravention of the Constitution goes together with the one for interpretation of the Constitution. It is unlimited. The Constitutionality or otherwise of an Act of Parliament must be construed vis-à-vis Constitution. The court's powers in Article 137(3) (a) must be applied together with the one in Article 137(1). In my view, these provisions apply to any Act of Parliament which a person alleges is inconsistent with or contravenes the Constitution. For purposes of exercising this jurisdiction, by the Constitutional Court, there can be no distinction between an Act passed to amend the Constitution or an Act passed for other purposes."**

Article 137 (5) (b) is mandatory in its language and as such the court has no other option, but to make a reference to the Constitutional Court, once any party to the proceedings requests so. This interferes with the independence of the court in terms of **Article 128 (1)** of the Constitution. Counsel thus prayed us to declare **Article 137 (5) (b)** to be inconsistent and in contravention of **Article 128 (1)** of the Constitution.

3.2 Inconsistency in Articles 128 and 137 of the Constitution

Article 137 (5) (b) provides that a court of law, other than a field court martial, handling proceedings where a question as to the interpretation of the Constitution arises, shall, if any party to the proceedings requests it to do so, refer the question to the Constitutional Court for decision in accordance with clause (1) of the article.

Article 128 of the Constitution provides for independence of the judiciary. Courts are to be independent and shall not be subject to the control or direction of any person or authority in the exercise of judicial power. No person or authority is to interfere with the courts or judicial officers in the exercise of their judicial functions. All organs and agencies of the state have to accord to courts assistance to ensure their effectiveness.

Both the Supreme Court of Uganda and this Court have in a way dealt with this issue. In Constitutional Appeal No.2 of 1998, ***Ismail Serugo Vs Kampala City Council & Attorney General***, the rest of their Lordships of the Supreme Court, expressed no contrary view to the holding of Wambuzi, CJ, as he then was, that:

> **"In his view for the Constitutional Court to have jurisdiction the petition must show, on the face of it, that the interpretation of a provision of the Constitution is required. It is not enough to allege merely that a Constitutional provision has been violated." Following the above holding, this court in Constitutional Reference No.31 of 2010: Uganda Vs Atugonza Francis, held that: "Article 137 (5) should be read in the proper spirit of the Constitution. The applicant must go further to show prima facie the violation alleged and its effect before a question could be referred to the Constitutional Court."**

From the above two decisions, it follows, therefore, that in **Article 137 (5) (a) and (b)** the court deciding to make a reference, must first be satisfied that a prima facie case exists or has been made out by the requesting party, that an interpretation of a provision of the Constitution is required. If the court comes to the conclusion that this is not established prima facie, then no reference should be made to the Constitutional Court whether under **Article 137 (5) (a) or (b).** It cannot therefore be said that **Article 137 (5) (b)** takes away the Independence of the courts. It is accordingly hold that **Article 137 (5) (b)** is not inconsistent with **Article 128** of the Constitution.

In conclusion,

The Inspectorate of Government cannot, through the Inspector General of Government, when he/she is the only one in office, prosecute or cause prosecution in respect of cases involving corruption, abuse of authority or public office under Article 230 of the Constitution, when the Inspectorate of Government is not duly constituted in accordance with article 223 (2) of the Constitution and section 3 (2) of the Inspectorate of Government Act No.5 of 2002, which require the Inspectorate to consist of the Inspector General of Government and two Deputy Inspectors General. This declaration is to act prospectively and not retrospectively as from the date of delivery of this Judgement.

CHAPTER FOUR

This chapter sets the stage for an analysis of the judiciary in Uganda by exploring the institution's evolution from relative obscurity to one of the country's most important governing bodies.

4.1 Definition of a Constitution

Although the writers of Constitutional Law differ in their opinions in defining the Constitution, most of them give the same meaning. Most researchers and jurists of constitutional law use the term 'Constitution' with two different meanings; one being a narrower (formative) and the other a wider (objective) meaning. The wider meaning indicates the whole system of government and the collection of rules that control the government. The narrower meaning is used to describe a selection of legal rules that controls the government and is embodied in a document[20]. Wheare separates the two meanings; seeing in the narrower meaning that "the constitution, then, for most countries in the world, is a selection of the legal rules which govern the government of that country and which have been embodied in a document". Regarding the wider meaning of 'constitution' he states that the constitution "***is used to describe the whole system of government of a country, the collection of rules which establish and regulate or govern the government***[21]."

Bradley & Ewing use Wheare's definition of the constitution in its wider meaning, but have their own definition of its narrower meaning. In their definition, "a Constitution means a document having a special legal sanctity which sets out the framework and the principal functions of the organs of government within the state, and declares the principles by which those organs must operate[22]." Thompson offers a further definition, according to which "a Constitution is a document which contains the rules for the operation of an organisation[23]." Thus, we can conclude that the differences between the various definitions of the Constitution are related to the

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[20] **Wheare, K.C., *Modern Constitutions*, Oxford: Oxford University Press, 1964, p. 2.**

[21] **Wheare, K.C., *Modern Constitution*, p.1.**

[22] **Bradley, A.W. and Ewing, K. D., *Constitutional and Administrative Law*, (13th Edition), London: Longman, 2003, p.4.**

[23] **Thompson, Brian, *Constitutional and Administrative Law*, London: Blackstone Press Limited, 1993, p.2.**

various contextual, political and historical views and opinion of the jurists. However, most definitions ascertain the difference between the narrower and wider meanings of the Constitution. We should not rely only upon one meaning since, for example, if we pursue the narrower meaning, which would include those states having no formal document, they would thus have no constitutions. However, this does not mean that these states do not have constitutions. For example, the UK has unwritten Constitution, which is contained many legal rules overseeing its government, such as the Parliamentary legislation of 1911 and 1949 which limited the powers of the House of Lords.[24]

There are also negatives in defining the Constitution in its wider meaning, which include the collection of rules and regulations for running any state. Here, not all legal rules and regulations pertaining to the Constitution are laid out in the constitutional document. For example, the French Constitution of 1875 did not mention the texts of elections, neither did it mention the texts of civil rights; these will be left to other separate regulations.[25] Finally, we can say that the Constitution has two meanings; the objective and the formative. The objective meaning is a collection of legal rules defining the structure of the state (whether it is unitary or federal); the type of rule (whether it is Royalty or Republic); state authorities and individual rights and duties, though by their nature all these rules are considered constitutional because the substance of its meaning pertains to its constitutional nature.

Thereafter, these rules are written in one or more formal documents, or not written in a document. However, the meaning of Constitution in its formative sense denotes the document itself, containing the main principles and rules of the state. In other words from the perspective of this formative way, the constitutional rules are that all the rules are outlined in this Constitutional Document. Thus, the Constitution in its formative way may be brief or extended.[26]

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[24] **For more details see: Barnett, Hilaire, *Constitutional and Administrative Law*, (6th Edit.), Oxford: Routledge-**

Cavendish, 2006, pp. 181-187.

[25] **Salt, Edward McChesney, *Government and Politics of France*, London: Harrap, 1920, pp. 15 and 19.**

[26] **For example, the constitution of Iceland is very brief, and written in 8 pages, while the constitution of India has written in 143 pages.**

Here, the constitutional document can be brief if it contains the main general rules and leaves the details to the ordinary laws; or if it states some constitutional subjects and leaves others. For example, the French Constitution of 1875 did not stipulate a text on civil rights.[27] In contrast, this constitutional document could be detailed in such a way that it will be not necessary to justify any rules not pertaining to its constitutional nature such as the French Constitution of 1848 which stated in Cap. II, Article 5, that the "Capital punishment for political offences is annulled,"[28] or the Egyptian Constitution of 1923 which stipulated the confiscation of Khedawi (Khedive) Abbas Pasha,[29] or the American constitutional legislation of 1919 which stated the prohibition of alcohol and punishment of its traders.[30]

4.2 Classifying Constitutions

Constitutions are, as noted, usually divided into written and unwritten constitutions. Such a division is relative but not absolute. Hence, the Constitution is considered to be written if most of its base pertaining to the system of government will be organized in the form of a written document or a series of documents with or without amendments. The origins of written constitutions lie in the American War of Independence, 1775-1783 and also the French Revolution in 1789.[31] Some writers consider some constitutions to be conventional if most of their bases will be unwritten though this does not exclude the existence of some written basis.

Such a basis could exist in a written text, but would still be the exception to the whole. In fact, every constitution blends into one that is partly written and partly conventional.[32] The distinction between the written and conventional Constitutions is relative. A constitution would be conventional as long as it is based upon convention and backed by some legal rules written in

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[27] **Salt, E M., *op cit.*, p.19.**

[28] **Bradley, A.W. and Ewing, K. D., *Constitutional and Administrative Law*, (13th Edition), London: Longman, 2003,p.4.**

[29] **Thompson, Brian, *Constitutional and Administrative Law*, London: Blackstone Press Limited, 1993, p.2.**

[30] **Barnett, Hilaire, *Constitutional and Administrative Law*, (6th Edit.), Oxford: Routledge-Cavendish, 2006, pp. 181-187.**

[31] **Barnett, Hilaire, *Constitutional and Administrative Law*, (6nd Edit.), Oxford: Routledge-Cavendish, 2006 pp. 8.**

[32] **Jennings, W. Ivor, *The Law and The Constitution*,**

official documents. Here, the United Kingdom's Constitution is the best example, since it is addressed as conventional constitution, and it still contains some written rules in official documents such as the Magna Carta of 1215, the Petition of Rights of 1628, and the Bill of Rights in 1689.[33] Other constitutional forms will be written as treaties, such as the one that united Scotland and Ireland with England,[34] and still others will be issued in legislation by the Parliament, for example the Act of Settlement of 1700 provided for the succession to the crown,[35] and the Parliament Acts of 1911 and 1949 restricted the power of the House of Lords.[36]

As with the UK Constitution, there are the Israeli and the New Zealand Constitutions, which are based upon a mixture of conventions and written legal rules. At the same time, there are many written Constitutions drawn up by constitutional legislators and written in a constitutional document containing certain constitutional rules based upon conventions and historical legacies that will be not written into the document. In France, for example, a constitutional convention created the functional post of Prime Minister, which will be ignored by the Third Republic Constitution in 1875, though the convention will be kept up as part of the Constitution.[37] However, the feature that characterizes states with a written constitution is that there has been a clear historical break with a previously pertaining constitutional arrangement, thus providing the opportunity for a fresh constitutional start.[38] The United Kingdom is still without a written constitution.

The term of 'written' constitution is unfortunate, since much of the British constitution is in fact written down in the form of Acts of Parliament and reported cases, although not in any special

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[33] Phillips, G. Godfrey, *Constitutional and Administrative Law*, (9th Edit.), London: Long man Group Ltd., 1977,

[34] Lyon, Ann, *Ibid*, pp.261-262; Alder, John, *op cit.*, pp.72-73 and Loveland, Ian, *op cit*, p.21.

[35] Phillips, O. Hood; Jackson, Paul and Leopold, Patricia, *Constitutional and administrative Law*, (8th Edit.), London: Sweet and Maxwell, 2001, p.50; Lyon, Ann, *ibid*, pp.379 and Barnett, Hilaire, *op cit.*, pp. 181-187.

[36] Salt, Edward McChesney, *Government and Politics of France*, London: Harrap, 1920, pp.50-53.

[37] Wheare, KC, *Modern Constitutions*, 2nd Edition, Oxford: Oxford University Press, 1966, p.4.

[38] Ward, Ian, *The English Constitution: Myths and Realities*, Oxford and Portland, Oregon: Hart Publishing, 2004, p.1.

document that could be labelled 'The constitution'. Ward indicates that the English constitution is written but is not collected in formal document. Instead it is collected in various statutes and cases, and various defining treaties.[39]

Recently, constitutions have been classified through their amenability to amendment or change, into flexible or rigid Constitutions.[40] The rigid constitution, on the other hand, is the one that will require severe and tighter measures for amendment, more than those required by a flexible constitution and ordinary law. A flexible constitution is one amenable to change or amendment by the normal law-making procedure empowered to amend the law in accordance with conditions and provisions stipulated for such amendments. Here, the constitutional text does not transcend the ordinary law. This is due to the nature of the flexible constitution, and consequently there will be no contradiction between the ordinary law and the flexible constitution.[41] According to this, the constitution script is transcendent above that of the ordinary law, which is confined within the basis stated in the rigid constitution; otherwise it would be non-constitutional law.

However, the process of constitutional amendment in rigid Constitutions varies from one state to another; for example in the constitution of the United States, constitutional amendment will be achieved in accordance with Article 5 and may be proposed by a two thirds majority of both Houses of Congress, or else according to the request of the legislatures of two-thirds of the states, by the convention summoned by the Congress. In order to be accepted, the proposed amendments must be approved by the legislatures of three-quarters of the states, or by conventions in three-quarters of the states. One of the aspects of such a rigid constitution is that

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[39] **Burns, James M., Peltason, J.W., and Cronin, Thomas E., *Government by the People*, (12th edit.) New Jersey: Prentice-Hall, 1984, p.38 and Loveland, Ian, *op cit.*, p.10.**

[40] **Peaslee, Amos J., *Constitutions of Nations*, (Vol.3), The Hague, Netherlands: Martinus Nijhoff, 1968, p.73; Senelle, Robert, *The Revision of the Belgian Constitutional and the Adaption of its Institutions to Fit Contemporary Realities*, Brussels: Ministry of Foreign Affairs and External Trade, 1965, p.2 and Alen, Andre, *Treaties on Ugandan Constitutional Law*, Deventer; Netherlands: Kluwer law and Taxation Publishers, 1992, pp.4-6.**

[41] **Ilbert, Courtenay, Sir, *Parliament: Its History, Constitution and Practice*, London, Thornton Butterworth Ltd., 1929, pp. 8-14 and Lyon, Ann, *Constitutional History of the United Kingdom*, London: Cavendish Publishing LTD, 2003, pp.55-56 .**

since its establishment in 1787 only 26 amendments will be included, the last of which will be in 1971.

The types of Constitution are divided into monarchy or republic. In the monarchy system, the Royal person (King or Queen) is the head of the state. The system is perpetuated through a hereditary system, and there is no authority standing between the monarch and the throne. For example, in the Kingdom of Saudi Arabia (KSA), **Article 5** of the legal rules of governing says that the state rule is a monarchy and that the throne is passed on from the founder, King 'Abd al-Rahman al-Faisal al-Saud to his sons and grandsons.[42] The Jordanian constitution, too, stipulates that the Jordanian monarch is hereditary in the family of King 'Abdullah Ibn Hussain and that the throne should be passed among the males of his progeny.[43]

The parliamentary system is based upon the separation of powers in a flexible way. Here, this system distinguishes between the dual nature of the executive power, where the President has formative or symbolic powers and the head of government (Prime Minister) has the executive powers. Such a system can exist in both the monarchy and the republic systems, where the Prime Minister and ministers (executives) are members of Parliament and are accountable before it. Here, the Parliament has the power to withdraw trust in any minister or from the whole cabinet.[44] Similarly, the executive authority has the right to dissolve the Parliament and call for new elections. The United Kingdom is an example of the parliamentary system.[45]

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[42] Allen, Michael and Thompson, Brian, *Cases & Materials on Constitutional & Administrative Law*, (8th Edit.), Oxford: Oxford University Press, 2005, pp.22-28; Alder, John, *Constitutional and Administrative Law*, (6th Edit.), Basingstoke: Palgrave Macmillan, 2007, 36-42, and Pettit, P., *Republicanism: A Theory of Freedom and Government*, Oxford: Oxford University Press, 1997, Chapters 1,2, and 3.

[43] Hughes, Christopher, *The Federal Constitution of Switzerland*, Oxford: The Clarendon Press, 1954, pp.3-5; Duverger, *Institutions Politiques et Droit Constitutiona*l, 11 em edit, 1970, p.

109 et seq., and Al-Hilo, Majid, *Al-Istifta` al-Sha'abi, bain al-Indhimat al-Wadh'aiyat wal Shari'at al-Islamiyat*, (The Referendum in the Statutory Law and Islamic Shari'a), Kuwait: Dar al-Manar al-Islamiyat, 1980, pp. 50-64.

[44] Rousseau, Jean-Jacques, *The Social Contract*, (Translated and introduced by Maurice Cranston), London: Penguin Books, 1968, Book II, Chapters 1, 2, and 3.

[45] Keir, David Lindsay, *The Constitutional History of Modern Britain Since 1485*, (8th edition), London: Adam & Charles Black, 1966, pp.266-272 and Lyon, Ann, *op cit.*, pp.254-257.

The other system of rule is that of separation between the local and central authorities; here the Constitution is either unitary or federal.[46] In the unitary state, one governmental authority runs both internal and external affairs. Though executive power is granted to one central government, legislative authority is also granted to one authority whether it has consisted of one or two councils, and the judiciary is granted to one constitutional power even if the level of the courts and their types have varied.. Examples of such states are the UK, France and Egypt. The other type of states are the federal states, which consist of two or more states combined with separate or distributed authorities, varying in degrees or levels of authority depending upon the type of their union. With regard to the development of the methods and ways of introducing written constitutions, many directions are followed.

Examples of constitutions presented in the form of a grant are the French Constitution for 1814, the Japanese Constitution in 1889, the Russian Constitution in 1906 the Italian Constitution in 1948 and the Egyptian Constitution in 1923. Introducing the Constitution as a Contract, this method is also one of the old methods of introducing a constitution. Here the founding authority is shared between the ruler and the people: hence the constitution is a combined work in which both the ruler and the ruled participate and is thus satisfactory to both. The people would express their wishes through an elected committee, such as a constituent society or constituent Assembly, which can argue the conditions of the contract and has the power of rejection. Rousseau thought that the state will be product of a covenant or agreement among men, 'all legitimate authority among men must be based on covenants'. The purpose of the state will be the protection of those people and that the sovereign must have enough power to provide such protection. Rousseau indicated that the social contract needs all to unite their individual separate wills in 'general will'.

Locke stated that the 'Government are dissolved, and that is; when the Legislative, or the Prince, either of them act contrary to their Trust', this meant that all should take part in government on equal conditions by voting and accepting the ruling of the majority. He added that 'by this breach of trust they forfeit the power, the people had put into their hand, for quite contrary ends, and it

[46] **Peaslee, Amos J., *Constitutions of Nations*, Vol. III- Europe, The Hague: Martinus Nishoff, 1968, (France) pp.308-311 and Knapp, Andrew, *The Government and Politics of France*, London: Routledge, 2006.**

develops to the people, who have a right to resume their original liberty and, by the establishment of a new legislative and the constitutional execution of the law'. This meant that the power goes back to the people, who may then found a new legislative and executive. He also believed that 'The People shall be Judge; for who shall be Judge whether his Trustee or deputy acts well, and according to the Trust reposed in him, but he who deputes him, and must, by having deputed him have still a power to discard him, when he fails in his trust?'[47]

4.3 The Independence Constitution in Uganda

Uganda attained its independence in 1962. As in many other British colonies, the independence constitution was bestowed on Uganda by an act of the British parliament. There is no way therefore that that constitution could be considered as deriving its legitimacy from the Ugandan people. Jim Paul aptly describes the process of constitutional promulgation throughout Anglophone Africa:

Paul (1974) argued that, Independence constitutions were like negotiated treaties. They were often more the product of ad hoc bargaining in London than the reflection of popular demands and manifestations of indigenous political culture. They were also often extraordinarily complex. But by accepting a constitutional document worked out in London on the eve of independence, a regime in Africa could hasten the attainment of national sovereignty and the entrenchment of its own power. Once independent, the regime could change the constitution to suit local needs, and not surprisingly, to tighten its own control over the political system (Paul 1974).

Those imposed constitutional documents were expected to survive to eternity. But in almost all Africa, they did not survive for long; and even when they did survive, they had undergone so many changes that at times it became difficult to relate them to the original texts. Uganda was no exception. Within a period of four years, in 1966, the independence constitution was overthrown by the very personalities that were supposed to protect it. Many reasons have been advanced as to why Milton Obote, the Prime Minister at the time, had to attack the existing constitutional order, but it is obvious that that is the genesis of the constitutional crisis which is still ongoing.

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[47] **Stanley, De Smith and Brazier, Rodney, *Constitutional and Administrative Law,* (8th Edit.), London: Penguin Books, 1998, pp.12.**

The independence constitution gave Uganda a ceremonial Head of State and a federal arrangement between the kingdom of Buganda and the Republic of Uganda. Of this arrangement, Yash Ghai has remarked that it was an attempt to achieve the impossible abundant as it was in unworkable compromises, institutionalized inequalities and attempts at isolating a part of the country (Buganda) from the mainstream of national politics (Ghai 2008). When this arrangement failed to function, Prime Minister Milton Obote decided to stage a coup and force the Buganda king who was also the Ugandan Head of State into exile. Obote assumed the functions of Head of State and ruled the country for one year under an Interim Constitution.

4.4 The Pigeonhole Constitution

The 1966 Interim Constitution, which Milton Obote imposed on Uganda after forcing the Kabaka of Buganda into exile, is referred to as the, Pigeonhole Constitution' because it is said that members of Parliament found copies of the constitution in their pigeonholes for them to approve! The Commission of Inquiry into Violations of Human Rights put these developments succinctly; *in* February 1966 the Prime Minister suspended the 1962 Constitution. This was a unilateral action taken without consulting either Parliament or the people of Uganda.

For a couple of months Uganda was literally governed without a Constitution. Then the 1966 Constitution was put in the pigeonholes of the Members of Parliament and they were asked to approve it even before reading it, and they did. In other words, this Parliament suddenly, and without consulting anybody, constituted themselves into a Constituent Assembly. They enacted and promulgated a constitution whose contents they did not even know (Republic of Uganda (1994): The Report of the Commission of Inquiry into Violations of Human Rights. Kampala].

4.5 The Republican Constitution of 1967

The 1967 Constitution can be said to be the first home-grown constitution. Though it came as a result of the 1966 crisis and its legitimacy has been questioned by many, the fact remains that it was the first attempt at constitution-making by Ugandans themselves. It is true that it ushered in many undemocratic principles and did not involve popular participation in its formulation, yet it remained a point of reference until the current constitution was promulgated in 1995. Zie Gariyo clearly depicts the mood of the time;

The events of 1966 after the abrogation of the 1962 Constitution, the deposition and exiling of the first President of Uganda, the declaration of a state of emergency and the introduction of the so-called republican constitution depicted a deeply polarized political atmosphere in Uganda. For several years to come, most political and social rights were curtailed by the UPC regime. Parliament was not only rendered inactive but many of its opposition members, characteristic of their narrow political scope, had already "crossed" the floor to join the ruling regime. Any pretence at rudimentary democratic practice was rendered meaningless by this single act (Zie Gariyo1993).

4.6 The 1995 Constitution

Upon coming to power in January 1986 after many years of turmoil, wars and military dictatorships, the NRM government promised a new constitution for Uganda. This was in line with the promise it made while still fighting in the bush; as part of laying the ground work for returning Uganda to democratic government, the interim Administration shall see to it that a new Constitution based on the popular will, is drafted and promulgated by a Constituent Assembly elected by the people themselves. The present Constitution (1967) was drafted by Obote to answer the needs of establishing a despotic state. It contains many provisions that are anti-democracy, and returning the country to democratic rule under such constitution would lead to a quick demise of democracy once more (NRM Secretariat, Mission to Freedom Uganda Resistance News, 1981-1985).

In 1988 the NRM government passed Statute No. 5 which came into force on 21st of December 1988 by Statutory Instrument of 1989 that established the Uganda Constitutional Commission. The Commission was mandated (S.4) to "Study and review the Constitution with a view to making dissertations for the enactment of a national Constitution that will, inter alia; guarantee the national independence and territorial integrity and sovereignty of Uganda; establish a free and democratic system of government that will guarantee the fundamental rights and freedoms of the people of Uganda; create viable political institutions that will ensure maximum consensus and orderly succession to Government; recognize and demarcate division of responsibility among the State Organs of the Executive, the Legislature and the Judiciary, and create viable checks and balances between them; endeavour to develop a system of Government that ensures

peoples participation in the governance of the country; endeavour to develop a democratic, free and fair electoral system that will ensure true people's representation in the legislature and other levels; Formulate and structure a draft Constitution that will form the basis for the country's new national system.

In order to carry out its work, the Commission was empowered among other things t seek the views of the general public through holding public meetings and debates, seminars, workshops and any other form; stimulate public discussions and awareness of constitutional issues. The Commission itself had its own guiding principles (Republic of Uganda (1993): The Report of the Uganda Constitutional Commission, analysis and Recommendations. UPPC, Entebbe.

In its presentation to the Constitutional Commission, the Uganda Law Society stated, the Law Society appreciates as an historical fact that past Uganda Constitutions have not been the result of political consensus of Ugandans. The same have been mainly the work of few interested groups that happened to possess political power at the time and as such those constitutions tended to protect the political interests of these groups rather than providing a framework of governance of Uganda based upon a collective political will of all Ugandans.

The Commission when appointed had 21 members. These were appointed by the President of the Republic in consultation with the Minister of Justice and Constitutional Affairs. The Director of Legal Affairs in the National Resistance Movement Secretariat and the Chief Political Commissar in the National Resistance Army sat in as ex-officio members. On 31st December 1992 the Commission submitted its Report and a Draft Constitution to the President of the Republic. The Constitution was enacted by the Constituent Assembly on 22nd September 1995, and on 8th October 1995 it was promulgated into law.

Criticism has been leveled at the way the Constituent Assembly was elected and the way the Constitution was enacted into law. In Rwanyarare and 2 Others vs. Attorney General [Miscellaneous Application No. 85 of 1993], the Constitutional Court ruled that Legal Notice 1 of 1986, which gave constitutional and legal basis to the NRM regime, was superior to the 1967 Constitution and that rules made by the NRM government to adapt the 1967 Constitution were valid.

4.7 Constitutional Decisions and Precedents

In 2004, judges continued to interpret prior laws and statutes, subject to constitutional provisions. The constitutional court struck down sections of the Leadership Code Act for inconsistency and contravention of the constitution. Similarly, the constitutional court reiterated the role of the court having the duty to uphold and protect the people's constitution. This decision overturned the majority decision of the constitutional court, which had ruled that once parliament has passed a constitutional amendment that amendment became part of the constitution and thereafter could not be questioned in a court of law.[48]

As a key custodian and protector of the constitution, the constitutional court came out strongly when it held that the Referendum (Political Systems) Act, 2000, was null. The constitutional court declared that the passing of the Act was in contravention of Articles 89, 90 (1) and (3) of the constitution; that the holding of the referendum before passing law under Article 269 to legalize political organizations contravened Article 69 of the constitution and that parliament had no authority to pass the Referendum (Political Systems) Act 2000 after the expiry of the period stated in **Article 271 (2)** without first amending the said provision of the constitution; This landmark decision was evidence of constitutional growth of the country's courts.[49]

However, the decision irked the president that he publicly attacked the judiciary on national television. This posed a serious setback to the independence of the judiciary as well as the constitutional role of the court in upholding the constitution. Consequently, the government appealed against the decision in the constitutional court, which upheld parts of the constitutional court's decision but overturned other declarations. The decision on appeal is, however, believed to have been reached as a result of political pressure. [50]The constitutional court applauded the rights to freedom of expression and of the press when it decided in favour of journalists who had been charged in 2002 with spreading false information and publishing information

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[48] **Hilary Kiirya (2005) Okumu Committed to High Court," *New Vision*, May 17.**

[49] **Perry, Michael J (2002). *The Constitution, the Courts, and Human Rights***

[50] **Boodram –v- Baptiste [1999] 1 WLR 1709 See i.e. section 3(1) of the Offences Against the Person Act 1861 (Jamaica)**

[50] **R –v- Mattin (1998) Court of Appeal, Criminal Division**

preconstitutional to national security. The charges related to an article alleging that the LRA had shot down an army helicopter in northern Uganda. The court set aside the majority decision which it held to be inconsistent with **Article 29 (1) (a)** of the constitution.

The constitutional court also found sections of the Divorce Act to be discriminatory and, therefore, unconstitutional because it provided for different grounds of divorce for men and women. It held that the sections in issue which enumerated the various grounds of divorce should be applied equally to both parties to a marriage and that the provisions relating to naming of the co-respondent, compensation, damages and alimony should apply to both women and men. These decisions clearly portrayed that courts as chief custodians of the constitution were still committed to upholding the constitution and that there was still public confidence in courts of law despite the set backs suffered during the period[51].

[51] **Makwanyane and Mchunu –v- The State (1995) Case No. CCT/3/94**

CHAPTER FIVE
RECOMMENDATIONS AND CONCLUSIONS

5.0 Introduction

This chapter presents the summary of findings from the research carried out in Kampala district, conclusions and recommendations on the role of the constitutional court to the interpretation of the Ugandan constitution.

5.1 Summary

From the same study, the increasing practice of constitutional courts of applying international law raise the question whether the traditional principle that decisions of constitutional courts are merely facts, accurately captures the legal role and relevance of constitutional court in interpretation of the constitution to achieve legal order in Uganda. In international investment arbitration, for instance, tribunals may be required to 'apply', rather than merely consider, national law in order to determine the parties' rights and obligations pursuant to the pertinent national law, when determining whether the host State and respondent in the proceedings have violated expropriation or 'umbrella' clauses in international investment agreements.

Considering that constitutional courts and tribunals may thereby give effect to national court decisions in a way that go beyond the classical 'state practice' value, this contribution also explores the conditions under which decisions of constitutional courts may or may not be considered as authoritative at the international level.

It should however be noted that the constitutional court in Uganda faces the dilemma of determining which cases warrant high degrees of deference and which ones do not. If it is overly deferential, constitutionally-guaranteed rights are too easily compromised. If it is insufficiently deferential, the ability of the government to formulate and implement public policy is hindered. The Court, in setting a high degree of deference, willingly limits its authority to review government decisions and to assess their effects on constitutionally-guaranteed rights and freedoms. It does so by giving "weight to the judgments of the elected branches of government out of respect for their superior expertise, knowledge, or legitimacy.

5.2 Conclusions

Constitutional interpretation of the constitution in the eyes of all Ugandans is slowly but steadily gaining momentum. Through a creative application of that, the judiciary has to some extent held the state, its agencies and private persons accountable for issues regarding the constitution and here the majority of the judges that have handled cases concerning the constitution have relaxed the laws of standing like the right of appearance in a court of law thus it can be stated that the concept of public interest litigation is firmly taking root in our jurisprudence since they some how know what the constitutional laws are all about. This is because an individual can now bring an action against the state, its agencies or private actors without fear of the case being dismissed and the applicant penalized with costs. However, the issue of costs should not be left to the discretion of the presiding judge and the Chief Justice should issue rules directing the judiciary not to impose costs on public interest litigants. Separate fees structures should also be developed in the interest of sustainable development.

5.3 Recommendations

If the interpretation of the constitution by the constitutional court is to be made more effective and appropriate, the constitutional department must strive to embark on serving people regardless of all the challenges and political operations encountered. The following recommendations will be appropriate:

5.3.1 Government

Government should be supportive and protective of the constitutional court in its interpretation of the constitution so that all people ignorant about the constitution understand it in a better way.

Government should accept to open up an equal basis, discuss and formulate policies jointly with constitutional court in Kampala district. This will help the constitutional court interpret the constitution to all people regardless of their political differences.

Lastly the government should set favorable policies, laws and regulatory frame works to fight against corruption which has been found as a major challenge to improvement of the work of the judiciary.

5.3.2 Constitutional court

Transparency and accountability at the court should be encouraged; this involves creating the conditions which will allow for open expression of views, free disseminations of information and the rule of law which is essential to the effective functioning of every department.

Constitutional court should not only interpret the constitution but also build networks and alliances with people in area especially at the local level. Through networking and alliance building, it identifies different interests and concerns, share information with different people, provide support to each other and maximize use of available resources to achieve the set objectives.

Constitutional court needs to ensure effective and proper amendment of the constitution as well as carrying out sensitizations so that people understand the different issues inside the constitution of the republic of Uganda and this will be achieved through appointing qualified personnel on merit.

The Court should be composed of a body of independent judges, elected regardless of their nationality, tribe or race and sex from among persons of high moral character, who possess the qualifications required in their respective positions for appointment to the highest constitutional offices of recognized competence in international law.

In addition, **article 30** requires that the judges who sit on that court exercise their powers "impartially and conscientiously." In resolving any doubt, the constitutional court might review **Article 38** of the Statute, which enunciates sources of law to be applied by the Court:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply;

International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

International custom, as evidence of a general practice accepted as law;

The general principles of law recognized by civilized nations;

Subject to the provisions of **Article 59, constitutional** decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. Thus the Court could apply these provisions of international conventions in ruling that an independent judiciary is a principle of international law.

5.3.3 General recommendations

a) If interpretation of the constitution by the constitutional court is to be made more effective and results come out positively, there is need for the government to put up a strong constitutional cabinet that is entitled to be a sole employee entitled to serve all Ugandans regardless of their tribe, sex, religion or political differences.

b) In reducing problems associated with the constitutional court in Uganda there is need for unity between the judiciary, legislature and executive since all the three work hand in hand for the success of the other hence with the absence of one the two cannot smoothly operate.

5.4 Future researchers should stick on the following issues;

Further researchers must place emphasis on the following issues while carrying out research:

In the first place they have to carryout research on the contributions of the humanitarian organizations to the interpretation of the constitution.

How the community works with the constitutional court to fight corruption in Uganda.

Further more, research on the contribution of the government towards enforcement of the constitutional work in Uganda.

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