AN OVERVIEW OF THE APPLICATION OF THE DOCTRINE OF SEPARATION OF POWERS IN UGANDA 1962-2013

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JUNE, 2013

DECLARATION

I BASAJJABALABA BRIHAN do hereby declare that, this is my own original research dissertation and to the best of my knowledge this same work has never been presented in any institution for academic purpose.

Signature .....

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APPROVAL

The undersigned certifies to have read and hereby recommends for acceptance by the Kampala international university, a dissertation entitled **"AN OVERVIEW OF THE APPLICATION OF THE DOCTRINE OF SEPARATION OF POWERS IN UGANDA *1962-2013"*** in partial fulfillment of the requirements of the Degree of Bachelors of laws.

Name of the supervisor: MS.KUHIRWA ROSETTE

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Date: 24/7/2013

DEDICATION

This dissertation is dedicated to my mother Mrs. Kyosiimire Constance, my brothers and sisters, friends; my uncles; Mr. Hajji Hassan Basajjabalaba, Dr.Kassim Ssekabira, Hon. Nasser Bassajja and all my aunties; ssenga Naira ,Mumbeja Nantale, Basajjabalaba Jalia and Mariam Basajja who helped me to undertake my course for four years, your support to me is unquantifiable may ALLAAH Bless you accordingly.

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All people listed above gave me the courage and help I needed to complete this research and the entire course

May God bless you all.

ABSTRACT

This Research examined how the doctrine of separation of powers has been addressed in Uganda over the years. It covered the historical perspective of the subject beginning with colonial times, to post independence Uganda and the various governments which ruled the country. Also special attention was paid to the role of the three arms of government under the 1995 Constitution of Uganda. The research also looked at how the Executive arm exercises its powers vis a vis the Judiciary and the Legislature. This research has found continued disrespect of court decisions and interference with parliament in the conduct of its functions by government through its executive arm. This research attempted to justify the overlap with in the arms of government and the effects there from. This research contributed to the existing knowledge on matters of constitutionalism.

It attempted to guide the policy and law makers like parliament to enact laws which strictly up hold the doctrine of separation of powers

It was intended to guide the executive arm of government on respecting the functions of other arms of government.

The research was also aimed at assisting other researchers interested in democratic government to appreciate this area.

LIST OF CASES

Attorney General-V- Good Times News Paper Ltd 1962 AC pg. 307.

Difasi-V-Attorney General (1972) EA 335.

Dr.kizza Besigye and ors v Attorney General constitutional appln.No.07 of 2005

Dr.kizza Besigye and ors v Attorney General constitutional apetition.No.18 of 2005

Dr.kizza Besigye and ors v Attorney General constitutional apetition.No.07 of 2007

Ibingira and others- V- Uganda (1966) E.A 305

Jim Muhwezi and 3ors v Attorney General and another constitutional apetition.No.10 of 2008

Oploto-V- Uganda 1969 E.A. 39

Liverside-V- Anderson

Re Lumu and others Misc App. No. 31-35 of 1966 (H>S>)

R.-v- Ibrahim (1970) E.A. 162

Rwanyarare and other –V- Attorney General, Misc. App. No. 85 of 1993; constitutional case.

Stanley Oonyu-V- Attorney General H.C Misc. case No. 113 of 1998 (unreported)

Semogerere and Zakaley Olumu-V- Attorney General constitutional case of 2000.

Tinyefunza-V-Attorney General constitutional No. 1 of 1997.

Masalu Musene and 3 Ors V AG Constitutional Petition No. 5 of 2004.

Uganda-V- Haruna Kanaabi, Criminal Case No. u997 of 1995 (Munaaba)

Uganda Law society V Attorney General No. 18 of 2005.

LIST OF STATUTES

The 1902 Order in Council

The 1962 Uganda Constitution

The Constitution of Uganda 1995

The Constitution of Uganda 1966

ACRONYMS AND ABBREVIATIONS

FDC	Forum for Democratic Change
JATT	Joint Anti-Terrorist Team
MP	Member of Parliament
NRA	National Resistance Army
NRM	National Resistance Movement
PRA	People's Redemption Army
UJOA	Uganda Judicial Officers Association
ULS	Ugandan Law Society
UPC	Uganda People's Congress

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CHAPTER ONE

1.1. INTRODUCTION

Separation of powers is defined by **black's law dictionary as**[1]

"The division of governmental authority into three branches of government, legislative, executive and judicial, each with specified duties on which neither of the other branches can encroach; the constitutional doctrine of checks and balances by which the people are protected against tyranny"

The purpose of the doctrine of separation powers according to **Justice Louis Brandies**[2] is both to avoid friction, but, by means of inevitable friction to the distribution of governmental powers among three departments, to save the people from autocracy.

However, separation of powers means something quite different in the European context from what it has come to mean in the United States[3] ….. Separation powers to an American evokes the familiar system of checks and balances among the three coordinate branches of government; legislature, executive and judiciary, each with its constitutional basis[4].

To a European, it is a more rigid doctrine and inseparable from the notion of legislative supremacy[5]

In Uganda, the doctrine of separation of powers is acknowledged by the 1995 constitution which is the supreme law of the land.

The 1995 Uganda constitution established three arms of government, the executive[6], legislative[7] and the judiciary[8] each with its designated roles and functions which should never be interfered with by another arm of government

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[1] Eighth edition at page 1396
[2] Justice Louis Brandies (as quoted in roscoe pound. The development of constitution Guarantees of liberty (1957)94
[3] Mary Ann Glendon comparative legal traditions (1994)67
[4] George White cross Paton, A Text book of Jurisprudence 4th edition pg52
[5] Mary Ann Glendon Supra
[6] Chapter seven
[7] Chapter six
[8] Chapter 8 of the constitution of Uganda 1995

Majorly, the legislature makes the laws, the executive executes laws, and the judiciary interprets and enforces the law in adjudication over disputes in society as guided by the constitution[9]

The 1995 constitution at the same time incorporates the concept of checks and balances as an essential means of ensuing democracy and ultimately sovereignty of the people

H.W.R WADE, on rule of law and economic development in Africa, noted that the distribution of government powers in various organs is one of the basic tenets of rule of law[10].

A government where there is separation of powers envisages democracy, rule of law and the judiciary like the parliament must be independent from the executive arm of government. This research will be centered on whether these elements have been achieved.

1.2 STATEMENT OF THE PROBLEM.

In a true democratic state, separation of powers is where the arms of the state, the executive, the legislature and judiciary have independent powers and areas of responsibility. **Hon Mr. D.Z LUBUYA**[11] IS noted to have remarked that, in such democratic societies, the concept of separation of powers is almost a house hold terminology.

Tracing Uganda after independence, there emerged regimes of Obote which witnessed the promulgation of the constitution, in 1966, and the abrogation of the 1962 constitution and the 1967 constitution which put Obote at the head of the executive. In this period the doctrine of separation of powers was not adhered to though the constitution so required. This trend of affairs was observed in the famous cases of **EXPARTE MATOVU**[12] **AND GRACE IBINGIVA'S**[13] case

After this period, Uganda witnessed a government of decrees under **IDI AMIN** and in his regime there was less respect for constitutionalism and separation of powers as the president had all powers. Following the promulgation of the 1995 constitution, it is said to be one of the best framed constitutions as each arm is independent from another. However in practice, the executive arm has been seen to exert pressure on other arms and has influenced them. For

[9] Article 126 and 128 of the constitution on the independence of judiciary
[10] H .R wade, Administrative law (1988) page 24.
[11] Justice of appeal, Tanzania,
[12] (1966) E.A
[13] (1966) E.A 306

example the executive was noted to have influenced parliament in passing of the referendum law 2000, the executive is noted to have influenced the administration of justice by the judiciary in **SEMOGERERE AND ZAKARY OLUM VS ATTORNEY GENERAL**[14]

Also considering other scenarios, like the **NTV saga**[15], the parliament was threatened by the executive on the issue of re-allowing the National Television (NTV) to broadcast in Uganda. Following the closure of Radio and TV Stations by government. The closure of NTV was a small administrative matter on the license to operate between the station and Uganda Broadcasting Corporation (UBC) .However, the Ugandan government failed to commit its self to any timelines to re-open NTV despite pleas from the members of parliament who accused the executive of deliberately undermining the authority of the parliament and frustrating an investor. "*We have done our part and stated our position which is that NTV should be reopened. We leave the rest to the executive*," the then Deputy Speaker, Rebecca Kadaga wrapped up the debate.

By Thursday April 14, 2007 when this article[16] was written, the Ugandan government had not switched NTV back on air, meaning that the parliament's resolutions were just a waste of time and the whole saga was a sign of abuse to the notion of the separation of powers as coined by Montesquieu. The recent attack was the police siege and closure of Monitor and Red pepper news paper premises and K.fm over **General Sejusa's letter.** This did not only have a negative impact on media freedom[17] but also on the Judiciary following government's refusal to comply with the court order to vacate the premises in question[18]. The court cited over stepping of the search warrant, this followed the Nakawa magistrate **Rosemary Bareebe** who had issued a search warrant to one **D/ASP Emmanuel Mbonimpa** to reverse her decision. These events are clear indications that the doctrine of separation of powers is still under looked and just on papers. This research tried to suggest what can be done to fill these gaps.

1.3 JUSTIFICATION OF THE STUDY.

The reason of this research is to determine the extent of application of the doctrine of separation of powers in Uganda; this research is also aimed at exposing the challenges encountered by the

[14] Constitutional petition No.7 of 2000
[15] On Wednesday April 4th 2007 reported in an Article by Gideon Munaabi first published in April 17, 2007
[16] ibid
[17] Uganda media closures cause chilling effects, African press 3rd June2013
[18] 24th May wed. after noon, court ordered Uganda police to vacate monitor and red pepper publication premises and their sister radio station kfm but in vain.

judiciary, the legislature in their operation from the executive arm of government basing on the various scenarios like the **black mambas sage in 2005**[19]**. The NTV saga supra** where the Uganda parliament became drama theatre[20], all of which limit the operation of the doctrine of separation of powers. This research is also aimed at generating new knowledge towards constitutionalism and suggesting law reforms in areas with gaps like on appointment of judicial officers (judges), [21] prerogative of mercy[22] which permits the president to have much influence on the judiciary.

1.4 OBJECTIVES

a) To determine the application of the doctrine of separation of powers in Uganda

b) To examine the influence of the executive on the judiciary and the legislature

c) To identify problems caused by the interference by other arms of government

d) To suggest possible steps to be taken to do away with the interference between arms of government

1.5 SCOPE OF THE STUDY

This research covered the independence of the judiciary and parliament in the operation of their business from 1962 to 2013. Because in this period Uganda has had one of the well framed constitution than ever which grants independence of three arms of government. However, there are still instances where there has been interference between arms of government like was noted in **UGANDA LAW SOCIETY VS. ATTORNEY GENERAL**[23] where it was held that the doctrine was blatantly violated. This research will be limited to Uganda because of easy accesses to literature about the topic and stake holders like members of parliament, members of the judiciary and executive can be accessed. This research was done in four months from February to May 2013.

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[19] Where black mambas were deployed at the high court and threatened court process

[20] The monitor, Wednesday April 4th, 2007, where the executive threatened the parliament following the heated debate over the refusal and delay by Uganda government to re-allow and NTV to broadcast.

[21] Article 146 of the 1995 constitution

[22] Article 121 of the 1995 constitution

[23] Constitutional petition No.18 of 2005

1.6 SIGNIFICANCE OF THE STUDY

This research contributed to the existing knowledge on matters of constitutionalism.

It attempted to enable the policy and law makers like parliament to enact laws which strictly up hold the doctrine of separation of powers

It was aimed at guiding the executive arm of government on respecting the functions of other arms of government

The research was intended to assist other researchers interested in democratic government to appreciate this area.

1.7 RESEARCH QUESTIONS.

a) How is the doctrine of separation of powers applicable in Uganda?
b) What is the influence of the Executive on the Judiciary and Legislature?
c) What are the problems associated with the interference by arms of government?
d) What steps can be taken to overcome interference between arms of government?

1.8 METHODOLOGY.

This research was greatly be quantitative as opposed to qualitative and much of the material were gathered from desk research; from text books, case law, statutory law, news papers, journals Articles and day to day scenarios about the doctrine of separation of powers.

1.9 LITERATURE REVIEW.

This area is rich in literature and various writers over time have written much about the doctrine of separation of powers.

The origin of this doctrine is hinged on the ideas of the English philosopher **JOHN LOCKE (1632-1704) AND BARON DE MONTESQUIEU (1689-1755)** French Philosopher.

JOHN LOCKE[24], noted and properly so, that there is a temptation of corruption where the same persons who have powers of making laws, to have also in their hands the power to execute them. In Locke's view separation of powers presupposes three branches of government the executive, legislature and judiciary, each with its powers and functions carried out by separate personnel.

[24] In his second Treatise of civil government.

This division of power would prevent absolutism as it was the case with monarchies or dictatorships where all branches are concentrated in a single authority.

Locke noted[25] that corruption would arise from opportunities that unchecked powers offer. concerning Locke's ideas on the doctrine of powers; though one can question the relevancy of his ideas to this research now since he was much concerned with monarchies and dictatorships which have since ended in Uganda, still his contention of unchecked powers is present in Uganda having regard to various corruption scandals by government officials like the issue of Global Alliance for Vaccines and Immunization (GAVI funds[26]) which involved four government officials and also the prime ministers resistance to step aside to enable proper investigation where other ministers; John Nasasira, and Sam Kuteesa stepped aside[27] indicate that there is still need to strengthen the principle of checks and balances, which this research will suggest.

BARON DE MONTESQUIEU (1689-1755)[28], articulated the fundamentals of separation of powers as a result of his visit in England in (1729-31). Montesquieu considered that English liberty was preserved by its institutional arrangements.

He saw not only separation of powers between the three branches of English government but with in them. However, Montesquieu's views were much influenced by his back ground in France where the doctrine was lacking

LOCKE AND MONTESQUIEU ideas found a practical expression in the American Revolution in the 1780 and in the French revolution, motivated by the desire to make impossible the abuse of power they saw as emerging from the England of George III, the framers of the United States Constitution adopted and expanded the doctrine of separation of powers.

To help ensure the preservation of liberty the three arms of government were separated and balanced.

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[25] As quoted in an Article by Graham Spindler
[26] In constitution petition No.10 of 2008
[27] In the case of Sam Kuteesa and others where they had stepped aside pending proper investigation about the alleged corruption about CHOGM funds
[28] In his book the sprit of laws (1748)

The powers of one branch to intervene in another through veto, ratification of appointments, impeachment, judicial review of legislation by the supreme court, though these writers had good ideas on the principle of separation of powers and checks and balances, no attempt was made to limit powers of intervention by arms of government in the affairs of others and the executive is left free to influence other arms and other arms are not empowered to attack the executive as they seem to be toothless, this research will suggest some ways to this effect.

GREER HOGAN, IN HIS BOOK "NUTSHELLS CONSTITUTIONAL AND ADMINISTRATIVE LAW[29], acknowledges that the concentration of powers of government in the same hands, makes one organ to be too powerful and that it would abuse such powers and also suggests the notion of checks and balances to control abuse of such powers.

Greer Hogan notes that in England there is no strict separation power because of the overlaps of personnel.

The Prime Minister and members of cabinet are drawn from parliament and the chancellor is a member of the three organs of government. This state of affair is relevant in Uganda's situation where members of parliament are part of the cabinet which affects the efficiency of the doctrine of separation of powers. This research intends to suggest the way to achieve appropriate checks and balances looking at the overlaps in the organs of government.

G. W. KANYEIHAMBA, "CONSTITUTIONAL LAW AND GOVERNMENT IN UGANDA[30]" analyses the doctrine of separation of powers from a wide perspective which is general in nature. He noted that the doctrine envisages three organs of government whose powers are spelled out clearly. He mentions that no organ should be allowed to sit on another, no organ should perform the duties of another organ and that one organ should not influence the others too. However, this situation has not been achieved in Uganda as still other arms of government are stronger than others and he did not suggest mechanisms of reducing such powers to avoid are arm stepping on others and this research will suggest such mechanisms in the era of the present constitution of 1995. He gives scanty information about checks and balances as a means of overcoming abuse of office which is manifested by high levels of corruption.

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[29] Sixth edition 2002

[30] Kanyeihamba, constitutional law and government in Uganda (East African Literature Bureau Kampala, Uganda 1975)

OBOLA OCHOLA;"UGANDA CONSTITUTIONAL LAW SINCE INDEPENDENCE" talks of the constitutional history of Uganda since independence. He shows the short coming and inefficiency regarding the 1967 constitution in relation to the doctrine of separation of powers. He gives detailed information on how the executive arm can abuse the doctrine of separation of powers but does not suggest the possible avenues to avert the problem. This research will concentrate on the 1995 constitution and the period there after and intends to suggest ways of reducing excess powers of the executive arm over other arms of government.

PETER OLUYEDE. "ADMINISTRATIVE LAW IN EAST AFRICA[31]" properly enumerates that one of the tenets of a state with rule of law is independence of the judiciary, where judges can discharge their functions without fear or favor of any one even government and that the executive, should be able to receive court decisions irrespective of their political consequences but he did not properly suggest means of achieving it and his work envisaged a constitution which allowed one party in Tanzania unlike Uganda today

J .B KAKOOZA IN HIS PAPER, "WHY WE NEED CONSTITUTION," considers that the problems of Uganda stem right from the period before independence.

He recognizes the need to separate powers of government but does not define means to achieve the same. He gives scanty information about checks and balances as mean of over coming abuse of office which is manifested by high level of corruption.

M.J.C VILE[32] notes that a government which controls all the powers that is the legislature, executive and judiciary will act arbitrary, pass any laws it wishes, there after it will administer and enforce them with without regard to the rights and to the rights and freedoms of the people should any one criticize or deviate from those laws the same government will judge him or her corruptly and in violation of the minimum standards required by the rule of law and he noted that accumulation of powers in the same hands leads to tyranny.

Denis Lloyds[33] recommends that in order to avoid a usurp of powers, it is necessary to distribute government functions and powers amongst the three arms of the government and to adjust their

[31] Administrative law in East Africa (East African Literature Dar-es-Salaam 1973)
[32] Mjc.vile, constitutions and separation of powers (1967) at page 50
[33] Constitutional and administrative law page 20

relationship to one another in such a way that the system of checks and balances is established between them.

H.W.R wade and C.F Forsyth[34], in their writing about rule of law and economic development in Africa, noted that the distribution of the government power among various organs namely legislature, executive and judiciary to interpret and apply the law to check abuse of power and to promise redress for aggrieved individuals are one of the basic tenets of rule of law. They further state that "disputes as to the legality of acts of government are to be decided by judges who are wholly independent of the executive....

PROFESSOR G.P MUKUBWA[35] "The concept of constitutionalism means that polity must recognize the nature of political power, its distribution and all its limitations. There a constitutional government is the one that is set with less or more limits concerning the relationship between government arms"

ACCORDING TO PROFESSOR KHIDDU MAKUBUYA[36], provides that in a constitutional government powers must be shared and that the concentration of such powers in the same hands as the source of instability.

ACCORDING TO HON MR.D.Z LUBUYA[37] stated that in a democratic society which believes in the rule of law, the concept of the separation of power is almost a house could terminology. Meaning the interdependence of organs of the state which are independent.

COURTS OF JUDICATURE, JUDICIARY HAND BOOK[38]**.** It is also noted in the judiciary staff Hand book that judiciary is a distinct and independent arm of government entrusted and mandated by the constitution to administer and deliver justice to the people of Uganda without influence from other government bodies.

ACCORDING TO DE-SMITH "CONSTITUTIONALISM AND RULE OF LAW[39]**"**, constitutionalism is practiced a country where elections are held on a wide franchise at frequent

[34] H.W.R wade Administrative law (1988) page 24
[35] G.P Mukubwa an African debate on democracy (2001) 1st edition pg 15
[36] Khiddu Makubuya the constitution aid and human rights in Uganda 1962-92
[37] Justice of Appeal of Tanzania
[38] Courts of judicature, judiciary hand book 1st edition 2007
[39] SA DE-Smith The New Common Wealth and its constitution London C.Hurst Aid. (1973) at page 3

intervals, where political parties are free to operate ,where there are effective legal guarantees of fundamental civil liberties enforced by an independent judiciary. This is true for Uganda where general elections are held every after five years with various political parties participating at all levels

BASCHIERA MARINELLA[40], INTRODUCTION TO ITALIAN LEGAL SYSTEM AND THE ALLOCATION OF NORMATIVE POWERS, this provides that for a government to exist there should be a distinction between the roles and functions of various arms of government. This is the foundation of constitutionalism.

EXECUTIVE BRANCH, WWW. DICTIONARY. REFERENCE, COM, central to the idea of separation of powers, an attempt to preserve individual liberty, the federalist paper provides that the executive is part of government that has sole authority and responsibility for the daily administration of the state and executing the law. The division of power into separate branch of government is central to the idea of separation of powers. In some countries the term government connotes only executive arm. However, the usage fails to differentiate between despotic and democratic forms of government. Separation of powers system is designed to distribute authority among several breaches, an attempt to preserve individual liberty in response to tyrannical leadership throughout history. This is a perfect approach for Uganda looking at its history as reflected in the preamble of the 1995 constitution.

NISAR AHMAD SALEEMI AND TIBAIJUKA KYOZAIRE ATEENYI, ELEMENTS OF LAW SIMPLIFIED SECOND EDITION, JUNE 2000[41].

They noted that separation of powers means that the powers of three organs of the state must be clearly prescribed in the constitution and these powers must be exercised by different persons as laid down in the constitution these organs are legislature, the executive and judiciary. This position is true for Uganda's situation as prescribed by the constitution though some persons fall in more than one arm of government. They acknowledged the need of this overlap that state organs need the assistance and co-operation of each other for example the ministers who apart of

[40] Introduction to Italian legal system and allocation of normative powers Vol. 34 (2006)
[41] Elements of law simplified second Edition, June 2000, at page 62, saleemi publishers Nairobi kenya

executive are given legislative powers under delegated legislation where it is convenient for parliament.

CHAPTERISATION.

Chapter One

This chapter covered the proposal of the research, and contains the introduction, statement of the problem, justification of the research, the scope of the study, the significance of the research, research questions, methodology and literature review.

Chapter Two.

This covered the definition and historical back ground of the doctrine of separation powers. It will there fore cover the doctrine during the colonial period of Uganda and the early period post independence, 1962 period, 1966 and 1967 periods, the research will also look at the doctrine under 1971-1979 and look at the doctrine under the 1995 constitution to date.

Chapter Three

This is chapter covered the doctrine of separation of powers under 1995 constitution

Chapter Four

This chapter covered the extent of realization of the doctrine of separation of powers in Uganda, executive vs legislature, the executive vs the judiciary. The problems associated with interference by arms of government in each other's business are also under this chapter.

Chapter Five

This chapter covered the general conclusion and recommendations on what can be put in place to ensure that the doctrine is observed and to show the need of separation of powers in a government like Uganda.

CHAPTER TWO

DEFINITON AND HISTORICAL BACKGROUND OF THE DOCTRINE OF SEPARATION OF POWERS

The doctrine of Separation of Powers has been defined by **Granner** to mean that the three powers of government that is, the Executive, Legislature and Judiciary must in free democracy be kept separate and never become exercisable by the same organs of government.[42]

The general idea of the doctrine of separation of powers goes back into history and it all stems from some great philosophical founders each of these philosophers gave his own opinion and understanding of the doctrine of separation of powers.

Blackstone, one of the commentators on the Law of England, stated that:— "*the basic principle that in all tyrannical governments that supreme magistracy or the right of both making and enforcing the law is vested in one and the same man, or one and somebody of man and whenever these two powers are united together there can be no liberty*"[43]

In other words Blackstone meant that there is no total liberty when the three branches of governments are vested in one person.

"Prior to the American and French revolution separation of powers never existed as part of any constitutional system of a national government.[44]

Further the doctrine of separation of powers is closely associated with the names of two political philosophers Locke an Englishman and Montesquieu a Frenchman. Locke found his observation on 17th Century England. His concept of separation of powers influenced Montesquieu but was slightly different as a subject of litigation.

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[42] Granner; constitution And administrative Laws, Penguine in SA, DE Smith
[43] Blackstone; Administrative Law Treaties in Kenneth Calp Davis, 1st Ed pg. 02, 1775
[44] Packer; Administrative Law Treaties in Kenneth Culp Davis 1st Edition pg 449.

He said in application of law courts consider themselves bound by statutory law except where such law is inconsistent with the constitution in which case the courts may first declare on such law.

Further he said, the function of court is to discover and apply the law and then so decides between the merits and arguments raised before it by actual litigants. The court is not concerned with the behavior of individuals alone. It may also examine the behavior of the executive and legislative upon the same principles.[45]

Different from the latter's ideas; Montesquieu lived in 18th Century which is historically described as the age of absolute monarchs in Europe. The French King Louis XIV who reigned the contemporary period of Montesquieu was perhaps the most despotic of all.

Montesquieu visited England and he was struck by the freedom of individuals in that country, he was so impressed that his experiences there formed the subjects of the book he wrote later.[46]

In his book, he described the three powers of government and concluded that the reason why these powers were independent and separate, he believed that the accumulation of powers in the same hands result into tyranny. A government wishing to act despotically can pass any laws it wishes, administers it ruthlessly without regard to the right of the individual and judges corruptly those in opposition. Thus, in order to preserve political and social liberty, it is essential for the constitution to ensure that the Executive, Legislature and Judiciary are independent of each other.[47]

Montesquieu advocates that the executive aspect of government be entrusted to the Executive, the legislative power entrusted to the legislature and the Judiciary power to be entrusted to the Judiciary each was to work on its own spheres without encroaching on the powers of the others.[48] However Montesquieu was mistaken about the British constitution as it observes the theoretical than practical rules of the doctrine. An obvious violation of the doctrine is the status of Lord Chancellor as the President of the House of Lords when sitting as the highest

[45] Kayeihamba: Constitutional Law and Government in Uganda pg 146-147 E.A Uganda

[46] L'Espirit des Lois

[47] Montesquieu: Spirit of the Law; Book XI Hofue Publishing Co. 1956 pg 152-156 1bid pg 156

[48] Ibid 156

Appellate tribunal of the land he is an important member of the Judiciary. As Chairman (Speaker) of the House of Lords sitting as part of the British Parliament he is equally important as a member of the Legislature.[49]

Indeed in the respect he is much more a legislator since he actively participates in the debate unlike the Speaker in the House of Commons who is expected to be important when presiding over the House.

The Lord Chancellor is at the same time a member of cabinet by virtue of the fact that he is a member of the Executive. There are other aspects of British Constitution which emphasizes the fusion of power rather than separation. In Her Majesty's government, the administration of justice is done in her name and through her assents to the bills she is part of the Legislature which is legally as the queen in parliament.[50]

With regard to the first concept of the doctrine the head of state that is Queen in theory a member of the Legislature although in practice she does not sit with the other members to participate in deliberations she attends the opening of legislature and reads the executive policy. The reading is preceded by ceremonial pomp and is known as "*the communication from the chair*". The government once elected becomes Her Majesty's government which includes the Prime Minister, the Cabinet and Minister source formed from the legislature. In other words to be appointed a Minister in British government one must be a member of House of Parliament.[51] By the end of the 20th Century-we still use the mixing of the three arms of power. In other words

British government and in this case the top judges, the Law Lords were part of the Legislative branch and the Executive which was the cabinet was a portion of the legislature . In this case parliament was not effectively checked either by the judiciary or by the executive. However no government in the world history has been more completely free from tyranny which is supposed to follow such mixing of powers.[52]

One distinguished American judge commented that, the concept of tyranny may be overcome only through separating appropriately the several powers of government in other words.

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[49] Ibid 4
[50] Ibid 4
[51] By recent convention for practical reason a member of House of Lord cannot be a Prime Minister Lord Home
[52] A Reign of Law.

(Later Sir Douglas Homes) had to renounce his peerage after resignation of Macmillan the American judge meant separation of powers was the only solution to avoid tyranny however, according to evidence it is not.[53]

(a) Separate compartments; separation is to be recognized in three ways:

James Wilson commented on how the principle of separation of powers should work the assumed that Montesquieu meant only that where powers of one branch of government is exercised by the same hand, who possesses the whole power of another departments the fundamental principle of a free constitution are subverted,[54] literature on the doctrine of separation of powers and status enacted by the first congress authorized military tensions under such relation as the president may direct and if also authorized superintendent and regulations as the president shall prescribe.

The status else prescribed the judicial branch to take the legislative action in making all necessary rules for the ordinary conduct of the business in the said countries.

From the above therefore the constitution did not provide for the three kinds of power shall be kept separate; it goes further to provide separately in each of the three branches. All the legislative powers congress Article (1) of the American constitution provides that judicial power shall be vested in one Supreme Court and inferior courts.

Also Wilson described how the three powers should be separated. In his book he stated that, in the strictest terms, the doctrine of separation of powers advocate that the three arms of government that is the legislature, executive and the judiciary should be kept.

(a) Separate compartment; separation is to be recognized in three ways;

Firstly, agencies in one organ should not be permitted to hold post in the other two. A member of the legislature should not at the same time be a member of the executive or the judiciary.

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[53] James Wilson 'Administrative Law Treaties' in Kenneth Culp Davis 1ST Edition pg 23,April 2000,London publishers

[54] Ibid 4

Secondly the doctrine implies that no organ should exercise the functions of the other two organs. Judiciary should not exercise legislative and executive powers Mutatis Mutatj.

Thirdly no one organ of government should be in position to influence one of the other remaining two organs. The Executive alone should not control the Judiciary and the legislature however, one observation may be made straight away that there is no single constitution that embraces the doctrine in its entirety, and moreover experience has shown that an application of the doctrine in absolute terms is impracticable and therefore undesirable.[55]

Therefore despite the fact that each branch interferes in the activities of the other branch it is not a notation of the doctrine of separation of powers but is in conformity with the portion of the doctrine that is called *checks and balances* such interferences may be one of the most desirable results of separation of powers theory but it also involve special changes further the fundamental necessity of maintaining each of the three from the control or coercive influence, direct or indirect, of either of the others has been stressed and is hardly open to questioning.

Also fundamental to democratic government there are checks and balances that block any institution, group or individual from becoming too powerful. It is important, for example, to have an independent judiciary that can prevent the Executive and legislative branches from overstepping their bounds. In the United States, the Executive and the congress operate separately to provide further checks on each other. In this way, no one person or even a single branch of government can mass enough power to threaten or violate citizens' rights.[56]

From the above we can say that separation of power depends on how the government has organized itself throughout its natural history but this does not prevent the three branches from making, interpreting and applying law.

2.2 THE PERIOD BEFORE INDEPENDENCE

During this period there was nothing like separation of powers before coming of the colonialists present-day Uganda was made up of kingdoms and societies that were headed by chiefs and clan leaders. The societies without a central leadership included the Langi, Lugbara, Acholi,

[55] Mathew Gandal and chester E,Finnj, Teaching Democracy pg 2
[56] A book on "Why Uganda still needs the movement system" pg 13.

Karamojong, Bakiga, Iteso, Bagisu, Sebei and the various Bantu and Japadhola groups of Bukedi. In these societies, power was wielded by clan leaders. Inter-clan feuds were common

Among non kingdom societies. Land was owned communally under clan leadership.[57] From that we can say that there was nothing like separation of powers but every power was vested in the clan leaders who could make law, decide disputes and also implement the law.

On the other hand, the societies of present day Bunyoro, Buganda, Ankole and Toro were organized as kingdoms each with a central leadership under a king who exercised power through chiefs and clan leaders. The kingdom had developed and at times fought each other for supremacy and expansion of territory.[58] Unlike societies with no central leadership the centralized societies had tried to apply the doctrine of separation of powers in the way that the king ruled with the help of chiefs and clan leader who he had delegated some power like ': collecting taxes and punishing the wrong offenders. A society like Buganda had a Chief Justice and a treasurer. The Chief Justice was to handle cases but again one has to note that the Kabaka or King was the final Court of Appeal and also had power to make laws but in implementation of these laws this was the work of chiefs and clan leaders so the Kabaka retained overall powers. Powers were not clearly defined so everything and power was retained by the king as the final man hence abuse of the doctrine of separation of powers.

The year 1894, the British finally committed itself to be responsible for Buganda and the Protectorate was announced on June 19th 1894.[59] The independence constitution provided for the president as head of state and prime minister as head of government. But this constitutional arrangement that was found on the West Minister model had the tendency of making the executive posses a domineering influence in parliament. It had the end result of producing a strong government which perhaps would have been well within the interest of those who are in government. It was so strong that a consensus had emerged that is more of our elected dictatorship.[60] In 1889 African Order-in-Council was promulgated under Foreign Jurisdiction

[57] Ibid
[58] London Gazette, June l9 1894.
[59] For text of the Ankole Treaty Sec. H. F. Morris Opcil 47-48.

[60] Order in Council, 1902.

Act[61] enabling local jurisdiction to be set up within that African continent. Once local jurisdiction was established then the local council was authorized to exercise considerable authority over British subjects. Later the order-in-council of 1902 was also established; it stated:

"Whereas by treaty, grant, usage, sufferance with other lawful means, His Majesty has power and jurisdiction in the Uganda Protectorate now therefore by virtue and in exercise of the powers conferred on His Majesty by the Foreign Jurisdiction Act."[62]

The order placed the administration in the hands of the commissioner, in him vested all right in relation to the crown hands and to him was given the right in His Majesty's name, of remitting fines and penalties and granting pardons for offence in and subject to the discretion of the secretary of state of appointing such public officers as may be necessary for the administration of the country.[63]

The Commissioner was further empowered to make ordinances for the administration of justice. The raising of revenue and generally for their peace, order and good governance of the Protectorate but in making such ordinances he was to respect the existing native laws and customs unless they were opposed to natural justice and morality. The ordinance was to have the force of law unless the secretary of state exercised his powers of disallowance.

The order next declared that there should be a court of record styled as his majesty's High Court of Uganda with full jurisdiction, in civil and criminal matters in Uganda and the subordinate courts and courts of special jurisdiction might be constituted and provisions made for the hearing of appeals from these courts by the High Court. The jurisdiction of these courts was to be exercised as far as the circumstances admitted in conformity with the Civil Procedure, Criminal Procedure and Penal Code of India.[64]

In all cases however to which the natives' courts were to be guided by native law so far as it was applicable and not repugnant to justice and morality and not inconsistent with any Order in

[61] G. W. Keeron: "The British Common Wealth; the development of its laws and Constitution.

[62] An Amendment was made in 1911 to this portion of order to effect that in so far as Indian cords did not apply, Jurisdiction was to be exercised "in conformity with the substance of common law, doctrine of equity and statutes of general application in force in England on August 11th 1902."

[63] *Ibid 21*

[64] We emphasize the word: "Post Colonial" because although never referred to as such, the colonial agreements commencing with the 1900 Buganda Agreement, were constitutional encasements.

Council Ordinance or rules or regulations made there under courts also enjoyed to decide cases according to substantial justice without undue regard to technicalities.[65]

From the above, we can see that the Commissioner under the Order in Council the Judiciary was provided for separately and was given powers to operate but the powers of the Executive and the Legislature were still vested in the Commission hence an abuse of the doctrine of separate of powers. This remained the situation until Uganda got its independence.

2.3 THE DOCTRINE UNDER THE 1962 CONSTITUTION

Uganda's first post-colonial constitutional instrument was the 1962 Constitution that followed negotiations between the British as departing colonial power and the nationalist politicians of the day.[66] Despite the prevailing belief promoted by politicians and confined by some academicians the 1962 Constitution was predated by a Constituent Assembly of sorts and was not entirely the product of a closed, non-participatory debate.[67]

This Constitution provided (under Section 77) that the Executive authority in Buganda shall extend to the maintenance and Executive of this Constitution and to all matters with respect of which parliament has for the time being power to make laws and Section 77(2) provided that the Executive authority of the Kingdom of Buganda shall extend to the maintenance of the kingdom or if the territory has for the time being powers to make law from the above we can see that Buganda as a kingdom had powers to make laws but again since the constitution provided for the Legislature. It was the overall law maker and if Buganda as a kingdom made laws that were beyond that of parliament they were null and void hence an indication of the doctrine of separation of powers.

The independence constitution provided for the president as head of state and prime minister as head of government. But this constitutional arrangement that was founded on the West Minister model had the tendency of making the Executive possess a domineering influence in parliament. It had the end result of producing a strong government which perhaps would have been well

[65] A report on Uganda Constitutional conference presented to parliament by Secretary for State for the colonies by command of Her Majesty, October 1961.
[66] Tindifa S. B. "Constitutional Rights Project" report FHRI 1994.
[67] 'Section 91(1) (2) Constitution of 1962.

within the interest of those who are in governance. It was so strong that a consensus has emerged that is more of our elected dictatorship.[68]

In Trinidad and Tobago, the Coding Commission established to formulate a constitution draft said of the West Minister Model as having the propensity of becoming a dictatorship when transplanted into countries with weak civil society institutions to check it. But as that was not enough those in power at independence cherished to have power more concentrated in government.

The 1962 Constitution also provided for the Legislature under Section 73 which provided that parliament shall have power to make laws for the peace, order and good governance (other than the federal status), with respect to any matter. Furthermore, Section 74(1) provided that the legislature of the Kingdom of Buganda shall have power to the exclusion of parliament to make law for peace, order and good governance of the Kingdom of Buganda. Also the Legislature of Federal State under 75(1) had power to make law for peace, order and good governance of these states .Laws made by the Kingdom of Buganda or federal status were not to exceed those made by parliament otherwise they would be null and void.

The 1962 Constitution provided for a separate court system that of the central government and that of the Kingdom of Buganda. S.90 (1) provided for the establishment of the High Court of Uganda and Section 94(1) also provided for the High Court of Buganda. The Chief Justice and other judges of the High Court of Uganda shall be the judges of the High Court of Buganda as per Section 94(2) (a).

The Chief Justice was appointed by the president and pursued judges appointed by the president acting in accordance with the advice of the Judicial Service Commission.[69] From the above; we can see the Executive control over the Judiciary. A judge of High Court could be removed from office by the president acting on the advice of the prime minister who shall appoint a tributary which shall recommend to the president whether the judge ought to be removed.[70]The 1962

[68] S.92 (5)(a) 1962 Constitution.

[69] Jokolo Onyango: Taming the Executive; the history of and challenges to Uganda constitutional

[70] Ibid

Constitution was abrogated. It seems the struggle for dominance between Muteesa and Obote made them lose confidence in the 1962 Constitution and therefore it could not work.

Obote could have lost confidence in the 1962 Constitution because of its quasi federal character

Which might have been perceived as a threat to national unity, integrity and effective government?

2.4 THE DOCTRINE DURING THE PERIOD 1966

This period witnessed the constitutional crisis that was essentially between powers of the main government officials-the supposedly "ceremonial" president and the executive prime minister was vague, and fraught with potential for conflict this is what happened in I966.[71] Following the growing rift between the President (Sir Edward Muteesa) and the Prime Minister (Milton Obote) and the rapture of alliance between Kabaka Yekka (KY) and Uganda People's Congress

(UPC) overthrew the 1992 Constitution and abolished the kingdom. Troops of the Uganda Army headed by Amin in May 1966 surrounded the king's palace and Muteesa was bounded into exile.[72]

The 1966 Constitution was constructed in amidst of this crisis. The National Assembly was convened and its members were informed that they had been constituted into a National Assembly representing the people of Uganda and had been assembled to draft a new Constitution of Uganda. Obote outlined the features that differentiated the proposed document (which members found in their pigeon holes) from the independence constitution, and set forth the motion or adaptation and the speaker immediately called a vote.[73] There was no debate, the opposition members of parliament walked out along with four members of government side.

The motion adapting the 1966 Constitution was passed by a vote of 55 to 4; the 1966 Constitution was thus promulgated without debate or discussion hence the apt description, '*pigeon-hole-constitution*". It created an executive presidency resting the office with fairly extensive powers of government. The old federal structure remained in place but basically as an

[71] Ibid

[72] Article 145 of the 1966 Constitution

[73] According to Pdwiffer the courts were now, "structurally positioned to occupy a position of substantial political significance at the apex of national governments. Pfeiffer pg. 34-35.

interim measure designed to pave the way for the introduction of a new constitution.[74] From the above we can say that the doctrine of separation of power was abused by the executive. Interfering in the affairs of the legislature and influencing it to make a new constitution without any debate. This led to the making of arbitrary laws that were favoring the government of that time hence abuse of the doctrine.

It is important to consider two cases in this time that is **IBINGIRA AND EX PARTE MATOVU'S cases** because they exemplify a significant transition in the mode of judicial power in existence of the independence era.

Grace Ibingira's case represents the first test of the operation of judicial power in realm of constitutionalism and resolved essentially the import of bill of rights provision in the 1962 Constitution. The case emerged in the midst of 1966 crisis in which allegations were made against the Prime Minister (Milton Obote) leading up the attempt to begin "no confidence[75] proceedings by a group of cabinet ministers. In realization Obote had his five ministers arrested at a cabinet meeting at Entebbe and detained under the Deportation Ordinance.[76]

The detained ministers brought out application in the High Court challenging the validity of the Deportation Ordinance in relation to the fundamental rights and freedom contained in the I962 Constitution as being the contravention of the right of freedom of movement. They also brought a writ of habeas corpus; seeking their release. The Uganda High Court upheld the ordinance and devised the application. The applicant appealed to the Court of Appeal **SPRAY, J. A. stated.**

*"Ultimately, they (the arguments of the state counsel) depend on the provision that s.19 of the **1962 Constitution)** authorizes legislation for the restriction of movement and residence of individuals. In our view it does not do so. All the paragraph j) does is to provide that lawful orders made under the statute restricting freedom of movement shall not constitute violation of rights to personal liberty. To decide whether such a statute accords with the constitution its*

[74] The cases were: Attorney General of Uganda Vs Kabaka's government 1965-393, Ibingira and others Vs Uganda 1966 E.A both concerning the 1966 crisis.

[75] Ibid pg 310

[76] *The law was Deportation (Validation) Act No. 14 of 1966*

however necessary to look at the appropriate section of the constitution which is Section 28 we can not see the ordinance as it stands to fall within paragraph of s.28 and we think therefore that at least so far as it purports to effect citizens of Uganda, it contravenes S. 28 and is in notation of freedom of movement."[77]

Spray (Justice of appeal in Grace Ibingira's case supra) concluded by stating that "the Deportation Ordinance had been abrogated by coming into force of the 1962 Constitution and therefore ... no lawful order of deportation can be made against the citizens of Uganda under the ordinance." The court ordered the case to be returned to the High Court, with instructions that the writ be obeyed and the detainees brought before the judge for their subsequent release. In response to this order, the High Court judge ordered the detainees immediate release.

In its turn the government transported the detainees from their respective upcountry prisons and collected them at Entebbe and had them all served detention orders under Emergency Powers (Detention) Regulations. These applied only in Buganda where the state of emergency had been declared.

To complete the circle, parliament passed legislation in one day indemnifying the government against the action it had taken against detainees under the Deportation Ordinance 38 on subsequent appeal, the Court of Appeal against the detainees' orders, declined their release, It made no reference to the constitution, accepted the validity of emergency powers, regulations and refused to accept the imputation of ill-motive on the part of the minister who had ordered the subsequent detention.

The court did not question the passing of the Deportation (Validation) Act nor the fact that it had retrospective application or that it was directed against specifically named individuals.[78] The court's response reflected the on adage once bitten twice shy![79]

More important the **Ibingira's** case represented the high point in the devise of the independence of the Judiciary especially in matters relating to fundamental rights and freedoms. This was

[77] (1966)E.A 445

[78] Katende and Kanyeihamba (1973) at pg 52 state that Attorney General/Godfrey Binaisa) was extremely angry with the decision of the court and stated that he would have appealed further if there was another place to go instead he adopted the opinion of administrative detention.

[79] *High Court Miscellaneous Application No. 31-35.*

abundantly reflected in subsequent cases in which issues emerged particularly in Lumu & 4 others[80]and in ***UGANDA -VS- COMMISSIONER OF PRISONS, EXPARTED MATOVU.***[81] In the Lumu case, the applicants had been arrested and put in police custody. On the next day, a warrant of arrest was applied for and duly issued under the provisions of the Deportation Ordinance. The court rejected the argument that the arrest had been manifestly illegal (in part because of time and which the warrants were issued and upheld the detentions, the fact that the arrest took place before the warrants were issued, would not affect the validity of the detention.

Matovu's case was of much greater significance not only because it examined the validity of the 1966 Constitution but for the lasting impact that it had upon the subsequent relationship of the Judiciary and the Executive up to the present time. The issue that arose in this case the most important one was whether the High Court had the power to rule on the validity of the 1966 Constitution. Matovu's case concluded that the court did not have the jurisdiction to hear the case even though it involved a highly political question and indeed the very foundation of power of a country. The court went on to declare that it lacked authority to rule on the validity of the constitution basically because ... courts, legislature and the law derive their origins from the

Boldness Obote showed in the speech of the emergency meeting of parliament and in the actual constitutional provision especially as they affected Buganda[82]

After the promulgation of the 1967 Constitution republicanism was introduced with a very powerful executive which has been described as "an imperial presidency with a combination of envy and greed.[83] The fusion of power in one man made separation of powers illusory. This undermined the political participation and it has been pointed out that the moment political organizations were destroyed by concentrating political power of the party in the heads of political parties; this started the claim of dominance which became constitutionalised.[84]

2.6 DOCTRINE DURING THE PERIOD 1971-1979

Obote sabotaged those who disliked his misuse of powers. In this atmosphere of antagonism, Idi Amin used a disgruntled section of the army to overthrow Obote's government on January 25,

[80] *(1966) E.A 514*
[81] Ibid 540
[82] Agg Ginyera – Pinywa ;Apollo Milton Obote, New York November1978 pg . 93
[83] Oloka Onyango "Taming the Presidency" conference paper Makerere University 1994
[84] Discussion on separation of powers at court of appeal.

1971 [85]Amin immediately suspended the 1967 Constitution provisions of chapter four and five which dealt with Executive and Parliament Legal Notice 1 of 1971,thus giving him high powers to make laws instead of parliament, he issued decrees. Following the coup, thousands of people were sent to prison while many thousands were killed.[86] By 1973 it had become clear that Uganda was under the rule of soldiers who cared little about civilians.[87]

The era of military rule under Amin was more debilitating to the judicial process by way of presidential decree. Idi Amin usurped much of the hands of the executive through his military tribunals he was the judge in his own court so here the Judiciary was not in existence but everything was vested in the president as the law maker and the judge.

During the Amin years of tyranny (1971-1979) Uganda experienced both economic and political turmoil. Under this regime, many Ugandans including Archbishop Jonani Luwum, the Chief Justice Benedict Kiwanuka, the Vice Chancellor of Makerere University, Frank Kalimuzo,

Anub's own wife Kay and other countless Ugandans were murdered in cold blood.[88] During this period again it is noted that the Judiciary was fussed with the executive in the case of **DIFASI 'V S AG.**

In this case Wambuzi J. held; *'I am inclined to view that the false imprisonment is a continuing injury that is limiting the freedom of individual...;'* In this case the effect of S.2 of the Miscellaneous and Limitation Act provisions is to wipe out outside tolerance month of the filing of the action. The plaintiff is at liberty to show that any imprisonments will in 12 months of the filing the suit was false. I accordingly hold so much of the alleged imprisonment is not statute bared.[89]

From this case we note that the executive made the courts to refrain from inquiry into the validity of a claim involving the abuse of power. As a result of Amin's chaotic policies the people hated him and a combination force of Ugandan fighters together with the Tanzanian People's Defense

[85] Why Uganda needs a movement system pg. 37.
74 Ibid 52
[87] Joseph Oloka Onyango: Struggle for Democracy in E.A the period between 197 1-1980 pg. 28.mr onyango is a former dean of faculty of law and head of human rights and peace center, school of law makerere university

[88] *Ibid 52*
[89] 1972 E.A pg 355

Forces (TPDF) finally defeated Amin in April 1979.[90]

2.7 THE PERIOD 1980-1985

Later as a result of political manipulation on the part of the Uganda peoples congress (UPC) and the democratic party (DP) leaders, the Uganda liberation front (UNLF) umbrella was torn, with both UPC and DP insisting on fictional, sectarians elections in I980[91], Although some of the leadership pressed for elections under UNLF and national consultative council (NCC) had passed a resolution approving elections under the front, this view was suppressed. Consequently, it is alleged that the UPC helped by the Military Commission, headed by Paul Muwanga, rigged the 1980 elections. The Electoral Commission was not allowed to announce the winners, as Paul Muwanga made it a criminal offense of any one, other than himself to do so. **Indeed as Legal Notice No. 10 dated December 10th, 1980 specifically laid out;**

"When the result of the poll at a constituency has been ascertained by the returning officer shall make no public declaration of the finding but forthwith communicate to the Chairman Military Commission with a confidential report on various aspects of the election. The Chairman shall ascertain whether the election has been free and fair of any irregularity or violence." A free and fair election could not result from this kind of environment without an independent electoral body .So the UPC was declared winners of the elections and Obote became the President of Uganda the second time and once again the country suffered under another dictatorship. Extra judicial killings were the order of the day as the army took the law in its hands.[92] This was a clear abuse of the doctrine of separation of powers

There was no protection of property and persons, members of parliament were murdered including **Sebastian Sebugwawo,** MP from Mubende and **Bamutwaki,** MP from Toro. After the defeat of the dictatorship, 'some of the human remains arising out of the killings were buried in mass graves in **Luwero Triangle.**

[90] Ibid 52
[91] *Ibid 52*
[92] Ibid 52

2.8 THE DOCTRINE UNDER THE NRM REGIME

As the National Resistance Movement (NRM) was proclaimed, its intentions were to radically transform the essential elements of government and participation in the country unlike the previous regimes. At the inauguration Museveni gave a speech that:

"No one should think what is happening today is a mere change of guards. It is a fundamental change in politics of the country. In Africa, we have seen so many changes that change as such as nothing short of mere turmoil, we have had one group getting rid of another only for it to be worse than the group it displaced. Please do not count us in that group. The people of the National Resistance Movement are a clearheaded movement with objectives and good membership"[93]

Following the late 1992 release of the report of Uganda Constitutional Commission (UCC) and the completion of the draft constitution the people of Uganda have entered the last and perhaps the most interesting phase in the cheered transition to a fully-fledged democratic system of governance, a system that has eluded the country over since the attainment of independence in October 1962. The syndics of the process of transition have been as contentious as it has been convoluted against the back drop of several years of civil strife, culminating into civil war.

The notion of constitutionalism took a back seat to the over-arching necessity to attain and retain power-whatever the cost. Uganda has the experience of virtually every form of government imaginable; one party dictatorship, military fascism and the movement government characterized as "No Party" system to recent kind-multiparty system. This smorgasbord of system of government has also witness interesting development in legal and constitutional regime to the extent that lawyers in government have become specialist in drafting legal notices to effective manifestly illegal usurpation of power.[94]

Looking at the main feature of this regime a further separation of powers can be seen from the **legal notice no. 1 of 1986**, which changed parliament to be a National Resistance Council and **Legal Notice 1/86** which prescribed composition or parliament to consist of chairman of the National Resistance Movement, the Vice Chairman of the National Resistance Council, a

[93] Ibid 52

[94] John Jean Baray & Oloka Oiiyango: Popular Justice and Resistance Committee Courts in Uganda. pg. 407.

Representative NRM of the ' (historical members'). It also provided for the national

Commissar the Administrative Secretary of the NRM and Director of Legal Affairs of NRM[95]

The legislative powers were vested in the National Resistance Council (NRC) **by Section 1 of Legal Notice 1/86 Amendment Decree No. 1/87** and such powers are to be exercised through passing of statute assented by the president. This already shows the Legislature was independent of the Executive and to go hand in hand.

The Legal Notice 1/86 Amendment Statute 1/89 Section 6 established a standing committee `of National Resistance Council to be known as National Executive Committee whose function was to set in Section 6(1), which was to discuss and determine the NRM to vote candidates to presidential and to oversee the general performance of government.[96] This gave the impression that the sole executive power was vested in the president as the final man. The Legislature also acted to check to the Executive by it was to regulate the exercise of power conferred upon the president to determine the operational use of the armed forces.

And further there has been no separation of powers in strict sense of the terms in the constitution for example the president is empowered to nominate ministers as he wants such appointed members of their loyalty to the cabinet and can not conceivably perform the role of checking the executive discretion. All we can say about the legislature was that in practice legislative control was terribly ineffective, parliament was often unaware of the scope of delegated authority and of what the cabinet is doing .However, and parliament was not in position to do anything considering its relative weakness.

Judicial independence as an avenue if redress against government was compromised by the executive power of appointment and removal of the judges. In practice the executive abrogated the its power of appointment and removal thus jeopardizing the independence of the judiciary indeed this power has been used as a stick to dismiss individual judges who dared challenge the government.

[95] Legal Notice 1/86 Legal Notice 1/1986
[96] Ibid

CHAPTER THREE

3.0 THE DOCTRINE OF SEPARATION OF POWERS UNDER THE 1995 CONSTITUTION

The 1995 Constitution establishes the arms of government as the Executive, Judiciary and the Legislature. This chapter is going to deal with the three arms of government under the constitution and each arm will be discussed independently.

In course of soliciting the views of the population for constitutional making the Constitutional

Commission pointed out in the report that there was concern over the abuse of power by the executive and the need to have mechanism to check it.[97] The Commission concluded that the executive has tended to be very powerful and has either over-ridden or misused the other organs.[98] Therefore the Commission task was to reduce pressure of the executive on Parliament and Judiciary.

3.1 THE EXECUTIVE

The 1995 Constitution of Uganda provides for the president who is the head of the executive as well as head of state.[99] He takes precedence over all people in Uganda.[100] This has elevated the position of the executive over Parliament and the Judiciary.

The president has powers of appointing the Chief Justice, Judges, Inspector General of Government and all other constitutional offices on the advice of Judicial Service Commission and the Public Service Commission respectively. These bodies advise the president on appointment of public officers but if the president has already decided on who to appoint

they have less chances of rejecting the appointment because on many cases the president has selected one name of the person he wants and the people to approve the appointment that is the

[97] Para 15, 57 of the report of Uganda Constitutional Commission
[98] Ibid
[99] Article 98 and 99 respectively of the 1995 Constitution of Uganda
[100] Chapter 7 of the Draft Constitution

parliament can not reject but to approve that appointment as it was in case of the Current Governor Bank of Uganda, **Tumusiime Mutebile**[101] and also appointment of **Justice Kikonyogo** as Deputy Chief,[102] a clear abuse of doctrine of separation of powers.

The President is the Commander in Chief[103] and has the powers to recruit, promote and dismiss officers. This power of appointment makes the President an over lord.

To counter this domineering position of the president especially over the appointment and dismissal judicial officers and members of the executive, a consultative mechanism was put in place in the name of the **National Council of the State** (NCS)[104]. In addition to approving appointments and dismissals, the President has to consult the National Council of the State. To avoid the president acting in his own cause, Art. 153(1) (2) of the draft Constitution requires the president and cabinet members of the NCS to exclude from the NCS deliberations when discussing appointment and dismissals.

When one examines the composition of the NCS consisting, of the President, Vice President, ten members of cabinet and about 45 representatives from district and women parliamentarians one is made to draw a conclusion that the executive has been made stronger by the proposed establishment of NCS. The idea of mediation is very important but because of its composition, one loses confidence in the institution. Secondly the NCS creates another center of conflict. It is bound to generate tension between the Executive and Parliament in an attempt for the two organs to win sympathy.

The National Council of State trims the power of parliament, which weakens this important representative body. The executive is instead strengthened and it may be agreed that Art 153(1) (2) would eliminate the influence of the President on appointment and dismissal but this is just a theoretical possibility. The Domineering position of the presidency in Uganda, has given rise to

[101] *Monitor Friday January 05/2000 pg 2*
[102] *New Vision December 12th, 2000 pg 1 & 2 8Q Article 98(1) 1995 Constitution*
[103] Art.98(1) 1995 constitution
[104] *S. B. Tindifa paper or Constitutionalisrn & Development in Uganda" pg 135 38*

culture of patronage and sycophancy. In some instances the presidents, in attempt to keep power, have bribed and brought people for support[105].

Another aspect that guarantees the presidential power is his or her immunity to criminal proceedings in any court of law[106] against the background that presidents in this country can engage in criminal activities. The immunity removes from the constitution the most viable mechanism to check the powers of the Executive. According to the Instrumentalist School of thought, constitutions have the effect of influencing the behavior of government officials.[107] Immunity puts the President above the law and should not be a tenet enshrined in the constitution. Nobody should be above the law; there should be a rule to be respected by the constitution itself.[108]

There is provision for impeachment of president and cabinet members and parliamentarians; this is a welcome constitutional provision. However the process of impeaching the president is very long. The power to remove the president is a preserver of parliamentarians. Although the parliament represents the people the constitution recognizes that the people still retain the residual sovereign power.

Therefore the procedure for impeachment should be made accessible to the people as opposed to one third of members of parliament to approve the petition to impeach the president and other members of the executive. Members of parliament may easily be manipulated especially if majority in parliament support the president or belong to the majority party. If there is evidence on oath by a citizen it should serve as sufficient notice to parliament to initiate the process of impeachment. This process can check on the executive and other leaders to be more responsible avoid situations that would propel them into breaching law and the oath of allegiance. Further the power exercised by parliament is intended to check on the executive and to ensure that the constitutional powers granted to the president are not exceeded or do not violate the constitution

[105] The alleged bribery of members of parliament to the amendment of the constitution to remove presidential term limits

[106] Art.98(5)of the 1995 constitution

[107] *"Building Constitutional Orders in Sub-Saharan Africa" published by International Third World Legal Studies Association and the Valparaiso University School of Law 1998 pg 37*

[108] Oloka Onyango pg 10

when making decision affecting the whole country[109] when the resolutions to remove the president is being debated the Chief Justice presides over the Legislature.

The President of the Republic of Uganda has the power to pardon[110], any person convicted of any offense, he can remit the whole or part of any punishment imposed on any person for any offense or penalty of forfeiture, or otherwise due to the Government of Uganda. He can grant a respite of the execution of any punishment imposed for a special or indefinite period. The President is advised by the Advisory Committee on the prerogative of mercy. The problem here is that once the committee recommends a person to be sentenced to death, the President is advised by the Advisory Committee on the prerogative of mercy[111].

The president has the power to divert from such advice hence making the role of that committee useless, the president can act on his own without being advised hence abuse of the doctrine of separation of powers.

3.2 THE LEGISLATURE

. The Uganda Constitution vests the Legislative power in Parliament and provides that there shall be the Parliament of Uganda [112] as the supreme law making body .The speaker heads the house, members of parliament vote for the speaker and they are elected by adult members of their respective constituencies whom they represent.

Under our present parliamentary system and even before, the leader of the majority party forms the executive sit in parliament. For this matter therefore the executive is part of the legislature which as a result hinders the smooth operation of the three arms of government and such lack of proper separation of powers reduces the checks and balances which are fundamental and foundation of parliamentary system of government.

It has been observed that the power of parliamentary system has always been diluted by giving the president the authority to control the powers of parliament or the legislative powers. The

[109] Ibid Article 107(4)
[110] The recent pardonby president museveni was to chris Rwakasis who was on the death row for over 20 yeays.
[111] Ibid Article 98(5)
[112] Ibid Article 77

constitution provides for the independence of parliament by providing that the president is not supposed to be a member of parliament and that it should only be parliament to make laws for peace, order and good governance. This is a sign of independence of legislature. However their independence has been abused by the executive influencing the legislature where members of parliament are part of cabinet. This was evidenced during the passing of the Referendum Law of 2000 where the Act was passed by the Speaker knowing that there was lack of quorum and this was challenged by members of Democratic Party this affects the doctrine of separation of powers.

Legislature independence is shown by empowering it with the power of approving presidential appointments and dismissals which must be approved by parliament in other words parliament can check the executive for the good of the nation as a whole.

However, the independence of the legislature is compromised by the fact that the president belongs to the same political party which commands a majority in parliament. The constitution does not envisage it but it affects the independence of the Legislature by hindering the effective checks and balances between the two organs. There is also some Legislature independence where the parliament has powers to remove the president from power by the provisions that:

"A notice signed by more than one third of members of parliament stating the intention to move a resolution to remove a president and specific offenses must be submitted to the Speaker who immediately sends a copy to the President. [113]

The Speaker has to request the Chief Justice to constitute a tribunal consisting of three Supreme Court judges to investigate the allegations and report to parliament stating whether or not a prima-facie case for the removal of the president has been established.[114]

When the resolution for the removal of the president is being debated the Chief Justice Presides over the legislature which constitutes into impeachment. The chief justice's main role is to guide

[113] Okum Wengi "Founding the Constitution of Uganda", Essays, Materials, Uganda Law Watch 1994 pg 16
[114] Article 107(4) of the 1995 Constitution of Uganda

the legislature and for this matter once a resolution of removing the president is passed it cannot be challenged by any court of law.

There is an indication that despite of the independence of each of the three arms of government, in cases of serious conflict the issue will be referred to the Judiciary and the co-equal branch of government. It is therefore suggested that in order to make the separation of powers there must be effective checks and balances. Parliament approves presidential appointment and removal of certain officers since most of presidential nominees require approval of parliament. However very few removals, approvals and even when approval is required for the proposed appointment, there is no implied powers to veto on removals.

The constitution provides that parliament shall have full powers to reject newly proposed appointees such checks will enable parliament in preventing the filling of offices with unsuitable or incompetent people with those against whom there is a tenable objection this manifested by the rejection of **Ssebagala** as minister by parliament. The current struggle is on the vetting of **General Aronda Nyakarima** as minister for internal affairs before resigning from active service of the army which has been challenged by parliament while the president insists that he must become minister.[115] . According to **Hon Ken Rukyamuzi Mp Rubaga North**[116] ,this has a negative effect not only on separation of powers but also on constitutionalism and rule of law while citing Article 208(2)[117] of the constitution .Other members of parliament have condemned this appointment including **Hon.Medard Lubega Segona And Mathias Mpuga**[118] who stated that this is intended by the president to cause chaos in the country .they cited the previous instance where **general Jeje Odongo** had to resign from active service of the Uganda people's Defense forces (UPDF) before he was appointed minister , they noted that departing from this position by the executive would be a move by the president to militarize the cabinet. Where the executive is not willing to adjust it is difficult to achieve the checks and balances. Another example was in the **New Vision headed "*Parliament received Museveni nomination.*"** in this

[115] At an interview of Theodore sekikubo mp Rwemiyaga and Nandala Mafabi ,current leader of opposition in parliament by the press on 9th july ,they noted that this contravenes the constitution and the UPDF Act

[116] On a debate ,Attorney general says Aronda can assume office without resigning from the army , www.nbs.ug.live mornimgbreeze@nbs.ug 11th 7-2013

[117] Art.208 (2) provides that the UPDF shall be non partisan and shall be subordinate to civilian authority as established in the constitution.

[118] News@nbs.ug/live, report by Jordan mubangizi about Aronda's appointment as minister

paper the Speaker told parliament that "by the powers conferred upon him by the constitution, His Excellency the President proposes to appoint **Mr. Emmanuel Mutebile as** Governor of Bank of Uganda. The speaker of parliament stated to the house "the President has subsequently directed me to request you to consider and approve the proposed appointment in accordance with the Constitution."[119]

From the above, we see that though parliament is entrusted with the powers of approval of all presidential appointments and also has power to reject such appointments, it is at times hard. For example Parliament tried to oppose Mutebile's appointment saying that president Museveni only considers members from his area and these are the ones occupying the most key posts, but parliament had no choice, the position of the Governor was vacant and there was a need of someone to occupy it so they had to dance on the tunes of the executive hence affecting the doctrine of separation of powers.

There is separation of powers to some extent where the president with the executive exercise their powers in accordance with the constitution. But in some cases the president has diverted from this and exercise powers in his own discretion and conscience for example when Uganda deployed her army in Congo[120] DRC in 2002 without parliament's approval though the law so required[121].

More still, in 2012, when the oil debate was tabled in parliament, identifying the Prime Minister **Amama Mbabazi** and other two ministers, **Hillary Onek and Sam Kutesa** to have signed oil deals which had too much lacunas leading to the loss of money to government. Furthermore, the President and the Executive interfered with the parliament's debate about stepping aside of the pined ministers. Hence, they are still in their position after the heat of the oil debate.

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[119] New Vision December 12/2000 pg 1 & 2

[120] BTI 2012 congo DRC country report,a global assessment transition process in which the state of democracy and mark the economy as well as the quality of political management ,this report indicate that this military operation by Uganda and Rwanda has led congo into more war and this was without approval of the county's parliament though the constitution so required.

[121] Art.210(d) of the 1995 constitution requires parliament's approval before deployment of troops outside Uganda.

3.3 THE JUDICIARY

The 1995 constitution provides for the independence of the Judiciary which means the legislature and the executive must not interfere with the Judiciary in any way when conducting its business. The judges should decide cases pending before them without fear or favor or influence from any body. Independence of courts is a factor with the fabric of separation of powers as this raises the question of impartiality in dispensing justice. The constitution also provides for judicial independence by ensuring security of tenure and securing remuneration and insulation from political pressure.[122]

It is always said that one of the ways of determining the level of civilization in any country is its standard of administration of justice and this depends on whether the judges are accorded independence to administer justice, impartially without any interference from the executive or any other body[123]

The independence of the Judiciary was also defined by the International Commission of Jurists at its meeting in **New Delhi in 1959 in these declaration terms**

"An independent Judiciary is an indispensable requite of a free society under the rule of law. Independence here implies freedom from interference by the executive or the legislature with exercise of judicial function. It was further said that independence does not mean that..."

"A judge is not entitled to act in arbitrary manner his duty to interpret the law and the fundamental assumption which under lie it the best of his abilities and in accordance with the dictates of his own conscience."[124]

From the above statement, the independence of the Judiciary from the executive and legislature remains a cornerstone of democratic government but it can not be absolute for example a judge cannot be independent of law and neither can he ignore the social and political issues on which

[122] K. J. reports pg 309
[123] Ibid
[124] K. Y. reports 1962 pg 12

he is asked to adjudicate upon moreover the antiquated doctrine of separation of powers has never been a correct reflection of politics and therefore there is more co-operation than separation amongst the three arms of government. This has been well placed in the 1995 Constitution of Uganda.

In the case of **ATTORNEY GENERAL -V- GOODTIME NEWS PAPER LIMITED: Lord Diplock** stated that "*in any civilized society it is the function of the government to maintain courts of law to which all the citizens can have access for the impartial decision of disputes as to their legal rights and obligation towards one another and towards the state as representing society as a whole.*"[125]

The question now is how can the independence of the Judiciary through its laws, regulations and other provisions[126] be achieved.

Among the conditions necessary to safeguard Judicial independence are the rights and status of judges, their education and training, their appointment, their decline, removal and tenure and professional immunity.

On the issue of status and rights-of judges where **Article 128(2)** of the Constitution states that no person or authority shall interfere with the courts on Judicial Officers in the exercise of their judicial function. This is the sign of independence of Judiciary as a separate organ of government one should not forget that the judiciary has been the most abused organ of government.[127] This position is premised on the aspect of security of tenure as regards appointment and dismissal of judicial officers. Prior to the 1995 constitution the aspect of security of tenure can better be traced from the case **of SHABAN OPOLOT V ATTORNEY GENERAL**[128] where the appointment and dismissal of officers was solely at the whims of the president who was the appointing authority could dismiss them at will for example obote fired **sir udo udoma, Amin fired Russell** and replaced him with **Ben kiwanuka** who later disappeared and was never seen

[125] 1967 AC pg 307
[126] Juuko F. W. Separation of Powers in the Reality

[127] According to a report on Uganda entitled "Judicial independence undermined 2007 by the International Bar Association Human Rights Institute Report.
[128] (1969)EA 631 where court stated that the prerogative powers including powers to dismiss officers at will vested in the president.

again under unknown circumstances but is said to have been killed by **Gen. Amin, Paul muwanga** also fired **wambuzi** and replaced him with **Masika**. This criterion of appointment of judicial officers has still been maintained in the 1995 constitution[129] though the constitution now lays down a proper procedure of removal of a judicial officer form office[130]. However, the judiciary still experiences the problem of their salary which has for long not been increased despite complaints. Officers of the Judiciary therefore judges need to be accorded a status comparable to that enjoyed by most senior members of other organs of government. The public expects them to enjoy a status equal to that of cabinet ministers.

Further **Article 130** provides that the Chief Justice is appointed by the president but with the approval b parliament as it was the case with the current Chief Justice **Benjamin Odoki** and the recent appointment of judicial officers of the lower courts are by the president with the advice of the Judicial Service Commission. This is an independent body which does not act in direction of the executive or any other authority however; some appointments are a subject of academic debate and questioning. Recently the Supreme Court Judge **Justice George William Kayeihamba** accused the newly appointed Deputy Chief Justice of being corrupt and incompetent and was asking the President to reconsider the appointment of Kikonyogo on this job.[131]" His objection failed because it is not the judges to approve the appointment but the parliament.

Further **Article 144 provides** for the tenure of judicial officers in Uganda. The Judicial Service Commission is enjoined by law to base its recommendations to appointment on qualification, experience and merit.

The Judicial Service Commission provides that in tendering the advice, the Commission shall have regard to the need to maintain the standard of efficiency and integrity in Judicial Service.

According to the above it shows that the responsibility for judicial appointment is shared by the executive and Judiciary and sometimes the Legislature where as the Executive and Legislature are political organs.

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[129] Article 142(1) on appointment of judges by the president with approval of the judicial service commission.
[130] Under Article 144(3) (4) (6) of the 1995 constitution
[131] Supreme court judge challenges the appointment, Monitor Friday January 2000 pg 2

A Judge is not removed from office except in accordance with the procedure stipulated in the Constitution"[132] as stated before judges are expected to conduct themselves in the manner fitting the dignity and responsibility of their office. They observe the code of ethics which is another way of safeguarding their status.

Judges under the Judiciary are high officers of state who are expected to discipline themselves without need for constant supervision from any authority. However it seems like the Judicial Service Commission does not have the power to discipline a judge. The machinery of dealing with the complaint against a judge is not clearly defined in most jurisdictions except as regards removal. The existing procedures of raising complaints include complaints to the Attorney General or members of parliament.

A Judge further enjoys immunity from civil action. In Uganda this is under Section 46(1) of the Judicature Act which provides that:

"A judge or other persons acting judicially shall not be liable to be sued in any court for any act done or ordered to be done by him in discharge of his judicial Function."[133]

This raises the issue as to whether or within the limits of jurisdiction a judge is protected by professional privileges from answering questions regarding his own conduct in court when exercising his judicial functions. **Section 118 of the Evidence Act** stipulates that:

"No judge or magistrate shall except upon special order of some court which he is subordinate shall be compelled to answer any question as to his conduct in court as such judges or magistrate but he may be examined as the matter he was so acting."[134]

One should bear in mind that the purpose of this immunity is not for the aggrandizement of judges but to enable them to do their work with complete independence and free from the actions against them or other similar consequences. This is intended to make them free and making independent judgment without any influences hence the separation of powers.

[132] Article 144(2) the 1995 Constitution
[133] Judicature Act 1996 Sections 46
[134] Uganda Evidence.Act Cap. 43 Section 118

Independence of Judiciary in Uganda today has been manifested in the ease of **TINYEFUZA V ATTORNEY GENERAL**[135]the plaintiff was an army representative in parliament and was summoned by committee of parliament to testify about the civil stiff in northern Uganda. In his testimony, Tinyefuza made stinging attacks on the Uganda people's defense forces (UPDF) which was not welcome by government particularly by the president who said that he had to answer to UPDF about what he said .however, the Constitutional Court decided in favor of the plaintiff without fear of the executive. the court's decision was based on privilege granted under **Article 97 and 173** of the constitution to a member of parliament. Also in **SEMOGERERE AND ZAKALY OLUMU V ATTORNEY GENERAL,**[136]court was strong enough to annul an Act of parliament and to declare the out comes of the referendum null and void even when it was clear that such a decision would set the judiciary on a collision with the executive .they are these incidences of boldness by the judiciary that have upheld judicial independence.

Response to the critics that appeared in the New Vision barely a week after her court judgment[137] against such a background the Judiciary must struggle to be independent and promote the evolution of the constitution.

It should be noted that although the Ugandan Constitution of 1995 provides for independence of the Judiciary by guarantying security of tenure of judges. It has been noted that the Chief Justice does not in practice enjoy security of tenure because of successive government which have always come in with a new Chief Justice.

[135] *Constitutional Petition no.1 1997*
[136] *Constitutional Petition of 2000*
[137] Makerere Law Society Journal of 1996

CHAPTER FOUR

4.0 THE NON ADHERENCE TO THE DOCTRINE OF SEPARATION OF POWERS BY EXECUTIVE THAT IS TO SAY; THE EXECUTIVE VIS A VIS LEGISLATURE, THE EXECUTIVE VIS A VIS JUDICIARY

The Executive, Judiciary and the Legislature are traditionally the three main organs of government. Each one is entrusted with distinct powers and responsibilities. The doctrine of separation of powers implies that the powers and responsibilities are equally distributed among the three organs of government in a manner that prevents anyone organ from abusing its powers. The concept of "checks and balances" is often used in the same breath as separation of powers because each organ of government is supposed to check possible abuses by the other and provide a chance to prevent extortion of power by organs of government [138]

Often the greatest fear in the political environment of developing countries is the executive arms of government will attempt to dominate the other branches of government. Several times during

Uganda's past, this fear has been transformed into reality as an observer insightfully stated:

"Since the inception of modern state of Uganda, both in its colonial and independent form, no phenomenon have had negative impacts on political development in the country as have the antics, failings and chicanery of the executive arm of government."[139]

There should be an independent legislature and judiciary to avoid the excesses of the executive. The amendments to the constitutional order effected by the NRM regime are instructive if only for the fact that they produce a curious amalgam of popular accountability, while concentrating executive power even more extensively in a single individual.[140]

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[138] A paper on "Parliament and Human Rights" presented by Mr. Livingstone Sewanyana, Executive Director Foundation of Human Rights initiative at Commonwealth Parliamentary Association Seminar for MPs Kampala Feb. 4th 1997.

[139] *Oloka Onyango J.; Taming the Presidential-some critical reflections on the executive and the separation. of powers in Uganda" East African Journal on Peace and Human Rights Vo. 2 No. 2, 1995*

[140] Innovations introduced by NRM worth specials mention include the creation of the system of resistance Councils and Committees (RCCs); the establishment of the conduct governing the operation of the military

THE EXECUTIVE VIS A VIS JUDICIARY

In Uganda following the decision in **UGANDA VS COMMISSIONER OF PRISONS EX PARTE MATOVU IN 1966**[141], where the applicant was ,detained under Emergency regulations took habeas corpus proceedings to the court of appeal which over ruled the objection on technical grounds and granted the writ but this was against the wishes or government and was thus not respected. The judiciary has been progressively undermined especially by the executive. This was manifested when the Constitutional Court on 25 June 2004 handed down a ruling that the Referendum (Political Systems) Act 2000 was unconstitutional, this provoked harsh criticism from the President directed specifically at the court and judiciary.

In a televised speech delivered on Sunday 27 June 2004, President Museveni stated:

'A closer look at the implications of this judgment shows that what these judges are saying is absurd, doesn't make sense, reveals an absurdity so gross as to shock the general moral of common sense. In effect what this means, is that this court has usurped the power of the people. This court has also usurped the power of parliament, to amend the constitution. Government will not allow any institution even the court to usurp the power of the constitution in any way.'[142]

A few days later, President Museveni was quoted as saying that *'the major work for the Judges is to settle chicken and goat theft cases but not determining the country's destiny'*[143].

Many sectors of society are believed to have interpreted this statement as a threat to the independence of the Judiciary in contravention of Uganda's Constitution.

The Uganda Law Society (ULS) declared that it was 'gravely concerned about the unwarranted attack by the Executive on the Judiciary in the performance of their constitutional duties'. The Society stated that it is a duty of all governmental and other institutions to respect and observe the independence of the Judiciary. The President was therefore out of order when he stated that

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Commission of inquiry into the violation of human rights and the promulgation of a statute governing the operation of intelligence agencies, see Oloka Onyango "Governance, democracy and development in _ today: a socio-legal emanate"; in African studies monogral. October 1992. at pg 92-98.

[141] (1966) EA 514

[142] An edited version of the speech is reprinted in The Monitor, 'Museveni mad with Judges over nullifying 2000 referendum

[143] I Ssuuna, 'Judges Favour Ssemo, Says Museveni', the Monitor, 30 June 2004,pg 5

the judges have usurped the power of the people to choose their political system. This was also criticized by other civil societies. The ULS stressed that **Article 137** of the Constitution gives the Constitutional Court exclusive jurisdiction to interpret and determine the constitutionality of Acts of Parliament or any other law or anything in or done under the authority of any law.'[144] This also attracted criticism from civil societies like Parliamentary Advocacy Forum (PAFO), The Foundation For African Development (FAD) that the president's rejection of the constitutional court's ruling amounted to overthrowing the constitution[145]

He also directed warnings at judicial officers who issued what he called 'bogus eviction warrants'. A State House statement quoted the President as saying that he 'will suspend a judge who colludes in illegal evictions and institute an inquiry[146] The President repeated his stance in his Statement of acceptance to the NRM National delegates conference in November 2006 . This explains the less respect of court orders by Hon. Minster for land Nantaba in the conduct of her ministerial mandate in respect of registered land owners[147]

Direct Interferences

The trial of opposition leader **Dr Kizza Besigye** ,which involved the two intrusions of government forces on 16 November 2005 and on 1 March 2007 at the Kampala High Court as analyzed below.

The Deployment of Joint Anti Terrorism Team (JATT) at the High Court – November 2005 1st March 2007.

On the morning of 16th November 2005, the date of the bail application of the PRA accused, a detachment of around 30 armed men in black uniform arrived at the High Court premises. They remained in the background at first, but when the sitting Judge Edmond Ssempa Lugayizi

[144] J Etyan, 'No constitutional crisis, says Law Society', New Vision, 29 June 2004,pg3
[145] H Kaheru, 'Respect Ruling-G7', New Vsion, 29 June 2004,pg3
[146] J Namutebi , 'Museveni warns land lords 'New Vision ,11 June 2005,pg6
[147] Minister Nantaba sued over alleged trespass Daily monitor, May 1 2013

declared that the accused had a constitutional right to be released on bail, the troops surrounded the Court premises, wielding Uzi machine guns and AK-47 assault rifles. The roads around the court premises were sealed off. The troops' commanders reportedly insisted that they had orders to take the accused away as soon as they were released.

When some of the armed men tried to force their way into the holding cells of the court several judges were reportedly evacuated from the premises. Prison guards were believed to have held the troops at bay and managed to lock them out of the holding cells. Faced with this situation, the accused's sureties refused to sign the bail documents, in order to keep the accused in the custody of the civilian authorities rather than handing them over to the armed men. The events were witnessed by 15 foreign diplomats, including 13 envoys from the European Union. The following day, Chief Justice Benjamin Odoki and Inspector General of Government Faith Mwondha condemned the deployment of the JATT.[148] The then High Court Principal, Judge James Ogoola, stated that the deployment of the JATT at the High Court was 'the most naked and grotesque violation of the twin doctrines of the rule of law and the independence of the Judiciary', the extent and content of which was simply
'Unprecedented'. He said the armed commandos had unleashed 'terror' and that not since the abduction of Chief Justice Ben Kiwanuka from the premises of Court during the diabolical days of Idi Amin had the High Court been subjected to such horrendous onslaught as witnessed last Wednesday'. He said this was 'the most reprehensible affront to the independence of the judiciary' had had a chilling effect on the administration of justice in the country.[149] As noted earlier Judge Lugayizi, who had presided over the bail application, withdrew from the case as a result of the military interference.[150]
The ULS condemned these actions by government and stated that the Attorney General had failed to ensure the government's adherence to the rule of law and various international treaties, including human rights covenants, to which Uganda was a signatory.[151]

[148] E Mulogo/E Masumbuko/ S Kasirye, 'Besigye;Chief Justice condemns court siege', The Monitor, 18 November2005.
[149] E Mulongo, 'Judge Withdraws From Besigye Case', The Monitor, 19 November 2005.

[150] H Kiirya,Judges,Magistrates cite Repeated threats ,New vision ,8 Dec 2005.
[151] S Muyita/ S Kasyate/ M Nalugo/ A Nanduto, 'Besigye Bail Bid Flops As Lawyers Go On Strike', the Monitor, 29 November 2005

The lawyers' strike on 28 November 2005 was observed by the majority of legal chambers and practices. At a rally at the High Court in Kampala, the ULS demanded that the Executive unequivocally condemn the acts of intimidation, threats and attacks and apologize to the Judiciary, the Bar and citizens of Uganda. It also called upon the government to appoint an independent commission of inquiry comprising national and international jurists to investigate the incidences, including the assault on the High Court premises that took place on 16 November 2005.

Appointment of Judges

The lack of judges is to be distinguished from a failure to appoint. The budget for judicial appointments is passed by Parliament, whereas appointees are recommended by the Judicial Services Commission whose members are appointed by the President.

There are concerns that the process of appointing judges is politicized. The Uganda Judicial Officers Association (UJOA) in October 2006 claimed that there was a 'trend of rewarding politicians, especially those who have lost elections',
While career judicial officers were being overlooked.[152] According to the UJOA, 98 percent of judges' appointments since 1997 have been political.[153] The Chairperson of the UJOA further stated that because of the judges' political affiliations, the public could sometimes predict the judgment of each judge on a panel before the actual ruling was made.[154]

Another issue which was raised is that if political appointments are vetoed, there is a failure to appoint any judges. The consequence of such inaction can be seen in the Ugandan Supreme Court. Following the death and the retirement of judges like the late Justices, Mulenga and Byamugisha (RIP), the chief Justice Hon. Benjamin Odoki and Hon Alice Mpagi Bahigeine thus the quorum of seven Judges to handle constitutional appeals is not met. According to the retired

[152] E Mulondo, 'Judicial Appointments Becoming Political Says Magistrates', The Monitor, 16 August 2006.

[153] A Mubiru, 'Judges' Appointments Annoy Judicial Officers', New Vision, 17 August 2006.

[154] Ibid

Justice James Ogoola[155] who is also the chairperson of the Judicial service commission noted that the supreme court should have eleven judges, that without one they can not sit for the important constitutional cases, he said that they had chosen five persons in fulfillment of their constitutional duty to the appointing authority to constitute the members of the supreme court. It is understood that the appointment process has stalled at the Presidential level and that there are a number of appeals which are pending. The judiciary is also faced the problem of delayed appointment of the chief justice after the retirement of Hon. Benjamin Odoki this has been blamed on the appointing authority. This has been worsened by **the re-appointment of the retired chief justice Benjamin Odoki** for a further term of office as chief justice for two years disregarding the names of fit and proper persons which had already been submitted to the president by the judicial service commission .This act ws in total contravention of the constitution [156] and have been highly condemned as 'a naked rape of the constitution,' and in particular the Uganda law society threatened to challenge this by all means.[157] This lack of enough judicial personnel has also been manifested by the appointment of **Justice Steven kavuma** deputy chief justice and acting chief justice at the same time.[158]

As regards the remuneration for judicial personnel, it was noted that in
November 2006, judges were accorded a 78 percent raise in their salaries until to date judicial officers are struggling for an increase on their pay.

The above concerns have a bearing on the independence and functioning of judiciary; however, the problem of lacking judges has been catered for by the recent appointments. Also the doctrine of separation of powers was tested in **JIM MUHWEZI AND 30 OTHERS VS ATTORNY GENERAL AND ANOTHER[159].**

The case among other issues concerned the appointment of the IGG (Justice Faith Mwondha) from the Judicial bench contravened Article 128 (1) and (2) of the 1995 constitution. Accordingly, the Judge could not possibly perform her role independently and at the same time

[155] Judicial service commission, judges ready for appointment Halima Athumani on 2012-09-08, 15:20:34.
[156] Its inconsistent with article 144(1) (a) which requires the chief justice upon attaining seventy years to retire.
[157] According to Nicholas Opio, secretary General, Uganda Law Society, this act is against the rule of law.www.nbs.ug/live,9:00 am , 23rd /7/2013
[158] Judicial chairs, Ron Musana,the kampala sun,Friday july,5th –Thursday 11th 2013 pg 4.this judge is a former state minister for defense ,he has been empowered as acting chief justice ,this implies that if he is unavailable to carry out his duties for any reason then he can now turn to himself as acting deputy chief justice which is not practicable
[159] Constitutional petition no.10 of 2008

investigate, arrest, prosecute a role that put her Office under the executive arm of government, her acceptance to serve as Inspector General of Government (IGG) Violated the Constitution especially provisions regarding separation of powers and the independence of the Judiciary[160].

As the IGG, she became a litigator on behalf of the state something that no Judge should ever do.

Defiance of court orders and directives by members of the executive[161], a case in point is how **Hon. Nantaba** has continuously disrespected court orders in the conduct of her ministerial mandate in respect of registered land owners. Here the minister of state Nantaba defied court orders restraining her and her agents from entering the land in dispute in Kakotero village Bbale county kayunga district[162]. In the minister's words she said '*I gave him enough time to remove his cattle but he has failed to do so I am going to get a place where he will put them, I am not bothered by the court order*"

THE EXECUTIVE VIS A VIS LEGISLATURE

With the promulgation of the 1995 Constitution the progress of the process of democratization under the Movement system gained irreversible momentum. The first direct presidential election in the history of independent Uganda which Museveni won by 75 percent of the votes cast were held on May 9th 1996 These were followed by June 1996 Parliamentary Elections which produced an independent and dynamic parliament free of party whip that has since then not only checked and balanced the power of the executive but has also to a large extent dictated the political agenda in the country.

This independent parliament has been affected by the influence of the executive in order to have a smooth operation. This can be seen from the decision of the constitutional court in the **Semogerere and Zakaley Olumu case.**[163] This gave birth to an amendment of the constitution on August 31st 2000 where parliament passed a Constitutional Amendment Bill, where it was settled that parliament shall determine its method of voting and quorum.[164]

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[160] Art.126 and 128

[161] Minister Nantaba sued over alleged trespass, Red pepper, 8th April 2013.

[162] Mr.David Batema the jinja high court registrar issued orders restraining ms. Nantaba from alienating or entering or destroying any property on the land in question.

[163] supra

[164] *The August House Vol. 1 and 2 pg 1*

The amendment was at one level, a housekeeping matter as indicated by the validating laws passed since the commencement of the 6th parliament In fact rather than undermining the constitution, the amendment under scored the separation of powers as well as the supremacy of the constitution The amendment aimed as smoothening the working relationship between the arms of government It was a balancing act that should underscore the fact that the arms of government that is the executive parliament and judiciary are partner in pursuance of good governance and democracy

Further the late **Hon. James Wapakhabulo**, the then National Political Commissioner and MP Mbale Municipality commented that the amendment was intended to achieve insulation of the proceedings of parliament from intrusion by the courts of law, our constitution is designed on the basis of separation of powers. The constitution says that the Judicial Officer must not be told by any authority including parliament how to do his work, likewise during the tenure of officer the President of Uganda is not to be sued or charged in a Court of Law.

In similar strain it is important that parliament as a third organ of state is also protected from interference by other organs of state. The decision of the Supreme Court that opened the internal proceedings of parliament to litigation in courts of law removed the protection which parliament is supposed to enjoy. It destroyed the principle of separation of powers as between the Legislature and Judiciary.

From the above , despite the justification given by the executive on amendment of the Constitution; this is to justify the executive interference in the legislature stating that it's the Judiciary that should not interfere in work of parliament and not the executive. The amendment is intended to validate any laws enacted by the parliament whether valid or not like the Referendum Law of 2000. This shows a non adherence of the doctrine of separation of powers by the Executive Arm of Government.

Considering the land mark verdict[165]**, against 5 NRM members of Parliament; Hon. Wilfred Nuwagaba, Mohammed Nsereko, Theodore Ssekikubo, Banarbas Tinkasimire And Vincent Kyamadidi** for Campaigning for Candidates of rival Parties, against NRM Candidates in the By elections, they were also accused of willful, intentional reporting or disseminating of false and malicious allegations against NRM in the media, using wrong for a in addressing pertinent issues and contempt of the disciplinary committee. Following the report in the New Vision[166], the party expected its seats to be vacant and to hold by elections in the respective constituencies, However this position is attracted controversial ideas from Lawyers[167], concerning the constitutionality of the point of MPs losing their seats in Parliament and Prof .Ssempebwa noted that we so far have no laws which affect a person exploited from the party. The expelled MPs noted it was pity that the party was attempting to punish them even on matters they raised on the floor of Parliament and that these disciplinary proceedings were clearly intended to silence the members of Parliament and being intimidated against speaking out on the issues of corruption, democracy, transparency in the growing up oil sector and good service delivery.

The Secretary General for NRM also the Prime Minister Hon. Amama Mbabazi at the press conference[168], noted that the verdict was not only expelling the named MPs from the Party but also from Parliament and noted that Parliament has no choice over it's the composition and that they had informed the speaker of Parliament of the expulsion . This state of affairs indicates that the doctrine of separation powers is being infringed where by members of Parliament are subject to questioning by the members of the executive basing on divergent Political Opinions irrespective of their freedoms of speech and expressions[169], and the protection given to MPs on business conducted in the house. If this was to be the position, the Parliament would fear conducting business for the sake of their seats subject to disciplinary action by members from the executive.

[165] Passed on 14th April 2013 on Sunday at the state house by the NRM central executive committee headed by the president Y.K Museveni in the NRM National Chairman.New vision Tue April 16th 2013 pg3
[166] Rebel mps must quit, new vision Tuesday, April 16th 2013 of Pg 3
[167] Like one of the respected constitutional lawyers, Professor Fredrick Ssempebwa, Maj. General Jim Muhwezi at of the new vision April 16 2013.pg3
[168] Held at the party Head quarters in Kampala on 15th April 2013
[169] Art 29 of the constitution.

Speaker Hon Rebecca Kadaga's decision on the case of the expelled NRM members of Parliament[170],

Following a letter from the Secretary General of the (NRM) party informing the speaker that the Central Executive Committee (CEC) of NRM party had received a report and proceedings of its disciplinary committee and four members, Hon. Theodore Ssekikubo, Hon Wilfred Nuwagaba, Hon Mohammed Nsereko and Banarbas Tukasimire had been expelled from the party (NRM). The letter also requested the speaker to invoke her power to direct the clerk of Parliament to declare the seats of the said members vacant so as to enable the electoral commission to organize by elections in their respective constituencies. The speaker strongly relying on **Article 83** on the tenure of the members of Parliament and with emphasis **on clause (g) of this Article** stated that the issue of the effect of the expulsion of members of Parliament from their political parties Vis –a-Vis their membership in Parliament is not new[171], because the clause in the 7th Parliament while considering clause 26(g) of the 2005 amendment bill No.3 and that the house deleted the clause under contention , or if he or she is expelled from the political organization for which he or she stood as a candidate for election.

In reaching her decision, the speaker noted that the Office of a Member of Parliament is a weighty Office which goes to the core of our democracy and therefore a decision to declare such Office vacant can only be made on clear, unambiguous and unequivocal provisions of the law.

The Right Hon. Speaker also based her decision to decline expelling the members of Parliament in question on the decision of the Supreme Court of Uganda.

In Brigadier Henry Tumukunde Vs Attorney General and another[172],

Where the Supreme Court unanimously ruled that, the reactions and powers of the speaker should always be much more vocal and clear when the person of a Member of Parliament is threatened or its rules are challenged in democratic countries.

The speaker also based on the example **in 1642 where Charles I of England**, at the time of absolute monarchy, in an attempt to arrest five members of the house of commons the king

139Daily Monitor fri.May,3 2013,at pg 4S

[171] Considering the vibrant debate in the 7th parliament on Amendment no.3 Bill 2005

[172] Constitutional Appeal no.02 of 2006.

demanded that the speaker identifies them, the speaker[173], bravely, politely but firmly responded to the king thus *Sir I have neither the eyes to see nor ears to hear except as directed by this house whose servant I am.*

Taking the same direction, the speaker based her decision on the constitutional provisions with out fear or favor and this serves as a land mark not only in Uganda's constitutionalism but also to the doctrine of separation of powers.

Army Commander Coup talk[174]

First Defense Minister **Crispus Kiyonga** said this to a Parliamentary committee; these same sentiments were reportedly echoed by President Museveni while addressing NRM caucus, on Wednesday. The then **Army Chief of staff Aronda Nyakairima** repeated the same sentiments, the army commander said *stand warned, stand advised, if you do not change course the army is going to take over*". This was unfortunate for constitutionalism and separation of powers as it was a threat to the independence of parliament and an attempt to take over power by illegal means

4.3 FACTORS AFFECTING INDEPENDENCE OF THE ARMS OF GOVERNMENT

There is lack of moral courage on the part of the judges and members of Parliament. They fear to make decisions against the executive on the questions of moral courage, those who have attempted to come out are termed '**rebel members**' and others fear to follow suit. One English judge is quoted extra judiciously as saying

[173] Lenthall
[174] Samuel ouga, the observer, 24 Jan 2013

"The line has moved in the past 10 years the courts are less reluctant to interfere with what one would once have been regarded as the ministers prerogative partly as a matter of confidence as a judge you do it once and you don t get fired so you do it again you sit and your first thought is the chap being fairly treated And if not you first thought is,' am alive to do anything to put the right. This new judge is ready to give themselves the benefit of doubt."

The reason for the need to change in altitude is explained by one other judge the courts have reacted to the increase in powers claimed by the government by being more active themselves [175]

This is very disadvantageous because it makes the arm of the Judiciary work according to the pace set by the Executive by not checking on them in case of wrong implementation of the law In Uganda the courts have taken broad standards of challenging the executive where they have conclusive evidence that fundamental human rights are being abused for example in the **SEMOGERERE AND OLUMU CASE** (supra) and, the case **of DR.KIIZA BESIGYE V ATTORNEY GENERAL**[176], where **Justice katutsi** despite the storm of military threats held that Besigye was being illegally detained and that he should be released forthwith and granted the writ of habeas corpus.

4.4 JUSTIFICATION FOR OVERLAP IN THE ORGANS OF THE GOVERNMENT

As advocated by Montesquieu that the organs of the government should be totally separated from each other for Uganda as it is built on United Kingdom laws this was a king of law that was imposed in Uganda by the 1902 order-in-council due to political economic and social causes, Uganda has to some extent attained a complete separation of powers due to the following:

Mr. Edrisa Kisawuzi[177] analyzed that definitely among other causes of an overlap of the government powers and in the work of the Judiciary and this steers justice through political

[175] quotation from Precious Ngabirano Buganda Road Magistrate that one of the causes is employer

employee relationship

[176] misc.cause no.161 of 5005.

[177] Ibid talked about democratization of government the enhancement of the local council but which judges the powers.

influence of the work of the Judiciary. This predetermines the direction of justice. This is mainly done by political heads.

He noted that there is no way in which the president or an executive can fail to cause an overlap in the work of the Judiciary when a case is being handled, has a political bearing in the case of judicial system in Uganda. He elected the manner of appointment and dismissal of members of the Judiciary as one in which the members of the Judiciary are influenced.

He conferred to why there had been a new Chief Justice, to each and every regime that comes to power if there was not the fulfillment of political agenda of every government through the Judiciary. This causes the separation of powers because the executive is added to the Judiciary at the end of the day the work of the Judiciary is interfered with.[178]

He noted that so long as the President has powers to appoint the Chief Justice, members of the Judicial Service Commission are indirectly judges and magistrates. These are appointed on political interests, otherwise this would pre-suppose that the judges, magistrates, the committee will decide cases on political lines, this damages the tunes of the masters. The effect of this is to unite the organs of government in the body thus as leading the judicial system being totally dependent on the prevailing political systems'[179]

According to Precious Ngabirano, the magistrate at Buganda Road Court described that the main of overlap lies where the executive employs members of the Judiciary to satisfy their interests. He continued to argue under this kind of situation is inconvincible that the Executive and the Judiciary operate in one organ thus limiting the independence of Judiciary.

He also observed that the government efforts to decentralize, the Judiciary and the Executive have emerged into one organ that is when the Local Council Act was passed. The Local Committees were to decide cases and also performs executive roles thus finding that democratization being one of the causes of the overlap in the organs of government. This has

[178] quotation from Bati Katurebe 12/4/2000 that one of the causes is the inferiority complex of judges.
[179] Ibid talked about more economics .

vested the Judiciary and Executive in one organ and this hinders the independence of the Judiciary.[180]

In an interview with **Bart Katurebe, he** argued that lack of independence of the Judiciary among others is caused by **inferiority of the judges** that are acting at a particular time that is whoever is judging cases because of being appointed by either the head of state or any other person even if he knows the law to be applied in a particular case, but if he feels that when he applies the law he has not done according to the interests of the other organs This influences the performance of such officers and they end up applying the law not the way it ought to be.[181]

He also pointed out that lack of independence of the Judiciary is caused by **poor economy** which leads to lack of funds and the necessary influstracture like enough court room for magistrates. The use of "Muluka' rooms by Magistrate would lead to the Magistrate to judge the case according to the wishes of the representative or the administrative council. If at all he diverges, he will not get the assistance from the district, this cause lack of separation of powers between the Executive and Judiciary.

Hon .Bart Katurebe propounded, that the present judicial system follow the rule of law that is to uphold human rights, to act in accordance with the constitution but not to hold the executive decisions thus he noted that in the case of **MAJOR GENERAL TIJNYEFUNZA -V-ATTORNEY GENERAL**[182] there was no total independence of the judicial officers. It would have been noted the other way round because of the fear of the President and the Executive as such but we are called to decide cases according to **Article 191 of the Constitution** without control or any one being subjected to any authority. All in all there can not be complete separation of powers because of the need of checks and balances.

[180] G W Kayeihamba uphold the rule of law as a stand for the independence of the Judiciary
[181] Opcit mixture of Judge with the executive functions

[182] Abraham Kiapi pg 41 to avoid oppression tyranny must be separation of these powers

4.5 EFFECTS OF OVERLAP IN THE INDEPENDENCE OF THE JUDICIARY The theory of separation of powers as it was championed by Montesquieu; was to the effect that "In order to protect the individual against oppression of the French monarchical system of government and to safeguard the individual from harsh rules and tyranny, there must be separation between the executive, the legislature and maintenance of judicial independence from the other organs."[183]

In every government there are three types of powers, the Legislature, Executive and Judiciary. The Executive in respect of things depends on the law of nations and the Judiciary in relation to matters that are dependent on the civil law by right of the first prince or magistrate enacts temporary or perpetual laws and amends and abrogates those that have been enacted. By the end he makes peace or war send or relieves embassies, establishing the public security and provides against invasion. By the third he punishes criminals or determines the dispute that arises between individuals. The later we shall call the judicial power and the other simply the executive power of the state.[184]

After describing the structure of a state, Montesquieu went further to outline the best arrangement for securing political liberty. He stated that if the three organs of government are not separate, there will be the oppression of people's rights and even independence of the Judiciary will be limited.[185]

When the legislative, Executive and Judiciary are vested in one person or in the same body, there can be no liberty because oppression may arise in the same monarch or senate and can enact tyrannical rules. There is no liberty if the judicial power is not separated from the executive and legislature. The liberty of the individual subjects would be exposed to arbitrary controls for the judges would then be the legislator where it is found to be the executive power. The judge would behave violently and oppressive.

He also added that there would be an end to everything if the same body had power to exercise those three powers that is if it is allowed, the executive to enact laws; to try cases and to pass acts

[183] Ibidpg4l
[184] Ibid pg 42 fusion of powers results into no liberty
[185] Ibid pg 43 fusion leads to an end of everything

of government, this leads to the violation of fundamental rights of the individuals and no public liberty[186].

It is accepted by all democratic countries that the Judiciary must be separate and independent from the other departments in the discharge of its functions and the report of the Presidential Commission on the establishment of a democratic party. In Tanzania for instance reflect the theory of checks and balances advocated by Montesquieu and his American followers but accepted as a wholeheartedly, the principal of judicial independence. Thus independence was described as a "foundation of rule of law" the report went on to assert that "it is essential for the maintenance of the rule of law that judges and magistrates should decide cases that came before them in accordance with the evidence."[187]

They should not be influenced by extraneous factors but if other organs converge in one organ. The rule of law is not upheld, that is in criminal cases they should not be convicted or because they believe a particular verdict will please the government in civil cases they should not consider the relative importance of the parties or the political consequence of their decision. Their job is to find the facts and apply the relevant principal of law.

It is in this principle in the United States of America which created trouble between the president and the courts during the great depression (1933-35). Attempts by the president to deal with the depression were frustrated by the Supreme Court declaring it unconstitutional. Another example is the constant slashing of the president by congress. Foreign and civil rights programs can easily be federated by a hostile congress thus no liberty[188]

Another effect of separation of powers is that the three departments can frustrate each other without the power. Though the President must resign if successfully impeached, he has power to dissolve the congress. It was mainly due to strict separation of powers that the former President Richard Winston was able to defy a congress committee from producing tapes that were relevant to determine his role in the water gate break in and the subsequent cover up.

[186] Ibid pg 143 that there should be independence of the judiciary because it is the foundation of the rule of law.
[187] Ibid that if there are various factors the rule of law will not be up held
[188] B.J. Odoki pg 10

He argued that under the constitution, the president was overall with the congress and subject to control of the latter. He further argued that he enjoyed executive privilege not to appear before congress or furnish off with official information. It was only after it became clear than he would be successfully impeached, that he resigned. The episode is a good illustration of what strict separation of powers can create and also evidence of the supremacy of congress over the President, despite the separation of powers.[189]

Despite the above mentioned episode it still happens that even if the President is unpopular, inefficient and has unacceptable policies, the people must put up with him until his tenure of office expires. His powers are defined by the institution each of the departments claims to be answerable only to the public. Congress can remove the President for any conviction of any of the serious offender with reason and bribery.[190]

As a constitutional theory advocated protecting the right of the individual looking at what happens in practice. It does not pay to seek the protection of the rights of the individual in the theory of separation of powers. It is advisable and better to devise other methods that can effectively balance the public interest with individuals' rights institution the permanent commission of inquiry of Tanzania and other administrative safeguards are more political than abstract-conceptions like the separation of powers.[191]

To add on the above, **Kiapi** argued that absolute separation of powers may not lead to the settlement of the organs of government, so there is need of arms of government to interfere in the activities of the other in a limited manner ,[192]

To add on the separation of powers is above all concerned with the independence of the Judiciary that is people concentrate on their areas of service and this leads to efficiency thus lack of separate powers limit the promotion of the functioning of the government hence limiting the Judiciary at large... [193]

Due to the above mentioned aspects, Montesquieu, therefore proposes three things to uphold the independence of the Judiciary among other thing that is one organ of government should not

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[189] Ibid pg l1
[190] Ibid pg 12
[191] Ibid

[192] Abraham Kiapi supra pg38
[193] Ibid pg 38

exercise functions of the other legislature makes laws only courts must confine themselves to hearing of cases and other forms of administration of the country.[194]

To achieve the liberty of the individual Montesquieu argued that abuse of powers must be checked by making the organ to check upon another organ of a state. It must be set by the one controlling the other with the implied threat that should be beyond its prescribed sphere it will be challenged by the other.[195]

Montesquieu expounded the idea of political responsibility of ministers by saying that they are not heads of state and must bare the blame of bad administration as the chief of the state acts on their advice. Though the law protects ministers, they should be subject to examination and punishment.

CHAPTER FIVE

5.1. CONCLUSIONS AND RECOMMENDATIONS

Undoubtedly Uganda's current government is to be commended for bringing a degree of peace and stability to a country beset by decades of strife, for boosting the country's economy, for instituting major constitutional reforms and ultimately for relaxing the grip on power that the National Resistance Movement had held for a generation.

However it is note proper to judge the Government by the poor Standards of previous regimes and it should not be benchmark against which to assess its performance. The Ugandan people should assess their government's performance by the standards reflected in the Constitution and the human rights treaties the government has undertaken to respect. A history of past atrocities should not limit the horizons of Ugandan society or the aspirations of the government in bringing about democracy.

With respect to matters being investigated by this research it becomes clear that there are very real threats to judicial independence in political cases and in the exercise of legislative powers; this has been characterized by threats from the executive for example speaker **Rebecca Kadaga's decision** not to recall parliament to discuss the issue of the death of a member of

[194] Separation leads to settlement

[195] Ibid Separation of powers within here people concentrate on their area of service this leads to settlement.

parliament Nebanda and the subsequent arrests of other members on the same matter basing on the argument that some Mps had withdrawn their signatures was associated with intimidation from the president[196] . The Uganda Government is urged to respect the separation of powers between the executive, legislature and judiciary which is so critical in upholding democracy and the rule of law.

It is appropriate that within a democratic society it must be possible to discuss and criticize court decisions but given the nature and purpose of the principle of the separation of powers, the Executive has to exercise caution in criticizing judicial decisions. Evidence suggests that the Ugandan Government has gone beyond legitimate criticism of court decisions and has intimidated individual members of the judiciary. For example, when the President announced that he will suspend judges[197] (although he does not have the constitutional power to do so) he sent a powerful message to civil society suggesting that he controls the courts. Independence of the Judiciary extends to the personal independence of judges. They have the right to decide cases before them according to the law, free from fear of personal criticism or reprisals of any kind, even in situations where they are obliged to render judgments in difficult and sensitive cases. The Executive sent a clear warning to other judges who might succeed **Judge Lugayizi** that their reputations and careers might be put in jeopardy too if they take decisions which run counter to the government's interests.

The rule of law requires that all branches of the State, including the Executive, strictly abide by the judgments and decisions of the Judiciary, even when they do not agree with them. By failing to comply with court orders the government has contributed to the erosion of the independent decision-making authority of the Judiciary, and has thus put in jeopardy the rule of law in Uganda.

Also considering the attempt to expel rebel members of parliament from the house by the national resistance movement central executive committee, it is evident that executive is exerting more pressure not only on members of parliament but also on the speaker. It follows therefore

[196] Samuel ouga, Museveni swears "parliament to be called over my dead body..."theoilrepublicwordpress.com Jan 2,2013

[197] H Kiirya,'judges,cite repeated threats' New vision ,8 Dec 2005.

that members of parliament should stand firm and speak their mind to defend constitution while performing their legislative roles.

The civil society should be ready to challenge through constitutional mean any organ of government where there is clear abuse power at the expense of other arms.

Concerning the problems associated with a state without separation of powers it is generally accepted by most authors and writers according to this research that in such governments where all powers are concentrated in the same hands arbitrary laws will be passed, those laws will be administered and enforced with less regard to rights and freedoms of the people and those who breach the law are judged corruptly in violation of the minimum standards required by rule of law. This state of affairs was experienced in Uganda during Amin's regime of decrees and generally before the 1995 constitution. But still the president's powers of appointment of judicial officers, members of the electoral commission, members of executive, governor bank of Uganda and other influential officer's government are to give the president a lot of powers. This is manifested by the recent agitation of electoral reforms and the need to reduce such powers to avoid tyranny which is a direct result of fusion of powers in the some hands.

According to this research, it has been found out that there is no absolute separation of powers and that concentration of powers in the same hands leads misuse of such powers. To do away with this misuse of powers, **the system of checks and balances** should be respected by all arms of government.

Consideration of necessary checks in each organ

a) Checks on the presidency:

Among the powerful checks on the presidency one may mention: rigid qualifications for presidential candidates, the determined duration in office, here the Ugandan parliament should do every thing possible to restore presidential term limits in the constitution, the necessity of parliamentary approval of the major presidential appointments and the impeachment.

b) Checks on parliament

These include: clear qualifications of candidates, strict enforcement of code of conduct, standing committees with effective powers, periodical general election and necessary presidential veto to oblige parliament to rethink its position.

d) Checks on the judiciary:

These include high qualification, strict code of conduct, independent judicial commission, legal aid to all and simplification of the entire administration of justice.

e) General checks:

All the above checks, however, can achieve little unless the general checks are in place. The general checks include:

i) Freedom of speech and press:

As long as a nation has these two basic freedoms there are sufficient checks on the entire system of government.

ii) Political education:

When the ordinary Ugandans get to know their rights ad duties, the demands of the common good and the true requirements of patriotism, a powerful check on all the three organs will have emerged; dictatorship is to a large extent a manifestation of political incapacity to change governments.

iii) Public opinion:

It is a powerful check on every organ of government. People must learn to speak and leaders must learn to listen. Public opinion can only emerge and develop where the freedom of association and assembly is respected and promoted.

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