

**THE DOCTRINE OF SEPARATION OF POWERS IN UGANDA:  
A MYTH OR A REALITY.**

**A FINAL YEAR RESEARCH PAPER SUBMITTED IN FOR PARTIAL  
FULFILLMENT OF THE REQUIREMENT FOR THE AWARD  
OF DEGREE OF BACHELOR OF LAWS AT  
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UNIVERSITY**

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**JUNE 2019**

## DECLARATION

I **SSENTONGO FALUKU**, hereby declare that this research is entirely my original work and has never been submitted to Kampala International University for the award of any degree.

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### APPROVAL

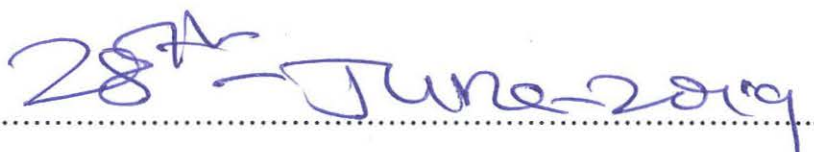
I, do hereby and confirm that I have supervised this research and that it is an original work of the student that satisfies the standard of the University in partial fulfillment of the requirement for the award of the degree of Bachelor of laws of Kampala International University.

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Date: .....



### **DEDICATION**

To both my lovely uncle MR. SSENDAWURA SULAIMAN and my aunt Mrs. KEMIGISHA ANISHA

I also dedicate this research to all orphans, whose lives both economically and socially depend on good Samaritans and Allah in Uganda in particular and this world at large.

## ACKNOWLEDGMENT

It gives me considerable pleasure to extend my heartfelt and sincere gratitude to Counsel BYEKITINISA FRANKLIN for having supervised me as the work progressed a contribution to which is solely attributed to him for success of this research paper.

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Finally I wish to absolve anyone who contributed and helped in this study of any responsibility for any fault or error that may lie therein. The responsibility for this is entirely on my shoulders.

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## ABSTRACT

There are other publications whose theme has been centered upon analyzing the doctrine of separation of powers in Uganda: a myth or a reality.

Materials on this subject are so scanty and while it's easy to come across several writings where the doctrine is mentioned. It often turns out that this is done sketchily and in passing. Numerous people have hitherto expressed the need to strengthen an observance of the doctrine in order to put in place good governance and its attendant benefits, but have not gone further as to recommend what measures ought to be put in place to achieve this end.

Yet still some people may look at the doctrine as an end in itself while nothing more than a mere means to an end.

Considering above, the task before me has not been easy. However, I have endeavored to do the best I can and came up with a commendable piece of work though it may not wholly be comprehensive.

This work has involved an analysis of the separation of power and whether it's a myth or a reality in Uganda post 1995 period to date.

As nothing much has been done by way of coming up with an analysis following the trend that I have took, I only hope that my maiden and humble contribution based on the doctrine of separation of power will be of some benefit not only to the students of constitutional law but also to those interested in constitutional governance with the law reform generally.



## CHAPTER ONE

### GENERAL INTRODUCTION

#### 1.1 Background

Administrative set ups at all levels in a civilized community is a necessity and the top of which is a government which is concerned with the general administration of that society. In order to carry out the duties and functions of government there must be a body of laws and rules which are the guiding factor and by which the people are to be governed. These rules or body of laws are to be found in a document which can be referred to as the supreme law or constitution<sup>1</sup> or in customs, conventions and recognized general principles and parliamentary acts.<sup>2</sup>

A constitution literally means the body of laws which are supreme within a given locality upon which all the other are based. Boling broke said of a constitution;-

“By constitution, we mean whenever we speak with propriety and exactness that assemblage of laws, institutions and customs derived from certain principles of reasons directed to certain fixed objects of public good that impress the general system according to which the community hath agreed to be governed.....we call this good government when.....the whole administration of public affair is wisely pursued and with strict conformity to principles and objects of the constitution”<sup>3</sup>

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

According to G. W. Kanyeihamba;

“.....a constitution of a state consists of basic fundamental laws which the inhabitants of a state consider to be essential for their government and wellbeing”<sup>4</sup>.

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<sup>1</sup> In countries with constitution

<sup>2</sup> In countries without constitutions like Britain

<sup>3</sup> Charles Harvard McLiwan “constitution-ancient and modern”(Cornwell university press, pg. 3)

<sup>4</sup> G.W Kanyeihamba “constitutional law and government in Uganda”, (East Africa literature bureau, Kampala 1975, pg. 3)

The constitution of Uganda contain a provision whose effect is that the constitution is the supreme law of the land and that it is from it that other laws derive their legitimacy and that another law that is in contravention is void to the extent of its inconsistency<sup>5</sup>. Having considered what the constitution is and what it basically contain it is important to also state that among the provisions, the most important ones are those that define, describe and delimit the functions of government. Because people place themselves in hands of governments by lawful means among others, by elections and consent thereby to be governed according to the law, it implies that the government carries out its functions and duties in line of the people's wishes and expectations. To this extent therefore, there must be in place a government whose duties and functions are clearly laid down such that ultimately, the people may be governed in such a way that may lead to their benefiting of democracy and good governance.

It has been contended worldwide by various scholars that good governance and democracy coupled with all its attendants benefits can only be realized if the powers and duties of government are divided into three separate and distinct organs and that concern is the cornerstone of the doctrine of separation of power- a doctrine with which this research is concerned.

The doctrine of separation of powers means that the powers of the organs of the government must be clearly described in the constitution and these powers must be exercised by the different persons as laid down in the constitution. The three organs of the state are: Executive, Legislature and Judiciary.

The doctrine of separation of powers advocates for the three different organs of government whose powers must be clearly spelled out and comprehensively streamlined. In most ideal form, it provides for three instances, is;

1. That one member of one organ should not be allowed to sit on another organ,
2. That one organ should not perform the duties of another organ, and
3. That one single organ should be in position to influence any of the remaining two

This is widely recognized set-up of the organs of government though their application and operation envisages a different understanding. To this extent it is agreed that there should be a legislature organ whose duty is to make laws of the governments; that there should be the executive branch which is concerned with the administration and formulation of policies and,

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<sup>5</sup> Article 2(1) and (2) of the constitution of Uganda 1995 as amended

thirdly that these should be a judiciary which should be concerned with the administration of justice.

The ratio decidendi behind the division of government into three distinct organs is intended to avoid the would be likely excesses of power and duties in a single organ that would ultimately result into the abuse of power to the detriment of the citizens, thus advocating for the separation of powers.

It was hoped that if an executive function was oppressive in a given way, then the aggrieved person would have recourse to the courts of law which would determine the validity of such an act according to the law. In a similar way, if the legislature were to enact a law which was unjust then the courts would be in a position to judge on the validity and legality of such a law basing it on the constitution.

In regard to what has been so far analyzed, it becomes an imperative that there are two ways in which the doctrine can be looked at. In the first place the doctrine can be looked at from the ideological aspect and on other way it would be looked at in the form of functional aspect. In that aspect you would be able to conclude that in the ideological and functional way it's a reality or a myth which is the purpose of this research.

In its strictest sense it can be seen that the doctrine advocates for comparatization in the sense that the three organs of government should be kept separately in their respective compartments. But with such set-ups one wonders whether there would be any check and remedial action if one organ, in the execution of its duties were to go beyond its boundaries or act arbitrarily.

It can't leave without saying that the doctrine from its ideological and functional aspect, it turns out that it's more of a myth than a reality. Looking at the practice in all over the world it can be seen that there are areas of overlap where one organ performs the functions of the other. An example is that concerning delegated legislation. Its fact that parliament is the most supreme legislature organ but for purposes of efficiency and expediency it has to delegate some of its powers to make laws to the executive. This is especially when dealing with specialized legislation which necessitates knowledge or expertise in the given sphere over which the laws are to be passed.

Specifically looking at the element of the functional aspect, an aspect which accords with reality and under which are to be found areas of overlap and which more importantly accords with

what is envisaged by the doctrine, namely providing a system of checks and balances. The system of checks and balance is the only meaningful way by which one can give the myth of the doctrine.

Indeed the function aspect of the doctrine as of necessity must be looked at as one projected towards evidencing the other round of the doctrine and as an aspect of ensuring the existence of good governance and the avoidance of arbitrariness. Though the 1995 constitution has gone a distance towards providing for the doctrine of separation of powers in a way of giving its reality, it's the same constitution that has provide what would be regarded as checks and balances which make the doctrine a myth. There is more that ought to be done and a revision and amendments of the constitution is necessary to put in place a framework through which everlasting advocacy the doctrine requires.

## **1.2 Statement of the research problem**

Separation of powers is one of the measures that are used to determine whether there exists rule of law in a given state. So it's from this understanding that Hon. Mr. Justice D. Z. Lubuva had this to say "in almost every domestic society which believes in the rule of law, the concept of the doctrine of separation of power is almost a household terminology"<sup>6</sup>. So, non-adherence to the rule of law means that each arm of government is not exercising its functions independent of each other as the constitution prescribes. Following Uganda's independence there emerged dictatorial regimes of Idi Amin Dada, Yusuf Lule Lutwa and Tito Okello, who ruled without any constitution but taking power in their hands and promulgating tyrannical laws.

Obote tried to rule according to the constitution of 1962 but later abrogated it and made the 1967 constitution which gave him head of the executive. During the period 1966 he failed to adhere to the doctrine of separation of powers and this can be seen when he influenced the judiciary to rule in favour of the executive as in the famous cases of Uganda. *Exparte Matovu*<sup>7</sup> and *Ibingira case*<sup>8</sup>.

The movement government has provided for the doctrine of separation under the 1995 constitution but also on several occasions, it has failed to adhere to the doctrine of separation

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<sup>6</sup> D.Z Lubuvu, J.A (Tanzania) "The Doctrine of Separation of Powers- Myth or Reality" A paper delivered at the EMJA conference Kampala, produced in Hakim. Journal of Magistrates and Judges Ass. March, 2007.

<sup>7</sup> (1966) E.A 305

<sup>8</sup> (1966)E.A 514

of power. The executive has influenced parliament in making laws in its favour for example passing of the referendum law 2000 and the movement act of 2000. The executive has also influenced the judiciary in its function to ensure that justice is done. The case of Ssemwogerere and Zackary Olum Vs Attorney General<sup>9</sup> and also Tinyefunza Vs Attorney General<sup>10</sup> witnesses this. The executive is aside to have influenced the judiciary to rely on the army regulation that were constitutional and later the court ruled in favour of the executive.

The idea of the doctrine of separation of powers in Uganda remains in theory or on papers but in practice the three powers

### **1.3 Aim/Purpose**

The general aim of the research is to determine whether the doctrine of separation is powers exists in Uganda and to determine to what extent it has been abused by the organs of government. The research is supposed to show what brings about the none observance to the doctrine and how it is mainly brought about.

Also to find out the consequences that may arise if the organs of government fail to adhere to the doctrine of separation of powers.

### **1.4 Objectives of the study.**

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

To show that a pure separation of powers is not a reality and neither is it desirable and this effect stress the need for inter-organ functioning with a view to provide system that will provide checks and balances which make the doctrine a myth.

To illustrate that the 1995 constitution does not adequately provide for the doctrine nor does it put in place a comprehensive system for checks and balances, hence the need to revisit some of its provisions and replace them with a view to provide a system that will enhance the realization of a free democratic society.

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<sup>9</sup> Constitutional petition No. 6 of 1999

<sup>10</sup> Constitutional petition No. 1 of 1997

### 1.5 Scope of the study.

The year 1962 Uganda attained independence from the whelm of the Britain and the 1962 constitution was promulgated providing the three arms of the government. The period of 1962-1967 can be described as the period of drama<sup>11</sup> in regard to the doctrine of separation of power where it witnessed the pull of forces between the executive and the legislature which later on resulted in the Kabaka crisis of 1966 which ushered in the 1966 constitution<sup>12</sup>. During the period of 1966 to 1970 under the operation of the 1966 constitution witnessed the realization of separation of powers coupled with the functional principle of checks and balance. The case of commissioner of prisons, Ex parte Matovu's case was witnessed.

During the period of 1971 to 1996 it can be described as the era off militarism. The ideology of separation of power during that was never the less observed and this dissertation won't be interested in that era.

During 1995 a new phenomenon in the history of Uganda was witnessed, the promulgation of the 1995 constitution. The following year 1996 witnessed the flustered direct presidential elections and execution of members of parliament not along party lines but on individuals' merit. Also the president appoints judges as part of the judiciary.

The year 1996 to 1997 witnessed the challenges of the presidential elections that were rigged. This was seen in the case of Rwanyarare Vs Attorney General.

The period of 1997 also witnessed the case of Tinyefunza Vs Attorney general. This showed the influence put on the judiciary by the executive to decide in its favour. The period 1998-2000 witnessed the debate on the referendum and final in 2000 it was passed as The Referendum Act which became law and here we witnessed the influence of the Executive on the Legislature which was later challenged in Ssemwogerere and Zachary Olum Vs Attorney General.

Also the Constitution amendment of 2000 showed the influence of the executive on the legislature. In addition, in the case of Masalu Musene and 3 ORS Vs AG Constitutional Petition,, Twinomugisha J. A on his part cited example where after passing a judgment, it is followed by threats to 'fix' or 'shot' the biased judges or to investigate corrupt judges, clearly these two provisions form the bedrock of the doctrine.

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<sup>11</sup> G.W Kanyeihamba, constitutional and political history of Uganda, pg. 65

<sup>12</sup> Commonly known as the pigeonhole constitution.

In the Uganda Law Society Vs AG constitution petition no. 18 of 2005, the doctrine was held to have been blatantly violated. In this heat, on November 19<sup>th</sup> 2005 there was an NRM national delegate's conference which returned Y.K Museveni as the unopposed party chairman and presidential candidate. He in an unprecedented speech threatened the judiciary by stating openly that he would not hesitate to fire judges who unjustly issue eviction orders<sup>13</sup>.

In 2006, a uniquely, dramatic and movie style like, the so called **the black Monday**, in the case of Rtd. Col. Dr Kizza Besigye & 21 others v Uganda<sup>14</sup>. After a bail was granted to the applicants, the court was surrounded by the **black mambas** from the army on the orders of the executive and the applicants were rearrested symbolizing the un independence of the judiciary a critical issue to be analyzed in the research.

Another most recent saga was that of 2017, referred to as the stupid order<sup>15</sup> under which deputy chief justice Steven Kavuma granted an interim order stopping parliament from debating, investigating or inquiring into the "Presidential handshake"<sup>16</sup>. It was an act of violating the embodiments of the principle of separation power.

The research is going to dwell on the extent to which the doctrine of separation of powers has not been adhered to by the executive influencing the other branches of government from 1962 to -date and see what challenges have taken place. The research will focus on the decided cases and written materials on this period.

### 1.6. Significance of the study

The research is significant because it will contribute to the existing knowledge on matters relating to constitutionalism

It's important in a way that the judiciary will know their limits in adjudicating matter of interests to the public

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

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<sup>13</sup> Daily Monitor 20<sup>TH</sup> November 2005

<sup>14</sup> Application number 6 of 2006

<sup>15</sup> New Vision, dated 12<sup>th</sup> march 2017

<sup>16</sup> Miscellaneous application No. 7 of 2017(arising from constitutional petition No.4 of 2017)

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

### **1.7 Hypothesis**

In its strictest sense, the doctrine of separation of powers is more of an ideal than reality.

Democracy, peace, order and good governance can be realized when the three organs of government work closely and co-operate other than working in isolation because the isolation of any can bring tyranny.

There exists areas of over-lap amongst various organs, powers and functions but such areas need to be clearly streamlined to avoid clashes.

The framers of the constitution of Uganda concerned themselves with simply defining the roles, duties and functions of various organs without taking into consideration the need to cater adequately for separation of power.

### **1.9 Methodology**

The materials will be gathered through the use of primary and secondary methods of research. This will be in form of interviews of prominent citizens and the main politicians and also a justice of court of appeal. The interview will be in form of questionnaires which will be toiled to the respondents. This is going to be used because it will generalize the view of representatives of the two organs of government, the legislature and the judiciary.

#### **Secondary sources**

These include among others, textbooks, articles, newspapers, statutes and case notes. These besides providing ample and useful materials also help to assess and evaluate the primary data collected from the research.

An analysis of the countries especially Britain and United states was made in order to portray how the doctrine of separation of powers works under the two different systems of parliamentary and presidential democracy. This was considered relevant because Uganda pursues a blend of two types of democracy. A study of these will be useful to unleash the necessary checks and balances and other extra-constitutional measures that function to provide for good governance.



### 1.10 Literature review

There is a lot of literature that has been written on the doctrine of separation of powers, however much attention must be put to some of the efforts in of these some writers.

G.W. Kanyeihamba in his book, “constitutional and political history of Uganda from 1894 to present”<sup>17</sup>. He analyses the doctrine of separation of power from a broad perspective which is a required spell in this research. He analyses that the doctrine means that the three organs of government that is, the legislature, the executive and the judiciary should be kept in three separate compartments. He says that the doctrine advocates that no organ should perform or be permitted to hold post in in one or the other two organs, No organ should perform the duties of another organ and no single organs should be in position to influence the other too. Besides, some arrangements he talks about. This has been overtaken by time. His analysis shall be required to evidence the reality of the doctrine and I will be able to override his idea in regard to the myth of it.

J.B Kakooza in his paper, “why we need constitution”, narrates how the problem of Uganda stems right from the period prior to independence. He recognized the need to separation powers of government but does not define what measures ought to be taken. He gives scanty information about Cheques and balances as a solution to check against abuse of office and corruption so this research is concerned about providing those checks and balances he did not point out in order to achieve effective leadership.

S.D Smith and R. Brazier in their book; “constitutional and administration law”<sup>18</sup> discusses both the common system of governance that is parliamentary and presidential system of government. They describe the doctrine in it’s entirely. They trace its origin and discuss it how effectively it can be applied in the system of governance. So this may be useful in this research as it shall held to understand the origin of the doctrine however on the other side of the read, if find it of no much importance in this research.

Obola Ochola, in his book “Uganda constitutional law since independence” talks about the constitutional history of Uganda since independence<sup>19</sup>. He shows the short coming in law and inadequacy regarding the provision for the doctrine under the 1967 constitution. He discusses in detail how the executive organ may function to abuse te doctrine of separation but does not

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<sup>17</sup> 2<sup>nd</sup> Edition 2010, published by lawAfrica pg 265

<sup>18</sup> Sixth Edition, published by Penguin Book Law at pg 18

<sup>19</sup> From Communal Phralism to Centralized and Dynamic Government, Makerere University Kampala pg 64

ably lay down what ought to be done not to provide avenues through which the doctrine ought to be strengthened. This is going to be promised for in the research to cover such loopholes

F.W Jjuko in his paper "Separation of powers; a myth or reality" ably gives information regarding the aspect of the doctrine. He also takes it from the period of capitalist. Liberal democrats and show how it partly emerged out of their desire to gain greater independence and guarantee of liberties. He does not adequately discuss the doctrine and how it ought to be preserved not of the attendant necessary to buttress the cheques and balances which are inevitable required to achieve the desire effect though this is important to enable us to understand the historical origin of the doctrine. It is not necessary in the understanding the doctrine ion the present case which the research is going to find out.

A. Tumwebaze in "salient concepts in administrative law in Uganda"<sup>20</sup>, briefly, he analyses the concept of separation of power in the perspective of its nature and the effect of its non-observance. In the same he highlights more about the origin of the concept and the concept of checks and balance which bring the functional aspect of it thus making it a myth.

Hogan and Powell in their book; "the government of great Britain" the book is centered on the doctrine of separation of powers and its observance in England. It pays slip services to the presidential system of governance since its main subject follows the parliamentary system of governance. Yet it still does not talk about the doctrine with respect of the third world countries which appear to be suffering from a malady of disregard to democratic principles. it does not for example discuss the presidential as united states parliamentary system of governments as the commonwealth constitutions are based on west minister model. Though this is relevant to under other system of government as that of united kingdom which is parliamentary in nature, Ugandan situation is a mixture of the two systems of two types governments and this will be shown in the research how the doctrine of separation of powers can be achieved in such a system f governance.

C.H McLiwan; "constitutionalism and modern"<sup>21</sup>, this book outlines what good government is. He mentions and discusses the need for separation of powers and the need to provide for cheques and balances. He discusses the presidential and parliamentary system of governance

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<sup>20</sup> Sept 2008 at page 57

<sup>21</sup> Charles Howard McIlwain, Eaton professor of science of government in Harvard university, published by the lawbook exchange Ltd pg 278

exhaustively however like all works covered above no attempt is made to cater for instance where a country combines the two types of democracy as the case in the Uganda today which the research is going to highlight.

P.A Oluyede; "Administrative law in East Africa"<sup>22</sup> does not only advocate for the doctrine but goes further to how the limits within which a need for its observance must be concerned in order to accord with reality and practical needs. However he discusses the constitutions of easy African countries and says they must be viewed along that line in order to give practice to the doctrine of separation of powers but does not focus on Uganda in particular but generalize, so this research is going to cover the doctrines in Uganda in period post 1995 period which is not done by Olunyede. Many sources than mentioned above here have been used as seen in the proceeding chapters.

### **1.11 Chapterilization**

#### **CHAPTER ONE**

This is going to include the introduction statement of the problem, aim (purpose, scope, significance, hypothesis, methodology and literature review).

#### **CHAPTER TWO**

This will include the definition and historical background of the doctrine of separation of powers. It will include looking at the doctrine in colonial Uganda, looking at the doctrine during the 1962-1966 periods, 1967 constitution in regard to that period. Further the doctrine will include the Militarism period of 1971-1979 and finally the NRM government.

#### **CHAPTER THREE**

The doctrine of separation of powers under the 1995 Constitution of the Republic of Uganda

#### **CHAPTER FOUR**

The non-adherence to the doctrine of separation of powers by the organs of the government i.e. the executive vis-à-vis legislature, the executive vis-à-vis judiciary and judiciary vis-à-vis legislature.

#### **CHAPTER FIVE**

This will include the solutions, recommendations that it will be found persuading and desirable to end it with the conclusion that will re-asses the importance of the doctrine of separation of powers and why we need to adhere to it.

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<sup>22</sup> Published by East African Literature Bureau, 1973 pg 113

## CHAPTER TWO

### 2.1 DEFINITION 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.<sup>23</sup>

The general idea of the doctrine of separation of powers goes back into history and it all stems from the Baron de Montesquieu an 18<sup>th</sup> century French philosopher, who built on the works of Aristotle and John Locke, divided the powers and functions of government into legislative, the executive and judicial power/functions. It is now accepted that these three branches of government encompass three distinct aspects.<sup>24</sup>

However 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"*<sup>25</sup>

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."*<sup>26</sup>

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<sup>23</sup> Granner; Constitution and administrative laws, penguin in S.A. DE Smith.

<sup>24</sup> Montesquieu C, De l' esprit des Lois (1748), 1989 Cambridge: CUP

<sup>25</sup> Blackstone; Administrative Law Treaties in Kenneth Calp Davis, 1<sup>st</sup> edition pg. 02,1775

<sup>26</sup> Packer; Administrative Law Treaties in Kenneth Culp Davis 1<sup>st</sup> edition pg 449

The doctrine of separation of powers is so closely associated with the names of two political philosophers Locke an Englishman and Montesquieu a Frenchman, Locke found his observation in 17<sup>th</sup> Century England. His concept of separation of powers influenced Montesquieu but was slightly different as a subject of litigation.

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.<sup>27</sup>

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 at 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.<sup>28</sup>

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

Montesquieu traveled to England and he was struck by the rights and freedoms of individuals in that country he was so impressed that his experiences there formed the subjects of the book he wrote later.<sup>29</sup>

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 to administer ruthlessly without regard to the right of the individual and judge corruptly and opposition to them. Thus, in order to preserve political and social liberty, it is essential for the constitution to ensure that the Executive, Legislature and Judiciary were independent of each other.<sup>30</sup>

Montesquieu advocates that the executive aspect of government he entrusted to the Executive; the legislative power entrusted to the legislature organ and the Judiciary power to be entrusted to the judiciary organ each was to work on its own spheres without encroaching

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<sup>27</sup> G.W Kanyeihamba: Constitutional Law and Governance in Uganda pg 146-147 E.A Uganda.

<sup>28</sup> Ibid 4 pg 146-147

<sup>29</sup> L' Esprit des Lois

<sup>30</sup> Montesquieu: Spirit of the law; Book XI Hofue Publishing Co. 1956 pg 152-156

the powers of the others.<sup>31</sup> However Montesquieu mistaken about the British constitution neither in theory nor in practice does it observe the theoretical 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 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.<sup>32</sup>

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 a member of the Executive. There are other aspects of British Constitution which emphasizes the fusion of power rather than Separation. The Government is 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.<sup>33</sup>

With regard to the first concept of the doctrine the head of state who is Queen in the 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 read 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 Ministers formed from the legislature. In other words to be appointed a Minister in British government one must be a member of House of Parliament.<sup>34</sup>

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 Legislature branch and the Executive which was the cabinet was a portion of the legislature branch. In this case parliament was effectively checked either by the judiciary or by the

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<sup>31</sup> Ibid pg 156

<sup>32</sup> Ibid pg 4

<sup>33</sup> Ibid pg 4 & Stanley De Smith and Rodney Brazier, Constitutional and Administrative Law, pg 21 1989

<sup>34</sup> By recent convention for practical reason a member of house of lord cannot be a prime minister, lord home (later Sir Douglas homes) had to renounce his peerage after resignation of Macmillan

executive. However no government in the world history has been more completely free from tyranny which is supposed to follow such mixing of powers.<sup>35</sup>

One distinguished American Judge commented that, the concept of tyranny of powers, may be achieved only through separating appropriately the several powers of government in other words the American judges meant separation of powers was the only solution to avoid tranny however according to evidence it is a myth.<sup>36</sup>

James Wilson commented on how the principle of separation of powers should work, he 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,<sup>37</sup> 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 to 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 powers shall be kept separate it goes further to provide separately in each of the three branches. All the legislative powers congress Article 1 (1) of the American Constitution provided that the executive power shall be vested in the president whereas Article 11(1) provided judicial power shall be vested in one Supreme Court and inferior courts.

Another writer also described how the three powers should be separated. In his book stated that, in the strictest terms, the doctrine of separation of powers advocate that the three are, government that is the Legislature, Executive and the Judiciary should be kept.

**(a) Separate compartments; 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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<sup>35</sup> A Reign of law

<sup>36</sup> James Wilson ' administrative law treaties' in Kenneth Culp Davis 1<sup>st</sup> edition pg 2

<sup>37</sup> Ibid

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 Mutandis*.

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 legislative and viz-a-viz however one observation may be made straight away that there is no single constitution that embraces the doctrine in its entirety forms, moreover experience has shown that an application of the doctrine in absolute terms is impracticable and therefore undesirable.<sup>38</sup>

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.<sup>39</sup> It's from that understanding that envisages the myth of the doctrine.

## **2.2 The period before independence**

During this period separation of powers never existed, 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, Karamojong, Bakiga, Iteso, Bagisu, Sebei and the various Bantu. In these societies, power was wielded by clan leaders. Inter-clan feuds were common among kingdom societies. Land was owned communally under clan leadership.<sup>40</sup> From that we can say that there was nothing like separation of powers but every

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<sup>38</sup> Mathew Gandal and chester E. Finnj; Teaching Democracy pg 2

<sup>39</sup> A book on "Why Uganda still needs the movement system" pg 13.

<sup>40</sup> Ibid



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 chief clan leaders. The kingdom had developed, into that had at times fought each other for and expansion of territory. 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 case 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 19<sup>th</sup> 1894.<sup>41</sup> The independence constitution provided for the president as head of state and prime minister as head of government. But this constitutional arrangement 'hat was found on the West Minister model has the tendency of making the executive passes a domineering influence in parliament. It has the end result of producing a strong government which perhaps would have been well within the interest of those who are in government. It is so strong that a consensus has emerged that is more of our elected dictatorship.<sup>42</sup> In 1889 African Order-in-Council was promulgated under Foreign Jurisdiction Act<sup>43</sup> 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*

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<sup>41</sup> For text of the Ankole treat sec. H.F.Morris Opil 47-48

<sup>42</sup> Order in Council, 1902

<sup>43</sup> G.W. Keeron: " the British Common Wealth; The Development of its Laws and Constitution"

*by virtue and in exercise of the powers conferred on His Majesty by the Foreign, Jurisdiction Act.*"<sup>44</sup>

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 free 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<sup>45</sup>

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 justice and morality.

The order next declared that there should be a court of record styled, it is Majesty's High Court of Uganda with full jurisdiction, civil and criminal and all persons and 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.<sup>46</sup>

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 Council Ordinance or rules or regulations made there under courts also enjoyed to decide cases according to substantial justice without endure regard to technicalities.<sup>47</sup>

From the above we can see that the commissioner under the order in council the Judiciary provided for repeatedly and was given power to operate but the powers of the Executive and of the legislature were still vested in the Commission hence an abuse of the doctrine of separation of powers remained the situation until Uganda got its independence.

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<sup>44</sup> 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 11<sup>th</sup> 1902

<sup>45</sup> *ibid*

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<sup>47</sup> A report on Uganda constitutional reference presented to parliament by secretary for state for the colonies by command of Her Majesty, October 1961.

### **2.3 The doctrine of separation of powers during 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<sup>48</sup>. 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 classed, non-participator, debate.<sup>49</sup>

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 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 beyond 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 has the tendency of making the Executive possess a domineering influence in parliament It has the end result of producing a strong government which perhaps would have been well within the interest of those who are in governance, It is so strong that a consensus has emerged that is more of our elected dictatorship.

The 1962: Constitution also provided for the Legislature Organ 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 but what we are not overall parliament had the supreme powers of making law. 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.

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<sup>48</sup> Tindifa S.B. "constitutional rights project" report FHRI 1994.

<sup>49</sup> Article 91(1)(2) constitution 1962

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 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.<sup>50</sup> From the above, we can see the Executive in controlling with Judiciary. A judge of a High Court could be removed from office by the president acting on the advice of the prime minister who shall appoint a tribunal which shall recommend to the president whether the judge ought to be removed<sup>51</sup>.

The 1962 Constitution was abrogated. It seems the struggle for dominance between Mutesa 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 “Sir. Edward Mutesa 1” and the executive prime minister “Dr.Milton Obote” was vague, and fraught with potential for conflict this is what happened in 1966.<sup>52</sup> Following the growing rift between the President (Sir Edward Mutesa) and the Prime Minister (Milton Obote) and the rupture of alliance between Kabaka Yekka (KY) and Uganda People’s Congress (UPC) overthrew the 1962 Constitution and abolished the kingdom. Troops of the Uganda Army headed by Amin in May 1966 surrounded the king’s palace and Mutesa was bounded into exile<sup>53</sup>.

The 1966 Constitution was constructed in the midst 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

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<sup>50</sup> Jokolo onyango: taming the executive; the history of and challenges to Uganda constitutional making

<sup>51</sup> ibid

<sup>52</sup> Ibid

<sup>53</sup> G.W Kanyeihamba, Constitutional and Political History of Uganda, Pg 98

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.<sup>54</sup> 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 interim measure designed to pave the way for the introduction of a new constitution.<sup>55</sup> 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 leads the making of arbitrary laws that were favouring the executive of that time hence abuse of the doctrine.

This supervisory role was imposed upon a situation in which both the executive power and the power exercised by the lower administration leaders had previously not been the subject of sanction. This set the stage for intense contradictions; contradictions that were sought to be resolved by extra-constitutionally power and eventually led to overthrow of the independence constitution of 1962.

These contradictions are clearly reflected both in number and in kind of constitutional cases that the courts decided between the periods 1962-1966 of the four reported cases in the selected reports one the period three of these were Uganda and all these three arose from the 1966 crisis or its antecedents.<sup>56</sup>

It is important to dwell on two of them because they exemplify a significant transition in the mode of judicial power in existence of the independence era.

Grace Ibingira's case<sup>57</sup> 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

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<sup>54</sup> Ibid

<sup>55</sup> The cases were: Attorney General of Uganda v kabaka's government(1965),Ibingira's and another v Uganda (1966) E.A both concerning the 1966 crisis.

<sup>56</sup> Chapter 46 1961 laws of Uganda.

<sup>57</sup> (1966)EA 305(No.1)

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” 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<sup>58</sup>.

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 1962 constitution as being the contravention of the right of freedom of movement. They also brought a writ of habeas corpus; seeking their realese. The Uganda high court upheld the ordinance and dismissed the application. The applicant appealed to the court of Appeal spray, J.A. stated

*“, 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 .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 however necessary to look at the appropriate section of the constitution which is section 28 we cannot 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”.*<sup>59</sup>

Spray concluded by stating that “the Deportation Ordinance had been abrogated by coming into of the 1962 Constitution and therefore ... no lawful order of deportation can he 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.

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<sup>58</sup> The law was the deportation (validation) Act No. 14 of 1966.

<sup>59</sup> (1966) E.A 445

To complete the circle, parliament passed legislation in one day indemnifying the government against the action it had taken against detainees under the Deputation Ordinance 38 on subsequent. Appeal the Court of Appeal against the detainees orders the court reframed from order the 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.<sup>60</sup> The court's response reflected the on adage once bitten twice shy!<sup>61</sup>

More important the Ibingira's case<sup>62</sup> represented the high point in the devise of the independence of the Judiciary especially in matters relating to fundamental rights and freedoms. This was abundantly reflected in subsequent cases in which issues emerged particularly in *R. E. ES Lumu & 4 others*<sup>63</sup> and in **Uganda -Vs- Commissioner of Prisons, Exparte Matovu**<sup>64</sup>. 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 manifested 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 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 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

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<sup>60</sup> Katende and Kanyeihamba(1973) at pg 52 state that attorney general (Geoffrey 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 option of administrative detention.

<sup>61</sup> High court miscellaneous application No 31-35

<sup>62</sup> Ibid

<sup>63</sup> (1966) E.A 514

<sup>64</sup> Op.cit pg 540

origins from the constitution aid therefore the constitution can't derive the origins from them because there can be no state without a constitution.<sup>65</sup>

It is obvious that the reluctance of the court to deal with the substance of the case was only in part related to legal questions that were involved. They were further more responding to the objective reality of their existence within the particular political conditions prevailing at the time. To rule that the constitution was invalid would also have meant that the course of power and legitimacy upon which the court itself was constituted, was indelibly tainted with illegality.

The 1966 constitution specifically produces for the powers of government separated in different organs. It provides for the Legislature, the Executive and the Judiciary but as discussed above. The Executive organ has influenced the other two organs that is the Legislature and the Judiciary and these organs instead of being independent have operated in light of the executive demands hence abuse of the doctrine of separation of powers.

## **2.5 The doctrine during 1967 constitutional period**

During this period, Obote the then president emerged in his true colours. He lost no time in tightening his hold in the country and preceded to enhance the powers of the center at the expense of the kingdom particularly Buganda.<sup>66</sup>

Gingyera-Pinywa has called the spirit of the 1966 Constitution one of anger and unitarism as opposed to the spirit of "compromise, tolerance and pluralism," which infused the 1962 constitution we suggest that the element of anger was important factor that made possible boldness Obote showed in the speech of the emergency meeting of parliament and in the actual provision especially as they affected Buganda.<sup>67</sup>

After the promulgation of the 1967 Constitution republicanism was introduced with a very powerful executive which has been distributed as "an imperial presidency with a combination of envy and greedy."<sup>68</sup> The amazing power in one man made separation of powers illusory. In fact it provided what has been expressed by others that separation of power does not exist<sup>69</sup>. This undermined the political participation and it has been pointed out that the moment

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<sup>65</sup> (1941)3 ALLER 338

<sup>66</sup> Phrase Mutibwa "Uganda since independence" pg 30

<sup>67</sup> Agg Ginyera- Pinywa: Apollo Milton Obote and his times, New York November 1978 pg 93

<sup>68</sup> Oloka Onyango: "Taming the Presidency" conference paper Misr-Huripek Makerere University, 1994

<sup>69</sup> Tindifa S.B Constitutional Rights Report supra



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.’

In the case of Stanley Oonyu .Vs- Attorney General <sup>70</sup> Justice Ntabgotha conducted how helpless the judiciary is viz-a-viz the executive. He castigated government officials for their behavior in ignoring court orders which reflect badly on the courts and the law courts apply.

The 1967 Constitution provided for the Legislature under Article 63 which stated that subject to the provision of their constitution parliament shall have power to make laws for peace, order and good governance with respect to any matter. But however also the president under this constitution was given powers to make law, under Article 64(1) stated whenever- at any time, same when the Assembly is sitting the cabinet advises the president that exceptional circumstances exist which render it necessary for him to make immediate action he may promulgate such ordinance as the circumstances appear to him to require from the above; This shows that under exceptional circumstances the president could do the work of the Legislature.

Parliament has been very much abused. It has been used to enact laws that can never be compatible with democracy. The 1967 Public Order and Security Act is a case in point power to detain a person without trial if in the opinion of the president, such a person was a threat to public security. The significance of this piece of Legislature is its expression of lack of confidence in the Judiciary it gives the president the powers to deal with the opponents extra judicial as if a state of emergency existed to require such stringent measures.

The 1967 Constitution, provided for an independent Judiciary but again as seen from above, this independence remained on paper but in practice it was a myth. Always the judiciary was influenced by the Executive is in the case of R. -Vs- Ibrahim <sup>71</sup>

Court made a very dangerous decision when a detention order signed by a minister was in question the judge pointed out that the minister has the interest of the state in mind and he is assumed to have acted judicially in arriving at a conclusion. One interpretation would be that the judge was in effect accepting interference in judicial function by the executive as legitimate.

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<sup>70</sup> Misc case no. 113 of 1988 (unreported).

<sup>71</sup> 1970 E.A 162.

## 2.6 Doctrine during the period 1971-1979

Obote sabotaged those who wanted 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, 1971<sup>72</sup>. Amin immediately suspended the 1967 Constitution provisions of chapter four and five which dealt with Executive and Parliament. Legal Notice I of 1971 gave 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<sup>73</sup>. By 1973 it had become clear that Uganda was under the rule of soldiers who cared little about civilians.<sup>74</sup>

The era of military rule under Amin was era 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 Janani Luwum. The Chief Justice Benedicto Kiwanuka, the Vice Chancellor of Makerere University. Frank Kalimuzo, Anub's own wife Kay and countless other Ugandans were murdered in cold blood.<sup>75</sup> During this period again we noted that the Judiciary was fussed with the executive in the case of DIFASI VS. AG.

In this case the plaintiff claimed damages for wrongful arrest and false imprisonment on charges of murder. Wambuzi J. held; I am inclined to view that the false imprisonment is a continuing injury that is limiting the freedom of an 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 imprisonment will in 12 months of the filing the Suit was false. I accordingly hold so much of the alleged imprisonment is not statute bared<sup>76</sup> . .

From this case we note that the executive made the courts to refrain from inquiry into validity of a claim involving the abuse of power. As a result of Amin's chaotic policies the people

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<sup>72</sup> Why Uganda needs a movement system pg. 37

<sup>73</sup> Ibid 52

<sup>74</sup> Joseph Oloka Onyango: Struggle for Democracy in E.A the period between 1971-1980 pg 28

<sup>75</sup> Ibid pg 52

<sup>76</sup> 1972 E.A pg 355

hated him and a combination force of Ugandan fighters together with the Tanzanian People's Defense Forces (TPDF) finally defeated Amin in April 1979.<sup>77</sup>

Prior to the overthrow of Amin, President Julius Nyerere had called a conference at Moshi, Tanzania of the various political groups that were opposed to Amin. The Moshi conference formed the Uganda National Liberation Front (UNLF) and chose Yusuf Lule 'is P:tsident of Uganda.<sup>78</sup>

The conference also created National Consultative Council (NCC) which to act as the legislature under the leadership of Edward Rugumayo. Each of the political group was given seat in NCC

From the above we note that the executive was headed by Lule and the legislative headed by Rugumayo. The judiciary was not so much provided for but however this period lasted for 68days as President Lule was succeeded by Godfrey Binaisa as president. The UNLF was as umbrella organization which brought Ugandans of different political opinions together.

## **2.7 The period 1980-1985**

Later as a result of political manipulation on the part of the UPC and the DP leaders, the UNLF umbrella was torn, with both UPC and DP insisting on fictional, sectarian elections in 1980<sup>79</sup>. Although some of the leadership pressed for elections under UNLF and NCC had passed a resolution approving elections under the front, this view was suppressed. Consequently, 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 10, 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."*

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<sup>77</sup> Ibid 52

<sup>78</sup> Ibid 52

<sup>79</sup> Ibid 52

So the UPC was declared winners of the elections and Obote became the President of Uganda the second time and once again suffering arose under his dictatorship. Extra judicial killings were the order of the day as the army took the law in its hands.<sup>80</sup> This is a clear abuse of the doctrine of separation of powers were not clearly defined the Legislature was silent and the Judiciary, the executive headed by Obote.

There was no protection of property or even murdered members of parliament including Seaano Sebawawo, MP from Mubende and Bamutwaki, MP from Toro. Palaces like Room 211 at the Nile Hotel, Katikamu, Kireka and any military barracks were killing centres. Kaaya's farm near River Lugogo in Luwero became a dumping ground for dead bodies. After the defeat of the dictatorship, some of the human remains arising Out of the killings were buried in mass graves in Luwero Triangle. Although about 70,000 fellows were buried.

## **2.8 The doctrine during 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 if to be worse than the group it displaced. Please, do not count us in that group. The people of the National Resistance movement are clear headed movement with objectives and good membership....."*<sup>81</sup>

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.

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<sup>80</sup> Ibid 52

<sup>81</sup> Ibid 52

The notion of Constitution took a back seat to the over-arching necessity to attain and retain power-whatever the cost. Uganda has the experience virtually every form of government imaginable to modern human kind-multiparty democracy. One party dictatorship military fascism and the current movement government characterized as “No Party” 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.<sup>82</sup>

Looking at the main feature of this regime a further separation of powers can be seen from the legal notice number 1 of 86, which changed parliament to be a National Resistance Council and which prescribed composition of parliament to consist of chairman of the National Resistance Movement, the Vice Chairman of the National Resistance Council, a representative of the NRM (historical members). It also provided for the national political commission the administrative secretary of the NRM and Director of Legal Affairs of NRM.<sup>83</sup>

The legislative powers were vested in the National Resistance Council (NRC) by section 1 of Legal Notice 1 of 86 amendment decree No. 1 of 87 and such powers are to be exercised through passing 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 of 86 Amendment Statute 1 of 89 Section 6 established a standing committee of national resistance council to be known as National Executive Committee whose function is to set in section 6(1), which shall be to discuss and determine the NRM to vote candidates to presidential aid and oversee the general performance of government.<sup>84</sup> This gives 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 but it was to regulate the exercise of power conferred upon the president to determine operational use of the armed forces.

However despite the powers that have been vested in the legislature the party structures in Uganda also undermined the effectiveness of the Legislature in a sense that a restrain on the executive power, the president and members of parliament belong to the same party and as a

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<sup>82</sup> John Jean Baray & Oloka Onyango: Popular Justice and Resistance Committee Courts in Uganda, pg 407

<sup>83</sup> Legal notice No. 1 of 1986

<sup>84</sup> Legal notice No. 1 of 1986

result of this most members of parliament have refrained from disagreement with the government hence this has made it impossible for total separation of power with the help of cheques and balances.

It has been observed that since independence, the Executive always retained broad legislative authority which has been conferred by enabling legislation which grants' relevant ministers broad authority to adopt the detailed rules for legislative proposes thus the executive has always been free to determine policy, adopt implement measures and use whatever coercion mean to executive those policies.

It is also noted that although constitutions since independence have always maintained the formal independence of the Judiciary the judiciary has always come under frequent vicious attacks from displeased different presidents.

Article 128(2) is to the effect that no person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions and under Article 128(3) all organs and agencies of the State shall accord to the courts such assistance as may be required to ensure the effectiveness of the courts. In Masalu Musene<sup>85</sup>, Mpagi Bahigeine JA noted that the maintenance of judicial independence as enshrined in article 128 depends upon public support for the judicial process to run effectively and independently. It is the public respect, for that principle that sustains it. By public is meant the government to reinforce and facilitate the effectiveness of the independence.

Twino inugisha JA on his part reiterated that for the Judiciary to be effective. It needs assistance from all but especially from the Executive and Legislature. He thus regretted the so called chastisement of the Judiciary apparently for no other reason other than doing a job vested in it by the Constitution. He cited examples where after passing a judgment, it is followed by threats to "fix" or "sort out" the biased judges or to investigate corrupt judges. Clearly thee two provisions form the bedrock of the doctrine.

However, the assistance must not only be necessary, but it must not be such that it violates the independence of the Judiciary. In *The Uganda Law Society V Ag*<sup>86</sup>, the doctrine was held to' have been blatantly violated. However because of certain acts of the security personnel at

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<sup>85</sup> Constitutional petition No. 5 of 2004

<sup>86</sup> constitutional petition no. 18 of 2005

the High Court premises, the bail papers could not be entered into some of the court offices and interpreted the Court's normal duties.

The Judicial Service Commission has been seen as an impartial body which allows for the appointment of judges based on merit rather than political inclination. But not everybody has shared this view unanimously. There have been questions raised about certain appointments or the timing of the appointment with allegations of political patronage. This was particularly the case with the appointment of Professor Kanyeihamba as Justice of the Supreme Court just shortly before the hearing of the appeal by the government in the case of Attorney General v Maj. Gen Tinyefunza<sup>87</sup> Godfrey Lule, Counsel for Gen Tinyefunza made the appeal to the Supreme Court for Justice Kanyeihamba to disqualify himself from hearing the appeal on grounds of likelihood of bias since prior to his appointment he had been Presidential Advisor. Kanyeihamba refused to disqualify himself. Similarly, the appointment of Bart Katureebe a former Attorney General to the Supreme Court Coram was attended to with similar attacks.

The aftermath of this clear abuse of the independence of the judiciary forced the Principal Judge Justice Ogoola James to write a poem about the events at the High Court which he described as 'the most naked and grotesque violation of the twin doctrines of the rule of law and the independence of the judiciary'. He equated the act to the heinous days of Idi Amin when Chief Justice Ben Kiwanuka was abducted from the premises of court never to be seen alive again.

Shortly thereafter, the Uganda Law Society also issued a statement criticizing the acts. The Uganda Judicial Officers Association also followed suit. Members of the Uganda Law Society fully robed later protested in front of the High Court protesting the deterioration of the rule of law and the immediate resignation of the Attorney General, Khiddu Makubuya. They also issued a statement to the effect that they will no longer recognize the Attorney General. The East African Law Society also issued a statement challenging the said violations. Similarly, the International Commission of Jurists showed its own fears and immediately sent a Commissioner to oversee the Besigye trial.

As it these events were not enough to show that the independence of the judiciary had already been violated in November 18<sup>th</sup> 2005 Lugayizi J. withdrew from the treason case. he did not

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<sup>87</sup> Constitutional Appeal No. 1 of 1997

give any reasons for doing so but many believe that it was intimidation from the state. The Principal Judge then took over the Besigye hearing.

In this heat, on November 19<sup>th</sup>, 2005 there was an NRM National Delegates conference which returned Y.K. Museveni as the unopposed party chairman and presidential candidate. He in an unprecedented speech threatened the judiciary by stating openly that he would hesitate to fire judges who unjustly issue eviction orders. He said "The government will not tolerate the eviction of tenants caused by the rulings of corrupt judges and magistrates. I will suspend any judicial officer and constitute a judicial commission of inquiry into his or her activities. if there is any evidence of any violation of the Land Act.

In this case therefore one is forced to conclude that Judiciary independence as an avenue of redress against government and removal of judges compromised by the executive power of appointment and removal of judges in practice the executive has abrogated the exclusive power of appointment and removal thus jeopardizing the independence of the judiciary indeed the removal of power has been used as a stick to dismiss individual judges who dared challenge the government.



## CHAPTER THREE

### THE DOCTRINE OF SEPARATION OF POWERS UNDER THE 1995 CONSTITUTION

The 1995 Constitution establishes the arms of government as the Executive<sup>88</sup>, Judiciary<sup>89</sup> and the legislature<sup>90</sup>. This chapter is going to rely on the three arms of government in 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 a need to have mechanism to check it.<sup>91</sup> The Commission further concluded that the executive has tended to be very powerful and has either over ridden or misused the other organs<sup>92</sup> 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<sup>93</sup> who takes precedence over all people in Ugandan.<sup>94</sup> This has elevated the position of the executive vis-a-vis 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<sup>95</sup> and the Public Service Commission<sup>96</sup> respectively. These bodies all advise the president on appointment of public offices or not but if the president has already decided on who to appoint they have with chances of rejecting the appointment because on many cases the president had selected one name of the person he wants and the people to approve the appointment that is the parliament cannot reject but to approve that appointment as it was in

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<sup>88</sup> Chapter seven of the 1995 constitution

<sup>89</sup> Chapter eight of the 1995 constitution

<sup>90</sup> Chapter six of the 1995 constitution

<sup>91</sup> Para 15, 57 of the report of Uganda constitutional commission

<sup>92</sup> *ibid*

<sup>93</sup> Article 98 and 99 respectively of the 1995 Constitution of Uganda

<sup>94</sup> Chapter 7 of the Draft constitution

<sup>95</sup> Article 147 of the Constitution of the Republic of Uganda 1995

<sup>96</sup> Article 166 of the Constitution of the Republic of Uganda 1995

case of appointing the current Governor Bank of Uganda, Tumusiime Mutebile<sup>97</sup> and also appointment of the Deputy Chief justice Kikonyogo.<sup>98</sup>

The President is the Commander in Chief<sup>99</sup> and has the powers to recruit, promote and dismiss officers. This power of appointment makes the President an over lord. This has been the case in many problems.

To counter this domineering position of the presidency especially over the appointment and dismissal a consultative mechanism was put in place in the name of the National Council of the State.<sup>100</sup> In addition to approving appointments and dismissals, the President has to consult the National Council of the State (NCS) 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(l) (2) would eliminate the influence of the President on appointment and dismissal but this is just a theoretical possibility. Domineering of the presidency especially in Uganda, has given rise to culture of patronage and sycophancy. Many presidents in this country, in attempt to keep power, have bribed and bought people for support.

Another aspect that guarantees the presidential power is his or her immunity to criminal and civil proceedings in any court of law<sup>101</sup> against the background that presidents in this country have been engaged in criminal activities, the immunity in the constitution waives the most

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<sup>97</sup> Monitor Friday January 05/2000 pg 2

<sup>98</sup> New vision December 12<sup>th</sup>, 2000 pg 2

<sup>99</sup> Article 98(1) of 1995 constitution

<sup>100</sup> S B Tindifa paper on "constitutionalism and Development in Uganda" pg 135

<sup>101</sup> Article 98(5)1995 constitution

viable mechanism to check the powers of the Executive. 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<sup>102</sup>.

There is provision for impeachment of president and cabinet members, parliamentarians, etc. this is an incredible constitutional provision. However the process of impeaching the president is very long. The power to remove the president is a preserver of parliamentarians<sup>103</sup>. Although the parliament represents the people the constitution recognizes that the people still retain the residual sovereign power<sup>104</sup>.

Therefore the procedure for impeachment should be made accessible to everybody, the requirement for a third of members of parliament approve the petition<sup>105</sup> to impeach is a circuitous process which 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 may impress obligation on the executive and leaders to be more responsible avoid situations that would propel them into breaching law an oath of allegiance.

The President of the Republic of Uganda has the power to pardon<sup>106</sup>, either free a subject to any unlawful condition or condition any person convicted of any offense he can remit the whole or part of any punishment imposed on any person of any offense or penalty of forfeiture, or otherwise due to government of Uganda. He can grant a respite of the execution of any punishment imposed for special or indefinite period. The President is advised by the Advisory Committee on the prerogative of mercy<sup>107</sup>. 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. The problem here is that once the committee recommends a person to be sentenced to death the president has the power to divert from such advice hence making the role of the committee useless the president can act on his own without being advised hence abuse of the doctrine<sup>108</sup>.

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<sup>102</sup> See Oloka Onyango Cit. op page 10

<sup>103</sup> Article 107(2) of 1995 constitution

<sup>104</sup> Article 1 of the 1995 constitution.

<sup>105</sup> *ibid*

<sup>106</sup> Article 121(4) of the 1995 constitution

<sup>107</sup> *ibid*

<sup>108</sup> *ibid*

Scrutiny of the executive itself reveals that many organs or institutions established and empowered to carry out executive functions and which are meant to be independent have suffered from a lot of political interference. This influence has percolated down to private institutions such as co-operative societies. It is true that each department of government must be held accountable for its activities in the discharge of public functions.

The ministers have to account to parliament or to the president for the mistakes that are committed in the departments. In Uganda owing to the culture of executive hegemony that has grown out of our constitutional experience the requirement for accountability has tended to justify political interferences in organs of the executive.

The Civil Service, the Police and the Army are institutions of government and the service of the state but too much interference has undermined the integrity of these institutions. Their effects have been partisan and this creates favourable conditions for instability. Recruitment training, appointments, promotions and dismissals in such bodies should not be subject to political discretion, though they have to act in accordance with governmental policy, they should be allowed to implement government policy without political interference, for this has encouraged the tendency to personalize these institutions. Control by the president or by the ministers through the supervisory roles should be exercised through general administrative guideline and purely on policy matters.

This affects the doctrine of separation of powers in such that the role of checks and balances among the branches of government has not been exercised properly, there is always interference especially from the executive among other branches especially the legislature in terms of approval. This is not what the doctrine provides for.<sup>109</sup>

### **3.2 The legislature**

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 when making decision affecting the whole country<sup>110</sup> when the resolutions to remove the president debated the Chief Justice presides over the Legislature. The Uganda

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<sup>109</sup> CW/IUIU/constitutional law/2007

<sup>110</sup> Article 107(4) of the 1995 constitution of Uganda

Constitution envisages the Legislature power in Parliament<sup>111</sup> and provides that there shall be the Parliament of Uganda<sup>112</sup>.

Further Uganda Law Society notes that the legislature is a vital organ of the state and as such must be exemplified of all dramatic norms in the country<sup>113</sup>. The Legislature has its independence by being given powers to make laws through bills passed by parliament and assented by the president<sup>114</sup>. However it should be noted that where the president refuse to assent to the bill it does not mean that the law won't be passed parliament has power to pass the bill<sup>115</sup> even though the president has refused to assent to the bill like as it was in the passing of the Local Government Act, 1997.

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, of this hinders the smooth operation of the three aims 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 have always been diluted by giving the president the authority to control the powers of parliament or the legislature. The constitution tried to provide 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<sup>116</sup>. This is a sign of independence of legislature. However their independence has been abused by the executive influencing the legislature. 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<sup>117</sup> this affects the doctrine of separation of powers.

The legislative independence is shown by empowering it with the power of presidential appointments and dismissal which must be approved by parliament in other words parliament can determine who is the best in people's interest and the nation as a whole.

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<sup>111</sup> Article 79 of the 1995 constitution of Uganda

<sup>112</sup> Article 77 of the 1995 constitution of Uganda

<sup>113</sup> Uganda constitutional commission, M2676

<sup>114</sup> Article 91(2) of the 1995 constitution

<sup>115</sup> Article 91(6)

<sup>116</sup> *ibid*

<sup>117</sup> *Paul kawanga ssemwogerere & others v AG*

Therefore from the above, the independence of the legislative body may be as a result of the possibility of the president belonging to the same political party the group which commands, a majority in parliament and which could affect 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".<sup>118</sup>*

'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.<sup>119</sup>

In law, a prima-facie case means that the available facts and the evidence are such that in the absence of defense there will be a conviction. The president is also entitled to appear in person or by any other person of his choice to defend him/herself<sup>120</sup>

If the tribunal determines that there is a prima-facie case and parliament passes a resolution supported by not less than two thirds majority the president ceases to hold office. The president is superseding to appear or be represented.

When the resolution for the removal of the president is being debated the Chief Justice presides over the legislature which constitute into impeachment court the chief justice's main role is to guide 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 the independence of each of the three arms-of government in cases of a serious of a 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. It underlies that it is inevitable to have a pure doctrine of separation of power.

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<sup>118</sup> Okumu Wengi "Founding the constitution of Uganda", Essays, Materials, Uganda law watch 1994 pg 16

<sup>119</sup> Article 107(4) of the 1995 constitution of Uganda

<sup>120</sup> Ibid

Parliament approves presidential appointment and removes certain office since most of presidential nominees require approval. However very few removals, approvals and even when approval is required for the proposed appointment, there is no implied powers to vote on removals.

It expressly provided that parliament shall have full powers to reject newly proposed appointees such checks will enable parliament to prevent the filling of office with bad or incompetent people with those against whom there is a tenable objection. However this can be exercised with the executive's help.

Recently in the New Vision headed "Parliament received Museveni nomination,' in this paper the Speaker told parliament that "by the powers conferred upon him by the constitution, His Excellency the President proposes to appoint Mr. Emmanuel Kwege Mutebile as Governor of Bank of Uganda." Further he commented that "the President has subsequently directed me to request you to consider and approve the proposed appointment in accordance with the Constitution."<sup>121</sup>

From the above, we see that it is only parliament entrusted with the powers of approval of all presidential appointments and also has power to reject such appointment. Parliament tried to oppose this appointment saying that Museveni only considers members from his area and those are the ones occupying the most key posts, but parliament had no choice the position of the governor was vacant and there was in 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 most cases the president has diverted from this and exercise powers in his own discretion and conscience and at the same time parliament has powers and means to limit prescribed by the constitution.

In 2006, the executive interfered with the Parliament by bribing MPs with 5 million, including the Chairman of Committee of Legal Parliamentary Affairs, by then, Hon Jacob Oulanyah, to change the presidential term limit and they did so. Further, parliament during

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<sup>121</sup> New Vision December 12/2000 pg 2

the heat of the bribing period, the executive recommended the parliament to amend rules of procedure of parliament from secret ballot to show of hands.<sup>122</sup>

More still, in 2011, members of parliament were further bribed with 5 million, which was purported to monitor NAADS programmes, but Beatrice Anywar among other opposition MPs returned the money that it was a trap for the executive to influence the parliament's decision making.

Further still, in 2011, the parliament was influenced by the executive, and the Land Agreement Bill, the Cultural Leaders Bill was debated and passed in one day, in addition, the Kabaka used a symbol of key to welcome New Year and the president was furious and recalled parliament to pass the hilt, since the key is FDC's symbol.<sup>123</sup>

The parliament further in February 2012, debated on the money given to the businessman Bassajabalaba, leading to the resignation of the two ministers, Saida Bumba and Kiggundu .the Governor Of Bank Of Uganda was also pinned in the saga, but the executive and president interfered by calling the NRM legislators in their caucus meeting to change the decision to fire the Governor. Therefore they have set double standards (no firing him).

In 2018, another drama was seen in parliament during the constitutional amendment bill<sup>124</sup>, the executive had to give every member of parliament 20 million in the gist that it was mean to help members during consultations in their constituencies, impliedly it was a form persuading members to vote in favour of the bill, this is seen as apure violation of the doctrine highlighted above.

And as a result of the above and in situation where the president uses excessive powers over parliament by being a dictator its parliament entirely be blamed in case of any fault since it has looked at the president as an absolute power who must be feared and respected instead of advising him.

### **3.3 The judiciary**

The 1995 constitution provides for the independence of the Judiciary<sup>125</sup> which means the legislature and the executive must not interfere in any way. The judicial officers should

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<sup>122</sup> Monitor 2006

<sup>123</sup> New vision 2011

<sup>124</sup> No 1of 2018

<sup>125</sup> Article 128 of the 1995 constitution of the republic of Uganda



decide cases pending before them without any interference<sup>126</sup>. Independence of courts is a factor with the doctrine of separation of powers as this raises the question of in-partiality in dispensing justice. The constitution also provides for judicial independence by ensuring security of tenure and securing remuneration and insulation from political pressure<sup>127</sup>.

It is always said that one of the ways of determining the land 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, impartiality without any interference from the executive or any other quarter whatever.<sup>128</sup>

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 requisite 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 He 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."*<sup>129</sup>

From the above statement the independence of the Judiciary from the executive and legislature remains a cornerstone of democratic government but it can be absolute for example a judge cannot be independent of law and he cannot ignore the social and political issues on which he is asked to a judicature. 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 organs of government. This has been well placed in the 1995 Constitution of Uganda:

As professor Friedman observed that: -

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<sup>126</sup> Article 128(2) of the 1995 constitution of the republic of Uganda

<sup>127</sup> K. J Report pg 309

<sup>128</sup> ibid

<sup>129</sup> K.Y Reports 1962 pg 12

*"It is now increasingly recognized by contemporary jurist that the broader line are fluid and that co-operation rather than separation is as constant-interchange if given and take between the legislatures."*

Executive and the Judiciary reflect the reality<sup>130</sup>. One gets an impression that this was trying to emphasize that for sure independence of the Judiciary is strengthened through co-operation rather than confiscation which also apply to the present situation. However one thing for sure is that the Judiciary must preserve to question or to disagree and to rule independently on judicial matters. The Judiciary has always the function of settling conflicts and also a judicature on matters that are unconstitutional.

In the case of Attorney General -V- Goodtime News Paper Limited<sup>131</sup> Lord Diplock stated that "in any civilized society it is a function of a government to maintain courts of law to which all the citizens can have access for the impartial decision of disputes as their legal rights and obligation towards one another individual and towards the state as representing society as a whole.

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

Among the conditions necessary to safeguard Judiciary independence are the right 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, Article 128(2)<sup>132</sup> states that no person or authority shall interfere with the courts or 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 its unequal organs of government and judges and justices are the highest officers of the Judiciary and for this matter therefore judges must be accorded with 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.

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<sup>130</sup> Penguin Law in changing society, 1964 pg 66

<sup>131</sup> 1967 AC Pg 307

<sup>132</sup> The constitution of the republic of Uganda 1995

Further Article 147(1)(a)<sup>133</sup> states that the Chief Justice is appointed by the president in his direction but with the approval of parliament as it was the case with the current Chief Justice Bati Katureebe other judicial officers of the lower courts are appointed by the president in accordance 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.

Previously, the Supreme Court Judge Justice George William Kanyeihamba 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<sup>134</sup>. His objection failed because it is not the judges to approve the appointment but the parliament.

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

Under article 142<sup>135</sup> the chief justice, the deputy chief justice, the principal judge, a justice of the Supreme Court, a justice of appeal and a judge of the high court shall be appointed by the president acting on the advice of the judicial service commission and with the approval of parliament.

According to the above it shows that the responsibility for judicial appointment is shared by the executive, Judiciary and Legislature. Though the ideological concept of the doctrine is clear, the functional part makes it unreal.

A judge is not removed from office except in accordance with the procedure stipulated in the constitution.<sup>136</sup> 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. The Judicial Service Commission has powers to discipline judicial officers<sup>137</sup>. The machinery of dealing with the complaint against judicial officers is not clearly defined in most jurisdictions except as

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<sup>133</sup> The constitution of the republic of Uganda 1995

<sup>134</sup> Monitor Friday, January 2000 pg 2

<sup>135</sup> Of the constitution of the republic of Uganda 1995

<sup>136</sup> Article 144(2) Of the constitution of the republic of Uganda 1995

<sup>137</sup> Article 148A

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.

*“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.”<sup>138</sup>*

This raises the issue as to whether or within the limits of jurisdiction a judge is also protected by professional privileges from answering questions regarding his own conduct in court “while exercising his judicial functions.

*“No judge or magistrate that except upon special order of a court which he is subordinate 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.”<sup>139</sup>*

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 any other similar consequences. This is intended to make them free and making independent judgment without any influences hence thus supporting the ideological aspect of the doctrine.

Independence of Judiciary in Uganda today has been manifested in the case of *Tinyefuza –Vs Attorney General*<sup>140</sup>. In this case the Constitutional Court decided in favor of the plaintiff ‘without the executive interfering with the judge’s right to reach a decision. The same was reached on in the case of *Semogerere & Zakaly Olumu Jv- Attorney General*.<sup>141</sup>

Further in the case of *Uganda -V- Haruna Kanabi*<sup>142</sup> in which Kanabi the editor of Shariat newspapers was convicted on charges of sedition. This was a decision which clearly showed that the magistrate was much concerned with the impact of her judgment on the executive that she was on the rights of the accused. This was clearly demonstrated by ambivalent and

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<sup>138</sup> Section 46(1) of the judiciary act

<sup>139</sup> Section 188 of the evidence act cap 43

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<sup>141</sup> Constitutional petition of 2000

<sup>142</sup>

contradictory response to the critics that appeared in the New Vision barely a week after her court judgment 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.

## CHAPTER FOUR

### 4.0 THE NON ADHERENCE TO THE DOCTRINE OF SEPARATION OF POWERS BY EXECUTIVE I.E THE EXECUTIVE VIS A VIS LEGISLATURE, THE EXECUTIVE VIS A VIS JUDICIARY.

The Executive, Judiciary and the Legislature are the three main organs of government. Each one is entrusted with distinct powers and responsibilities. The doctrine of separation of powers implies the power and responsibility is 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 of separation of powers because each organ of government is supposed to check possible abusers by the other and provide a chance to extortion of power by the others<sup>143</sup>.

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 its colonial and its independent form no phenomenon has had a negative impact on political development in the country as have the antics, failings and chicanery of the executive arm of government."*<sup>144</sup>

There should be an independent legislature and judiciary to avoid the excess powers of the executive. The amendments to the constitutional order affected 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<sup>145</sup>.

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<sup>143</sup> 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. 4<sup>th</sup> 1997

<sup>144</sup> Oloka Onyango J, "Taming the presidentialism - some critical reflections on the executive and the separation of powers in Uganda" East Africa journal on peace and human rights Vo. 2 No.2, 1995

<sup>145</sup> Innovations introduced by NRM worth special mention include the creation of the system of Resistance Councils and committees (RCCs); the establishment of the conduct government, the operation of the military, the commission of inquiry into the violation of human rights and promulgation of a statute governing the operation of intelligence agencies, see Oloka-Onyango "Governance, democracy and development in Uganda today; a social legal emanate" in Africa studies monograph, October 1992, at pg 92-98

This partly explains Yoweri Museveni's almost total domination of the current political scene in one and the same instance a boon and a blow to the construction of a new democratic order in this country<sup>146</sup> as one observer insightfully states:-

*"Although Yoweri Museveni can be said to have provided with -new brand of leadership and a strong one has far proved to be incapable with development of democratic relations in the state, according to which citizens are presumed to have and enjoy parity of right and obligations."<sup>147</sup>*

The same observer goes on to add "... for conditions for democracy cannot be created either by clearing them into existence or by coercive measures with bread fear into the population, democracy will become a real responsibility for people only when there is reciprocal respect between rules and citizens without resort to violence for its enforcement."<sup>148</sup>

The enactment of presidential power is manifest right from Legal Notice <sup>149</sup> which commenced with a fusion of executive and legislative powers. This was reflected in the fact that the Chairman and Vice Chairman of the NRM respectively became Chairman and Vice Chairman of the National Resistance Council (NRC) and empowered to preside at all meetings of the body. This explains the several closed sessions of the assembly at which critical decisions on national policy have been renamed through with only slight resistance, The interference of the executive in the operation of the Legislature and the' Judiciary has been one of its abiding trademarks.<sup>150</sup>

#### **4.1 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 9<sup>th</sup> 1996. These were followed by June 1996 Parliamentary Elections which produced an independent and dynamic parliament free of

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<sup>146</sup> Museveni is currently the holder of public offices to wit: chairman national resistance movement, chairman national resistance council, chairman national resistance army and minister of defense

<sup>147</sup> See Amin Omara- Otunu: "the challenge of democratic pluralism in Uganda" Nairobi law monthly no 35 august 1999

<sup>148</sup> Op.cit at F. No 2 pg 8

<sup>149</sup> No. 1 of 1986

<sup>150</sup> 'No party democracy in Uganda' myth and reality by Justus Mujaju and Oloka Onyango, fountain publishers, 2000

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.<sup>151</sup>

This independent parliament has been affected by the influence of the executive in order to have a smooth operation. This could be seen from the decision of the constitutional court in the Semogerere Olumu case<sup>152</sup>. This gave birth to an amendment of the constitution on August 31<sup>st</sup> 2001) where parliament passed a Constitutional Amendment Bill, where the aspects of the Constitutional Amendment Legislation are that parliament shall determine its methods of voting; quorum of a third of all members of parliament will only be necessary in court of law without special leave of parliament first had and obtained. In addition all laws that have been enacted by the 6<sup>th</sup> parliament were validated by the amendment.<sup>153</sup>

Further stated that the amendment was necessary and vital on a number of intersecting levels contrary to what emanated from some quarters, the amendment was at one level, as housekeeping matter as indicated by the validating laws passed since the commencement of the 6<sup>th</sup> parliament. In fact rather than undermine the constitution, the amendment underscored the separation of powers as well as the supremacy of the constitution. The amendment aimed at 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.<sup>154</sup>

Further James Wapakhabulo, the 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 office the President of Uganda is not to be sued or charged in a Court of Law<sup>155</sup>.

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 law removed the protection which

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<sup>151</sup> *supra*

<sup>152</sup> The august house vol. 1 and 2, pg 1

<sup>153</sup> *Ibid* pg 1

<sup>154</sup> *Ibid* pg 3

<sup>155</sup> *Op.cit* at footnote No.5 pg 72-73



parliament is supposed to enjoy. It destroyed the principle of separation of powers as between the Legislature and Judiciary.

From the above we can see that 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.

The solution adopted in 1995 Constitution gave parliament the power to create the organs of movement political system and require that system be democratic accountable, transparent and to give all citizens access to its portions of leadership (Art 70 of the 1995 Constitution with promulgation of the constitution the Attorney General ruled that the informed NRM had no legal status and could not receive any funds from the government. To judge from the legislation sent to parliament the inner circle resisted any possibility of losing over the NRM structure.

Its first bill simply declared that the President of Uganda be the Chair of Movement making the election of the NRM leader necessary. It also made all MPs ex-office members of NRM "National Conference" whether they chose to join or not. Even though the supporters of the NRM were the majority in parliament this bill was rejected. It 'vas slightly revised by introducing an election of a Chair of the Movement and voted into Law (Movement Act 1997) when the first National Conference was finally held in 1998, not only was Museveni voted unopposed. Also the Vice Chairman and the National Political Commissar 12 (NPC) regardless of the Constitution, the NRM seems to be a classic case 'the Iron Law of Oligarchy" that organization lighting democracy will eventually adopt internal authoritarian methods (Michael 1962). This is another non adherence to the doctrine of separation of power due to the executive which is the Movement System influences the legislature.

The NRM introduced a Bill in Parliament to permit political parties to complain legally during the forthcoming referendum-only to withdraw it few months later (the Political Organization Bill, 1999). The Political Organization Bill prepared by the NRM government did not seek to simply legalise the parties. It kept them firmly under the government supervision. At the same time the Bill made clear that its provisions would not apply to any movement organisation. It closely regulated the fundraising by parties and required parties to

give the police 72 hours' notice of rallies. It gave the power to suspend or ban a party and have its assets seized to a minister in the NRM government<sup>156</sup>.

In addition, the minister was even given the powers to make regulations to prevent interference in the operation of the Movement political system. But the inner circle of the NRM remained worried. Museveni the Monitor newspaper reported argued that the votes in the referendum would be confused if they saw parties campaigning before their activity that had been validated by victory in the referendum.<sup>157</sup>

When Parliament Legal Affairs Committee proposed amendment to this legislation, the Minister of Justice and Constitutional Affairs withdrew it, claiming that the changes would need fresh cabinet approval. These withdrawals had a significant political consequence by enforcing parliament to authorize the referendum without changing the status of parties, there was no longer any assurance that government will bring a Bill to legalized parties before the referendum is held. The NRM certainly gives the appearance of deep concern that it might win a fully democratic referendum once again it is protecting itself at the expense of furthering a measure of democracy that it had championed 4 years earlier hence non adherence to the doctrine by the Executive.<sup>158</sup>

The Member of Parliament of Amuria County, Onapito Ekimoloit moved a motion to amend Article 113 of the Constitution baring minister once appointed as minister should resign from being Member of Parliament<sup>159</sup> in or order to have smooth operation of the legislative. This was rejected by the majority members of parliament and also ministers and this shows that once the legislature has many of its members being part of the executive the influence is passing of any law can easily be made so long as it favors the executive whether valid or not as the referendum law hence non adherence to the doctrine.

#### **4.2 The executive vis-a-vis judiciary**

The independence and autonomy of the Judicial Arm of Government often serve as the barometer of the extent to which executive power has been brought under control or "tamed", even if, as in the recent case of Nigeria, the regime simply ignores the decisions handed down that might be adverse to their interests.<sup>160</sup> There is an obvious problem if the Judiciary is a

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<sup>156</sup> The monitor 12 June 1999

<sup>157</sup> Op. cit at F.N No. 2 pg 74-75

<sup>158</sup> Op. cit at F.N No. 2 pg 13

<sup>159</sup> Op. cit at F.N No. 2 pg 14

<sup>160</sup> 1966 E.A 514

conservative force and insensitive to the demands of minorities and other oppressed groups. However as Liebman points out, such a case with the American Judiciary until only recently;

“Although traditionally a conservative fore in American history, which generally served to protect business and property interests from any or, at least, from excessive or uncompensated redistribution of wealth or taking of property by the government, the Federal courts in the 1930s-1980s used their constitutionally given life time tenure and financial and political ‘independence to protect a poor and unpopular minority.’”<sup>161</sup>

In Uganda since the ignominious decision in the case of Uganda-Vs-Commissioner of Prisons Ex-Parte Matovu<sup>162</sup>. The Judiciary has been progressively undermined in its effectiveness as a bastion against the infraction of democratic rights and freedoms. This was largely achieved by the provision on appointment of members of the Judiciary; the tedious and time consuming procedure on constitutional references and the wide scale use of ouster clauses in the legislation (such as the Notorious Public Order and Security Act, 1967) which expressly prohibited Judiciary from inquiry into any action performed under such law<sup>163</sup>.

In this connection many issues arise on the exercise by the Executive and Judiciary and semi judicial power, the exercise of disconnection and the principle of natural justice, the administrative tribunal hand less cases which are supposed to be handled by the Judiciary thus the Executive inference In the Judicial function.

Some other mechanism perhaps involving the legislature ought to be introduced likewise the security of tenures in order to be effective separation of power, there is need to protect the tenure of office of judicial officers<sup>164</sup> not to be misused by the executive.

Another issue that relates to separation of powers was made at a local level when we had moved from colonial days when the Judicial Commission used to exercise judicial function at the same time exercise executive powers over the natives. This added the same (powers) that is the Executive and the Judiciary within the same body. This shows therefore that there is no independence of the Judiciary hence non adherence on the doctrine of separation of powers.

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<sup>161</sup> Op. cit at F.N No. 2 pg 14

<sup>162</sup> Fred Juuko pg 6 talked about the colonial day when the judicial commission used to exercise executive function

<sup>163</sup> Article 282(1)

<sup>164</sup> 1969 E.A 39

More to that, we had the Local Council introduced in 1988 by National Resistance Movement. There is little doubt that there is need for the people to participate in the present administration of justice. However the present arrangement of popular justice uses the executive powers and the judicial power into a group of persons as a consequence of judicial powers has been modified so that the judicial powers of local councils are not exercised by persons exercising the judicial powers and the executive powers. This at the end of the day creates 'no independence of the Judiciary because its work is being interfered with'.<sup>165</sup>

The Executive arm has a lot of influence on the Judiciary Article 282(c)<sup>166</sup> provided that any prerogative functions which under the executive lay or rests in the president and shall be exercised by the President under common law prerogatives in England were handed over to the present also equivalent to Article 99(1).<sup>167</sup>

In *Opolot -V- Uganda*<sup>168</sup> in this case the President pardoned Opolot. Also under Article 121(4) which allows the president on the advice of the committee to extend prerogative of mercy to the people who have been convicted for major crimes. This exercise influences the Judiciary this no adherence to the doctrine of separation of powers. However this may be regarded by the executive as last opportunity to remedy what may not be correct within the judicial system.<sup>169</sup>

In 2005, the un independence of judicially were realised when One Dr. Kizza Besigye, an aspirant presidential candidate was arrested and charged with treason and rape before the high court and in the same period taken to a general court martial and there with terrorism and illegal possession of guns. In the high court, Besigye applied for and was granted bail. On release, he was rearrested<sup>170</sup>, this was a signal that the judicially is not independent.

The reactions of some of the army operatives from the executive part like that of General David Tinyefuza, the then coordinator of security services were reminiscent of aminism. The general accused the Ugandan judges of always siding with the offenders<sup>171</sup> appearing on the television with an angered and frightening face typical of feared terrorist, General Tinyefuza charged; "who are these fellows(judges)? The judges have no power to order the army. The

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<sup>165</sup>

<sup>166</sup> 1962 independence constitution

<sup>167</sup> 1995 constitution

<sup>168</sup> *Penguin Law in Changing Societies* 1964 AC Pg 307

<sup>169</sup> *Op. cit* at F.N. 25

<sup>170</sup> G.W Kanyehimba, constitutional and political history of Uganda at page 288

<sup>171</sup> *ibid*

army will not accept this business of being ordered by the judges”<sup>172</sup> that was atypical treat which revealed that the army under the executive command does not respect judicially as an independent organ.

In the same case when Dr. Besigye and his co- accused appeared before the high court for trial, the high court was besieged by armed personnel who are members of the Uganda peoples defence forces. They were dressed in black and are known as the Black Mambas. They caused fear amongst the judicial officers, staff, civilians and lawyers. Both the chief justice and the principle judge reacted against the siege and the learned principle judge regarded the siege as the rape and defilement of the temple of justice<sup>173</sup>.

It is therefore a matter of confidence that regardless of the influence and the pressure the executive has all along inserted on the judicially, the judicial officers have gone along to reveal the true requirement of the doctrine

#### **4.3 Factors affecting independence of the judiciary**

There is lack of moral courage on the part of the judges. The judge fear to make decisions against the executive on the questions of moral courage, one English judge is quoted-extra judiciously as saying:-

*“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 you-first thought is the chap being fairly treated. And if not your first thought is,<sup>174</sup> am alive to do anything to put the right. This new judge is ready to give themselves the benefit of doubt”.*<sup>175</sup>

The reason for this 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.<sup>176</sup>

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<sup>172</sup> Daily monitor, 18 November 2005

<sup>173</sup> G.W Kanyeihamba, constitutional and political history of Uganda at page 290

<sup>174</sup> ibid

<sup>175</sup> Ibid 8, the executive appoints three judges on political interests.

<sup>176</sup> Source direct quotation from precious Ngabirano, Buganda Road Magistrate that one o the causes is employer employee relationship

This is very disadvantageous because it makes the arm of the Judiciary move 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 Ssemwogerere and Olumu case<sup>177</sup>. The case of Tinyefunze -V- Attorney General<sup>178</sup> and many others.

#### **4.5 Effects of overlap in the independence of the judiciary**

The theory of separation of powers as it was championed by Montesquieu he said: "In order to protect the individual against an oppressive of the French Monarchical System of Government and to safeguard the individual from, harsh rules and tyranny and oppression, there must be separation between the executive, the legislature and maintenance of judicial independence from the other organs."<sup>179</sup>

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 second he makes peace or war send or relieves embassies, establishing the public security and protects against invasion. By the third he punishes criminals or determines the dispute that arises between individuals. The latter we shall call the judicial power and the other simply the executive power of the state.<sup>180</sup>

After describing the structure of a state, he went further to outline the best arrangement for securing political liberty. In a state on this he said that if the three organs of government are not separate, there will be the oppression of the individuals, of people's rights and even independence of the Judiciary will be limited<sup>181</sup>

When the legislative, executive and judiciary are vested in one person and in the same body (magistrate), 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 isn't separated from the executive and legislature. The liberty of the individual subjects would be exposed to

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<sup>177</sup> supra

<sup>178</sup> supra

<sup>179</sup> Montesquieu; spirit of the law, Book XI Hofue publishing co. 1956 pg 142

<sup>180</sup> Abraham Kiap pg 42, fusion of powers results into no liberty

<sup>181</sup> Op. cit pg 43 fusion leads to an end of everything.

arbitrary controls for the judges would then be the legislator where it's 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's allowed, the executive to enact laws; to try cases and to pass Acts of government, this leads to the violation of fundamental rights of the individuals and no public liberty<sup>182</sup>

It is accepted by all democratic countries that the Judiciary must be separate and independent from the other department in the discharge of its functions and the report of the Presidential Commission on the establishment of a democratic party. 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".

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 right programs can easily be federated by a hostile congress thus no liberty.<sup>183</sup>

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

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<sup>182</sup> Op. cit pg 143, that there should be independence of the judiciary because it is the foundation of the rule of law

<sup>183</sup> B.J. Odoki pg 10

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.<sup>184</sup>

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 (parliament) over the President, despite the separation of powers<sup>185</sup>

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 claim 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.<sup>186</sup>

As constitutional theory advocated protecting the right of the individual<sup>187</sup> 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 colt 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

To add on the above, Kiapi argued that absolute separation of powers may lead to the settlement of the organs of government, so there is need of one government to interfere in the activities of the other.<sup>188</sup>

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 an inseparate powers limit the promotion and the function of the government hence limiting the Judiciary at large<sup>189</sup>

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<sup>184</sup> Op. cit page 11

<sup>185</sup> *ibid*

<sup>186</sup> *ibid*

<sup>187</sup> Chapter four of the constitution 1995

<sup>188</sup> Op. cit F.N. 38

<sup>189</sup> Abraham kiapi pg 40



Due to the above mentioned aspects, Montesquieu, therefore proposes three things to uphold the independence of the Judiciary among other things that is one organ of government should not exercise functions of the other. Legislature makes laws only courts (judiciary) must confine themselves to applying of laws enacted by the legislature.

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)<sup>190</sup>

He expounded the idea of political responsibility of ministers by saying that they are not heads of state and must bear 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 of punishment.

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<sup>190</sup> Montesquieu, spirit of the law 1956

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATION

#### 5.1 Conclusion

It was pointed out at the beginning of this dissertation that the question under analysis is the “separation of powers in Uganda: a myth or a reality” It is clearly indicated that the adherence to the doctrine of separation of powers came into existence to ensure that the arms of government operate independently. The doctrine of separation of powers has been shown to be an ideal than reality. In practical matters, what is possible to achieve may be approximation to it.

It is precisely because of failure to adhere to it that the system of checks and balances was evolved to supplement it and ensure that on one hand, where a separation of powers is not possible than in the course of inter-dependence and co-operation organs do not conflict so as to bring about statement, and on the other hand to ensure empowered so as to check on any of the other two while being able to resist an encroachment upon it by any of the remaining two.

While it may be argued that Uganda has suffered a lot of abuses because of failure of the constitution to provide for a separation of powers and a mechanism where an organ can be adequately checked. It ought to be born in mind that the constitution is a mere piece of paper which by itself is without any power if the people chose to delegate it to the “dust bin”.

Our study has indicted that the executive has been the greatest violator of separation of powers. A number of measures have been taken to strengthen the other arms of government but their practical effectiveness has not been realized. The study further reveals that this non-adherence is mainly the executive grips of the army.

Adherence by the executive, parliament and judiciary to the constitution of the state heads the democratic governance and support for rule of law for any given society we recommend the following to be adopted as policy measures towards making a doctrine of separation of powers of reality.

## 5.2 Recommendations

1. Creating a viable and just democratic governance order, political instability and democratic accountability must be put in place which depends on a complex institutional network involving conscious and active citizens who recognize an anniversary bidding system of mutual rights and obligations.
2. In the field of financial misappropriation and corruption, the abuses for the spread to the field of politics where the leaders out of desire to stay in power for life while continuing to draw the nations resources, resort to suppressing any person or section of the population considered a challenge to their stay in power such benefit can partly be eradicated by a cultivation of public morals and ethic.
3. Rulers and the ruled must set considerable interests and accept constraints which guarantee that neither tries to maximize their own gains at the expense of each other or of integrating of the social system as a whole, Rulers must respect the right of the people to pass judgment on their performance, respecting the law, refuse corrupt payments and meet obligations rested in their offices.
4. Withdrawal of support by donor from countries who are guilty of human rights abuses, given the state of sovereignty donors can only operate where they come sort of accommodation with governments and must rely on them for implementation economic dependence forces, must African governments to at least lip services to donor demands but getting effective action, this can be impossible given the weakness of administrative and political structures. This kind of action has forced some countries to restore rule of law in their countries and ushering in democratic governance.
5. Anarchists who claim that they can attempt to impose order on society from above must stifle the capacity of people to organize themselves through participating structures to conservatives that individual security and economic efficiency requires a system which rests control in the expatriate backed by absolute authority of a state.
6. Enforcing the law; stable and competent judicial and administrative system governed by politically neutral and universal rules. Thus standards of good governance area function of the levels of autonomy and competence in the institutions established to deal with these functions, legislative part system, civic services, judiciaries, etc some constitutional provisions, phrases and words are not clear that they admit more than one meaning. Government should provide some organs and rest it with the power of constructing and interpreting the constitution and making pronouncements on other

laws and acts which are apparently inconsistent with the provision of the Constitution. The most organs to do this could be the Judiciary.

7. This is necessary because army and police can be used as instruments of extortion intimidation and repression. In even the best cases only a tiny majority can get access to the courts. Judges and arresting officers can be the corrupted, political influence can be used to get evidence removed or cases withdrawn. Legal profession is small, professional associations are weak, the court system is remote and inaccessible and few citizens have the knowledge, confidence or resources to use the formal legal systems.
8. There is need for reform because courts are under fundamental show and probably corruptible; the police are underpaid and have no resource to use so cases take months to be investigated, bribery and extortion are common and only the very rich have access to the formal legal system. Strengthening on local council courts advocates should be recruited by government to advise the local council officials on the bias of law.
9. Reform of the institution of judicial power in Uganda. The appointment of the Chief Justice should be subjected to the much more open and critical process that takes into consideration that personal antecedents their suitability for the performance of the function entailed, as well as the need to ensure the absence of do react political influence on the selection of the judicial officers. Such process can be undertaken by a select committee of the legislature. The committee would comprise bipartisan members of legislature and retired members of the Judiciary academia and diverse public interest groups. Judicial Service Commission which is responsible to prepare and implement programs for the collection of and for the dissemination of information to the public about law should only advise the judicial arm of government and institutions like finance, defense and national security local government and public services.
10. The Attorney General should neither be member of cabinet nor •a member of the parliament but should only be an ex-officio member, attending cabinet meeting and parliament serious. This would be dangerous since the Attorney General is principal legal advisor to the government participating in implementing of government policy would mean ignoring his legal and concentrating on other duties and taking an active role in parliament which uses to upholding the government position voting a very

sensitive issues. This is especially necessary in light of the disastrous performance of previous Attorney General in advising government on legal matters.

11. The immunity of the President for criminal prosecution or civil liability during his or her tenure in office should be amended to make him liable the violations he or she does during the tenure of office.

These are several reasons for this proposition:-

- a) There is simply no justification for an absolute unqualified immunity and pre-provision in the constitution does not adequately deal with the issue.
- b) Fear of prosecution after leaving office may lead the person to hold on the office at whatever cost even for life.
- c) The provision allowing for prosecution after one has left office may not be enforceable. For instance 3 Uganda's former presidents died out of the country and that imply no one would stay around for prosecution.

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