

**AN ANALYSIS ON THE OPERATION OF THE DOCTRINE OF SEPERATION OF  
POWER IN UGANDA**

**BY  
LUKWAGO HUSSEIN  
REG NO: 1153-01024-02153**

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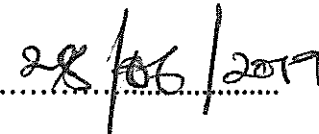
**JUNE, 2019**

### DECLARATION

I **LUKWAGO HUSSEIN** do hereby declare to the best of my knowledge and belief that this is my original piece of work and that it has never been submitted for the award of any degree to any university or college or published as a whole or part.

I further declare that all materials cited in this dissertation which are not my own have been fully acknowledged.

SIGNATURE: 

Date: 

**LUKWAGO HUSSEIN**

**REG NO: 1153-01024-02153**

### APPROVAL

This dissertation titled "*An Analysis on the Operation of the Doctrine of Separation of Power in Uganda*," has been submitted under my supervision and approval.

Signed.....

Date 26/06/2019

MR. ISAAC AFUNANDULA  
(SUPERVISOR)

## **DEDICATION**

I dedicate this research to my parents and my family at large. Thank you for all the support rendered to me throughout the entire course. May the Almighty God bless you all.

## **ACKNOWLEDGEMENT**

First and foremost, I would like to thank my Creator for breathing life into me and for entrusting me with the will, strength and wisdom to work on this research.

I'm eternally indebted to my supervisor, Mr. Isaac Afunandula for his supervision and timely observations and comments on the draft chapters, which assisted me in producing this work.

I would also like to express my profound gratitude to the School of Law at Kampala international university for giving me the opportunity to study and for remaining in touch with me throughout my studies.

I would not have done justice to this research without recognizing the support both financially and spiritually i got from my Mother Mrs. Nakanwagi Sarah Luswa for the support they gave me during my study period.

Above all, i express my heartfelt gratitude to all friends and relatives who cannot be mentioned individually by name due to limited space. I acknowledge and appreciate all of you.

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The 1995 Constitution of the Republic of Uganda

The Constitution of the Republic of Uganda 1967

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## ABSTRACT

This research is based on the doctrine of separation of powers in Uganda and particularly it examines the legal challenges to effective implementation of the principle of separation of powers in Uganda. The doctrine of separation of powers as advocated by French philosopher Montesquieu in his book *Esprit Des Lois* that there must be different organs with different function, power and personnel and in Uganda the doctrine it is provided under article 4 of the Constitution; the problem is that though the doctrine is recognised in Uganda by the mother law of the country which is a supreme law and all other laws must abide to it but still in Uganda there is infringement of the doctrine as it can be seen that there is personnel working in more than one organ but also there is a problem of one organ to exercise the powers of another organ which is contrary to the doctrine of separation of powers as stipulated under article 4 of the Constitution. Therefore this research attempts to look on the challenges facing effective implementation of the doctrine in Uganda and offers recommendations which some of them suggested some amendment of some provisions which goes contrary to the doctrine but some of them aimed at making sure that the doctrine by any means it is adhered. So it is hoped that those recommendation when implemented they can move as from the infringement of the doctrine of separation of powers and makes Uganda to have practical separation of powers rather than theoretical one.

## CHAPTER ONE

### 1.0 Introduction

The doctrine of separation of powers is the doctrine and a practice of dividing powers of government organs to limit the abuse of authority by those organs. A Government of separated powers assigns different political and legal powers to the legislature, the Executive and Judiciary.

The legislature is given powers to make law that govern the country<sup>1</sup>, for example the declaration of laws that are civil and these that are criminal in nature. The Executive is also empowered to administer the law by primarily bringing law breakers to the trial and to appoint the officials and oversee the administrative responsibility.<sup>2</sup>

The Judiciary has the power to try cases brought to courts and interpret the laws under which the trials are conducted.<sup>3</sup>

In order for government to conform to the role of law at all times, mechanisms for the supervision of these functions must exist within the constitution. Such mechanisms erected up on the doctrine of separation of powers.

### 1.1 Background of the Study

The balance of power among these branches varies from country to country. This is because of different arrangement reflecting different approach to the problem of distribution of political power.

Chief Justice Benjamin Odoki mentions that Uganda has experienced authorities regime dating from the pre-colonial period continuing through colonialism and the independent Uganda in spite of attempts to establish democratic structure in Uganda's political development.<sup>4</sup>

The 1995 constitution attempted to neutralize such challenges. Among the objectives that resulted into the promulgation of the 1995 constitution were the need to recognize and demote

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<sup>1</sup> The 1995 constitution of the republic of Uganda, Chapter six

<sup>2</sup> The 1995 Constitution of the Republic of Uganda, Chapter seven

<sup>3</sup> The 1995 Constitution of the Republic of Uganda, Chapter eight

<sup>4</sup> The Constitutional Judicial Review Committee report 20014

division of responsibility among the state organs of the Executives, the Legislature and the Judiciary and create viable checks and balances between them.<sup>5</sup>

The doctrine of separation of powers expressed by the French Philosopher Montesque was part of the development of the role of law. The doctrine warns that accumulation of the three powers of government in the same results in Nyranny and lack of political and social liberty.<sup>6</sup> Therefore there is need to separate the powers of the arms of the state and define their relationship and limitations.

However, should be remembered that separation of powers in its absolute terms might not be helpful. Close consultation and cooperation is very essential for effective performance of either branch. According to Chief Justice Odoki, they are like three cooking stones, which play distinct roles but always in cooperation with each other.<sup>7</sup>

This implies that where one stone is missing the cooing is bowed to fail. In light of the above; the research has provided as assessment of the contribution of the doctrine of separation of powers towards the effective performance of the organs of governments.

## **1.2 Statement of the problem**

The question whether constitutional obligation in developing countries such as Uganda has been maintained has always attracted public interest following Uganda's independence in 1962, various regime which had no respect for the doctrine resulted into dictatorship, high level of injustice and human violation.

Then, with the promulgation of the 1995 constitution which contains the principle mechanism erected upon the doctrine, it was hoped that such a situation would no longer exist.

However, Uganda has still experienced persistent demand for separation of powers in the recent past years. In line with that, there has been political discontent about the performance of the organ especially during the transition period that was characterized by interference with the

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<sup>5</sup> Ibid page 236

<sup>6</sup> G.W Kanyaihamba: Constitutional and political history of Uganda, from 1994 to the present century publishing house, 2002 page 297-298

<sup>7</sup> Odoki: Constitutional Draft report, 1993, page 234

function and the independence of the legislature and the judiciary it is therefore essential to scrutinize the factors believed such a regrettable situation

### **1.3 Objective of the study**

The major and general objective of the study will be;

To examine the applicability and operation of the doctrine of separation of power and the present Uganda

The other objectives will include;

- a) To discuss the nature history and development of the doctrine of separation of powers
- b) To discuss the operation of the doctrine in Uganda
- c) To discuss the factors affecting the operation of the doctrine in Uganda
- d) To make recommendations

### **1.4 Research Questions**

- a) What is the nature history and development of the doctrine of separation of powers
- b) How has the doctrine been applied or operated in Uganda
- c) What factors affect the operation of the doctrine in Uganda
- d) What are the recommendations?

### **1.5 Justification of the study**

Constitutional obligation is most controversial in developing countries and the doctrine of separation of powers is a model of democracy, constitutionalism, the role of law and therefore an analysis of its operation Uganda serves as a reminder to the stakeholders of the need to preserve its values .

The study will offer guidance on how the relevant authorities can maintain proper balance between the organs without undue interference with either organ.

According to Montesquieu liberty is most effective if it is safeguarded by the doctrine of separation of powers.

The study will provide the readers with an account of the factors behind such distressing experience in Uganda .

## **1.6 Hypothesis**

The study will be based on the following

Separation of powers is a constitutional principle, which should be preserved for the effective performance of the main organs of government

The legal mechanism constraining the powers of the three branches depend on a great deal on the popular sentiment of the people of Uganda

Application of the doctrine in its absolute terms is impracticable.<sup>8</sup> the function of government are best performed in a climate of closer consultation and corporation between the organs and this takes form of check and balances and has been substantiated in the subsequent chapters, however this should not be read as a scope goal to usurp or interference or functions of their organs

Finally, Uganda has adopted political pluralism in the recent past and this might have an impact on the operation of the doctrine in consideration of the social economics and political setup of Uganda

## **1.7 Methodology**

The study will be conducted through both quantitative and qualitative methods. A comprehensive library archival study of the literature on separation of powers government was conducted

Reference will also be made to newspapers, websites, internet sources and parliament Hansards

Interviews will also be conducted with the public (major focus being on key informants) to find out more on the challenges to the doctrine of separation of powers and how they be controlled.

Some question are provided in the appendix

## **1.8 Synopsis/ Structure of the thesis**

The research will consist of four chapters

### **Chapter one**

Covers the general introduction, background of the study, statement of the problem, objectives of the study, methodology, research question, scope of the study, hypothesis and literature review.

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<sup>8</sup>M. Redish, "Judicial Review and the 'Political Question' ", 79 Northwestern University Law Review (1984), 1031–1061; K. Breedon,

## **Chapter Two**

Covers the historical development of the doctrine. The chapter also covers background of doctrine in Uganda. Its observance and challenges prior to the promulgation of the 1995 constitution.

## **Chapter Three**

Consideration of a critical analysis of the provisions relating to the doctrine under the 1995 constitution and the system of checks and balances in Uganda.

The chapter also discusses the operation of the doctrine of separation of powers and check and balance under the multiparty system of government with reference to the developed democracies.

## **Chapter Four**

The several analysis of the essence of the doctrine with a new of concluding a ascertaining whether or not it has been realized conclusion. The chapter with also consider the possible measured recommendations.

### **1.9 Scope of the Study**

#### **1.9.1 Subjective Scope**

The study will entail a circumspection of the doctrine of separation of powers especially the operation of the doctrine in Uganda, its effectiveness, identifying the challenges faced by government organs in exercise of their duties and how this affects the smooth running of the government organs and drawing conclusions and making recommendations that would provide alternative edition to the existing state of affairs

#### **1.9.2 Time Scope**

With a brief history from the colonial period to the promulgation of the 1962 constitution, the study will cover the period from the promulgation of the 1995 constitution to date

#### **1.9.3 Geographical Scope**

The geographical scope of the study will mainly limited to Uganda.

### 1.10 Literature Review

Justice G.W Kanyaihamba (2002)<sup>9</sup> in his book, constitutional and political history of Uganda, considered the doctrine of separation of powers. He mentions that the relationship between the three organs of government on one hand and between the three organs and the citizens on the other hand guided by two formulate of good governance and freedom namely; the doctrine of separation of powers and the rule of law.

He notes that in its strictest terms, the doctrine advances that the organs of government should be kept in separate compartments. As a matter of explanation justice Kanyaihamba says that persons or agencies belonging to one organ should not be permitted to hold posts in other organs

In addition he explains that no one organ should have power to control any other organ or exercise the functions of the other.

However, he observe that embarrassing the doctrine in absolute terms would result in statement in government and make public administration rigid and unworkable and therefore undesirable

In his words he states as follow;

“The functions of government are best performed in a climate of closer consultation and cooperation between the organ of government.”

He therefore advocates for the system of checks and balances as the most desirable for the effective performance of the organs. This entails imposition of restriction on the other. Should they act beyond or abuse their constitutional powers and ultimately censure and correct them if they have done so.

Justice G.W,Kanyaihamba’s approach to the doctrine seeing to be in line with the provision of the 1995 constitution of the Republic of Uganda regarding the doctrine

Although he does not refer to it, his explanation is a suitable guide to the study about separation of power in Uganda

The idea of absolute application of the doctrine of separation of power in Uganda is amongst the members of parliament. This is a sensitive issue that may have an impact on the operation of the doctrine of role of law.

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<sup>9</sup> G. W Kanyeihamba , Constitutional and Political History of Uganda, From 1994 to the present Century Publishing House, 2002 page 297 - 298

From the above view point, it is essential to an over the question whether the relevant recent and present events in Uganda reflect Kanyaihamba's standard of the doctrine.

David (1995)<sup>10</sup> also considered the doctrine of separation of powers in his book Administrative law. He mentions that in every state there are three sorts of powers; of the legislature (making laws) the Executive (administrative) the carrying out of laws and the Judiciary (the interpretation and application of the laws in a particular dispute). He adds the fact that it is not always easy to draw a theoretical line between the organs or to distinguish them in practice inspite of the possibility of pointing out examples of function that can clearly fall under a particular organ.

In his attempt to establish a difference between the administrative and judicial power, he refers to the view of the committee on ministers power. Thus an administrative decision is wholly within the complete discretion of the minister-such decision is determined by consideration of public policy

A true judicial decision on the other hand, presupposes that an existing dispute between two or more parties is disposed of by a finding on any facts in dispute and application of the law. What remains is to determine whether this destination seems unsatisfactory and may not be of grate use to the third world where the Executive organ is always dominate

That not withstanding, Foulkes maintains that drawing a precise is indeed difficult in theory and impossible in practice. Further that, irrespective of the above difficulties the powers ought to be in separate hands, separate institutions for there would be an end of everything were the same man or body to exercise those three powers

From the above notes, it can be safely said that Foulkes was concerned with English perspective of the doctrine of separation of powers

He notes that the doctrine is not part of their constitution, the Executives is drawn from the majority party in the house of commons hence the executive except in extreme case controls the legislative powers. The rational here is to ensure constant agreement between them.

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<sup>10</sup> David Foulkes: Administrative Law, 8<sup>th</sup> Edition Butterworth (1995) pg. 4-5



The only provision for separation of powers he mentions resides in the independence of the judiciary security in office is given the members of the judiciary. In their turn, the members may express concern at their need to avoid usurpation of the executive or legislative function.

In the final observation, Foulkes has clearly expressed the position on separation of power in England- that he did not consider, separation of powers especially in the third world is highly regarded as fundamental constitutional principle. Therefore, a microscope view on this principle in the third world perspective would be of great importance in order to develop units values in Uganda

A.W.Bradley (1997) <sup>11</sup> also wrote about separation of powers, begins by discouraging legislative supremacy of parliament as the basic doctrine of constitutional law that cause principles of constitutionalism such as separation of power to be under valued.

Bradley perceives separation of powers to be opposed to the concentration of state powers in a single person or group since that is a clear threat to democratic governance. He further identifies important need for separating state power not only in political decision making but also in legal system where an independent judiciary is essential if the role of law is to have any substance.

Regarding the issue of distinguishing the organs, he agrees with all writers that the organs of government are distinguishable unlike particular tasks that they may perform

Admittedly he mentions that there is no clear cut demarcation between some aspects in these functions nor is there always a neat correspondence between the functions in these government institutions.

To Bradley, in a mature democracy it is imperative that judges are independent both of parliament and executive and that parliament is not a rubber stamp for the cabinet. Indeed as he states, the essential values of law, liberty and democracy are best protected if distinct institution discharge the three primary functions of law-based government

Bradley refers with dissatisfaction to Robson who described separation of powers as;

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<sup>11</sup> A.W. Bradley K.D Ewing; constitutional and administrative law, 12<sup>th</sup> edition, Longman London New York 1997, page 87-98

“that antique and rickety chariot..... so long the favorite vehicle of writers on political science and constitutional law for the conveyance of fallacious ideas <sup>12</sup>,”

He considers this a denial of justice to the contribution that the doctrine has made towards the maintenance of liberty and the continuing need by the constitutional means to restrain the abuse of government power. Therefore, separation of powers is very essential for developing countries especially those with nasty political experience resulting from conflict struggle over political power. For the cited reasons by Bradley to reject the description offered by Robson above, the researcher fully associate himself with his views.

In his further notes he warns that complete separation of powers is possible neither in practice in theory. On the aspect of one person not belonging to more than one of the three organs. There is a strong convention that ministers are members of the house of parliament. This observation means to have had basis on the position in developed democracies to channel constant agreement and cooperation among the organs of government.

However, in the third world perspective the application of this convention needs a criteria examination in order to safeguard the values of the doctrine of separation of powers

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<sup>12</sup>A.W. Bradley K.D Ewing; *Constitutional and Administrative Law*, 12<sup>th</sup> edition, Longman London New York 1997, page 87-98

## CHAPTER TWO

### THE DOCTRINE OF SEPARATION OF POWERS.

#### 2.1 Introduction

The doctrine of Separation of Powers deals with the mutual relations among the three organs of the Government namely legislature, Executive and Judiciary. Lord Mustill in **R vs Home Secretary, Ex parte Fine Brigades Union**<sup>13</sup> defined the doctrine of separation of powers in England as: - “It is a feature of the peculiarly British conception of the Separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed.”<sup>14</sup> The doctrine of separation of powers has been further defined as the “Separation of Power of the states from that of the federal government into three branches (Executive, Legislative and Judicial), each of which has specific powers upon which neither of the others can usurp. These checks and balance are given large credit for the prevention of a tyrant ever seizing power in the country.”<sup>15</sup>

According to Montesquieu: “When the legislative and executive powers are united in the same person, or in the same body or Magistrate, there can be no liberty. Again, there is no liberty if the judicial power is not separated from the Legislative and Executive power. Where it joined with the legislative power, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Where it joined with the executive power, the judge might behave with violence and oppression. There would be an end of everything were the same man or the same body to exercise these three powers...”<sup>16</sup> In other words, each organ should restrict itself to its own sphere and restrain from transgressing the province of the other and hence in the long run by so creating separate institutions of this nature, it is possible to have a system of checks and balances between them.

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<sup>13</sup>[1995] 2 AC 513.

<sup>14</sup>ibid

<sup>15</sup>Webster's New World Law Dictionary, By Susan Ellis Wild-legal Editor at page 237- Wiley Publishing Inc.

<sup>16</sup>Montesquieu, *De L' Esprit des lois*, 1748 quoted in Justice D.D. Basu: Administrative Law, Edn. 199

In 1966, Dr. Apollo Milton Obote abrogated the 1962 Independence Constitution replacing it with a new Constitution. This 1967 constitution reaffirmed Uganda a republic since Uganda was then going to be governed by an Executive President who is elected by universal adult suffrage and hence also created the fundamental structure of the state which was the executive, legislature and the judiciary. Each organ was supposed to operate independently without influence from the others.<sup>17</sup> This in other words insinuated the doctrine of separation of powers in the governance of Uganda.

The doctrine of separation of powers has properly been enshrined in the 1995 Constitution of the republic of Uganda (as amended). It clearly shows that there are three separate arms of government and each plays a unique role and are expected to check on each other. Under Article 91 (1), It states that the exercise of the legislative powers is vested in the Parliament of Uganda with power to make laws through bills passed by Parliament and assented to by the President.<sup>18</sup> Article 126 (1) provides that the exercise of judicial powers is vested in the Judiciary which is derived from the people and is exercised by the courts established under this Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people of Uganda.<sup>19</sup> Article 99 (1) provides that the executive authority of Uganda is vested in the President and shall be exercised in accordance with this Constitution and the laws of Uganda.<sup>20</sup>

However, despite the fact that doctrine of separation of powers is the enshrined in our constitution, since time memorial, we have lived to see many of our leaders more so the executive arm act to the contrary and in my opinion this doctrine of separation of powers has remained prevalent in Uganda and to a larger extent has not been adhered to as explained here under;

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<sup>17</sup>OlokaOnyango; Judicial Power and Constitutionalism in Uganda, 1993 pg.42

<sup>18</sup>The 1995 Constitution of the republic of Uganda (As amended)

<sup>19</sup>ibid

<sup>20</sup>ibid

The habit of usurpation of powers actually began with Obote's government as early as 1963, in the post-independent Uganda<sup>21</sup>. In *Jowett Lyagoba v. Bakasonga*<sup>22</sup>, court held that the installation of the Kyabazinga of Busoga was illegal. Obote ensured that Parliament passed The Busoga Validation Act Act No.9 1963, validating the installation of the Kyabazinga. By doing this, Obote was interfering in the judiciary by making use of his executive powers. In *Ibingira's case*<sup>23</sup>, the appellants were arrested on suspicion that they were plotting to overthrow the Government. They applied for a writ of habeas corpus after being arrested unlawfully under the Deportation Ordinance. The writ was granted and they were transported to Buganda, set free, and then re-arrested under Section 165 of The Emergency Powers (Detention) Act 14. When Ibingira appealed to the East African Court of Appeal, it upheld the Government side<sup>15</sup>. Obote had also dragged the army into politics. He sent General Amin to raid the Kabaka's Lubiri in Mengo<sup>16</sup>. He also further usurped powers of Parliament during the debate on the Administrations (Kingdom) Bill, 1996<sup>17</sup>, where it is observed that Government was trying to usurp the Parliament's powers to make laws.

Amin toppled Apollo Milton Obote's government on 25th January 1971. This 1971 coup sealed what was already an established fact; the predominance of the executive power<sup>18</sup>. General Amin, who was, on many occasions, described as a son of Obote's politics, pursued the non-separation of power to the extreme. He suspended articles 1, 3, and 63 and Chapters IV and V of the 1967 Constitution. Article 1 emphasized the superiority of the Constitution; Article 3 dealt with the alternation of the constitution and article 63 dealt with powers to make laws<sup>19</sup>. He thus enabled himself to enact laws. "this meant that the constitution was no longer "supreme law", that it could be altered Without reference to parliament and finally that Parliament lost its law-making powers to the head of State- now empowered to rule by personal decree. In effect, this made the president, not only "the supreme law" of the land, but also the sole law-maker."<sup>20</sup> All this was contrary to the demands doctrine of separation powers.

In 1986, the NRM came to power through a legal notice No.1 Of 1986 and this was a very new and fundamental change in the history of our country provided the very many new sui generis

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<sup>21</sup>Kivutha Kibwana, *Constitutionalism in East Africa*, pg44

<sup>22</sup>(1963) E.A. 57

<sup>23</sup>*Grace Ibingira and others v. Attorney General* (1966) E.A. 305/443

ideas most important of which was the unprecedented 1995 constitution which properly lays down the separation of powers. It is just so sad that the same framers of constitution that explains and illustrates the doctrine of separation of powers have not lived to see it grow but have continued to murder it for their own good hence sabotaging the doctrine of powers. In the case of Major General David Tinyefuza v. The Attorney General<sup>21</sup>, after a run-in with the Uganda Peoples' Defence Forces (UPDF) over testimony he gave to a parliamentary committee investigating the war in Northern Uganda, General Tinyefuza (now known as Sejusa) sought to resign from the army. However, his petition was blocked by the Head of State/ Commander-in-Chief (President Museveni) and the-then Minister of Defence (Hon. Amama Mbabazi). This showed how the executive was interfering with the judiciary which is contrary to the demands of the doctrine of separation of powers. The manifestations of usurpation of powers in this case, day to day political experiences and other recent case such as Brigadier Henry Tumukunde v. Attorney General and Electoral Commission<sup>22</sup> all show how the habit of usurpation of powers has remained prevalent and to a larger extent this doctrine of separation of powers has not been adhered in Uganda as explained by and large.

Even in present day in Uganda, we have continued to witness the habit of usurpation of powers. One of the most recent examples was on 27th September, 2017 where we witnessed a joint force of presidential guards, the elite Special Forces Command (SFC) soldiers and police officers in an operation that was commanded by Kampala Metropolitan Police Commander, Frank Mwesigwa, attached to parliament forcibly pulling out several legislators opposed to lifting the age limit from the chambers of parliament. This was a very clear example of the executive arm of the government interfering with the work of another arm of government which is the legislature which in the long run is contrary to the demands of the doctrine of separation of powers which calls for all the three arms of government to act independently.

Another unforgettable example is one that happened on Wednesday November 16, 2005 in the "PRA (People's Redemption Army) Suspects case",<sup>23</sup> where a group of men who later came to be known as the Black Mambas, raided the High Court in Kampala. The hooded men were on a mission to re-arrest suspected members of the People's Redemption Army, a shadowy rebel outfit, upon being granted bail by Justice Edmond Ssempe Lugayizi which clearly showed the

executive interfering with the work of the judiciary by trying to intimidate the judicial officers and contrary to the demands of the doctrine of separation of powers which calls for all the three arms of government to act independently.

Furthermore, to drive the point home, in January 2017, we saw a very interesting scenario where the then Deputy Chief Justice, Justice Steven Kavuma also issued an orders barring for debating the Shillings 6 billion bonuses issued to 42 top government officials for their role in the Heritage Oil tax case. This angered the speaker prompting her to describe the court orders as ‘stupid order’.<sup>24</sup> The speaker of parliament Rebecca Alitwaalakadaaga faulted court for issuing the orders stopping parliament from doing its work, saying the Parliaments (Powers and Privileges) Act, says no process issued by any court in Uganda in the exercise of civil jurisdiction shall be served or executed within the precincts of Parliament while Parliament is sitting or through the Speaker, the Clerk or any other officer of Parliament. According to Kadaga, there have been attempts in the recent past by the judiciary to encroach on the powers of parliament. She says there is need for clear separation of powers between the different arms of government to help each other in fulfilling their mandates.<sup>25</sup> These explained just above leaves me with no doubt that the doctrine of separation of powers has been adhered to in my mother land Uganda but to a smaller extent and hence a lot needs to be done to turn the tables and avoid this kind of evil of usurpation of the doctrine of separation of powers from becoming the new normal.

There is a notion that “You cannot bite the hand that feeds you” and many people have argued that this explains the habit of usurpation of powers which is a very wrong and unconstitutional argument that makes the future of our country blurry. Therefore, we should seriously strive and ensure that there be independence of these organs of the state. However, as per the words of Thomas Jefferson, a former and the third president of U.S.A who once said “There is no country in the world that observes the Doctrine of separation of powers to its eternity.”,<sup>26</sup> it’s therefore also important to note that the achievement of the doctrine of separation of powers seems to be a difficult task because even the countries from which the notion emanated from inter alia, America, Britain and France, do not fully have separation of powers.

In a conclusion, non-separation of powers has been a common phenomenon in Uganda and is a kind of evil that has continuously become the new normal as explained by and large. This in the

long run shows that the habit of usurpation of powers has remained prevalent in Uganda and the demands of the doctrine of separation of powers have not been to a larger extent adhered to as explained by and large. Therefore, this brings me to a suggestion that endless Efforts should hence be made to separate the different powers of the organs of state, as much as possible so as to have a better tomorrow.



## CHAPTER THREE

### SEPARATION OF POWERS DURING POST INDEPENDENCE UGANDA

#### 3.1 Introduction

This is chapter out to examine, intrinsically, the non-separation of powers during General Idi Amin's regime. The notion of non-separation of powers was actually begun by philosophers in ancient monarchies like Montesque, Rosseau, Turgot, who advocated for separation of powers. This notion was first put in writing by Dicey, another philosopher. The main aim is to show how powers were supposed to be separated in governance and how military governments did the contrary. In other words, the main point of examination is the erosion of Judicial and Legislative powers and the superiority of the Executive that was, in turn, in the hands of military rulers.

Separation of powers is a political doctrine of constitutional law under which the three branches of government (executive, legislative, and judicial) are kept separate to prevent abuse of power. It also known as the system of checks and balances, each branch is given certain powers so as to check and balance the other branches. The Government or State has three organs: Executive, Legislature and the Judiciary. Each organ is supposed to operate independently without any influence from the others<sup>24</sup>. The Legislature makes new laws and alters or replaces the existing laws. The Executive deals with administration of the government according to the existing laws of the state. The Judiciary interpretes and applies the law by rules of discretion of the facts of a particular case<sup>25</sup>. Separation of powers, thus, not only deals with the boundaries of exercise of Government power but also ensures the minimum detrimental interface of other state organs<sup>26</sup>. This, however, was not the case in the militant regimes where the executive intruded in the other organs' operations.

#### 3.2 The Obote regime (Post Independence Uganda)

The habit of non separation of powers actually began with Obote's government as early as 1963, in the post-independent Uganda<sup>27</sup>. In *Jowett Lyagoba v. Bakasonga*<sup>28</sup>, court held that the

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<sup>24</sup>OlokaOnyango; *Judicial Power and Constitutionalism in Uganda*, 1993 pg 42

<sup>25</sup> G.W. Kanyeihamba; *Constitutional Law and Government in Uganda*, 1975 pg 147

<sup>26</sup>*The 1995 Constitution of the Republic of Uganda*.

<sup>27</sup>KivuthaKibwana, *Constitutionalism in East Africa*, pg44

installation of the Kyabazinga of Busoga was illegal. However, since he was in opposition of this decision held by the court, Obote ensured that Parliament passed **The Busoga Validation Act**<sup>29</sup>, validating the installation of the Kyabazinga. By doing this, Obote was interfering in the judiciary by using his executive powers. This action showed that the executive could do what it wanted in total violation of the separation of powers doctrine, and could actually undermine what court had decided.

In *Ibingira's case*<sup>30</sup>, the appellants were arrested on suspicion that they were plotting to overthrow the Government. They applied for a writ of *habeas corpus* after being arrested unlawfully under the **Deportation Ordinance**<sup>31</sup>. The writ was granted and they were transported to Buganda, set free, and then re-arrested under Section 165 of **The Emergency Powers (Detention) Act**<sup>32</sup>. When Ibingira appealed to the East African Court of Appeal, it upheld the Government side<sup>33</sup>. The executive was not willing to accept the release of the accused persons, despite having been granted under a fair established court process. What was even more appalling for the rule of law, was that another law was enacted and used in order to enforce their arrest. Even on appeal, their arrest could not be quashed because it was practically valid done under the operation of the law.

Later on, before the battle of Mengo, Obote introduced the 1966 Interim Constitution, whose intention was extremely controversial, without any discussion<sup>34</sup>. The process of introduction of the constitution, review and passing was all skipped in order to hurriedly pass the new constitution. This has a similar occurrence in the recent case where constitutional amendments were passed without proper referendum and process. The 1966 constitution was referred to as the "Pigeon Hole" Constitution by Abu Mayanja during a parliamentary session;

*"I know the new constitution was dropped in our pigeon holes, we read it when we left Parliament and after we had been sworn in."*<sup>35</sup>

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<sup>28</sup> (1963) E.A. 57

<sup>29</sup> Act No.9 1963

<sup>30</sup> *Grace Ibingira and others v. Attorney General* (1966) E.A. 305/443

<sup>31</sup> Cap48, 164; *Laws of Uganda*.

<sup>32</sup> Section 1, 65, of 1966.

<sup>33</sup> Kivutha Kibwana, *Constitutionalism in East Africa*, pg44

<sup>34</sup> *ibid*

<sup>35</sup> *Uganda Parliamentary Debates*, vol.65, 1966/1967

Obote also dragged the army into politics. He sent General Amin to raid the Kabaka's Lubiri in Mengo<sup>36</sup>. He further usurped powers of Parliament during the debate on the **Administrations (Kingdom) Bill**, 1996<sup>37</sup>, where it is observed that Government was trying to usurp the Parliament's powers to make laws. Section 24 of **The Administrations (Western Kingdoms and Busoga) Act**<sup>38</sup> empowered the executive to make laws instead of parliament, which ordinarily under the 1967 Constitution was the body mandated with the power to make laws. Abu Mayanja stated *inter alia*:

*"...In other words, Section 24 is conferring power to make laws upon the Government, that is to say, upon the ruler and his Council of ministers, whereas, according to the constitution, and indeed according to common sense, the power to make laws should be vested in the Legislature..."*

### 3.3 The Idi Amin Regime

The 1971 coup sealed what was already an established fact; the predominance of the executive power<sup>39</sup>. Amin toppled Apollo Milton Obote's government on 25<sup>th</sup> January 1971. This was the beginning of the habit of usurpation of powers of other organs. General Amin, who was, on many occasions, described as "a son of Obote's politics", pursued the non-separation of power to the extreme. He issued **Legal Notice No.1 of 1971** which suspended Articles 1, 3, and 63 and Chapters IV and V of the 1967 Constitution. Article 1 emphasized the superiority of the Constitution; Article 3 dealt with the alternation of the constitution and article 63 dealt with powers to make laws<sup>40</sup>. He thus enabled himself to enact laws.

*"...meant that the constitution was no longer "supreme law", that it could be altered without reference to parliament and finally that Parliament lost its law-making powers to the head of State- now empowered to rule by personal decree. In effect, this made the president, not only "the supreme law" of the land, but also the sole law-maker."*<sup>41</sup>

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<sup>36</sup> Godfrey Okoth; *Law and Struggle for Democracy in East Africa*, pg50

<sup>37</sup> Kivutha Kibwana, *Constitutionalism in East Africa*, pg44

<sup>38</sup> *ibid*

<sup>39</sup> *ibid*

<sup>40</sup> *The Constitution of The Republic of Uganda*

<sup>41</sup> Oloka Onyango; *Constitutionalism in East Africa*, pg44

In 1971, Amin went ahead with the **Armed Forces (power to arrest) Decree**<sup>42</sup>, which shook the Judiciary to its roots. In the case of *Efulayimu Bukenga v. Attorney General*<sup>43</sup>, it was stated that neither the police nor private citizen was lawfully entitled to arrest without warrant or shoot any one in cold blood. However, this practice continued and the Judiciary could not raise a finger about it since it had virtually been silenced. For example, Ben Kiwanuka C.J. ruled against the Government when the British High Commissioner brought a writ of *habeas corpus* for a British manager was being held by the military<sup>44</sup>. This resulted in his disappearance and subsequent murder. Still, the Judiciary could not say anything. This action contradicted with what Amin often stated that the independence of the Judiciary was absolute<sup>45</sup>.

Amin further militarized the judiciary and the cabinet. According to him, the purpose of this was to “discipline” them according to the **Armed Forces Acts and Regulations**<sup>46</sup>. He set up military and paramilitary tribunals like the Military Tribunal, Economic Crimes Tribunal, State Research Bureau and others. These had the powers to try, incarcerate and even execute civilians. By doing this, the traditional functions of the Civilian Judicial Courts were eroded. Amin recruited, in his army, the *Anyanya* (Nubians) from southern Sudan, *Simba* rebels from Eastern Zaire, *Kakwa* from his own tribe and the riff-raff, commonly known as *bayaye*<sup>47</sup>. The army then became a personal toy moreover; it was the one that was controlling the activities of the state.

Amin also issued **The Constitution (Modification) Decree**<sup>48</sup>, which stated that the President could appoint the Attorney General, who had to be a cabinet Minister. This action or decree had its origins in Obote’s regime and was a sheer display of the interference by the Executive in matters of the Judiciary because the attorney General was chosen according to the president’s wish, and obviously in his interest.

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<sup>42</sup> Decree No. 13 of 1971

<sup>43</sup> (1972) H.C.B. pg87

<sup>44</sup> Akena Adoko; *From Obote to Obote*, pg40

<sup>45</sup> Mamdani Mahmood, *OPCit*, pg44

<sup>46</sup> Mamdani Mahmood; *Imperialism and Fascism in Uganda*

<sup>47</sup> Sathyamurthy; *Apolitical Development of Uganda, 1900-1986*, pg615

<sup>48</sup> Decree No.5 of 1971

Amin also issued **The Proceedings Against Government (Protection) Decree**<sup>49</sup>, prohibiting courts from granting remedies during any proceedings against Government. This, as the regime claimed, was to protect public order<sup>50</sup>. The Judiciary was continuously being crippled since the Constitution was no longer valid and the decree made the Government's actions even more unquestionable.

Amin also maimed the Parliament's powers to make laws. He went ahead and issued the **Parliamentary (Vesting) Powers Decree**<sup>51</sup>. This decree gave the Council of Ministers, which was predominantly military, powers to make laws. By doing so, he was taking control of the legislature's operations. This clearly showed how the Executive interfered with functions of the other organs, in order to elevate himself to absolute power. He further sought this by issuing the **Suspension of Political Activities Decree**<sup>52</sup>. This halted political activities. The military government controlled the restructuring of the economy, reorganization of administration and restoration of public order.

Amin also exhibited his militarism and brutality when he shifted the issuing of arrest warrants from the Traditional Courts of Judicature to the Minister of Internal Affairs<sup>53</sup>. The Minister, in turn, issued already signed warrants to various military organs so that, when one was suspected of being dangerous, it was easy to place his name in the space left for the name. The arrest warrant was regarded legal and lawful because it had the Minister's signature. Such unscrupulous behavior maimed the powers of the judiciary and legislature. It was an extreme exercise of extra-constitutional powers and showed non-separation of powers in Amin's regime<sup>54</sup>.

In the case of *Uganda v. Alfred James Kisubi*<sup>55</sup>, the court held that the Constitution was subject to Amin's decrees such that, any provision of the Constitution that was inconsistent with any decree passed after the proclamation was void. The Legislature and Judiciary were thus

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<sup>49</sup> Decree No.8 of 1972

<sup>50</sup> Mamdani Mahmood, *OPCit*, pg45

<sup>51</sup> Decree No. 8 of 1971

<sup>52</sup> Decree No. 14 of 1972

<sup>53</sup> *ibid*

<sup>54</sup> Oloka Onyango; *Law and Struggle for Democracy in East Africa*, p49

<sup>55</sup> (1975) H.C.B. 173

suppressed by Amin's decrees. He had successfully interfered in their operations and they could not question him or his actions.

There was no separation of powers since Amin was an absolute ruler, who did the work of all organs of the state. He did this at times with his ministers, who were "puppets" and followed anything he said. He even gave the ministers power to censor the press by issuing the **Newspapers and Publication (Amendment) Decree**<sup>56</sup>. They were thus in position to carry out actions according to Amin's interests.

He further issued **The Trial by Military Tribunal Decree**. Here, a military tribunal was enacted such that the power to try suspects was vested in the military. The judges only had to effect decisions the decisions of the tribunal. The courts were now affected by the military, which could sentence suspects at its own wish. The judges could no longer handle serious offences, which were left for the military tribunals.

*"The Fascists played the tune and the judges danced. Most legislation consisted of Presidential decrees and major violations of the law were judged by military tribunals. The judges handled petty cases and sat on harmless Commissions of Inquiry that rubber stamped the officials' decisions"*<sup>57</sup>

One weakness of absolute power is that it corrupts absolutely. Amin used his position in government to appoint foreigners to top judicial posts. A good example of this was the appointment of Mohammed Akber Khan as a High Court Judge<sup>58</sup>. Amin also appointed Mohammed Said, a Pakistan National, as Chief Justice (replacing the murdered Ben Kiwanuka). The resident Magistrates of Mbarara and Masaka were also foreigners<sup>59</sup>. This act made the Judiciary weaker for Amin's benefit, and made it crippled since the foreigners were not learned about the Ugandan law<sup>60</sup>. They were Muslim friends of Amin, who were inexperienced, incompetent and acted as go-aheads for Amin's dictates.

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<sup>56</sup> Decree No8 of 1971

<sup>57</sup> MamdaniMahmood, *OPCit*, p44

<sup>58</sup> *Ibid*

<sup>59</sup> *ibid*

<sup>60</sup> AkenaAdoko; *Uganda Crisis, 1969*, pg16-12

### 3.4 The Post Amin Period

The post Idi Amin era was a period of uncertainty in the constitutional history of Uganda. It was characterized by attempts to correct the wrongs of both the Obote I and Amin regimes. The military government of General Tito Okello ruled from July 1985 to January 1986 with no explicit policy except the natural goal of self-preservation—the motive for their defensive coup. The NRM government that seized power in 1986 promised to correct the wrongs of the past regimes and immediately began the constitutional making process that culminated in the 1995 constitution.

As the NRM government ruled for three consecutive terms, an issue came up as to whether term limits should be lifted or not. The Constitution was subjected to a referendum, which obviously decided that the term limits should be uplifted. This was however criticized by most observers as an indirect way of avoiding constitutional provisions and legalizing something that would actually have been wrong. When successful, the age aspect of presidential term limits had not been considered. As the president approached the age limit of 75 years, the anti Age limit Bill was introduced and hurriedly passed in parliament. This was discussed in the case of *Mabirizi & Ors v Attorney General*<sup>61</sup> where court found that some aspects of procedure actually needed referendum and could not be passed into law at the whim of the executive and its majority support in parliament.

Although the constitution provided for the normative nature of separation of powers, some few incidences particularly with regard to military involvement in government have shown glimpses of the past situation in Uganda. Incidences such as the seizure of the High court by armed men during a court session have sent reasoning reminders of the precarious nature of militarized politics Uganda is susceptible to interference and violation of the rule of law<sup>62</sup>.

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<sup>61</sup>CONSOLIDATED CONSTITUTIONAL PETITIONS NOS. 49 of 2017, 3 of 2018, 5 of 2018, 10 of 2018, and 13 of 2018.) [2018] UGCC 4 (26 July 2018);

<sup>62</sup><https://ugandaradionetwork.com/story/justice-ogola-revisits-attack-on-high-court-by-black-mamba> Accessed 20 October 2018

### 3.5. Conclusion

In conclusion, therefore, non-separation of powers was a common phenomenon in Amin's regime. He was the Executive, Judiciary and Legislature. There was no semblance of powers. The Executive maimed the powers of the other organs, especially the judiciary and attempts to thwart that arrangement were dealt with. The relationship between the executive and other organs has remained strained in the present Uganda. There must, however, be independence of the other organs from the executive. However, achievement of non-separation of powers seems to be a difficult task. The countries from which the notion emanated from, for example, America, Britain and France, do not fully have separation of powers. Efforts should, hence, be made to separate the different powers of the organs of state, as much as possible.



## CHAPTER FOUR

### SEPARATION OF POWERS AND APPLICATION OF THE POLITICAL QUESTION DOCTRINE

#### 4.1. Introduction

In Uganda, courts have considered and applied the political question doctrine since the 1960s. The political question doctrine is a function of the separation of powers doctrine and provides that there are certain questions of constitutional law that are constitutionally committed to the elected branches of government for resolution.<sup>63</sup> As a result, such questions are non-justiciable and require the judiciary to abstain from deciding them if doing so would intrude upon the functions of the elected branches of government.<sup>64</sup> The underlying theme is that such questions must find resolution in the political process.<sup>65</sup> Like in Ghana and Nigeria, the development and application of the political question doctrine in Uganda has been influenced by legal developments in the United States. This article examines the case law development and trends in the application of the political question doctrine theme in Ugandan jurisprudence. This article discusses the history of the political question doctrine in Uganda. This article also discusses the case law developments and trends around the application of that doctrine in Uganda, and argues that the doctrine is undoubtedly part of the constitutional law of Uganda.

#### 4.2. Upholding Constitutional Making as a Political Question

The Uganda High Court sitting as a Constitutional Court considered and adopted the political question doctrine in *Uganda v Commissioner of Prisons Ex Parte Matovu*.<sup>66</sup> In *Matovu*, the

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<sup>63</sup> M. Redish, "Judicial Review and the 'Political Question'", 79 Northwestern University Law Review (1984), 1031–1061; K. Breedon, 'Remedial Problems at the Intersection of the Political Question Doctrine, The Standing Doctrine and the Doctrine of Equitable Discretion', 34 Ohio Northern University Law Review (2008), 523–566 (explaining that the purpose of the political question doctrine is twofold. The first, rooted in the Constitution's separation of powers, is to ensure proper judicial restraint against exercising jurisdiction when doing so would require courts to assume responsibilities which are assigned to the political branches. The second is to ensure the legitimacy of the judiciary by protecting against issuing orders which courts cannot enforce); H. Wechsler, Principles, Politics, And Fundamental Law 11–14 (Cambridge University Press, Cambridge, 1961); K. Yoshino, 'Restrained Ambition in Constitutional Interpretation', 45 Willamette Law Review (2009), 557–564, at 559 (arguing that the political question doctrine is a doctrine of justiciability, noting that other such doctrines include standing, ripeness, mootness, and the bar on advisory opinions; that the justiciability doctrines underscore the idea that there can be rights without judicially enforceable remedies); and S. LaTourette, 'Global Climate: A Political Question?', 40 Rutgers Law Journal (2008), 219–284 (arguing that the political question doctrine is a function of the separation of powers).

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

<sup>66</sup> *Uganda v. Commissioner of Prisons Ex Parte Matovu*, [1966] EALR 514.

applicant, Michael Matovu, was arrested under the Deportation Act on 22 May 1966, and then released and detained again on 16 July 1966, under the Emergency Powers Act and the Emergency Powers (Detention) Regulations 1966 which had come into force after his initial arrest. Between 22 February and 15 April 1966, a series of events took place, including a declaration of a state of emergency in the region of Buganda. These events resulted in a unilateral suspension of the Constitution of 1962, which had established a federal system of government between the Kingdom of Buganda and the Republic of Uganda,<sup>67</sup> by the then Prime Minister Milton Obote. By this act, Obote had effectively taken over all powers of the government of Uganda by depriving the ceremonial President and Vice-President of Uganda, contrary to the Constitution of 1962, of their offices and vested their authorities in the Prime Minister and the Cabinet through the imposition of a new Constitution of 1966. Commentators refer to the Constitution of 1966, which was imposed on Uganda when Parliament adopted it on 15 April 1966,<sup>68</sup> as the pigeon hole Constitution because it is said that the members of Parliament found copies of the Constitution in their pigeonholes for them to approve.<sup>69</sup> The Commission of Inquiry into Violations of Human Rights describes these developments of 1966 as follows:

In February 1966 the Prime Minister suspended the 1962 Constitution. This was a unilateral action taken without consulting either Parliament or the people of Uganda. For a couple of months Uganda was literally governed without a Constitution. The 1966 Constitution was put in the pigeonholes of the Members of Parliament and they were asked to approve it even before reading it, and they did. In other words, this Parliament suddenly, and without consulting anybody, constituted themselves into a Constituent Assembly. They enacted and promulgated a Constitution whose contents they did not even know.<sup>70</sup>

According to one legal commentator the political arrangement under the Constitution of 1962 was an attempt to achieve the impossible and inevitably led to the coup of 1966.<sup>71</sup>

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<sup>67</sup> Eastern African Centre for Constitutional Development, Report of the Fact Finding Mission in Uganda on Constitutional Development (Eastern African Centre for Constitutional Development, Bukoto, 2002), 15.

<sup>68</sup> Matovu, *supra* note 4 at 542.

<sup>69</sup> Eastern African Centre for Constitutional Development, *supra* note 5.

<sup>70</sup> *Ibid.*, at 16, citing Report of the Commission of Inquiry into Violations of Human Rights (1994).

<sup>71</sup> Y. Ghai, 'Matovu's Case: Another Comment', 1 *Eastern Africa Law Review* (1968), 68.

In *Matovu*, the applicant sought an order for his release. One of the issues that had to be determined by the *Matovu* Court was whether the Emergency Powers Act 1963 and the Emergency Powers (Detention) Regulations 1966 are *ultra vires* the Constitution to the extent that the Act and Regulations enabled the President to take measures that may not be justifiable for purposes of dealing with the situation that existed during a state of emergency. Since there were two constitutions before the *Matovu* Court, being the Constitution of 1962 and Constitution of 1966, the Court on its own accord raised the question of the validity of the Constitution of 1966. When questioned by the *Matovu* Court, counsel for the applicant observed that he was in some doubt as to the validity in law of the Constitution of 1966. On the other hand, the government submitted that the *Matovu* Court had no jurisdiction to enquire into the validity of the Constitution because, among other reasons, the making of a Constitution is a political act and outside the scope of the functions of the Court.

According to the government's argument, since there are three arms of government, it was the duty of the legislature and the executive to decide the validity of the Constitution, the issue being a political one; that the duty of the Court was to accept that decision and merely interpret the Constitution as presented to it. It was also the government's submission that the members of the legislature, who passed the Constitution, did so as representatives of their constituencies to which they must account. Further, it pointed out that since judges were not elected but appointed and represented no specific constituencies to which to give account of their stewardship, the *Matovu* Court would be usurping the functions of the legislature if it undertook to enquire into and pronounce on the validity or otherwise of the Constitution of 1966. In support of this submission, the government referred the Court to United States Supreme Court cases in *Luther*,<sup>72</sup> *Marbury v. Madison*,<sup>73</sup> and *Baker v Carr*,<sup>74</sup> and the concept of the political question as discussed in these cases.

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<sup>72</sup> *Luther v Borden*, 48 U.S. 1 (1849) (held that controversies arising under the Guarantee clause of article four of the United States Constitution were political questions outside the purview of the court).

<sup>73</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>74</sup> *Baker v. Carr*, 369 U.S. 186 (1962).

In addressing the government's submissions, the *Matovu* Court accepted that "the government's exposition of political question doctrine as elaborated in *Luther* cannot be faulted."<sup>75</sup> Commentators consider *Luther* as a classical representation of the earliest application of the political question doctrine that was first developed in *Marbury*.<sup>76</sup>

In *Luther*, the United States Supreme Court had to determine whether it had the power to legitimize the popular dissolution of an entrenched state government. The plaintiff, Martin Luther, had been arrested after the declaration of martial law but before the enactment of the Rhode Island Constitution of 1843. The plaintiff was arrested by martial law troops after they had entered his home and damaged his property and harassed his elderly mother.<sup>77</sup> The plaintiff later sued the martial law troops for trespass. The defendants, admitting an otherwise tortious breaking and entering, sought to justify their action on the ground that they were agents of the established lawful government of Rhode Island, which State was then under martial law to defend itself from active insurrection; that the plaintiff was engaged in that insurrection and that they entered his premises under orders to arrest the plaintiff.<sup>78</sup>

The case arose out of the political differences which agitated the people of Rhode Island between 1841 and 1842, and which had resulted in a situation wherein two groups laid competing claims to recognition as the lawful government.<sup>79</sup> Plaintiff's lawsuit against the troops depended on which was the lawful government of Rhode Island at the time of his arrest, namely the government under the royal charter or the one under the People's Constitution.<sup>80</sup> The lower court's refusal to hear argument on that issue, its charge to the jury that the earlier established or

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<sup>75</sup> *Matovu* supra note 4 at 531.

<sup>76</sup> Redish, supra note 1 at 1036; A. Savitzky, 'The Law of Democracy and the Two *Luther v Borden*: A Counter History', 86 *New York Law Review* (2011), 2028–2070, at 2043 (-arguing that *Luther* expanded considerably the notion of a political question doctrine after *Marbury*). But see L. Henkin, 'Is There a 'Political Question' Doctrine?', 85 *Yale Law Journal* (1976) 597–625, at 608 (concluding that *Luther* did not establish a pure political question doctrine).

<sup>77</sup> *Luther v Borden* supra note 10 at 34. For a discussion of the political events during the Dorr rebellion, see G. Dennison, *The Dorr War: Republicanism on Trial 1831–1861* (University Press of Kentucky, Lexington, KY, 1976); and M. Gentleman, *The Door Rebellion: A Study in American Radicalism 1833–1849* (New York, NY, 1973).

<sup>78</sup> *Baker v Carr* supra note 12 at 218.

<sup>79</sup> *Ibid.* See also, *Luther v Borden* supra note 10 at 34.

<sup>80</sup> *Luther v Borden* supra note 10 at 35.

'charter' government was lawful, and the verdict for the defendants, were affirmed upon appeal to the Supreme Court.<sup>81</sup>

Chief Justice Taney, who wrote the majority opinion in *Luther*, framed the issue in institutional terms and focused his analysis on the practical effects of deciding which sovereign was legitimate.<sup>82</sup> He observed that if the Supreme Court could decide that the charter government was not legitimate, it could throw Rhode Island into legal chaos such as the invalidation of taxes and laws and possibly the nullification of its court decisions.<sup>83</sup> Chief Justice Taney reasoned that "when the decision of this court might lead to such results, it becomes its duty to examine very carefully its own powers before it undertakes it to exercise jurisdiction."<sup>84</sup> Chief Justice Taney found that the power to decide which constitution or government was legitimate belonged to state officials, the Congress and the President but not in the federal courts.<sup>85</sup> Further, he reasoned that Congress' decision under article IV of the United States Constitution to recognize a state government or its representatives is binding on every other department of government and could not be questioned in a judicial tribunal.<sup>86</sup> In her reaction to the case, Professor Barkow is correct when she argues that Chief Justice Taney restated the classical theory of the political question doctrine and concluded that:

This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And while it should always be ready to meet any question confided to it by the Constitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take

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<sup>81</sup> Ibid. See also discussion in *Baker v Carr* supra note 12 at 217.

<sup>82</sup> Savitzky, supra note 14 at 2039.

<sup>83</sup> R. Barkow, 'More Supreme than Court? The Fall of the political Question Doctrine and the Rise of Judicial Supremacy', 102 Columbia Law Review (2002), 237–336, at 255; and Savitzky, supra note 9 at 2039–2040.

<sup>84</sup> *Luther v Borden*, supra note 10 at 39.

<sup>85</sup> *Luther v Borden*, supra note 10 at 39–43 (discussing the organs of government who have authority to resolve this dispute). See also Savitzky, supra note 9 at 2040.

<sup>86</sup> *Luther v Borden*, supra note 10 at 42. See also *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912) (where an Oregon tax legislation was challenged on the basis that Oregon lacked a republican form of government because the Oregon constitution improperly permitted the people to legislate by initiative and referendum. The Court discussed how all sorts of problems would emerge if it were to conclude that Oregon lacked a republican form of government. It concluded that it would open the door for every citizen to challenge taxes or other government duties).

care not to involve itself in discussions which properly belong to other forums. No one, we believe, has ever doubted this proposition.<sup>87</sup>

The *Matovu* Court relied on *Luther* to arrive at its decision. According to the Court, the political question doctrine as articulated in *Luther* “is a sound doctrine,” but was not applicable to the circumstances in *Matovu*.<sup>88</sup> It reasoned that ‘however useful and instructive the observations of the United States Supreme Court in the several matters discussed in that case maybe, the Ugandan government erred in relying on it as supporting the proposition that the validity of the Constitution of 1966 was a non-justiciable political question.’<sup>89</sup> Further, the Court found that *Luther* was irrelevant and distinguishable on the facts of *Matovu*.

Firstly, the *Matovu* Court observed that *Luther* was a contest between two rival groups as to which should control the government of Rhode Island. It argued that there was no such contest in Uganda,<sup>90</sup> and observed that the government of Uganda is well established and has no rival. According to the Court, unlike in *Luther*, the question that was presented to it was not the legality of the government but the validity of the Constitution. While it is correct that *Luther* dealt with mainly the question of which government was legitimate, it is incorrect to characterize *Luther* as not examining the validity of the Constitution. To the contrary, the question of the validity of the Constitution was among the questions before the *Luther* Court. In his analysis of the Dorr Rebellion, which led to the *Luther* case, Professor Amar has observed that the charterists (one of the rival groups claiming to have established a lawful government) had submitted a Constitution, which had received the votes of less than one third of the adult males, less than half of the registered vote.<sup>91</sup> Yet technically this became the Constitution of the State of Rhode Island, and the People’s Constitution, which had been submitted by the other group, did not.<sup>92</sup> According to Professor Amar, the valid Constitution received seven thousand votes; while as the People’s Constitution nearly fourteen thousand.<sup>93</sup>

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<sup>87</sup> *Luther v Borden* supra note 10 at 46. See also Barkow, supra note 21 at 256–257.

<sup>88</sup> *Matovu* supra note 4 at 531–533.

<sup>89</sup> *Ibid.*, at 533.

<sup>90</sup> *Ibid.*

<sup>91</sup> A. Amar, ‘The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and The Denominator Problem’ 65 *University of Colorado Law Review* (1994) 749–786, at 775.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

Chief Justice Taney considered the question of whether the People's Constitution as opposed to the charterists Constitution, which became the Constitution of Rhode Island, was valid, and found that the power to decide which Constitution was valid rested in state officials, the president and Congress.<sup>94</sup> On this point, Savitzky has argued that Chief Justice Taney rejected the vote that had been casted on the People's Constitution as proof of its lawful adoption and declared:

Certainly it is no part of the judicial functions of any court of the United States to prescribe the qualification of voters in a State nor has it the right to determine what political privileges the citizens of a State are entitled to, unless there is an established constitution or law to govern its decision.<sup>95</sup>

As argued by Savitzky, the lack of established law or Constitution authorizing popular action was the very core of Chief Justice Taney's application of the political question doctrine. He observed that for Taney there was no rule by which a court could determine the qualification of the voters upon the adoption of the proposed Constitution unless there was some previous law of the State to guide it.<sup>96</sup>

Secondly, the *Matovu* Court observed that *Luther* raised all sorts of political questions, including the right to vote and the qualification for such voters. Unlike in *Matovu*, there were two rival governors appointed in *Luther* and the rivalry between them produced a situation which was tantamount to a state of civil war. The Court observed that insurrection had in fact occurred in Rhode Island and war was levied upon the state. Further it, noted that *Luther* also involved the question as to whether the government was republican or not, which is a political question reserved for the Congress under Article IV of the United States Constitution.<sup>97</sup> In the Court's view, these circumstances were not present in *Matovu*.

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<sup>94</sup> *Luther v Borden*, supra note 10 at 39–43. See also Savitzky, supra note 9 (arguing that *Luther* teaches that a court cannot competently choose a true Constitution).

<sup>95</sup> *Luther v Borden*, supra note 10 at 41. See also Savitzky supra note 102 at 2040.

<sup>96</sup> *Luther v Borden*, supra note 10 at 41; and Savitzky, supra note 102 at 2040

<sup>97</sup> See *Luther v Borden*, supra note 10 at 42. Barkow, supra note 21 at 256. The *Matovu* Court also discussed *Baker v Carr* in ways that is not clear whether they considered it controlling in *Matovu* or not. Supra note 4 at 533–535.

While the *Matovu* Court acknowledged that *Luther* involved political questions such as the right to vote, it fails to recognize that this political question was considered in the context of deciding the validity of the two rival constitutions in Rhode Island. Further, while the political instability in Rhode Island at the time when *Luther* was decided may not be equated to that which prevailed in Uganda at the time of *Matovu*, it is misleading for the *Matovu* Court to paint a rosy picture of the political situation in Uganda at the time. The fact is there was a considerable amount of political instability in Uganda that was predicated upon *Matovu* and surrounding political events, which eventually led to the coup d'état of 1971 that brought General Idi Amin to power.<sup>98</sup>

It is surprising that despite finding that *Luther* was distinguishable from *Matovu*, the Court reached a conclusion which is in accord with Chief Justice Taney's main considerations in deciding *Luther*.<sup>99</sup> The Court held that any decision by the judiciary as to the legality of the government could be far reaching, disastrous and wrong because the question was a political one to be resolved by the executive and legislature, which were accountable to the constituencies.<sup>100</sup> However, unlike *Luther*, the *Matovu* Court held that a decision on the validity of the Constitution was within the Court's competence.<sup>101</sup> It found that the Constitution of 1966 was valid for a number of reasons including the fact that it had been accepted by the people of Uganda and the international community, and had been firmly established and implemented throughout the country without opposition.<sup>102</sup> Hence, the Court felt it could not reverse this political reality. There is probably another practical consideration that led the Court to legitimate

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<sup>98</sup> Following Amin's ascendancy to power Uganda remained relatively unstable and erupted into a civil war between 1981 to 1986. It was only in 1995, when Uganda adopted a -democratic Constitution. It could be argued that the period between 1966 to 1986 can best be characterized as a period of political instability in Uganda. For some discussion about the political history of Uganda, See H. Ingrams, *Uganda: A Crisis of Nationshood* (Her Majesty's Stationery Office, London, 1960); P. Mutibwa, *Uganda Since Independence: A Story Of Unfulfilled Hope* (World African Press, Kampala, 1992); and J. Okuku, *Ethnicity, State Power and The Democratisation Process in Uganda* (Nordic Africa Institute, Uppsala, 2002).

<sup>99</sup> *Luther v Borden*, supra note 10 at 38–39 (noting that "if the court could decide that the charter government was not lawful, it could throw Rhode Island into legal chaos-convictions would be reversed, compensation revoked and legislation abrogated").

<sup>100</sup> *Matovu*, supra note 4 at 515 and 540. See also, Barkow, supra note 21 at 255 (observing that Chief Justice Taney was motivated by practical concerns such as the potential legal chaos that would ensue if the court had decided one way or another); Savitzky, supra note 14 (noting that *Luther* decided against determining which was the legitimate government because this would throw Rhode Island into legal chaos). Professor Weinberg has argued that the duty of courts does not evaporate because there are obstacles to enforcement or threats of crisis or chaos, and yet *Matovu* and *Luther* alike seemed to have been decided on this basis. See also, L. Weinberg, 'Political Questions and the Guarantee Clause', 65 *University of Colorado Law Review* (1994), 889–947, at 905.

<sup>101</sup> *Ibid*.

<sup>102</sup> *Matovu*, supra note 1 at 539.



the Constitution of 1966 and that is the fear of rendering all past acts and taxes open to legal challenges, including the legitimacy of the judges that had been appointed by the Prime Minister Obote under the impugned Constitution.

It is possible to criticize *Matovu* for misconstruing and misapplying *Luther*. I submit that *Luther* was controlling on *Matovu* because it teaches that the act of constitutional formation is the province of the people alone as popular sovereignty. As Justice Woodbury observed, in his concurring opinion in *Luther*, “our power begins after theirs end.”<sup>103</sup> In this regard, the government of Uganda correctly relied on *Luther*. While *Matovu* has been criticized by some commentators,<sup>104</sup> it is still good law in Uganda and has been cited with approval by judges in Uganda<sup>105</sup> and elsewhere.<sup>106</sup> Since *Matovu*, the political question doctrine has been the subject of consideration and application by the Uganda Court of Appeal in *Andrew Kayira v Edward Rugumayo & Others*<sup>107</sup> where the Court relying on *Matovu* ruled that the removal Professor Lule from the office of President of Uganda was a political question not reviewable in the courts of law but reserved to the political organs of the state. Perhaps the most cardinal application of the political question doctrine, in the context of the post-1995 Constitution of Uganda, was by Supreme Court of Uganda in *Attorney General v Major General David Tinyefuza*.<sup>108</sup>

### 3. Upholding Military Matters As Political Questions

The case of *Tinyefuza* arose when on 29 November 1996 General Tinyefuza gave evidence before the Parliamentary Sessional Committee (Sessional Committee) on Defence and Internal Affairs about the insurgency in North Uganda. In his testimony, General Tinyefuza made a harsh attack on the Uganda Peoples’ Defence Force regarding its conduct generally and in particular,

<sup>103</sup> *Luther v Borden*, supra note 4 at 52; and *Savitzky*, supra note 14 at 2041.

<sup>104</sup> See, M. Kirya, *The Independence and Accountability of the Judiciary in Uganda: Opportunities and Challenges* (2009) available online at [http://www.kituoachakatiba.org/index.php?option=com\\_docman&task=doc\\_details&gid=369&Itemid=36](http://www.kituoachakatiba.org/index.php?option=com_docman&task=doc_details&gid=369&Itemid=36)(criticizing *Matovu*)(last accessed 12 May 2013); C. Kirkby, *Exorcising Matovu’s Ghost: Legal Positivism, Pluralism and Ideology in Uganda’s Appellate Courts*, 12–21 (LLM Thesis, McGill University, Montreal, QC, 2007); N. Mkwentla, *The Legal Effect of a Coup D’Etat on Traditional Constitutional Concepts* (LLM Thesis, Rhodes University, Grahamstown, 2001)(discussing *Matovu* and other cases).

<sup>105</sup> *Attorney General v. Major General David Tinyefuza*, Const. Appeal No.1 of 1997 (S.C), (unreported); *Andrew Kayira v Edward Rugumayo & Others*, Constitutional Case no 1 (1979); *Centre of Health Human Rights v Attorney-General*, Constitutional Petition No 16 (2011).

<sup>106</sup> See *Madzimbamuto v Larder Burke* (1966) 1 AC 645; *R. v. Ndhlovu* 1968 (4) SA 515.

<sup>107</sup> *Andrew Kayira v Edward Rugumayo & Others*, supra note 148.

<sup>108</sup> *Attorney General v. Major General David Tinyefuza*, Const. Appeal No.1 of 1997 (S.C), (unreported).

it's handling of the insurgency in North Uganda.<sup>109</sup> General Tinyefuza then learned from media reports that the military authorities thought his evidence before the Sessional Committee "did not conform with the military line" and that he should resign from the army and appear before the High Command.<sup>110</sup> General Tinyefuza did not consider himself a member of the army at the time he addressed the Committee, but to clear the air he resigned by a letter sent to the President.<sup>111</sup> He received a response from the Minister of Defence rejecting his resignation on the basis that it did not comply with the National Resistance Army (Conditions of Service)(Officers) Regulations 1993.<sup>112</sup> General Tinyefuza perceived these events as exposing him to an atmosphere of fear and felt that his rights were about to be infringed.

As a consequence, General Tinyefuza petitioned the Constitutional Court seeking a declaration that the threats to punish him for his testimony before the Sessional Committee would be in conflict with Article 87 of the Constitution; that the rejection of the resignation letter was unconstitutional and that the army regulations were no longer applicable to him because – at the time of his testimony – he had been appointed to a post in the public service.<sup>113</sup> The Constitutional Court ruled in favor of General Tinyefuza and the Attorney General appealed to the Supreme Court.<sup>114</sup> The Supreme Court in a five<sup>115</sup> to two<sup>116</sup> decision reserved the Constitutional Court.

In his opinion in favor of the majority view, Justice Kanyeihamba remarked at the outset that in order to dispose of this appeal according to the principles of the Constitution and laws of Uganda, it was essential for him to make some preliminary observations which he said ought to

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<sup>109</sup> See Major General David Tinyefuza v Attorney General [1997] UGCC 3 (Justice Manyido opinion).

<sup>110</sup> Attorney General v. Major General David Tinyefuza, Const. Appeal No.1 of 1997 (S.C) (Justice Wambuzi opinion), at 2.

<sup>111</sup> Ibid

<sup>112</sup> After submitting his resignation, there were media reports quoting the President saying that General Tinyefuza would have to sort out his problems with the army before he is allowed to resign. Criticisms against General Tinyefuza from other senior army officials were also reported in the media. See Major General David Tinyefuza v Attorney General [1997] UGCC 3 (Justice Manyido opinion).

<sup>113</sup> Ibid.

<sup>114</sup> For a discussion of the Court of Appeal decision see, Justice Constance Byamugisha, Administering Justice Without Undue Regard to the Technicalities, (December 2003) A paper presented to Green Watch Uganda. See also Paul Semogerere v Attorney-General, Constitutional Appeal No 1 (2002); and R. Ellet, Emerging Judicial Power in Transitional Democracies: Malawi, Tanzania and Uganda (ProQuest, Ann Arbor, MI, 2008), pp. 407–498.

<sup>115</sup> Justices Kanyeihamba, Wambuzi, Tsetooko, Karokora, and Kekonyo.

<sup>116</sup> Justices Mulenga and Oder.

guide a court in adjudicating constitutional matters of this kind and others.<sup>117</sup> Justice Kanyeihamba began by examining the political question doctrine as applied in the United States and as developed by the courts in Uganda.<sup>118</sup> He observed that the general rule is that courts have no jurisdiction over matters which are within the constitutional and legal powers of the legislative or the executive.<sup>119</sup> Kanyeihamba went on to observe that even in those cases where courts feel obliged to intervene and review legislative or executive acts when challenged on the basis that the rights of an individual are infringed, they do so sparingly and with great reluctance.<sup>120</sup> Further, he re-affirmed the endorsement in *Matovu* of the political question doctrine.<sup>121</sup> Constitutional commentators agree with Justice Kanyeihamba's approach to constitutional adjudication, arguing that 'the political question doctrine requires the judiciary to decide as a threshold matter in all cases whether the question before it has been assigned by the Constitution to another co-ordinate branch of government.'<sup>122</sup>

Before addressing the merits, Justice Kanyeihamba highlighted some of the areas which, in his view, would be appropriate to apply the political question doctrine in Uganda.<sup>123</sup> He noted that among them is whether or not courts should demand proof of whether a statute of the legislature was passed properly or not; the conduct of foreign relations;<sup>124</sup> and the question of when to

<sup>117</sup> Tinyefuza, *supra* note 43, at 3.

<sup>118</sup> *Ibid.*, at 11.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*, at 12.

<sup>122</sup> Barkow, *supra* note 21 at 243–244; M.E. Nixon-Graf, 'A Gathering Storm: Climate Change as Common Nuisance or Political Question?', 19 New York University Environmental Law Journal (2012), 353–379 (discussing that the political question doctrine requires courts to make a threshold determination whether a claim is properly within the judicial branch of government); M.D. Gouin, 'United States v AlvarezMachain: Waltzing with the Political Question Doctrine', 26 Connecticut Law Review (1994), 759–781 (arguing in favour of the applying the political question doctrine in foreign affairs cases); R. Price, 'Banishing the Specter of Judicial Foreign Policymaking: A Competence-Based Approach to the Political Question Doctrine', 38 NYU Journal of International Law & Politics (2006), 323–354, at 331 (advocating for a reformulated political question doctrine so that it is used to more carefully distinguish between those cases that raise separation of powers concerns and should therefore be dismissed, and those which do not.); and K. Breedon, *supra* note 1 (characterising the political question as a self-imposed restraint mechanism on the judiciary, which requires courts to dismiss a case as nonjusticiable if deciding the matter in dispute would encroach upon the functions of the electoral branches of government).

<sup>123</sup> Tinyefuza, *supra* note 43 at 12.

<sup>124</sup> B. Free, 'Waiting Does v Exxon Mobole Corp: Advocating the Cautious Use of Executive Opinions in Alien Tort Claims Act Litigation', 12 Pacific Rim Law & Policy Journal (2003), 467–498; Gouin, *supra* note 60 at 763–781; F.W. Scharpf, 'Judicial Review and the Political Question: A Functional Analysis', 75 Yale Law Journal (1966), 517–597, at 567, 583–584; J. Nzelibe, 'The Uniqueness of Foreign Affairs', 89 Iowa Law Review (2004), 941–1009; *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918) (applying the political question doctrine to the conduct of

declare and terminate wars and insurgencies.<sup>125</sup> Most commentators acquiesce to Justice Kanyeihamba's characterization of areas which are most appropriate for the application of the political question doctrine.<sup>126</sup> Based on common law authorities, Justice Kanyeihamba was convinced that courts should avoid adjudicating upon these kinds of questions unless in very clear cases of violation or threatened violation of individual liberty are shown.<sup>127</sup> Justice Kanyeihamba added that the reluctance of courts to enter into the arena reserved by the Constitution to the other arms of government reaches its zenith when it comes to the exercise and control of powers relating to the armed forces their structure, organization, deployment and operations.<sup>128</sup> In his view, the accepted principle is that courts would not substitute their own views of what is in the public interest in these matters particularly when the other co-ordinate arms of government are acting within the authority granted to them by the Constitution.<sup>129</sup>

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the foreign affairs); *United States v. Belmont*, 301 U.S. 324 (1937) (noting that the executive branch has exclusive competence in foreign affairs).

<sup>125</sup> Tinyefuza, *supra* note 43 at 12. In the United States, courts typically take the same view in cases involving military matters. See *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984) (finding suit regarding U.S. military activities in El Salvador raised nonjusticiable political question); *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987) (finding suit to compel presidential compliance with War Powers Resolution raised nonjusticiable political questions). *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948); *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) (holding that "certainly it is not the function of the Judiciary to entertain private litigation – even by a citizen – which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region."); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (holding that in this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak as a representative of the nation).

<sup>126</sup> Gouin, *supra* note 60; C.R. Chase, 'The Political Question Doctrine: Preventing the Challenge of US Foreign Policy in 767 Third Avenue Associates v Consulate General', 50 Catholic University Law Review (2001), 1045–1080, at 1055; L. Wishik, 'Separation of Powers and Adjudication of Human Rights Claims Under Alien Tort Claims Act-Hanoch-Tel-Oren v Libyan Arab Republic', 726 F.2d 774 (D.C.CIR.1984), Cert. Denied, 105 S.Ct. 1354 (1985), 60 Washington Law Review (1985), 697–720; H. Wechsler, *Principles, Politics and Fundamental Law* (Harvard University Press, Cambridge, MA, 1961), at 11–14.

<sup>127</sup> Tinyefuza, *supra* note 43 at 12.

<sup>128</sup> *Ibid.* Under United States law, the greater the degree of control by the military the more likely the courts are going to find that challenges involving the military or private military contractors present nonjusticiable political questions. See *Whitaker v Kellogg Brown & Root, Inc.*, 444 F. Supp. 2d 1277, 1281 (2006) (holding private military contractor was subject to military's orders, regulations, and convoy plan, rendering suit against the private military contractor arising out of convoy accident nonjusticiable). B. Davidson, 'Note, Liability on the Battlefield: Adjudicating Tort Suits Brought by Soldiers Against Military Contractors', 37 Public Contract Law Journal (2008) 822–834; J.H.L. Perez-Montes, 'Comment, Justiciability in Modern War Zones: Is the Political Question Doctrine a Viable Bar to Tort Claims Against Private Military Contractors?', 83 Tulane Law Review (2008), 219–254, at 246.

<sup>129</sup> Most judges agree with this view and have similarly held that the political branches are better placed than the judiciary to appreciate what is to the public benefit. Chief Justice Gubbay writing for a unanimous Supreme Court of Zimbabwe in the landmark case of *Nyambirai v National Social Security Authority* 1996 (1) SA 636 (ZS) explained it convincingly when he upheld a legislative policy to compel employees and employers to save for their retirement and said: "I do not doubt that because of their superior knowledge and experience of society and its needs, and a familiarity with local conditions, national authorities are, in principle, better placed than the Judiciary to appreciate what is to the public benefit. In implementing social and economic policies, a government's assessment as to

Justice Kanyeihamba's reasoning is that since military matters are within the exclusive jurisdiction of both executive and legislature, it is not for the courts to consider whether the discretion of the executive has been exercised properly, if at all.<sup>130</sup> In his view, it is parliament which has the authority to bring the executive to account in these military matters.<sup>131</sup> To support Justice Kanyeihamba's view, the United States Court of Appeal in *Schneider v Kissinger* makes an important pronouncement that 'the lack of judicial authority to oversee the conduct of the executive branch in political matters does not leave executive power unchecked because political branches exercise checks and balances on each other in the area of political questions.'<sup>132</sup> Some commentators agree with these judicial sentiments. For instance, Ibrahim Imam writing with others has made an important suggestion that "we should not be overly concerned that the political question doctrine deprives the courts of enforcement power over certain constitutional provisions because the Constitution and electoral process provides an appropriate substitute."<sup>133</sup> Thus, Justice Kanyeihamba cannot be faulted for pointing out that Parliament is the appropriate organ of government to check the executive on military questions, and that in the context of the political question doctrine, this is a sufficient constitutional check on executive power.<sup>134</sup>

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whether a particular service or programme it intends to establish will promote the interest of the public is to be respected by the courts. They will not intrude but will allow a wide margin of appreciation, unless convinced that the assessment is manifestly without reasonable foundation. The Minister has proclaimed that the Pensions and Other Benefits Scheme provides a service in the public interest. That is an assessment which this Court should respect" (at 644). See also *Apostolou & others v The Republic of Cyprus* (1985) LRC (Const) 851 (rejecting the argument that the government had no authority to compel a self-employed individual to pay contributions to the social insurance fund established under the Social Insurance Law of 1980; *Sechele v Public Officers Defined Contribution Pension Fund and Others* [2010] LSHC 94 (upholding a compulsory civil service pension fund in Lesotho); *Steward Machine Company v Davis* 301 US 548 (1937) (upholding the provisions of the United States Social Security Act of 1935); *Schweiker v Wilson*, 450 US 221, 230 (1981) (reasoning that unless a statute employs a classification that is inherently invidious or that impinges on fundamental rights, this Court properly exercises only a limited review power over Congress, the appropriate representative body through which the public makes democratic choices among alternative solutions to social and economic problems).

<sup>130</sup> For a similar reasoning see *Corrie v. Caterpillar, Inc.*, 503 F., 3d 974 (9th Cir. 2007) (declining to intrude into the government decision to grant military assistance to Israel because this question was committed under the Constitution to the legislative and executive branches).

<sup>131</sup> Tinyefuza, supra note 43 at 12.

<sup>132</sup> *Schneider v Kissinger* 412 F.3d 190, 200 (2005).

<sup>133</sup> I. Imam, A.O. Sambo, W. Egbewole and A.B. Abdulkadir, 'Judicial Activism and Intervention in the Doctrine of Political Questions in Nigeria: An Analytical Exposition' 1 *African Journal of Law and Criminology* (2011), 50–69, at 51, citing *Obi v INEC* (2007) 9 MJSC 1.

<sup>134</sup> *Olson v Morrison*, 487 US 654 (1988) (Scalia dissenting) (arguing that another significant check is that people will replace those in the political branches who are guilty of abuse of power).

Justice Kanyeihamba then reflected on the principle of separation powers under the Constitution of Uganda and was very clear that in Uganda, as in the United States, courts are not the only actors on the constitutional stage. In my view, he correctly observed that the Constitution provides that the constitutional platform is to be shared between the three arms of government, being the executive, judicial and legislative arms; that courts need to bear in mind the judgments of other repositories of constitutional power concerning the scope of their authority and the necessity for each to keep within its powers including the courts themselves. Professor Tribe has agreeably observed that ‘so long as the manner in which the Constitution is to be interpreted remains open to question, the meaning of the Constitution is subject to legitimate dispute, and the judiciary is not alone in its responsibility to interpret.’<sup>135</sup>

Instead, Justice Kanyeihamba pronounced that the principle of separation of powers demands that unless there is the clearest of cases calling for intervention for purposes of determining constitutionality of action or the protection of the liberty which is presently threatened, the courts must refrain from entering arenas not assigned to them either by the Constitution or laws of Uganda. Moreover, he pronounced that it is necessary in a democracy that courts refrain from entering into areas of disputes best suited for resolution by other government agents. In their discussion of the political question doctrine in Canada, Cowper and Sossin have similarly observed and argued that “based on the principle of separation of powers, the political question doctrine limits judicial power in a number of circumstances where the other branches of government have a stronger claim to decide the issue raised.”<sup>136</sup> I think it is clear that Kanyeihamba’s pronouncement reflects the idea that the executive and legislature have a stronger claim to decide military questions that emerged in this case.

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<sup>135</sup> Tinyefuza, *supra* note 43 at 13.

<sup>136</sup> L.H. Tribe, *American Constitutional Law* (Foundation Press, New York, NY, 1988) at 34–35. See also *United States v Butler*, 297 U.S. 1, 87 (1936) (Justice Stone dissenting) (arguing that courts are not the only agency of government that must be assumed to have the capacity to govern); J.P. Mulhern, ‘In Defense of the Political Question Doctrine’, 137 *University of Pennsylvania Law Review* (1988), 97–176, at 126 (arguing that there is no obvious reason why a court’s assertion of judicial power should be any more authoritative than a president’s assertion of executive power. Both are part of our constitutional tradition and there is no apparent way to establish any priority between them. Courts share responsibility for interpreting the Constitution with the political branches); and L. Seidman, ‘Secret Life of the Political Question Doctrine’ 37 *John Marshall Law Review* (2003), 441–480, at 442 (arguing that Constitution vests in the political branches final interpretive authority as to the meaning of some constitutional provisions; that in relation to those provisions the political branches self-monitor).

It is understandable from Justice Kanyeihamba's examination above that in Uganda, as it is Ghana and the United States, the political question doctrine is recognized as originating from the principle of separation of powers. Moreover, it is also understandable that there are potential limits on the application of the political question doctrine; that is to say it may not apply in cases of clear constitutional violations or abuse of power. Justice Kanyeihamba's views in this regard are similar to those of Justice Kpegah of the Supreme Court of Ghana. The two justices hold similar views on the proper equilibrium of powers among the three arms of government insisting on the notion that each arm of government enjoys equal constitutional powers to interpret and enforce a Constitution.<sup>137</sup> *Tinyefuza* is not the most recent application of the political question doctrine in Uganda. As early as March 2012, the Constitutional Court dismissed a case on the basis of this doctrine.

#### 4. Upholding Healthcare Matters As Political Questions

The Constitutional Court of Uganda recently applied *Tinyefuza* to dismiss a constitutional petition in *Centre of Health Human Rights v Attorney-General*<sup>138</sup> (herein as the *Maternal Health Case*), a case challenging government action or inaction on the basis of the political question doctrine as articulated in *Tinyefuza*. In *Maternal Health Case*, the plaintiffs petitioned the Constitutional Court in terms of sections 137(3) and 45 of the Constitution challenging the failure of government to provide basic maternal commodities in government health facilities. The plaintiffs sought a declaration that acts or omission of government, which have led to high maternal deaths in Uganda, were inconsistent with the constitutional right to life and health.

At the start of the proceedings, the government raised a preliminary objection to the Constitutional Court's jurisdiction to hear the matter on the basis that the political question doctrine prohibits the judiciary from hearing cases of this nature.<sup>139</sup> At least to some extent the government's preliminary objection in the *Maternal Health Case* is consistent with Justice Kanyeihamba's pronouncement in *Tinyefuza* "that courts have no jurisdiction over matters which

<sup>137</sup> G. Cowper and L. Sossin, 'Does Canada Need A Political Questions Doctrine?', 16 Supreme Court Law Review (2002), 334–372, at 345.

<sup>138</sup> See Muhern, *supra* note 74; Cowper and Sossin, *supra* note 75; Tribe, *supra* note 74; and Barkow, *supra* note 21 at 239 (arguing that the constitutional structure vests some interpretive authority with the political branches); and Seidman, *supra* note 74 at 444 (arguing that political branches have final interpretive authority as to the meaning of the Constitution).

<sup>139</sup> Citing *Attorney General v. Major General David Tinyefuza, Baker v Carr, supra*; and *R v Cambridge Health Authority ex PB* [1995] 2 ALL ER 129.

are within the constitutional and legal powers of the political branches of government.” What is more, the government can be read to be of the same mind with Professor Barkow’s thinking that ‘in all constitutional cases the primary question must be whether the question before a court has been committed to another branch of government.’<sup>140</sup>

Relying on *Tinyefuza* and other foreign authorities, the government argued that the way the petition was framed required the court to make a judicial decision involving political questions, which the court had to determine at the outset whether it had jurisdiction to determine those questions. Further, it argued that in adjudicating such matters, the Constitutional Court would in effect be interfering with political discretion which by law is a preserve of the executive and legislature. Further, the government’s view was that the Constitutional Court should not deal directly with questions that the Constitution has made the sole responsibility of other branches of government; that for the Constitutional Court to determine the issues in the petition, it would be required to review all the policies of the entire health sector and make findings on them, and that the implementation of these policies was the sole preserve of the executive and legislature. To further substantiate its claims, the government submitted an affidavit by the Principal Secretary of the Ministry of Health, which outlined the efforts and strategies undertaken by the government to improve maternal health services and ensure high standards in the health sector. It then cited sections 111(2)<sup>141</sup> and 176(2)(e)<sup>142</sup> of the Constitution that it claimed preserved the right of the executive and the legislature to formulate, review and implement policies and allocate resources. In dismissing the petition, the Constitutional Court endorsed the political question doctrine as pronounced by the Supreme Court in *Tinyefuza*.<sup>143</sup> While the Court was correct in stating that that doctrine had been adopted by the Supreme Court in *Tinyefuza*, it is important to point out that the Constitutional Court first adopted the political question doctrine in *Matovu* and subsequently applied it in *Andrew Kayira v Edward Rugumayo*.<sup>144</sup> In fact, in *Tinyefuza* Justice

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<sup>140</sup> Barkow, *supra* note 21 at 244.

<sup>141</sup> Section 111(2) provides that “the functions of the Cabinet shall be to determine, formulate and implement the policy of the Government and to perform such other functions as may be conferred by this Constitution or any other law.”

<sup>142</sup> Sections 176(2)(e) provides that “appropriate measures shall be taken to enable local government units to plan, initiate and execute policies in respect of all matters affecting the people within their jurisdictions.”

<sup>143</sup> Citing *Attorney General v. Major General David Tinyefuza*, *Baker v Carr*, *supra*, and *Coleman v Miller*, 307 U.S. 433 (1939).

<sup>144</sup> *Andrew Kayira v Edward Rugumayo*, Constitutional Case No 1 (1979).



Kanyeihamba acknowledged that *Matovu* had adopted the political question doctrine as a sound principle to be applied in Uganda. Perhaps, one of the significance of highlighting *Tinyefuza*'s adoption of the political question doctrine is that *Tinyefuza* was the first case that applied the political question doctrine after the 1995 Constitution. Prior to *Tinyefuza*, it remained uncertain whether the political question doctrine was applicable in Uganda under the 1995 Constitution.

In justifying the application of the political question doctrine in the *Maternal Health Case*, the Constitutional Court reasoned that the Constitution clearly stipulated the different roles assigned to each of the three organs of government. According to the Constitutional Court, this implied that the autonomy of each organ of government must be immune from undue intrusion from the others. In as much as it may be correct that the government had not allocated sufficient resources to the health sectors, the Court reasoned that the duty to determine such matters was the preserve of the executive and no other organ of government. For this reason, the Constitutional Court pronounced that it is bound to leave certain constitutional questions of a political nature to the executive and legislature to determine. The Constitutional Court justified its reluctance in adjudicating the issues in the petition arguing that in doing so it would be substituting its discretion for that of the executive. In other words, the Constitutional Court was concerned that by adjudicating the issues in the petition, it would intrude into the domain of the executive in conflict with the principle of separation of powers.

Therefore, the Constitutional Court sustained the government's preliminary objections and held that it had no power to determine or enforce its jurisdiction on matters that required analysis of government health sector policies because the acts or omissions complained of were committed to the political branches and thus fell under the political question doctrine. Professor Wechsler and other commentators characterize this version of application as the classical political question doctrine.<sup>145</sup> According to Cutaiar, the classical version was recognized in the landmark Supreme

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<sup>145</sup> Wechsler, *supra* note 1 at 9. Wechsler has been interpreted as stating that the judiciary has no basis, and no business, abstaining to hear a case where the Constitution could fairly be interpreted as requiring them to abstain. See, Gouin, *supra* note 60 at 778. See also T. Cutaiar, 'Lane Ex Rel. Lane v Halliburton: The Fifth Circuit's Recent Treatment of the Political Question Doctrine and What It Could Mean for *Commer v Murphy Oil*', 55 *Loyola Law Review* (2009), 393–412, at 398. The other political question doctrine version is called the prudential version commonly associated from Professor Bickel. The prudential version is a judge-made overlay that courts have used at

Court decision *Marbury*.<sup>146</sup> The basic premise of the classical version is that “the political question doctrine is itself a product of constitutional interpretation, rather than of judicial discretion.”<sup>147</sup> I agree with proponents of the classical political question doctrine that the only appropriate use of the political question doctrine is to jurisprudentially guide the court in determining the circumstances the Constitution has committed to another branch of government the determination of a question.<sup>148</sup>

## 5. Conclusion

Based on the above analysis, it is plain that the political question doctrine is an integral part of Uganda’s constitutional law. The courts have applied this doctrine to deal with some of the most important constitutional questions in Uganda. A common feature in the application of this doctrine in Uganda is that courts place a particular emphasis on the Constitution’s text and the preservation of the separation of powers.<sup>149</sup> The discussion above demonstrates how Uganda has come to grips with the judicial response to political questions.

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their discretion to protect their legitimacy and to avoid conflict with the other political branches. See Barkow, *supra* note 21 at 253

<sup>146</sup> Cutaiar, *supra* note 84 (arguing that the political question doctrine is a product of constitutional interpretation rather than judicial discretion).

<sup>147</sup> Scharpf, *supra* note 62 at 538.

<sup>148</sup> Wechsler, *supra* note 1 at 7–8.

<sup>149</sup> See, *Baker v Carr*, *supra* note 12; *Ghana Bar Association v Attorney-General* [2003–2004] SCGLR 250; *Onuoha v Okafor* (1983) NSCC 494 (holding that the lack of satisfactory criteria for a judicial determination of a political question is one of the dominant considerations in determining whether a question falls within the category of political questions); and *Balarabe Musa v. Auta Hamzat*, (1983) 3 NCLR 229, 247 (holding that the impeachment of a State governor was a political question not appropriate for judicial review. Justice Ademola reasoned that “impeachment proceedings are political and for the court to enter into the political thicket as the invitation made to it clearly implies in my view asking its gates and its walls to be painted with mud; and the throne of justice from where its judgments are delivered polished with mire”).

## CHAPTER FIVE

### RECOMMENDATIONS AND CONCLUSION

#### 5.1 Recommendations

The common law is the major protector of civil rights at the state level. However Ugandan government has a tradition of introducing legislations that decrease civil rights rather than protecting civil rights. If Ugandan constitution is entered with Bills of rights then this will have to be considered by the government courts when making decisions. Government bills of rights will help to encounter the trend towards the removal of civil rights. The constitutional entrenchment of government bills of Rights will result in the High Court having to consider them when deciding cases.

Our Constitution mentions the clear provision of separation of powers. Yet, by pursual of article and their arrangement, one could easily understand that the framers of our Constitution too inclined toward the doctrine of separation of powers. But in practise the separation of power is not well maintained in Uganda compared to other states. For instance the American Constitution, all the executive powers have been vested in President. All the legislative powers have been vested in Parliament. All the judicial powers have been vested in Supreme Court. The Constitution clearly demarcates spheres for each of the organs of the Government namely judiciary, legislature and executive. As mentioned, each of the organs does not encroach the other organ in essential elements, but each of the organs may encroach the other organs in the matters of incidental elements.

In Ugandan President has given too much power and there is no clear separation of power, compared to the other states. For instance the judiciary is interfered by the executive as the fact that the president is the appointee of the judges of the Court of appeal and High Court. It is clear that when judges being appointees of the president are free in most cases but sometimes they are discharging their duties while their mind-set about the interference by the executive arm of the state and they are likely to pay royalty to the executive whereby the president is the head of it. These indicate that there is no clear independent of judiciary so far as the separation of power is concerned.

The Role of the Judiciary in Safeguarding the Principle of Separation of Powers in Uganda should be well maintained, since the constitution is regarded as the supreme law of the land and makes all organs of the state subject to the constitution. In this kind of democracy, the principle of the rule of law is also emphasised. Therefore separation of powers is necessary if political liberty and progressive well-being of all is to be achieved. For the judiciary, separation of powers is the foundation for judicial independence, which is one of the most essential characteristics of a free society.

The judiciary has a sensitive and crucial role to play in controlling the exercise of power and upholding the Bill of Rights. For example although Parliament has a wide power to delegate legislative authority to the executive, there are limits to that power and it is the duty of the courts to ensure that the limits to the exercise of public power are not transgressed

In order for the judiciary to effectively perform its function. It is important that the judiciary be independent and that it be perceived to be independent. Thus, the role of the judiciary in safeguarding the principle of separation of power includes developing the principle itself. Therefore, there are times when the courts must perform the difficult task of reconciling democracy with the operation of the courts themselves. If the judiciary is to function without fear or favour, ill-will or affection, it must be truly independent and outside the control of the other branches.

According to the doctrine of separation of power in Uganda is not well maintained because the Judiciary face several challenges which hinder their effectiveness. These include the limitation which is found in the various constitutional checks on the judiciary to maintain checks and balances especially as relates to appointment and removal of judicial officers which is normally not done by the judiciary itself.

Article 98 of the Constitution which gives power to the government to enact law for altering any provision of the constitution, is the offensive provision which normally have block the separation of powers between the three state's organs of the government as it is bring usually the conflict between the judiciary and the legislature as far as the separation of power is concerned.

Therefore Uganda should maintain separation of powers so that to influence the growth of administrative law.

#### **5.1.1 Leaders must Rule according to the Rule of Law**

First of all the leaders must rule according to the rule of law and that they must respect the principle set forth by the laws of the country including the doctrine of separation of powers which is the constitutional principle and that they must know that no one is above the law.

#### **5.1.2 Amendment of Laws to Reflect the Doctrine**

The provision of some laws which are contrary with the constitutional principle of separation of power which some of them vest power to personnel of other organ to perform the functions other organs must be amended to reflect the constitution which provides for the doctrine of separation of powers.

#### **5.1.3 Amendment of Constitution Provisions**

Some provision of the constitution also have to be amended so that to reflect the doctrine of separation of powers but also the power of the President must be reduced because President have many powers which are the source of the infringement of the doctrine of separation of powers.

#### **5.1.4 Changes to the System of the Government**

The system of the government must be changed so that it go together with the doctrine of separation of powers and that by stopping some personnel to work in more than one organs that for examples the ministers shall not comes from members of the parliament.

#### **5.1.5 Limit of Powers of Organs of the State**

The constitution and other laws have to set out the limit of powers of each organ so that the organs to know the limit of exercising their powers because that will make each organ to restrict itself to what is allowed by law and that will make the state to function smoothly.

#### **5.1.6 Punishment for violators of the Doctrine**

The laws must set out the punishment for the one who will go contrary with the doctrine of separation of powers without long the status or position of the violator in the government that will act as deterrence for the one who want to infringe the doctrine.

#### **5.1.7 Education to the Schools and Society on the Doctrine**

The legal education concerning the doctrine of separation of powers must be given to all people so that for them to be in position to recognise when infringement of it when it happens so that to prosecute the one who violate it and also to the schools for student to know and understand the doctrine.

#### **5.1.8 Adherence to the Doctrine of Check and Balance**

On exercising the doctrine of check of balance the organs must look that not to extend beyond their power vested on that check and balance doctrine because sometimes the doctrine of check and balance resulted to infringement of doctrine of separation of powers because mostly the organs do extend beyond their limits and perform the functions which are not part and parcel of their power vested to them by the constitution through article 4.

### **5.2 Conclusion**

What emerges from the preceding analysis is not only that the doctrine of separation of powers is a prominent feature of Uganda's constitutional system, but also that this doctrine is not merely an abstract theoretical and philosophical construct. Instead, it is a practical, workable principle that is as relevant today as it was when first formulated centuries ago. The threat of tyranny is as potent today as it was when Lord Acton warned famously that "power tends to corrupt, and absolute power corrupts absolutely. "The separation of power, whether in the British, or French sense, does not, as some critics suggest, require a rigid separation of the different organs of power into watertight compartments, but rather sufficient separation to forestall the dangers that are inherent in the concentration of powers. The Ugandan analysis demonstrates that the doctrine contains elements of universal validity that no country can afford to ignore in the arrangement of its governmental institutions. Although the doctrine of separation of powers. alone cannot explain Uganda's outstanding and enviable record in Africa as a successful, liberal, multiparty,

constitutional democracy, its impact cannot be ignored. The executive, especially the Office of President, is as powerful as any in Africa, but what sets Uganda apart from most other African governments is the considerable freedom with which the courts regularly review and invalidate irregular and illegal executive and legislative acts. Individuals who feel that their constitutional rights have been infringed have regularly resorted to the courts. In a recent case, one party challenged the jurisdiction of the Industrial Court, arguing that it was subsumed under the executive arm of the state and thus in conflict with the doctrine of separation of powers embodied in the constitution. This judicial freedom places Uganda in marked contrast to many African countries, who copied the British model of the separation of powers, providing a much more limited vision of judicial independence. Consequently, those governments regularly suffer no consequences for violations of their constitutions.

The simple fact that Uganda's constitution creates situations in which the same persons belong to more than one of the three organs of power, or that each of these organs to some extent control and exercise the functions of the other, does not by necessity contradict the doctrine of separation of powers. The special cases where an organ performs the functions of another, or interferes with the functions of the other are both explicit and implied by the nature of government itself. These special cases are determinable and limited; the doctrine would be meaningless if it could be circumvented completely and with impunity. The doctrine, as an important touchstone of constitutional democracy, appears to do no more than provide that particular functions, for practical purposes, belong primarily to a given organ of power, while simultaneously superimposing a power of limited interference by another organ to ensure that the former does not exercise its acknowledged functions in an arbitrary and despotic manner. In a modern age that stresses realism and political pragmatism rather than strict dogma, the doctrine of separation of powers facilitates unity, cohesion, and harmony within a system of checks and balances. It is clear that while the separation of powers on its own cannot guarantee constitutional democracy, where, as in Uganda, it exists and is allowed to work, it does so reasonably well and creates a more sustainable and feasible constitutional democracy.

The doctrine of separation of powers it is of good essence therefore it must be adhered as clearly stipulated in the constitution under article 4 and that it must be effectively implemented as also

stated by Montesquieu that the doctrine requires the three organs of the state to have different power, function and personnel. Therefore the organs of the state through the personnel must make sure that they adhere with the doctrine of separation of powers and that also the organs they must exercise the doctrine of check and balance without going beyond and cause the infringement of the doctrine of separation powers. Therefore for all of that to be archived and the doctrine to be adhered then the recommendation given below must be taken into consideration.



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