THE CONSTITUTIONAL HISTORY OF UGANDA SINCE INDEPENDENCE 1962: A CRITICAL ANALYSIS.

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DECLARATION

I KAJUBI GEORGE WILLINGTON do hereby declare that 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 credentials in any university or college or published in whole or part.

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

Signed..... Date.....27/10/17.....

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APPROVAL

This dissertation is submitted with the approval of my supervisor.

Signed..... Date..27th October 2013.

M/S. BASAJABALABA JALIA

DEDICATION

This work is dedicated to my dear wife and children who have been my source of inspiration.

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This research work has taken a lot of my time and other resources to come to this final stage which was still enough and it has involved some other people who have helped me to reach this final stage.

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ABSTRACT

This research investigated the constitutional history of Uganda since independence of 1962 a critical analysis. The purpose of this study is to address the general public on how rulers/leaders alleviate from leading according to the constitution which poses a danger to democratic governance. The researcher found out that although here have been established constitutions put in place; the reality is that most of these constitutions have remained on paper. This research reviews the constitutional changes right from the period Uganda was declared an independent sovereign state by looking at the events immediately before and after the granting of independence, the concept of constitutionalism and violent change, challenges faced in protecting and upholding the constitution and proposed recommendations that the government of Uganda should adopt.

CHAPTER ONE

GENERAL INTRODUCTION TO THE STUDY

1.1. Introduction of the Study

The study focused on the history of the constitution of Uganda since 1962. This chapter presents the background of the study, background of the problem, statement of the problem, objectives of the study, research question, scope of the study, significance of the study and chapterisation.

1.2. Background of the Study

Under the colonial rule an alien institution in form of the legislative council was created under the order-in-council 1920. It was a lien in that, though prior to its formation we had our own traditional councils (which however were neither representative nor legislative) for example, the Lukiiko in Buganda, Rukarato in Bunyoro and Toro and the Eishengero in Ankole, these had in reality become just subordinate sections of the provincial administrative department of the protectorate government[1]. They had been stripped bare of substance and made to assume the role of local tribal barazas. African representation on the legislative council only came to be in 1945, twenty-five years after the formation of the council: since the council was the platform from which participation in government by the people could be effected and from which the government could be controlled in fact, we can conclude that effective participation by the people in designing policies affecting them was negated by the colonial masters, putting aside other weaknesses or defects of the legislative council, the point to be noted is that it was through such platform and others like political parties, that demands for independence were made and our leaders, at independence selected or in some cases elected.

[1] Uganda Protectorate government, memorandum on the constitution of the Native Government of Buganda Kingdom, entitled "The Uganda Agreement 1900", P. 23

On its inception, the legislative council was essentially foreign, consisting of the Governor and at least two other persons. In 1926, an Indian was made a member and in 1945, the first Africans were allowed into the council. This African representation was increased from three to four and then to eight in 1950. Even then the council could not claim to represent the true aspirations of the Africans since none of the members had been elected but rather merely selected. This offended against the concept of representative democracy. It can be confidently said therefore that the legislative council did not represent the interests of the majority. It represented the interests of the rulers and this characteristic it had was to continue even after independence. This strange character was even recognized by Governor Cohen and liberal as he was, he felt no need to change it....

> *"I believe .... That there is an immediate need for a substantial increase in the size of the legislative council but I see no need to change its character and I should be opposed to any alteration at present either in the balance between government and unofficial sides of the council or in the balance between the different groups on the unofficial side...*[2]

The legislative council had assumed a role of merely ratifying the decisions already taken by this majesty's government. The Executive dominated all the way and independent Uganda seems to have inherited this idea of pushing parliament into a rule-making, thus pushing parliament into a position of rubber-stamping party decisions. In such circumstances, limited government could not be meaningfully realized.

Having said all this, we should consider the role, whether positive or negative, played by Buganda in achieving independence for Uganda. It should be noted first

[2] "Uganda Protectorate Government, Dispatch No. 434, March 15, 1953, from the governor of Uganda to the secretary of STATE for colonies to be found in Uganda constitutional documents.

of all that Ugandans had become politically conscious of the need for independence after the formation of political parties, the first being the Bataka party founded in 1946[3]. It was through such parties that Ugandans became aware of their right to self-determination and agitated for their independence, hoping that it would be meaningful to them. After independence, however, the political parties that were still in existence assumed a different role altogether. It has been said that Uganda has been handicapped by tribalism, feudalism, traditionalism and over such problems, all products of the British influence and policies.[4] One such policy was that of indirect rule which inter alia, led to the growth of inward-looking attitudes in the natives, who hence considered national institutions and unity as a threat to their existence. The agreements that had been entered into with the native rulers, while on one hand curtailing their absolute powers, conferred privileges and rights to these rulers on the other hand, which privileges they were not willing to part with at independence. Of these native kingdoms, Buganda ranked most special in the eyes of the British. Unlike the other kingdoms, it had its own system of administration and government. It thus considered itself to be a nation in its own, all this with British encouragement. It is no wonder therefore that on the eve of independence, Buganda wished to secede from the rest of Uganda. Coleman J.S. explains this;

> *"Where conquest states that centralized chiefdoms have been recognized and used as units in local administration by colonial authorities, they tend to become foci for separatist subnationalisms in the modern territorial system...."*[5]

Buganda and to some extent the rest of the kingdoms therefore formed the core of Uganda's political and constitutional problem up to the time of independence and

[3] The Uganda National Congress Founded by Musazi in 1952; the progressive party by E.K Mulira in 1955, the D.P in 1954, Uganda People's Union 1959, UPC in 1960

[4] Obol – Ochola, "Uganda Constitutional law since independence (unpublished)

[5] Coleman J.s., "politics of sub Saharan African" in Almond and Coleman politics of Developing Areas (Princeton university Press 1960) pp. 254-60)

even beyond. The minister commission of 1961 was therefore set up to make recommendations about the form of government which would be suitable for Uganda and also consider the relationship between the central government and local authorities in Uganda. According to the terms of reference of the commission, it was to bear in mind.

> *"the desire of the peoples of Uganda to preserve their existing institutions and customs and the status and dignity of their rulers and leaders."*[6]

The commission just worsened the situation however, because it recommended federal status for Buganda and semi federal status for the other kingdoms, while the Eastern and Northern provinces and Kigezi were to have a unitary relation with the central government. National unity was thus sacrificed and this signified in the end a struggle for power between the different factions and consequently attempts at limiting that power have been to no avail, since each faction, once in power, wishes to have no opposition at all.

A conference to discuss the constitutional framework for Uganda took place in Lancaster House in London between September 18, and October 9, 1961 and its conclusion formed the basis for Uganda's internal self-government constitution which in turn formed the basis for Uganda's independence constitution.

However, with the independence constitution around the corner, the National Assembly could not claim to represent the people of Uganda. The voice of the people as a source of power for the government was still considered of no consequence. That is why parliament in independent Uganda could easily be and is in fact easily manipulated by the executive for its own ends. It is through such "specially elected" members and their like that the executive comes to dominate the

[6] Report of the Uganda Relationships Commission 1961 (The Minister of Reports) in A. Kiapi, Basic Documents on constitutional law in E. Africa, Vol. 1 (unpublished).

parliament of the day, and enact laws to further their own interests or enable them to do so.

Internal self-government constitution came into force on March 1, 1962, when Uganda was granted internal self-government with the Kiwanuka as Uganda's first Prime Minister.

1.3. Statement of the Problem

Uganda has gone through various constitutional changes i.e the 1962 Independence Constitution, the 1966 Constitution, the 1967 Republican Constitution and currently the 1995 Ugandan Constitution. Different leaders abrogated their own constitutions save for the late presidents Idi Amin, Binaisa, Lule and Tito okello. The major attribute of political differences emanated from the constitutions of the day which concentrated a lot of power to the sitting presidents.

In 1986 Uganda again experienced another political change by ushering in a new government (National Resistance Government) led by the current president of Uganda Yoweri Kaguta Museveni. His government brought new ideas for example the 10 point program as its pivotal point for proper governance. In 1995 a new constitution was promulgated, this was regarded as the best constitution the country has ever witnessed. Under this constitution, the aspect of Human rights was properly introduced in chapter four. Most of the problems of the past were resolved for instance the return of kingdoms and rule of law.

However, despite of the above, rule of law/constitutionalism has been abused, parliament has simply become a rubber stamp of the executive, arbitrary laws have continued to be legislated such as the recently public order and management Act was passed by parliament. One wonders as these events unfold, what is the way forward for Uganda. Amendments into the constitution are made to favour a certain class of people. This poses a danger to democracy/constitutionalism with its

attendant long term negative consequence hence the need to investigate why constitutions have failed to formulate the full realization of democracy in Uganda.

1.4. Objectives of the Study

1.4.1. General Objectives

The study generally examined the efficacy of the legal constitutional framework as an integral aspect of democracy and the challenges faced and showed how it effectively helped in guarding against the abuses of our constitution.

1.4.2. Specific Objectives

i) To assess the effectiveness of the concept of constitutionalism in line with the 1995 constitution and Uganda's obligation in ensuring that the constitution is respected.

ii) To critically evaluate and examine the efficacy of the doctrines of separation of powers of law and respect of human rights in order to ensure that leaders are restrained from abusing these powers.

iii) To critically evaluate and examine the effective checks on the abuses of political power by the authorities and ensure the need for greater accountability and transparency.

iv) To identify the challenges/limitations in implementing/protecting the existing constitution and propose measures to strengthen their implementation.

v) To suggest recommendations to strengthen the legal framework for full realization of the principle constitution and constitutionalism.

1.5. Scope of the Study

The case study of the research focused on the history of Uganda's constitution. Uganda has gone through many political turmoil and constitutional changes. The study investigated the challenges faced during constitutional changes. The time

scope of analysis was from post colonization especially 1962 independence constitution to date analyzing whether the promulgation of different constitutions have been effective in attaining rule of law in the country.

1.6. Significance of the Study

The study played a significant role in determining whether the existing constitution provides for principles rule of law and constitutionalism.

The research findings will help governmental bodies such as Ministry of Justice and Constitutional Affairs, parliament of Uganda, Uganda Law Reform Commission adopt more realistic approaches to protect the constitution.

The study will in future also be useful to policy makers, academicians, lawyers, judges and other stakeholders in as far as appreciation and implementation of the principles of rule of law and constitutionalism are concerned. It will be vital for Uganda in its attempt to structural set up to ensure that constitutionalism can be improved. The study will also benefit the community, that is to say, the individuals. This is because from the past constitution to the present rule of law has consistently been abused.

1.7. Methodology of the Study

The study employed qualitative research methods from which various secondary data collection methods was used such as library research study on books, government policies, and commission reports and desk research. This is because the major forum of the study was to examine the legal perspective of the constitution putting into consideration the challenges encountered. The researcher visited and conducted his research in libraries among which are Law Development Center, Uganda Human Rights Library and KIU library.

1.8. Literature Review

For a considerable length of time, men have expressed concern with the articulation of the institutions of the political system, and granted government has a role to play in society, this must be coupled with the realization that government must be brought under control and its powers limited. This is in order that the government should not be destructive of the values it was intended to promote in fact. How to control governmental power and control it effectively therefore remains the fundamental question. Constitutionalism, largely addresses itself to this question.

Most of the materials available, however, on the subject of constitutional history are by foreign (non-Ugandan) authors and very few, if any, focus on Uganda, despite the very interesting events Uganda has seen. The little material available is not up to date and especially the period from 1971 to 1986 is not covered. G.W.

Kanyeihamba is, however, commended for his piece of work, in the book **Constitutional law and government in Uganda**[7], where he gave a detailed discussion of Uganda's constitutional developments since the colonial times up to 1971. He analyzed fully, the five constitutions Uganda administration up to 1967 and also a brief coverage of events immediately before and after the coup d'etat of 1971. The book lacks, however, current aspects as far as constitutionalism is concerned. Recent events have shown not less than five changes of governments and with each change of government, sections of the existing constitution (an instrument of constitutionalism) are suspended if such sections are inconvenient to the goals of the rulers in power and these rulers then introduce their own frameworks, often called Decrees. The much that Kanyeihamba discusses, under the periods covered in his book, is amply done, however. Though his discussion is largely and formally of historical nature, this is inevitable, of a constitutional lawyer.

[7] Kanyeihamba G.W Constitutional law and government in Uganda. (East African literature review, Kampala 1975).

A fortiorari, it is the past that determines the present and what is happening today has its roots in the past. In any case, his discussion is not devoid of analysis. From him we learn the conditions that sharpen the constitutions of Uganda 1962, 1966 and 1967 and why they failed to work. From a perusal of his work, however, i understand him to be saying that the fundamental question is merely constitutional. With this however, I cannot agree. To me, the problem is largely political, and this is so however legalistic a national constitution may sound. Issues of who leads who, with, what intent and purpose and within which restraints are all matters of a political nature. Elaborate constitutional provisions are therefore not likely to be of much use. Kanyeihamba's failure to identify fundamental question is however off-set by his right conclusion that the voice of the majority should be paramount and that the leaders should act in accordance with the dictates of the majority.

J.Y Obol-Ochola in his book, **the Uganda constitutional law since independence**[8], has also more or less, argued on the same liens as Kanyeihamba. He analyses events leading up to independence and even beyond but stops short of the coup d'état of 1971 and thus, also does not have recent developments. In as much as he identifies the major handicap that militated against the evolvement of strong national democratic institutions at independence and thereafter, his analysis is commended. This view of the fundamental problem as national unity is not totally wrong either. However in light of the social economic realities of the day national unity is not foreseeable in the near future in Uganda. With a people so grossly unequal, both socially and economically or even politically, national unity will continue to be beyond reach and the interests of the rulers and ruled will continue to be divergent. In such circumstances Obol-Ochola says that what is practical and realistic must prevail. What he fails to tell us, however, is as to what test to apply in determining the issue-objective or subjective.

[8] J.Y Obol-Ochola, the Uganda constitutional law since independence, unpublished, Makerere University Faculty of law.

E.K Makubuya, in an article entitled, "**legal framework for Democracy in Uganda**"[9] goes beyond the year 1971 and in fact covers events up to 1979, which saw the advent of the Uganda National Liberation Front Government. This is one of the few sources of materials on the developments I have come across. His analysis is not without content either and from this we get to know the clogs and fetters on democratic progress (constitutionalism more or less) in Uganda. He observes that while the constitution is in existence alright, its working on democratic lives has been prevented by the over-concentration of power in the president, thus preventing an effective check on his powers, an extensive qualification to the constitutional bill of rights; the existence of such laws as the press censorship and correction Act (Cap. 306), public order and security Act 1967, Act 20 of 1967 and other related laws all of which are inimical to constitutional – principles and practice in Uganda. On this aspect, his discussion is very useful in so far as it supports our contention that constitutional devices are ultimate power control, on failure of which they resort to extra-legal methods of political manipulation – the Army and their privileged position in the parliament of the day.

Of the English authors, C.H. Mcilwain in his book **Constitutionalism and the changing world – collected papers**[10], while realizing the importance of constitutionalism observes that it is only a strong government, equipped with enough power that can ensure democratic processes and prevent despotic rule.

The democracies of the world, if they are to succeed most become less contemptible than they have been, that is, they must become more competent. Disorder in the past has been overcome by a concentration of power. It can be overcome by no other means...."[11] (emphasis mine)

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[9] Makubuya E.K., "Legal Framework for Democracy in Uganda". Mawazo Vol. 6 No. 1 June 1985.
[10] McIlwain, G.H. Constitutionalism and the Changing world collected papers. Cambridge university press, 1939
[11] Ibid, P. 277

It should be remembered that it is a fact that overconcentration of power that has created problems for Uganda and led to the divergence between the theory and practice of the constitution. Fortunately, Mcilwan cautions against this – "The powers of the governors should be great, yet they must be limited."[12] He notes that one of the methods of doing this is by or through the doctrine of separation of powers. This doctrine, we submit, is not very effective in checking the excessive use of governmental powers. It has not been strictly adhered to or respected in Uganda either.

D.O. Aine, in an article entitled, **"A comparative study of the constitution position and powers of the president of Zambia"** has also tended to have the view held by Meilwain, about the concentration of powers in the government. Aine has argued that it is at times necessary to concentrate powers in an Executive president and the cabinet in order to "carry out a vast economic programme based on national interests....."[13]

The late Kwame Nkrumah was also of the same view, while defending the preventive detention Act, which first appeared in ex-British colonies in Ghana in 1958.

"The government in determined not to be caught unprepared as a number of states have been by subversions either from within or without.... It may therefore on occasion be unfortunately necessary to have special powers."[14]

I still maintain, however, that over-concentration of powers in the government is really dangerous and should be avoided if the constitution is to be respected and maintained. M.J.C. Vile, in his book, **Constitutionalism and the separation of**

[12] Ibid

[13] Aine D.O., "A comparative study of the constitutional position and powers of the president of Zambia" Nigerian law journal Vol. 4, 1999

[14] See Kalunga L.T. "Human Rights and the Preventive Detention Act 1962 of the Republic of Tanzania – some operative aspects "E. African Law Review, vol. 11 – 14

powers [15], has argued in the same connection that our skepticism about constitutional devices intended to limit the exercise of governmental powers should not lead us to dismiss just like that, the need to limit continued concentration of power into the hands of the Executive.

"The concentration of more power into such hands or of certain sorts of power may be inevitable given certain assumptions about the military, social and economic needs of modern societies, but which powers, how much of them and how they can be effectively limited are the questions we should be asking ourselves"[16], he argues this argument, however, falls back to what his fellow English authors, and no doubt some authors from the developing world, have been advancing relating to the solution to the dilemma. He also argues that the doctrine of separation of powers can go a long way in solving these problems. He adds perhaps, the concept of representative government and leaves it at that. While the doctrine of separation of powers and the concept of representative government may be valid for governments in the developed world, for example, Britain and the United States, for developing countries like Uganda, much is left to be desired. Leaders in the developing world (Uganda) feel themselves to be indispensable as far as exercise of governmental power is concerned. Any desire for share in the exercise of power or any attempt to succeed those in control is taken to be "subversive" and treasonable. It can be seen therefore, that under such circumstances, the concept of representative government cannot apply and neither will the doctrine of separation of powers.

To A.H. Birch, in his book, **The British System of Government**[17], it is parliament which can effectively control the action of the government departments. He is

[15] Vile M.J.C., constitutionalism & the separation of powers (Clarendon press Oxford, 1998)
[16] Ibid, pp. 10 - 13
[17] Birch A.H. The British system of Government, (Allen and Unwin Limited, London 1967

supported in his view by L.S. Amery in his book, **Thoughts on the constitution**[18], who notes that advice and criticism of the "nation's representatives" can be an effective check on the government of the day.

While all this may be true as far as Britain and her constitutional system is concerned, Uganda and other developing countries are exceptional cases, since no consensus has been reached between the rulers and the ruled, as to how best the system of government should be carried out. Professor H.W.R Wade has observed that, "Government under the rule of law demands proper legal limits on the exercise of power. This does not mean merely that acts of authority must be justified in law for if the law is wide enough; it can justify a dictatorship based on the tyrannical but perfectly legal principle of "quod principi placuit legis habet vigorem." The rule of law requires something further. Power must first be granted by parliament within definable limits."[19]

While admitting the need to control the exercise of governmental powers and on this point we agree with him, the professor seems to be saying that it is parliament which can do this and do it effectively. On this point however, I cannot agree with him, because he assumes the existence of parliament separately from the other organs of government that is the Executive and judiciary. Unfortunately in Uganda and other developing countries, the executive has come to dominate and influence parliament to such an extent that parliament as an organ of control on the Executive is rendered useless. This has been possible through the device of the party system. In Kenya and Tanzania and not very long ago in Uganda, membership of the parliament was and still is synonymous with membership of the party and the life of parliament became dependent upon the pleasure of the president.

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[18] Amery L.S. Thoughts on the Constitution (Oxford University Press, London (1964)

[19] See Seidman R.B, "Constitutional standards of judicial Review of Administrative Action", Nigerian law journal vol. 1 No. 2 Dec 1965, p. 232 quoting H.W. R Wade, administrative law (1965)

Of great relevance of this paper, is the work of Y.P Chai and J.P.W.B Mcauslan, in their book **public law and political change in Kenya**[20]. The two authors have argued that the fundamental question must be viewed within a political context because the reality is that key interpretations of the law are given by politicians within a political rather than a legal framework and that the law is moulded and altered to suit the whims of the politicians. They observe further, that an important task lies upon the government to create confidence in, and respect for the institutions of government so that they become legitimate in the eyes of the people. The legal system is ideally put to a good use in this process, whereby the governmental institutions are used and altered, for the development or otherwise, of legitimacy. What the two authors are saying therefore is that the leaders should always be aware of the need for legitimacy and always act in accordance with the dictates of constitutionalism in their administration of the peoples. The law and the constitution should in this process be the umpire unfortunately, however, this is not so in practice. As the authors note,

"The constitution is not in practice seen as an umpire above the political struggle but as a weapon in that struggle which can be used and altered in order to gain temporary and passing advantage over one's political opponents.[21]

Although the authors specifically focused onto events in Kenya, their argument and analysis equally applies to Uganda. That this is so is borne out by the facts and events that Uganda has gone through for the past twenty five years or so. Many leaders have come and gone and with each leader, Uganda has witnessed a different constitution or for that matter, a Decree which sets out the framework of the government of the day. Those sections of the hitherto existing constitution are appropriately suspended if they are inconvenient to the goals of leaders in power.

[20] Ghai C & MCauslam, public law and political change in Kenya: A study of legal framework of government from colonial times to the president (Oxford University Press, London, 1970)
[21] Ibid P. 511

Chai and McAuslan's analysis is therefore very useful in as far as it identifies the fundamental issues.

Chai and McAuslan are supported in their arguments by I.E Duchachek, in his book **Rights and Liberties in the World Today: Constitutional Promise and Reality**[22] who is of the view that constitutions generally deal with the hard core of politics and in this view we agree with him. He observes that;

"*The dynamic force behind all constitution making is primarily political: however legalistic a national constitution as supreme of the land may sound, it basically deals with the hard core of politics... and for that reason political leaders are not inclined to allow their legal experts to have the last word. They consider constitutions to be too serious to be left to constitutional lawyer alone.*"[23]

It is precisely for that reason therefore that any attempts to put a limit upon the exercise of power, through the device of the constitution will be fruitless since it is the leaders that determine which powers they should have and to what extent and purpose they should exercise them. Constitutions therefore come to hang in a balance.

Herman Finer, in his book, **Theory and Practice of Modern Government**, has also rightly argued that every constitution reflects the material and spiritual circumstances of the time and "its meaning in operation as distinct from its meaning on paper is fairly responsive to contemporary necessities."[24]

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[22] D.V Chachck L.D, Rights & Liberties in the world Today; constitutional promise and reality, (California 1990) cited by Ele O.C. Human Rights in Africa: some selected problems. (Nigerian institute of international affairs 1998)pp. 24 – 31.

[23] Ibid

[24] Herman Finer, Theory and Practice of Modern Government, Vol. 1, (Methuen and Company Ltd., London 1932)

From his argument, we can gather that the politicians are always very ready to put aside, that, which does not appeal to their tastes and replace it with what they want. It is the constitution that generally reflects the wishes and desires of the rulers. Finer notes, however that the constitution cannot be taken or accepted as the sole evidence of what is constitutional.

It must be read together with the laws which define it. He gives examples of the French "Declaration of Rights of men and citizens" 1789 which contains warning that the articles shall have effect according to the laws yet to be made. He also cites the German constitution of 1919, whose articles always ended with the phrase "a law shall state the details."[25]

This analysis is, therefore, not without content especially if seen in light of the various laws on the Ugandan Statute books which make meaningless the various constitutional guarantees of human rights. That the constitution is a reflection of the material and spiritual circumstances of the time is also borne out by a critical look at the constitution of Uganda 1962, 1966 and 1967 as well as the various Decrees passed by the subsequent governments. Finer's analysis is therefore relevant in this respect.

That state power should be derived from and exercised in accordance with the law has been widely held to be the underlying concept of the Rule of Law. There is abundant literature on the Rule of law but we feel here that, a brief review of the Report of the international commission of jurists on "**The Rule of Law in a free society"**[26] will suffice. The commission, in a conference under the above heading, in 1959, defined the concept of the Rule of law as

"the principles, institutions and procedures not always identical but broadly similar which the experience and traditions of lawyers in different countries of the world,

[25] Ibid, P. 192

[26] International Commission Jurists, Report on "The Rule of Law in a Free Society" New Delhi India 1959

often having themselves varying political structures and economic background, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of men."[27]

The concept works under the assumption that the law is based upon the respect for human dignity and in fact tries to enhance it. That the law is the final arbiter in the political struggle. This attitude runs through the whole report of the commission. Unfortunately however, and in as far as this is so, the concept of rule of law may not be very useful since law itself is used as an instrument by those who wield political power, to legalize their excessive use of power. The law is often bent to the wishes of the politicians and in the process, the sanctity of the human personality is of least concern to these politicians; it should not be forgotten that law was used as second weapon to establish and maintain the colonial rule as well as to subdue any recalcitrant natives. Even after independence, it continued to serve this purpose effectively.

Oloka Onyango[28] suggests a complete refashioning of the conceptions of power and its control that we have been subjected to right from colonial times. He appreciates the notions of popular justice as exemplified in the local councils and committee statutes.

On the other hand professor Kiapi[29] was of the view that since independence, governments, in Kenya, Tanzania and Uganda have not lived up to the constitutional principles of governance such as the observance of human rights, the rule of law, separation of powers and the rule of the judiciary. He cited the

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[27] Ibid P. 197

[28] Olako Onyango: state structures, the constitutional process in the struggle for a democratic future in Uganda, A working draft P.3

[29] A Kiapi undesirable constitutional development in Uganda since independence paper presented at a conference on constitutionalism and rights: an African United States Dialogue at Kampala on August 12th – 15th 1991

extension of lives of governments as one of the political diseases that have affected Uganda since independence. According to him, non-observance to rule by constitutional principles is the main cause for future of constitutionalism.

Professor Mandani has suggested that the starting point for analysis should be how power has been organized in relation to different social groups, thus leading us to a conception of rights organic to African realities and not a conception lifted in every detail mechanically from the western historical experience. He is further of the view that there is a need for the resignation of the state apparatus in the rural areas so that is a demarcation or division of powers between the legislative, judicial, administrative and coercive organs of state with a system of checks built into the organisation as a move towards constitutionalism. Appreciating the objectivity of professor Mudani's directed to constitutionalism and social movements.

Professor Ssempebwa [30] has stated that "the basis of all future political developments are the people in whom sovereignty is vested, the people are the foundation of political power which would normally be exercised by their chosen representatives." He is of the view that going by the experience of political tragedy – Ugandans have gone through, there is a dire need for involving the people in governance as to give maximum effect to their aspirations.

Conclusion, I submit, therefore that unless Ugandans are willing to be more tolerant, moderate, and mutually understanding as well as readily willing to build and accept more democratic institutions the gap will continue to exist between what appears on paper and what actually happens in practice.

[30] F. Ssempebwa: "The constitution as a basis for political and social economic development. Article informing the constitution of Uganda – Essay and materials edited by Richard Okumu-Wengi, Uganda law watch (1994) P. 36

1.9. Chapterisation

This research study is divided into five chapters which points out the central issues on constitutional history of Uganda.

Chapter one

The chapter gives a general introduction, background of the study, objectives, statement of the problem, significance of the study, scope of the study, methodology and used literature review.

Chapter two

The chapter discusses the development of the different constitutions in Uganda as an independent sovereign state.

Chapter three

This chapter deals with a critical examination of the concept of constitutionalism in line with rule of law.

Chapter four

This chapter deals with factors/challenges limiting the protection/respect of our constitution.

Chapter five

This chapter proposes certain recommendations that may be used as a yardstick to uphold and respect the constitution.

CHAPTER TWO

UGANDA AS AN INDEPENDENT SOVEREIGN STATE

2.0. Introduction

This chapter seeks to examine how far the concept of limited powers of government was observed and kept by what some have called our "national leaders". Since it was now fellow blacks leading fellow blacks surely one would expect a change for the better as far as constitutional government was concerned. Whether this was so or not is the concern of this chapter.

2.1. Events Immediately before the Granting of Independence.

Under the colonial rule an alien institution in form of the legislative council was created under the order-in-council 1920. It was alien in that, though prior to its formation, we had our own traditional councils (which however were neither representative nor legislative) for example, the Lukiiko in Buganda, Rukarato in Bunyoro and Toro and the Eishengero in Ankole, these had in reality become just subordinate sections of the provincial administrative department of the protectorate government.[31] They had been stripped bare of substance and made to assume the role of local tribal barazas. African representation on the legislative council only came to be in 1945, twenty-five years after the formation of the council.

Since the council was the platform from which participation in government by the people could be effected and from which the government could be controlled in fact, we can conclude that effective participation by the people in designing policies affecting them was negated by the colonial masters. Putting aside other weaknesses or defects of the legislative council the point to be noted is that it was through such platform and others like political parties, that demand for

[31] Ibid

independence were made and our leaders, at independence selected or in some cases elected.

On its inception, the legislative council was essentially foreign, consisting of the Governor and at least two other persons. In 1926, an Indian was made a member and in 1945 the first Africans were allowed into the council. This African representation was increased from three to four and then to eight in 1950. Even then the council could not claim to represent the true aspirations of the Africans since none of the members had been elected but rather merely selected. This offended against the concept of representative democracy. It can be confidently said therefore, that the legislative council did not represent the interests of the majority. It represented the interests of the rulers and this characteristic it had was to continue even after independence. This strange character was even recognized by Governor Cohen and liberal as he was, he felt no new to change it: -

"I believe ...that there is an immediate need for a substantial increase in the size of the legislative council but I see no need to change its character and I should be opposed to any alteration at present either in the balance between government and unofficial sides of the council or in the balance between the different groups on the unofficial side..."[32]

In 1961 the Munster commission was set up to make recommendations about the form of government which would be suitable for Uganda and also consider the relationship between the central government and local authorities in Uganda.
The recommended federal status for Buganda and semi federal status for the other kingdoms, while in the Eastern and Northern provinces and Kigezi were to have a unitary relation with the central government hence creating confusion.

[32] Ibid

National unity was thus sacrificed and this signified in the end a struggle for power between the different factions and consequently attempts at limiting that power have been to no avail, since each faction, once in power, wishes to have no opposition at all.

On or between 18th September and October 9, 1961, a conference to discuss the constitutional framework for Uganda took place in Lancaster House in London and its conclusion formed the basis for Uganda's internal self-government constitution which in turn formed the basis for Uganda's independence constitution. This conference used the Munster Report as its working document.

2.2. The Period 1962 – 1967

2.2.1. The Uganda Independence Constitution 1962

The most important aspect of the independence constitution is that, it was devised by the British and designed to protect their interest. By creating a hotchpotch form of government, neither federal nor unitary, the Ugandans would remain divided and therefore fail to identify the major issues at stake, while the federalists would continue enhancing British interests.

Article 1 of the constitution declared it to be supreme law of the land like under the internal self-government constitution, parliament was to be composed of Her Majesty represented by the Governor, and the National Assembly, which assembly consisted of eighty-two elected members and nine specially-elected members plus the Attorney-General and or the speaker[33].

Parliament that was therefore created by the 1962 constitution was a remote body and meaningless to many Ugandan and this because of the fact that the executive could subjugate and in fact did subjugate it. Its role as an effective control on the

[33] Article 38, Uganda Independence Constitution, laws of Uganda 1962 – subsidiary legislation

arbitrary exercise of governmental power therefore became meaningless. The enormous restrictions that were placed on the parliament also prevented it from doing an effective job. It had no power for example, to alter the constitutions of the federal states,[34] and it could not legislate to abolish Buganda's option for indirect election of its members to parliament.[35]

Ibingira has argued correctly that those limitations or restrictions sprang up during colonial rule. They continued, however, even after independence and the question is to protect who this time? The British interests, I would say it comes as no surprise therefore that governments in independent Uganda have run out of control and institutions which are supposed to guard against this are being used as tools by the rulers to further their own interests at the expense of the masses.

Turning to the Executive under the independence constitution, the constitutional provisions were generally in line with the British concept of "cabinet government" based on the west minister model, which model imports parliamentary democracy. This we have seen has been overridden by the wishes of the executive. The concept of cabinet government assumes the executive to be the supreme rule-making body and the executive is therefore equipped with a lot of powers to effect this. Unfortunately, however any attempt to limit those powers has now come to be felt cumbersome and a nuisance by the executive. That is why the voice of the people in form of parliament is often ignored by the rulers, however much as this is provided against by the constitution.

Seith C. Otuteye, has noted that framers of constitutions in a bid to enable their governments to conduct with efficiency and speed, the difficult task of nation-building after decolonization"[36] tend to give the executive wide powers. He notes

[34] Article 5(5) of Uganda Independence Constitution
[35] Article 43 of 1962 Uganda independence constitution
[36] Seith C. Otuteye, "Constitutional innovation in French west Africa; the experience of Guinea and the ivory cost

for example that under the Ivory Coast Constitution, the president, a symbol of national unity is the guardian of the constitution and the sovereignty of the state.[37] He appoints ministers and revolves their appointment at will, determines all appointments to the public service and the armed forces; and the national assembly cannot question his political responsibility. Otuleye realizes, however, the high risk involved in granting such vast powers: -

"With this objective, the constitutional framers have however assumed the risk of conferring upon the chief executive a wide range of powers that would enable him to control and maintain an uncomfortable surveillance over the constitutional organs of the state.[38]

In as much as wide powers are needed for the executive to carry out the task of nation building limitations should be placed on those powers, if peace, order and good government are to be realized.

The Uganda independence constitution, like the internal self-government constitution, provided for comprehensive powers to be vested in the executive. Under Article 61, the Executive authority was to be vested in the majesty, represented by the Governor – General.

A cabinet of ministers was provided for under Article 63, consisting of the prime minister and other ministers, to be appointed by the Governor on the recommendation of the prime minister. The governor had to act in accordance with the advice of the cabinet of ministers. Power was therefore divided between the governor and the prime minister, thus preventing at least in theory, the rule of one man. In this respect therefore, constitutionalism (limited government) was achieved by the independence constitution.

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[37] Article 8 f the ivory coast constitution
[38] S.C Otuteye, op.cit, p.21

A great in-road was however, made into the concept of limited government. Matters relating to external affairs, defence, including the armed forces, internal security, control of the police forces and the execution of publication under agreements with the kingdoms were the exclusive preserve of the governor, for which he needed no consultation with anybody. To crown it all under article 67 clause 2 if at all he consults and acts in accordance with the advice of the cabinet or not was not questionable in court. This was a grave mistake, we feel, on the part of the framers of the constitution and were one of the avenues for the disrespect of democratic institutions by the executives.

With absolute discretion in matters relating to internal affairs and especially the armed forces and police, the executive could do as it wished in suppressing its opposition and entrenching its position. The late former president Obote did this exactly in 1966 when he overthrew the independence constitution and promulgated another, passed by his faction.

That constitutional provision was therefore a defeat on the concept of limited government and subjected the whole country to the whims of one man. One may, however argue that in order to guard against and powers of the president can be controlled by the cabinet ministers. Under the circumstances, this could not be so, however, because the constitution provided that on such matters as above the governors did not need to consult or take the advance of the cabinet.

Under Article 63(2) of the constitution it was provided that "the cabinet shall be collectively responsible to parliament..." This gave power of control over the government to the parliament, which parliament, we have seen as really a toothless organ in this respect, having become subordinated to the government or executive it was supposed to control. Commenting on the doctrine of collective responsibility,

Ibingira observed that it was entrusted to an untried cabinet which had no experience at all or even responsibility in managing the affairs of the people.

"One of the greatest mistake committed by both Ugandan politicians and the "protecting power" was that a party whose leaders were never tested in the exercise of executive responsibility should have been given such vast and awesome powers as were enjoyed in this independent African government. So long as the politician has no real or specific responsibility to execute and thus be judged for he can say the sweetest or most convincing words and he will not be easily contradicted, no matter how ill-suited he may actually be..."[39]

According to Ibingira therefore, and I agree with him, the doctrine could not be an effective method in controlling the powers of government, no doubt due in part to the character of the politician in power. Perhaps I should add that the doctrine is to some extent (in the Ugandan context) self-defeating, putting in mind the fact that ministers are appointed from the members of the National Assembly and also the fact that the executive dominates parliament, parliament and the executive merger into one; implying therefore that under the doctrine of collective responsibility, the executive is responsible to itself; power it is true can itself be a limit to power, by virtue of the requirement for accountability, but how can one account to oneself? Purporting to control governmental power through the requirements of accountability to the people, the parliament, the independence constitution therefore failed. In a country where there is no agreement as to the supremacy of the masses' voices, power becomes illimitable.

2.2. The State of Human Rights and Rule of Law

Under the independence constitution, the fundamental human rights and the aspect of Rule of law were in one way or another compromised.

[39] Ibingira op.cit., P. 256

The question here is as to what extent fundamental human rights were respected in Uganda in light of the fact that wide powers were vested in the executive.

The question of fundamental rights aptly illuminates the opposition between the theory and practice of constitutionalism in Uganda, and it is probably worthwhile at this point to remember how far the colonial masters tried to bridge this gap between the theory and practice as far as fundamental rights were concerned. It is also important to remember that while over colonial masters had no bill of rights, they insisted on its existence in our constitution at independence. This was in order to protect the minority parties who in turn protected British interests.

It is common knowledge that the colonial system was essentially repressive and in spite of the recognition of fundamental human rights, these rights were limited by statutory laws in order to preserve effective imperial rule[40] and the tradition of saddling the fundamental rights with exceptions and qualifications was to continue even after independence. Statutory limitations on human rights during the colonial regime appeared in such legislations like the Vagrancy Ordinance, Cap. 47 of the laws of Ugandan protectorate, 1951 which restricted freedom of movement; the Deportation ordinance Cap. 46 laws of Uganda protectorate 1951, which in effect restricted freedom of association, as happened in Re G.L Binaisa[41]; the law of seditious libel and many others.

The Uganda independent governments were later to emulate those laws and this was not surprising since there had been no fundamental change in the structure of government. All this supports my submission that the legal system and other government institutions which are supposed to curb such practices is used in fact to perpetrate those very practices.

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[40] Ibid p. 258
[41] (1959)E.A 997

At independence, some groups advocated for incorporation into the constitution of a Bill of Rights for safeguarding the rights of those groups. This was not surprising either, because as Y.P Chai observes.

"With the prospect of independence, the racial or tribal conflicts or as more often, the potential conflicts become obvious, competition for political power with its many rewards becomes acute and the minority groups aware to agitate for safeguards."[42]

A bill of rights therefore, came to be incorporated in the independence constitution, in a bid to prevent abuse of powers and also protect minority groups like the Asian communities. Whether these rights safeguarded under the constitution had any legal force in reality, is doubtful especially in view of the government, determination in countries like Uganda, to take action failed to be in the public interest whatever that means. Without stable political institutions in which there is a consensus between the governed and the governors, formal guarantees of individual rights are destined to be more descriptions without content. In any case, the machinery designed to enforce these rights, that is, the court system, is likely to incline in favour of the state than the individual and worse still, it takes money to put it into motion.

A significant legislation at this time, which constituted a possible derogation from fundamental rights was the emergency powers Act 1963 which superseded the order-in-council 1939, under which the governor could declare a state of emergency. In his memorandum to the constitutional committee (Lancaster conference 1962), the Katikiro of Buganda stated:

"It is of the utmost importance to secure that emergency powers should only be used for the legitimate purposes of national defence and public safety. They must not be employed as a political constitution ..... if the central government can

[42] Chai Y.P., independence and safeguards in Kenya "East Africa law journal vol. 3 1967, P. 177

assume unlimited emergency powers, the autonomy of the kingdoms within their own spheres can never be secured...."[43]

While credit is given to the Katikiro for realizing that emergency powers could in fact be used as a political device to justify excessive use of power, the Katikiro seems to have taken the fundamental question is to be the autonomy of the native kingdoms. He was not to be blamed because he was part and parcel of the system and he sought to safeguard that very system – a system of autocratic rule where the wishes of the masses are not to be taken into account. The Katikiro failed to realize that the import of emergency powers was to suspend the fundamental human rights in order to safeguard the "security of the state" or its "peace, order and good government."

The constitution under Article 30, empowered the Governor General to declare a state of public emergency under which persons could be detained if considered a threat to peace, order and good government. Although detailed provisions were enacted under Article 31, protecting persons so detained, it is doubtful whether such provisions were often complied with. At least there is evidence that Obote did not do so during the state of emergency declared in 1966.

In a nutshell, one can conclude that the independence constitution provided for some measure of limited government and mass participation in government, through their so-called representatives in parliament constructive criticism and debate could go on during parliamentary sessions, in the first parliament under the independent government of Uganda. However the constitution, while providing limits did not prove legal and effective restraints, and consequently political tension began to build up between the central and federal governments especially with

[43] Ibingira op.cit., p. 26

Buganda government as was reflected in the cases of **Attorney General of Uganda Vs Kabaka Government**[44] **and Joseph Kazaaire V. Lukiiko.**[45]

The independence constitution, like the subsequent constitution also failed to provide a framework for building strong institutions which could stand against dictatorships; and the crisis of 1966 and consequent overthrow of the independence constitution therefore became inevitable.

2.3. The 1966 Constitution

As I have already discussed above, the 1966 constitution overthrow the independence constitution of 1962. The key observation in the coming into force of this new constitution, is that the whole process was anyway, very irregular and in conflict with constitutionalism because in the first place, the mode in which the constitution was introduced defeats logic the members of parliament were told to find their copies in their pigeon holes and in any case, what's with the story lingering in the background, the members of parliament had very little choice but to approve.

The legality and validity of the 1966 constitution was challenged in the case of, **Uganda Vs commissioner of prisons, exparte Matovu,** where the court sanctioned the illegal seizure of power by a section of the government in violation of the independence constitution. The court held that this amounted to a revolution in law and that a new legal order had been established; that the constitution was effectively abrogated and the 1966 constitution was therefore valid[46].

Obol-Ochola gives the practical implications of the case as including (i) it provided the necessary legal authority to the so many changes that followed, (ii) it opened

[44] (1965)EA 472
[45] (1963)EA 472
[46] Kanyeihamba, op.cit, pp 78-89

the way for other changes of political nature to be made on the basis of the 1966 constitution.

While agreeing with him that the case highlights the conflict between practice and principle and that what is practical and realistic must prevail, we should add that the test of what is realistic must be objective but not subjective. Often what is realistic to the rulers is not so for the masses and we maintain that the voice of the people must be paramount and must prevail.

Simply to put it, the 1966 constitution was aimed at achieving a unitary form of government for Uganda. This apparently meant to the powers that were, a merging of the functions of the executive and head of government. This supports my contention, that the late Obote (former president of Uganda) wanted and in fact got a lot of powers and henceforth, government and the whole country came to be ruled by one man. The constitution was therefore passed, in order to further the interests of one man and concentrate all powers in one man. The rest of the constitutional provisions of the 1962 constitution were hardly affected and neither was constitutionalism hardly achieved. The 1966 constitution was to be in force until another one was passed by the constituent Assembly.[47] Meanwhile, events elsewhere were not very good. An open rebellion had broken out in Buganda. A state of Emergency was declared under which many Ugandans were to suffer. The enormous powers given to the president in a state of emergency served to consolidate power in one man, to the exclusion of the other groups. That this was so was clearly demonstrated by the case of **Ibingira and Others V. Attorney General of Uganda.**[48] Grace Ibingira and his ministerial colleagues had been arrested and detained under the Deportation Ordinance, Cap.46 of the laws of Uganda. The case was dismissed by the Uganda High Court. The court of Appeal for East Africa allowed the appeal and ordered the government of Uganda to release

[47] Lecture by Mary I.D.E Maritum, "Uganda & Her constitutional changes; A historical overview," delivered under the auspices of faculty of law, Makerere University, 16th March 1987.

[48] Ibid

them. They were later rearrested and deported to Patiko in Northern Uganda. Parliament passed an Act – the Deportation (validation) Act 1966, to invalidate (in effect) the court's decision awarding damages to Ibingira and his group. This is a very clear example of how the governmental institutions can be manipulated by the wielders of power to foster their own ends. This is ridiculous because it is these very institutions that are supposed to curb abuse of power, which are being used to exercise arbitrary power. Honourable Latim, the then member of parliament for Acholi North west while opposing the Deportation (Validation) Bill stated:

"I am asking this government to refrain from using this house to nullify the decision of the judiciary. I am also asking the government not to fight its rivals in this house by enacting oppressive laws".[49]

The little protection given to the detainees, under Article 31 of the constitution was no protection at all since it was not respected or observed.

Honourable A.K. Mayanja, the then member of parliament for Kyaggwe North East observed,

"..... what is the purpose of our coming in order to give extra-legal powers to the government if these powers are not going to be used?... We make these elaborate regulations, these regulations have not been followed and the first type of infringement is not one which was made by members of the security forces.

.... The first infringement of law, Mr. Speaker has been the infringement of the constitution 1966."[50]

He cited an incident where more than one thousand five hundred innocent people were arrested in one day and later released, without having been informed that they had infringed any law, all contrary to Article 31 clause 1 paragraph (a), of the 1966 constitution. The Emergency powers while at times desirable, give the

[49] Kanyeihamba op.cit., p. 54

[50] Uganda V. Commissioner of Prisons Exparte Matovu (1966) EA 514

prevailing circumstances, are often subject to fragrant misuse and they fully illuminate the distinction between the practice and principle.

The state of emergency was to continue for five years until 1971 when Amin came to power. In 1967, the government published proposals for a new constitution. The government put up a show of trying to involve the people in drafting a document that would set out the relationship between the governor, and the governed. This was by inviting people to make suggestions and criticisms as to the nature of the constitution yet to be. This was a useless exercise so long as the government was not ready to respect part of its bargain. Parliament which had never been elected by the people constituted itself into a constituent assembly and adapted the proposed constitution. A Republican regime was established under the new constitution.

2.4. The Republican Constitution of 1967

This constitution did not help to solve the previous loopholes and challenges encountered in the independence constitution.

For instance under Article 31 the president had unfettered power to appoint and dismiss minister as well as constitute public offices and fill them.[51] Under article 39, parliament was to be composed of the president and the national assembly as well as ministers and their deputies. The doctrine of separation of powers was thus made a mockery of the president was also given the powers to prorogue and parliament under Article 62. To crown it all, where the president was required by the constitution or any law to consult or to consider or to act in accordance with the advice of any persons or authority, whether he did so or not was not questionable in any courts of law,[52] This Republic constitution further carried forward the irregularities of the 1966 constitution by providing under Article 26 clause 3 that the

[51] Preamble to Article 145 of the Revolutionary Constitution 1966
[52] (1966)EA 306

person holding office as president before the commencement of the constitution shall be deemed to have been elected as president. Under Article 62 clause 5, the members of parliament then, were also so deemed, of this Kiddu Makubuya notes: *"The provisions which deem people to have been elected are manifestations of dangerous antidemocratic tendencies." Law thereafter is enacted on basis of people's presumed rather than actual consent."*[53] Those then were some of the provisions of the constitution relating to the executive and if one takes a close look at them, one cannot fail to see an over-concentration of power in the president. While we acknowledge what professor Kiapi says that

"To guide the destines of millions (of people) effectively, the president must be given lots of power over the people".[54]

I subscribe to the saying that too much power corrupts and absolute power corrupts absolutely. Conventional checks and balances, which underlie the doctrine of separation of powers, did not work here in Uganda, because as we have seen, the executive dominated the legislature though the instrument of the party and the rotten practice by members of parliament of crossing from one party to another without the consent of the Electorate.

Members of parliament have thus been accused of not being guilty of any gesture of usefulness[55]. The late Obote's UPC thus came to dominate the parliament. Not forgetting also the idea of "specially – elected members" which the Republic constitution even safeguarded in Article 40. That apart the president by virtue of his law-making powers under Article 64 also forms part of the legislature.

The courts' power to check on the actions of the legislature and the executive is meaningless if parliament, at the instance of the executive can invalidate court

[53] Uganda parliamentary debate (Hansard), vol. 65 1966-67 series, p. 1077.
[54] Ibid, vol 61, p. 235
[55] Lecture by E.F Sempebwa "Uganda's past and present constitutions, merits and demerits" delivered under the auspices of faculty of law, Makerere University, 16th March, 1987.

decisions as in the case of **Ibingira V. Attorney – General and Decree No. 1 of 1987** in effect invalidating the decision in **Sempebwa V. Attorney General civil suit No. 435 of 1986.** The Doctrine of collective responsibility we have already seen since the executive and parliament were one and the same under Obote's government, the idea of vote of no confidence under Article 30 of the constitution was also of no effect.

I can conclude therefore that the government under Obote was really beyond control of the people. The constitution in turn imposed no effective restraints on the government, the explanation here being that it was designed to do just that. No wonder therefore that the government was not prepared to meet its principle obligations to the people.

2.4.1. Fundamental Human Rights under the 1967 Constitution

In the field of fundamental human rights the constitution contained an elaborate Bill of rights in chapter III. Whether this Bill was respected is another matter. Professor A. Gladhill writing on fundamental rights observed that,

There are constitutions devised to throw dust in the eyes of the observers while the ruling clique or party does as it lives here the fundamental rights like billinis are important only for what they conceal[56].

The government was particularly fond of using the executor "public peace and security" to derogate from the fundamental human rights provisions in the constitution.

To this end the public order and security Act, Act 20 of 1967 was passed (replacing the Deportation Act, 1963) under which preventive detention is made lawful in Uganda. It was used to detain political opponents real or imaginary and under

[56] Professor A. Gladhill, "Fundamental rights" in J. N. D. Anderson, changing law in Developing countries, George & Unwin Ltd, London 1967, p. 82

section 13, it is provided that no court may question a detention order. The court however held in **Kyesimira V. A.G**[57] following **Nakkuda Ali V. Jayaratine,**[58] that the court could so question the order life the government acts ultra vires the Act.

In practice also, constitutional safeguards are rarely observed.[59] A few examples of violation of the fundamental rights are in order. Under Article 10 clause 3, a person who is arrested or detained must be taken to court without undue delay. **In Ofwono .V. Bukedi District Administration**[60], the plaintiff was arrested by chiefs and policeman of the dependent. He spent eight days in prison without being charged and without being taken to court. The defendants were held to be highly "oppressive and high handed."
In **Victoria Openja V. James Mubiru,**[61] the plaintiffs' detention in prison for five days without being taken to court was held to be unlawful.

In **West Nile District Administration V. Dritto**, the plaintiff was arrested and kept in prison for forty-nine days without charge.
"I am perturbed at the casual way in which it appears arrests are being made and at the frequency with which we hear of unlawful detention. In the present case the local commander does not appear to have been clear even in his own mind on what charge he was arresting the respondent and no attempt appears to have been made to comply with sections 27, 30 and 31 of the C.P.C. This constitution gave a grave interference with the liberty of the citizens"[62] while the constitution provides under Article 15 for a trial to be conducted within a reasonable time, cases

[57] Constitutional case No. 1 of 1981
[58] (1951)Ac 66
[59] Obwooli Oloya, "Emergency powers in preventive detention in independence African states: the Uganda case" LLB Thesis Makerere University 1986, p. 76 -67
[60] H.C.C.S No. 324 of 1968 (unreported.
[61] H.C.CS No. 324 of 1968 (unreported)
[62] (1969)EA 324

appeared in court where prisoners have been detained for so long a time. Cases like;

Morrison Mayanja V. Uganda; Lubega and Another V. Uganda; R. V Doka Musu and others,[63] All clearly demonstrate this point. Again contrary to the constitution (Article 12) the police are known were for using fortune methods against prisoners, especially to extract information from then or even at the time and scene of arrest. Reference should be hard here, to **Serwanga V. A. G; Mukiibi .V. A.G., Sengendo V. A.G** and many others[64].

On the whole constitutionalism seems to have been in a balance especially in the latter half of the decade. The people had no control whatsoever, on the leaders in power especially after 1966. All preference at encouraging the people to run their affairs was abandoned and the government institutions and systems which were supposed to control and regulate governmental power were on the contrary being used by the rulers to perpetrate their rule.

Even the law itself was being made a mockery of and this is not surprising since the legislative organ had been subjugated by the executive.

2.5. Conclusion

In conclusion, we have seen that Buganda and the entire Uganda was under a state of Emergency until 1971 and no semblance of order could be said to exist under such state of emergency and in an attempt to bring back such order, the rulers found it necessary to pervert the governmental systems while at the same tie consolidating their power. The 1967 constitution instead of providing against this went on in fact to do the contrary. This show that the rulers, in their quest for power are always intolerant of those institutions which hinder their efforts to realize

[63] Misc Cr. Application No. 251 of 1971, H.C. Misc.Cr. App. No. 71 – 74/197
[64] H.C.C.S No. 718 of 1970;, H.C.C.S 240 of 1970 & H.C.C.S 731 of 1971 respectively

their ends and can always do away with those institutions or simply ignore then, at the earliest opportunity possible. Instead created those institutions which promote the interests of the rulers. In the process, the masses are of least concern to the rulers, despite claims to the contrary. That rulers always consider constitutional limits as a nuisance and always do away with them at all costs is amply illustrated by the overthrow of the 1962 independence constitution, the enactment of the 1966 and later 1967 constitutions which two constitutions were all to the tastes of Obote and his clique since they gave them what they wanted. However, "divisible and feudalistic" the 1962 constitution was, the subsequent constitutions were no better, at least for the masses, who continued to suffer at the hands of the ruling class. The desire to cling to power, to the exclusion of the masses, by hook or crook thus breaking all rules of the game, is our major problem.

CHAPTER THREE
CONSTITUTIONALISM AND VIOLENT CHANGE

3.0. Introduction

It is my submission that constitutionalism and violent change are incompatible and cannot coexist. The period immediately after independence saw some form of limited government. The subsequent governments increasingly become careless of the dictates of constitutionalism. Even today in the current regime signs are manifesting that constitutionalism is slowly eroding due to personalization of institutions, interference from and by different heads of different institutions among others.

3.1. The Notion of Constitutionalism

By constitutionalism we mean the theory of conducting politics according to the constitution of a country. In this sense a country's constitution is a document which sets out the framework and composition of the government as the overall composition of the polity. Such a constitution may be written as in the US, or unwritten as is with the UK.

Apart from creating, organizing and distributing government powers, the constitution also ensures that governmental power is exercised legitimately[65]. This in turn means that a constitution place restraints on governmental power and provides a standard of legitimacy for assessing its actions.

An essential element of constitutionalism is the requirement that right conduct consists of following the rules, especially in Uganda and other countries where the constitution is declared to be supreme law of the land; however the idea of constitutionalism cannot disregard the forces of social change lest it become static.

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[65] Supra

In Uganda, Article 2 of the constitution states that this constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.

If any other law or any custom is inconsistent with any of the provisions of this constitution, the constitution shall prevail and that other law or custom shall to the extent of the inconsistency be void.[66]

As a result of this reality, constitutionalism has faced many challenges throughout Uganda's constitutional history, its major test being how to make constitutional limitations effective against rulers.

3.2. The State of Constitutionalism since Independence

The political turmoil that followed the forceful overthrow of the 1962 constitution, beg of emergency regulations and detentions. Constitutionalism and violent change could not be compatible under such circumstances. It was to the dictates of their conscience that the rulers of the time, owed their allegiance with the rise to power, not through the mandate of the people (thereby laying waste to all the constitutional laws and rules) but through a violent change of government, the rulers give into themselves vast powers in order to combat any threats to their power. The hitherto existing laws are dispensed with formally or informally, if and when they appear contradictory to the power-that-be constitutionalism thus comes to hang in a balance.

B.O Nwabueze notes,

"Where there are legal restraints on the powers of government, politicians have either ignored them or amended them and with power in their hands, the politicians have perpetrated their rule".[67]

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[66] Supra

In January 1971, Amin overthrew the first Obote government power was purportedly grabbed and usurped in the name of the people – "to save a bad situation from getting worse"! Ruth first has however observed that;
"Whatever the political background to the coup d'état, when the Army acts, in generally acts for army reasons in addition to any other it may espouse".[68]

Military governments, the major perpetrators of violence can never be accountable to the people since the people did not give them their mandate on the change of government. Constitutionalism is thus put at stake violent change defies all constitutional rules and however valid the reasons given for the overthrow of government constitutional norms and principles under which power ultimately lies with the people, are offended.

It is worth noting that the 1967 constitution of Uganda provided in Articles 30(3) and 62(2), for a change of government but not for a violent change of government. The 1995 constitution provided a different approach to change of government. It provides that "it is prohibited for any person or group of persons to take or retain control of the government of Uganda, except in accordance with the provisions of this constitution. Any person, who, singly or in concert with others, by any violent or other unlawful means, suspends, overthrows, abrogates or amends this constitution or any part of it or attempts to do any such act, commits the offence of treason and shall be punished according to law.
Even if the 1967 had provided for a change of government, little difference would have been made since "unless concrete conditions are created to ensure

[67] Mkude T.L reviewing B.O Nwabueze's book, constitutionalism in the Emergent states, East African law Review vol. 7 No. 1 1974
[68] Ruth first, The Barrel of the Gun; political power in Africa and the coup d'etat (Penguin press, London 1970) p.20

performance of civilian rule, constitutional provisions...cannot bring an end to military intervention..."[69]

Once the law is made, altered and amended to suit the political necessities of the time constitutionalism can never be achieved.

Constitutionalism could not constitute a guiding factor either where, for example under Amin and Obote, control of the Army meant control of the government. The events in the period 1966 up to today rendered true Ibingira's assertion that the army was likely to be feature in Uganda's public life for a long time.[70] Amin's subordination of the constitution cut down any remains of the democratic system.[71] Like under obote's state of emergency 1966, persons continued to be detained by virtue of the Detention (prescription of time limit) Decree, Decree 7 of 1971. The Bill of rights under the constitution, though preserved, was only of paper effect. Control of the government through parliament, turned into the council ministers, became impossible under Amin's regime.

With the erosion into the independence of the judiciary, the court system was also shattered. In the field of fundamental rights, the regime was most brutal since these rights are determined by the nature of state power and the way it reveals itself in practice.[72]

Repressive methods were taken to suppress all position, real or imaginary. All political activity was suspended by the suppression of political activities Decree, Decree 14 of 1971. Over Decrees in contravention of the Bill of rights included the Armed Forces (powers of Arrest) Decree 7 of the 1972, and others. Since

[69] Osita C. Eze, Human Rights in Africa, some selected problems (Macmillan Nigeria publishers Ltd 1984)
[70] Ibingira C.S, The Forging of an African Nation, (Viking press, New York 1973), P. 291
[71] Legal Notice No. 1 of 1971, section 1 and 8
[72] The practice of killing suspects by the police and army was held to be unlawful by Russel J. in Efulayimu Bukenya V. Attorney General H.C.C.S No. 730/74

jurisdiction was withdrawn from the courts and vested in the military tribunals, independence of the judiciary which the international congress of jurists held to be very vital[73] became an illusion. Justice, during this time was held to be in great danger since the judiciary was no longer independent.[74]

Under Amin's military regime therefore, constitutionalism was bound to be a mere with since the government was under no control whatsoever.

Another violent change took place in 1979, and the Uganda National Liberation Front (UNLF) was ushered in. the UNLF constitution, agreed to by a clique of exiles, purportedly on behalf of the people, and formed the basis of government. This regime was however, generally held to be most democratic of all regimes in the past that Uganda has seen. Its parliament was more meaningful, and the government even attempted to limit the presidential powers granted under the 1967 constitution. This was a bold attempt indeed and reference should be had to the case of **Kayiira and Semwogerere V. Rugumayo Omwony Ojok and others.**[75] By trying to curb the excessive powers of the president, the UNLF government gave an indirect recognition to the concept of limited government and constitutionalism. That the army was still a force behind the government is borne out by its role in putting down the demonstration in Kampala after Lule's overthrow. Constitutionalism hangs in a balance, however because of the way presidents were appointed and removed in succession, without seeking the mandate of the people. The holding of General Elections 1980,[76] is most commendable as far as constitutionalism was concerned. No elections had ever been held for the last

[73] Report of the international congress of jurists on "the rule of law in a free society". New Delhi India, January 1959, p. 37-38

[74] Report of the international commission of jurists on "Uganda and Human Rights", Geneva, United Nations 1977, p. 22

[75] Constitutional case No. 1 of 1979

[76] The National consultative council (hitherto performing National Assembly Functions) was dissolved by legal notice no. 6 of 1980

eighteen years, (from 1980 backwards) despite the constitutional provisions relating to the same. Unfortunately, however, the 1980 elections were massively rigged – the inevitable result of a government holding elections to which it was a party. The electoral malpractices that took place were no doubt inimical to constitutionalism.

The General elections 1980, returned Obote back to power and the government structure assumed that shape it had in the latter half of the 1960s. The anomalies and demerits of the 1967 constitution were also back in force. The Army continued to be a major pillar behind the government and together with its affiliate at this time, the National Security Agency (NASA) it suppressed all opposition.

Members of parliament, from the opposition parties crossed over to the Uganda people's congress, purportedly taking with them with all the people's support in their constituencies. Sympathies for the opposition led to massacring of whole villages.

The international court of justice review noted that six years after the fall of Idi Amin, insecurity still reigned in Uganda and human rights violations in form of extra judicial detentions and executions, disappearances, torture and arbitrary detentions[77], still continued.

Akinola Aguda and Oluwandare Aguda explained this

"*People who wield political power not by the will of the general populace determined through the process of free and fair elections but by sheer force and force it was during the 1980 elections are bound to be haunted by fears, real or imaginary of citizens who may feel strongly against their rule.*"[78]

[77] International court of justice review June 1985, No. 34 p. 16

[78] Akinola Aguda and Oluwadure Aguda, "Judicial Protection of some fundamental rights in Nigeria and in the Sudan before and during the military rule" journal of African law vol. 16(2) 1974 p. 140

Constitutionalism could not therefore be said to have been achieved during this period in light of such things like political coercion, preventive detentions, electoral malpractice, undermining of fundamental rights and freedoms and rule of one party state.

Obote was not dedicated to the upholding of constitutionalism but was more concerned with staying in power at all costs even if it meant perverting the institutions of government, which he certainly did.

The July 27, 1986 violent change of government did not change much and constitutionalism still continues to be accorded disrespect.
The 1995 Ugandan constitution has been held as the best constitution that the country has witnessed. This grand norm has spelt out the notion of separation of powers for instance Article 79 of the constitution vests powers to legislate in the parliament; Article 99 vests the executive authority of Uganda in the president while Article 128 gives the mandate to the judiciary to exercise judicial powers. One may agree with me that in Uganda there is separation of powers but the reality on the ground is different.

In the recent years the country has witnessed abuse of the principles of rule of law/separation of powers. This poses a danger to constitutionalism under democratic governance.

3.3. Independence of the Judiciary

The provisions of the Uganda constitution which prescribe the independence of the judiciary must be nailed by academic readers as some of the best. Yet the defense of that independence has occasionally led to bloodshed and to the lives of

Kanyeihamba making headlines in national newspapers.[79] The only offence committed by these people is to stand up and defend Article 128(1) of the Uganda constitution which provides

"In the exercise of judicial power, the courts shall be independent and shall not be subject to the control or direction of any person or authority".

The same article goes on to state that no person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions and that all organs and agencies of the state shall accord to the courts such assistance as may be required to ensure the effectiveness of the courts. It also provides that a person exercising judicial power shall not be liable to any action or suit for any act or omission by that person in the exercise of judicial power and that sufficient financing for facilitating and sustaining the judiciary and judicial officers shall be provided for directly from the consolidated fund.[80]

Underscoring the principle of judicial independence at an international conference of refuge law judges held in Ottawa, Canada, that country's chief justice asserted thus:

"The basic theme which is basic for the protection of all human rights in the law is the independence of the judiciary which, in Canada is underscored both by the provisions of the constitution and respect for human rights of the citizens"[81]

The learned chief justice then spelt out the tenements of an independent judiciary in three distinct concepts each of which must exist and be practiced for any judiciary to be constitutionally and organically independent. He said that in Canada, the first two concepts are formalized and secured by the provisions of the constitution. The two are the security of tenure and financial security of both judicial officers and the institution of the judiciary. The third concept which he

[79] Monitor Newspaper 17, April 2004

[80] G.W. Kanyeihamba Constitutional and political history of Uganda, 2nd edition P. 286

[81] Keynote address at the IARL held in Ottawa.

called institutional independence is not written down in any law. It concerns the relationship between the judiciary, other arms of government and the public. This third element of the independence of the judiciary in Canada and other major democracies of the world is not founded or prescribed by formal provisions of the constitution or of any written law. It is founded in the minds and beliefs of the people. It is based on the culture of the people and their successive government over centuries and years.[82]

In Uganda the situation has been different in 2006, when Dr. Besigye and his co-accused appeared before the High court for trial, the High Court was besieged by armed personnel who are members of the Uganda People's Defence Forces. They dressed in black and are known as the black mambas. They caused fear amongst judicial officers, staff, civilians and lawyers.

Both the chief justice and the principle judge reacted angrily against the siege. In his statement of disapproval, the learned principal judge declared that the day the black mambas besieged the High Court building will always be recalled in the country's history as a day of infancy. The learned principal judge regarded the siege as the rape and defilement of the temple of justice.[83]

Prior to the above, in 2005, the judicial service commission's fear were realized when one Dr. Kiiza Besigye, an aspirant presidential candidate was arrested and charged with treason and rape before the high court and in the same period taken to a general court martial and charged there with terrorism and illegal possession of guns. In the High Court, Dr. Besigye applied for and was granted bail. On release, he was rearrested and taken to the General Court martial where he was facing the latter charges and had refused to recognize that court's jurisdiction to try him. The

[82] Ibid
[83] Kanyeihamba supra p. 290

General court martial denied him bail and he was returned to jail. Besigye's lawyers challenged the power and jurisdiction of the military general court martial over Besigye, a retired army officer, now a civilian. The lawyers pointed out the consequential double jeopardy of his trial in both the High Court and the military tribunal if he were to be tried more or less at the same time. The issue of whether the High Court and the general court martial had equal or concurrent jurisdictions was referred to the constitutional court. The constitutional court held that the General court martial is subordinate to the High Court. It further held that the general court martial had no jurisdiction to hear the charges of terrorism against Dr. Besigye and twenty two other suspects and that the purported trial in the general court martial was illegal.[84]

The reactions of some of the army operatives like that of General David Tinyefunza, the former coordinator of security services were reminiscent of Aminism. The general accused the Ugandan judges of always siding with offenders. Appearing on television with an angered and frightening face, general Tinyefunza charged; *"Who are these fellow (judge)? The judges have no power to order the army. The army will not accept this business of being ordered by the judges."*

Referring to the learned principal judge, Hon. James Ogoola who typified the feelings of most Ugandan judge and members of the legal fraternity when he reacted sharply against the military assault on the High Court building in which Dr. Besigye and the other suspects were being tried, the General who appears to have had some legal training, further charged. "Who appointed him? Did he go through a ballot? Did he come there by accident? We have given them power but they should not order us about". These are neo-colonial systems. If you look at the neo-colonies and the legal regimes in them they are absolutely confused.

[84] Constitutional petition number 12 of 2006

3.4. The Role Played By the Courts in Protecting the Constitution

It has been one of the aims of paper to convey to the reader that institutions and systems of government have often been used by the rulers to concentrate and bolster up their power and positions. In this process the court system and the legal profession has been no exception. The courts are often called upon to adjudicate on issues which are essentially political in nature and this leads to a clash between the executive and the judiciary. The courts thus come to succumb bit by bit to the dictates of the rulers. The courts especially become cautious of making legal rules which may hurt the government in such circumstances; constitutionalism can never be achieved, since the judiciary has then been maneuvered into a position of subservience to the government. Before the might of the state, the courts are already powerless, since decisions of the courts incompatible with the interests of the rulers are done away with. This was for example done in the case of **Monitor Publication ltd Vs A.G.** in which the company obtained a court order preventing the police from continuous trespass on her premises. General David Sejusa had published an article titled "There is a plot to assassinate those who are against Muhozi's preparation for presidency. The court issued an order but it was rejected by the police who ignored it. More so, in the case of **Ibingira V. Attorney General of Uganda**[85] and the case of **Sempebwa V. A.G.**[86] in both cases, through legislative enactments, the court decisions were denied of any effect.

Apart from the state inhibiting the courts from being an effective pressure group for constitutionalism there are some other factors in-built in the court system itself.

i) The judiciary maintains a culture of remoteness from the people and it is often correctly argued that the courts are inaccessible by the majority of people due to lack of funds to facilitate their cases. The people therefore

[85] Daily Monitor Newspaper, 18 November, 2005
[86] Supra

are not to support the judiciary when it is being encroached upon the executive.

ii) The nature of law itself militates against the courts playing an effective role. Politicians use the law to suppress all opposition and enhance their interests. This can be witnessed by the recent walk to work demonstrations that saw opposition politicians teargased while others unlawfully arrested.

The recent public order and management bill was passed into an Act of parliament.

One can keenly observe that this law was legislated to suppress the opposition politicians. The colonial times saw a governmental and social system essentially authoritarian and repressive, maintained by the law. Indeed in the eyes of the colonial masters, the maxim was "whatever happens, we have got the common law and they have not".[87] That is why he had such laws like the Deportation Act Cap. 308 and the public order and security Act, Act 2 of 1967 on our statute books. Attempts at regulating and controlling the powers of government by the courts are to some extent mere window-dressings.

It is also argued on the other hand, that the courts have tried all in their power to limit the powers of government and maintain a rule of law and constitutionalism.

One author stated that "in recent years, there have been calls from within the judiciary itself and outside the judiciary from the academia for a more activist approach to the Uganda's judiciary's interpretation of the law.[88]

In view of the constitutional provisions enumerated it can be said that the Uganda judiciary has passed the test. Since 1995, the law has allowed courts more leverage than ever before to stand up against executive excess and illegal action and to

[87] Kanyeihamba op. cit

[88] Frederick W. Juuko, independency of the judiciary and rule of law strengthening constitutional activism in East Africa 2005 Kituocha katiba publishers.

promote human rights. In some instances the constitutional court has made radical judgments that uphold rule of law.

In Charles Onyango – Obbo and Andrew Mwenda V. The A.G.[89] the petitioners were charged with publication of false news "contrary to section 50 of the penal code. The charges arose out of a story they had published in the Monitor Newspaper entitled "Kabila paid Uganda in Gold, says report. The applicants petitioned the constitutional court seeking declarations that section 50 of the penal code was inconsistent with Articles 40(2) guaranteed under Article 29(1) and also inconsistent with Article 40(2) and 43(2), (c) of the constitution.

In a judgment that reflected the courts reluctance to rock the boat "the constitutional court held the range of individual choice those acts incompatible with the maintenance of public peace and safety and the rights of individuals. On appeal,
the supreme court held that section 50 lacks sufficient guidance on what is, what is not, safe to public, and consequently places the intending publisher, particularly the media in a dilemma given the important role of the media in democratic governance and law places it into that kind of dilemma and places such unfettered discretion in the state prosecutor to determine... what constitutes a criminal offence, cannot be acceptable and is not justifiable in a free and democratic society.

In a seminar entitled "Towards an improved system of administration of justice" observed that once a court has performed its legal duty, the order made hereunder should not be violated by the organs of government. It also noted the disregard of court orders for production of people detained.[90]

[89] The constitutional appeal No. 1 of 2002
[90] Seminar paper – "Towards an improved system of Administration of Justice" – seminar/workshop held in Kampala under the auspices of the ministry of justice, August, 2013

The nature of rights being protected by the courts also militates against the courts playing a useful role. These rights are essentially political and civil in nature and in the absence of economic prosperity and high levels of literacy, these rights are meaningless. The international congress of jurists emphasized that without a certain standard of education and economic security, the fundamental rights will remain meaningless.[91]

In 1999, the constitutional court again showed that it was not yet prepared to lock horns with the executive and declare the referendum and other provisions Act 1999 as being unconstitutional and therefore null and void. The Act had been passed by parliament in total disregard of the requirements for quorum laid down by the constitution and other procedures laid down by law.

In a petition brought by **Ssemwogere & Olum .v. The Attorney General**[92] challenging the constitutionality of the Act had been passed in an unconstitutional manner and was therefore null and void. It dismissed the petition as incompetent and held that it has no jurisdiction to handle the matter.

On appeal by the petitioners, the Supreme Court held that the constitutional court had jurisdiction to hear the matter and directed the court to hear the petition on its merits.[93]

In a series of events that were reminiscent of the Ibingira Saga of 1960s, perhaps in a bid to avert an impending constitutional crisis, the government hastily enacted the referendum (political systems) Act No. 3 of 2000 before the constitutional court could rule on the matter. On June 25, 2004, the constitutional court redeemed itself and in a manner that left Ssemwogerere and fellow opposition politicians clapping

[91] Report of the international congress of jurists on "The rule of law in a free society" new Delhi, India, p. 193
[92] Constitutional petition No. 3 of 1999
[93] Constitutional Appeal No. 1 of 2000

with glee, rose to the occasion. It declared that the 1999 Referendum Act had been passed in an unconstitutional manner and was therefore null and void. Similarly, the 2000 Referendum on political systems was declared null and void.

The immediate repercussions of this ruling were enormous, the NRM government reacted like it had been slapped in the fence and decided that it would not take the ruling lying down. Never before had the government come out to confront the judiciary in such a blatant manner. The weekend following the delivery of the judgement, a furious president Museveni came out on national television to dismiss the ruling. He accused the constitutional court of usurping the powers of the people, being corrupt and UPC sympathizers.

"The government will not allow any authority including the courts, to usurp people's power in any way. We shall not accept this. It will not happen. This is absurd and unacceptable".[94]

Nevertheless, the judiciary too, came out to defend itself, chief justice Benjamin Odoki called upon the government and the people to leave the courts to function without intimidation. He encouraged the judges to continue to execute their duties without fear or favour. He also attempted to calm the storm by assuring the nation that there would be no crisis as a result of the judgment.[95]

Lastly, the Supreme Court faced its own test of independence in 2001, when it presided over the presidential election petition, **Besigye, V. Museveni & the Electoral Commission.**[96] Besigye sought an order that president Museveni had not been validly elected, and that the election be annulled, on the grounds that the presidential elections Act 2000 and the Electoral Commission Act 1997 had not been complied with. By a majority of three to two, the Supreme Court dismissed the

[94] The monitor, June 30, 2004, p. 18
[95] See, The monitor, ibid pp. 1 -2
[96] Election petition No. 1 of 2001 (unreported)

petition and ruled that although the electoral laws had not been complied with, the non-compliance did not affect the result in a substantial manner. Furthermore, whereas the court conceded that various illegal practices and offences had marred the election it held that there was no evidence to prove that the first respondent (Museveni) had personally committed any illegal acts or other offence, or that such acts/offences were committed with his knowledge, consent or approval.

Did the Supreme Court pass the test? Whether or not the answer is in the affirmative, what is clear is that the court made a decision to uphold the result of an election, which by the court's own admission was marred by various forms of rigging.

3.5. Conclusion

We can conclude therefore that given the wide powers vested in the executive, while the courts attempt to strike a balance between the needs of a fair and efficient administration and the need to protect the individual from abuse of those powers, they have not played a significant useful and effective role in this regard. This has been so far a number of reasons as briefly outlined above. Perhaps we should add charges leveled against some judicial officers, unbecoming of such officers.[97]

In assessing the role of the judiciary in protecting human rights and checking executive excess, it may be said that with the 1995 constitution, there has been a considerable improvement in the manner in which the courts handle cases brought by citizens against the executive. Despite repeated negative and hostile comments from the executive, many of the rulings have shown a positive impact as opposed to the past.

[97] Odoki C.J., An Introduction to Judicial conduct and practice (LDC publication Kampala 1984) preface.

CHAPTER FOUR
CHALLENGES FACED IN PROTECTING AND UPHOLDING THE CONSTITUTION

4.0. Introduction

This chapter discusses challenges faced in protecting and upholding the constitution.

4.1. Abuse of Human Rights

4.1.1. Freedom of Speech and Assembly

In the recent years, police has exercised brutality against certain politicians, which opposition political parties saw as a restraint on freedom of speech.[98]

In many cases the police on its part says it was provoked by opposition members who apparently sought to test the level of tolerance in the country. As illustrated by the action of the opposition member of parliament (MP) for Kampala central. He declared that he would hold two political rallies without seeking permission from the IGP as was required by law, in order to express his views against government's proposals to take over the administration of Kampala City.[99]

What followed was his arrest and exercise of brutality against the opposition sympathizers who attended the rally.

Key point is that Article 20(1) of the constitution states that fundamental rights and freedoms of the individual are inherent and not granted by the state.

(2) The rights and freedom of the individual and groups enshrined in this chapter shall be respected, upheld and promoted by all organs and agencies of government and by all persons.

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[98] MPs Kamya, Lukwano charged", The New Vision, 12 Feb 2008

[99] Lukwago Defiant on land Rally, "The New Vision 18 January, 2008

Article 21(10(2), all persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law. It is believed that the policies actions to quell/stop political assemblies are unconstitutional plus their actions since they are selective.

In another development the IGP refused to apologize to the D.P after police officers musacked the D.P office and caused damage. Through the mediation of a senior citizen, Joash Mayanja Nkagi a former minister of finance, the police agreed to and repaired the officer, prompting the IGP to express hope that a new chapter had been opened in the relationship between the police and DP, where the parties would exist harmoniously with the police.[100]

The power of the police to control public rallies was considered in the constitutional court case of **Muwonge-Kivumbi V. The A.G**[101]
Section 32(2) of the police Act provides that "it if comes to the attention of the IGP that it is intended to convene any assembly or form any process on any public road or street or at any place of public resort and the IGP has reasonable grounds. For believing that the assembly or procession is likely to cause a breach of the peace the IGP may by notice in writing to the person responsible for the convening of the assembly or procession prohibited the convening of the assembly or reforming of the procession.

The court held that this provision is inconsistent with Articles 29(1) and (2) of the constitution which provide the fundamental rights of an individual are inherent and not granted by the state.

[100] New Vision, 2 July 2008
[101] Constitutional court petition No. 9 2005

The court also held that section 32(1) of the police Act contravened Article 29(1) (d) of the constitution which guarantees every person's freedom to assemble and to demonstrate together with others.

In her judgement, the Deputy chief justice laid down the principle that *"A right to freedom of assembly and to demonstrate with others is a fundamental right guaranteed in Article 29(1) of the constitution. As long as there is no contravention of Article 43 of the constitution and the rights are exercised within the confines of the law, there would be no justification for invoking the powers.* Under 43 of the constitution sets out limitations on fundamental and other human rights and freedoms.

Kivumbi's case followed a refusal by the police commander in Masaka Township to allow an organisation calling itself popular resistance against life presidency from holding an open air rally. Unfortunately for the police, the power of the IGP under the Act only extends to regulation of assemblies and rallies on public roads or streets or at places of public resort and consequently the police could not prevent a rally being held in another place. The police was however, adamant and insisted that it would continue to require seven days' notice from those intending to hold a rally. The decision was subject to different interpretation.

4.2. Personalization of Institutions

In Uganda institutions have been personalized as different authorities can only listen to the commands of the head of state. This has suffocated the notion of rule of law especially the doctrine of separation of powers. One cardinal principle of the constitution is that it is fundamental because all laws get their authority from it. Each law must be justified on the basis of some provision in the constitution. It is also fundamental because it concerns itself with the ultimate distribution of power. For instance who may be elected who may vote and powers to be enjoyed in

office? This constitution spells out duties/functions of different heads of departments or organs of government.

Sometimes the people heading different institutions are facing a difficulty to execute their duties independently without interference from above. As a result this has caused selective persecution of some Ugandans while others walk away freely. One good example is the case of the former vice president Gilbert Bukenya who was charged with the offence of corruption and other offences related hereunder when Uganda hosted CHOGM conference. Some Ugandans condemned the IGG for selectively charged Bukenya yet the decisions Bukenya made were collective in nature being a member of a cabinet. Although he appealed and won the case, this left a question mark.

In 2005 parliament unanimously amended the constitution to lift term limits. It is argued that the president had an upper hand in manipulating the members of parliament to allow him contest in 2006 election. This was after each member who supported the motion was given 5million shilling which some members claimed that it was meant for their facilitation in their constituencies.

The police has been one of the best example of personalization of institutions. Most opposition groups are suppressed not because they have breached the law but because they are arguably a threat to the incumbent president. In the recent months Dr. Kizza Besigye & Lord Mayor Elias Lukwago were under preventive arrest in their homes by police who ensured that they don't hold rallies. Their arrest is totally political.

It is believed what is causing all this is because the president is the appointing authority and so the appointees always ensure that they have to please their master hence deviating from the constitution.

During the elections, the Army always comes out to intimidate those opposed to the incumbent. This was witnessed in Mbale District in one of Nandala Mafabi's constituency where the army engaged with the locals by shooting live bullets to masses which resulted into people dying while others sustaining injuries in 2011 elections.[102]

Parliament though some members have and are still fighting to stop the above, but the situation is not different either.
In the recent month NRM expelled four of its members from the party. The speaker gave her ruling on the matter but it did not go well with her as some Ugandans accused her of being a sympathizer of the opposition. The case is on appeal as we await the ruling/decision of the Supreme Court.

In addition, there are bills which have been passed into Acts of parliament after NRM members always meeting at state house to discuss and agree on the subject matter the good example is the KCCA, the public order and management Act though its awaiting assent from the president.

4.2. Election Laws and Electoral Malpractices in Uganda

The first area of concern is the appointment and status of members of the Electoral commission. In my view, the electoral commission and the way its members are selected need a radical surgery. Political party leaders have raised reform proposals in this area and their views ought to be accommodated so that the nation has an Electoral Commission which is truly independent and impartial and is trusted and respected by all sections of the community. The universal Declaration on Human Rights on Democracy is fairly clean. It provides that the key element in the exercise of democracy is the holding of free and fair elections at regular intervals enabling

[102] Annual Report: Uganda 2011/Amnesty International
www.amnestyusa.org/research/reports/annual_report_uganda_2011

the people's will to be expressed[103]. That will cannot be freely expressed if the elections are presided over and conducted by a partisan electoral commission. Professor Kanyeihamba states that persons who are not properly trained or who are easily intimidated to comply with the ruling party should never be employed in this role.[104]

Another area is the desirability to reform Uganda election laws. Admittedly, certain sections of some laws need to be reviewed, tightened and made more operational. Judges of the courts of judicature of all the divisions have heard petitions and delivered findings and recommendations.
For example, section 59(6)(a) of the presidential elections Act which appears to conflict with article 104(1) of the constitution should be amended. This section was subject of petition in the constitutional court and we are waiting for the court's ruling.[105]

Uganda has witnessed election malpractices for instance in the 2006 elections, the report revealed that during the campaigns, government pronouncements were routinely made at NRM-O rallies, mixing the NRM-O platforms and manifesto with government affairs in a way that was indistinguishable from bribery.

Bribery is incompatible with free and fair elections. In Mbale it was observed the distribution of cash to voters on the eve of polling day. The NRM-O presidential candidate spoke out against the practice of inducing voters with gifts of soap, sugar and salt. This practice was not restricted to any one political party, although the most well-resourced party was the most frequent offender.

[103] Article 12 of universal Declaration on Human Rights
[104] G.W. Kanyeihamba, constitutional and political history of Uganda. P.308
[105] The Petition was filed in Uganda constitutional court in 2009

DEMGROUP noted that cases of bribery were "rampant" during the campaign and on polling day although many cases were not reported to the police. On polling day the incumbent MP in Arua district was arrested on allegations of vote buying, as was the incumbent district women MP in Yumbe District.[106]

While in 2011 elections, freedom of expression, association and peaceful assembly were severely challenged in the general elections that took place in February 2011, NGOs and journalists who tried to expose irregularities and allegations of corruption by government as well as human rights violation by the security forces faced acts of intimidation and attacks. The government to date has not punished those in violation of the above rights.[107]

4.3. Intimidation and Arrest of Human Rights Defenders Promoting Free and Fair Elections and Denouncing Corruption

In 2011 NGOs faced acts of intimidation when trying to expose irregularities and allegations of corruption by government during pre-election times. For instance, on November 23, 2010, Mr. Ofwono Opondo, the Deputy spokesperson of president Museveni's ruling party, threatened the Democracy monitoring Group (DEM Group) that he would use his influence to cancel the registration and accreditation of this group as an election observer following reports that some NRM candidates had not resigned from their posts in government before contesting as prescribed by electoral laws. On January 26, 2011 a coalition of NGOs led by the Uganda National NGO Forum (UNNGOF) launched a campaign called "Respect Your Honour and Return our Money Campaign" aiming at denouncing allegations of corruption on Feb 5, 2011, the police arrested an employee of UNNGOF, Mr. Job Kiija, and a volunteer for the coalition, Mr. Dennis Muwonge, while they were distributing leaflets against corruption and mismanagement. They were taken to Kampala central police station

[106] Report of the common wealth observer group on presidential and parliamentary elections 23 Feb 2006 in Uganda

[107] Annual Report 2011 of the observatory for the protection of human rights defenders (FIDH- OMCT)

and ultimately released after being interrogated for four hours. The following day, nine other persons were arrested including Mr. Andrew Dushime, a member of UNNGOF, and volunteers who were distributing the statements as well as individuals carrying it.

Subsequently, the defenders sent a letter to the IGP informing him of their illegal arrest. Although a team of officers belonging to the professional standards unit took the victims testimonies, these were no development afterwards.

On February 8, 2011, Ms. Eunice Apio, the Executive Director of facilitation for peace and development (FAPAD), was summoned for interrogation and intimidation by the Lira district police commander and the Lira District Resident Police commander and the Lira District Resident Commissioner, after a member of her organisation had read the coalition statement during a talk show on Radio Rhino on February[108].

4.4. Attacks on Media and Journalists Reporting on human rights Violations by Security Forces.

Ugandan government uses media and penal laws to prosecute journalists, restrict who can lawfully work as a journalist, and resolved broadcasting licenses without due process. Journalists face harassment and threats, especially outside the capital. After being forced off air by security agents during the September 2009 riots, CBS Radio was permitted to operate again in October 2010. The government never provided evidence in court of any wrong doing.

Journalists in 2011 faced numerous violent attacks aiming at preventing them from documenting and reporting on violence and irregularities linked to elections as well as human right violations by the security forces. For instance, on February 18,

[108] Ibid

2011, while he was covering the presidential and parliamentary polls in Mbale district in eastern Uganda, Mr. Julius Odeke, a journalist from the Red Pepper and Razor Newspaper, was shot in the knee by the bodyguard of the minister of the presidency Beatrice Wabudeya, who was trying to confiscate Mr. Odeke's photos of electoral violence in the area. On Feb, 23, 2011, during Election Day at Kakeeka polling station in Rubaga division in Kampala, supporters of NRM ruling party candidate Peter Ssematimba, who were reportedly angry with the media coverage of the polls irregularities, attacked the journalists present at the polling station with sticks. Thus, Ms. Lydia Nabazziwa, a reporter from Bukedde TV, was injured at her ear, Mr. Nixon Bbaale, a camera man for channel 44TV, was injured at the head, Mr. Brian Nsimbe, a reporter for channel 44TV, was injured at his arm, the equipment of Ms. Florence Nabukeera, a reporter with Bukedde newspaper, were stolen, Ms. Christine Namatumbwe, a reporter for Metro FM, had her radio recorder, mobile phone and hand bag stolen. The six journalists filed a complaint and an investigation was ongoing with no results at the end of April 2011. In April 2011, atleast eight journalists were injured by security forces during a "walk to work" protest. For instance, Mr. Ali Mabule, a correspondent of the New Vision newspaper, was beaten by a Ugandan People's Defence Forces (UPDF) soldier to prevent him from taking a photo of a soldier beating a professor in Masaka on April 14, 2011. Mr. Nroman Kabugu, a journalist for Kamunye newspaper, was then beaten by a UPDF soldier as he was taking photos of his colleague being beaten. Ronald Muhindo a journalist with Radio one, Stuart Yiga, a reporter with the Red Pepper newspaper, and Francis Mukasa, a camera man of Wavah Broadcasting Service (WBS) TV were assaulted by security forces as they were covering the April 14 protests in Kampala, including human rights violations that occurred in that context. Furthermore, journalists were denied access to places where the riots were taking place and to Kasangati hospital where a demonstrator reportedly died following security forces beatings are inhalation of tear gas.

4.5. Interference of Institutions

As already noted above, institutions continue to be suffocated. Our constitution (1995 constitution) lays down unties/functions of different heads of institution.

However this is not respected as different heads of institution have their interests for instance in the case of Muwonge – Kivumbi V. The A.G[109]

The constitutional court held section 32(2) of the Police Act inconsistent with the provisions of Article 20(1) & (2) of the constitution which provides that fundamental rights of an individual are inherent and not granted by the state.

The court also held that section 32(1) of the Police Act contravened Article 29(1)(d) of the constitution which guarantees every person's freedom to assemble and to demonstrate together with others. Section 32(1) of the police Act was held to be unconstitutional.

Parliament in the recent month passed the Public order and management bill into an Act which was asserted to by the president recently.

This contravenes Article 92 of the constitution which states that parliament shall not pass any law to alter the decision or judgment of any court as between the parties to the decision or judgment.[110] Police was fighting hard to see to it that this bill is passed since it participated in its making.
What is shocking is that parliament is an organ with legislative powers could go ahead and pass this law.

[109] Supra
[110] 1995 Ugandan constitution

In 2006, the Army was deployed heavily at high court to re-arrest Dr. Kiiza Besigye with 22 others accuseds of treason. They had been aligned and they had applied for the grant of bail. The presence of the army at court premises intimidating judges and lawyers had never been seen witnessed in Uganda.

4.6. Lack of Law Enforcement

The greatest obstacle to Uganda's constitution is the failure by authorities to comply with the law. What is shocking is that many of those people deliberately manipulate, break or infringe laws.

Research findings have shown that Uganda has adequate laws on corruption, on abuse of office, on discipline of security forces, on intimidation, on vote rigging and on vote stuffing but state organs and authorities have failed or unwilling to enforce these laws. It is simply diversionary that every time we fail in the endeavor to enforce the existing laws, we invoke the red herring and somehow cry out that those laws need to be amended or reformed. The truth of the matter is that we all know where the faults lie but many of us are afraid to say so let alone come in the open and oppose or fight the failures and deliberate sabotage of our constitution and laws.

4.7. Conclusion

The above limitation has shown that in spite of the fact that there is an established constitution. It has not helped much to curb the vice of acting unconstitutionally by our leaders yet we suppose that these leaders should follow the constitution. It is believed if this trend continues, the 1995 Ugandan constitution will remain on paper as long as our leaders don't subject themselves to the provisions of our constitution.

CHAPTER FIVE
CONCLUSIONS AND RECOMMENDATIONS

5.0. Introduction

This chapter proposes certain recommendations that Uganda should adapt in order to promote and strengthen our constitutional framework.

5.1. Recommendations

Since the country has witnessed the worst human rights abuses since independence, there is a need to set up an institution for purposes of reconciliation. Uganda's sharp divisions are politically motivated and the only way to unite this country is to reconcile the wounded, which will foster a healing processing for many souls who were either subject to these human rights abuses or lost their loved ones.

In order to fight human rights abuses, there is need to bring to book to those human rights offenders without fear or favour. Police officers need to be sensitized that no one is above the law. That even in quelling demonstrations, or effecting arrests they should stop acts of brutality and respect the constitution and also respect people's rights at all levels.

Rule of law and constitutionalism should be strictly observed in order to avoid personalization of institutions of government. There is need to set up a special comment to investigate cases of personalization of the institution. This committee should be non-partisan whose work among others is to investigate cases of personalization of government institution so that the culprits are punished according to the law.

In order to stop interference of institutions leaders should restrict themselves to serve the interests of Ugandans rather than promoting the interests of their bosses. This will end the infighting amongst leaders and will ensure national service to the country at large.

Parliament as one organ of government is headed by the speaker who he or she is deputized. There is need to select a speaker and the deputy who are not part of the ruling party but someone who is neutral probably a person from the judiciary. This is because with the current constitution, it states that the speaker and Deputy speaker shall be elected by members of parliament from among their number. Uganda is in the multiparty dispensation where in most cases the ruling party retains the majority seats from which there comes a speaker and deputy speaker. This kind of selection stifles national issues since the opposition sometimes may present good views. Once this is done I believe parliament would be neutral even though there numerical strength from different political parties.

With the constitution in place research has shown that the idea of separation of powers is declining. In order to avoid this, there is need to reduce on the president's powers of appointment so as to end personalization of institutions. Although parliament checks the executives head (president) powers of appointment by approving the appointees, this has failed to work since on the appointments committee in parliament there is numerical strength whereby the ruling party has the biggest number. It is obvious that always the wishes of the president prevail in such circumstance. This can be done by setting up a new appointments committee to specific positions in Uganda and leave the president with reduced powers. This will usher in a balanced government which will ensure that the idea of separation of powers and checks and balances are achieved in its totality.

There is need to amend electoral laws so as to introduce the culture of free and fair elections.

One area of concern is the situation where an opponent successfully challenges the winner in a parliamentary election on grounds that the latter committed electoral offences. When the electoral commission calls for a by-election in the constituency, the culprit is allowed to compete again for the seat. In my view, this is iniquitous, such an offender should not only be disqualified from.

Contesting in the subsequent by-election but in any other elections for a period of not less than five or six years as the court may deem necessary.

There is need to make reforms on the situation of appointment of the electoral commission. The constitution currently gives the president the power to appoint the electoral commission with the approval of parliament. It is because of this provision which enables the presidents to overstay in power since they have the powers to appoint persons of their own choice and this gives them confidence that they can rule as they wish. Since Uganda is under multiparty dispensation, other stakeholders should have a say in the appointment of this committee. A balance electoral commission will usher in a true democracy and respect of our constitution. Its true I support the idea of instituting a balance or electoral commission as proposed by Dr. Kiiza Besigye the former presidential aspirant in 2001, 2006 and 2011 elections and Betty Kamya also the former presidential candidate. With this idea if implemented respect of constitution will be maintained.

Professor Kanyeihamba in his book revealed that in Tanzania, the chairperson of the electoral commission must be a judge of the High Court or of the court of Appeal. In Namibia members of the Electoral commission must be approved by

parliament and the chairperson must be a judge or former judge of the Supreme Court or the high court. I entirely agree to his suggestions.

A team reviewing the electoral law like it's done in Tanzania recommended that advocates that are members of the electoral commission should be private men and women who are not members of political parties and whose professional and personal qualities guarantee balance, objectivity and independence. Nomination for appointment to the Electoral Commission should be proposed by political parties, civil society organization and professional associations.

Before being appointed, each nominated candidate must first be vetted by a screening board to test their impartiality and transparency. The board should consist of the chief justice of Uganda as chairperson, The speaker of the National Assembly, the leader of the opposition in the National Assembly, the President of Uganda law society, A nominee of the vice chancellors of Uganda, universities. Once this is implemented, leaders who rig elections will be fought.

The media and other civil society organizations should be given protection for their work which ensures that the constitution is respected. These state actors should be sensitized on how to be balanced in their coverage of news and C.S.O should also give a balanced critique of government's programmes.

There is need to restore presidential term limits, this should also extent to members of parliament since the research has found out that presidents have always influenced the legislature to make constitutional amendments in their favour. For MPs, this will enable new faces in parliament which will make it difficult for the president to influence.

In order to strengthen our constitution, there is need to put restrictions on amendment of some constitutional provisions especially those on term limits. First if such provisions should be amendment, the amendment should be by a referendum and this should be left for the people to decide and refrain the president from campaigning. The electoral commission should only be mandated to formulate the question for determination.

Secondly a period should be put in place in case of amending such provision and this should more/longer than the terms that the sitting president is in power.

5.2. Conclusions

This paper has been an attempt to discuss the concept of Uganda's constitutional history. Its principles and reality in Uganda, which concept is essence majorly focuses on limitation on the powers of government of the day. The constitution provides a system/method of effective restraints upon governmental action and ultimately provides a setting for orderly change. All this is in the hope that the individual will receive adequate protection from the arbitrary will of the ruler.

The constitution is the ideally, the tool for an effective restraint of governmental action. Whether or not it does effectively control governmental power, has been, I hopefully shown in the paper. The constitution is also a fundamental yardstick against which political norms and practices are measured.

However, it is often used as a disguise for power, which is used and misused as deemed convenient. Under those circumstances, constitutionalism is put at stake, and in the final analysis who is intended to be protected against arbitrary exercise of power is the one to suffer.

It has been my major objective to convey to the reader that despite the constitutional restraints placed upon the rulers, designed to prevent abuse of

power, these restraints have either been disregarded out rightly or merely ignored or even changed whenever it has been necessary and conveniently (to the rulers) to do so.

The many leaders Uganda has seen, have had no sympathy with such restraints and all this is explainable in terms of who is the most economically powerful at the time – because with the economic right one can easily manipulate the democratic government institutions to his own advantage, and in the result such institutions lose all trappings of being democratic and end up serving one man. What is astonishing is that it is these very institutions that are supported to limit that very abuse of power, which are in fact being used to perpetrate power to one's advantage.

Power, it seems is so sweet that those who have it are not willing to part with it and will do everything possible to retain it the constitutional restraints notwithstanding. Thus the divergence between principles and practice.

The British established a system that was essentially authoritarian and repressive and this was emulated and continued by our leaders at independence. The causes of the problems today, the wish to cling to power at all costs, to the exclusion of the rest and thus ignoring the rules of the game – find roots in the colonial system. The institutions built by the colonialists and which were left behind were not designed to enhance national bonds of unity and democratic processes. They have thus been used over the years by different factions, to maintain themselves in power and the most irrelevant consideration has been the constitutional restraints on such power – which consideration is in the final analysis the people of Uganda.

For so long, the people of Uganda have been ignored by the rulers who in their speech for power feel that the masses do not matter. The governmental institutions

designed to ensure that the people's interests are paramount and safeguarded – parliament and the legal system – have in fact been used to take away the interests and rights of the people. In practice, what is given by one hand is taken away by the other. A show of legality is often put up while all sorts of practices go on.

In such governmental institutions therefore, the people cannot and do not have confidence. The institutions of government have been so manipulated that there comes a time when the masses feel that that is the normal trend of things. They therefore tend to remain aloof- uncaring and docile of what is going on – while one faction fights the other for power. They have been cheated so much that they don't attempt to influence the circumstances. That is why dictatorships have been maintained in Uganda for so long a time.

Lastly, as long as there is no established link between the rulers and the ruled – a sort of consensus between the two, Uganda will continue suffering with the problem of the constitution. Where the principles do not meet with reality. So long as the rulers take themselves to be above the people, no form of constitutional order will exist in Uganda.

The problem is not so much with the constitutional provisions as with the character and nature of both the rulers and the ruled. Unlike British where a consensus has been reached between the rulers and the ruled, Uganda is not so blessed with strong democratic institutions. We should therefore strive to build these institutions, democratically elected, before we can reach a consensus. Such institutions include a strong democratic executive subject to the will of the people, a democratic parliament freely and fairly elected, and a more down to earth judiciary culturally attached to the people. Only then shall we bridge the gap between theory of constitution and its practice.

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