

**THE CRITICAL ANALYSIS OF THE DOCTRINE OF SEPARATION
OF POWERS AND CHECKS AND BALANCES
IN UGANDA**

BY

**BYARUHANGA REGAN COLLINS
DIL/43663/143/DU**

**A RESEARCH REPORT SUBMITTED TO THE SCHOOL OF LAW IN PARTIAL
FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD
OF A DIPLOMA IN LAW OF KAMPALA
INTERNATIONAL UNIVERSITY.**

AUGUST, 2015

DECLARATION

I **Byaruhanga Regan Collins**, hereby declare that this study is my original work and it has never been submitted in whole or part to any University or Institution for the award of any other diploma.

Signed..........

BYARUHANGA REGAN COLLINS

Date:.....23/10/2015.....

APPROVAL

This piece of work has been under my supervision and now it is ready to be submitted.

Signature: 

Ms. APIO ESTHER

Date: 22nd / 10 / 2015

ACKNOWLEDGEMENT

I would like to acknowledge my supervisor Ms. Apio Esther for the guidance rendered to me, during the carrying out of this research.

I acknowledge the family of Mr. and Mrs. Elly Kifene, Sister Racheal Conie, Kainembabazi Edna, Uncle Muhereza Edson and Maj. Gen. (Rtd) Kahinda Otafiire, Counsel Turinawe Patrick and Her Worship Kamasanyu Gladys for the guidance, moral and financial support rendered to me.

I thank the entire lecturing staff of Kampala International University, the Head of Department and all my friends.

May God reward you all abundantly.

ABBREVIATIONS

NRM	National Resistance Movement
PRA	People Redemption Army
EAC	East African Community
FDC	Forum for Democratic Change
NRC	National Resistance Council
UCB	Uganda Commercial Bank
UHRC	Uganda Human Rights Commission
AG	Attorney General

STATUTES

The 1995 Constitution of the Republic of Uganda

The 1967 Constitution of the Republic of Uganda

The Referendum and other provisions Act of 1999

The Constitution (Amendment) Act No. 13 of 2005.

CASES

Grace Ibingira and others V. Uganda (1966)EA 305

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

Re Abraham (1970)EA

Rwanyarare and Others Vs Attorney General

Ssemwogerere and Zachary Olum V. Attorney General (const. petition no. 3 of 1999)

Attorney General V. Tinyefunza (const. appeal No. 1 of 1997)

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ABSTRACT

Separation of powers is the doctrine and practice of dividing powers of Government among different branches to guard against abuse of authority. Among the objectives that resulted into the promulgation of the 1995 constitution were the need to recognize and demarcate division of responsibility among the state organs of Executive, the Legislature and the judiciary and create viable checks and balances between them.

Therefore, the research examines the provisions regarding separation of powers and checks and balances and their relevance to the performance or functioning of the organs of government with regard to present conditions in Uganda.

Particularly, the researcher discusses the operation of the doctrine of separation of powers during the political transition to multiparty, its observance and relevance under multiparty democracy and the challenges thereof.

The research also gives a general historical account of the doctrine and its background in Uganda.

In the final analysis, the researcher advances various recommendations that would enable the observance of the doctrine in order to ensure good governance.

CHAPTER ONE

1.0. INTRODUCTION

Separation of Powers is the doctrine and practice of dividing powers of Government among different branches to guard against abuse of authority. A Government of separated powers assigns different political and legal powers to the Legislature, the Executive and Judiciary. The Legislature¹ has the power to make laws; for example the declaration of what acts are criminal. The Executive² with the power to administer the law by primarily bringing law breakers to the trial and to appoint the officials and over see the administration of government responsibilities. The Judiciary³ has the power to try cases brought to courts and to interpret the laws under which the trials are conducted. In order for governments to conform to the rule of law at all times, mechanisms for the supervision of these functions must exist within the constitution. Such mechanisms erected up on the doctrines of Separation of Powers.

1.1. BACKGROUND OF THE STUDY

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

Chief Justice Benjamin Odoki mentions that Uganda has experienced authoritarian regime dating from the pre-colonial period and continuing through colonialism and the independent Uganda in spite of attempts to establish democratic structures in Uganda's political development⁴. The 1995 Constitution attempted to neutralize such challenges. Among the objectives that resulted into the promulgation of the 1995 Constitution were the need to

¹ The 1995 Constitution of the Republic of Uganda, chapter six

² Ibid chapter seven

³ Ibid chapter eight

⁴ Benjamin: The search of a National Consensus. The making of the 1995 Constitution, Fountain publisher, 2005, page 230

recognize and demarcate division of responsibility among the state organs of the Executive, the Legislature and the Judiciary and create viable checks and balances between them.⁵

The doctrine of Separation of Powers expressed by the French philosopher Montesque was part of the development of the rule of law. The doctrine warns that accumulation of the three powers of Government in the same results in tyranny and lack of political and social liberty⁶. Therefore there is need to separate the powers of the arms of the state and define their relationship and limitations.

However, should be remembered that Separation of powers in its absolute terms might not be helpful. Close consultation and cooperation is very essential for effective performance of either branch. According to chief Justice Odoki, they are like three cooking stones, which play distinct roles but always in cooperation with each other⁷. This implies where one is missing the cooking is bound to fail. In light of the above: the research has provided an assessment of the contribution of the doctrine of separation of powers on towards effective performance of the organs of Government.

1.2. STATEMENT OF THE PROBLEM

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

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

However, Uganda has still experienced persistent demand for Separation of Powers in the recent past. In line with that, there has been political discontent about the performance of the

⁵ Ibid page 236

⁶ G.W Kanyehamba Constitutional and political History of Uganda From 1994 to the present century publishing House, 2002, page 297- 298

⁷ Odoki: Constitutional Draft Report, 1993, page 234

organs especially during the transition period that was characterized by interference with the function and the independence of the Legislature and the judiciary.

It is therefore essential to scrutinize the factors behind such a regrettable situation⁸.

1.3. OBJECTIVES OF THE STUDY

The major and general objective of the study is:

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

The other objectives include:

- i) To find out the relevance, and the challenges of the doctrine in Uganda
- ii) To discuss the historical development of the doctrine of separation of powers and its background.
- iii) To ascertain the public view about application of the doctrine in Uganda
- iv) To make recommendations through which the essence of the doctrine may be realized in light of the return to multiparty system of governance in Uganda.

1.4. RESEARCH QUESTIONS

- i) What is the relevance and the challenges of the doctrine in Uganda?
- ii) Discuss the historical development of doctrine of separation of powers and its background.
- iii) Ascertain the public view about application of the doctrine of separation of powers in Uganda.
- iv) Analyze the recommendations through which the essence of the doctrine of separation of powers may be realized in light of the return to multiparty system of governance in Uganda.

⁸ References were also made to newspapers, web sites Interact Source and parliament Hansards

1.5. JUSTIFICATION OF THE STUDY

As mentioned earlier, constitutional obligation is most controversial in developing countries and the doctrine of Separation of Powers is a model of democracy, constitutionalism, the rule of law and therefore an analysis of its operation Uganda serves as a reminder to the stake holders of the need to preserve its values.

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

According to Montesquieu liberty is most effective if it is safeguarded by the doctrine of Separation of Powers. From the time Uganda as colonized the doctrine as negated even where it existed. This accounts for the failure of Ugandans to realize liberty over years. Therefore, the study has provided the readers with an account of the factors behind such distressing experience in Uganda and who they may be guarded against.

1.6. METHODOLOGY

The study was conducted through both quantitative and qualitative methods. A comprehensive library archival study of the literature on Separation of Powers government was conducted thus doctrinal legal research.

Interviews were also conducted with the public (major focus being on key informants) to find out more on the challenges to the doctrine of Separation of Powers and how they be controlled. Sample questions are provided in the appendix.

1.7. CHAPTERISATION

The research consists of four chapters.

Chapter One Covers the general introduction, background of the study statement of the problem, objectives of the study, methodology, scope of the study, significance of the study, literature review and the historical development of the doctrine.

Chapter Two covers background of doctrine in Uganda. Its observance, and challenges prior the promulgation of the 1995 Constitution.

Chapter Three considers a critical analysis of the provisions relating to the doctrine under the 1995 Constitution and the system of checks and balances in Uganda. The chapter also discusses the operation of the doctrine (checks and balances) under the multiparty system of government with reference to the developed democracies.

Chapter Four, the general analysis of the essence of the doctrine with a view of concluding, ascertaining whether or not it has been realized conclusion. The chapter will also consider the possible measures / recommendations through which its values may be preserved.

1.8. SCOPE OF THE STUDY

Although instances prior to Uganda's independence and post independence periods have been considered, specific concern is on the period 1995 to the present (April, 2011).

1.9. LITERATURE REVIEW

Justice G.W. Kanyeihamba In his book, Constitutional and Political History of Uganda (2002), considered the doctrine of Separation of Powers.

He mentions that the relationship between the three organs government on one hand and between the three organs and the citizens on the other hand guided by two formulae of good governance and freedom: namely, the doctrine of Separation of powers and the rule of law

He notes that in its strictest terms. The doctrine advocates that the organs of Government should be kept in separate compartments. As a matter of explanation Justice Kanyeihamba says that persons or agencies belonging to one organ should not be permitted to hold posts.

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

However, he observes that embracing the doctrine in absolute terms would result in stalemate in government and make public administration rigid and unworkable and therefore undesirable.

In his words he states as follows:

*"...the functions of government are best performed in a climate of closer consultation and cooperation between the organs of government"*⁹.

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

Justice G.W Kanyeihamba's approach to the doctrine seems to be in line with the provisions of the 1995 Constitution of the Republic of Uganda regarding the doctrine. Although he does not refer to it, his explanation is a suitable guide to the study about Separation of Powers in Uganda.

The idea of absolute application of the doctrine in Uganda is negated by the fact that Cabinet is chosen from amongst the members of Parliament¹⁰. This is a sensitive issue that may have an impact on the operation of the doctrine the rule of law.

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

David Foulkes also considered the doctrine of Separation of Powers in his book Administrative Law¹¹. He mentions that in every State there are three sorts of powers: of the Legislative (making laws), the Executive (administrative) the carrying out of the laws and the Judiciary (the interpretation and application of the laws in particular disputes). He adds the fact that it is not always easy to draw a theoretical line between the organs or to

⁹ Ibid page 300

¹⁰ The 1995 Constitution of the Republic of Uganda, Article 113

¹¹ David Foulkes: Administrative Law, 8th edition, Butterworth, 1995 page 4-5.

distinguish them in practice inspire of the possibility of pointing out examples of functions that can clearly fall under a particular organ.¹²

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

A true judicial decision on the other hand, presupposes that an existing dispute between two or more parties is disposed of by a finding on any facts in dispute and application of the law. What remains is to determine whether this distinction is practicable. However due to the element of discretion involved in both, this distinction seems unsatisfactory and may not be of great use to the third world where the Executive organ is always dominant.

That notwithstanding, Foulkes maintains that drawing a precise distinction between the various kinds of powers is indeed difficult in theory and impossible in practice. Further that, irrespective of the above difficulties the powers ought to be in separate hands, separate institutions for there would be an end of ever thing were the same man or body to exercise those three powers.

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

He notes that the doctrine is not part of their Constitution, the Executive is drawn from the majority party in the House of Commons hence the Executive except in extreme case controls the legislative powers. The rationale here is to ensure constant agreement between them.

The only provision for Separation of Powers he mentions resides in the Independence the Judiciary. It is the case that a strong statutory guarantee of security in office is given the members of the Judiciary. In their turn, the members may express concern at them to avoid usurpation of the Executive or Legislative function.

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In the final observation, Foulkes has clearly expressed the position on Separation of Powers in England- that in my view rhymes with the level of her social, economic and political development. In other jurisdictions that he did not consider, Separation of Powers especially in the third world is highly regarded as fundamental constitutional principle.

Therefore, a microscopic view on this principle in the third world perspective would be of great importance in order to develop on its values in Uganda.

A.W. Bradley¹³ also wrote about Separation of Powers begins by discouraging Legislative Supremacy of Parliament as the basic doctrine of Constitutional law that cause principles of constitutionalism such as Separation of Powers to be undervalued. Bradley perceives Separation of Powers to be opposed to the Concentration of State Powers in a single person or group since that is a clear threat to democratic governance.

He further identifies important need for separating State power not only in political decision making but also in the legal system where an independent Judiciary is essential if the rule of law is to have any substance.

Regarding the issue of distinguishing the organs, he agrees with all writers that the. Organs of Government are distinguishable unlike particular tasks that they may perform. Admittedly he mentions that there is no clear cut demarcation between some aspects these functions nor is there always a neat correspondence between the functions s.yte institutions of Government.

As a matter of background to further comprehension of the doctrine, lie notes that the Parliament, the Courts and Central Government owe their origin to the Monarchy; before these institutions developed as distinct entities, the King governed through his Council with a mixture of legislative, executive and judicial work- these roles are performed in name of the crown today.

¹³ A.W. Bradley K.D. Ewing: Constitutional and Administrative Law, 12 edition, Longman London New York, 1997, page 87- 98

To Bradley, in a mature democracy it is imperative that Judges are independent both of Parliament and Executive and that Parliament is not a rubber stamp for the Cabinet. Indeed as he states, the essential values of law, liberty and democracy are best protected if distinct institutions discharge the three primary functions of a law-based government. Bradley refers with dissatisfaction to Robson, who described Separation of powers as:

".... that antique and rickety Chariot..., so long the favorite vehicle of writers on political science and Constitutional law for the conveyance of fallacious ideas" ¹⁴

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

In his further notes he warns that complete separation of powers is possible neither in practice nor in theory. On the aspect of one person not belonging to more than one of the three organs. There is a strong convention that Ministers are members of one or other House of Parliament. This observation seems to have had basis on the position in developed democracies to channel constant agreement and cooperation among the organs of Government.

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

¹⁴ Ibid 13 page 89

CHAPTER TWO

2.0. THE GENERAL HISTORICAL BACKGROUND OF THE DOCTRINE OF SEPARATION OF POWERS

It has been shown that any organized community over the world ought to have a body of persons on whom lies the authority of carrying out certain functions and duties, Further such duties, authority and functions are crucial to such organs as they compose Government and therefore they must be well defined and the boundaries and limits properly defined.

The doctrine of Separation of Powers as introduced earlier is the pillar upon which mechanisms for the supervision of government functions are erected. The doctrine has also been conceptualized but where did it originate?

The development of history presents a variety of scholars who have attempted to define Government and how it should be structured for instance, the (reels philosopher and scholar Aristotle wrote.

All states have three elements;- (i) that which deliberates about public affairs; (ii) that which is concerned with the magistrates and (iii) that which is the judicial power. In our present situation those organs may be equated to the Parliament, the Executive, the Judiciary respectively (Kanyehamba W. (1975). Constitutional Law and Government in Uganda).

Therefore it was thought that these organs could best perform their functions provided they are separated without undue interferences which might affect their performance. The modern understanding of the doctrine in relation to the functions of the Government is closely associated with the French scholar Montesquieu who wrote about it after experiencing its functions while he stayed in England. He described the three organs of government thus he is well known for the doctrine of Separation of powers. Montesquieu lived at a time when most of Europe was ruled by despots. Montesquieu had visited England where he was impressed by the degree of independent and liberties, which the people enjoyed. This experience contributed a great deal to desire to write a book¹⁵. In his book, he

¹⁵ L'Espirit dea Loi

attributed the freedom that flourished in England to the powers of government being independent and separate. This is the basis of his paramount view that concentration of government power in the same hands could lead to an abuse of those powers hence a likely source of tyranny. However, it is vital to note that Montesquieu's view about separation of powers in relation to England raised controversy and criticism since it had hardly existed in France. Most scholars do not appreciate separation of powers in absolute terms and this explains why Justice G.W Kanyeihamba considers Montesquieu to have embraced the system of checks and balances which suits best in government affairs.¹⁶ Indeed the system of checks and balances is what is practicable and viable efficient running of government functions and this will be expounded further in the next chapter.

2.1 THE BACKGROUND OF THE DOCTRINE OF SEPARATION OF POWERS IN UGANDA.

2.1.1 The Colonial Era

Uganda like other African countries did not know of the organized form of government we have today. For instance, in Kingdom areas, the Kings exercised all powers of the traditional governments without any definite limitations or controls. The lesser which were bound to carry out the wishes of the Kings.

With the beginning of colonial era, the British exercised all the powers of government. The 1902 Order in Council empowered the Commissioner (recognized political leader) to make Ordinances for the administration of justice to appoint, discipline and dismiss public officers. This was a combination of the Executive and legislative powers. It is therefore apparent that there was a total negation of the doctrine of Separation of Powers. The Commissioner could as well do as he wished hence justice and liberty of the natives were at stake. J G.W Kanyeihamba noted that the period from 1902 - 1920 might be described dictatorial and despotic if not in practice at least in law. (Kanyeihamba W. (1975). Constitutional Law and Government in Uganda).

¹⁶ Supra I7 page 149

With the 1920 Order in Council, the Commissioner then renamed Governor would no longer have absolute control. Admittedly a lot was done to provide for Separation of powers after the formation of the Executive and Legislative Councils headed by the Governor. Perhaps this was to ensure an effective spring board for the British to safeguard their interests without stringent complaints from the natives. This was due to the gradual sense of enlightenment of the native community. Dr. Oloka Onyango mentions that;

“...Within the higher levels of governance no pretence was even made of the Judiciary exercising any powers independent of those of the Executive, judicial officers were ipso facto officers of the colonial regime and consequently the doctrine of Separation of Power between these organs of the state was a convenient but a necessary which was transplanted in its trappings but not in the manner in which it actually functioned” Therefore, despite the changes after 1920, the power essentially remained in the same hands (Oloka Onyango (1993), Judicial Powers and Constitutionalism in Uganda)

For purposes of this study the structure virtually remained the same throughout Colonialism in Uganda.

Though one may convincingly talk of separation of powers during this period the fact that it existed in theory should not be undermined. This explains why most African States including Uganda experienced constitutional confusion at independence. This was so because control and coercion rather than management and persuasion were the hallmarks of colonial legal order. For instance the colonial judicial service as a whole had administered this coercive order whose perpetuation involved a heavy baggage of Jurisprudence that was anything in practice but in theory consistent with the lofty values of constitutionalism which the States were expected to embrace.¹⁷

With the above discussion of the appalling colonial era, one should not be surprised such Constitutions were found unworkable.

¹⁷ The independent Constitution were based on severely modified version of the of the Westminster model with separation of Powers which was previously negated.

THE POST DEPENDENCE ERA 1962 -1967

Despite the challenges experienced, the Order in Council was important not only because they were the first legal instruments but also because of the elements they put in place. Most of those elements influenced politics and government throughout the colonial period and the post independent Uganda.

The 1962 Constitution was based on compromise of opportunities alliances between political interest groups, demands of Buganda and the Central Government. It had separately provided for the Executive. Legislature and the Judiciary though the power boundary between the top government officials, the Ceremonial President and the Prime Minister was vague and fraught with potential for conflict. This confusion could inevitably result into irreparable conflict that would leave profound effects on constitutional development of Uganda. The Constitution went on trial and was found unworkable and as overthrown. This is attributable to the failure of the colonial regime to preserve the values of the doctrine Separation of Powers as earlier mentioned. The overthrow resulted into the fusion of the office of the Head of State and the Prime minister the Executive President who as the Head of Government was a member of the National Assembly under the new Constitution.¹⁸

The combination of the Executive and the Judiciary was a mere negation of the doctrine of separation of Powers. Not only did this affect the performance of the Judiciary but also the performance of Government. Thus after accumulating government power in one, then one would be joking to exact the rule of law to be of any essence.

In effect the crisis ushered in a period of judicial impotence as demonstrated by a number of cases.

In **Grace Ibingira and others V. Uganda (1966) EA 305** the applicants were detained pending a decision by the concerned minister whether the deportation order should be made against them under the Deportation Ordinance.

¹⁸ The 1966 Constitution

Their detention was challenged on grounds of inconsistency with the Constitution Article 19(1). It was held that no lawful order could be made under it.

The unfortunate order was challenged by transporting the detainees to Entebbe where they were re-arrested under the Emergency Powers (Detention) Regulations which were enacted in a period less than 24 hours to serve against the specific individuals. On subsequent appeal the court was reluctant to defend the innocent citizens by failing to set them free.

It is interesting to note that the case was dismissed without any reference to any relevant law- the Constitution; the validity of the Emergency Powers (Detention) Regulations was not examined, the passing of the Deportation Validation Act nor did the Court question its retrospective nature and application to specific individuals. The above cases demonstrate the Executive pressure over the Judiciary and the Legislature to out its desires. It cannot be said that an independent and conscious Parliament could have passed a law against specific individuals within a period of 24 hours. It is also imponderable to imagine that an independent and conscious Court could dispose of a case validly without references to any law applicable and giving any reasons for its findings. Thus it can be safely said that the doctrine of Separation of Powers was meaningless to the Executive and this amounts for failure to uphold the Rule of Law.

In Uganda V. Commissioner of Prisons Exparte Matovu¹⁹

Matovu was arrested at the height of the crisis and detained for one day before the Emergency Regulations came into force. The case revolved around the question of personal liberty and also failure to grant the writ of habeas corpus on the basis of a retrospective law without proven justification was a serious flaw. The individual right to liberty was sacrificed to ensure the interests of upholding 'law and order' as the Executive objective. Indeed the situation as it was in 1966, full of threat and inducement the rule of law could not escape compromise after dispensing with the doctrine of Separation of Powers.

¹⁹ (1966) EA 514

2.1.2. THE POST INDEPENDENCE ERA 1967-95

The events of 1966 were followed by Government proposals for a new Constitution-1967 which formalized most of the initial changes within the 1966 Constitution. Among others were the creation of an executive President and increased restrictions on human rights. The 1967 Constitution also had provisions relating to the doctrine of Separation of Powers. However for every such provision, means were ensured through which the doctrine could be rendered meaningless.

The Constitution provided for a very strong Executive President who was the Head of the government and Commander in Chief of the armed forces.²⁰ The doctrine of Separation of Powers *inter alia* presupposes that each organ is able to place limits, on the power exercised by any other organ. In this case the Judiciary and the Legislature were constitutionally handicapped and could not easily check the executive power.

Considering the Judiciary the Constitution particularly provided that the Chief Justice as appointed by the President would head the Judiciary²¹, other judicial appointments were to be made by the President on the advice of the Judicial Commission to which the Attorney General was a member²².

It is clear that the President had the opportunity to appoint the members of the Judiciary he wished to work with and nothing much may be criticized about that. What must not escape criticism is the fact that the AG who is a member of the Executive was included on the Commission perhaps this was intended to ensure that those who were in position to submit to the whims of the Executive are recommended for judicial work, This would later affect the Independence of the Judiciary hence the negation of the doctrine of Separation of Powers.

²⁰ The Constitutional of the Republic of Uganda 1967, Kampala, min. of Constitutional affairs revised Ed. 1990, Article 24 (1)

²¹ Ibid Article 89 E(1)

²² Ibid Article 90 (1)

In regard to its roles of checking and supervising the Executive and the Legislature, the Judiciary was rendered impotent.²³

In the case of **Re Abraham (1970) EA**, the Ag. Judge upheld the validity of a questionable detention order and stated as follows:

“one cannot look behind a valid detention order, as it must be assumed that a minister ought to be and deeply concerned about liberty of the subject and only issues a detention order after considering all the information before him. That in particular he has the interest of the state in mind and he is assumed to have acted judicial arriving at the conclusion.” This clearly shows how unfortunate the situation was; the rule of law was clearly meaningless to the detriment of the people of Uganda.

It was not surprising that upon the departure of the President for the Common Wealth Conference, the army overthrew the Government in order to save the bad situation from getting worse. This marked the onset of militant politics that was to characterize the Amin regime. The regime cited violation of Human Rights through Detentions, lack of political freedom and prolonged state of emergency but made no pretence of respecting the constitution and the organs set by it.

The new legal order²⁴ gave powers of Parliament to the military Head of the State in addition to the suspension of the salient Article²⁵ of the Constitution.

In effect, the President became the supreme law with all the powers of Government that into total dictatorship and within a space of two years, the regime had turned the country into an absolute military institution. This meant that an attempt to talk of Powers during this period would be unrealistic.

With the 1980 elections, which resulted into Obote II. The victorious party formed Government without regard to the doctrine of Separation of Powers in a meaningful manner.

²³

²⁴ Notice No.1 1971

²⁵ Article 1 of the 1967 which provided for the supremacy of the constitution

It should however be noted that the conditions at that time were by and large intolerable for the observance of such sensitive constitutional principles. That notwithstanding, the Government had an obligation to ensure the rule of law in Uganda at all times.

For the period from 1986-1995, Uganda experienced the National Resistance Movement leadership. This was and is under the leadership of President Museveni through what was termed as liberation war.

The legal notice provided that in every matter of National importance, the army Council had to be consulted and its views were to be strongly taken into regard when enacting any law²⁶. More to that, the President was the head of the Executive as well as the Chairman of the National Resistance Council.

The other members of the Executive were also members of the NRC. With such an arrangement the search for the doctrine of Separation of Powers during this period could be a waste of time. However it is important to note that the situation had improved in terms, order and peace in Uganda.

What would be remembered is that as in previous regimes, the position of the Judiciary was compromised by the Executive. In **Rwanyarare and others v. Attorney General**²⁷ the judge, in fear of confronting the Executive failed to rule on the matter before him. Instead referred the case to the Constitutional Court unnecessarily.

According to Mukubwa, the reason was because the Executive was quoted by law in media to have said that it would not respect any ruling of court if it was against the position of government.

²⁶ Legal notice no. 1/1 986 as amended by legal notice no. 1/1986 amendment decree.

²⁷ Constitutional case no. 1/1994.

Upon a study of Uganda's history since Independence, one needs not to be surprised about all that has been mentioned. Violation of the viable mechanisms of supervising the exercise of government power cuts across all the regimes and continues to exist to date.

To this end therefore, the doctrine of Separation of Powers has been meaningless over the years stretching from colonial period. Certainly with such a nasty background, there was urgent need to devise means through which Uganda could be set to the rule of law and constitutionalism.

This desire was fulfilled by the promulgation of the 1995 Constitution of the republic of Uganda, which clearly provides for a constitutional Government. It was therefore hoped that such constitutional violations and incorrect exercise of power would no longer exist pursuant to the demarcation among the main Organs of Government. Thus the question "whether or not the cherished democratic principles have been observed in this different era in Uganda's politics is my next concern.

CHAPTER THREE

3.0. THE OPERATION OF THE DOCTRINE OF SEPARATION OF POWERS 1995 TO THE PRESENT.

3.1. INTRODUCTION

The 1995 Constitution was a result of the Odoki Constitutional Commission set out to gather the views of the people and prepare a draft Constitution. This was done with a view that, Separation of Powers was necessary to prevent the kind of tyranny that had occurred in the country in the past when the Executive tended to override the other organs (Benjamin Odoki (2005), The search for a national consensus. The making of the 1995 Constitution).

The new Constitution ushered in a new era in Uganda's constitutional development. All that has been discussed in the previous chapters is summarized by the preamble thereto. It is to the effect that Uganda's history had been characterized by political and constitutional instability. For instance, the high incidences of regime change whereby from independence in 1962 to 1986, the country zoomed through nine Heads of State. (Benjamin Odoki (2005), The search for a national consensus. The making of the 1995 Constitution)

To put an end to the anxiety and lawlessness, the Commission placed in the Constitution legal mechanisms that would hopefully ensure correct exercise, supervision and balance of governmental power. Such legal mechanisms are erected upon the doctrine of Separation of powers as mentioned earlier.

3.2. HIGHLIGHT OF THE PROVISIONS RELATING TO SEPARATION OF POWERS UNDER THE 1995 CONSTITUTION.

Separation of Powers presumes that every organ of Government should be kept independent of all the others. Thus the Constitution clearly establishes each organ respectively. Under chapter six the Legislature is established²⁸ with the power to make laws.²⁹

²⁸ Article 77(1)

²⁹ Article 79(1)

Article 79(2) disqualifies any other body or organ from making any provisions having the force of law in Uganda except with authority conferred by an Act of Parliament.

The Executive with its functions are provided for under chapter seven. Article 99(1) provides for executive power that vests in the president and it is to be exercised in accordance with the Constitution and the laws of Uganda. The function of the Executive is to determine, formulate and implement government policies. This also includes enforcement of the laws of the country and for this reason; it includes the whole structure of the public service, police, prisons and the army. All this power is intended to be exercised with a view of ensuring the welfare of the citizens and to protect the constitutional integrity of Uganda.

The most important aspect of Separation of Powers is the Independence of the judiciary under chapter eight in which the Constitution vests judicial power in the courts. Article 126 (1) provides that such power is derived from the people and must be exercised in the name of the people and in conformity with the law values, norms and aspirations of the people³⁰. This implies that the courts must protect them from any unlawful acts of any of the other organs.

Article 128 (1) of the Constitution also provides that in exercise of judicial power the courts shall be independent and shall not be subject to control of any person or authority³¹.

The Article further requires that no person shall interfere with the courts or judicial officers. in the exercise of their judicial function and all other organs are obliged to accord the courts all the necessary facilitation to ensure its effectiveness³². Simply stated the function of the judiciary is to administer justice. This is a very sensitive role which must be guarded jealously by the judiciary in order to avoid undue interferences/influences from other organs.

³⁰ Article 126(1)

³¹ Article 126(1)

³² Article 128(3)

According to Retired Justice Kanyeihamba absolute application of Separation of power is unworkable and undesirable³³. Therefore the Constitution provides for means through which cooperation and checks and balances may be realized.

For instance, Parliament may censure a Minister on special grounds such as abuse of office, misconduct and mismanagement³⁴. This was realized with the censure of Mrs. Kabakumba Matsiko – former minister of Information and national guidance. However, the aspect of Cabinet reshuffle may impend the efforts of Parliament to do away with poor performers in Government the Constitution also confers extensive powers on Parliament in respect of financial matters in Article 93.

The Legislature has further been seen to be in position to oppose certain decisions of the Executive which are not in the interest of the public. For instance, the desire to create new committees for EAC affairs and Conflict Resolution was opposed by the Parliamentary Committee on Rules, Discipline and Privileges. The Members argued that such issues could be adequately handled by the Foreign Affairs Committee and Defence and Internal Affairs Committees of the house respectively³⁵. The value in such actions lies in the avoidance of unnecessary expenditure.

The Judiciary, in exercise of power as noted above, has been able to check the other organs. In the case of **Ssemwogerere & Zachary Olum V. Attorney General**,³⁶ the Referendum and other Provisions Act was nullified for failure of Parliament to follow the requisite procedures. The importance of such a case is that unlawful short cuts, through the Constitution are avoided by the Executive and Legislature hence emphasizing the rule of law

³³ Supra 8

³⁴ Article 188 of the 1995 Constitution of the Republic of Uganda

³⁵ Judges Strike: City police go Slow on Arrest, Daily monitor Wednesday March 7th 2007, page 3

³⁶ Constitutional Petition No. 3 of 1999

The case of **Attorney General V. Tinyefuza**³⁷ illustrate the balance of power between the Judiciary and the Executive.³⁸

The court held that Tinyefuza's appointment fell within the scope of Executive powers which in effect raised a political question outside the competence of courts to intervene. Retired Justice Kanyeihamba noted that the courts can only interfere where the acts of the Executive violate the rights of an individual. The suspension of court activities may also be interpreted as an intention to check the actions of the Executive.

The Executive being the supreme organ of Government may also check the exercise of power by other organs. Recently the executive was concerned about the demands of the members of Parliament for 60 million for their facilitation over motor vehicles. This was also due to the public concern raising issues of poverty, diseases and poor transport which need more financial attention. The president strongly objected to this demand as being too costly for the Government. As a result 30 millions for each Member was agreed to by them and the Government. This was a very important and desired check on the power of the Parliament over financial matters, specifically on their power to determine their own allowances.

The President must assent to laws made and passed by the Parliament before they may be enforceable in Uganda. This implies that where the laws made are against the best interests of the people of Uganda, the President may deny his assent³⁹. Therefore the president has the right to decline to assent to a bill where he feels there is an injustice or where the bill is wanting.

It is thus obvious that checks and balances done in good faith are essential for good governance and this will be expounded later. Suffice it is note now that, the Constitution will always be hailed for the above sensitive provisions but it is also true to slate that they have been misinterpreted and negated in a number of cases: This explains why during the course of deciding politically sensitive cases, the courts have often ended up locking horns with the

³⁷ Constitutional Appeal No. I of 1997

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³⁹

Executive. Therefore there is need to analyze the above provisions considering the practicability and applicability of separation of powers in the present Uganda.

As Montesquieu noted, accumulation of the three powers of government in the same hands results in tyranny. Admittedly the considerable observance of human rights, rule of law and constitutionalism are attributable to adherence of the organs to separation of powers & Checks and balances.

However with the emergence of the desire to open political space and removal of term limits, the executive was seen to be in position ready to do anything to meet its desired end. This resulted into disregard of the principle of separation of powers which forms the backdrop of many aspects of the rule of law and constitutionalism. Therefore one can only realize the rule of law if it is observed at all times which of recent the Government has failed to do.

3.3. A CRITIQUE OF THE ORGANS OF GOVERNMENT UNDER THE 1995 CONSTITUTION

In an ideal constitutional and democratic government, the Parliament, Executive or the Judiciary should be able to perform their functions without any undue interference. The parliament is responsible for representing and rewarding people's views, it is also responsible for making and passing the laws that govern the country. The executive is responsible for managing and doing the necessary for the welfare of the country as per the ministries⁴ and the judiciary is responsible for enforcing the law as made by the parliament. However there is ample evidence to show that in Uganda the powers of each organ have been interfered with and undermined. The legislature and judiciary have always fallen victims of the undermine of separation of powers by the executive as is well discussed below.

Consequently, Parliament unlike the Judiciary has developed a dangerous political syndrome in complying with most of the demands of the executive. The above position is exemplified by a number of enactments such as the Referendum and Other Provisions Act of 1999. This was followed by the 2000 Referendum that was objected by the majority opposition groups arguing that it amounted to a violation of fundamental human rights both at National and

international level.⁴⁰ The referendum was objected strongly by the opposition on grounds that there was no fairness and no freedom, therefore the results were not valid.

The constitutional (amendment) Act 13 of 2000 was also a result of the executive pressure on the Legislature causing it to disregard the requisite Procedures: the constitutional (amendment) Act no. 1/2000 was nullified by the Supreme Court consequently.

Further in 2002, the Parliament was made to enact the Political Parties and Organization Act (PPOA) that was also criticized for infringing on the rights and freedoms of the people.⁴¹

Various mechanisms were ensured to restrict the operation of opposition political parties⁴².

The above are some of the extreme examples making a simple point that; there has been a systematic undesired control over the parliament by the Executive.

Regarding the Judiciary, the Executive has always expressed its unwillingness to respect the rulings against its wishes. According to the former chief Justice of Uganda⁴³, an independent and impartial Judiciary is important for courts in democratic countries lean in favor of the liberty of the individual when applying and constructing rules and policies that are vague while justifying public policies or acts. He added that it is the best-suited branch to protect and strengthen the rule of law: though there have been threats emanating from the Executive generally and against individual judges⁴⁴. This undermines the rule of law. This was witnessed with case of **Besigye V. Museveni**⁴⁵, whereby the President expressed dissatisfaction against the two Justices who dissented. In almost all the cases where the government has lost, such sentiments as 'the do not know what they are doing have been common.

⁴⁰ PK Semigerere; Friday, Monitor 1999; Article 20(1) of the Universal Declaration of Human Rights of 1948 and 43 of the 1995 Constitution which provide for the rights of freedom of peaceful assembly

⁴¹ Sam Njoba on BBC World Africa, Wednesday

⁴² Section 7 of the PPOA restricted the activities of such parties to Kampala not National Level

⁴³ Hon. Benjamin Odoki

⁴⁴ Hon. Justice Benjamin Odoki, the rule of Law in Uganda today: Contemporary challenges. An address on lawyers' day at Uganda Christian University, 25th Nov 2005

⁴⁵ Presidential Election Petition No. 1 of 2001

Thus, the above presents a consistent attempt by the strong Executive to water down the fore mentioned essence of separation of powers. This persisted over the years to date especially with the emergence of the controversial political transition of separation of powers.

3.4. THE CHALLENGES OF POWER DURING THE POLITICAL TRANSITION

It has been shown that the Judiciary, unlike the Legislature has on various occasions defended the Constitution and endeavored to uphold the Rule of Law. As a result, the Executive sought to devise means through which the Judiciary had to be contained. This culminated into the Kyankwanzi Conference of March 2003 whose proposals were to the effect that the President should have power to appoint and remove Judges without the current procedures. It also proposed that Judges should be appointed on contract terms. This would compel them to always dance to the tune of the Executive so as to secure reappointments. This was a clear attempt to demoralize the judiciary. With such proposals one would be joking to expect the Judiciary to still be independent hence the negation of separation of powers.

The 'NRM' Government has been trying to democratize Uganda in a manner that may be referred to as turning the pages without closing the book. Democratic governance presumes peaceful and constitutional change of Government that Ugandans after almost 53 years of independence are still yearning to realize.

The year 2003 presented one of the major challenges to the 1995 Constitution in respect of its provision for term limits. Thus the Parliament was, pressurized to accept the amendment and this involved payment of five million shillings to the 'NRM'. Members of Parliament which was disguised as facilitation. This is because the members who were known to be on the opposition side were not considered for the alleged facilitation.

The dominance of the 'NRM' coupled with the absence of credible opposition groups which always made it possible for the Executive to force through controversial policies and Legislations such as the Kisanja Bill, Privatization of DCB and the deployment of troops 'in Congo. Thus such a Parliament could not check the Executive and force it to respect the

Constitution. The general opinion is that the political leaders have lacked political will to serve Ugandans. For instance, the failure of the Parliament to foresee the dangers of overstaying in power has been a regrettable concern of many Ugandans. In view of Uganda's constitutional history, it cannot be said that a conscious and independent Parliament could have passed the third term Bill. Consequently, Separation of powers has lost value which accounts for the present standoff among the organs.

As earlier mentioned the Independence of the Judiciary is an important aspect of Separation of powers. However political realities such as unwillingness to handover political power could not spare the might of the Judiciary and the rule of law; the administration of justice as highly interfered with by the Executive. At one time the president stated that the accused Dr Besigye having been lawfully brought to court should prove his innocence⁴⁶. This was a message to the courts that the accused was guilty yet he had not been tried and found guilty by the court. This explains why the Government was reluctant to accept the ruling of court granting the accused bail.

The major concern lies in the failure of the Executive to respect the decisions of court.

The accused⁴⁷ was granted bail by the High Court but was rearrested by the armed military officers also known as the Black Mamba. This was a violation of Human Rights and it is what Montesquieu was talking about; by that time the Executive desired to exercise all the powers of government which would usher in tyrannical rule, hence no Rule of law. One army operative Gen. David Tinnyefuza accused Judges of always siding with offenders⁴⁸.

According to Retired Justice Kanyehamba, in his book, 'Commentaries on Law, Politics and Governance, he appeared on Television with an angered face typical of a feared terrorist

⁴⁶ Dr. Besigye was a presidential candidate for FDC and was arrested on charges of rape and treason. However the public opinion suggested that the arrest was political with intention of clipping his wings.

⁴⁷ Dr. Besigye was the 14 people Redemption Army (PRA) Suspect was granted bail on 16th Nov. 2005.

⁴⁸ Solomon Muyita and Peter Nyanzi: Besigye Ruling angers Tinnyefuza, the Daily Monitor Friday Feb, 3rd 2006 pp 1-2.

when he questioned the authority of Judges and stated that they have no power to order the army and that the army would not accept the business of being ordered by them⁴⁹.

In line with that, the Principal Judge at the time James Ogola had strongly condemned the assault on the Judiciary by which the General said the following:-

“Who appointed him? Did the Principal Judge you are talking about go through a ballot? Did he come here by accident? We have given them power but they should not order us about”⁵⁰

The best interpretation of this comment by a member of the Executive is to the effect that, the Judiciary, in performance of its functions is subject to the control of the Executive against Article 128 of the Constitution. The view that the Judges have no power to order the army and this implies that the rule of law means nonsense because this would mean that they are above the law.

It is also surprising to note that the PRA suspects were under detention in disregard of court decisions⁵¹. On 1st January, 2007, the government lodged an application for cancellation of bail of the suspects following the debate of the court rulings⁵². The Chairman⁵³ of the Legal Committee of Parliament wondered if the cabinet would nullify the court’s decision and it was observed that the matter affects the independence of the Judiciary and added that one arm of Government is deliberately refusing to comply with the Orders of another arm⁵⁴.

The message in this is that the cherished system of administration of justice in Uganda has been tampered with since the rights of the people such as liberty are no longer protected by the courts.

⁴⁹ Kanyeihamba’s Commentaries on Law politics and Government, Renaissance Media Ltd. 2006 page 59

⁵⁰ The Daily monitor, Friday 31 2006,page 2

⁵¹ In Col. Dr. Besigye and others Attorney General Const. Petition No. 12 of 2006. The court ruled out that the trial of the PRA suspects in the General court Martial is unconstitutional and ordered for their release. However, this order was disregarded at the order of the executive. On 12 Jan 2007 the court again ruled against the continued detention of the suspects.

⁵² The Daily monitor Jan 31 2007, the AG appeared before the Parliamentary legal Committee noted that the cabinet would discuss the matter.

⁵³ Mr. Peter Nyombi, he is also a member of Parliament for Nakasongola county

⁵⁴ Ibid

The public believes that there is urgent need to reorganize the NRM leadership in order to revive the 1986 spirit, character and love for Uganda. Various events have been witnessed which show that the constitutional principles such as separation of powers on which the importance of the Judiciary depends, a time will come when Judges will be arrested like it happened in the regime of Idi Amin⁵⁵.

One of the lawyers for the PRA suspects paused a question;

“What is the remedy for people whose rights are being infringed against as a result of an unconstitutional action of a public authority if that authority does not respect the decisions of the constitutional court and the Supreme Court?”⁵⁶

He also asked whether or not the Constitution is still supreme and finally warned that taking short cuts through the Constitution and bending the rule of law are a sure source of Constitutional instability, tyranny, oppression and exploitation.⁵⁷ In other words it is the Executive that is supreme hence certain means should be ensured by the Parliament and the Judiciary through which proper checks and balances may be realized to prevent dictatorship.

3.5. SEPARATION OF POWERS, CHECKS AND BALANCES UNDER THE MULTIPARTY DEMOCRACY/SYSTEM

There is sufficient evidence to support the fact that the principle of separation of powers operates more effectively in an environment of multiparty systems.

As earlier mentioned, Separation of Powers, a term set out by the French political thinker Montesquieu is a model for good governance of the state. Suffice it is to say that checks and balances constitute a part of its major elements.

Checks refer to the ability, right and responsibility of each power to monitor the activities of the other(s); balances refer to the ability of each entity to use its authority to limit the powers of the others whether in general scope or in particular cases. The success of separation of

⁵⁵ Ben Kiwanuka the chief justice was arrested from his office and has never been seen again

⁵⁶ David Mpanga

⁵⁷ Ibid

powers, and checks and balances depends on the system of government adopted. Classical examples may be drawn from developed democracies such as the UK and the USA.

A country may choose a Parliamentary system instead of a Presidential system.

Under the former, the Prime Minister is a Member of Parliament and so are ministers and all are collectively responsible to Parliament.

The Head of State carries out ceremonial duties only. A good example is the unwritten Constitution of the United Kingdom and the 1962 Constitution of Uganda.

It is also noted that the Supreme Powers of the State are vested in the Representative branch of the Imperial Parliament. The members are chosen by an electorate whose commands are executed by a committee chosen by the Crown from the ranks of that party having a majority in the House of Commons.

From the above view point, it can be safely said that there is no clear-cut demarcation between the Executive and the legislature in the UK. Hence the Executive controls the Legislature except in extreme cases. Though there is a high degree of co-operation which is essential, it has been said that such lack of Separation of Powers reduces checks and balances which is the bed rock of the Parliamentary system.⁵⁸

It is also vital to note that the Judiciary enjoys greater independence -a very important aspect of Separation of Powers. This enables the Judiciary to ensure proper checks on the exercise of power by the other organs.

Under the Presidential system, the organs of Government are sharply separated with each kept in its own sphere of responsibility. Thus the President and Ministers are not part of the Parliament. The President is normally elected nationally and is generally accountable to the people. A good example is the US where the President is the Head of State and Government, Commander in Chief of the Armed Forces and has power to declare war and

⁵⁸ R. Okumu Wengi: Founding the Constitution of Uganda, Essays and Materials, Kampala, Uganda Law watch. 1994

sign Treaties⁵⁹. The legislative body is composed of two Houses the lower is called the House of Representative and the upper is called the Senate. They both enjoy supreme legislative power but the Vice President is the President of the Congress, which on the face of it is a real violation of separation of powers. This is because the Vice president who is appointed by President is a member of the Executive.

Regarding the Judiciary, the Chief Justice is appointed by the President and he in turn nominates and appoints the lower Judges. The Judiciary is said to be independent and this fact is illustrated in some cases:

For instance, in the Nixon Watergate crisis, it was observed that, "Notwithstanding the deference, each branch must accord the others, the judicial power of the United States vested in the Federal Courts can no more be shared with executive branch than the Chief Executive; for example, can share with the Judiciary the power to override a presidential veto any other conclusion would be contrary to the concept of separation of powers and checks and balances that flow from the scheme of a tripartite government..."⁶⁰

Considering the above position, each branch checks the actions of the others and balances their powers in a constructive manner.

However, it cannot be said that the above systems are watertight; inconsistencies may exist. Unlike the British system which ensures Constant Corporation between the organs, it may be difficult for the US system. For example, the Congress may have a democratic majority yet the President and his cabinet may be Republican⁶¹. The system of checks and balances is self-reinforcing because of the ability of the other two organs to take a corrective action.

⁵⁹ C.H. Pritchett: the American Constitution, New York, MC Graw hill Company 1959, page 98-162

⁶⁰ W.B Lockhart Kashmir and JH hoper: Constitution cases, Comments, Questions, edition, west publishing company, 1975p, and 317

⁶¹ That is the present position in the United States; the new Iraq policy was rejected by the congress

Perhaps having considered the above settings, the findings of the Constitutional Review Commission revealed that the people wanted wider separation of powers and retention of the Presidential system of government with clear separation of roles.

It was the view of the UHRC that upon return to multiparty system of governance, Separation of Powers would also work better in Uganda.⁶² In Uganda today, Political Parties have so far attempted to check the ruling party (NRM) regarding the correct exercise of power.

The Parliament is dominated by the NRM and this implies that it is unlikely proper checks and balances of power between itself and the Executive. This also makes it impractical to the Legislature and the Judiciary to take a corrective action against the Executive in the event of abuse of power which is the case for developed democracies. For instance the opposition petitioned Parliament to pronounce itself on the continued detention of the PRA suspects by Government in disregard of the judicial orders. However, it is on record that Parliament has always failed to represent the views of the people, lack of accountability to the Electorate, manipulation by the Executive, lack of acceptance of the role of opposition and the absence of Separation at Powers and checks and balances.⁶³ Therefore such a concern may be considered to be for the opposition hence offering no solution.

Regarding the public opinion, the press has considerably kept the public aware of the developments in the country. For example, the public expressed strong sentiments with respect to demand of 60 million for the parliamentarians' facilitation and it is for this reason that the executive intervened and objected to that amount. This is also true for the PRA case where the public expressed concern over the failure of the Executive to respect the orders of court. Such public opinion is said to have an effect on the outcome of elections and this enjoins the Government to meet the demands of the people.

⁶² Ibid

⁶³ An Address by Hon Justice Benjamin Odoki, Chief Justice of Uganda on the Rule of Law in Uganda

To sum up the foregoing boils, the situation in Uganda today seems to conform to the essential difference between Separation of Powers as developed in the common law theory and in France. In the former, the checks and balances inherent in the mixed Constitution and in Montesquieu's analysis were incorporated into the doctrine. In France, on the other hand, the judges were regarded as sources of tyranny and not liberty as in England, and the might of the popular will, combined to 'establish the non interference' model of separation of powers which is totally inapplicable in Uganda. The views by the Executive, that Judges are siding with offenders and that they have no power to order the army today are very unfortunate and are substantial symptoms for tyrannical governance. This leaves a lot to be desired from the present Government by the public about real democracy and the rule of law.

In conclusion therefore, Uganda to a smaller extent respects the doctrine of separation of powers and such a view is derived from the submission above.

CHAPTER FOUR

4.0. CONCLUSION AND RECOMMENDATIONS.

4.1. THE FINDINGS FROM THE QUESTIONNAIRES.

According to the research in relation to the questionnaires, time has changed and the period from 1995 up to today is better than the period from 1962 — 1995. This is so for today the law is more strengthened than during the period between 1962 to 1995. The law is more respected now than it was then.

The opposition in Uganda today has got the opportunity though limited to play its role effectively. This is so following the fact that the opposition strongly follows the law and in the interests of the good of the public.

However, the opposition also goes weak sometimes for some leaders get corrupted and loose the morale of fighting for the good of the people but become self styled hence fail to do their job effectively as expected.

The removal of the term limit was unnecessary. The act was self styled and not done in the interest of the public. This is so following the fact that the members of the parliament were paid off to support the change and amend the article. This was done in the interest of the executive to give some members i.e. the president to stay in power for an unlimited period. This showed the mighty of the executive which is in position of getting what it wants.

4.2. CONCLUSION

In the final analysis, it should be noted that the people of Uganda have been painfully struggling to realize viable and sustainable observance of the democratic system of governance that has for long been expected to deliver the Country from its undesirable political woes.

The 1995 Constitution of the Republic of Uganda took pains to provide for mechanisms that would ensure the rule of law among which was the Principle of Separation of Powers and checks and balances that are known to be viable safeguards against tyrannical leadership as we have already seen.

However as I conclude that these provisions have not been observed to the expectation of the public in light of the current events in Uganda some of which have already been discussed. The reason for this seems to be the fact that there has been no unified position reached by the organs of Government in respect of the interests of the people of Uganda and that none can meet its responsibilities in complete disregard of the functions of the other (s). In hand with that, the 1995 Constitution does not embrace Separation of Powers as absolute terms; it embraces the system of checks and balances which fosters cooperation among the organs for the common good.

However, as from the earlier discussion, it is apparent that the expectations of the constitutional makers and the people of Uganda have not been met. Specifically, the Judiciary that is the most vulnerable cannot play its role without the corresponding participation of the other stakeholders like the Executive, the Legislature and the civil society, particularly the Lawyers.

It should be noted that all the three organs of Government derive their authority from the people of Uganda in whose interest and on whose behalf it is to be exercised⁶⁴. On the contrary, there has been a standoff between the main organs characterized by blatant interference that may hardly be justified. For instance the incident as we have already seen security men forced their way into the Court's Criminal Registry and rearrested the six PRA suspects⁶⁵ a clear indication of the disregard of Separation of Powers.

⁶⁴ Under Article 71 and 103 the Member of Parliament and the President are elected by the people and under Article 126 judicial power is divided from the people and it is to be exercised in conformity with the nor

⁶⁵ The Daily Monitor, Monday March 5th 2007, the suspects had been granted bail by the High court; the Government considers that decision to be

During the transition period, the Executive was seen to be ready to do anything possible to succeed with the third term bill. This resulted into the amendment of Article 105 which limited presidential term limits to two upon corrupting the Members of Parliament with five million that was disguised as facilitation. The general public sentiment was that the current President should have handed over power and this would take Uganda to a new era in its constitutional and political development.

Therefore the failure to transit Uganda to a new chapter has so far culminated into abuse of the Constitution by disregarding the Principle of Separation of Powers, Independence of the Judiciary and the demise of democratic governance. Simply stated overstay in power breeds dictatorship and tyranny. It has also caused the occurrence of the endless strikes and criticism against the government.

As earlier mentioned, the return to multiparty politics was conditioned by the desire to secure the third term for the NRM leadership. This implies that the normal and ordinary operation of multiparty democracy is impracticable since they were a product of selfish interests⁶⁶. Ordinarily the opposition in the Parliament would be able to check the exercise of power by the Government but it has failed to do and this fosters the violation of constitutional safeguards against abuse of power among which is the principle of Separation of Powers.

It should also be noted that Uganda has lacked democratic culture and this accounts for the persistent attempt by the Government to fight any kind of political opposition. The failure of the Government to respect and observe the Independence of the Judiciary is believed to be hinged on the desire to clip the wings of the opposition.

What should be noted is that the NRM Government has for almost 30 years governed without credible opposition and therefore having been compelled to open up political space, it remains unwilling to accept free operation of the opposition parties. Admittedly, the lack

⁶⁶ The NRM party preferred maintaining power at the expense of other parties

of mechanisms through which the Judiciary may enforce its own decisions remains a fundamental challenge to the maintenance of an independent Judiciary. The Executive controls the power of enforcement and this further subjects the effectiveness of the Judiciary to Executive pleasure. Though this may at times enable the Executive to check the Judiciary, it may as well facilitate frustrations of the decisions of Courts as is the case with the PRA case.

Furthermore, under multiparty democracy it is always desirable to create institutions that are governed basing on professional capability. 'Target institutions include the Army and the Police which are expected to be professional and non partisan. However the events in Uganda cannot be easily associated with this desire. The Police have been used to abuse the Independence of Judiciary and the opposition activities while the Army is on record for regularly intimidating the public and institutions such as the Judiciary and the Legislature all of which have diluted the Rule of Law. With such a situation, the disregard of Separation of Powers is inevitable since the Judges and the opposition are regarded as sources of tyranny and not liberty.

Generally, as much as the government has tried to ensure the operation of the doctrine of separation of powers. It has also failed as we have already seen to implement its operation. Therefore, there has been several set backs against the doctrine. As we have already seen, this is normally because the executive does not respect the independence of the judiciary and legislature.

4.3. RECOMMENDATIONS

From the earlier submission, it is clear that the organs of government have been publicly undermining on another and this makes the public to lose confidence in their operations. Members of the Executive were quoted blaming the Judiciary as siding with offenders and this is and this is hazardous to the reputation of the Judiciary before the public. The

president is on record to have condemned the Judiciary as biased, unprofessional, anti-NRM and this undermines the people's confidence in it.⁶⁷

4.3.1. RECOMMENDATIONS TO THE EXECUTIVE

The Executive should desist from criticizing the Judiciary and instead find ways to strengthen it by providing all the necessary facilitation to ensure its effectiveness.

The executive's interference in other organs makes them weaker and unable to do their work effectively.

I recommend that the executive should strictly respect the independence of the other organs so as to give them a chance to do their work effectively. This is so because its interference has paralyzed other organs i.e. the judiciary and legislature.

4.3.2. RECOMMENDATIONS TO THE JUDICIARY

The Judiciary needs to be stronger to be able to take decisions that would compel the other organs to respect and observe the Constitution. The Retired Chief Justice Benjamin Odoki commenting on the independence of the Judiciary noted that qualified members of high moral authority and integrity should be appointed as judicial officers to reduce ineffectiveness of the Judiciary.

He argues that such persons would not simply succumb to the whims of the Executive. The challenge however, is that the present practice of appointing judicial officers by the President leaves little chance for confident Judges who would disregard undue influence and intimidation.

Therefore the Independence of the Judiciary which is a major aspect of the Principle of Separation of Powers may better be realized where the Judiciary is self regulatory. A strong Judicial Service Commission should be set and provided for in the Constitution to select the most qualified persons through a much more open and critical manner. The Commission should take into consideration such persons' antecedents, therefore the performance of the

⁶⁷ Report of the select Committee on election Violence. September 2002. page 186

function entailed as well as the need that there are no direct political influences on the selection of such persons. The Commission should also be responsible for removal and promotion of such persons all of which would be based on competence and proper accountability.

The members of the Judiciary should object to any attempt to compromise its Independence. I consider the suspension of judicial work as most appropriate response to the Court raid of 1st March 2007 (supra), It should be noted that judicial power has for long been subject to the Executive pleasure and pressure as a result of the presidential power to appoint the Judges. It is for such pleasure that the Judiciary has been extremely unwilling to upset the Government in the event of the abuse of its Independence.

Thus I recommend that such actions as suspension of judicial work as a measure towards ensuring optimum respect for the Judiciary. The rationale behind such an action would be to compel the Executive to account to the people for the failure of Justice in the Country. However this should not be misunderstood as fostering the suffering of the people who in the event of suspension would suffer an injustice. In regard to the above I recommend resignation of judicial officers in cases of persistent violations of the rule of law. It should be noted that the breakdown of the rule of law cannot be disassociated with the abuse of human rights. Thus in some cases, resignation may represent a protest against abuse of people rights. However in developing Countries this aspect seems impracticable because politicians and other public or civil servants are unwilling to lose their jobs since selfish interests over ride public interests.

Suffice is to mention that if the Chief Justice had resigned, it would have better signified the desired patriotic response to attacks on the rule of law and a clear protest against the abuse of the rights of the suspects who were granted bail. This would paint an unpleasant record on the Government and would act as an effective check on the exercise of power by the Executive upon the matter becoming an international concern.

Recording the difficulty surrounding the enforcement of findings of courts, there is need to provide for mechanisms through which the judiciary may independently enforce certain decisions.

4.3.3. RECOMMENDATIONS TO THE LEGISLATURE

According to the research, in Uganda most of the members of the parliament are also members of the executive.

This has made it very difficult for the members to realize the independence of the two. Thus the two should be completely separated by recruiting different people. The members of parliament should not be part of the executive. This independence will lead to the realization of separation of powers.

The legislature should also be strong in the way that it does not stand or, entertain being corrupted and interfered. Their point can be driven through demonstrations, boycotting and also using the law.

Earlier observations also pointed out that the ruling Party dominates the Parliament and this makes it easier to interfere with functions of Parliament. Among the causes for this, is the fact that the members of Parliament and the President are elected at the same time. Under this current position the people are always more concerned about the presidential elections and therefore have no opportunity to make independent choices on their representatives. Thus, it is desirable for the election of the President and the Members of Parliament to be conducted separately in order to enable the people to properly scrutinize the parliamentary candidates.

4.3.4. RECOMMENDATIONS TO THE PRESS

Furthermore, the press is described as the fourth estate because of its considerable influence over the public opinion which it wields by distributing facts and opinions about the various

branches of the Government. Such opinion in turn indirectly influences the branches of Government by expressing public sentiment with respect to wanting issues.

In light of this position, the press in Uganda should play a more active role in order to ensure public awareness of all the actions taken by the main organs of Government. The public should be informed of the dangers of interference with the functions of the Judiciary since, in absence of an independent Judiciary and Parliament, the rights and freedoms of the people would be at stake. However the press should not do the publication in order to entice unfair protest against the government

The public should strongly condemn any abuse of power in order to uphold the rule of law.

In a word, only sense of patriotism among our leaders can save Uganda from disintegrating into a civil strife leading to political instability and insecurity that the people hoped to get rid of by adopting the famous 1995 Constitution of the Republic of Uganda.

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APPENDIX: INTERVIEW GUIDE

Research Guide Questions

1. Is the judicial organ most vulnerable independent in Uganda? If yes or no, to what extent?
2. What should be done in order to effectively preserve the Independence of the Judiciary and the rule of law?
3. What can you say about the November 2005 events where the High Court was surrounded by the security organs while hearing the bail application by the 14 or so treason suspects in regard to the essence of the Doctrine of Separation of Powers?
4. Do you think the Executive should respect all the decisions passed by the Judiciary? Can you cite examples, which justify your answer?
5. Does multiparty politics which Uganda adopted have any impact to the operations of the doctrine of Separation of Powers?
6. In most cases the Executive branch overshadows the other branches. How can the Executive branch be made to adhere to the doctrine of Separation of powers at all time?

Questionnaires:

1. Has there been any difference between the period 1962-1995 and 1995 to the present in regard to the observance of the doctrine of Separation of Powers in Uganda?

Yes ☐

No ☐

2. In America, the leader of opposition has the ability to scrutinize the work of Government which guards against abuse of power. Is the leader of opposition in Uganda able to play this role effectively?

Yes ☐

No ☐

Give reasons for your answer.

.....
.....

Was the removal of the term Limit in 2006 necessary?

Yes ☐

No ☐

international level.⁴⁰ The referendum was objected strongly by the opposition on grounds that there was no fairness and no freedom, therefore the results were not valid.

The constitutional (amendment) Act 13 of 2000 was also a result of the executive pressure on the Legislature causing it to disregard the requisite Procedures: the constitutional (amendment) Act no. 1/2000 was nullified by the Supreme Court consequently.

Further in 2002, the Parliament was made to enact the Political Parties and Organization Act (PPOA) that was also criticized for infringing on the rights and freedoms of the people.⁴¹

Various mechanisms were ensured to restrict the operation of opposition political parties.

The above are some of the extreme examples making a simple point that: there has been a systematic undesired control over the parliament by the Executive.

Regarding the Judiciary, the Executive has always expressed its unwillingness to respect the rulings against its wishes. According to the former chief Justice of Uganda⁴³, an independent and impartial Judiciary is important for courts in democratic countries lean in favor of the liberty of the individual when applying and constructing rules and policies that are vague while justifying public policies or acts. He added that it is the best-suited branch to protect and strengthen the rule of law: though there have been threats emanating from the Executive generally and against individual judges⁴⁴. This undermines the rule of law. This was witnessed with case of **Besigye V. Museveni**⁴⁵, whereby the President expressed dissatisfaction against the two Justices who dissented. In almost all the cases where the government has lost, such sentiments as "the do not know what they are doing" are common.

⁴⁰ PK Semigerere; Friday, Monitor 1999; Article 20(1) of the Universal Declaration of Human Rights and 43 of the 1995 Constitution which provide for the rights of freedom of peaceful assembly

⁴¹ Sam Njoba on BBC World Africa, Wednesday

⁴² Section 7 of the PPOA restricted the activities of such parties to Kampala not National Level

⁴³ Hon. Benjamin Odoki

⁴⁴ Hon. Justice Benjamin Odoki, the rule of Law in Uganda, 10th anniversary of lawyers' day at Uganda Christian University, 25th Nov 2005

⁴⁵ Presidential Election Petition No. 1 of 2001

Thus, the above presents a consistent attempt by the strong Executive to undermine the mentioned essence of separation of powers. This is consistent with the emergence of the controversial political transition of separation of powers.

3.4. THE CHALLENGES OF POWER DURING THE POLITICAL TRANSITION

It has been shown that the Judiciary, which has been defended the Constitution and endeavored to uphold the Rule of Law. As a result, the Executive sought to devise means through which the Judiciary could be weakened. This culminated into the Kyankwanzi Conference of March 2003 whose proposals had the effect that the President should have power to appoint and remove Judges on current procedures. It also proposed that Judges should be appointed on contract terms. This would compel them to always dance to the tune of the Executive in their reappointments. This was a clear attempt to deny the Judiciary its independence. One would be joking to expect the Judiciary to still be independent hence the negation of separation of powers.

The 'NRM' Government has been referred to as turning the pages without closing the book. Democratic governance presumes peaceful and constitutional change of Government and the realization of the rule of law and independence are still yearning to realize.

The year 2003 presented one of the major challenges to the 1995 Constitution in respect of its provision for term limits. Thus the Parliament was pressurized to accept the amendment and this involved payment of five million shillings to the 'NRM' Members of Parliament which was disguised as facilitation. This is because the members who were known to be on the opposition side were not considered for the alleged facilitation.

The dominance of the 'NRM' coupled with the absence of a strong opposition has always made it possible for the Executive to force through controversial Legislations such as the Kisanja Bill, Privatization of D.C.B and the appointment of a new President of Congo. Thus such a Parliament could not check the Executive and force it to respect the