CONSTITUTIONALISM IN THE POST 1995 UGANDA WITH REFERENCE TO THE INDPENDENCE OF THE JUDICIARY

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DECLARATION

I NAKAWALA HELLEN, Declare That, This Research On "*Constitutionalism in the Post 1995 Uganda With Reference To The Independence Of The Judiciary*". *The Research* Is Entirely My Original Work Both In Substance And In Style, Unless Otherwise Acknowledged, And The Same Has Never Been Presented To Any Other Institution Of Learning For Any Form Of Academic Reward.

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DEDICATION

I hereby dedicate this piece of work to my beloved parents Mr. and Mrs. Kannene Nathan and Janet of Jinja For their wonderful contribution in my academic career and helping me fulfilling my dreams for a better future. You worked tersely and dedicated your efforts towards educating me and uplifting my social status. Not forgetting my siblings

I love you all.

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May God Richly Bless and Reward You for your Generosity.

LIST OF ACRONYMS AND ABBREVIATIONS

ART	Article
CRC	Constitutional Review Commission
CID	Criminal Investigation Department
DANIDA	Danish Aid Program
DRC	Democratic Republic of Congo.
GCM	General Court Martial
DPP	Director of Public Prosecution's
IGG	Inspector General of Government
RDC	Resident District Commissioner
RC	Resistance Council
LC	Local Council
LDU	Local Defence Unity
LEGCO	Legislative Council
IMF	International Monetary Funds
NGO	Non Government Organization
PJ	Principal Judge.
NRA	National Resistance Army
NRM	National Resistance Movement
MP	Member of Parliament
UPDF	Uganda Peoples Defence Forces
UPC	Uganda People's Congress
WB	World Bank
HURINET	Human Rights Net Work
E.G	For example

LIST OF STATUTES AND CONVENTIONS

The Constitution of the Republic of Uganda, 1995

The 1962 Constitution

The 1966 Constitution

The 1902 Order-in-Council

The 1939 Order-in-Council

The Judicature Act, Cap 13

The UPDF Act, Cap 307

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CHAPTER ONE

1.1 Introduction

The rule of law can be traced from the works of Dicey[1] and to him it deals with two aspects viz, a government of laws and not men, and must be carried out within well established and non-discriminatory parameters. There must be absolute supremacy of the law via-viz arbitrary exercise of powers coupled with equality of all citizens and no discrimination in application of the Law.

Dicey observed that,

> *'If am subject to another person, am at the mercy of his whims, passions, anger and prejudices. But if we are both subject to the law, then the personal factor is taken out of politics. By subjecting everyone to the law, we make ourselves equal. All persons must subject themselves to the law. The power must be exercised in accordance with the law and conditioned with the law.'*

To understand popular democracy and rule of law, one needs to know the genesis of the concept of rule of law and constitutionalism so as to find out whether it has been applied correctly in Uganda. We evaluate whether they have been adhered to and enforced like any other growing democracies. According to S.A.De Smith, constitutionalism and rule of law are,

' ... principles that the exercise of political power shall be bound by rules, rules that determine the validity of the legislative and executive action by prescribing the procedures according to which it must be performed or by delimiting it's permissible actions thus constitutionalism becomes a living reality to the extent that the rules curb the arbitrators of discretion and are in fact observed by the wielders of political power, and the extent that within the forbidden zones upon which authority may not trespass there's significant room for the enjoyment of individual liberty[2].

The International Committee of Jurists articulated ten features of the rule of law and popular justice but this study mainly deals with five of them as below.

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[1] An Introduction to the study of constitutions. Macmillan. London. 1959.
[2] SA De Smith. Page 205.

Separation of powers with each of the three organs of government independent in their activities. In the Uganda constitution, it's stipulated under chapters 6, 7, 8. This is also closely linked with the military under the executive arm of government.

Equality before and under the law. All citizens irrespective of race, colour, and tribe are equal and the law must be applied equally to them. This is closely linked to the national objectives and directive principles of state policy under part III of the constitution.

Judicial independence. Here various aspects are dealt with such as nature and method of appointment and disappointment, tenure, salary arrears, hierarchy of courts, and the Judicial Service Commission. The judiciary is faced with constant threats and interference from the other two organs of government. But it ought to be noted that the judiciary is also to blame for some of their problems. The above was elaborated by Ntabgoba (P.J) as he then was, said that

> *'The behavior of government officials ignoring and disregarding summons ... courts are reprehensive and regretted. This behavior where the executive continues to disregard court orders can ... bring disrepute not only to courts but also the law they administer*[3]*.'*

1.2 Historical Background

Looking back at history, it is easy to stand in judgement over the Judiciary and criticise it for being the "handmaiden to executive and legislative excess, rather than an instrument to prevent it." However, the truth is that judicial independence can only flourish in a democracy. From the formation of the Protectorate of Uganda in 1894 to 1995 when Ugandans got their first "home-grown" Constitution, Uganda could hardly be described as a democracy. During the Colonial Period, the Judiciary was there to protect and guard the interests of the British Crown, which appointed and dismissed judges at pleasure. After independence, the Judiciary operated under several forms of civilian and military dictatorships where the executive overtly and covertly showed that it did not respect the

[3] J. Oloka Onyango. Judicial power and constitutionalism in Uganda. CBR Working paper 30/93

Courts and their decisions. In these circumstances, where the rule of law was non-existent, judicial independence could hardly be expected to thrive. With particular reference to the various judgements over the years that have legitimised the unconstitutional assumption of power, it is all too easy to say that the Judiciary failed in its role as protector and guarantor of human rights and the rule of law.

1.2.1 Colonial Uganda (1900-1962)

The legal framework under which the Colonial Government exercised its powers over the people of Uganda was contained in the (B)uganda Agreement of 1900 and the 1902 Order in Council. The major aim of the colonial government was to maintain law and order and to ensure the smooth running of the colonial administrative machinery. The role of maintaining law and order was paramount and was not subject to judicial consideration or appeal. Human rights and promoting the rule of law were definitely not a priority.

The protectorate was headed by a Governor, who exercised executive, legislative and judicial powers. For example, under section 2 of the Deportation Ordinance 1908, the Governor could order the deportation of any person who was shown to be conducting himself so as to be dangerous to the peace and good order or was endeavouring to excite enmity between people of the protectorate and His Majesty. Section 3 specifically provided that the deportation order was not subject to appeal. This showed clearly that the administration of law and order took precedence over human rights considerations.

This fusion of judicial and executive power was repeated at the lower levels of governance. At village level, the chiefs had power to maintain law and order in their areas of jurisdiction, and this power gave them a lot of leverage to act as legislators, judges and administrators. "If you were a peasant in the village and it was time for taxation, the chief was the person who assessed your property. The chief decided how much tax you should pay. If you thought you had been unfairly assessed, you appealed to the chief. The chief decided on that appeal. The chief had the right to make a bye-law which required you to contribute to labour to build a road or to entertain a visiting dignitary. The chief collected the tax and the tribute. The chief

arrested you if you failed to pay that tax, and the chief jailed you. The chief decided where you worked while in jail. The chief released you upon completion of your sentence, and it was the chief who decided what extra penalty you would pay on top of the tax for having failed to pay the tax on time!"

This fusion of powers was compounded by the fact that state power could not be subject to judicial scrutiny. In many ways, this set the stage for the judicial attitude towards executive power in the post-colonial period.

1.2.2 The Judiciary In Post-Colonial Uganda (1962-1971)

The legacy of the colonial era affected the operation of the post independence Judiciary. Because executive power had not been the subject of sanction, the post-colonial era was characterised by conflicts within and between the various arms of government. A good example of a conflict between the Executive and the Judiciary was reflected in the case of **Grace Ibingira. & 5 ors V AG**[4], one of the major issues that arose in the case was about the implications of the Bill of Rights in the 1962 constitution. During the 1966 crisis, allegations were made against the then Prime Minister Obote and there was an attempt to begin "no confidence" proceedings by five of his Cabinet Ministers including Ibingira. Obote had the five ministers arrested at a Cabinet meeting at Entebbe and detained under the Deportation Ordinance. The detained ministers brought an application in the High Court challenging the validity of the Deportation Ordinance as a contravention of the right to freedom of movement enshrined in the 1962 Constitution. They also brought a writ of habeas corpus seeking their release. The High Court upheld the Ordinance and denied the writ. The applicants appealed to the Court of Appeal. The Court of Appeal found that the Deportation Ordinance had been rendered inapplicable by the coming into force of the 1962 Constitution and therefore no lawful order of deportation could be made against a citizen of Uganda under the Ordinance. The Court ordered the case to be returned to the High Court, with instructions that the writ be obeyed, and the detainees brought before the judge for their subsequent release. The High court subsequently ordered their immediate release.

[4] (1967) EA 254

The Executive was not about to stand for this. It transported the detainees from their respective upcountry prisons and to Entebbe, and served them all with detention orders under the Emergency Powers (Detention) Regulations.[5] These regulations applied only in Buganda, where a state of emergency had been declared. Parliament then passed the Deportation (Validation) Act in one day, indemnifying the government against the action it had taken against the detainees under the Deportation Ordinance. On subsequent appeal to the Court of Appeal against the detention order, the court refrained from ordering their release. It accepted the validity of the Emergency Powers Regulations without referring to the Constitution at all. It did not question the passing of the Act or the fact that it was retrospective in nature and therefore contrary to the rule of law.

This case showed the independence of the Judiciary in newly-independent Uganda was more of a myth than a reality. Subsequent cases showed that the Judiciary was indeed the handmaiden of executive excess rather than an instrument to check it. In **Uganda v. Commissioner of Prisons , Ex parte Matovu**,[6] one of the issues that arose was whether the High Court had power to rule on the validity of the 1966 Constitution, either because it arose from a political act outside the scope of court, or because it was the product of a successful revolution. Kelsen's Pure Theory of Law was relied upon heavily in the judgement. The infamous Pakistani authority of **State v. Dosso and Anor**[7] was also relied on. The case dealt partly with the political question doctrine, which asserts that courts do not have the jurisdiction to inquire into an executive action that relates to a matter of a political nature. In Matovu's case, the Court held that it did have the jurisdiction to hear the case even though it involved a highly political question, but went on to hold that it lacked the authority to rule on the validity of the Constitution, "because courts, legislatures and the law derive their origins from the Constitution and therefore the Constitution cannot derive its origin from them, because there can be no state without a Constitution."

[5] 1966
[6] (1967) EA 141
[7] (1958) 2 PLR 201

The reluctance of the court to rule that the Constitution was invalid, though regrettable, was understandable. To rule that the Constitution was invalid would also have meant that the source of power and legitimacy on which the Court itself was constituted was tainted.

However, in upholding the validity of the detention order issued against Matovu, the Court sanctioned the infringement of individual liberties and t6hereby cast doubt on judicial independence. The court bestowed legitimacy on the illegal acts of the government and the unconstitutional revolution and set the stage for similar holdings upholding unconstitutional revolutions down the road. In so doing, it not only undermined individual rights and freedoms, but also sanctioned disrespect for constitutionalism and the rule of law. Above all, it may have contributed to encouraging the culture of militarism in Uganda's politics.

1.2.3 The Idi Amin Dictatorship (1971-1979)

Whereas the previous government of Apollo Milton Obote had maintained a charade of separation of powers and an independent judiciary, Idi Amin's military dictatorship made no such pretences. Parliament lost its law-making powers to the Head of State, who now ruled by Presidential decree. Judicial power became militarised. The President, not the Constitution, was supreme. The whole country, including the Judiciary, was in a state of perpetual fear and helplessness.

The disappearance and subsequent death of the first Ugandan Chief Justice, Benedicto Kiwanuka, sent shivers throughout the whole country and the Judiciary in particular. The Judiciary was rendered even more impotent by the creation of a wide range of military and para-military bodies such as the Military Tribunal, the Economic Crimes Tribunal, the State Research Bureau, the Military Police and the Army; all with quasi-judicial powers which they exercised without any due regard to the principles of natural justice or respect for fundamental human rights. Moreover, these bodies were not subject to direct judicial scrutiny.

Although the era was characterised by widespread violation of human rights perpetrated by the state and its agents, the citizens had little or no recourse to the courts as a result of the proclamation of the Proceedings Against Government (Protection) Decree.[8] The law provided that courts could not grant relief in any actions brought against the military government for injuries sustained as a result of measures taken to maintain law, order and public security. Thus, the courts were rendered ineffectual in their role of protecting citizens from the excesses of executive power.

1.2.4 The Uganda National Liberation Front (Unlf) Government And Obote Ii (1979-1985)

After the ouster of Idi Amin in April 1979, the Judiciary operated in an atmosphere that was more relaxed than the one that obtained during the period of dictatorship. However, it remained clear that the Judiciary was still wary of making radical judgements in sensitive cases concerning the validity of executive action. It appeared that the Judiciary was keen to avoid anything that would put it on a collision course with the executive. This attitude of the Judiciary was abundantly manifest in the case of **Kayira and Semwogerere v. Rugumayo, Omwony-Ojok, Ssempebwa and Others**.[9] This was a Constitutional case concerning the validity of various actions that had culminated in the removal of Yusuf Lule from the Presidency of Uganda. Relying on Matovu's case, the Court upheld the validity of revolutions through extra-constitutional means. Wambuzi, C.J. as he then was, refused to grant a declaration that the procedure followed in removing Professor Lule was unconstitutional, saying:

> *"If this Court were to say that Prof. Lule's removal as President was unconstitutional, then it follows that whatever government which came into power was illegal... The consequences of issuing such a declaration are grave indeed."*

The "grave" consequences envisaged by the learned Chief Justice were that it would embarrass Binaisa, Q.C., who was now in office as president, to say that his predecessor had been removed unconstitutionally. As in Matovu's case, the Court relied on Kelsen's Pure

[8] 1973
[9] (1980-81) HCB 79

Theory of Law to justify the extra-constitutional revolution, and in so doing, appeared to act as a "rubber-stamp" rather than a check for illegal executive action.

Binaisa's government was succeeded by the second Obote Government after the highly contested elections of 1980. As in the first Obote Government, the executive continued to treat the judicial arm of government with thinly veiled contempt. On paper, the provisions of the 1967 Constitution that stipulated judicial independence remained. In practice, the Judiciary tried to uphold the rights of individuals, but the executive was always two steps ahead. For example, in **Kyesimira v. Attorney General,**[10] the Court of Appeal overruled a detention order that had been served on the appellant who was an opposition member of Parliament. The grounds for overruling the order were that several procedural requirements provided for under the Public Order and Security Act had been overlooked in imposing the order. In a move that showed the government's total disregard for the Courts and the rule of law, Kyesimira was served with another order and returned to custody.

In general, this wanton disregard for the rule of law characterised the second Obote regime. Although the Judiciary tried to uphold the rights of citizens who approached the courts for redress, the political atmosphere in which it operated made it difficult to check the excesses of the executive.

1.2.5 The Judiciary in the Early Years of the Movement Government (1986-1995)

One of the most radical changes introduced by Yoweri Museveni's National Resistance Movement which took power in 1986 was the Resistance Committee Courts. Resistance Committees were elected political and administrative units that existed at village (RC I), parish (RC II), sub-county (RC III), county (RC IV) and district (RC V) levels. As a system that proclaimed itself as "broad-based, all-inclusive and non-partisan," the Movement championed a form of "grassroots" democracy under which the people of Uganda were to participate in running their own affairs, including the administration of justice. The

[10] (1978) HCB 101

enactment of the Resistance Councils and Committees (Judicial Powers) Statute, gave the Resistance Committees (RCs) {RCI, II and III} judicial powers.

Since 1988, the LCs have dispensed "popular justice," to the people of Uganda. Needless to say, during the early years of the Movement government, they attracted both praise and criticism from various quarters. On the one hand, the initiators of the system, that is, the NRM government and its sympathisers, praised the RC Courts for bringing justice nearer to the people, and allowing the people to take part in the resolution of their own disputes. On the other hand, the Uganda Law Society and the magistrates and judges in the mainstream Judiciary did not hesitate to express their unease with the obvious lack of separation of powers inherent in the LC Court System. Concern was also expressed about the manner in which these Courts, manned by "lay" people, administered justice, often contravening the law, violating fundamental rights, and exceeding their jurisdiction.

Today, the LC Courts continue to administer justice all over the country. It would appear that they have more or less been accepted by Ugandan society in general, including those sections that were initially opposed to them on grounds that they violate the doctrine of separation of powers. While it is acknowledged that they continue to play a great role in administering justice in this country, many of the problems that have beleaguered them since their inception in 1988 still exist. For example, failure to follow proper procedure, exceeding their jurisdiction, lack of remuneration for officials, and the absence of enforcement mechanisms for their judgements, are yet to be dealt with.

1.2.6 The Relationship between the Executive and the Mainstream Judiciary under the NRM Government

The 1995 Constitution lays a good foundation for judicial independence. It emphasises that 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. This provision is reinforced by further provisions that grant judicial officers immunity from being sued as a result of any action or omission committed during the exercise of judicial power. The security of tenure of judges is

ensured by a provision that their salaries shall be drawn from the Consolidated Fund, and their salaries and other benefits should not be varied to their disadvantage. The Judiciary is self-accounting and deals directly with the Ministry of Finance in relation to its finances. Security is further ensured through the methods for appointment and removal of judges.

Judges are appointed by the President on the advice of the Judicial Service Commission, with the approval of Parliament. They can only be removed from office on recommendation by a special tribunal constituted for the purpose of establishing that the judge can no longer perform the functions of the office due to inability of body or mind; that the judge is guilty of misconduct, misbehaviour or incompetence. All the above provisions enhance the independence of the Judiciary in Uganda.

However, although the Constitution ensures the independence of the Judiciary, the law is less clear on the issue of accountability. One of the issues facing the Judiciary in Uganda today is how to balance independence with a satisfactory level of accountability. Whereas judges are held to account by the appellate system, whereby judicial decisions can be reviewed and corrected, there is a need for further measures to ensure judicial discipline. The issue of accountability has gained prominence of late, in part because of President Yoweri Museveni's criticisms of the Judiciary, and his protestations that the Judiciary has usurped the power of the people and makes judgments that are contrary to their wishes. Furthermore, assessments of corruption in Uganda regularly name the Judiciary as one of the most corrupt government departments in the country. The various allegations of judicial misconduct have reached such a level that for some time now, the Judiciary has lived under a looming "threat" of a Commission of Inquiry.

The Constitution of 1995 provides that a judicial officer may be removed from office for inability to perform the functions of his or her office arising from infirmity of body or mind; misbehaviour or misconduct; or incompetence. The question of his or her removal has to be referred to a tribunal constituted for this purpose. Unfortunately, the Constitution does not define what constitutes misbehaviour, misconduct or incompetence.

The introduction of the LC Court system was reflective of the NRM government's attitude towards the mainstream Judiciary. The government viewed the system as elitist and largely irrelevant to the majority of Ugandans, hence the need for an alternative system at the grassroots. This attitude sometimes erupted into outright disrespect for the principle of judicial independence by subtle but yet undeniable interference in the work of the Judiciary. Moreover, the fact that the Movement government was not democratically elected, but was itself a military government that took over power by force, left the Judiciary in the same untenable position that had characterised much of its existence since independence.

A memorable example of the government's interference with judicial independence is the experience of Chief Magistrate Okalebo (as he then was). He experienced first hand the consequences of not dancing to the tune of the executive, or not being sensitive enough to discern the political ramifications of a case that came before him for hearing. Three journalists appeared before him, charged with "defamation of a foreign potentate," under section 51 of the Penal Code Act. At that time, former Zambian President Kenneth Kaunda was visiting the country. At a press conference hosted by State House, the journalists asked him what were deemed "embarrassing" questions, hence the charges. Chief Magistrate Okalebo dismissed the charges against two of the journalists on the grounds that the journalists had not "published" anything intended to revile the visiting President, but had merely asked him questions. Under the Penal Code, publishing was an essential ingredient of the offence.

The third journalist was scheduled to appear before Okalebo the following day for a hearing of his bail application. However, in a move that could only be interpreted as having been done in bad faith, Okalebo was suddenly transferred from Kampala to Mukono, and could no longer preside over the case. Another magistrate was brought in from Masaka specifically to deal with the case against the third journalist. Not surprisingly, the journalist was subsequently denied bail on very flimsy grounds. Of course, the government denied that it had had anything to do with Okalebo's transfer.

With regard to the Judiciary's handling of constitutional cases involving sensitive political issues, the Judiciary appeared to become more courageous by disallowing illegal executive action that resulted in the violation of citizens' rights. In the case of **Ssempebwa v. The Attorney General,** to its credit, the Judiciary upheld the rights of the petitioner and emphasised the need for the Legislature and Executive to act within the framework laid down by the law. One of the main issues in the case turned on the validity of Legal Notice No. 6 of 1986, which sought to prohibit actions against the NRM government resulting from destructive activities that accompanied their assumption of power. The said Legal Notice was subsequently declared unconstitutional for failure to comply with the constitutional provisions for the passing of valid legislation. Unfortunately, in a style reminiscent of Obote's, the government simply re-enacted the same law, this time taking care to comply with the required technicalities.

However, despite the fact that the petitioner won the case, the Judiciary has been criticised for "resurrecting the ghost" of Matovu's case and upholding the legality of extra-constitutional revolutions. In upholding the petitioner's right to redress for the violation of his human rights, the court simultaneously relied on Kelsen's Pure Theory of Law as expounded in the Matovu and Kayiira cases to bestow legality on the NRM's forceful takeover..

Generally, the period 1986 - 1995 was characterised by various contradictions in the political and legal framework, which made it impossible for judicial independence to flourish. As already mentioned, the NRM government was itself a military government, which, although it brought about hitherto unknown "grassroots" democracy and a certain level of freedom, clamped down on political party activity and silenced political opponents by charging them with treason. Although the Judiciary attempted to uphold the rights of the people as reflected in the Okalebo incident and the Ssempebwa case, there was a limit to what it could achieve in what was in many ways an undemocratic regime.

However, the other side of the coin is that the concerned judges had little or no choices open to them; their hands were tied. One can only speculate as to what the consequences would have been if they had declared as unconstitutional the governments under which they were operating. On the other hand, it may be argued that the Judges had the option of resigning, rather than use their offices to rubber stamp "illegal" governments.

In 1988, the NRM government established a Constitutional Commission, which carried out countrywide consultations and came up with a draft Constitution. In 1994, a Constituent Assembly was put in place to debate the proposals in the draft Constitution and come up with a final document. Finally, in October 1995, a new Constitution was promulgated. After less than ten years, that Constitution is currently undergoing some major reviews. The remaining part of this paper analyses the current law governing the Judiciary and the proposed amendments to the law; and identifies a number of crucial issues that constitute opportunities and challenges for fostering judicial independence in Uganda.

After the Constitutional court judgment which nullified the 2000 referendum, the government reacted in a manner very intimidating of the courts. In a series of events that were reminiscent of the Ibingira saga of 1960s, the government hastily enacted the Referendum (Political Systems) Act No. 3 of 2000 before the Constitutional Court could rule on the matter. The immediate repercussions of this ruling were enormous. The NRM government reacted like it had been slapped in the face 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 judgment, 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 sympathisers:

> "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."

In the week following the landmark judgement, the Movement mobilised its supporters for a big demonstration against the Judiciary. In a clear act geared at intimidating the Constitutional Court, on June 29, 2004, hundreds of Movement Supporters poured onto the streets of Kampala to protest the ruling. They chanted anti-Judiciary slogans and appealed to the President to sack the five judges who presided over the case. They presented a petition to the Speaker of Parliament, demanding that punitive action be taken against the judges. In a show of so-called "people power" against the Judiciary, some judges were forced to stay away from their chambers and the courts.

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 judgement. It would not be far from the truth to assert that no other judgment has caused so much excitement and uproar in Uganda. However, in a move which can only be interpreted as an attempt to pre-empt the constitutional crisis which seemed inevitable at the time, the Constitution (Amendment) Bill 2005 now provides in section 4 that "where any referendum is held under this Constitution, the result of the referendum shall be binding on all organs and agencies of the state and on all persons and organisations." One wonders whether to give the government credit for the additional provision to the effect that the above section shall not affect the power of the courts to inquire into the question whether the subject matter should have been subjected to a referendum or to question the compliance of the referendum with the procedures prescribed by the law.

Later, the comments made by the President directed against Justice Kanyeihamba, describing him as 'even unfit to be a judge of chicken thieves' was deplorable and unfortunate to say the very least. The attack on the High Court,- the temple of justice by military men after the release of the PRA suspects is just but another example of the challenges that the Courts have faced and continue to face in this age.

The Constitutional Court was also put to the test in Constitutional Petition No. 7 of 2000, in which Ssemwogerere and Olum[11] challenged the validity of the Constitutional (Amendment) Act, which sought to amend articles 88-90 of the Constitution. The bill for the Act was debated, passed and assented to by the President on the same day. It was published in the Gazette the following day and thereby became a law. Ssemwogerere & Olum petitioned the Constitutional Court for a declaration that the Act was invalid for failure to comply with the Constitutional requirements for amendment of the Constitution. The Constitutional Court held that the amendment had been made in accordance with the law and that there was nothing wrong in passing the Act in two days. The lone dissenting judgment of Twinomujuni, JA, who described the amendment as "a coup against the sovereignty of the people and the supremacy of the Constitution," rang hollow at that time as the nation awaited the ruling of the Supreme Court on appeal.

In January 2004, the Supreme Court declared that Act 13 of 2000 was null and void because it was passed in total disregard of the Constitution. Needless to say, the ruling caused a lot of excitement among opposition members of Parliament and among the legal fraternity. As started by the petitioners' lawyer, the Supreme Court ruling was a "landmark" judgement, notable not just for its ruling on parliamentary voting procedures, but because it reaffirmed the Judiciary as protector of human rights and a bulwark against executive impunity acting in cahoots with the legislature.

There are number of other cases where the Constitutional Court has shown a reluctance to be radical and rule in favour of the promotion of human rights rather than preserve the status quo. Fortunately, many of its conservative judgements have been overturned on appeal to the Supreme Court. Most recently, the Constitutional Court dismissed a petition brought by opposition Members of Parliament challenging the constitutionality of the Constitution Amendment Bill 2005 because of its omnibus character. The petitioners correctly alleged that it was unconstitutional for the government to bring one omni-bus bill seeking to amend more than 120 articles of the Constitution, whereas the Constitution provides different

[11] Constitutional Petition No. 7/2000

procedures for amending different articles. In typical style, the Executive was two steps ahead and even before the Court could deliver its ruling, the Cabinet had already resolved to withdraw the Bill from Parliament and present two separate bills.

1.3 Methodology

Due to geographical limitations, timeframe and scarce financial resources, fieldwork will be minimal. The research will be dependent on prior published documents; secondary data, Government documents, Newspapers, NGO publications, textbooks and reports from libraries and material published on the internet. The study mainly employed a qualitative research method.

In analyzing these aspects (stated in the introduction) reliance was placed upon materials on the various topics and this accorded me a proper insight on the topic of study. This research also examined some articles from newspapers, magazines and journals.

1.4 Scope Of The Study

The study addresses the extent to which the rule of law and constitutionalism has been realized, respected and observed by various institutions especially the three arms of government. It's not that before 1995, there was no rule of law, but-the fact that there's escalating violation of the above aspects. This study contains four chapters.

Chapter one is the introduction to the thesis, Chapter two is separation of powers that is the relationship between the Executive and Legislature coupled with the military, Chapter three analyses the judiciary and chapter four addresses Recommendations and conclusions.

Chapter two discusses separation of powers as one of the aspects for the realization, respect of rule of law and constitutionalism in Uganda. In the strictest senses, this doctrine advocates that the 3 organs should be kept in separate compartments. In so doing we are seeking answers to the question, **how different have the traditional organs of the state operated under the 1995 Constitution?** We are particularly concerned with how the constitution has introduced fundamental change, against the backdrop of the struggles to enhance the respect

for constitutional modes of governance- a problem which has dogged all the past governments.

Central to this is analysis is the role of the Executive both in the context of the constitutional framework which has been construed to other organs. Shall examine the place of the Legislature in Ugandan politics, seeking to assess the extent to which it has escaped from its historic role as a rubber stamp. Still will examine whether the constitution has created a sustainable framework for the effective operation of the structures of the government it has created, with particular emphasis on the Executive power and whether the mechanisms of governance of the state put in place are sustainable.

This chapter also assesses how far the constitution distributes checks and balances to the executive power among the 3 organs of the state. Also shall attempt to show appropriate remedies to correct an emerging trend towards a more less 'absolute' separation of powers especially with regard to the exercise of the executive and legislative powers, and the practice of the executive and legislature of attempting to restrain the judiciary's role of checking overreaching by the other two arms. It ought to be noted that there's no absolute mode of separation of powers, but it's common in democracies that world over to establish checks and balances resulting in the restraints by one branch of government upon another and there's no separation that's absolute. The principle of checks and balances recognizes the functional independence of the 3 bodies, while the principle establishes mechanisms to ensure that the constitutional order as a totality prevents the branches of government usurping the powers of another, thus independence or interdependence of the branches.

Chapter three analyses judicial independence as a vital requirement in the realization of rule of law and constitutionalism and chapter four deals with conclusions and recommendations.

1.5 Objectives.

i) To examine whether Uganda's judicial arm of government is independent.

ii) To establish the challenges facing the realization of the concept of judicial independence in Uganda.

iii) To evaluate the performance of the judiciary and other constitutional bodies in the realization of the rule of law and constitutionalism in the period from independence up to date.

iv) To consider and recommend measures to improve access and efficiency of the courts and in particular, the desirability of establishing a unified judicial service in Uganda.

1.6 Literature Review

An array of literature exists on the judiciary and the justice delivery system in Uganda. Lennington wrote on constitutional law and the practice in Uganda.14 His work also discusses the judiciary and enforcement of fundamental freedoms and liberties, among other issues. He analyses jurisprudence from the different benches that endured since independence. The work does not however cover enforcement of human rights by the current bench.[12]

Hatchard studies the adequacy of constitutional safeguards and domestic laws in protecting individual liberties during a state of emergency.[13] His work was influenced by a proclamation of a state of emergency on Uganda since independence until early 1990. He reviewed human rights cases pertinent to the state of emergence. The work does not cover the current bench but provides useful insight into the approach of the previous benches.

Hatchard et al, explores constitutionalism in Eastern and Southern African states.[14] The work makes reference to the practices of the judiciary in Uganda. The work advocates for best practices and draws from various jurisdictions on independent and effective judiciaries. Thus, the work does not cover the area contemplated in this study.

Saller makes a comprehensive review of the judiciary in Uganda.[15] She focuses on the constitutional provisions establishing the judiciary, structure of the courts and an analysis of

[12] G. Lennington, *Constitutional law of Uganda* (2001).
[13] J Hatchard *Individual freedoms & state security in the African context: The case of Uganda* (1993) 35.
[14] Hatchard et al, Comparative constitutionalism and good governance in the Commonwealth: An Eastern and Southern African perspectives (2004) 150.
[15] Report by the Legal Resources Foundation WO 41/84 September (2002)

several rulings of the superior courts and the response of the government and finally she analyses the concept of separation of powers. In essence, her study assesses the independence of the judiciary in
Developing countries and this is very crucial to this study.

A report entitled "The state of justice in Uganda" studies of the justice delivery system in Uganda, from formal and special courts to the attorney general, police, prisons and the legal profession.[16] It evaluates institutional independence of the stakeholders named above and the extent of executive influence on same. Mention is made of several human rights jurisprudence of the current bench and this work develops these cases in greater detail.

Another report called "Justice in Uganda" covers a wide spectrum of issues including intimidation of judges by the executive, politicization of the police, repressive legislation and its effect on human rights, and also specific human rights cases from the current bench.[17] This work also develops on the approach of the current bench in human rights protection.

Former CJ of the SC of Uganda, Wambuzi, also wrote on the judiciary, focusing on the independence of the judiciary through security of tenure, conditions of service and autonomous budgets.[18] Wambuzi also examined the role of the courts in promoting human rights. He further analysed the international standards for the protection of rights at the domestic level. This paper develops the jurisprudential analysis particularly taking into account the jurisprudence of the current bench.

De Bourbon[19] discusses how protective the jurisprudence of the courts has been in the past and he predicts a difficult future for human rights litigation because of certain constitutional impediments made by the current bench in terms of protecting human rights.

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[16] The State of Justice in Uganda", Report by the International Council of Advocates and Barristers (2004).

[17] <http://www.humanrightsfirst.org/defenders/hrd_Uganda/LRFreport30-09.pdf< (accessed 14 July 2005).
[18] Wambuzi, The independence of the judiciary with special reference to parliamentary control of tenure, terms and conditions of service and remuneration of judges: judicial autonomy and budgetary control and administration" Paper delivered at the Latimer House conference 1998
[19] De Bourbon note 2 page 195-221.

Dumbutchena[20] wrote on judicial activism in Africa including Uganda as a way to protect human rights. He saw judicial activism as a tool to achieving social justice by interpreting bills of rights in a generous and purposive way to give effect to human rights particularly in African society where the common people have several odds against them. He analysed the jurisprudence relating to women rights in the above-referred work. This paper essentially looks beyond the studies mentioned above into the factors that have influenced the two judiciaries above in deciding cases. In particular, it analyses how these benches have protected human rights in their jurisprudence.

The main function of this conceptual framework is to overcome the deficiencies in the present literature and to stimulate the research on the rule of law and constitutionalism in post 1995 Uganda.

Kanyeihamba G.W.[21] shows the historical development of various aspects of rule of law and constitutional development but only portrays the period of 1975 and therefore need for post 1995 research.

Henry M Onoria[22] only deals extensively with human rights and not the other aspects of the rule of law and constitutionalism such as separation of powers and judicial autonomy. Therefore the need to compile this thesis that covers the whole of the aspects.

J.Oloka Onyango[23] elaborates extensively the role of the military in Uganda's affairs but only up to 1998 yet a lot has happened especially with the recent elections and setting up of various paramilitary groups all for the sake of retaining power. This like Onoria's addresses only one aspect that's the military but also up to 1998.

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[20] E Dumbutshena "Judicial activism in the quest for justice and equity" in B Ajibola *The judiciary in Africa* (1998).
[21] In Constitutional law and the Governance in Uganda published in 1998
[22] In his paper on Protection and enforcement of fundamental rights and freedoms under the 1995 Constitution, 1999
[23] Governance, state structures and constitutionalism in contemporary Uganda. CBR Constitutionalism III

CHAPTER TWO

EFFECT OF THE CONCEPT OF SEPARATION OF POWERS ON INDEPENDENCE OF THE JUDICIARY

2.1 Introduction

The doctrine of Separation of powers emerged out of what were considered to be the major limitations of absolute government. It was scholars and the philosophers who championed the doctrine e.g. Montesquieu (18th C) and Locke (17th C). They asked themselves how best the individual could be protected from the tyranny of government and this could be achieved if you had revision of power. The government power was made up of 3 components i.e. Executive, legislature and Judiciary. They assumed that tyrannical rule comes about when these 3 powers are vested in one individual and to minimize it there was need for that separation.

To Montesquieu, it meant,

a) 3 organizations should be operated by different peoples. Kanyeihamba[24] says that personal/agencies in one organ should not be permitted to hold posts on the others two.

b) Each organ of the state should be independent of the other two. But independence means that there should be no control of one organ by another. There should be a system of checks and balances so that no single organ can usurp authority at the expense of the other and to the error of the individual.

c) No one organ of state should exercise powers of the other(s). They should operate which the consent of each other. It should be spontaneous and not coercive. If the Executive wants to carry out a policy, it should first publish it, so that it's in the open and subject to comment, debated, discussed a passed by leg. Should have access to courts to determine it's in legality.

[24] Kanyeihamba Constitutional Law and governance in Uganda 1984 - 2002 page 146.

The example that's often cited of the separation of powers is that provided by the USA constitution, where all Executive powers are vested in the President and his cabinet and powers of legislature with the congress. Judicial powers are vested with the courts and in USA therefore federal courts and state courts which deal which state disputes. It separates legislative functions which are performed primarily by House of Representatives. However, the Executive has an oversight of the functions and that is exercise through the mechanism of presidential assent.

2.2 Effect of the Separation of powers doctrine on judicial independence in Uganda

Separation of powers creates and spreads opportunities among different groups of people. It also helps to diffuse tension that might come-up. There is no thing as absolute as separation of powers. What has emerged is system of "cheeks and balances"

> "*No single construction embraces the doctrine in it's entirely. Experience has shown that an application of the doctrine in its absolute terns is impracticable and undesirable*"[25]

There is no individual model of separation of powers, but its common in democracies the world all over to establish checks and balances resulting in the restraint of one of the branches of government upon another and there is no absolute separation of powers[26].

Various reasons are advance in support of separation of powers viz Legislature is a representative of people and incase Executive formulate policies against people; they should help out through vote of no confidence. The Judiciary has powers to declare invalid acts of the Executive and the laws of the legislature, if there are repugnant to the constitution[27].
The 1995 constitution stipulates their various roles under chapter 6 and 7 and they act as handmaidens of each other. It should be noted that since the inception of the modern state of Uganda both in its colonial and independent form, no phenomenon has had a lasting and

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[25] Ibid page 146
[26] Dr. Geore William Mugwanya, Uganda Constitutional Review Commission Critical Inquiry .....page 36
[27] Marbury vs. Maidson ICR 137, 1803, Gibbons vs. Ogen 9 wheat 1 1824.

negative impact on political developments as have the antics, failings and chicanery of the Executive arm of government[28].

The constitution adopts a classical formulation of Separation of powers; the President is the head of the cabinet and presides over meetings. The checks and balances of the Executive are in form of impeachment, vote of no confidence, where any grounds under art. 107 are found to exist. This is initiated by the legislature and supported by 1/3 of them. The Judiciary is then involved where Chief Justice sets up a tribunal to Investigate. (But this ant applicable with militant regimes in Africa).

The tenure of the President before the amendment (2005) of art. 105 (1)' and (2) was 5 years terms. In a democracy, the length of service of the Executive becomes a vital issue in ensuring that there's smooth transfer of power.

The constitution introduced several new organs in the system e.g. Inspectorate Of Government, Uganda Human Rights Commission and Electoral Commission all of each perform specified functions that ensure the Executive powers is held in check. Cabinet members are checked through article 118 i.e. Censure. (But this has hindrances as will be dealt which later).

The above checks still have a hindrance i.e. threat of militarism, and pathological threat-diseases of "stays".

The 1995 constitution suffers from a bit of confusion due to the history and the adopted traditions from UK and the attempt in 1995 constitution to move to a more US type of government. Where there's a written constitution and art. 2 that make it supreme, therefore parliamentary supremacy in adjusted. There's still a hangover which is reflected in the idea that sovereignty of parliament should not be constrained. It's an idea that was first

[28] Oloka Onyango.Taming the President. Some Critical Reflections On The Executive And Separation Of Powers In Uganda. East African Journal On Peace and Human Rights. Vol.2 I 995.page .. 19 I

articulated by the late (RIP) Hon James Wapakabulo during the referendum 2000 and also by Prof. Apollo Nsimbabi. The most effective method of legislative powers is Judiciary but this has been met with difficultly. Once the Judiciary checks Parliament, they change / amend the law e.g. **Ibingira I & II;**[29] **Ssempebwa vs AG** [30]**and Lyagoba's case**[31]**.**

Article 92 however stopped this habit but the same old tricks are still applied as in **Ssemogerere vs. AG**[32] and Referendum case which led to the adoption of an Amendment Act No 13. Individual MP's can be checked by people through right of recall under, out 84 but rare - procedure is hard.

The greatest hindrance with regard to checking the legislative body was the 1st Amendment Act where in **Ssemogerere and Olum vs. A.G** [33]- the Supreme Court declared the Referendum Act null and void. It also declared invalid the provisions relating to way In which parliament determines quorum. The voice voting method that was used was inconsistent with the constitution. The amendment changed art 88 on quorum of parliament and added "entitled to vote." The further change on art. 89(2) stipulated that,

i. The new quorum shall only be required when parliament is voting on any question.

ii. Rules of producer will prescribe the quorum that would be necessary of the conduct of business with regard to voting, the process will again be determined by rules of procedure of parliament.

Article 90 and most vital **article 97** were amended with the addition of 2 new causes. First was to limit the giving of evidence to forum (court) other than parliament which out Parliamentary league - any member of Paul, office before parliament committee in any place other than Parliament. They need special League permission. This is notwithstanding art. 41on the right to access information.

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[29] [1966] EA 305 No 1, [1966] EA 455 No 2
[30] Constitution petition No 1 of 1986
[31] [1963] EA 57
[32] Constitution petition No3 of 1999
[33] Constitution petition No 1 of 1999

In sum, this affected the mechanism of checks and balances especially of the court over leg on it raises made superior the rules of procedure of parliament to the constitution and the oversight by courts over leg authority. The amendment also effectively overturned the stipulation in **article 92** against Parliament passing legislation that will have the effect of overturning a court decision.

> " ... *One wondered how the "independent" DPP probably "lacks" evidence to prosecute Prime Minister Apollo Nsimbabi and his fallen Deputy Henry Kajura for leading 99 other MPs to perjure themselves in the constitutional court on whether there was quorum during the passing of the referendum Act in 1999*[34]."

Separation of powers has been a central concept in modern constitutionalism. The dearest expression of this perspective may be found in Art. 16 of the French Declaration of the Rights of Man of 1789 " *Any society in which the safeguarding of the rights isn't assured, and the Separation of powers is not observed, has no constitution*[35]".

Separation of powers is one of the attributes of a free democratic order. Montesquieu was in no doubts about the importance of the principle. It was to be valued as a guarantee against tyranny.

> "*When the legislative and executive. Powers are united n the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, less the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner*[36].

It's also vital for the judicial powers to be wholly independent of the other 2 branches of government.

Shall discuss the relationship of love and hate between the Legislature and Executive together and judicial autonomy independently not forgetting the military.

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[34] Karoli Ssemogerere. 'Why the rule of law may become a relie of the past'. Daily Monitor.December, 15th, 2005.page
[35] Eric Bernett. Separation of powers and constitutional governments. 1995 page.599
[36] Ibid. Page 601

2.3 Relationship Between The Legislature And Executive With Regard To Separation Of Powers

The function of the exercise of legislative powers hasn't had an edifying role virtually throughout Uganda's history. Perhaps, this point can best be appreciated from an examination of the historical origins of this body in the establishment of the protectorate. Under the 1902 Order- In Council, legislative powers was exercised by the colonial governor, who was a power unto himself until it was deemed fit that he rule with the aid of an Executive council. It wasn't until 1920, that it was considered appropriate that a separate organ of government be established in order to carry out the legislative function of government. Hence, the establishment of the Legislative Council (Legco). But a quick reversal of the composition and powers of this body demonstrated that the intention was not really to create a Separation of powers or a mechanism of checks or balance Executive excess. Rather, it's stemmed from the fact that it had become obvious that the governor was unable to perform all the talks necessary. Thus the membership of the Leg - co was actually the same as that of the Executive Council.

The first post-colonial legislative body under the UPC government led by Milton Obote was a fairly robust and energetic body, until its mettle was tested in the wake of the 1966 crisis with the passing of the "Pigeon Hole" constitution, which the honorable members of the house hadn't even read before they voted in favour of its promulgation. It reduced the extent of legislation power, transferring much of it to the Executive.

Under Amin, legislative power was totally usurped by the Executive, not only in the sense that elections were indefinitely postponed, but also to the degree that Amin personally became the sole law- making authority.

As the legislative arm of the government, the National Resistance Council in many respects established the ***mondus operandi*** of the legislative function of government under the Movement system of government. First, it comprised of a Cabinet of staunch movement

adherents, (historical) who not only dominated the debate, but who constantly sought to assert the supremacy of the movement. Secondly, as the National Resistance Council was both a legislation body as well as a political one which Museveni doubling as the chair of legislative council-a classic case of fusion of powers, and a return to the status existing during colonialism.

Some of the specialties of the National Resistance Council related to the manner in which the Executive played an inordinately prominent role in its operations, not simply from the manner in which cabinet posts, NRM secretarial ships, special assistantships were dangled in front of members but also to the "closed" sessions of the body, and the extra-sessional sessions, which normally took place in the President's official and private residences.

> "*The Executive arm of government has no doubt maintained a firm grip on the legislature over the past years. The president also happens to be the chairman of the NRC and although he hasn't been too common in the house, he has once in a while presided over some sitting of the NRC particularly whenever it has debated very sensitive and delicate matters like privatization. During debate on matters where the Executive has had serious interests, Ministers have made it a point to turn in large numbers. Several members of the NRC have held positions on the boards of public enterprises and commissions. These haven't hesitated to come to the defence of these institutions or their patrol in the Executive arm whenever they have been under seize in the house.*"[37]

These sessions were frequently held since the NRM regime came to power in 1986, until the coming in force of the 1995 Constitution. These sessions, involved the President calling and chairing these sessions to discuss matters dealt with by the NRC. These sessions were used to extend the NRC tenure for 5 more years, and at times produce democratic overnight changes on the seemingly decided positions adopted a day ago E.G. THE IMF and World Bank loans, the return of Asian properties. These sessions though at times good, these sessions are irreconcilable with the norms of separation of powers, transparency, and open management of the state and their outcomes may be inimical to the ideals of democratic govenlance

Since the passing of the '95 constitution, the legislative body has manifested clearly contradictory tendencies. On the one hand it has sought to assert its independence of the

[37] John Kakande. Commemorating 10yrs of the life of NRC. New Vision January, 26th 1996.

Executive through a variety of actions e.g. censorship motion against ministers, Kirunda Kivejinja, Jim Muhwezi Wandera Kazibwe and Sam Kutesa. Since the adoption of the 1995 Constitution, issues especially political have remained and created polisation while the interpretation and application of somewhat less contentious aspects such as the separation of powers has raised serious questions and tensions. On the other, it has essentially endorsed the state position on the war in Northern Uganda with little more than a slap on the wrist, despite the constitution sets out ways on the deployment of troops, it has failed to curtail Executive excesses or to sanction the Presidency for manifestly unconstitutional actions, and it hasn't yet managed to exert the necessary control over the fiscal operation of government. One can explain these contradictory tendencies in a number of ways.

First was the desire in the Constituency Assembly to assert the sovereignty of Parliament over Executive with regard to the sanctioning of appointment's to the cabinet, Bench and other bodies. But despite this, the vestiges of executive oversight remained, not least III the maintenance of the immunity from Court process. Secondly, the oversight powers of the legislative body were used with particular regard, enabling the President to confer favours on individuals.

The message of the 1995 constitution has been taken up by the new legislation with much greater vigour than its predecessors. The current Parliament has taken on the Executive and secured a much greater degree of accountability. The legislature cannot be run over roughshod and the executive is forced to at least go through motions of consultation. However, it remains trapped by the phenomenon which has dogged movement politics i.e. "individualism" it can do little more than nibble at the edifice of state power a control. Kenya, like Uganda is faced with the above problem.

Despite multiparty politics, the manner in which Kenyan politics are organized has meant that policy formulation and agenda setting is still under the shadow of political patronage which undermines the independence of the legislature.[38]

[38] Issa G. Shivj. Democracy and cotitutionalism in East Africa page 19

The situation of the present legislative is compounded by a manifest indecisiveness on the part of CA delegates.

With the constitution manifests many elements of the theory of parliamentary supremacy, this is not consistent at all times, neither clear when the supremacy stops e.g. censure motion.Art.118 empowers the legislature to move such a motion but then shifts the power over it resolution to the Executive when it stipulates that the President shall take such action as is appropriate which he doesn't do/take as he has done in both eases.

Clearly the Ugandan legislature has been weakest in what may perhaps be described as among the most critical aspect of governance today. It has also been rocked which polarization on various issues. In the areas of financial accountability, the legislature is yet to assert the full extent of control over both the determination of financial policy and Executive expenditure.

The functioning of parliament still remains overshadowed by the Executive. The Congo issue in 1999 raised a lot of controversy and has railed Uganda in debt where its estimated that each Ugandan (young, old) will have to pay Uganda shs 698,000 (directly). In a speech to parliament in 1998, President Museveni argued that;

> *"Our involvement in Congo .... Is mainly because of the threats to over security that emanate from there in t form of NALU in the past and more recently, Allied Democratic Forces ... Therefore Mr. Speaker, may I restate my position. We are in Congo primarily for our own security."* [39]

Although, it's perfectly in order for a country to ensure its security interests' the constitutional snag is that the president (Executive) did not seek the approval of parliament as stipulated. On June 23rd, 1999 Democratic Republic of Congo filled an application against the Republic Uganda in the registry of the International Court of Justice in the Hague, Netherlands, accusing Uganda of aggregation, human right violation and plunder among others. William Tayebwa[40] summarized the length submissions as follows" he wondered

[39] Nyangabaki Bazaara, Constitutionalism in East Africa page 49.
[40] William Tayebwa DRC court case against Uganda. Sunday Vision July 20th 2000 page 29

how gold, diamond, wood, coffee and trafficking of all sort, would take precedence over the suffering of an independent people held hostage by an army that shows no respect for human rights and swaggers about like unconquered, more than six hundred kilometers from its boarder" he said the war led to instruction of three million dozes of vaccine, thus exposing several million Congolese civilian children to the risk of ***poliomyelitis.*** The DRC asked the court to order Uganda to hence forth respect in full the right of the DRC to sovereignty, political independent and territorial integrity, and the fundamental rights and freedom of all persons on its territory. No wonder in 2006 the above court held unanimously that the Uganda government must compensate the Congo for the above violations which were illegally authorized by the President of Uganda without following the required procedures of informing, debating the above in parliament. This shows that he and his "generals" that carried out the above atrocities should be held liable without the innocent masses having to do it.

The Executive and legislature have often clashed e.g. legislation to liberalize the production of electricity. Until 1999, the production and distribution of electricity was monopolized by Uganda Electricity Board and to allow new investors needed a new law. To allow private investors into this business, the Executive wanted parliament to expeditiously pass a law liberalizing the production of electricity so that foreign investors could embark on the construction of dams at Bujagali and Karuma falls. However the environmental consequences related to dam construction at these sites hadn't been assessed and, therefore parliament insisted on a study first.

During a World Bank sponsored workshop in Kampala, President Museveni accused MP's of delaying the process work could cause "political crisis"

> *"These days, am very disgruntled, am tired and sick of wiseacres, everybody is an authority they don't listen to my advice ..... Parliament is confusion. We have struck a compromise with Mr. Adam that we can have a dam at Bujagali and then Karuma afterwards, but still I have a problem which parliament."*[41]

[41] Slyvia Jjuko. President sick of MPS, bad officials. The Monitor 27th, October, 1999.

The MP's hit back, Major Okwir Rwaboni (youth western) and Elly Karuhanga showed that the legislature could check Executive process/ decisions not followed to the book. Peter Nyanzi, "Emphasized that Parliament has shown that even a poor and needy state like Uganda reserves the right to study investment proposals, take them through a sifting process and negotiate for what is best for its people and on the best terms possible. That they should follow the prescribed procedure despite being good programmes. Its amazing and ironical that even in the light of the hastily made shoddy deals with companies like Midroc, Westmont and Tahar Forurati's Africa Continental Hotels, the government is now criticizing parliament for "delaying" to approve the AES power deal."[42]

This pressure from donors is detrimental to the maintenance of adequate checks and balances between the Executive and Parliament.

In terms of constitutional develops of Uganda, the year 2000 was In many ways the most epochal since 1996 where the 6th Parliament, in the light of its 5 year lifespan, passed a number of laws with far reading implications e.g. the controversial Referendum (Political Systems) Act, 2000 was at the forefront. The president was quick to slam the Judiciary after having been declared null and void with no mention of parliamentarians who had absented and led to lack of quorum and the plethora of presidential "advisors,' cabinet ministers and staff who hadn't advised government of the problem."What they have done shows legal bankruptcy and insensitiveness (sic) to the aspirations of the ordinary people."[43]
The year was also famous for fire brigade procedures and fast food constitutional amendments as portrayed by the Ssemogerere and Olum case challenging the Referendum laws. Parliament also was involved in other non-legislative activities e.g. the controversial car loan scheme, the Karamoja question of armed rustlers, Kanungu cult deaths, the valley dam saga, Uganda military involvement in the Congo and finally the loss of UPDF funds. The situation in Uganda is similar to that in Kenya where the Legislature approved the budget even before it read it.

[42] Delay on AES was good for all. New Vision December, 10th, 1999.
[43] New Vision, 18th August 2000.

The years 2001 and 2002 also had significant impact on Separation of powers with regard to Legislature in the wake of presidential and parliamentary elections. It also ended the 6th parliament's contract / tenure and ushered in the 7th parliament. (But this was manifested in "the elections". A number of incidents are instructive. During the Ypresidentiallelections, two ministers were sited in election violence. As a measure to counter election violence, a parliamentary select committee was setup to probe the degenerating electoral process. In a typical example of distrust between the legislature and executive, attempts by the executive to have the judicial inquiry by parliament were rejected by parliament, not as an impugning on the honesty of the bench, but circumvent the occurrence of previous commissions of inquiry, where results have been merely shelved by the executive.

They also believed, and rightly so, that being among the instigators of the violence, the Executive would easily use the Judiciary to control the investigation. The report showed growth in election violence with 742 cases reported to police, 17 people lost their lives during the elections. The committee came up with various recommendations e.g. ending the army and state agencies involvement in elections and the chairman of the Electoral Commission sacked. Given the fact that the report had its genesis in the legislature; it met a lot criticism from the executive arm of government for being none comprehensive and lacking in content. The report was another phase of war between the two bodies.

Unlike the 6th Parliament that was dynamic, rigorous and a challenge to the Executive, the 7th one was toothless. It had been constantly bulldozed and intimidated by the Executive. This is portrayed by the sale of Uganda Commercial Bank. This was due to the fact that Parliament was full of movement cadres.

The year,2003 commenced which the meeting of the NEC and National reform were movement each which several for reading proposal for constitutional reform were tabled and largely accepted. The year ended which submission of the report of the commission of inquiry into Reform of the constitution chaired by Prof Edward Ssempebwa.

It represented a period of significant development m the area of constitutionalism, opening up of political space, proposals to lift presidential term limits, cabinet proposal that would have the effect of weakening the powers of institutions that entrench constitutional governance and tilting the balance of power in favour of the executive, non-tolerance to opposing Views, an open disregard for judicial decisions by the executive, escalating war in Northern Uganda forceful dispersal of opposition public rallies.

This prompted the creation of Constitutional Review commission (CRC) which it hoped would be resolved by consensus. The CRC was mandated with the task of collecting the views of the people inter alia on the system of governance they wanted, vesting the president with powers to dissolve parliament when both parties failed to agree on matters of fundamental Executive or Legislation importance. Cabinet proposal were presented by the Vice President after it was deemed inappropriate for the Ministry of Justice and Constitutional Affairs since she was the appointing officer of the commission. During the cause of the year, several proposals for constitutional reform were forwarded to the constitutional review commission eg art. 118 that provides for censure which enjoined the president to take appropriate action. Cabinet proposed the president against parliament should be vested which powers to censure errant ministers. Art 113 on approval of ministerial appointments by parliaments that it should read parliament can only withhold approval on grounds of past criminal acts in case where both fail to agree. Art 91 (6) (b) - if the president does not assent to a bill passed by parliament, it automatically becomes law.

Alternatively that the president and parliament will legislate together to ensure the president can't rule by decree or that parliament overrides the powers of the president as the case may be.

In the main, the cabinet proposals were justified on the grounds that the "executive" had routinely encountered difficulties, contradiction and inadequacies in implementing the constructional provisions for the current constitution. However, a more critical examination demonstrates that the proposal were in fact a reflection of the past conflicts that various

bodies have had which government or where they have taken a position on issue which differs from that of government and have refused to give the latter's demands.
It has been argued that the proposal to vest the president with power to dissolve parliament is desired from the concept of a social work, where by the electorate elects representative who make decisions on their behalf. These representatives are elected on the basis of policies presented during elections. Therefore, when parliament and the president fail to agree on their policies, its legitimate that they should go back to the people on whose authority they act when making decision-critics have failed to take note of the fact that dissolution applies to both the president and parliament.

The context within which the proposals were made assumes significance when one analyses the relationship between president and 6th parliament since 1996. The cabinet proposals were presented at a point in time when parliament had on a number of times refused to cave in to pressure from Executive. Ibrahim Ssemujju emphasizes that like the Political Organization and the Parties Bill, president always summons MP's and studies them as to why his position on the Bill should be accepted, endorsed and invariably. This allowed political parties to open branches at district levels which the president objected and refused to assent to the Act, only to have the 7th parliament pass the bill incorporating the disputed clause.[44]

The proposal stipulating the grounds upon which parliament may withhold the approval of ministerial appointments was presumably made to prevent the re-occurrence of a past situation where MP's had objected to the re-appointment of ministers that had been censured, which approval was later granted.

Oloka Onyango[45] stipulated that when an appointing authority presents its proposals to a body it has created, the question of under influence and the powers that it exercise becomes pertinent Related to this is the argument that the removal of the presidential term limits was not among the matters or which submission were raised with the commission during its

[44] Is the 7th Parliament just a big balloon, Sunday Monitor, March 16th 2003
[45] Supra at 211

country wide consultations, and yet it was contained in the proposal presented to cabinet. The fact that cabinet will receive the final report, prepare a white paper, increases possibilities of a "modified" report reaching parliament.

Critics of the proposal to vest the president with power to dissolve parliament when both have failed to agree on matters of legislative and executive importance argued that in a multi- party political system where the president has a majority in parliament, a rejection of his/her policy in a vote of no confidence. Thus where he/she has a majority and an impasse in reached, why should minority views take precedence over the majority? Why should one individual have powers to dissolve an institution because it disagrees with him/her on a policy issue? There are alternatives which are less costly, disruptive, time consuming e.g. dialogue, people can recall the president upon failure to deliver (not in Uganda where majority belong to the peasantry class). Despite the fact that cabinet proposals were genuine, they were intended to extend executive power and reducing the power of institutions that perform similar functions. There is need to maintain balance of power between the executive and parliament in order to ensure that the former doesn't exceed its powers.

Various organizations (HURINET, UWONET, UJCE, and COPAW) on Monday April 4, 2003 published an article "The Position of the Supreme Organs of the Movement"
Undermining constitutional gains that stated various aspects where if the Kyankwazi (NEC) meeting proposals are adhered to, legislative powers would be curtailed as Executive power are strengthened. The highest organs under the movement that is National Executive and National conference have just concluded a vital national meeting where a number of constitutional issues were raised. Given the fact that they have the highest movement organs, they were expected to design a plan to ensure a healthy transition given the current concerns regarding the future of Uganda.

They emphasized that" in our analysis, reading of mind of these organs we sense a "deconsolidation" of constitutional achievements since the coming into force of the 1995 constitution. Reports from the delegates indicated that they didn't have a free and fair

atmosphere to discuss these issues. There were no consultations by the delegates in preparation for the meetings and therefore views not representative of the constituencies that they represented. They handled various aspects that need restating below and their implication on constitutionalism and rule of law in Uganda.

On the powers of the president viz- a-viz the parliament, we believe that the proposals made by the movement organs if adopted would undermine they very concept of separation of powers. In effect, they establish rule by decree as parliament's fundamental roles as lawmaker and overseer of government are utterly eroded.

On dissolution of parliament, they stated that the power to dissolve parliament by the president threatens the independence of the legislature, in all cases of exercise of its duties, parliament must act without the fear of the executive. But parliament's autonomy can't be guaranteed in an environment characterized by the constant threats of dissolution by the president. The enjoyment of such powers by the Executive head leaves parliament weak and incapable of checking the Executive. The dissolution of parliament by the president is tantamount to a usurpation of the power of the people collectively expressed through their elected representatives. That it further undermines the concept of free and fair elections as it compels the vote to choose those who are more likely to give the to president his/her way. The net result will be the existence of a parliament that is beholden to and patronized by the Executive. In essence the proposals replace popular will with the dictates of the individual who occupies .the president's office. They further argued that descent is key ingredient in a well-functioning democracy yet the position of movement organs discourages the emergence of detergent opinion on national issues and punished with dissolution.

On the supremacy in law making, the position that the president should over ride parliament in the making of laws in based on the presumption that "the boss is always right and final". It also goes against conventional wisdom that the president would always have superior interest in the country over and above a parliament which openly and freely thinks through, debates and passes laws. Given the fact that the 2 primary functions of parliament

that is, making laws and oversight would have been stripped of the house by movement proposals if adopted. It's difficult to justify the existence of this institution. It would be unfair and oppressive to charge the taxpayer for the maintenance of such an ineffective state organ.

Regarding appointment and censure of ministers, they stated that, it has been proposed by the movement that parliament withhold its approval for the appointment of a minister only on the basis of past criminal activities not known to the President.
That power to censure be removed from parliament. They are concerned and stated;

> *"We're concerned that this undermines the principle of popular participation and propose that the current constitutional position not only be maintained but also strengthened".*

Our position is based on the need to empower the people to hold their government accountable through their elected representatives. After all, government is for people although proposals made by movement organ seek in effect to establish a government of the president, by the president, for the president.

Given the tremendous wide powers that the president would enjoy under the movement proposals and the lack of criteria guiding censure of ministers, we are "weed" out those who don't toe his/her line, rather than deal which the incompetent and manually questionable ones where parliament withholds its approval for a ministerial appointment only on the ground of past criminal acts not known to the president, what happens to past criminal record known by him but which he chooses to ignore?

About presidential Administration of Districts, it was proposed that the proportion of MP's that is needed to authorize the president to take over the executive and legislation function of a district be reduced form 2/3 to simple majority. We are concerned (they said) that if the intention of the decentralization policy was to devolve power to the people, then self--management should not be withdrawn from them until there exists compelling reasons to, and this should be reflected in substantial support form peoples' elected representatives addressing themselves to the merits of this action. "Making it easier for the president to take

over the districts in open to abuse by the executive and a real likelihood to use their power to reward sympathizers and repress descent is real.

On the lifting of presidential term limits, they stipulated that in any progressive society, the rule of law and culture of constitutionalism constitute fundamental components of democratic governance that must be protected. Therefore situations where constitutional amendments are effected merely to suit individual pursuits of those that hold state power are to be completely discouraged. Further to this, the proposed amendments set a negative precedent for future constitutional practice. It should be noted that term limits as per Odoki Constitutional Review Commission report acts as a check against the tendency to abuse power vested in the office of the president as the temptation to manipulate and distort national institutions is tampered by the knowledge that sooner rather than later, he will relinquish power and account for its use. The call for lifting of the 2 term limits is partly based on the assumption that of the country's 24 million people there are no capable Ugandans who can provide effective and better leadership. There's need to de-emphasizes the monopoly of power by individuals and instead establish effective structure and systems through which work power can be exercised and checked.

The term limits offers the country the opportunity to re-evaluate its national programme and direction through new and fresh ideas brought in by a new team of administrators (of 1995 objective or our past history).

It ought to be noted that the road to democracy can only be sustained by a commitment to certain values cardinal of which are openness, inclusively and willingness to dialogue with those that are different from us. Further, as civil society organization, uses recognize that a complex political climate is emerging. We call upon all people and government institutions, CRC to give precedence to national interests and avoid narrow and shut term gains.

2.4 Militarisation of Executive.

The Military is an intrinsic and important part of the Executive arm of government-both in the context of the constitutional framework which has been constructed to control it, as well

as in the substantive dimension of the relationship to the other organs of the government. The military and the phenomenon of militarism have played a particularly prominent role in the governance of the country throughout its history. The executive cannot be examined alone without the other pillars upon which state power is designed and exercised.

Throughout the colonial period, militaristic methods of resolving disputes were frequently resorted to by the state. It's for this reason that Idi Amin's brutality in the suppression of anti-colonial dissent was praised and overlooked rather than punished by his superiors. At independence, Milton Obote likewise refused to comment on the disciplinary action against Amin, perhaps in recognition of the same quality which he deemed essential for his effective governance. This was also due to the fact that Amin had become too powerful to be easily removed. The Amin era needs no more mention in here. It's trite to point the fact that central to the exercise of executive power is the place of the military, which has played an inordinate role in the determination of the mode of governance in Uganda.

Part of this is due to the fact that the military was transformed not only into the principal location for the path to political power, but also as the site for petty accumulation of civil conflict and graft.[46] Traditionally, the military is an arm of the executive, but it's relationship is complex to understand. At times the military has usurped power from the executive. It's compounded by a situation in which the ruling power must use the military as a force to police the domestic arena. Brett captures this,

'The role of force is always silent in democratic state formation, however, because contending parties have not fully internalized the constraints which must be accepted if rule is to be governed by consent .Where they reject these rules, armies support and at times initiate a transition from democracy, yet armed struggle can also be used to challenge dictatorship and become the agent of democratic transition. Where democracy exists in a stable form its survival depends not only on the willingness of those with guns to allow civilians to rule, but

[46] The Monitor, February 05,1996.

also on the willingness of the civilian rulers to settle their differences without resorting to armed power.[47]

The Uganda People's Defence Forces has played and continues to play critical role in the process of governance. The military was or is the vanguard of the political struggle and has assumed its place at the head of all activities from petty crimes to conflict castigation in neighbouring states. It's not surprising that Museveni never relinquished his army rank until recently even when elected as a civilian president. Legal notice No. 1/86 reinforced the role of the military in politics and has created for the military a permanent niche for the mechanics of state governance. The NRM has introduced military representation in the Legislature, though not being the first.

The concern for several years has been the Local Defence Forces (LDU's) and several both government and private armed militia forces that were established to arguer the civilian police and the army. Since there creation it has remained beyond the pale of the law. They are neither part of the army nor part of the police and may be this legal limbo is not exactly safe. They are problematic in several different ways, **In David Kironde vs. Mukono District Administration and AG,** although held that LDU agents were those of the state, is only in respect of non criminal matters. The reluctance of the government to regularize their status has raised several questions about state commitment to the rule of law and democratic process.

The military remains the greatest violator of human rights in Uganda. Despite being trumpeted as a manifestly different force today, the UPDF and its Criminal investigation branches remain dogged by patterns of abuse that cannot be explained. A 1998 US Report stated that,

> *'The government's human rights record remains the same and there has continued to be numerous problems. Movement domination of politics limiting civilian activity by use of the military, security forces using excessive force at times resulting in death. Government forces committed or failed to prevent some extrajudicial killings of suspected rebels and civilians.*

[47] Brett, The military and Democratic transition in Uganda 1994,page 209

Police, UPDF, LDU forces regularly beat torture suspects to obtain forced confessions. There were numerous cases in which the government detained and charged the above with human rights abuse. However, despite measures to improve the discipline and 'training of the forces, and punishment they remain a problem in Uganda[48].

Evidence of the above is the case of one Major Micheal Katambira who was charged, tried and convicted by a UPDF Court Martial over making criticism of Muhoozi (president's son) in the recruitment of personnel in the army, as well as other issues of Universal Primary Education and northern war. A reading of the proceedings of the Unit Disciplinary Committee that conducted the trial makes one shudder at the military administration of justice. The proceedings lasted two days, accused denied legal representation, and court averred that in seeking a lawyer the accused could possibly say the truth. This is just the tip of the ice burg as there are many army officials that have suffered the same. There are various instances such as the Mengo shooting where the accused still walks a free man despite killing people. One wonders why the Court Martial has not tried the army official yet a mere questioning and responding to policies that are wrong by an army official warrants severe and swift court martialing in 48 hours. The reason is that he was carrying out what the regime cherishes i.e. termination of political opponents at all costs. If the UPDF claim to being a radically different organization from its predecessors, then we are in for a treat.

The army should not serve the interests of its leader but the citizens. The likes and dislikes of the military should not dictate the course of events. It must be subordinate to the people. A culture of respecting civilians and civilian authority must be nurtured. Once the army fails to realize that the army exists not as an end but as a means to population protection, then civilian control is impossible. The above has led to the belief that nobody can lead Uganda without military knowledge and decoration. But experiences from other jurisdictions have shown that this is not true.

'Indeed several army officials were later to go public, not minding about the non-partisan clause, declaring that they would not salute Kizza Besigye if he won elections. That's why the army took a strong grip against him in the elections' [49]

This has also been against their non-partisan slogan. There are various reports that have shown military involvement in election violence and malpractices. Since 1996, the military

[48] US Department 1998, 363- Reported in Oloka - 1998
[49] Daily Monitor, January 28th 2006 page 6

has been involved in all kinds of malpractices and violence all in the sake of retaining their boss' whims. The army has also been personalized by the president. He's often quoted as saying that he will not let anyone mess around his army. A recent comment by army officials with regard to elections was leveled against Col. Bogere over the way he voted or did not during the debate on the bill seeking to amend art. 105 (2). Needless to say is the fact that most presidents have had close alliance with the army or stayed a short reign.

2.5 Military Court Martials

It's also vital to address the aspect of the military court martial. There has been a lot of hullabaloo about the above court ever since Col. Dr. Kizza Besigye appeared before it in November on terrorism charges. Lawyers have even gone further to challenge the court in the constitutional court. Despite being a military court, it's similar to other courts. It observes the same procedure like ordinary courts. An accused is entitled to legal representation of one's choice and where one cannot get one; the court gets one at their cost. Before the court, the suspect is presumed innocent until proven guilty. The guilt of the accused is proven beyond reasonable doubt. Suspects are also given an opportunity to cross examine witnesses. Before putting a suspect to his defence, the court explains to the accused his right to give evidence on oath, in which case he/she may be cross examined by the prosecution.

The court gives a person convicted of a non-capital offence to make a plea of mitigation. The difference with other courts is that the powers of the DPP regarding institution of criminal proceedings don't extend to it. Prosecutions regarding institution of criminal proceedings against a person charged in the GCM are instituted by a commanding officer. Also in the civilian court, the judge determines the sentence while in the GCM, members of the GCM determine the sentence. The verdict of the GCM is by majority opinion and is binding on members of the court. Before they arrive at the verdict, the members of the court are advised on the law and procedure by an advocate (judge advocate). Section 201(2) makes it an offence for a member of the court to disassociate him or herself from the court ruling and where one pleads guilty, one is dismissed from the court. Punishment includes death, confinement, fines, forfeiture of seniority, causation, dismissal with disgrace, etc. However a person who has been handed a sentence by the GCM has a right to lodge an appeal at the Martial Court of appeal headed by a High Court judge. Section 199 of the UPDF Act creates

the Court Martial Appeals court to hear appeals from decisions of the GCM and that decision is final.

Uganda is not alone in having a separate Court Martial Appeal Court. The Uniform Code of Military Justice of the US in art.141 provides for the US Court of Appeal for the armed forces. Uganda has 3 court Martials i.e. the General, Field and Division court martials. The GCM is convened by the UPDF high command, for a period of a year. It consists of a chairman, two senior and two junior officers, a political commissar and a noncommissioned officer. The court chairperson is chosen from serving military officers above the rank of Major. The court tries active soldiers that have breached the army regulations, enemy prisoners of war (POW's), for instance the 14 PRA suspects. The UPDF Act also gives it's appellate jurisdiction over decisions of the Division Court Martials. A division court martial is found in each division of the UPDF. It's composed of a chairman, and all the positions like the court martial. The Field Court Martials are not permanent or standing military courts. One has to be convened by a deploying authority. This means that lawyers and judges in the court are drawn from the unit involved whenever the court is needed. Once the trial ends, the court is dissolved e.g. the one that tried the late Col. Sula Semakula convicted two UPDF soldiers Corporal James Omedi and Private Abdullah Mohammed in Moroto in 2000 for murdering an Irish priest Rev.Fr. Michael O'Toole Declan.

CHAPTER THREE

INDEPENDENCE OF THE JUDICIARY AND CONSTITUTIONALISM IN UGANDA.

3.1 Introduction

Independence of the judiciary determines the justice of the state as courts and judges are free to exercise their power, jurisdiction and perform functions without fear or favour of anybody or the state. Neither the executive nor anybody can dismiss them at will. The constitution states that once a judge is removed from office, he/she must be given reasons as to why that's so. The Judicature Act states that,

> *'A judge or any other body acting judicially shall not be liable ... for any act done or ordered to be done by them in the discharge of their duty ... '*

The judiciary is to interpret the law, its application by the rules, determine the legality of various society actions and not any court may do so. The tenements of a constitutional independent judiciary are security of tenure, financial security both of officers and institution.

It should be noted that as Benson Tusasiirwe[50] notes positive changes would mean commitment to constitutionalism and the rule of law, democracy, respect of human rights and an end to the days of the high handedness unbridled corruption and impunity. To understand the root cause of all problems, one needs to know what caused these problems.

In pre-colonial period, different societies had different ways to administer justice. Most of this was handled by the clan heads who they usually convened elders meetings to settle disputes amongst various groups.

> *'In judicial terms, the clan heads were the institutions responsible for the administration and enforcement of justice. These were more of mediators rather than judges.*[51]

[50] The Judiciary under Uganda's fourth constitution.
[51] Benson Tusasiirwe ibid page 3

By 1900, there was advancement incase filling, remand deportation especially in Buganda and Bunyoro. It needs to be shown that there was no separation of powers. There were several treaties that were signed between the colonial masters and the natives. By 1905, the Natives Court's Ordinance was made to provide for the establishment of native courts in Uganda. It should be noted that there were for both natives and non - natives and governed by different laws. The 1939 order-in-council related to the appointment, qualification, removal, immunity that paved way for judicial autonomy. As then principle judge, Ntabgoba said, these courts also had various problems as today's. The use of Saza chiefs, district administrators as magistrates was challenging and problematic. Most of them had no or little knowledge of the law as colonialists wanted to keep the people out of the reality of the world. It was no mistake that they advanced the application of common law as against customary law as in **Rex vs. Amkeyo.**[52] Where the issue was whether a wife could give evidence against her husband? Under the Indian Evidence Act, still applied in Uganda, this was not possible. (It's this that Lord Denning in another case stated that whatever the good points of the English common law, it could not be applicable in African context. It was not a mistake that most cases that the courts handled then were criminal cases.

3.2 Judicial autonomy between 1962-1995.

A number of preliminary points need to be made about the post independence judiciary in order to set the ball rolling. Both the higher and lesser courts remained overwhelmingly foreign in composition. Many were a hold over of the colonial era, waiting the termination of their contracts. Hence, erstwhile the complex of superiority remained, this was tempered by an acute awareness of the change in situation that independence,

> *'There can be little doubt that the blind adherence to judicial precedent. .. can do a considerable amount of harm to the community. When precedence ha out lived its usefulness, it's better to say so ... the community will have the benefit of a clear cut change in principle of a decision based on modem requirements'*[53]

[52] (1917) 7 EALR
[53] (1962) E.A. 259

Many cases that were decided by the courts upheld the principles that were non-colonial notions of justice. **Abudullah Bin Mohammed vs R**[54] upheld the notion of the infamous decision of wife purchase in **Rex Vs Amkeyo**[55].

Historical antecedents affected the operation of the judiciary in Uganda. Independence brought situations in which the courts were to assume a predominant role in the administration of justice. They were structured to occupy a position of substantial political significance at the apex of government. This role was imposed in a situation where the executive had not been brought to sanction. They sought to be settled by extra-constitutional power and eventually led to the overthrow of the 1962 constitution in 1966. Analyzing the above Benson Tusasiirwe notes that,

> *'The independence constitution emphasized division rather than unity by placing regional interests above national ones. Any attempt at political, economic, cultural transformation of Uganda were bound to encounter the inevitable obstacles. The constitution made sure that this would be rare and slow. It was designed to cater for a historical Uganda where tradition and economic power was in the hands of a few.'*[56]

Before long, a crisis had arisen between the Kabaka and the Prime Minister Apollo Obote and it was this that would later determine the independence of the constitution as reflected in the number of cases decided. Two cases demonstrate the mode of judicial autonomy in this era, **AG vs Kabaka's Government**[57], **Ibingira and others vs Uganda**[58], **Uganda vs Commissioner of prisons Exparte Matovu.**[59] The Ibingira case represented the first test of the operation of the judiciary in the realm of constitutionalism and resolved around the import of the bill of rights section in the 1962 constitution. Allegations were made against the prime minister leading to the beginning of no confidence proceedings against him. Obote had the 5 ministers arrested under the Deportation Ordinance of 1964. This was challenged in relation to fundamental rights and freedoms of movement and wanted their release. Justice Fraud upheld the ordinance and denied their release. The government transported

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[54] (1963) E.A 188.
[55] Supra
[56] Benson Tusasiirwe Ibid and also Kanyeihamba G.W.(1975) PAGE 77-8.
[57] (1965) E.A.393
[58] (1966) E. A 306
[59] (1966) E.A 514.

them from karamoja and served them with detention letters at Entebbe where the above regulation was applicable. The ordinance wasn't challengeable in court[60] and was only applied in Buganda where there was a state of emergency. On appeal, court rejected their release and surprisingly made neither reference to the constitution nor the passing of the Act, it's retrospective application

Case represented the demise of the High court with regard to the protection, enforcement of the fundamental human rights. Therefore it ought to be noted the today's hindrances are not a recent development but we are practicing what is common referred to as once bitten twice shy and it was prepared to lock horns with the executive to have their way out.

The Matovu case was of great significance because it represented the first test for the courts to declare the validity of the regime and constitution but as always the courts were more interested in keeping the order of the day and not venture in activism. This case would have a lasting impact on the relationship between the judiciary and the executive. One of the issues was whether the High court had the power to rule on the validity of the 1966 constitution. This arose from a political act outside the scope of the constitution i.e. it was a product of a successful revolution. The court said that it lacked the jurisdiction to inquire into the validity of the constitution because the courts, legislature and the law derive their validity from the constitution. They applied the Kelsen's theory of law regarding statehood as discerned from the various authorities such as **State vs. Dosso.**[61] The rule that the constitution was invalid would also mean that the source of power and legitimacy of the courts was in question. Up holding the detention orders, the court sanctioned government action in the infringement of personal liberties. Similarly, they sanctioned the fact that as long as a clique of people was able to overthrow the government and effectively replace the constitutional order, they became legitimate and a legal revolution.[62]

[60] Prof Kanyeihamba – Constitution and political history 1984- 2002.
[61] (1959) 2 Pakistan Sup Ct. R 180.
[62] Benson Tusasire Ibid page 18

The 1966 constitution placed the president beyond judicial scrutiny as per art.24 (3) and this is what has today commenced into the immunity granted to the president under our laws. Similarly the DPP wasn't to be subjected to the control of any person while the constitution subjected the DPP to the AG under art. 71(5) of the new constitution. This potrayed that when confronted with more serious question the judiciary shied away and acted a being more executive than the executive and this curtailed the autonomy that they would have had in the enforcement of the fundamental rights of the populace. The government of the day enacted laws that were in fact not even challenged in the courts of law. Perhaps with the trend of events the populace had been to loose credit in the judicial system. People were arrested, detained without any information as to the reason of their arrest as evidenced by the Public Order and Security Act of 1967 and the Emergency Powers Act of 1978. Like today's Anti-Terrorism laws, these were meant to curb political opponents.

The period between 1971-1985, was characterized not only by the demise of judicial autonomy but also by military rule under Idi Amin. This was evidenced by the sudden disappearance of the Chief Justice and the subsequent death. Art. 1, 3, and 63 were all suspended making the constitution no longer a supreme law of the land as per Legal Notice 1 of 1971. Parliament lost it's law making powers to the president, judicial scrutiny of the executive excesses was curtailed and ushered in military rule under various tribunals i.e. Economic crime's tribunal, state research bureau military police, and armed forces to execute civilians. The Amnesty International Report of 1978 reported the above stating that,

> *'The military tribunals were a complete travesty of any accepted norms of justice. Members had no legal training; defendants denied legal representation ... trails in enclosed 'courts', proceedings not published. Cases conducted in secret with no appeal to a non-military legal authority, only to the Defence Council'*[63]

It ought to be noted that the era between 1971-1985, there were few constitutional cases because as Tusasirwe [64] stated there were two kinds courts i.e. one manned by the legally trained judicial officers and the other by the military and the people distrusted both these. Disputes were settled by extra means. The army and the police were always on the loose as

[63] Benson Tusasiirwe page 4
[64] Ibid page 23

they always thought that they were lawfully entitled to arrest without warrant, shoot in cold blood. The dire effects of the Matovu case as espoused by the kelsen theory was evidenced in the UNLF period in the Kayira case[65] that dealt with the removal of Yusuf Lule. The then Chief Justice stated the fears behind court's refusal to be straight that if they declared that the removal of Lule was illegal and unconstitutional was that the new comer would be illegal and thus grave indeed. It's no wonder that Uganda is locked in this cacophony as a result of the judiciary's lack of activism. Courts have failed to emerge from the role of rubber stamp and thus propound the positivist notion. It was no wonder that the court (by of all judges, our current Chief Justice) gave vague reasons for not following the **Asma Jilani vs. State of Punjab**[66] case claiming that it wasn't available to the court to peruse through and that the case was influenced by the socio-cultural conditions in Pakistan that were equally different from those in Uganda. One wonders why in the fast place it had followed the State vs. Dosso of the same state.

The Obote II era saw some improvements in the judiciary but it was still struggling with it's past. The closest it came to outlawing the Matovu case was in **Re Sevumbi case**[67]where the court said that the Matovu case could not be relied upon. The prohibition against giving a detention order under the Public Order and Security Act only applied if it was lawful and concluded that if a person is detained unlawfully, he can therefore challenge the order under sec. 33 of the Judicature Act or sec. 22 of the Constitution. Similarly, the case of **John Kityo vs. AG**[68] and also in **Re Buregyeya**[69] where the courts refused to uphold panda gari operations and illegal detentions. But it should be noted that this was a period of turmoil with various new governments trying to ensure their survival in power and there cared less about the judiciary and also the people were still too traumatized by the Amin era and the judiciary was trying to rebuild from zero.

[65] (1979) H.C.C.S/2/2001
[66] HCCS/32/1978
[67] (1980) HCB 36
[68] (1983) HCB 56
[69] (1985) HCB 99

The National Resistance Movement's first decade in office has witnessed the most dramatic change with regard to the independence of the judiciary especially by the promulgation of the 1995 constitution that had better provisions relating to the independence of the judiciary. The regime began by instituting Resistance Councils, IGG, Public Accounts Committee all in the name of exercising judicial autonomy. One of the most radical changes introduced by the movement was the concept of administration of justice, which came to be best known as the RC courts' that were broad based all inclusive, non partisan. This championed grass root democracy under which the people took part in the governance of their own affairs. This was strengthened by the enactment of the Resistance Councils and Committees (Judicial Powers) Statute.[70]

The government came out full blast to criticize the judiciary against blind and selfish adherence to some precepts of law that were adopted from the colonialists and which were uncritically considered as sacrosanct. This was an indication that they required the law to serve the people and not the other way round as the other regimes had portrayed. This however does not mean that the regime did or has not violated the independence of the judiciary. Justice Ntabgoba has criticized the security officials and government of their contempt and increased executive sensitivity and this was aimed at redressing the image of the judiciary after decades of decay and mistrust by the populace.

However this did not stand the test of time when the executive was again at it with judicial influence. In a case involving journalists that were arrested over the pretext that they had defamed the visiting Zambian head of state by asking embarrassing questions. Chief magistrate Okalebo that was presiding over the case was transferred to Mukono and Bamwine Edward replaced him. Clearly portrayed that the executive was always prepared to do all that's necessary to have its way.

It ought to be noted that the judiciary is at times the cause of its own problems. One wonders what the chief justice was doing then. The judiciary despite the above has changed a lot. The

[70] Monica Twesiime Kirya. The independence and accountability of the judiciary in Uganda, opportunities and challenges Page 7-8.

people began to feel the body as one that would settle their disputes as evidenced in the increments in the number of disputes.

The 1995 constitution provides for the judiciary under chapter eight that deals with the administration of justice. Under art.126.1, judicial powers are exercised in the name of the people and inconformity with the written laws and values of the people. It also mandates parliament to make laws providing for the participation of the people in the administration of justice that was non existent in previous constitutions. Art.128, the judiciary is granted immunity from the influences of other state organs but this is not the case. As noted by Benson Tusasirwe[71], the people had made their views clear to the Uganda Constitutional Commission that the judiciary lacked independence from the other organs of the state thus susceptible to manipulations as in the past. They also complained about the corruption, sectarianism, discrimination and alien laws especially common law.

Under art. 142, 143, 144, and 145, the constitution provides for the appointment, qualification and tenure of the judicial officers. Under the Judicature Act, the judges are also protected.

In 1999, the real test for the judiciary was on the line in **Paul Ssemogerere and Olum vs. AG**[72] that challenged the procedure taken while passing the Referendum and other Provisions Act of 1999. They argued that the act was passed without quorum in parliament and also that it was enacted after the expiration of the date stipulated in the constitution. The petition was at first thrown out on technical grounds that the petitioners could not use parliamentary records as evidence without the speaker's permission. The constitutional court said that the petitioners could use the Hansards and that this had violated the petitioner's right to access to information under chapter 4 of the constitution. Kanyeihamba once again was at the fore front championing the independence of the body by saying that with holding of such evidence was contrary to the principles of transparency, openness that are vital in the administration of justice. Soon afterwards the President came out firing at full blast that the courts were UPC supporters and what they had done portrayed legal bankruptcy that was

[71] Ibid page 30
[72] Constitutional Petition No. 3 of 1999.

sheepishly followed by the then National Political Commissar, Wapakabulo (R.I.P) and Prime Minister Apollo Nsimbambi said that the Government would not allow the courts to usurp the power of the people.[73] However the Chief Justice as the head of the body called upon the government and people to leave alone the courts to do their role and assured the people that their would be no problem or crisis after the judgment. As usual the government is always using the 'crisis' issue to get away with al it's illegal acts which up to date has really paid off as evidenced from the recently concluded elections. This also proved right the fears of Ntabgoba when he stipulated that the RDC's were interfering with the judicial activities especially of the magistrates, not forgetting the press that discuss the pending cases which he called the greatest interference.

Apart from the above, the control of finances has limited judicial independence. The most damaging aspect was or is the IMF and World Bank cost cutting measures. The effect here is that the judiciary which is already under capacity cannot recruit new members to handle the work load. For several years the judiciary has had to work under capacity as per the Ntabgoba's speech in 1999 where he noted that Uganda had about 350 judges and magistrates, while at the magistrate level there were only 18 in service as opposed to the 29 and that in such situations speedy trails were not possible. This was also further curtailed by the Specific Officers (salaries and allowances) Act of 1999 that sought to reduce the salary of the judicial officers.

The case that was ground breaking was that of **Major David Tinyefuza vs. Attorney General**[74] he was denied retirement after appearing before the parliamentary committee to testify why the northern war was not ending and gave contrary views to those of the president and arm commander. He claimed that he was forcefully being employed which was against his fundamental human rights as per art.25 of the constitution. The constitutional court granted him redress but the AG appealed and the Supreme Court reversed the decision. But this portrayed the fact that the court especially the constitutional court was wiling to protect the rights of the individual without fear of the executive arm.

[73] Monitor June 30th 2004 page ...18
[74] Constitutional Petition No. 1 of 1996.

In the later cases that were decided by the constitutional court, the court seemed to tie it's noose by which it would hang itself with the aspect of technicalities. It should be noted as Sir Newham stated,

> *'Procedural rules are intended to serve as handmaidens of justice, not to defeat it ... and ensure that each party has a fair hearing.'*[75]

In Rwanyarare and another vs. AG[76], the constitutionality of the 1996 elections were contested challenging the legality of the regime and this was brought under art. 50 and 137 of the constitution. The court threw out the petition claiming that they had no jurisdiction to hear matters of rights' enforcement but only entertained constitutional interpretation under art.13 7. However one wonders whether the justices had taken time off to read art. 126 (2) (e)? They concluded without shame saying that the petition was in a wrong forum or court. It was in the same way that the other two petitions that followed were thrown out by the constitutional court, two Uganda **Journalists Safety Committee and Another vs. AG**[77] cases i.e. case number 6 and 7 of 1997 that had sought to redress various sections of the penal law that was inconsistent with the constitution. It was not until the intervention of the Supreme Court in **Ismail Serugo vs. Kampala City Council and AC**[78] that the justices of the constitutional court got their senses back.

Two Justices of the Supreme Court expressed their concerns about this trend by the constitutional court,

> *'lam constrained to caution against what appears to be a trend of making access to the constitutional court difficult for fear of opening a floodgate. In my view, this trend will defeat the intentions of art. 137.3 .'*[79]

The most trying cases for the courts between 2000-2006 were the presidential elections petitions both of 2001 and 2006. In 2001, Col (Rtd) Dr. Kizza Besigye petitioned to the Supreme Court in **Dr. Kizza Besigye vs. Yoweri Kaguta Museveni**[80] challenging the legality of the results after a hotly contested race with his long time ally and boss, the incumbent. It

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[75] Prof Chris Maina Peter, Independence of te Judiciary In Tanzania. Page 24 -25
[76] Constitutional petition No. 11 of 1997
[77] Constitution petition No 6, 7 of 1997
[78] Constitutional petition No. 2 of 1998.
[79] Benson Tusasirwe Ibid page.....47(judgments by justice Mulenga and Twinomujuni)
[80] Supreme court Election Petition No.1 of 2001

was clear from the evidence that the elections had been rigged but the court by a unanimous decision of 3-2 held that the rigging and irregularities did not substantially affect the results of the election. Here the judges once again failed to define what substantial rigging was required to nullify an election. There were various scholarly arguments about the judgment with some claiming that once the elections were declared null and void there would be anarchy in Uganda. It was not surprising that the ones who were championing this were the same that had aided in the election malpractices. This was again a way of how the judiciary had cowed down to the whims of the executive.

Aggrey Awori, a member of parliament bluntly said and correctly, 'everybody knows that there was rigging, but the stomach dictates on the brain'. With the 2006 petition, the petitioner was out to prove what had eluded him in 2001 i.e. proving rigging as having substantially affected the results of the elections. This time the justices pull out another stunt of claiming that' there was rigging, bribery and intimidation but that all these were carried out without the knowledge of the defendant. Do the justices expect us to believe this argument especially with all the incidents before the elections? It ought to be noted that there is delegated responsibility that would make the president liable for the acts, omissions by his ministers, army and supporters.

Apart from the executive excesses, the judiciary is faced with the problem of corruption that has crippled it's effective operation as noted by Winluck Wahiru.[81] It ought to be emphasized that corruption is aimed at keeping those in power there through financing government activities. The increased cases of corruption and professional misconduct has tainted the judiciary. The media is awash with advocates who have been reported to the Law Society for illegal conduct. In some particular case in Lira, an advocate assaulted a Magistrate who questioned his conduct before the court. Still in the same district, prosecutors and magistrates are accused of misappropriating bail money, delaying trials, demanding bribes and instituting illegal private prosecutions[82]

Chief Justice said,

[81] Independence and accountability of the Judiciary by Kituo Cha Katibua the monitor 3rd March, 2005 page 2
[82] The monitor June 23rd 2006 page 12.

'The true understanding and respect of the judiciary can be achieved only as a public response to the integrity, impartiality, fair and honest play, conscientious attention to duty and simple courtesy,[83]

The Movement has manifestly shown their redness to cramp down the judiciary. It was earlier recommended but rejected by parliament that the DPP should be affiliated to the Attorney General which in essence was a reversal of the Amin and Obote days where these two bodies were under one. The independence of the DPP is also undermined by the fact that government is able to pay 2 billion Uganda shillings all in the name of prosecuting one that exercised his constitutional right to stand against the only one with a 'vision'. It's surprising that the government claims to be without money to adequately fund the judiciary yet it has got 2 billion to pay some clique of lawyers to do the same job that the DPP department could have done effectively if properly paid and staffed. Also the DPP has been ineffective in that instead of prosecuting the people that mislead the nation they are busy in non-serious matters e.g. it failed to prosecute Prime Minister Apollo Nsimbambi and Henry Kajura his deputy for misleading court that there was quorum during the passing of the Referendum Act in 1999.[84]

The Attorney General has also manifested himself as a Movement sycophant in the last months before the 2006 Presidential elections. It goes without mentioning that he's one the most highly respected, learned professors law that Uganda has had but what he was saying with regard to the nomination of one of the imprisoned candidates was really not fro a legal point of view. He had failed to realize that all persons are innocent until proven guilty. Many Ugandans were astounded by the kind of legal advice he was giving to his department.

Lastly the influence of the army has also had a bearing on the effective operation of the judiciary. The so called 'generals' and 'historicals' as envisaged by the remarks by both Gen. Tinyefuza and former health minister Jim Muhwezi. The general was reacting to the ruling by the court in favour of Col. Dr. Kizza Besigye and he had no kind words for the judicial officers. Specifically referring to Justice Ogoola, he said,

[83] Ibid page 12
[84] The Monitor December 15th, 2005 page 10.

'Who appointed him, Did the Principle judge go through the ballot, Did he come here by accident We have given them power but they should not .'[85]

One wonders whether this is the same army officer that sought redress from the courts a few years ago after being denied retirement from the army. Similarly the siege of the High Court by the so called Urban hit squad reminds one of the Amin days where it was a case of always on the run for ones dear life,. It was no mistake that the PRA suspects that had been granted bail instead stayed in prison for fear of being re-arrested and tortured in secret locations. The above are the problems that the judiciary has faced and it's sought that these need urgent redress before it's too late.

Therefore, Judicial independence is the yardstick of a functional judiciary and has been explained not only to mean independence from the legislature or the executive but also from political organs, the public or from themselves.82 It is universally accepted in modern day democracy discourse that a Constitution must effectively guarantee judicial independence. The Constitution provides that "in the exercise of his judicial authority, a member of the judiciary shall not be subject to the direction or control of any person or authority".[86]

It is also universally acknowledged that the inclusion of bold statements of the traditionally accepted safeguards in the Constitution is not sufficient.84 It is pertinent to have, in addition to the traditional safeguards, individual independence of the judge coupled with institutional independence to achieve a human rights based approach in their work. In South Africa, the Constitutional Court (CC) has reiterated judicial independence as the complete liberty of individual judges to hear cases before them with no outside pressure from government, pressure group, or even another judge.

Financial autonomy is also fundamental to judicial independence.[87] Without it, judicial independence is at stake through executive withholding of funds. Scholarly work has

[85] The Monitor February, 3rd 2006 page 1,2 and also The weekly Observer February 9-15th 2006 page 3
[86] Article 128 of the Constitution, 1995
[87] Ibid

advocated for self-accounting and financial independence. Thus it is pertinent to note that the independence of the judiciary is all embracing and indeed include issues of appointment, conditions of service as well as removal from the bench.

The constitutional provisions establishing the framework for human rights protection is fairly good. In compliance with international norms, one notes in particular the constitutional entrenchment of the guarantees of independence of the judiciary in section 79B, the Bill of Rights is also entrenched and justiciable. One also notes the entrenchment of appointment procedures, remuneration of judges and provisions for removal from office.

Potentially, one would be inclined to state that while noting gaps in the national framework, the minimum protection and provisions for an active judiciary are present. Some of the gaps can be covered by judicial revolution and activism, for instance drawing on comparative jurisdictions that have used civil rights to extend protection to socio-economic rights can catered for the absence of socio -economic rights.

Similarly, the non-incorporation of international instruments should also not work against human rights protection since many of the rights in the Constitution have correlative rights in international/ instruments. Thus an opportunity exists for the judiciary to draw from interpretative tools such as UN General Comments, the decisions of the African Commission as well as soft law. In conclusion it is apparent that while the current Constitution is not the best in comparison to other constitutions, it nonetheless is not the worst either and can be used for the protection of fundamental civil liberties and freedoms.

CHAPTER FOUR:

CONCLUSIONS AND RECOMMENDATIONS

4.1 Recommendations

Continuing education for judicial officers should be geared towards enabling them to better appreciate their role in safeguarding constitutionalism and the rule of law. Adequate research facilities would also enable the judges to write more progressive and well-researched judgements.

The Judiciary, Parliament, the Executive and Civil Society should engage in a consultative process geared towards coming up with a more transparent system for judicial appointments. This will help to remove current suspicion of appointments for improper motives arising from the big role played by the Executive in judicial appointments.

The terms and conditions of service of the lower judiciary should be improved. Since there is a general belief that allegations of corruption in the Judiciary are mainly about the magistrates, improving their terms and conditions of service should go a long way in improving their security and hence their independence.

Efforts should be made to promote judicial accountability by ensuring that as far as possible, proceedings are open to public scrutiny. There is a need for more courtrooms for the conduct of civil proceedings. The government and its development partners, particularly DANIDA have already done a lot to improve the infrastructure of the Judiciary. However, there is still a long way to go.

A clear and confidential procedure for filing complaints of judicial misconduct should be established. This will help to preserve the integrity and independence of individual judges and the Judiciary as a whole.

The judicial officers should be encouraged to continue with education that will expose them to Experiences from other jurisdictions. For they should borrow a leaf from the Indian

judiciary which has been commended for their judicial activism with regard to the interpretation of the law. This would have helped the constitutional court during the period when they threw out petitions on grounds of lacking jurisdiction to hear the petitions.

Also related to the above judicial accountability should be ensured through open public scrutiny. We need to borrow the Tanzania experience under the Pensions (Additional Retirement Benefits to Specified Officers) Order, 1996, where the judges retirement package is known and under the legislature. This reduces corruption since it does not create uncertainty.

There's the need for more Ugandans to access justice which is a fundamental right that can be used increasingly as a measure of the development of the independence and accountability of the judiciary.

As pointed out by J. J. Barya, and Oloka Onyango[88], RC courts (local council courts) which are popular and accessible to the ordinary citizen need to be streamlined with regard to procedural and substantive laws. They should be allowed to handle simple criminal matters to relieve the courts of the huge case load. To ensure effective administration of justice, they should be paid allowances for the work to reduce corruption tendencies e.g. transport, communication and other necessities as stationary.

With regard to executive excesses, the judiciary needs to stand firm and administer justice without fear or favour. The president has always been threatening to institute a commission of inquiry into the judiciary like that of Kenya where various justices were suspended that has caused a lot of problems in the administration of justice. The justices have warned the president and besides we have witnessed vast commissions but of no effect.

> *'There's growing cynicism that commissions of inquiry are being used as avenues for the public to vent their anger and think that the government is cracking the problem.*[89]

[88] Popular Justice and Resistance Committee Courts in Uganda – Friedrich Erbert Stiftung.
[89] Commission of Inquiry Sunday Vision June 25th 2006

The same corrupt leaders are again appointed and this time to 'juicy' ministries. The various probes are, Police, global fund, junk choppers, etc. It should be emphasized that the executive should refrain from interfering with the judiciary as they have done with the army from the press.

The executive should strengthen the judiciary by participating in the development, financing of the body instead of wasting time and monies in none productive ventures. It ought to be noted that for long various NGO's have funded the judiciary e.g. DANIDA with regard to rehabilitation of offices and staffing but all this is still a drop from the sea. It ought to be noted that this dependency on the donors is not advisable.

As noted by Tusasiirwe, the judiciary needs to address some of these problems by its self. The high court has created 4 divisions, to cater for the public out cry of delay in hearing cases, i.e.[90] the commercial, criminal, family and civil .The fruits of this was that in 2001, the commercial court that had 4 judges disposed of 533 main suits and 495 application, the civil and family divisions, with twice the number of judges, only completed 684 suits and 567 applications.

The approach of the bench ought to encompass a generous and purposive approach to interpretation that draws on international law and comparative jurisprudence to enable effective discharge of its mandate. Issues of technicalities and procedure ought not to obstruct substantive justice but rather aid in the attainment of justice. The current bench should also adopt innovative approaches towards the protection of socio-economic rights despite their absence in the national framework.

Independence and integrity of bench should be endeared. Judges must unambiguously maintain fidelity to the law and jealously guard their independence and integrity. The judiciary should enjoy institutional and financial independence. Commitment to

[90] Ibid page ... 57

constitutional provisions on independence of the judiciary by all organs of state is therefore required. The judiciary must also have financial autonomy in drawing up its budget and dealing directly with the relevant state authorities on financial matters. Judges must be persons of integrity and ability with appropriate qualifications.

The role of the CJ must be evident through prudent judicial leadership and must call for respect and enforcement of court orders. Administration of the courts must also be reflective of the commitment of the courts to human rights protection. The regaining of relevance and institutional competence are pertinent for the current bench. The judiciary needs to regain its role as the final arbiter in human rights matters.

There is need for continuous training for members of the judiciary. There are emerging needs, scientific advances, changing perceptions and modalities of thinking and ideas in human rights and democracy. This calls for a paradigm shift in the training and retraining of members of the judiciary. It is therefore recommended that the judiciary continuously update themselves in changing and emerging human rights issues.

The JSC should be strengthened and mandated to improve access to justice and efficiency, advocate for conditions of service and handle complaints. The rules of procedure for the JSC should be written and precisely deal with issues of nomination of judges and revise the weight of its advice in the appointment process. The composition of the judiciary must be representative of the justice delivery system. The JSC should play a pivotal role in the protection of judges from political pressure and handle misconduct issues according to the constitutional principles. Legitimate concerns about the functioning of the judiciary should follow proper channels.

The arms of government should engage in institutional dialogue to ensure independence of the judiciary yet ensuring transparency and accountability. Conditions of service, judicial bribing and the strengthening of the national framework for human rights protection should be the focal points for dialoguing, among others.

4.2 Conclusions

This dissertation has addressed how the principle of the independence of the Judiciary and separation of powers has operated in Uganda, from the colonial period to date. It has been shown that the colonial judiciary, which was to all intents and purposes an instrument of the British Crown for maintaining law and order in the Protectorate (colony), created a legacy of a post-independence dependent judiciary which was all too ready to dance to the executive's tune.

The lack of democracy that characterised successive post-independence regimes undermined the separation of powers and rendered the Judiciary impotent in the face of massive human rights violations and disrespect for the rule of law. This is not to say that the Judiciary never made any attempt to uphold the rights of citizens or to stand up against illegal executive action. However, the general picture created was one of a powerless Judiciary operating in the shadow of a stubborn executive.

Since the promulgation of the 1995 Constitution, the Judiciary has been entrusted with a greater role in the promotion of the rule of law. Indeed, on many occasions, the Judiciary has passed radical judgements in favour of human rights that the Executive has found unpalatable. The Judiciary can no longer be described as impotent and powerless. It has shown that it can be strong and courageous and withstand constant criticism from the executive and also from the public. It can dispense justice without fear or favour.

In a synopsis, the first decade of the NRM reign witnessed remarkable change with regard to rule of law and constitutionalism. This was a change from the reign of Obote and Amin where these aspects were none existent. It was from 1986-1995 with the promulgation of the constitution that the greatest stride towards democracy was started as proclaimed the 'fundamental change and not merely a change of guards'. However, as evidenced by various aspects portrayed in this thesis, the later years have witnessed a change for the worst. There has been total disregard and constant violation of human rights by government officials, rigging of elections, a repeat of the 1980 reason for the' liberation war', judicial intimidation

and manipulation by the President's 'generals', siege of the courts of law by sycophants 'Urban hit squad', No respect of court orders especially the Military court martial led by a designer judge now musician with no understanding of the court procedures and law as evidenced by various case reports. The Legislature has been bribed to delete the term limits which the NRM in 1985 stated that the greatest problem, cause of all chaos, institutional collapse was leaders that stayed too long in power thus to retain in power and avoid answering fro the mistakes, they inkling on to power. Therefore, Ugandans should get the wakeup call and realize that unless these aspects of rule of law and constitutionalism are strictly followed, then Uganda will return to the dregs of 1971-86 of man eat man society.

In conclusion, it must be emphasised that the principle of the independence of the Judiciary and separation of powers can only thrive in a democracy. Unless the government of the day is committed to the rule of law, it is unrealistic to expect the Judiciary to always stand up to executive or legislative excess. After all, judicial officers too, are human beings, with legitimate fears for their own safety and security.

BIBILIOGRAPHY

Books

Benjamin O, *The search for a national consensus: the making of the 1995 Uganda Constitution* (2005) Fountain Publishers Ltd Kampala.

Benson Tusasiirwe, *the Judiciary under the Uganda's fourth constitution*

Hatchard J et al, *Comparative constitutionalism and good governance in the Commonwealth: an Eastern and Southern Africa perspective* (2004) Cambridge University Press.

Hatchard J, *Individual freedoms & state security in the African context: the case of Zimbabwe* (1993) Ohio University Press.

Jjuuko F, *Constitutionalism in East Africa: progress, challenges and prospects in 2002* (2005) Fountain Publishers.

GW Kanyeihamba **constitutional and political history in 1984-2002Uganda**

G. Lennington, *Constitutional law of Uganda 2001*

Macmilan, *An introduction to the study of constitutions.1959*

Monica Ttwesiime kirya, The independence and accountability of theJudiciuary in uganda

Nyangabaki Bazara, *Constitutionalism in East Africa 1999*

Prof Chris Maina Peter, *independence of the judiciary in Tanzania 2005*

Oloka-Onyango J, *Constitutionalism in Africa: creating opportunities, facing challenges* (2001) Fountain Publishers.

Onoria H "Major decisions on fundamental rights and freedoms in Uganda in 2003, 11 East African Journal of Peace & Human Rights (2005) (1) 150.

Onoria H "Review of the major decisions on rights and fundamental freedoms in 2001 and 2002"

Shivji I, *State and constitutionalism: an African debate on democracy* (1991) SAPES Trust.

Shivji I, *The concept of human rights in Africa* (1989) Codesria Book Series.

Tumwine-Mukumbwa G "Domestic application of human rights norms" 3 East African Journal of Peace and Human Rights (1996)

Walubiri P, *Uganda: constitutionalism at crossroads* (1998) Uganda Law Watch Centre.

Newspaper articles

John Kakande. **"Commemorating 10yrs of the life of NRC. New Vision January", 26th 1996.**

Karoli Ssemogerere. **"Why the rule of law may become a relie of the past". Daily Monitor.December, 15th, 2005.page**

William Tayebwa **"DRC court case against Uganda". Sunday Vision July 20th 2000 page 29**

"Delay on AES was good for all". New Vision December, 10th, 1999.

"What they have done shows the legal bankruptcy and insensitiveness to the inspiration of the ordinary people" New Vision, 18th August 2000.

"Is the 7th Parliament just a big balloon, Sunday Monitor", March 16th 2003

"Judiciary blames the FDC for delays in poll cases" *The Daily Monitor*, 11 January 2009.

"Prime Minister Apollo Nsimbambi said that the Government would not allow the courts to usurp the power of the people". The daily monitor 30th June 2004 page 18

"Prosecutors and magistrates are accused of misappropriating bail money, delaying trials, demanding bribes and instituting private prosecutions" the Daily monitor June 23rd 2006 page 12

"D.P.P has been inefficient to prosecute the people who misled the nation that they were busy" .e.g Prime Minister Apollo Nsimbambi and Henry Kajula his deputy, for **misleading court that there was column during the passing of referendum in 1999 the** Daily monitor December 15th 2005 page 10

Reports and other publications

"Breaking the silence, building true peace" A report on the disturbances in Matebeland and the Midlands 1980-1988 by Catholic Commission for Justice and the Legal Resources Foundation April (1999) http://www.sokwanele.com/pdfs/BTS.pdf< (accessed 13 September 2005).

"Clear the filth" mass evictions and demolitions in Uganda, A Human Rights Watch, http://hrw.org/backgrounder/africa/uganda0905/uganda0905.pdf,(accessed 0ctober 2005).

"Cross-border traffic in human rights jurisprudence: Interights' Experience" Paper at the session on International human rights norms and their domestic application: judicial methods & mechanisms',

"Hostile to Democracy: The Movement and political system in Uganda" Human Rights Watch Report New York October (1999).

"Justice in Uganda", Report by the Legal Resources Foundation WO 41/84 September (2002)<http://www.humanrightsfirst.org/defenders/hrd_zimbabwe/LRFreport30-09.pdf< (accessed 14 July 2005).

<http://www.humanrightsfirst.org/defenders/hrd_Uganda/LRFreport30-09.pdf< (accessed 14 July 2005).

"Operating environment of the Legal Profession in Uganda in 2010" Report by Uganda Law Society (2010).