A CRITICAL ANALYSIS OF THE EFFECTIVENESS OF THE PRINCIPLE OF SEPARATION OF POWER IN UGANDA.

BY

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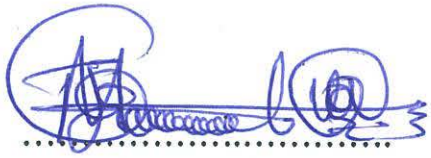
A DISSERTATION TO BE SUBMITTED TO THE FACULTY OF LAW IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF A DEGREE OF BACHELOR OF LAWS AT KAMPALA INTERNATIONAL UNIVERSITY.

SUPERVISOR.



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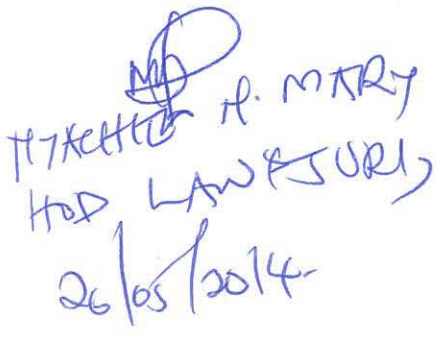

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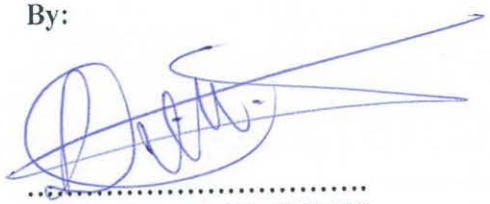
DECLARATION

I LUTAAYA RAMATHAN do hereby declare that the research work I have submitted has never been submitted to any institution for any academic award and that the same is my original work.

Declared and Signed at Kampala this 22nd **day of** April **the year 2014,**

By:



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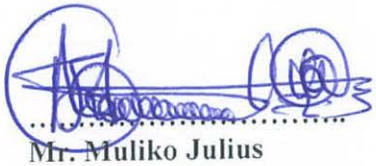

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Mr. Muliko Julius
SUPERVISOR

DEDICATION

I dedicate my research work to my parents Hajji Swaibu Semwanga and Hajjat Norah Lutaaya, Hon. Namayanja Rose Nsereko and the managing partner of Kintu Nteza & Co. Advocates, Mr. Kintu Felix Edward Nteza for their academic, financial and moral support towards my education.

Thank you.

ACKNOWLEDGEMENT

I thank the almighty Allah for all the lifetime He has given till.

Special thanks to the staff and management of Kintu Nteza & Co. Advocates for the time they have accorded me during the entire academic session and their academic guidance towards me.

Great and sincere thanks and appreciation to Mr. Muliko Julias Esq, my supervisor for his full commitment and guidance he accorded to me throughout the entire work despite his busy schedule.

ABSTRACT

In multi party nations the doctrine of separation of power should put at the apex as people have different political ideologies. This would not the case in states that have no multi party system as all people and all authorities would be acting and or seen to be acting in the name and in the interest of the all citizens who have a similar political thinking.

However, in a multi arty system of governance, the opposition which is composed of the advising members of the sitting government will always need to see that all arms of government which happens to be the principle of the doctrine of separation of power independent from each other.

Despite the fact that the executive is almost the appointing authority even of the judiciary, it would be disrespect of the doctrine if the executive uses the opportunity to exploit the judiciary and or direct it on how to do and conduct its work.

On the other hand the legislature comprised of the members of the ruling party and the opposition, the executive should not direct its members on the conduct of their duties in the August House as this would lead to infringement on the independence of the house and the entire decisions there from.

Therefore all organs of the government should do and conduct their duties independently.

Bearing in mind that each arm has a duty of checking on the other in terms of how it has used it powers, each arm should therefore diligently check on other in order to avoid misuse of power so vested in each institution.

More so the respect of either institution by the other encourages rule of law as every institution would conduct its self and its duties within the armpits of the powers so accorded to it by the law and in the event that it supersedes its powers, the other institution will have to come in check on the same and the other will also respect the actions of the checking institution.

LIST OF ACRONYMS

NRM	National Resistance Movement
UPC	Uganda People's Congress
GAVI	Global Alliance for Vaccines and Immunization
IGG	Inspector General of Government
UBC	Uganda Broadcasting Corporation
BC	Broadcasting Council
NTV	National Television
M.C.A	The magistrates court Act
Cap	Chapter
Ulii	Uganda Legal Information Institute
NCA	The National Constitutional Assembly of Wales.
MP	Members(s) of Parliament
KB	King's Bench
QB	Queen's Bench

CHAPTER ONE

1.0 Introduction

This chapter presents and describes the background of the study, problem of the research, purpose and objectives of this study, research question, and area of the study and significance of the study and methodology and literature review.

1.1 Background of the study

The doctrine steams from the idea that the welfare of society is enhanced by the preservation of some distinction and balance between the powers of various components of the society, has had a place in western thought from the earliest times. According to Plato,[1] the balance between the powers of the nobility and those of the people formed basis of the doctrine of separation of power whereas Aristotle[i]identified the three powers of the State as the deliberative, the magisterial and the judicative. Although Aristotle identified the separate powers in that way he stopped short of suggesting that they should be exercised by different organs of the State. Nevertheless this identification of the distinct powers or functions of the State is regarded as the seed from which the modern doctrine of separation of powers has sprung. The doctrine thus emerged during the period of the Roman republic but in imperial times was subordinated to the absolute power of the supreme, often deified, emperor. Nevertheless the continued, albeit weakened, survival of republican forms as well as the existence of a coherent and sophisticated body of law distinct from, although not superior to the will of the emperor, kept alive an understanding of the distinct functions of the State.

It was universally held in western Christendom that the Divine law both revealed and natural was binding upon all rulers not only upon the conscience of the monarch which could be prodded by the judgment of churchmen and nobles but could operate to relieve subjects of their duty of allegiance and to justify them in disobeying the royal authority or even rebelling against it.

[1]. *In the Book of his Politics-iv*

Similarly in England, the notion of the separation of powers developed from three aspects, the idea that royal power was subject to Divine Law and its corollary with respect to the subject's duty of allegiance and obedience which now forms the executive, the Common Law derived from the customary laws existing at the time of the Norman Conquest which was fashioned by the Norman lawyers and the king's judges, into a unified and coherent body of law which was independent of legislation and the royal prerogatives and the king was bound to respect the law thus the legislature and the king's judges who applied this law formed the judiciary. The independency of such arms was summarized in the famous dictum "The king is under no man, but under God and the law"[2].

The gradual growth and authority of the institution of parliament added a further dimension to the separate exercise of the distinct powers of the State which Aristotle had identified. Legislation was enacted by the king in Parliament. The executive power was exercised by the king through the high officers of State. The judicial power was exercised by the king's judges.

By this time another novel political doctrine originating on the continent took root in England to the peril of the independent exercise of the separate powers of the State. The doctrine of the divine right of kings to govern was enthusiastically espoused by the Stuart monarchs. It placed the king above all legal, political and ecclesiastical restraints the impact of which was the confrontation of the judiciary and the legislature by the king/monarchy which formed the executive.

It should be noted that after ushering in of the Stuarts Era, the principle of the exercise of judicial power independently of royal power was distinctly unattractive to the Stuart kings. They asserted an absolute power of appointment and dismissal of judges who did not believe in the supremacy of the king above the Law that is judiciary and parliament. The case in point is James II dismissed a Chief Justice of the Common Pleas, a Chief Baron of the Exchequer and two puisne judges. Those practices of the Stuart kings as well as their claim to dispense from compliance with the laws passed by parliament led paradoxically to the establishment of the conditions which now underpin the independence of the judiciary. The struggle between the king and parliament led to the development of the theory of an independent judiciary and when the Stuarts

[2] *The Spirit of the Laws*

were overthrown by the revolution of 1688, the new regime was determined that such excesses of royal power would not be repeated.

The constitutional changes which followed the revolution of 1688 emphasised the distinction between the legislative and the executive power. This was actualized by the Bill of Rights of 1689 that prohibited the suspension of laws by the crown without the consent of parliament and the levying of taxes except by grant of parliament. The legislative power was thereby placed firmly in the hands of parliament and distinguished from the crown's exercise of executive power. The separation and independence of the judicial power was provided for in the Act of Settlement 1701. The judges were no longer to hold office only during the king's pleasure but were to have security of tenure during good behaviour. The king's power to remove judges would be exercised only upon an address of both Houses of Parliament and Judicial salaries were fixed.

In 1748 Montesquieu repositioned the doctrine of the separation of powers which was the first fully developed theoretical recognition and formulation of the doctrine which had a profound influence on all subsequent European, American Constitutions and upon subsequent political and legal thought. In view of the great influence of his work, it is worth quoting, as of particular interest of the separation of the judicial power from the other two powers; *"Again there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression."*

Framers of the different Constitutions including that of Uganda[3]were greatly influenced by Montesquieu's thought as well as by the post-1688 constitutional arrangements in England. They opted for a complete legal separation of powers.

To attentively consider the different departments of power, it must be perceived that, in a government they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be

[3]1995 Ugandan constitution

least in a capacity to annoy or injure them. The Executive on the other hand not only dispenses the honours, but holds the sword of the community whereas the legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated and on the contrary the judiciary, has no influence over either the sword or the purse: no direction either of the strength or of the wealth of the society and can take no active resolution whatever. It may truly be said to have neither force nor will but merely judgment and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments[4].

The doctrine steams from the idea that the welfare of society is enhanced by the preservation of some distinction and balance between the powers of various components of the society, has had a place in western thought from the earliest times. According to Plato,[5] the balance between the powers of the nobility and those of the people formed basis of the doctrine of separation of power whereas Aristotle[6] identified the three powers of the State as the deliberative, the magisterial and the judicative. Although Aristotle identified the separate powers in that way he stopped short of suggesting that they should be exercised by different organs of the State. Nevertheless this identification of the distinct powers or functions of the State is regarded as the seed from which the modern doctrine of separation of powers has sprung. The doctrine thus emerged during the period of the Roman republic but in imperial times was subordinated to the absolute power of the supreme, often deified, emperor. Nevertheless the continued, albeit weakened, survival of republican forms as well as the existence of a coherent and sophisticated body of law distinct from, although not superior to the will of the emperor, kept alive an understanding of the distinct functions of the State.

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Similarly in England, the notion of the separation of powers developed from three aspects, the idea that royal power was subject to Divine Law and its corollary with respect to the subject's

[4] For a major work on governance see: Wade HWR and Forsyth CF: *Administrative law* (8ed); OUP2000.
[5] *Wade and Bradley –Constitutional and Administrative Law 11th Edition page 23*
[6] *Per Baron de Montesquieu*

duty of allegiance and obedience which now forms the executive, the Common Law derived from the customary laws existing at the time of the Norman Conquest which was fashioned by the Norman lawyers and the king's judges, into a unified and coherent body of law which was independent of legislation and the royal prerogatives and the king was bound to respect the law thus the legislature and the king's judges who applied this law formed the judiciary. The independency of such arms was summarized in the famous dictum "The king is under no man, but under God and the law."[7]

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[7] *Blacks law dictionary 8th edtion at pg. 1395-1396*

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Framers of the different Constitutions including that of Uganda[10] were greatly influenced by Montesquieu's thought as well as by the post-1688 constitutional arrangements in England. They opted for a complete legal separation of powers.

To attentively consider the different departments of power, it must be perceived that, in a government they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive on the other hand not only dispenses

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[8] *Statesman and Laws*
[9] *In the Book of his Politics-iv*
[10] *According to Bracton*

This paper therefore provides a simple examination of the instances that call separation of powers. It goes ahead to examine the Ibingira case and the applicability of the doctrine in several other common wealth countries. For these reasons, this paper is divided into five chapters. The following is its chapter breakdown:

Chapter 1: The Concept of separation of powers: an Overview

This chapter briefly introduces the concept of separation of powers. It then goes ahead to touch on the major parts on how the research will be carried out so as to bring in a better understanding on why the veil ought to be lifted.

Chapter 2: Literature Review

This chapter discusses previous research about the topic it puts across what this research aims at hat misses in previous works.

Chapter 3: Separation of power in the Contemporary Ugandan Setting

This chapter simply gives a simple explanation on what the doctrine of separation of power is. It highlights on the circumstances that make it necessary for separation of power both in constitutional terms and from a common law point of view. In view of this, this chapter gives a brief critique on the current happenings in Uganda more so in regards to the Ibingira case all in a bid to see whether those actions were justified in that situation.

Chapter 4: Reforms in the Area of separation of power

The necessary reforms are outlined in view of the shortcomings that follow this area of constitutional law. Other jurisprudences are also investigated with a view of checking the viability of this part of constitutional law.

Chapter 5: Conclusion and Recommendations

This chapter puts the whole research paper into context by discussing it wholly and summarily.

Definition of separation of power

The phrase "separation of power" is derived from two key word to wit: "separate" and "power" whereof "separate" is defined to mean dividing a group of people or things into smaller groups whereas "power" is defined to mean the ability to have and exercise political control over a country or government.[12]

Therefore, the concept of 'separation of power' may mean three different things, that is to say: that the same persons shall not form part of more than one of the organs of government, for example, that Ministers should not sit in Parliament; that one organ of government should not control or interfere with the exercise of its function by another organ, for example, that the judiciary should be independent of the Executive; that one organ of government should not exercise the functions of another, for example, that Ministers should not have legislative powers.[13]

While referring to a model for the governance of democratic states, the phrase has further been defined to mean a situation where the three arms of the state; the executive (or government), the legislature, and the judiciary have independent powers and areas of responsibility but interdependent branches.[14]

Legally speaking, the phrase "separation of power" has been defined to mean the division of governmental authority into three brunches i.e. the legislature, executive and judiciary each having specific duties of which neither of the other brunches can encroach thus it's a constitutional doctrine of checks and balances by which people are protected against tyranny.[15]

1.2 Statement of the Problem

The study has examined the relevancy of the doctrine of separation of power to the development of constitutionalism and the political history and future of Uganda. This has included the extent of respect of roles functions and duties of each department of government, the independency of

[2] *In the Book of his Politics-iv*
[3] *According to Bracton*
[4] *The Spirit of the Laws*
[5] *The Spirit of the Laws-Chapter 6*

either departments and the extent of infringement of one department by another department of the government.

The study has further focused on the extent to which the different departments have carried on their role of checking on the powers of other departments to the benefit of the subjects and the extent of their failures to the detriment of the led. Much emphasis was also be put on the analysis of the existing laws and their relevance to the doctrine of separation of power pointed, out their weaknesses and also made relevant recommendations to such weaknesses so as to strengthen the doctrine of separation of power which is a cardinal principle of rule of law in democratic states.

1.3 Significance of the Study

The study benefits the following disciplines;

It will help the Ministry of constitutional affairs and justice to design appropriate strategies and policies that will help in lifting there to implement the doctrine of separation of powers in Uganda.

The research report is of great significance to the researcher, as it will act as a way of attaining Bachelor of Laws from the University. This is because a research paper is a requirement for an individual to graduate from Kampala International University.

Lastly, it is expected to form basis for future research on related studies in Kampala International University, as it will boost documentary literature in the Library. Therefore it will be used for future reference.

1.4 Objectives

1.4.1 General Objectives

The study was intended at examining the doctrine of separation of powers in Uganda.

..4.2 Specific Objectives

i. The research examined the law relating to the doctrine of separation of powers in Uganda.
ii. The research examined the relevancy of the doctrine of separation of powers in Uganda.
iii. The research identified solutions to the challenges faced by the doctrine of separation of powers in Uganda.

l.5 Research questions

i. What are the laws relating to the doctrine of separation of powers in Uganda?
ii. What are the relevancies of the doctrine of separation of powers in Uganda?
iii. What are the solutions to the challenges faced in doctrine of separation of powers in Uganda?

l.6 Scope of the study

l.6.1 Geographical Scope

The study was carried out in Uganda.

l.6.2 Content Scope

The study was aimed at investigating the law relating to the doctrine of separation of powers in Uganda. It further determined the relevancy of separation of powers in Uganda, and to find out solutions to the challenges faced by the doctrine in Uganda.

l.6.3 Time Scope

This study was carried out in a period of two months (February – April 2014). This duration of time was enough for the researcher and it was used to carry out the research and thereafter obtained the necessary data and information.

CHAPTER TWO

2.1 Literature review

The researcher discovered that lot of research has been made in relation to the doctrine of separation of power both by national and international scholars. A lot of books and articles have been written all in the name of tracing the practicability and respect of the doctrine by its inter-arms.

Journalists have made a number of articles and papers alongside the legal brains that have written and presented papers connected to the doctrine. This has been supplemented by the presentations of heads of foreign missions and heads of political and religious institutions.

This however has frequently highlighted the extent at which the executive of the current legal regime has ursped and used the state agencies to arbitrary use its powers and authority, infringe on the powers of other arms, disrespect their decisions and thus interfering with their independence.

This has left a lot of loopholes in commenting on the role of either organs of government in relation to their roles in respecting and interfering with the duties and roles of other organs without necessarily pointing at on organ. This has been the main reason and point which has prompted a research on this topic

Further all the research work which has been done does not show to which each organ has been interfered with and hence causing another reason for this research.

By the end of this research, it will be shown that each organ of government in Uganda has had respects and disrespect toward the other organ, and that at several instances all organs have at least interfered with the independence of other organs.

Cheryl Saunders in his Article "**The Separation of Powers and the Judicial Branch**", discusses the meaning of the doctrine of separation of powers in its application to the judiciary in countries in the British or (perhaps more suitably) the Commonwealth constitutional tradition, with particular reference to questions of a broadly constitutional kind that many such countries are facing. It is thus intended to be comparative, rather than directed specifically to the

circumstances of the United Kingdom, although the topic clearly is prompted by developments, here.

The comparison might have been less productive before these changes were set in train. The institutional arrangements for the protection of judicial independence and the rule of law in most Commonwealth countries are broadly similar to the arrangements that were broadly assumed to be in place in the United Kingdom, or at least in England and Wales. Relevantly, in most Commonwealth countries they are justified by a doctrine of separation of powers; often as a constitutional requirement. In fact, however, the arrangements in this country were quite different in significant respects. This does not mean that they were worse. It helps to explain, however, why the doctrine of separation of powers has had here what Trevor Allan rightly describes as "unsympathetic treatment".[16] It also explains why the changes that are in train align the position of the judiciary in this country more closely with countries elsewhere, removing some obstacles to effective comparison and bringing the United Kingdom under what I will argue is a distinctive separation of powers umbrella. However his article does not look at the other organs of the government, it focuses on the effectiveness of the doctrine on the judiciary hence this research.

In another Article by **Hon Justice Len King, AC** he explained that an initial difficulty in any discussion of the doctrine of the separation of powers is to decide what the doctrine embraces and what the expression means. He used ***Wade and Bradley's*** words in describing states that:
The concept of 'separation' may mean three different things:
"that the same persons shall not form part of more than one of the organs of government, for example, that Ministers should not sit in Parliament, that one organ of government should not control or interfere with the exercise of its function by another organ, for example, that the judiciary should be independent of the Executive, that one organ of government should not exercise the functions of another, for example, that Ministers should not have legislative powers."[17]

[16] Trevor Allan, *Law, Liberty and Justice*, Clarendon Press, Oxford, 1993, 50; see also Eric Barendt "Separation of Powers and Constitutional Government" [1995] *Public Law* 599, to much the same effect.
[17] *Constitutional and Administrative Law* 11th Edition page 23

It will be seen at once that none of these meanings apply to the relationship of the legislature and the executive government in this country, at least to any substantial extent. Indeed it is not too much to say that the doctrine as it applies in this country extends little beyond the principle that the judiciary must be independent, to the fullest convenient, and perhaps essential if the purpose of this paper is to be fulfilled, to make some reference, under the topic of separation of powers, to the relationship of the legislature and the executive government, as well as to the relationship of those two organs with the judiciary.

In another article by PETER A. GERANGELOS is concerned with the identification of principles, derived from the doctrine of the separation of powers, which govern the relationship between the Commonwealth Parliament and the courts referred to in Ch III of the Commonwealth Constitution in the situation where Parliament purports to amend the law which is applicable in pending legal proceedings. This is an area of considerable complexity in that, unlike legislative usurpations of judicial power, such as a Bill of Attainder, **Graham Spindler** also in his Article[18]The doctrine of the separation of powers divides the institutions of government into three branches: legislative, executive and judicial: the legislature makes the laws; the executive put the laws into operation; and the judiciary interprets the laws. The powers and functions of each are separate and carried out by separate personnel. No single agency is able to exercise complete authority, each being interdependent on the other. Power thus divided should prevent absolutism (as in monarchies or dictatorships where all branches are concentrated in a single authority) or corruption arising from the opportunities that unchecked power offers. The doctrine can be extended to enable the three branches to act as checks and balances on each other. Each branch's independence helps keep the others from exceeding their power, thus ensuring the rule of law and protecting individual rights.

Obviously under the Westminster System – the parliamentary system of government Australia adopted and adapted from England – this separation does not fully exist. Certainly in Australia the three branches exist: legislature in the form of parliaments; executive in the form of the minsters and the government departments and agencies they are responsible for; and the judiciary or the judges and courts. However, since the ministry (executive) is drawn from and

[18] Separation of powers: doctrine and practice originally appeared in the publication legal date march 2000

responsible to the parliament (legislature) there is a great deal of interconnection in both personnel and actions. The separation of the judiciary is more distinct.

2.2 Origins of the Doctrine

States throughout history have developed concepts and methods of separation of power. In England, parliament from its origins at least seven centuries ago was central to an struggle for power between the original executive (the monarch) and the councils of landowners, church leaders and commons. Similarly judges, originally representing the executive, developed increasing independence. Parliament was a significant force in an increasingly mixed form of government by the time of the Tudors and soon afterwards was directly challenging the doctrine of the divine right to power of the Stuart monarchs. The English Civil War (1642-60) between parliament and monarchy resulted in the monarchy continuing but under an arrangement which established not only parliament's legislative authority but also opened the way to the development of cabinet government.

English philosopher John Locke (1632-1704)[19] noted the temptations to corruption that exist where *"... the same persons who have the powers of making laws to have also in their hands the power to execute them ..."*Locke's views were part of a growing English radical tradition, but it was French philosopher, Baron de Montesquieu (1689-1755), who articulated the fundamentals of the separation doctrine as a result of visiting England in 1729-31. Montesquieu[20] considered that English liberty was preserved by its institutional arrangements. He saw not only separations of power between the three main branches of English government, but within them, such as the decision-sharing power of judges with juries; or the separation of the monarch and parliament within the legislative process.

Locke and Montesquieu's ideas found a practical expression in the American Revolution in the 1780s. Motivated by a desire to make impossible the abuses of power they saw as emerging from the England of George III, the framers of the Constitution of the United States adopted and

[19] In his book, *Second Treatise of Civil Government*
[20] In his Book, *The Spirit of Laws* (1748),

expanded the separation of powers doctrine. To help ensure the preservation of liberty, the three branches of government were both separated and balanced. Each had separate personnel and there were separate elections for executive and legislature. Each had specific powers and some form of veto over the other. The power of one branch to intervene in another through veto, ratification of appointments, impeachment, judicial review of legislation by the Supreme Court (its ability to strike down legislation or regulations deemed unconstitutional), and so forth, strengthened the separation of powers concept, though inevitably involving each branch in the affairs of another and to some extent actually giving some of the powers of one branch to another

It was a high water mark in institutionalizing individual liberty through the separation of powers and one embedded even further by early judgments of the Supreme Court but, as the struggles, inefficiencies and political gamesmanship illustrated by the recent Clinton impeachment attempt or by Congress's delaying of budgets, it also made government harder. This had been partly the intention. Few subsequent democracies have fully adopted the American approach, but the concept is widely aspired to, though taking varying forms amidst the complex interplay of ideas, interests, institutions and Realpolitik that are part of each system of government.

2.3 The Doctrine in Australia - the Commonwealth

While certainly not the American model, a form of the doctrine operates in the Australian versions of the Westminster model, most notably in the Federal Constitution. The writers of the Australian Constitution in the 1890s retained the Westminster cabinet system. Unlike the Americans of the 1780s, they had several working democratic federal constitutional models to examine, along with well-established democratic traditions of their own, and wanted to maintain strong ties with Britain, not create a revolution. Their interest in the U.S. Constitution was more in its mechanisms of federation such as the Senate, than in the checks and balances between branches of government. Nevertheless some elements can be found.

The Australian Constitution begins with separate chapters each for the Parliament, Executive and Judiciary, but this does not constitute a separation of powers in itself. Executive power was nominally allocated to the Monarch, or her representative the Governor-General (Section 61), while allocating it in practice to the Ministry by requiring the Governor-General to act on the

Government's advice (subject, of course to the Governor-General's controversial 'reserve powers'). This was the Westminster model and it relied on convention as much as the words of the Constitution. However, the specific requirement for Ministers of State to sit in Parliament (Section 64) clearly established the connection between Executive and Parliament and effectively prevented any American-style separate executive.

The situation with the judiciary however was found to be different. The whole of Chapter III of the Constitution (Judicial Power of the Commonwealth)[21] and Section 71 in particular, was found to have been used by the courts to establish a strict separation of powers for Federal Courts from the ministry and parliament. In New South Wales v. Commonwealth[22], the High Court ruled that this part of the Constitution does embody the doctrine of separation of judicial powers. This also applies to tribunals and commissions set up by Federal Parliament which, unlike some of their equivalents in the states, can only recommend consequences. The Federal Parliament itself, however, has the rarely used privilege of being able to act as a court in some circumstances, primarily where it may regard a non-member as acting "in contempt" of parliament.

The Constitution does provide for one form of physical separation of executive and legislature. Section 44, concerning the disqualifications applying to membership of Parliament, excludes from Parliament government employees (who hold "an office of profit under the crown") along with people in certain contractual arrangements with the Commonwealth. This was demonstrated in 1992 after Independent MP, Phil Cleary, had won the Victorian seat of Wills. Cleary, on leave without pay from the Victorian Education Department at the time of his election, was held to be holding an office of profit under the Crown and disqualified. The Court noted that that Section 44's intention was to separate executive influence from the legislature. This requirement does not apply to state elections.

Elections themselves, in recent years, have reflected voter concern with separation of powers-

[21] Laws of new south Wales
[22] [1990] HCA 2; (1990) 169 CLR 482; 90 ALR 355,

related issues. In 1995, NSW voters overwhelmingly endorsed a referendum proposal clarifying the independence of judges. In the 1999 Victorian election, voters appeared to reject a perceived concentration of power by the Premier, particularly in his gagging of fellow party members and changes to the role of the state Auditor General.

Even though the Australian Constitution says little about political parties, parties have an important impact on the relationship of powers between executive and legislature. The existence of varied political parties is a feature of the freedoms of opinion essential to a liberal democratic system and the contest between them is a factor in controlling the potential excesses of any one group. However, the system can have other effects. Since by convention the party controlling the lower house forms the government, then the ministry (being also the party leaders) also exerts authority over the lower house. The exceptional strength of Australian party discipline ensures that, within the house, every member of the numerically larger party will almost always support the executive and its propositions on all issues. Despite debates and the best efforts of the Opposition and Independents (particularly in Question Time), this inevitably weakens the effective scrutiny of the executive by the legislature.

Party domination in Australia thus further reduces the separation between executive and legislature, although Parliamentary processes do usually prevail. However, robust democratic systems have a capacity to self-correct, as has been demonstrated by the Senate. Because of the party system, the Senate failed to ever be 'the states' house' originally intended by the Constitutional framers. However, the adoption of a proportional system of voting in 1949 created a new dynamic and the Senate in recent decades has rarely been controlled by Governments. Minor parties have gained greater representation and Senate majorities on votes come not from the discipline of a single party but from a coalition of groups on a particular issue. This happens in most democracies but in Australia is often regarded (particularly by supporters of the major parties) as an unnatural aberration. As a result the role of the Parliament as scrutinizer of executive government, immobilized to some extent in the Lower House by the party system, has been expanded by the Upper House.

2.4 The Doctrine in Australia - the States:

In the case of the Australian states, where the basic governmental structures were in place before the Australian Constitution, separation of powers has little constitutional existence even though it is generally practiced. This has been shown in cases such as Clyne v. East[23] for NSW and the doctrine extensively discussed in cases such as Kable Vs. The Director of Public Prosecutions[24]. In these and other judgments it was noted that a 'general' doctrine of separation of powers operates as accepted practice in the state through constitutional convention. That the position is similar in other states has been confirmed in various cases in Victoria, Western Australia and South Australia.

In practice, there is far more crossing of responsibilities in the states than federally. As with the Commonwealth, Ministers have powers to make regulations (in effect, legislating) and are, of course, Members of Parliament and responsible to it. Again, the rigid party system increases the domination of at least the lower house by the executive from the majority party and there are often complaints that the executive is manipulating parliament or treating it with contempt. In some cases upper houses have increased their roles of scrutiny of the executive, though this varies according to the electoral systems used for upper houses – where they exist.

Parliamentary scrutiny of the executive and, in particular, by the NSW Upper House, was tested in 1996-99 when Treasurer Michael Egan, on behalf of cabinet, refused to table documents in the Legislative Council of which he is a member. The documents related to several controversial issues, and the reasons given for this refusal included commercial confidentiality, public interest immunity, legal professional privilege and cabinet confidentiality. The Council, determined to exercise its scrutiny of the executive, pressed the issues and eventually adjudged the Treasurer in contempt, suspending him from the house twice. The matters were resolved in several cases in the High Court and the Supreme Court of NSW. The results upheld that the Legislative Council did have the power to order the production of documents by a member of the House, including a minister, and could counter obstruction where it occurred. However, the question of the extent of

[23] (1967) 68 SR (NSW) 385. 2.
[24] (1996) 189 CLR 51; [1996] HCA 24

the power as regards cabinet documents will be subject to continued court interpretation.

In relation to the judiciary, traditionally the most separated and independent arm, the separation so clearly established in the Commonwealth does not exist in the state constitutions. Nevertheless, certain state courts, having had jurisdiction to deal with Federal laws conferred on them by the Commonwealth Parliament, have in effect a Federal Constitutional basis for separation of their powers. The general separation of state courts is practiced, but the issue of tribunals set up by state parliaments is different since such bodies sometimes exercise both executive and judicial power through being able to impose fines or penalties. The Administrative Decisions Tribunal in NSW is one such example.

In NSW, the issue of judicial independence was recently raised in a rare Australian instance of a legislature exercising scrutiny over a judge. The power of removal of a judge in NSW lies with the Governor on Parliamentary recommendation, the possible grounds being proved misbehaviour or incapacity. In 1998 the Judicial Commission recommended Parliament consider removal of a Supreme Court Judge on the grounds of incapacity. In the Court of Appeal it was argued that this contradicted the concept of the independence of the judiciary. The Supreme Court agreed that[25], despite the lack of any formal separation of powers in the NSW Constitution, the Commonwealth Constitution did significantly restrain Parliamentary interference with the judiciary. Nevertheless, the court held that nothing had occurred that would impinge on the integrity of the judicial system and that Parliament could consider the case. Justice Bruce appeared before the Legislative Council but removal was not recommended.

Therefore while the doctrine of the separation of powers and its practice will not necessarily be the same thing, the purpose behind the doctrine can be seen to be embedded in democracies. In the Westminster system, as practiced in Australia, discussion of the doctrine is riddled with exceptions and variations. Certainly, in its classical form it exists here only partially at best; but in practice mechanisms for avoiding the over-concentration of power exist in many ways – through constitutions and conventions; the bicameral system; multiple political parties; elections; the media; courts and tribunals; the federal system itself; and the active, ongoing participation of

[25] Justice Bruce justice of the court of Appeal of NSW

citizens. The doctrine is part of a simultaneously robust and delicate constant interplay between the arms of government. A tension between separation and concentration of powers will always exist, and the greatest danger will always lie with the executive arm – not judges or legislatures – because in the executive lies the greatest potential and practice for power and for its corruption. Preventing this in our system relies as much upon conventions as constitutions and the alarm bells should ring loudly when government leaders dismiss or profess ignorance of the concept.

2.5 The law relating to separation of powers as a whole and the relevancy of doctrine in the contemporary Ugandan Setting.

2.5.0: Introduction

Some of the intriguing issues that may arise due to separation of powers revolve around the aspect of constitutional law. What options may be available in case one organ of the government puts assets out of the reach of the other two remaining organs within the government? Yet again, what options are available where one organ is used by the other to conceal funds extracted improperly from the public? In Matovu's case[26], 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."

G.W.KANYEIHAMBA in his book[27], had the fundamental consequence of establishing that the three organs are separate and distinct from each other and that are not agents to each other. Pursuant to this, any irregularity between the three organs of the government which may in any way undermine the provisions of the constitution may be referred to the constitutional court for purposes of interpretation. This naturally means that the constitution is the regulator of the doctrine of separation of powers. This can only be achieved if there is rule of law where by all the three organs of the government are governed by the same law.[28] It then naturally follows that

[26] Supra
[27] *constitutional and political history of Uganda*
[28] *Supra*

the public can pursue the individual offices directly in case of any irregularity contradicting with the doctrine of separation of powers.

Secondly, the execution of the objects of this chapter has been done manifestly in consideration of the fact that not all provisions in regards to separation of power will be covered and therefore, without prejudice, only the most vital provisions and aspects will be covered.

Lastly, it should be clearly noted that in covering the whole scope of this chapter as well as the foregoing chapters, mention of provisions in specific consideration of ministers and members of parliament as examples of separation of powers can only be legitimate instances in an environment where the organs are the ones that foam the governments themselves. It is therefore genuine to argue that such examples ought to be provided where it is made clear that we are under an assumption that we are dealing with the government its self.

The NTV saga

On Wednesday April 4, 2007, the Ugandan Parliament became a drama theater when the executive showed the Members of Parliament (MPs) that they were just units making up a paper tiger in a heated debate over the refusal or delay by the Ugandan government to re-allow Nation TV (NTV) to broadcast in Uganda. NTV signals were switched off by Uganda Broadcasting Corporation TV (UBC TV) on the instructions of the Broadcasting Council (BC) on January 27, 2007. Its signal was re-instated two days later by UBC but was again switched off a day later by officials from the Broadcasting Council. Two of NTV's transmitters were also confiscated by the BC.

MPs from both the ruling National Resistance Movement (NRM) and the opposition put up a spirited fight to ensure the station re-opened immediately but the government ministers insisted that the government could not have NTV re-opened. This debate followed two resolutions by the Parliament of Uganda to have the TV station re-opened by mid night April 2, 2007.

The Minister of Information, Ali Kirunda Kivejinja, said the station had failed to fulfill its pre-license obligations and that the Broadcasting Council (BC) was ready to get it back on air "as soon as legal and procedural requirements have been complied with." This is in spite of his earlier briefing to the same parliament that the NTV closure was a small administrative matter

between the station and the Uganda Broadcasting Corporation (UBC), which could easily be sorted out.

In the April 4, 2007 debate, the Ugandan government failed to commit itself to any timelines to re-open NTV despite pleas from the Members of Parliament who accused the executive of deliberately undermining the authority of the parliament and frustrating an investor. "We have done our part and stated our position which is that NTV should be reopened. We leave the rest to the executive," the Deputy Speaker, Rebecca Kadaga wrapped up the debate.[29]

By Thursday April 14, 2007 when this article was written, the Ugandan government had not switched NTV back on air, meaning that the parliament's resolutions were just a waste of time and the whole saga was a sign of abuse to the notion of the separation of powers as coined by Montesquieu.

2.5.1 The doctrine of separation of powers its values and limitations

The doctrine of separation of powers is one of the essential elements of the rule of law, because without a proper separation of powers the rule of law will be imperilled, but the doctrine has a wider application and this Constitution Watch will examine it in greater detail.

It will be seen that although the doctrine represents an ideal which cannot be put into practice absolutely, it does emphasise the need to provide adequate checks and balances within the governmental system.[30]

2.5.2 Doctrine of Separation of Powers

In essence, the doctrine of separation of powers is that for a free and democratic society to exist there must be a clear separation between the three branches of government, namely:

2.5.3 The Executive:

[29]Report by the daily monitor Thursday April 4th 2007
[30]G.W.Kanyeihamba: constitutional and political history of Uganda

The executive is the arm of government that has sole authority and responsibility for the daily administration of the state[31], it executive branch executes or enforces the law. The division of power into separate branches of government is central to the idea of the separation of powers[32].

The executive derives its legality from the 1995 Uganda constitution[33]. It comprises of the president of Uganda[34], the vice president, the cabinet and state ministers who are appointed by the president, the police force and the Defence force, and other law-enforcement organisations all the administrative, law-enforcement and coercive organs of the State fall within the Executive Branch, making it potentially the most powerful of the three branches of government unless its powers are subject to limitations.

The separation of powers system is designed to distribute authority among several branches an attempt to preserve individual liberty in response to tyrannical leadership throughout history. The executive officer is not supposed to make laws (the role of the legislature) or interpret them (the role of the judiciary). The role of the executive is to enforce the law as written by the legislature and interpreted by the judicial system. However it is also a source of certain types of law, including decrees or executive order, Executive bureaucracies commonly the source of regulations.

In Uganda, the leader of the executive branch being the president, he gains authority by virtue of being elected by the majority suffrage of at least 50% of the registered voters[35] and holds the office for tenure of 5 years[36] subjected to a right to seek a re-election. The president as the head of state of head of the executive has wide powers including but not limited to appointment of judicial officers to notably, chief justice, deputy chief justice, principle Justice Judges of the high court[37].

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[31] Executive Branch, www.dictionary.reference.com

[32] Separation of Powers, www.reference.com
[33] 7th chapterof the 1995 Uganda Constitution.
[34] Article 98 of the constitution
[35] Article 103 of the constitution
[36] Article 105 of the constitution
[37] Article 142 of the constitution

2.5.4 The Legislature:

The parliament of Uganda derives its legality under the provisions of the 1995 constitution[38]. The composition of the Parliament of Uganda is set out under[39] and it comprises of two hundred and fifteen (215) directly elected members representing constituencies, sixty nine (69) District Women Representatives, and twenty five (25) Representatives of Special Interest Groups i.e. ten (10) for Uganda Peoples Defense Forces (the national army), five (5) for Workers, five (5) for the Youth and five (5) for Persons with Disabilities.

The mode of electing members of the legislature is set out in the constitution[40], for the directly elected members and district women representatives, voting is by universal adult suffrage secret ballot and winners are determined by a first past the post methods. The Members Representing Special Interest Groups are elected by secret ballot in Electoral Collages that comprise of leaders in those groups from grass root level. The winners are determined by a first past the post method within the collages.

The election of the members of the legislature is conducted by the electoral commission which was established and mandated by constitution[41] to conduct free and fair elections and referenda. The activities of the Electoral Commission under this role are regulated by several Acts of parliament and regulations made there under to wit The Electoral Commission Act (as amended) [42], the 1995 Uganda Constitution, Women, Youth and Persons with Disabilities (PWDs) Council Acts, The Political Parties and Organizations Act[43], The Parliamentary Elections Act[44], The Parliamentary Elections (Special Interest Groups) Regulations, 2001(covers Election of Youth, Workers and the Army Representatives to Parliament), The Parliamentary Elections (District Women Representatives) Regulations of 2001, The Local Governments Act[45], The National Youth Council Act and Regulations and The National Women Council Act and Regulations.

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[38] 6th schedule of the 1995 Uganda constitution.
[39] Article 78 of the 1995 Uganda constitution.
[40] Article 81 of the 1995 Uganda constitution
[41] Article 60, 61 and 62 of the 1995 Uganda constitution
[42] Cap 140 Laws of Uganda.
[43] No. 18 of 2005.
[44] No. 17 of 2005.
[45] Cap 243 (as amended)

2.5.5 The Judicial branch:

The judicial branch derives its legality from the constitution[46]. The judiciary comprise of the courts of Judicature as set out under the constitution[47] to include the supreme court[48], the court appeal[49], the constitutional court which is the court of appeal sitting as the constitutional court to hear cases constitutional interpretation[50], the high court[51], and magistrates courts[52] and other courts and or tribunal s set out under other relevant laws including the Local council courts.

The judicial officers in Uganda who hold the highest offices including Chief justice, deputy chief justice, the registrars, the judges, principle judge hold their offices on appointment by the president on approval of the parliament[53] which they hold on terms specified in their employment contracts or may retire upon clocking sixty years.

Other judicial officers are appointed by the judicial service commission which is set out under the constitution[54]. The judicial service commission is entrusted by the duties of overseeing the conduct of judicial officer, discipline and also advising the president on the necessary judicial reforms[55].

It should however be noted that the appointment of judicial officers by the executive an infringement on the principle of separation of power, coupled with the constitutional requirement of subjecting appointed judicial officer to approval of the legislature. A critical study of the judicial service commission reveals that the judicial service commission is also controlled by the executive which appoints the members who hold key positions in it[56] hence a conclusion that the judiciary survives on the mercy of the executive and the legislature. How then do you expect the principle of separation of power to efficient!

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[46] Chapter 8 of the constitution
[47] Article 129
[48] Article 130-133
[49] Article 134-136
[50] Article 137
[51] Article 138-141
[52] A set out under section2 of the Magistrates court Act
[53] Article 142
[54] 146-151
[55] Article 147
[56] Article 146

2.6 How each branch is financed?

It would be impractical to expect each branch of government to raise its own finances. The financing of all the branches must therefore come from the central government fiscus, and may limit their independence because whichever branch controls the fiscus can starve the other branches of funds. In order to maintain the independence of the different branches, the Constitution could make it obligatory for each branch to be provided with adequate funding to enable it to carry out its functions.

2.7 Limitations on the separation of powers

There is probably no country in the world in which the doctrine of separation of powers is applied strictly and absolutely. There are not always clear dividing lines between administrative, legislative and judicial functions jurists have wasted oceans of ink and mountains of paper in trying to define those terms precisely and in a modern State there must be a great deal of co-operation and interaction between the Executive and the Legislature, in particular, if the States business is to be efficiently conducted.

In modern countries, therefore, there is always some overlapping of functions. For example: Legislation has become so far-reaching and complex that Parliament cannot enact all of it. Acts of Parliament must leave details to be filled in by regulations made by other authorities, usually Ministers. Hence the Executive branch must be given some law-making powers. At present all subsidiary legislation must be laid before Parliament, but Parliament has no power to repeal it. It would be closer to the ideal of separation of powers if Parliament did have such a power.

The role of government has expanded so greatly that many decisions which affect people's lives must be made quickly, and some of these decisions require specialised knowledge which is not possessed by judges or magistrates. Many of these decisions are made by administrative tribunals established by and answerable to Ministers. Hence the Executive branch is increasingly given judicial powers. This is not necessarily undesirable so long as the tribunal obey the basic standards of fairness laid down by the law and so long as the courts is able to review their decisions.

It is generally recognised that in a legal system such as ours, judges do not just interpret the law. They develop and adapt the law to take account of changing circumstances, and in that way they actually make law. Hence the judicial branch has some law-making or legislative powers, but this power should not go beyond refining and developing existing law.

In some countries the Head of State is elected by Parliament, not by the people. This is usually the case where the Head of State is non-executive, but in South Africa the executive President is elected by the National Assembly. While this violates the strict doctrine of separation of powers it has the advantage of ensuring that the Executive does not get too powerful and is ultimately answerable to Parliament.

Few modern constitutions provide for the direct election of judges and magistrates. They are usually appointed, subject to safeguards to ensure their independence, by the Executive or the Legislative branch, or by both branches.

Because there cannot be a complete separation between the different branches of government, the doctrine of separation of powers can best be defined as a governmental system of separated institutions sharing power fairly between them. Relative powers of each branch should be balanced.

2.8 Value of the doctrine of separation of powers

Even though the doctrine of separation of powers cannot be applied absolutely, it retains considerable value.

In the first place, it emphasises the need for a State to have strong independent institutions in order to check arbitrary rule by the Executive. This is particularly important in a country such as Uganda among others which does not have a long history of democratic rule. The Executive will always try to increase its powers by encroaching on the functions of the other branches of Government, sometimes for the best of motives. Without strong institutions to oppose it these encroachments by the Executive will continue until the other branches lose their power to check it.

Secondly, the doctrine provides a yardstick against which constitutional proposals can be assessed in order to determine whether or not there will be adequate checks and balances within the governmental system to ensure that individual rights are protected.

2.9 Separation of powers not the only test

As a test for determining whether a constitution or governmental system is good or bad, the doctrine of separation of powers must be applied with caution. It is fair to say that constitutions which completely ignore the doctrine are usually bad ones one of the branches of government will be found to overshadow the others or liable to do so. But constitutions in which the doctrine is observed are not necessarily good ones.

If the doctrine is observed so strictly that the different branches do not co-operate with each other, there may be governmental gridlock. And the doctrine has nothing to say about the nature of the powers that can be exercised by each of the branches within its own sphere.

If, for example, all the powers of the Executive are vested in one individual and there are no limits on his or her power, then the State will be a dictatorship or nearly so; and if the Legislature, though completely independent, is not elected by universal suffrage, then the State will be undemocratic; and if judges, though completely independent and irremovable from office, are ignorant and corrupt, then there will be no rule of law.

So the doctrine of separation of powers has its limits in determining whether or not a State is well governed. It is only one of several tests to be applied.

In the second part of this Constitution Watch we shall compare the three main constitutional proposals that have been put forward since 2000 the so-called Kariba draft constitution, the NCA draft and the Law Society's draft to see how far they provide for a separation of powers.

2.10 The doctrine of separation of powers in Uganda

The doctrine of separation of powers in Uganda is provided for under constitution of 1995 where by the three arms of government are provided under three different chapters as follows:

The legislative organ of government is provided for chapter six which provides[57] that where it states that there shall be a parliament, it also provides for the functions of the parliament, qualifications for the members of parliament, emoluments of members among others. The same chapter provides also for procedures in parliament

Then chapter seven of the constitution[58] provides for the executive arm of government with ***article 98*** providing for the office of the president as the head of states, head of government and commander-in-chief of the Uganda peoples' defence force. The chapter also provides for the election of the president.

Chapter seven[59] includes the office of the vice president under the executive arm of government, the Article goes ahead to include the cabinet as part of the executive under ***Article 111,*** the attorney general under ***article 119*** is also a member of the executive, the director of public prosecutions is also part of the executive as per ***Article 120*** and finally the diplomatic representatives are also seat on the executive.

Chapter eight also provides for the judicial arm of the government which under ***Article 126*** states that

"(1) judicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people." The most important of all is ***Article 128*** which states that "the judiciary shall be independent and shall not be subject to the control of any individual or any authority and that any act or omission by any judicial officer shall not be personally responsible[60]. In 1999, the Constitutional Court again showed that it was not yet prepared to lock horns with the executive and declare the Referendum and Other Provisions Act 1999 as being unconstitutional and therefore null and void.[61] The Act had been passed by Parliament in total disregard of the requirements for quorum laid down by the Constitution and other procedures laid down by law. In a petition brought by Ssemwogerere& Olum[62] challenging the constitutionality of the Act, the Constitutional Court was hesitant to rule that the Act had been

[57] Article 77
[58] Article 98-125
[59] Article 108
[60] The constitution of the republic of Uganda 1995
[61] Ssemwogerere & Olum v. the Attorney General
[62] Supra

passed in an unconstitutional manner and was therefore null and void. It dismissed the petition as incompetent and held that it had no jurisdiction to handle the matter. On appeal by the petitioners, the Supreme Court held that the Constitutional Court had jurisdiction to hear the matter and directed the court to hear the petition on its merits.

In a series of events that were reminiscent of the Ibingira saga of 1960s, perhaps in a bid to avert an impending constitutional crisis, the government hastily enacted the Referendum (Political Systems) Act No. 3 of 2000 before the Constitutional Court could rule on the matter. On June 25, 2004, the Constitutional Court redeemed itself and in a manner that left Ssemwogerere and fellow opposition politicians clapping with glee, rose to the occasion. It declared that the 1999 Referendum Act had been passed in an unconstitutional manner and was therefore null and void.

Similarly, the 2000 Referendum on Political Systems was declared null and void.

The immediate repercussions of this ruling were enormous. The NRM government reacted like it had been slapped in the 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 sympathizers:

"The government will not allow any authority, including the courts, to usurp people's power in any way. We shall not accept this. It will not happen. This is absurd and unacceptable." In the week following the landmark judgment, the Movement mobilized 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 favor. He also attempted to calm the storm by assuring the nation that there would be no crisis as a result of the judgment.

2.11 The Jim muhwezi Saga:

The 1st petitioner, Major General Jim Muhwezi is a Member of Parliament for Rukungiri Municipality Constituency. He is a former Minister of Health in the Central Government of Uganda. The second respondent, Capt. Mike Mukula and the third respondent, Dr. Alex Kamugisha were at the material time Deputy Ministers of Health and the 4th respondent, Alice Kaboyo was at all material times employed as Private Secretary to his Excellency the President at State House Nakasero.In October 2007, the four respondents were charged at Buganda Road Chief Magistrates Court of various offences of abuse of office, theft, embezzlement, causing financial loss, making false documents, forgery and uttering false documents all in connection with Global Alliance for Vaccines and Immunization (GAVI) Funds which were donor funds being administered by the Ministry of Health. The charges were preferred after the Inspector General of Government [IGG] had made a report to the President implicating the four respondents in the misuse of the funds. It was the IGG who had investigated the case on orders of the President and it was that office conducting the prosecutions in the aforementioned court.

At the trial, the respondents pleaded not guilty and objected to being prosecuted by the IGG on the grounds that it would be unconstitutional for that office to prosecute them. They obtained a court order staying the proceedings until the constitutionality of the proposed trial was determined by the Constitutional Court. They filed this petition seeking for the following remedies:-

a) A declaration that the arrest and prosecution by the Inspector General of Government of your petitioners with offences other than offences mentioned in article 230(1) was and is

in contravention of and ultra vires the powers conferred upon the IGG under article 230(1) of the Constitution of the Republic of Uganda 1995.

b) A declaration that the arrest and prosecution of your petitioners by the IGG for the offences mentioned herein above was and continues to be done without authority or legal basis and in contravention of the supreme law of the land and is unconstitutional to the extent that it is inconsistent with and contravenes the provisions of Article 230(1) of the 1995 Constitution.

c) A declaration that the act of arresting and prosecuting your petitioners by the IGG with offences for which the IGG has no authority to arrest and/or prosecute anyone is illegal, ultra vires the powers conferred upon the IGG under the Constitution and is nullity.

d) An order that the prosecution of your petitioners be discontinued for being ultra vires and inconsistent with and in contravention of the Constitution of the Republic of Uganda.

There are various issues were agreed upon by the parties as far as the facts were concerned among which the following were more relevant to my research;

a) Whether the commencement of the investigations by the 2nd respondent and subsequent arrest of the petitioners was in contravention of articles 225, 227, 228, 42 and 231 of the Constitution.

b) Whether the appointment of the IGG from the Judicial Bench contravenes articles 128(1) and (2), 223(3) and (4), 139, 144(2)(3) and (4), 224 and 225 of the Constitution.

In resolving the first issue court held that, If the President directs the IGG to investigate anyone and the IGG does it, the report made by the IGG does not become void merely because such words were used as long as the President does not interfere with the IGG's power to decide whether to investigate or not and how to do so. In the instant case, there is no evidence that the President interfered in any way with the investigations. He simply "presidentially" requested the IGG to perform her duties under the Constitution. The resulting report on the investigation cannot be said to be unconstitutional. In our humble view, the investigations and subsequent

arrest of the petitioner was done lawfully under the powers conferred on the IGG by the Constitution of the Republic of Uganda. We answer this issue in the negative.

In considering the second issue it was also held that, The Constitution of Uganda makes provision for separation of powers. It is a fact that three organs of state are not rigidly separated in functions and powers. The separation of powers between the executive and the legislative may overlap here and there but the distinction is very clear. However, the Constitution provides for strict separation of powers between the judiciary on one hand and the executive and the legislative on the other hand. The separation is embedded in the doctrine of the independence of the judiciary in article 128 of the Constitution and other constitutional provision contained in Chapter eight thereof. In this case the court was affirmative to the issue.[63]

In my view even though court held it in a negative way I still feel that that was an intervention by the executive into the work of the judiciary. Despite the fact that the IGG was a member of the executive arm the independence of the IGG is a direct example of the independence of the judiciary.

2.12 CONCLUSION

In conclusion therefore the doctrine of separation of powers up to now remains one of the major controversial subjects in constitutional and administrative law, and it is likely to remain so, and for the years to come. As discussed in the essay, the doctrine of separation of power remains only an exceptional act accorded by the constitution of Uganda and law courts.[64]

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[63]) South African Association of Injury Lawyers vs Health (CCT 27/00) [2000] ZACC, 22, 2001,South Africa: Constitutional Court

[64] Publication of civil society of Uganda, Kampala 2003.

CHAPTER THREE

METHODOLOGY

3.0 Introduction

The research methodology was focused on the research instruments used to investigate the problem. It involved the ways in which data will be selected.

In this research, the researcher considered the research design, the study areas, research instrument and data presentation.

3.1 Research design

The researcher employed descriptive research design; this focused mainly on using qualitative data collection methods like documentation among others. Under this, the use of cross sectional design was very necessary to collect the needed information quickly from different libraries and the internet. It was also a very important means and approach in achieving research objectives.

3.2 Study area

The study covered cases in Uganda and for clarification it implores the applicability of the doctrine in a few other common wealth countries.

3.3 Research instrument

In order to go through the process of data collection, the researcher used the following instruments, text books, magazines, journals, and reported cases among others.

3.4 Documentation

Documentation was also applied since it was a source of supportive information from agencies that deal with facts on the topic and have put them in a number of documents, reports, journals and bulletins, text books and work of other scholars whether published magazines, written data source including published and un published documents agency reports, newspapers articles, internet sources, local government acts among others so as to obtain relevant information. This method was used to obtain information about the doctrine of separation of powers in Uganda.

3.5 Limitations of the study

The limitations included:

Financial constraints; the researcher suffered during his research due to lack of enough finances. In all activities that the researcher undertook, there was need to use money. This was a big challenge for the research as there was no source of income to fund such activities that involve money.

Time limit was another problem faced by the researcher. The research needed four to five months but by the time the research was commenced, the researcher had remained with a period of two months.

Cumbersomeness of the information gathering technique, moving to different libraries was not an easy task. Going from one library to another was a tiresome task to perform in a short period of time.

3.6 Conclusion

The researcher faced a number of challenges and or limitation during the research as highlighted above, however despite the problems, the researched overcome them and thus successfully completed the research.

CHAPTER FOUR

REFORMS IN THE AREA OF THE DOCTRINE OF SEPERATION OF POWERS

4.0 Introduction

It cannot be gainsaid that Uganda's case law has generally tended to be unmotivated in the generation of principles relevant to this area of separation of powers. Our courts have fashioned their decisions according to English laws without particular emphasis on what is relevant to Uganda. Similarly, in the wake of calls for reforms in other organs of the government[65] this area has remained stagnant despite constant abuses of the principles of 'separation of powers'. On a legal note, Uganda's constitution[66] has failed to attract reforms despite constant reforms on the parent foam. For this particular reason, it miserably fails to measure up to the standards more so in regards to the doctrine of separation of powers.

Based on the above predicaments, this chapter will seek to chart a course so as to arrest some of the shortfalls that come along this area of company law. Some of the reform proposals may seem controversial or even unwelcome due to the concepts of 'the doctrine of separation of powers'. However, it should be noted that separation of powers is not intended to ignore the principles of checks and balance but as a way of providing checks on abuses that often attend upon this very doctrine.

Therefore, in a bid to point out the necessary reforms and the required changes, this analysis has been criticized under these heads:

4.1 Checks and Balance

This principle of checks and balance hold the curse of creating confusion and enabling a murky environment devoid of clear stipulations as to when the different organs of government should check on each other. Dicey[67] doesn't mince her words in stating that Aristotle's approach is lethargic and inappropriate in the modern business world where a lot of administrative decision

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[65] For an in depth analysis on reforms see J.K Chebii, 'Reforming Kenya's Company Law: Lessons From Other Countries' (2002)1 *East African Journal of International and Comparative Law* 71, Faculty of Law, Moi University, Kenya

[66] Cap.486, Laws of Kenya

[67] *Supra* n.81

activity is carried out collective made by different bodies. Hence, he proposes that the courts should take precedent in such structures where constitution is not very clear more free and open. An implication of such a move would be the treatment of such organ in a way that obligations and liabilities would attach to individual offices and officers responsible not the whole organs for example the executive. Such would reflect the reality on the ground that such entities trade and work within their jurisdiction as an organ group consider themselves an arm of government hence respect for each other's duties therefore respect for the doctrine of separation of powers and not individual companies. Reforms in this area should therefore be based along these lines. G.W.Kanyeihamba [68] provides some guidance on reforms of separation of powers in this scope. He cites factors such as fundamental, non-fundamental, entrenched and non-entrenched[69] as being relied upon in different jurisdictions to build up a body of rules under or a constitution which other organs of a government may be held liable to back the obligations of the each government organ. Fortunately, Uganda's constitution provides for that already though not enforced.

Another reform that should be pursued is the amendment of Uganda's Constitution so as to give the courts the discretion to order any government's arm which to collectively make decision to the obligations of another government organ where there is need or to \make orders which ensure that the different organs come to terms and proceed jointly so that their liabilities are pooled together. Such a move has been adopted in New Zealand and Ireland.[70]

Along the same lines, the Ugandan Constitution should be amended to adopt a provision that envisages a realistic separation of powers and rule of law. According to G.W.Kanyeihamba,[71] this would entail a move whereby a member of the legislature cannot be a member of the member of any other arm of government that is to say executive or judiciary. This would in ensuring complete separation of powers ensuring the rule of law.

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[68] L.S. Sealy (2001), *Cases and Materials In Company Law*, Reed Elsevier Ltd, UK (7th ed) 75
[69] The financial condition of a firm that does not have enough capital to carry on its business
[70] *Supra* n.134
[71] Constitutional law and governance in Uganda

Further, to avoid an embarrassing scenario such as that experienced during the Muhwezi saga, reforms should be adopted which ultimately would be relevant in trimming the excessive powers of the executive especially the appointing authority more so in regards to the office of the IGG, judges among other offices. These offices are much affiliated with the judicial arm of government which causes the executive to have serious influence in the activities of the judiciary. In my opinion if such reforms are adopted similar issues to those in the muhwezi case would be no more.[72]

4.2 Power of Courts

It is manifestly inherent in Uganda's jurisprudence that any legal reforms sought should have the power of courts in mind. This situation is no different. Pursuant to this, reforms in this area of separation of powers should consider the empowerment of courts so as to avoid abuses. In light of this, measures such as giving the courts the jurisdiction to protect arms of government which are 'one-man shows' where the doctrine was abused making them suffer, should be pursued.[73] This may be done through the amendment of The Constitution to provide for provisions which give the courts the jurisdiction to allow the president be proceeded against as long as it evident that he acquired prior knowledge of his action.[74]For example in the case of Henry Tumukunde vs AG/Electro commission on appeal[75] to the Supreme Court which is the highest appellate court in the country has once again set a precedent by putting the powers of the executive (the president and his servants) in check. Through his lawyers, on appeal to the Supreme Court, Tumukunde argued that he wrote his resignation letter under immense fear and undue coercion thereby making his purported resignation unconstitutional. In other words, it was argued that the brigadier's resignation had no legal effect because it was secured by unconstitutional means when the executive (the president and senior members of the UPDF), violated Tumukunde's rights as a member of parliament when they forced him to resign from his seat.

[72]Constitutional Petition No.10 of 2008
[73]*Supra* n.34
[74]*Ibid*
[75](CONSTITUTIONAL APPEAL NO. 2 OF 2006)

The court stated that "The doctrine of separation of powers is very important for our fragile democracy because as it were, there is a constitutional desire to protect citizens of this country from the excesses of the executive and stop it from abusing state power. That's one of the roles of the judiciary and parliament and the former needs to be commended for standing up to this high ground." In the court's holding it was a declaration that neither the Commander–In-Chief nor members of the High Command are empowered by the constitution to force a member of parliament to resign or recall him or her from parliament. The court particularly addressed itself to the provisions of article 83 of the constitution which lays down the legal circumstances under which an MP can vacate his or her seat in parliament. And these are very specific - that's, if one resigns voluntarily, if one is disqualified by law, when parliament is dissolved, if member is absent for 15 sittings without satisfactory explanation and if found guilty of violating the Leadership Code of Conduct. These actions demonstrate the interference of the executive in duties of the legislature and the judiciary if the above reforms are adopted it would help to encounter such abuses.

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 Uganda Code of Judicial Conduct promotes judicial accountability by laying down principles and rules designed to provide guidance for regulating judicial conduct. The Code of Conduct enjoins judicial officers to exercise their functions independently, impartially, with integrity, propriety, competence and diligence. It provides details on behaviour that is prohibited. It is therefore helpful and may provide a guide as to what constitutes misbehaviour, misconduct or incompetence. Similarly the courts' powers may be reformed through consideration of the following:

4.2.1 Interests of Justice Appointment of Judicial Officers – how transparent should the process be?

As mentioned at the beginning of this paper, aside from the absence of overt and covert executive interference in the work of the judiciary, there are a number of other tenets or benchmarks of an independent judiciary. These include the requirements regarding the qualifications, training and selection or appointment of judges; terms and conditions of service of judges; and the suspension and removal of judges.

Article 10 of the UN Basic Principles on the Independence of the Judiciary provides that:
"Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory."[76] In line with this principle, Article 142 of the 1995 Constitution provides that Judges shall be

[76]United Nations Basic Principles on the Independence of the Judiciary

appointed by the President acting on the advice of the Judicial Service Commission and with the approval of Parliament. Article 143 enumerates the qualifications for the various ranks of judges, all of whom must be advocates of at least ten years' standing for High Court Judges and Judges of the Court of Appeal; fifteen years for Supreme Court judges, and twenty years for the Chief Justice.

Article 146[77] establishes a fairly representative Judicial Service Commission consisting of a Chairperson and deputy chairperson who must meet the minimum standard for appointment to the Judiciary, a person nominated by the Public Service Commission, two nominees from the Uganda Law Society, a Supreme Court Judge nominated by the President in consultation with the other judges, and two members of the public, not being lawyers, nominated by the President; and the Attorney General. All the members of the Commission are appointed by the President with the approval of Parliament. The Judicial Service Commission is given a number of functions under Article 147, which include advising the President on judicial appointments and handling appointments for the lower levels of the bench (Chief Magistrates and Magistrates Grade I).

Aside from the above provisions, there is nothing more specific in Ugandan law regarding the procedure for the selection and appointment of judges. Whether or not the above provisions are sufficient to safeguard against judicial appointments for improper motives is a matter open to debate. It is interesting to note that four out of nine members of the Judicial Service Commission, which is responsible for advising the President on judicial appointments, are Presidential nominees. This is in itself not an immediate threat to judicial independence. After all, the International Bar Association Minimum Standards of Judicial Independence provide that participation in judicial appointments and promotions by the executive or legislature is not inconsistent with judicial independence, provided that appointments and promotions of judges are vested in a judicial body in which members of judiciary and the legal profession forms a majority. However, the fact that it is not possible to know exactly how judges are selected for

[77] 1995 Uganda constitution

appointment leaves abundant room for doubt and speculation regarding motives for appointment[78]. In this regards tremendous reforms deserve in the system.

4.2.2 Public Policy

Public policy may generally be said to entail the principles and standards regarded by the legislature or the courts as being of fundamental concern to the state and the whole of society. In a narrow scope, it is the principle that a person should not be allowed to do anything that would tend to injure the public at large.[79]

The researcher found out that the Constitution[80] ought to empower the courts by enabling them to consider this ground as an emphasis for the doctrine. For instance, this ground may have been used as an impetus to ensure tightness of the doctrine for example during the Besigye's case. By this, I mean that rampant persecution should not be encouraged through the use of government offices as vehicles to oppress the public. Such would tend to be against the public policy.

The researcher is of the view that adoption of this ground should be done without many problems because the courts have gone ahead to condemn even in cases that seemed far-fetched.[81]However, this should be done through clear and defined guidelines because public policy casts a wide net which if also not checked may be the subject of abuses.

[78]Separation of Powers and the Judicial Branch by Cheryl Saunders
[79]*Supra* n.
[80] 1995 Uganda constitution
[81] supra n.41

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.0 Conclusion

The foregoing chapters have essentially been bound within the scope of demystifying the doctrine of separation of powers more so in a context that satisfies the Ugandan environment. They have been executed in manner that focuses on the Muhwezi's case or issue all in a bid to view whether this requirement necessitating separation of powers had been satisfied in that instance.

This paper has been instrumental in defining procedures that ensure separation of powers in Uganda by taking a closer look into the provisions of the 1995 constitution of the Republic of Uganda. This process entailed a close examination on the provisions of all the three arms of government in the constitution and practice. In this manner the constitution provides the duties of the executive in chapter seven, the judiciary under chapter eight and finally legislature's duties in chapter nine. Having recognized that, this paper has been prudent enough to highlight some of the merits and demerits of the doctrine of separation of powers.

This research has had the delight of engaging in the critique of instances that necessitate and go against the doctrine of separation of powers. For instance situations such as the independence of the judiciary, the principle o of rule of law and the known principles of democracy when an arm of government is being used as a mere façade to persecute the public, where the government office is being used to evade rights of relief already possessed by the public as well as in instances where the government structure is being used to evade limitations imposed on conduct by law. All these apply by dint of being of a common law nature hence Ugandan courts have the onus of upholding the doctrine of separation of powers in circumstances that depict these. Other circumstances that need focus are of constitutional nature and they include those contradictory to *The 1995 constitution of the republic of Uganda*. They include; those in regard to strict separation of government organs.

Most importantly, this research paper has been critical in discussing the circumstances surrounding the Muhwezi saga. This paper has avoided politics and generally tended to trace the genesis of this whole issue. This has been done through an analysis of the entity of the judiciary more so its services and functions. This is vital because the legal fraternity outcry arose due to the executive's stake in the judiciary. The Muhwezi saga's origin and existence have been highly controversial and this has been complicated. The main bone of contention in the saga was;

Whether the appointment of the IGG from the Judicial Bench contravenes articles 128(1) and (2), 223(3) and (4), 139, 144(2)(3) and (4), 224 and 225 of the Constitution. The prosecution contended that at the time of her appointment as IGG, she was a sitting judge of the High Court which office was governed by the provisions of article 128 of the Constitution. She had taken an oath of office to administer justice to all independently, impartially and without fear or favor from any quarter. On her appointment as IGG, which was done under article 223 of the Constitution, she did not resign her office as a judge of the High Court. The duties of the IGG are prescribed under articles 225 and 230 of the Constitution. These powers include the power to investigate, cause investigation, arrest, cause arrest, prosecute or cause prosecution in respect of cases involving corruption, abuse of authority or public office. The Constitution of Uganda makes provision for separation of powers. It is a fact that three organs of state are not rigidly separated in functions and powers. The separation of powers between the executive and the legislative may overlap here and there but the distinction is very clear. However, the Constitution provides for strict separation of powers between the judiciary on one hand and the executive and the legislative on the other hand. The separation is embedded in the doctrine of the independence of the judiciary[82].

The researcher therefore answers the first question in the affirmative, namely that the constitution of Uganda makes provisions for separation of powers. However this paper found out that the doctrine of separation of powers though provided for in the constitution the same constitution provides for the violation of the doctrine placing the office of the IGG under the executive arm of government limits the doctrine. The same applies to appointing powers to the executive for example in the instant case the president appoints an officer of the judiciary to an IGG is direct interference with the work of the judiciary.

[82] Article 128

Having examined the foregoing, this paper has made it imperative to examine the procedures necessarily provided in the constitution on the doctrine of separation of powers. This has been done in specific consideration of the fact that without procedural laws, it would be very difficult to move the vehicle of substantive laws. Hence with this in mind, this paper has viewed specific constitutional provisions in regards to the doctrine and their respective procedural aspects that ensure that this is done.

5.1 Recommendations

This research has illustrated that this area of constitutional law is not without its own shortcomings. For instance the concept of separation of powers is shallow amidst an environment of confusion vis-a vis the principles democracy. On the other hand, the Ugandan courts are not well geared to handle some of the abuses brought forth by the concepts of state responsibility and liability. Similarly, various issues arise during justice and powers of the courts which are directly related to the doctrine of separation of powers but the concept falls short under some of these circumstances.

Therefore to seal some of these glaring loopholes, there are several recommendations in this regard. For instance, Continuing education for judicial officers would be useful in exposing them to the experiences of judges in other jurisdictions. For example, the Indian Judiciary has been widely commended for its activist approach to the interpretation of law, which has enabled it to promote human rights. 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 judgments. Secondly, 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. This paper also recommends that 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. This research further

recommends that 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. Also 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 researcher also recommended that courts be empowered to handle situations in which the concept of separation of powers and abused. Measures such as giving the court's jurisdiction to protect the public from government organs which are one man's show where powers of arm of government are abused should be pursued. This may be done through an amendment of the constitution to enable the court to declare such persons or officers personally liable for all or some liabilities.

The constitution should also be amended to include a provision which should abolish a person from belonging from more than one arm of government.

In a general conclusion, a careful study having been carried out and if this research is carefully perused along side the existing law, it will be noted that the executive is accorded more powers compared to other arms of the government which makes it interfere with and in the conduct f duties and obligations of all other arms. This will therefore lead to a general conclusion that there need be an amendment to the constitution to check and or reduce the powers of the executive mostly on the issue of powers of the executive in appointing of members who hold positions in other arms of the government. This will greatly promote the independence of each branch and will be an achievement to the doctrine of separation of powers.

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