UNIVERSITY OF NAIROBI

FACULTY OF LAW

CONSTITUTIONALISM AND THE ROLE OF THE JUDICIARY IN UGANDA

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A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS OF THE L.L.B. DEGREE OF THE UNIVERSITY OF NAIROBI

APRIL: 1977

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A C K N O W L E D G M E N T S:

I wish to express my sincere gratitude to MR. J.B. OJWANG, Lecturer Faculty of Law, University of Nairobi, for his valuable, advice and criticisms which helped to improve the quality of my Dissertation greatly.

I also feel indebted to MR. OKOTH OGENDO, The General Supervisor of Dissertations Faculty of Law University of Nairobi for his lecturers on Dissertation writing without which the exercise could not have been successful.

I must also thank all my friends who I could not mention by name for all the help they gave me, either directly or indirectly.

MESHACK OKOTH OBURA

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INTRODUCTION:

The justification which was sought by the colonial powers was that the African was at a much inferior stage of evolu tion and it was therefore necessary to colonise him and civilise him. This could not be done unless effective control was imposed upon him by the colonisers and consequently governments were set up directly controlled from the government of the colonizing power. Whereas the British colonial governments were absolutely dictational, the colonised being given no opportunity to determine how he was to be governed, the model of government which the British introduced in their former colonies was completely different from the colonial model. This is the Westminister model of government which was Arbitrarily indroduced, although Legico debates of 1962-1963 gave an impression that these was some consent.[1] The foregoing points must be borne in mind throughout the discussion that shall follow hereafter.

Constitutionalism or restraints upon the bounds of governmental actions has always been said not to exist in African Governments. Having made the area of study to be Uganda, the purpose of this exercise is to determine whether the concept of constitutionalism has ever been known or recognised both theoretically and in practice in Uganda. The method that shall be employed is firstly, to trace the historical evolution from the earliest times when it has been known. This has to be done because it is apparent that Western acedemicians while writing on constitutionalism, and indeed on any other subject, have used the present very high standards to determine whether constitutionalism or any other concept is honoured in African institutions.[2] And they have always come up with the answer that it does not exist. Whereas if we look at some books we discover that, for example, constitutionalism has been held to have existed in the Roman Empire.[3] It is known that the Roman Government had a tendency towards

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1. First, Ruth. The Barrel of a gun. Penguin African Library 1972, pp. 50-53

2. For example 'The Marriage institution'. See R.V. Ankeyo. (1917) 7 E.A.L.R. p. 14.

3. Mc Ilwain, Charles Howard. Constitutionalism: Ancient and Modern Cornell University Press 1947 Revised edition p.46.

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CHAPTER ONE:

HISTORICAL EVALUTION OF THE CONCEPT OF CONSTITUTIONALISM

From as early as the Epoch of the Greek City States, the world has been trembling in the balance between the orderly procedure of law and the process of Force which seems so much quick and effective.[1]

Thus the choice has been between law on the one hand and power on the other hand. This is what constitutionalism is all about.

Some writers have gone as far as stating that constitutionalism "extends backwards to a time whereof the memory of man runneth not to the contrary".

Plato with his celebrated philosopher-King concept recognised constitutionalism but did not support it. He argued that since the philosopher-King knew what was good for his subjects, legal retraints would frustrate his efforts of ruling for the benefit of his subjects. Plato thus distingushed between the "ideal" and the "actual" attainable. The ideal is less perfect than the actual attainable and it is due to the presence of legal restaints that make it so. Plato thus argued that constitutionalism suffered from defects inherent in its own merits.

It is the works of Aristotle that we find the Greek Conception of Legal restraints fully developed. "Law is reason without passion, the ultimate sovereign in any society of free men must be the command of reason and not exclusively the will of men".[3]

Aristotle condemmed the kind of democracy where the people incited by demagoues acknowledge no legal restraint upon rulers. During Aristotles time there existed an interesting procedure for the guardianship of the laws made by the rulers. Within one year of the enactment of a measure an action may be brought to secure its annulment on the ground that it was an ill-considered innovation in conflict with the constitution. And again an action lay for the punishment of the proposer of the offending law.

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1. McIlwain, C.H. Constitutionalism: Ancient and Modern. Cornell University Press Revised edition 1947 p.1
2. Ibid. p.21
3. Sir Ernest Baker. Aristotles Politics p. 141

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Roman constitutionalism had a tendency towards autoeracy. What is impressive is how the Romans managed this tendency with the spirt of individual liberty "what has pleased the prince has the force of law".[4]

The Romans made a very important contribution to constitutionalism. It was the first time that a clear distinction was drawn between "jus publicum" and "jus privatum". Private rights affected private individuals while all individuals participate in the public. This distinction has to this day behind the history of legal safeguards against encroachment by the Government. The Romans had what was known as "actio popularis" which was open to any private citizen in the event of the infringement of the common rights of all.

Medieval constitutionalism like any other constitutionalism put the government under the law. But during the Middle Ages legislation was rare and so medieval constitutionalism concentrated on abuse of momarchic executive power. This is when the English became the drivers of the vehicles towards morden constitutionalism. It was a struggle between the Barons and Freelords and above all the churchmen on the one hand and the Royal bureaucrats on the other.[5]

The essential feature of medieval constitutionalism, was the distinction between "Gubernaculum"and "jurisdictio".[6] These were bounds to the Kings discretion established by law that is positive and coercive and an act beyond that was ultra vives. So for the first time we had a clear act distinction between government on the one hand and law on the other - But the effect of Roman law on medieval constitutionalism was very great as can be demonstrated in the words of Bracton that "none can pass judgement on an act as charter of the King so as to make void the Kings act."[7] So there was that element of Roman absolutism. However it must be pointed out that the judge was allowed to quash an enactment or charter of the King if it infringed earlier rights created by the King.[8]

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4. Mcllwain, C.H. Constitutionalism Ancient and Modern Cornell University Press revised edition 1947 p. 51

5. Fredrich, C.J. Limited Government:Prentice-Hall inc. p.51.

6. Mcllwain, C.H. Constitutionalism: Ancient and Modern Cornell University Press revised edition p. 78 "Gubernaculu Lirerally means government. It referred to the powers of the King. "Juridictio" referred the extent of the Kings power.

7. Ibid. p. 72

8. Ibid. p. 72

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The supremacy of parliament which has been regarded as an important requirement of mordern constitutionalism did not gain any prominence until the 16th Century.

However throughout the history of constitutionalism there is no period in which obedience to the King is so stressed as in the 16th Century. "Jurisdictio" was almost swallowed up in "Gubernaculum". The King was in this period regarded as the vicar of God and if it was not due to religion differences among the subjects, the King could have ruled with an absolute authority. So the old line between "jurisdictio" and "Gubernaculum"was weakened but not destroyed.

It was not until the middle of the 16th Century to the early 17th Century that many French lawyers and historians began to contribute to the development of Constitutionalism. One of them, Claude de Reysell said "there are three bridles by which the supreme Kings of France can be restrained, Religion, jurisdiction and La police.[9]

Today constitutionalism has been given divergent interpretations. "Constitutionalism to me" said De Smith S.A., "means the principle that the exercise of political power shall be bounded by rules which determine the rules of legislative and executive action by prescribing, the procedure according to which it must be performed or by delimiting its permissible content. According to De Smith the rules may be mere conventional norms or prohibitions set down in a basic constitutional instrument the disregard of which may be pronounced ineffective by a court of law. He further admits that although restraints may be exist in any form, a written constitution may serve to fortify constitutionalism,

Although De Smith admits that the Western model of Government is not the ideal for constitutionalism and that a constitution ... must reflect on the community that it survives,[11] he still insists that constitutionalism is only practiced where there is free elections held at frequent intervals and on the accountability of the Government to an evitity distinct from itself. Why this contradiction, it is inexplicable.

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9. Ibid. p. 98

10. De Smith, S.A. Constitutionalism in the Commonwealth today (1962)4 Malaya law review 205

11. Ibid. p. 206

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The American view is distinct from the English view. It insists on the test of legitmacy , that the Government that is being restricted must have come to power through the will of the people. If further insists that the Government must be a creature of the constitution and that the constitution is anteceden to the Government. Like the English view the Government must be accountable to some independent authority thus requiring the doctrine of separation of powers.

The Socialist analysis of the nature of the state is much different from Western democracy. If the state is an instrument of class rule, it is argued, the theory of independent branches of Government becomes meaningless. So constituionalism became meaningless in a socialist state.[12]

Having seen how constitutionalism has been practiced through the ages and the mordern definitions, it is now appropriate to discuss how this has been embodied in the constitution of Uganda and whether it is true that no constitutionalism has ever been practiced in Africa institutions.

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12. Martin, R. Personal Freedom and the law in Tanzania. Oxford University press 1974 p.37

CHAPTER TWO:

THE RELATIONSHIP BETWEEN CONSTITUTION AND CONSTITUTIONALISM

This chapter is intended to examine critically with particular reference to the area of study the relationship between constitution and constitutionalism. Different scholars have contended that a particular kind of constitution is more ideal for the practice of constitutionalism. But it is important to point out that such a contention is most misconceived because as we shall descover hereinafter, there is no constitution of a particular kind which is unversally accepted as the most ideal both theoretically and practically. This chapter shall, therefore, critise the disadvantages of such constitutions and then shall proceed to critically analyse the constitution of Uganda and constitutionalism. However, this shall be done in a most theoratically basis and it is in the next chapter that case-law shall come into play. One important point must be mentioned at this juncture: Uganda as I had pointed out earlier is a country that has undergone numberous political upheavals and now it has a military government and the constitution that existed before the advent of military rule has undergone various modifications. Accordingly any discussion of and reference to the constitution shall be deemed to be reference to the constitution that existed immediately before January, 25th 1971. Since military government is a percular kind of government, it affords treatment of its own and a chapter shall be devoted to it after the following chapter. One other important point which requires attention is that Uganda has had two constitutions under civilian government. However since the Republican Constitution did not change its pre-decessor drastically, the two constitutions shall be treated together.

The question should now then be asked: What kind of constitution is required for constitutionalism to be practicable? "Constitutionalism" Nuabweze said, "thus presuposes a written constitution. It is the constitution that creats Arms of government, cloths then with their powers and in so doing delimits the scope within which they are to operate. A government operating under a written constitution must act in accordance therewith, any exercise of power outside the constitution is invalid.[1] Nuabweze can thus be labelled an "American Democrat". He cannot imagine a government being possibly restrained without having a written constitution in which the powers of the Government are clearly and in certain terms spelled out. Being in a Western Democrat, Nuabweze also insists on Universal franclise for both me and women so that they can be

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1. Nuabweze B.O: "Constitutionalism in Emergent States" (London Hurst 1973)p.5

allowed to express their changing opinions about the government.

De Smith as we saw earlier does not insist on a constitution being writtten, but like Nuabweze insists on universal suffrage, the government being accountable to an entity distinct from itself, in other words, the doctrine of seperation of powers and free organisation of political parties.

Having looked at the opinions of these writers, it is appropriate that we apply them to Uganda, which is the subject to the study. Firstly it is of great importance to mention that both the standards of Nuabweze and De Smith are too high to test for a country like Uganda. Nuabweze forgot one important point when he insisted on a constitution being written, he should have only looked at the English system and could have seen how effective the restraints upon the Government were without a written constitution. Universal suffrage is also not a condition precedent for constitutionalism. Even Nuabweze himself admitted that the means by which a government cames to power is not a condition precedent for constitutionalism. For tyrannies have been returned to power by a majority of 90% of the votes.[2] So if a formal written constitution is not the test as it is apparent, then what should be the test? The test Nuabweze resorts to is: does the constitution impose limitations upon the powers of the government? In Liyange V. R, the Privy Council rejected the idea that the constitution can be limited by nature, Natural law only has a moral force in an unwritten constitution.[3] However it must be pointed out that this is not the conclusive test. The test should be whether the government complies with these restraints or not. This was stated in no uncertain language in Bribery Commissioner V. Renisanghe.[4] Where it was held that under a written constitution which prescribes the proceedure for law making, even if the legislature is supreme, if it does not follow the procedure so laid down in the constitution then the courts have a duty to declare that Act invalid.

Since it appears that there is a dispute as to what constitutionalism is, it is only logical that a reconciliation is sought. It is clear that all these writers have failed to accomplish one fact. They have failed to treat the question of the means to be used to achieve constitutionalism and the degree to which constitutionalism is practiced on the one hand and the question of whether constitutionalism is practiced or not on the other hand, as completely

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2. Ibid. p. 2
3. (1967) A.C. 259
4. (1965) A.C. 172

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distinct subjects. It has been seen that constitutionalism can be practiced whether or not a constitution is written. Constitutionalism has been seen to to alive in two extreme conditions, where there is a formal and where the restriction is accepted by tradition. Whereas De Smith admits that a constitution must reflect to the community that it serves,[5] it is absurd that he still insists on constitutionalism to depend on universal suffrage, free organisation of political parties and the seperation of powers. If a constitutio has to reflect on the community that it serves it follows by necessary implicatio that there are circumstance under which universal suffrage, free organization of political parties and the seperation of powers has to be dispensed with.

That a constitution must reflect on the community that it serves is quite true. The cyprus constitution of 1960 had serve a Greek majority and Turkish minority. The constituion provided in it self that it could not be changed. The Turks feared domination and discrimination by the Greeks. This constitution even went as far as apportioning public officers communally between the Turks and the Greeks.[6] "In a state where there is majority and a minority constitution alism must not only be a living reality but the constitution must also be most detailed to its innermost core so that the majority do not oppress the minority." The Cyproit constitution even went as far as apportioning television programmes at a ratio of 7:3 which is also the ratio of Greeks 7 to 3 Turks in the populatio

A country with so numerous ethnic groups like Nigeria found it necessary to here a Federal constitution, otherwise constitutionalism would be in jeorpardy. In a homogeious community like England, it is not necessary to have a formal document clearly spelling the bounds of Government action. If the argument discussed hereinabove is good, can it also be argued that constitutions of developing countries like Uganda reflected on the community that they served? If it is evident to such governments that due to the percularities of such communities, a multi-party system is unpracticable why not provide for a one party system in the constitution? Why should De Smith say that there is no constitutionalism in such countries? The African governments have the problem of constructing nations within arbitrarily drawn geographical boundaries that was the idea of the colonial powers. Such countries are fragmented by many different tribes and it is extremely difficult to bring them under one umbrella.

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5. "Constitutionalism in the Commonwealth Today (1962)
4 Malaya Law Review 205 at p.206

6. Ibid. p.206

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It goes without saying that such countries are so poverty stricken and the rapid development of the country should be the main concern of any government. These goals can only be achieved with minimum opposition to the Government which must be awarded wide powers. Uganda is no exception to this situation.

The independence constitution of Uganda made an attempt to make a nation out of fragmented societies and one Kingdom which was to be given preferential semi-autonomous treatment.[7] There was also a special kind of minority group which had to be provided for.[8] However they subsequently learned a lesson that this constitution did not reflect on the community that it was to serve and the consequence was the 1966 Revolution. However as we shall see in the next chapter, despite the difficulties created by the 1962 constitution, Uganda was a country in which constitutionalism was practised definitely more than its two East African counterparts.

The 1967 Republican constitution attempted to be more identical to the community that it was to serve. The Republican constitution created a strong executive, led by the President who was to have wide powers. This was absolutely necessary with the circumstances of Uganda. All executive powers vested in him, he is the commander-in-chief of the Armed forces and takes procedure overall persons in Uganda. Most important of all is that he is not liable to proceedings in any court.[9] He can also declare a state of public emergency as he did in 1969.

Prima facie it would appear that there are no restraints on the powers of the president. However there is an indirect restraint. The declaration of public emergency under Article 21 of the constitution cease to have effect after certain periods unless ratified subsequently by the National Assembly. The National Assembly may also revoke such a declaration of public emergency before the expiration of the period. The fact that the declaration of public emergency can b revoked by the National Assembly ensures that this power is not unreasonably exercised. It is important to point out that under the 1966 constitution the President was in his executive capacity required to act in accordance with the advice of the cabinet. But in the 1967 constitution it was conspicuously missing. Article 79(1) of the constitution provides in substance that where the President i required to act in accordance with the advice of any person, the question whether he has so done or not shall not be questioned. This appears to be giving the President too wide powers and would make constitutionalism impracticable. One may argue that whatever the President has done cannot be questioned in any court of la One writer argued that this provision was meant to nullify the provisions

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7. G.S.K. Ibingira: "The forging of an African Nation" (Viking, U.P.H.) p.22
8. The Asians feared oppression and discrimination under a black government.
9. Article 24 constitution of Uganda.
10. Kanyaihemba G.W: "Constitutional Law and Government in Uganda" E.A. Literatur

which require the President to act in accordance with any persons or institutions advice."[11] It is pointed out that the President is an important public figure and needs wide discretionary powers to convey out his functions efficiently. It is further pointed out that if the Presidents person is immune from judicial process then why make his actions subject to judicial process?[12]

But one important point must be emphasised. If the President is given wide discretionary powers it does not necessarily follow that he is going to act without exercising due caution. For it must be remembered that he shall be liable for his actions when he ceases to hold that public office. And there is authority from Uganda itself which has indicated that this is actually the position.[13] This can be argued to be another indirect restraint.

The cabinet of Uganda is the formulation of government policy. How can it be made certain that this body does not go beyond the powers that is prescribed In formuleting and implementing this policy the cabinet is responsible to Parliament and is expected to exercise caution when carrying out its functions. As regards public officers they must exercise their functions with reasonablene so that they do not encroach on the freedom or rights of the citizen because wi them they enjoy no immunity from judicial process if they exceed their powers.

As regards the legislature, the 1967 constitution like its predecessor preserved a multi-party system. However there were all banned in 1969 when the was an attempt on the life of the President.[14] But as we already said in this chapter the means of which a Government ascends to power is not a condition precedent for constitutionalism so whether you have a one-party or multi-party system does not make much difference. Section 3 of the constitution provides that the constitution is the supreme law of Uganda and any law which is inconsistent with that constitution is void to the extent of its inconsistency. It is therefore futile for the legislature to cause the enactment of a law whic is inconsistent with the constitution because it would be declared void by the courts. That a law is not inconsistent with the constitution is made sure by the procedure laid down for the enactment of any law. There is an elaborate procedure laid down in the constitution for the enactment of statues so that

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11. Ibid p.184
12. Ibid p.185
13. Baumann V. Nadiope (1968) E.A. 308
14. Kanyaihemba G.W: Constitutional Law and government in Uganda p.241

CHAPTER THREE:

CONSTITUTIONALISM AND THE ROLE OF THE JUDICIARY IN UGANDA

What this chapter aims to do is to answer the question: What role has judiciary played in Uganda as an instrument of constitutionalism? This question shall be answered in three stages. Firstly, there shall be an examination of conditions which are essential for the judiciary if it is to act as a guarantor of the rights of the individual and a watchdog over excessive use of governmental powers. The next stage of answering this question shall be whether such conditions for the efficient operation of the judiciary have ever, (if at all they do not now) existed in Uganda. Then finally there shall be an examination of the several cases that have come up to the courts touching on the limitation of governmental powers.

Perhaps the most important condition precedent to the efficient working of the judiciary is its independence from political interference. Independence of the judiciary can be seen in two perspectives: There must not only be formal provisions for all independence of the judiciary, but it must also be seen to be independent. There must be ...." a strong congreous and independent judiciary capable in all circumstances of holding the balance evenly between the overreaching zeal of bureacrats and politicians on the one hand and the God given rights of the individual on the other".[1]

It is only rational that if there is a dispute regarding the limits of govenmental action, between the individual and the state, an impartial body should adjudicate upon that matter. For if that body which is entrusted with such a task appears to be biased there shall be no faith in it, and an aggrieved individual shall be left with no apparatus which he can utilize to enforce his rights. States have therefore seen it as logical to provide a procedure to be followed in the appointment of the officials of the judiciary. The safest method employed is to entrust the appointment and dismissal of judges on an independent body.[2] This procedure make the judges aware of their independence and any fear of political coercion and intimidation is accordingly excluded. Perhaps the importance of this practice can only be emphasized in the words of Mr. Justice Oyemade.....

"I will not allow myself to be intimidated into sending innocent

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1. GYANDOH, S.O. Jr. The role of the Judiciary under construction at Proposals for Ghana 1968 volume 5. University of Ghana Law journal 133, at 150

2. In many common wealth cpuntries this takes the form of an advisory commission.

persons to jail. Even if it means loosing my job, I am still sure of leading a decent life. The only thing we have now in this country is the judiciary. We have politicians changing from one policy to another, and one party to another, but the only protection ordinary people have against all these inconsistencies is a fearless and upright judiciary".[3]

So it necessarily follows that the Judges must be made concious of their freedom to decide on what they feel is just and proper and conditions must not be created to make the achievement of this end difficult. Mere constitutiona provisions to the effect of making the judiciary an independent organ is not enough. This independence must be a practical reality, for even if it is written down that the Judiciary is independent and the judge is made aware that any decision that departs from the wishes of the government shall be met with disciplinary action, then it will require a brave Judge to pronouce judgement against the government. It is a futile exercise to have litigation between the government and the individual all ending in favour of the former. This is the independence of the judiciary is not a practical reality.[4] There is no suggestion whatsoever that the conclusive test of an independent and upright Judiciary should be an evenly balanced outcome of litigation, but surely there should be strong suspicions if all litigation involving the government often end in its favour.

The next stage shall be an examination of the constitutional provisions governing the Judiciary of Uganda, whether the Judiciary has been independent and upright is not a matter of constitutional provisions but a matter of practice which we shall see hereinafter.

CONSTITUTIONAL PROVISIONS GOVERNING THE JUDICIARY:

It is chapter 7 of the constitution of Uganda that deals with the Judiciary. The appointment of the Chief Justice is vested on the President. It is clear from the provision that he is under no obligation whatsoever to seek the advise of any person as regards the appointment of the Chief Justice.[5] For other Judges of the High Court it is provided that the President shall be advised by the Judicial service commission as to their appointment.[6] However, another constitutional provision makes it quite clear that the President is under no obligation to call this advice.[7] And as regards this very body which is supposed to advise the President as to the appointment of Judges, he has got a constitutional power to appoint three out of its five members.[8] Under the

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3. As quoted by Nwabweze: Constitutionalism in emergent states, London Hurst 197 p.146
4. Ibid. p. 146 5. S.84(1) constitution of Uganda 6. Ibid. S. 84(1)
7. Ibid. Article 79(1) 8. Ibid. Article 90

foregoing circumstances it is apparent that the Presidents opinion is very weighty as regards the composition of the judiciary. It may be logical to suggest that these powers are too wide and it could have been better if the appointment of the judicial service commission was vested on the Chief Justice.

It is agreed that constitutional provisions for the independence of the Judiciary can help entrench that independence although such provisions per se is not the conclusive test. It therefore follows logically that the mere restriction of the constitutional provisions of the independence of the Judiciary does not imply that the Judiciary is not importial in its functions. The conclusive test is the practical effect: Does the Judiciary as the bastion of constitutionalism in practice limit the powers of the government so as not to encrouch on the freedom of the individual?

Before answering the foregoing question there is a point which is worth of mention, whereas in the two East African Countries, i.e. Kenya and Tanzania, the courts were introduced by the colonial power and they are the forerunners of those charged at independence with the protective role: They were in the eyes of the African population part of the authoritarian administrative structure which was being imposed upon them.[9] The legal profession, it is not surprising regarded the courts as being in East Africa to service the primary communal needs of the small immigrant communities and not concern themselves very much with matter generally subnumed under the head of the rule of law.[10] Whereas the colonial administration did not discourage this approach and infact contribute to it in Kenya and Tanganyika by laws which prevented advocates from appearing in the native courts which were solely for Africans and keeping those courts separate from the ordinary legal system. It was accordingly difficult for the legal profession to have much contact with the African population or native administration.[11]

The Uganda position was however different for throughout the colonial period the courts had more contact with the Africans, there was never the same racial division as in the other two East African countries and were seen by Buganda and to a lesser extent the other treaty Kingdoms as an institution for protecting their constitutional rights as Kingdoms.[12]

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9. Mc Auslan, J.P.W.B. The evolution of public law in East Africa in the 60's (1970) Public Law 153 at 164.
10. Ibid. p. 165
11. Ibid.
12. Ibid.

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> "One essential attribute of constitutionalism, the use of the courts to solve politico-constitutional matters, was accepted however erroneously, as a matter of strict law in Uganda prior to independence. This tradition was carried over to the erra of independence, and in Uganda, unlike the other two East African countries upto the coup d'etat in 1966".[13]

Before any remarks are made about the above mentioned general comparisons between the three East Africa countries, it is first appropriate at this juncture to examine the case law since independence to establish whether what has been siad about Uganda is true.

Ibingira and others V. Uganda.[14] is apparently the major case of constitutionali before the coup d'etat of 1966. The appellants had been detained under the Departation ordinance (Cap. 46). Under this ordinance the appellants once deported thereunder, could not leave the part of the country to which they had been deported. The appellants, in applying for a writ of Habeas corpus in the HighCourt of Uganda, challenged the detention on the ground that the Deportation ordinance under which they had been detained was void for its inconsistency with the 1962 constitution of Uganda, in so far as it restricted the appellant's constitutional right of freedom of movement. However the Highcourt held that the appellants had been lawfully detained and deported and that the Deportation ordinance fell within the ambit of S.19(1)(j) of the constitution because freedom of movement could be restricted to such an extent as may be necessary in the...."Exercise of a lawful order"...but when the case came up to the court of Appeal for East Africa, judgement was given in favour of the appellants and it was S.1 and S.28 of the constitution which was given more weight. It was argued by the court of Appeal that S.1 of the constitution provided that the latter is the supreme law of Uganda and any law inconsistent therewith is void to the extent of its inconsistency. It was further stated that S.28(a) and (b) provided that a citizen of Uganda can only have his freedom of movement restricted by order of court, Further, paragraph (d) of the same section provides that only non-citizens can have their freedom of movement restricted without order of court and that since the appellants had been detained without order of court as required by the constitution which is the supreme law of Uganda, the law under which they had

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13. Ibid.
14. (1966) E.A. 306

been detained was void to the extent of its inconsistency with the constitution and the detentions were thus invalid: The case was accordingly remitted to the High court with orders to issue a writ of habeas corpus on behalf of the detainees which writ was accordingly issu by the High court. It is important to note that the appellants were again detained immediately after their release, but this time the government did it under a "better law".[15] One remark that must be made about this case is that it demonstrates the faith that the then Uganda government had in a "government of law". Whatever was politically expedient had to be done wit due regard for the law.

Another case which affords attention is Uganda V. Commissioner of Prisi Ex-Part Michael Matovu.[16] This case is of paramount importance because it only challenged the excessive use of power by the government but it also brought into question the legality of the government itself. This case came immediately after the coup d'etat of 1966. It is important to note that the government did not interfere with the proceedings in court when its real leg existence was challenged. It must be accepted that the question of whether the Judges were biased or not being irelevant, the judges gave very concinci and justified legal principles in holding that the government was legal.[17]

McAuslan expressed fears of the possibility of the use of the courts bei destroyed by the 1966 coup d'etat.[18] However his fears were unfounded as we are going to see hereinafter, because resort to the courts to solve excessiv use of governmental powers did not cease at least upto the advent of the mil regime. Shah V. Attorney-General Uganda.[19] Manifestly demonstrated the up-rightness of the Judiciary of Uganda in pointing out boldly where the govern had exceeded its powers. The government purpoted to pass legislation with restrospective effect which tended to preclude rhe plaintiff from enforcing contractual rights with the defunct Kingdom of Buganda.[20] Since the governm

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15. Emergency powers (Detention) regulations
16. (1966) E.A. 514
17. The Highcourt applied Kelsenian Principles on the basis of The State V. Dosso and Another (1958)2 Pakistan supreme court Reports 180 and held t there had been a successful revolution and the birth of a New State.
18. (1970) Public Law, 153 at p.165
19. (1970) E.A. 524
20. This was done by virtue of an ammendment of the Local administration A

of Uganda had taken over that Kingdom, it had also taken over its assets and liabilities, and it is the latter they intevnded to deny. This piece of legislation also purpoted to declare invalid any judgement of any court giving an individual power to enforce payment of a debt owed to him by the defunct Kingdom.

Jones, J. in holding that this piece of legislation was unconstitutional in so far as it deprived an individual of his constitutional right of freedom to hold property had this to say:-

> "The Amendment Act is clearly restospective in effect. Without wishing to appear unduly critical it appears to me that this piece of legislation, to put it mildly, is ill-considered and makes inroads into the fundemental rights of the common man. To give a Minister these wide and unbridled powers may well in itself militate against the public interest" [21]

As regards the provision of the amending Act which purported to invalidate proceedings before any court which touched on contracts with the former Kingdom of Buganda, Mead J. had the following to say:-

> "Section 2 of the amending Act compels a court to declare void any proceedings pendings before it and any judgement entered by the court without living any discretion vested in the court. The constitution defines the limits of the powers of the legislature, the executive and the Judiciary. The constitution manifests an intention to secure to the Judiciary, freedom from political legislative and executive control. In my view the legislatures direction under the provisions of section 2 of the amending Act as to what order a court shall make is a usurping the functions of the Judiciary" [22].

Yet another case which demonstrates the faith of the individual in the court as the position of the freedom of the individual and protecting the same from ill-considered governmental action was Opoloto V. Attorney-General Uganda.[23] The appellant had been relieved of his duties as chief of staff of the Armed Forces of Uganda. The importance of this case to thesubject on discussion is that it challenged the limit of the powers of the chief executive to appoint and dismiss his officers. From the reasoning of the High court of Uganda and of the Court of Appeal for East Africa, It is evident that this dismissal was done in accordance with the law.[24]

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21. (1970) E.A. 524 at p. 530
22. Ibid 535
23. (1969) E.A. 631
24. It was rightly argued that the President at Independence had inherited some of the powers of tje crown, one of which was to appoint and dismiss civil servants.

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As it was pointed out ibid in chapter 2, that the President is not liable to civil proceedings in any court. This protection was also ex to the Kings of the defaunct Kingdoms. The case of Bauman V. Nadiope.[25] which a former King of Busoga was successfully sued for recovery of a c suggests that a President may also be liable to civil proceedings after vacating office. This, it can be argued, is an indirect restraint on t Presidents actions during his term of office.

The foregoing are the cases which I have decided to cite to demonst the role of the Judiciary in constitutionalism as a reference. However must lay emphasis upon one fact, that what cases have been herein cited neither conclusive nor exhaustive. These cases were selected because t dealt with major constitutional issues. However it must be pointed out there are other cases which due to lack of space could not be cited.[26]

There is one comment which can be made at this juncture. It was said by Mc Auslan that in Uganda, unlike her two other East African counterpar the courts have often been resorted to resolve political-constitutional i and he attributed this to the more liberal approach of the courts in Ugan than in the other two state.[27] However it is important to note that the foregoing cases involved a particular 'class' of persons in Uganda societ If Uganda was a homogeneous society then probably more cases involving po constitutional issues could have come up to the courts. However the illi rate in Uganda is still very high and many people are still ignorant of t legal rights. Accordingly it is the elite who participate in litigation. foregoing points can be illustrated by the case of Nyakaitana V. Rwamunah The plaintiff had been detained for pointing out to the chief the latters in assessing his graduated personal tax liability. However, the plainti hired the services of an advocate and obtained judgement for damages for imprisonment.[29] This case is intended to demonstrate how officers of the government still attempt to exceed the limit of the powers conferred upon by virtue of the ignorance of the individual. However, one fact is estab that before the advent of the military regime the Judiciary in Uganda had tained afair degree of independence. The next chapter therefore which wi

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25. (1968) E.A. 306
26. For example Muyimba V. Uganda (1969) E.A. 433
27. (1970) Public Law 153, at 165
28. Unreported. Cited by Kanyeihamba, G.W. Constitutional Law and Gove in Uganda East African Interature Bureau p. 227.
29. Ibid.

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be the conclusion shall discuss military rule and constitutionalism but because of the peculiarities of that kind of government it shall be a brief exercise as not much constitutional rule is to be expected from an military government.

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CHAPTER FOUR:

CONCLUSION:

MILITARY RULE AND CONSTITUTIONALISM:

The justificatory statement often put forward by military governments when seize power include the need to avert corruption, to avoid bloodshed, to create conditions under which democracy may be restored etc.[1] These regimes often vest legislative and executive powers on one person or a group of persons. The military governments also often exclude judicial review of the executive and of legislation, since it is often the executive that is vested with legislative powers, the courts are accordingly incapacitated in any inquiry on power relations.[2]

> "That cornerstone of constitutionalism, the judicial review of the constitutionality of legislation is thus absent in a military government."[3]

Uganda was not an exception to the foregoing after January 25th 1971 when the civilian government was deposed. By Legal Notice No. 1 of 1971, chapter IV and V of the constitution of Uganda, dealing with the legislative and executive organs of the government were suspended. Parliament was dissolved and all legislative power vested on the military head of state.[4] By another Decree the military head of state was made the President and he was also precluded from liability to any proceedings whatsoever in any court.[5]

Under the foregoing circumstances what is the fate of constitutionalism? Every reasonable person who has been keenly watching the trend of events in Uganda would find a ready answer to this question. The events indicate clearly that the soldier...." is utterly unfit for government leadership. The kind of training and experience a soldier gets is intended to keep him in the barracks and not in a cabinet seat."[6]

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1. Declaration by the Armed Forces officers by Uganda Gazette General Notice No. 124, 1971.
2. For example Decree No. 1 of the Military regime of Nigeria of 1960 section 6.
3. Constitutionalism in emergent states: B.O. Nwabueze p. 244. London Hurst 1973
4. Legal Notice No. 1 1973 s.3 Supra
5. The constitution (modification) Decree (5 of 1971)
6. Constitutional Law and Government in Uganda: Kanyeihamba; G.W. (East African Literature Bureau) p.141.

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Although the constitutional independence of the judiciary has been maintained, its practical independence has been seriously eroded by the military regime. The disappearance of the then Chief Justice Benedicto Kiwanuka in 1972, after pronouncing judgement against the government and issuing a writ of habeas corpus in favour of a government detainee was an emphatic warning to the Judiciary that they had to sing the military tune. The foregoing point is further illustrated by the fact that no case touching on a constitutional issue between the individual and the government has come up to the courts since the ouster of the civilian administration.

Under the circumstances mentioned hereinabove it is extremely difficult to restrain the powers of the government due to the excesses of the military regime. It is apparent that the resort to the courts to solve politico-constitutional issues which has prevalent in the past-independence era and the era of the Second Republic of Uganda[7], will remain suspended as long as the present regime subsists.

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7. The First Republic come into existence after the coup d'etat of 1966. The Second Republic came into existance after the coup d'etat of January, 25th, 1971.

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