THE CONSTITUTION OF THE REPUBLIC OF UGANDA

by

AKENA ADOKO

Source: The Transition 33, pp-10-12

The Uganda Revolution which took place early last year made it clear that if Uganda was to remain a democracy then it was absolutely necessary to reorganize that democracy in such a way that the characteristic benefits which generally emanate from democratic governments were not interfered with, and in such a way that certain evils such as hereditary monarchy, excessive crime, separatist tendencies, and weakness of the Central Government were eradicated, or, as far as possible, neutralized. There is a consensus of opinion that the way the Constitution of the Republic of Uganda was introduced, and passed, with most of its provisions, deserve the highest praise. The criticism of the Constitution is centred on those provisions which aim at the elimination of the evils mentioned above and at the injection into the country's political machinery the flexibility it requires to cope with new problems.

The critics of the Uganda Constitution do not seem to have taken trouble to distinguish between the essence of a democracy and the paraphernalia with which it is clothed in different countries, and consequently have tended to advocate the adoption by Uganda of the collaterals of English or American democracy. A cursory reader of the Uganda Constitution cannot fail to see that it vests sovereign power of the state in the whole people of Uganda and the exercise of that power in the representatives of the people. It provides, in other words, for a representative democratic Government. How come then a person like Mr. Abu Mayanja, M.P., states that the Constitution has created, not a republic but a one man dictatorship? The reason is simple: he is not willing to begin at the beginning. He wants Uganda to start from where, say, U.K. is now. This is admirable but not realistic. Another critic of the Constitution seems to be arguing in the abstract-also admirable, but unrealistic. Any person who has taken trouble to consider the realities of Uganda would concede that the Constitution of the Republic of Uganda is the best for the country.

There has been an outcry, by critics, against the Uganda Constitution on the grounds that it made enactment of a detention act possible, and consequently that it did not protect the rights of the individual. Leaving aside the well known fact that the detention act is now found in almost each and every independent country in Africa and that consequently one might deduce that there were circumstances peculiar to Africa which necessitated this, let me hasten to say that there is no Government in the world which gives an absolute and categorical recognition to civil liberties. "Thus" wrote Franz Neumann, "the state may intervene with the individual's liberty-but first it must prove that it may do so. This proof can be adduced solely by reference to "law" and it must, as a rule, be submitted to specific

organs of the state: courts or administrative tribunals." These conditions for depriving an individual of his liberty must be fulfilled in this country even when the deprivation is effected under the Detention Act.

There is a mistaken belief that the state alone is the enemy of liberty. This is not the case. Private social power may, as in the case of Buganda before the revolution, be a greater enemy of liberty and state interference may always be on the side of liberty. Thus, in the case of Buganda many people were beaten, in the name of the Kabaka (who himself had no qualms in boxing any of his subjects, even the Katikiro) and forced to demonstrate for this or that or to give up certain opinions. As no subject dared complain against this invasion of his right for fear of being accused of abusing the Kabaka very little could be done to save the situation. In the Lost Counties, a market was burnt in broad daylight, and some persons shot and killed by no less a person than the Private Social power himself and none dared to help the Police in their investigations. Once you have this kind of Social Giant who calls himself and is called by others-towards whom he behaves as if he actually was-the husband of man, how can a government protect the liberty of the citizens from his invasion? Would resorting to a detention act be an unforgivable sin in that case?

There are other circumstances necessitating a detention act in Uganda. The fact that until recently we were ruled by a foreign power has tended to identify the Central Government, with its laws, and trappings as belonging to alien people and therefore something which must be avoided and frustrated. We have tended to identify ourselves with the assassin and other criminals and to resent the law and officers enforcing it. What must the Government do in such a case? Leave the known assassin to continue with his bloody trade or interfere with his liberty in the interests of the liberty of other law abiding citizens? In my view, the assassin must not be allowed to benefit from the abnormal attitude towards the law now prevalent in certain parts of the country. He, together with people like him, must be made to realize that the protection of his liberty by the state is not a one sided affair. It is conditional on his respecting the liberty of other individuals.

There is one other point which should be borne in mind. When you talk of liberty, a Ugandan in the village-and an overwhelming number of Ugandans live in villages-thinks more in terms of conduct prohibited rather than the law prohibiting it. To acquit a person who has murdered another on the ground that the case has been proved but not proved beyond reasonable doubt, that the case is based solely on the confession of the accused or because of this or that technicality, savours to them too much of injustice and tends to encourage the aggrieved persons to take the law in their hands. The law of evidence has yet to be amended in accordance with the African conception of justice. Till then, a provisional legislation devised to attain the type of justice which satisfies the masses of Ugandans and hence discourages them from looking down on the law and taking it in their own hands is necessary. This was more so during the revolution when the lives of law abiding citizens were threatened by illegal arms in the hands of subversive elements. For instance, in one case a fugitive handed some firearms to an abettor who was then charged for illegal possession of arms. He admitted having received the guns and

having hidden them but denied illegal possession. He was acquitted. Ugandans were shocked. They admitted the impossibility of understanding foreign law which in their mind tended to encourage the very object which it was meant to prevent- namely the commission of crimes. The law abiding citizens who obeyed the law in order to maintain their liberty were puzzled.

I am not advocating the reign of informers. I am advocating a reversion to a situation applicable in Uganda before independence and applicable to Britain now. This is that honest and fair minded people without any legal training but whose notion of justice is compatible with that of the community in which they live should be made to preside in the hearing of certain types of cases so that justice is not only done but seen to be done. These persons are known in United Kingdom as justices of the peace, and, in Uganda before independence, as native court judges. With the integration of courts after independence, a number of these judges were taken and given a brief training in law at Nsamizi. To show that they have now mastered all the technicalities of the English law of evidence some of them have indulged in dismissing most of the cases brought before them on certain technical points of law. Recently one such case happened in Lango. A man was caught red-handed committing a crime, and the "learned" Magistrate trying the case, to show his learnedness, dismissed the charge and ordered the arrest and trial of those who brought the charge. The Lango were not amused. The Magistrate had to run for his life to Lira and to ask for an immediate transfer. The provision for a tribunal to hear cases of detention does not only satisfy, as shown above, the legal requirements of justice, but also satisfies the masses of Uganda who want justice to be done and to be seen to have been done.

Another criticism against the Constitution is that absolute power has been vested in the hands of one man, and that it follows as the night, the day, that it will corrupt him absolutely. If Uganda had made any radical departure by vesting powers in excess of those generally vested in the Heads of Governments and States, the criticism would have been well deserved. But this is not the case. As long ago as 1787 when the Constitution of the U.S.A. was in the making, the Federal Convention of America was impressed by, amongst other examples, the powers vested in the Prime Ministry and the Crown in Great Britain, and decided to emulate it, and so the Constitution of America provided that, "the executive power shall be vested in a President of the United States of America." The Uganda Constitution merely echoes this. That those who should be expected to know about these things should uphold the provision of the American Constitution as a model for democracy and denounce the very same provision in the Uganda constitution as a model for dictatorship manifests abundantly that the outcry is not creditable to the good faith of the assailants.

It may, however, be argued that the vesting provision in the American constitution was a more designation of office and not a grant of power. But such an argument can only be entertained by a person ignorant of the authorities and precedents which have clearly established that the vesting provision does constitute a grant of power. "The Constitution," wrote William Anderson, 'does not say that the

President is 'chief executive'. That would imply that there are other executives, of lesser power, associated with him. This vesting clause places the entire executive power of the United States Government in the hands of one man. It does so by constitutional provision, beyond the power of Congress or the Courts to take it away." Emphasizing the same point, President Theodore Roosevelt of America wrote, "I decline to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws."

This view was no doubt challenged by President William H. Taft but unfortunately during his presidency Taft acted consistently, especially on public questions, with it. Locke resolved the issue with the following classical statement:- "Many things there are which the law can by no means provide for, and those must necessarily be left to the discretion of him that has the executive power in his hands, to be ordered by him as the public good and advantage shall require; nay, it is fit that the law itself should in some cases give way to the executive power, or rather to this fundamental law of Nature and Government-viz., that as much as may be, all the members of the society are to be preserved."

The critics of the presidential powers tend to overlook two things. First, that there is also danger in failing to concentrate sufficient powers to carry out governmental functions in the hands of the executive. I would personally hate to see, once more, the progress of the country hampered by struggles for power as nearly happened last year. If advanced countries like the U.S.A. and Britain have to take precautions against this kind of situation why not countries like Uganda and other African states whose governments, because of the backwardness of the countries, have more extensive functions?

Secondly the critics tend to overlook the fact that the powers vested in the President are those which enable him to control the business of government, and not necessarily to execute it himself. So overwhelming is government business that no single person can do it himself or even consent to try do so. This is why we have a cabinet and ministers in charge of various ministries, the Public Service Commission, Uganda Electricity Board, and Uganda Development Corporation etc., to help carry out certain governmental functions. In spite of this fact, that the executive powers are delegated and distributed, the vesting of such powers in the hands of one man ensures that somebody, and not an anonymous mass, must be held responsible by and directly accountable to the people of the country for the way the government powers are used.

Much fuss has been made about the President's powers as Commander-in-Chief of the Uganda Army, and his powers to pardon and to legislate. Again, on examination, these powers turn out not to be peculiar to be Ugandan President but are basically the same as those conferred on the presidents of the so-called great democracies. In America, there is nothing nominal about the President's power as

Commander-in-Chief. Thus, "as Commander-in-Chief the President is the ceremonial, legal, and administrative head of the armed forces….. The President may involve himself in such direction of military movements and strategy and the actual conduct of military operations as he sees fit" In Uganda, the Constitution waters down the power of the President as Commander-in-Chief by providing that Parliament may regulate the exercise of such power.

Again under the American Constitution the substance of the power to pardon is basically the same as under the Uganda Constitution. Article 11, Section 2 of the American Constitution provides that the President, "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." It has been held that the Congress cannot change the effect of a pardon granted by the President.

I have quoted above Locke's classical statement on the power of the executive. The content of that statement was, incidentally, in the year 1890 In re Neagle, fully endorsed by the Supreme Court of the United States. With regard to the power of the executive to make provisional regulations to carry out certain governmental functions Locke said, 'For the legislators not being able to foresee and provide by laws for all that may be useful to the community, the executor of the laws, having the powers in his hands, has by the common law of Nature a right to make use of its for the good of the society, in many cases where the municipal law has given no direction, till the legislative can conveniently be assembled to provide for it." The power given to the President of Uganda under the Constitution is indeed much less than the above in that these provisional regulations can only be made in the time, and during the duration, of public emergency, and when there is no National Assembly due to the dissolution of Parliament.

The most pointless of the criticisms of the Constitution, are those pertaining to the election and removal of the President. The Constitution provides for political parties to nominate at the time of a general election one of their members as a presidential candidate and for every person nominated as a parliamentary candidate to declare, at the time of his nomination, the presidential candidate he supports. The presidential candidate nominated by the party with the greatest numerical strength of the elected members returned after the election is to be the President. It is clear that this is essentially the same as the provision for the election of the Head of Government in Britain where immediately after a general election the leader of the party commanding a majority in the House of Commons becomes the Prime Minister. It is not necessary for the Queen to summon all the elected members before appointing a prime minister from the majority party and to ask which of them have changed their minds during the election about their party leadership. This is inconceivable. It goes to the credit of the party in government in Uganda that in the interests of democratic rule by political parties it has magnanimously discontinued the practice by providing in effect that those who stand for election to parliament on the ticket of a given party must do so on the understanding and commitment that when their party wins they will form a government with their

leader as the head of that government. This is what happens in England. You do not stand on the Conservative party ticket and then back Labour party leader Mr. Wilson as the head of government.

The critics also say that the removal of the president under the new Constitution is not easy. One of them said that the president's post was that of a politician and consequently must not be protected as that, for instance, of the Chief Justice. But is it so protected? Is the Chief Justice compelled to render an account of his trusteeship to the people of Uganda at the end of every five years of service and to place himself at the mercy of the said people for re-election as the President of Uganda is under the new Constitution? The Constitution also provides for the removal of the president for misconduct and for mental and physical incapacity. The President in short, may be removed from office by the electorate during the election, or by the electorate's representatives i.e. the members of parliament on grounds of serious misconduct or by an act of God i.e. where he is incapacitated by reasons of ill health or death, from carrying out his duties, or where the cause of such incapacitation is human. What more additional grounds do the critics want for the removal of a president? One point which the critics seem to have missed is that the President is not a houseboy and should not therefore be removed as a houseboy. If this is what the critics want then I am afraid they are rightly disappointed. No nation worthy of the name would allow its president to be removed from office by any Tom, Dick, or Harry or by a handful of megolomaniacs or on a mere flimsy ground or excuse.

The most confused criticism of all is that Uganda has not vested the power to interpret the Constitution in the court of the State. According to one critic the highest court of the State of Uganda is the Court of Appeal for Eastern Africa. Eastern Africa, as everyone knows, is not one state and the Court of Appeal for Eastern Africa is certainly not the highest Court of one state but an international court for three states. Now if Uganda wanted an international court to be the highest authority to interpret its Constitution. why should it vest such powers in an international court confined only to East Africa? Would it not be more impressive to go one step further and vest these powers in the international court for all the Commonwealth countries i.e. the Privy Council? Nay, it would be much better to vest it in the international court for all the nations represented at the United Nations. This is absurd. The requirement that the highest court in the land be the authority to interpret the Constitution, of that land has been fulfilled by the Constitution which has vested such powers in the High Court of Uganda which is the highest court in our state.

On the question of abolition of kingships, the critics are reluctant to discuss the merits of the case. They dare not either say that hereditary monarchy is a good thing, for their conscience tells them the contrary, or that it is a bad thing, for reasons to be noted later. They are therefore compelled to shirk the issue and advance such argument that the Constituent Assembly had no mandate to do away with the institution of kingship because when its members were campaign-to be elected to Parliament, they pledged themselves to maintain the institution, and

because there was no evidence that the people in Kingdom areas wanted kingship abolished. Hence the critics claim that they have no mandate from the electorate to abolish kingship.

In the first place, not all the parties pledged themselves to preserve kingship. On the contrary, the Uganda People Congress, for instance, promised to maintain the dignity of the kings i.e. as long as they were kings. Secondly, is it sound reasoning for the critics to pick only the provision relevant to the abolition of kingship and claim a lack of mandate as a lame excuse for not discussing its merit, while at the same time discussing the merit of all the other provisions of the Constitution?

We have, in this country, always been of the opinion that a member of parliament is not an ambassador for his constituency, and consequently that he does not have to refer every question which arises in parliament back to his constituency for direction in the way the Uganda Ambassador to the U.N. does. Because of this our members of Parliament have been regarded as representatives of their constituency and not constituency delegates. Consequently they have been regarded and respected as men of conscience and judgment who would defend the truth and justice as they see it with their lives if need be and certainly against any wrong public opinion in their constituency.

What Mayanja called the principle of representation is really not a matter of law but of ethics. It is what the electors regard as their moral duty in chosing the person to represent them, and the spirit which the elected representative regards as fundamental to the discharge of his representative duties. Now, in Uganda, our electors who consist of people of no formal education and no training in the art of modem government have resigned themselves to the necessity of selecting as their representatives, persons with more knowledge on such things and persons who speak a foreign language which is not known to them but which is legally the national language. Once they have selected him they trust his good judgment. With all his knowledge on modern governmental matters of which they are ignorant, they are sure that the chances of his being wrong, and their being right on such matters are remote. They appreciate that knowledge must, in the light of a given premise, lead, in all good faith, to a different conclusion from that of ignorance, and the conclusion derivable from knowledge has greater chances of being right than that derivable from ignorance. So when you have a member of parliament (in the Uganda context, a leader of the people in his constituency) who is afraid of examining the merit of a case before receiving a lead from the people of his constituency who in their turn are waiting for a lead from him, you find yourself in a vicious circle.

Why is it that in an area governed by a monarch, the subjects- this is possibly abetter description than the citizens-are not articulate on the subject of hereditary monarchy itself? Thomas Paine endeavoured, as long ago as 1776 to explain this. "Most wise men," he wrote, "in their private sentiments have ever treated hereditary right with contempt; yet it is one of those evils which when once

established is not easily removed; many submit from fear, others from superstition, and the more powerful part shares with the king the plunder of the rest." .

What about the institution of hereditary monarchy itself which our critics dare not question? This has long been held to be an unnecessary evil. "There is not a problem in Euclid," said Thomas Paine, "more mathematically true than that the hereditary government has not a right to exist. When therefore we take from any man the exercise of hereditary power, we take away that which he never had the right to possess and which no law or custom could or even can give him a title to."

With the achievement of independence on the 9th day of October, 1962, we nominally achieved a degree of unity. Many persons still thought in terms of locality and tribalism, and certain local councillors still thought that the Central Government of Uganda was an alien government which they could force out of an area which they claimed belonged to them notwithstanding the fact that the said area formed an integral part of Uganda. Time and certain measures were necessary to help develop national feelings. History abounds with instances which prove that such feeling of national oneness has generally developed by subjugation to a reasonably powerful common central authority catering for the interest of all, and offering opportunities to all to participate in a common interest. This, as stated at the beginning of this article, was one of the aims of the Constitution of the Republic of Uganda. Whereas, therefore, the 1962 Constitution was one for Independence, the 1967 Constitution is one for real National Unity.