MAKERERE UNIVERSITY – FACULTY OF LAW

PUBLIC LECTURE, 15TH MARCH, 2007

THE CULTURE OF CONSTITUTIONALISM AND THE DOCTRINE OF SEPARATION OF POWERS

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I wish to begin my remarks by disclosing that I have been part and parcel of Governance in Uganda since the late 1970s. As a Member of Parliament, Cabinet Minister and first Senior Presidential Advisor, I was involved and a member of the decision making bodies that evolved the NRM and succeeded in building a Uganda we live in to-day. I am one of those who believe that the NRM has made some remarkable scores of achievements in governance and development. If I am now one of those deeply concerned about the developments and attitudes regarding the way we are currently governed, it is that, like so many Ugandans, I am afraid that we may be slipping back into misgovernance which may lead to loss of much of what we had already gained and accomplished.

The subject of our discussion to-day has been rooted in history from time immemorial.

I have been closely associated with institutions involved in governance for over forty years. During this time, I have been a student, a professor, a Member of Parliament and a Cabinet minister and now judge. I have also written several books and published numerous articles in which the subject of governance figures prominently. Three of my major books, **Constitutional Law and Government in Uganda, Constitutional and Political History of Uganda From 1894 to the Present and**

Kanyeihamba's Commentaries on Law, Politics and Governance, deal principally with powers, functions and limitations on government. In the last named and latest book, I define, describe, as well as illustrate the exercise of governmental powers and touch on concepts such as the Rule of Law, Separation of Powers, Human Rights and Constitutionalism.

POWERS OF GOVERNMENT

Most Constitutions prescribe the different functions performed by the three organs of government, namely the legislature, the executive, and the judiciary. The legislature is that body within a state which is entrusted with the making of new law and the alteration or repeal of the existing law. It is also the organ which is designed to monitor and bring the executive to account. It can also, vary, limit or expand the jurisdiction of the courts by law, provided all these are in conformity with the constitution. Without a legislative body of some sort, no modern state can provide laws readily enough to meet conditions of development obtaining in society.

Nowadays, the most powerful instrument for legal change in the state is legislation. On almost every front of development, there must be some law that lends legality, legitimacy and credibility to what is proposed and done in the interest of the public. However, it is conceded that Parliament must obey the rules which are prior to its sovereignty. Thus, Sir Owen Dixon said;

"The law existing for the time being is supreme when it prescribes the conditions which must be fulfilled to make a law but the question of what may be done by law so made, Parliament is supreme over the law". The law meant here is of course one which is subordinate to the Constitution.

The executive is the body in the state which is entrusted with the administrative functions of government in accordance with the constitution and laws of the state. It is the organ which initiates and frames most public policies of governance, development and security and, executes the same in conformity with the laws and constitution of the state. It makes the choice and priorities of the manner and time in which the policies

shall be implemented. In this regard, members of the executive do make and publish a lot of subordinate legislation by way of rules, regulations and statutory instruments to amplify and supplement the laws made by Parliament or interpreted by the courts. It is the same organ which finds, distributes, grants or withholds public funds for any public project or development however defined and described. In terms of social, political and economic change and functionally, the executive arm of government has increasingly become the most important of the three organs of government.

The Judicial function consists of the interpretation of the law and its application by rules or discretion to facts of particular cases. The institutions which are entrusted with these functions are the courts of law or the courts of justice or simply, the judiciary. The primary task of the judiciary is to determine the legality of the different kinds of acts and behaviour in society. This does not mean that a court may investigate those acts or behaviour on its own volition. In each case, it is for the individual or a group of them to raise the subject matter of litigation, whether civil or criminal, as an issue for adjudication. Once an issue has been raised appropriately and in a court with jurisdiction on the subject, that court has a duty to hear the parties, reach a decision and finally dispose of the matter in accordance with the laws of the land and the dictates of justice in the particular case as perceived by the presiding judge or judges. Courts are duty bound to reach decisions and justice demands that they do so expeditiously. This may be contrasted with the classical Roman Law procedure which at one period allowed a judge to declare that he was unable to reach a decision on the case because there was no express law on it.

In the application of law, courts consider themselves bound by statutory provisions except where such provisions are inconsistent with the Constitution, which is a superior law, in which case the provisions of the Constitution will prevail, at any rate to the extent of inconsistency. Some states give room for judicial latitude and discretion. Occasionally, a court may be faced with a problem where there is no express law. The court then applies the principles and rules of the common law, equity,

custom and international law. It may draw analogies from the experiences and practices of courts in other legal jurisdictions. Concepts such as natural justice, fairness and special circumstances of the particular case come into play. Thus, the function of the court is to discover and apply the law to facts and acts, or behaviour and so decide between the merits and demerits raised in submissions and arguments by parties who must be or who represent actual litigants. In common law countries generally, courts are not concerned with speculative, academic, or hypothetical questions.

Nevertheless, where there is no specific law or code which provides directions as to the source of the judge's authority, a judge will normally turn to persuasive precedents, textbooks, the use of analogy and such other aiding devices as may be afforded by custom, trade usage, and logic. Many codes lay down specific instructions as to what other sources judges should resort to. The Japanese Code relies on customs and, in default of that, on reason of equity. The Swiss Code provides that in the last resort, the judge should apply the rule which he would make if he were acting as a legislator.

In this labyrinth, courts will entertain suits and applications from individuals, firms, associations, companies, governments and organisations and determine all, applying the same principles, precepts, rules, values and standards, without fear, favour on ill-will.

In consequence, the role of the Executive must be understood and appreciated in relation to those of the other two organs of government.

In their report on Uganda, Dr. John-Jean Barya and Mr. Simon Peter Rutabajuka for the Economic Commission for Africa, the learned authors examine the effectiveness of the main arms of government in ensuring democratic, participatory and accountable governance. They assert that institutional effectiveness and accountability refer to the existence of checks and balances among the three arms of government. It also refers to respect for the rule of law by all arms of the state especially the executive. They also see it in the quality and manner in which the state guarantees for its citizens through

provisions of or ensuring the provision of health, education, housing, water, transport and other utilities. They examine the institutional effectiveness and accountability in terms of the extent to which civil society exists and operates and in particular the autonomy in which it carries out its activities and lastly, they examine the place and importance of the media in society and its development.

TOLERANCE IN THE EXERCISE OF POWER

In public and private affairs, tolerance connotes the ability of a person, leader or group of them to allow and forebear other persons to hold and express different opinions or act differently even if they do not agree with the people who are inclined or advised to exercise tolerance. It is an art of endurance or patience which characteristically permits variation in opinions and behaviour whether of a political, religious or social nature. Tolerance was once epitomized by a liberal politician who expressed total and unequivocal disagreement with the view of his opponent but also his unconditional commitment to fight to death in his efforts to protect the right of that same opponent to continue expressing those views without interruption. Tolerance is often equated with liberal democracy. liberal democracies depend on values beyond what is lawful or constitutional or the dictates of the concept of majority rule. It is not often appreciated that intolerance and dictatorship can exist and often do under majoritism of a democratic phenomenon. Thus, an American scholar by the name of Ronald Dworkin identifies the Bill of Rights as designed to protect individual citizens and groups against certain decisions that a majority of other citizens might want to make even when that majority acts in what it believes to be the general or common interest.

The exercise of governmental powers may be legitimate and constitutional but the manner in which they are exercised and its consequences may have to be buttressed by the rule of law and constitutionalism. As Nwabueze once wrote;

> ***"The term 'constitutional government' is apt to give the impression of a government according to the terms of a constitution.***

There are indeed, many countries in the world today with written constitutions but without constitutionalism. A constitution may also be used for purposes other than as a restraint upon government. It may consist to a large extent of nothing but lofty declarations of objectives and a description of the organs of government in terms that import no enforceable restraint; such a constitution may indeed facilitate or even legitimize the assumption of dictatorial powers by the government. Indeed, it is not an exaggeration to conclude that for many countries, a constitution is nothing more than a proclamation of what governments are entitled to do, and often do, to restrain the liberty of citizens or deprive them of proprietary interests".

In a number of countries, constitutions are perceived by those in power, not as protectors of the human rights and the liberties of the individual but as instruments for legitimizing the exercise of power. For the opponents of these rulers, constitutions are understood in terms of the government's legitimacy to exercise arbitrary power, to impose restrictions on certain freedoms and rights and to do whatever the ruling oligarchy deems necessary and in its interest. It is the kind of constitution that revolutionaries and leaders of military *coups d'etat* find an easy target and the overthrow of which encourages further stringent measures against the population.

Apart from governmental restraint, individual rights and freedoms are protected mainly by unhampered access to the jurisdiction of the ordinary courts whose independence and impartiality are constitutionally guaranteed and which must be transparent in the performance of their functions. With notable exceptions, it is access to court that is often projected and intended to moderate the behaviour of rulers while injecting a sense of tolerance all round. Similarly, the idea of constitutionalism does not depend on the letter of the law or on the constitution or indeed on its correct interpretation. While these attributes are necessary preconditions, they need to be supplemented by other considerations such as equity, fairness and the hearing and

respect of minority views so as to bring into focus the needs and desires of society as a whole. That is the measure of constitutionalism. Thus, it may be constitutional for courts to be independent and impartial in adjudicating disputes between one individual and another or groups of them and the government but if the courts' decisions are ignored or not implemented, there is no constitutionalism.

The government may be advised not to proceed with a certain policy because of its harshness to citizens but government may insist upon it by persuading Parliament to legitimize it with the passing of the desired law. The law will certainly be constitutional but the policy may not reflect what is constitutionalism because it denotes government by law and not under the law, which itself symbolizes intolerance.

For many countries of Africa, the period between the grant of independence by the colonial powers and the struggle to establish national ethos and democracy was characterized by suspicions and hatreds between the peoples inhabiting those countries. The conflicts therein were such that solutions to them could not be provided by the dictates of democracy alone. A great deal of compromise and co-operation between opposing communities and factions was, in certain instances, enhanced by monolithic organizations while yet in others only multiple party organizations could provide the answers. In others, government by delegations from all sections of the country was the only logical answer for accommodating the fears and aspirations of everyone. The idea of winner takes all or of the holding of victory rallies and feasts in closely contested and controversial campaigns was to be discouraged or at any rate, tinged with moderation and tolerance.

In cases of sharp differences in society, it is imperative that predetermined rules of constitutionalism be entertained with restraint, accommodation and tolerance. An important aspect of the new understanding in governance should be the education of leaders that neither they nor anyone else has a monopoly of wisdom and intelligence or knowledge at all times to originate the right policies or solutions to current national and

world problems. Leaders need to accept and appreciate electoral and political defeats and loss of power as proper attributes of democracy and constitutionalism. The system of public administration must guarantee the lives and happiness of previous or ousted leaders in a manner that will discourage them from clinging to power by whatever means as the only way of protecting themselves. It needs to be emphasized again and again, that in developing and poor countries, the distribution of and access to the national wealth and resources are as important as the maintenance of law and order, legalism and constitutionality are as important as the political reality of the situation, just as the concept of democracy needs to be balanced fairly evenly with the people's right to be governed well and peacefully.

In most developed countries, the function of law is determined largely by the national ethos, social, culture and political ideology which have long histories behind them. In developing countries, these concepts and ideas are still in the formative stages. Consequently, public law must be directed to their evolution, growth, consistency and nurture. Regrettably, in some countries, the courts which were established as the last bastion in the defence of the freedoms and rights of the individual and against the oppression by or injustices of public authorities, have been reluctant to confront the executive while parliaments, the symbols of democracy and liberty have occasionally hesitated or showed partiality and timidity in challenging maladministration and abuse of power by members of the executive.

It is therefore imperative that arms of government stand up, uphold and protect the values for which they were created. In the political, economic and social crises that tend to characterize the developing countries, there can be little doubt that problems of constitutional instability and underdevelopment will increasingly bring pressure to bear upon the communities and governments concerned. The solutions to these problems will consist, in part, a constant review of the constitutionality of government action and on the other, tolerance on the part of both the rulers and the governed.

In an illuminating guide to the Kenya Constitution, Prof. Yash Ghai has enumerated and described the functions of government. In his view, the most important functions include the making of laws, policy making and implementation, the management of the economy, ensuring that law and order and the security of the population are maintained and protected, enforcing laws which protect people's lives, families and property, safeguarding national resources not only for the present but increasingly for future generations, satisfactory resolution of disputes on a variety of matters between members of families, manufacturers and consumers, trading partners, employers and employees, citizens and public authorities, landlords and tenants, educational institutions and students and so on.

Ghai maintains that the satisfactory resolution of these disputes is essential to the security, stability, economic and social development of society. The state has the ultimate responsibility for ensuring national unity and social cohesion and for fostering a sense of public responsibility and commitment to the public good.

Arguably, only in *Utopia* can a government be perceived which is capable of performing all the functions and fulfilling all the conditions we have mentioned and examined. However, the said functions and conditions together constitute the litmus paper against which all governments are tested. Governments which endeavour to and achieve the greatest number of scores against the test are said to be amongst the best in the World. Governments which score the least of points are said to be amongst the worst.

In the case of Uganda, there is ample evidence to suggest that as a state, the country has never been amongst the best as far as its governments are concerned. The independent government of Milton Obote was found wanting and overthrown by the military government of Idi Amin. The Amin regime published eighteen reasons why it found it necessary to overthrow Obote and his administration. The Amin *junta* was in

turn defeated in a civil war. The victors published a catalogue of the failures and the misdeeds of that government. The short administrations of Prof. Lule, of the Military Commission and of General Tito Okello also failed and their shortcomings and evidence of misgovernance have been analysed and published in diverse books and articles.

The NRM government which has ruled Uganda since 1986 assumed the mantle of political power with the greatest of expectations that it would be among the best governments in the World. Indeed, in its bush war against the forces of repression and the first years of its rule, it promised and performed to the levels of those expectations. It is not surprising either that it has been during this rule that the greatest number of analyses, publications and filming have been undertaken and recorded revealing what went wrong before. The same Government appointed the Commission of Inquiry into Violation of Human Rights. The findings, conclusions and recommendations contained in its voluminous report is one of the most important public documents preserved in this country's archives. The story of the NRM-NRA told in the *Mission To Freedom* is another classic publication detailing the omissions and transgregations of past governments in Uganda. One of the contributors to *Mission to Freedom* is President Yoweri Kaguta Museveni himself. He wrote;

> *"At the time of launching the armed struggle, many people in the country did not know what it was all about. Moreover, the majority of Ugandans knew there was something drastically wrong in Uganda, but they did not know that anything could be done to remedy the situation …. The purpose was furthermore to use the paper to keep people informed about what was taking place in Uganda in general and with regard to the resistance war. We also wanted to alert Ugandans and friends of Uganda about the seriousness of the degradation that was taking place in our country as a result of a corrupt system which was being perpetuated by a bankrupt leadership."*

The publication contains news and commentaries about the Uganda National Resistance and its military wing, the National Resistance Army.

Generally, the NRM government must be credited with having encouraged and nurtured freedom of expression and of the press under which writings and publications works about government failures including itself have mushroomed over the years. One such books is Kasozi's *"The Social Origins of Violence in Uganda"* which was published in 1994. Whereas Prof. Kasozi's contribution is devoted mainly to Governments' misgovernance from 1964 to 1985. other publications have appeared since then criticising and detailing the omissions, misdeeds and reversals of the NRM administration.

Thus, writing about Parliament as an instrument of democracy, Prof. Grace Tumwine-Mukubwa observed in 1998;

> *"For the majority, the reason for not consulting is really economic. Elections in Uganda are held under what has translated itself to mean "personal money". Votes are bought and sold. Reports on the election process of 1996 other than for the President, showed that the whole exercise has been commercialised".*
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> *Consequently, some members of Parliament do not feel that they owe any duty to their constituents. Even those members who are more public spirited and would like to consult, may find themselves in a quagmire. Immediately they visit their constituencies, they find out that they are expected to perform the role of father christmas. They are met with all sorts of financial requests such as school fees for children, graduated tax, money for medicines and money for alcohol. For this reason, many members just avoid going to their constituencies for any reason.*

There can be no doubt that one of the greatest disservices the NRM government has done to Uganda is to accept and encourage monetisation of and bribery in all public elections. In *Constitutional And Political History of Uganda, From 1894 To The Present*,

I discussed the ghosts of the past and unholy alliances with new ones appearing since the advent of the NRM administration and observed;

> *"Since 1996, the NRM has unveiled many facets which few Ugandans expected from it. It can be stated that since the promulgation of the 1995 Constitution which was arguably the finest hour of the NRM administration, the leadership has appeared to concentrate more on political games of how to stay in power and exclude others from it longest."*

In his incisive article headed: Africa: **The Agony of Being a Mere Buzzword**, Dr. Kabayo wrote;

> *"For a short time during the mid 1990s, it looked as if a few African countries were going to break out of this club of the destitute, with some like Ghana, Uganda, Senegal, Tanzania, Mozambique, Botswana, South Africa and others registering growth rate in excess of 5% per annum. News about this economic good fortune gave the continent hope and even fuelled talk of an 'African renaissance'. However, the poverty assessment study of Sub-Saharan African countries financed by the World Bank, conducted later in the same year concluded that the cheerful statistics were not the beginning of a genuine economic turn around, but a mere illusion, no more than, what one journalist called a 'result of good rains and bad accounting.' And what is more, the experts confirmed that Africa's poverty is increasing and deepening, in a trend that is unlikely to be reversed in the foreseeable future."*

WHAT WENT WRONG?

The priorities which inspired African nationalists and liberators to fight for freedom and against repression and injustice altered. The highest preferred by the new African leaders came to be how to stay in power longest for the sake of self. The obvious urge to ensure the security of the state turned into the love of power and the protection of the nation changed into the protection of the leader and his or her immediate supporters even if this could only be achieved at the expense of the former priorities such as eradication of disease, poverty and ignorance. The leader, his or her immediate family, government loyal Ministers and public servants became the most important assets of the state to be sustained and protected at all costs.

While national policies continued to be formulated and implemented on such subjects as defence, economic development and social services, the implementation tended to first favour first the privileged members of the ruling oligarchy. The social and economic analysis of the *personalised state* began to reveal interesting phenomena. The major beneficiaries of the few economic gains achieved tended to be the leaders and their immediate supporters. The new priorities effectively alienated the middle and industrious classes of the nation who were enlightened to know the meaning and effect of the new emphasis. The leaders were forced to turn to the poor and the peasants who knew next to nothing and who could, on being bribed with a few coins and big but empty promises, do whatever the leaders wished, including voting massively in support of the leader's wishes however whimsical. It increasingly became obvious that without the poor and the ignorance of the state being duped into becoming the vehicles to and instruments of power, the metamorphosed leaders would have starved to death and certainly lost office long time ago. The new leadership of Africa thus chose to survive longest by riding on the backs of the poor and the ignorant. Those who questioned the new priorities were threatened with the unleashing of the Military forces against them.

Some of the leaders also realised much earlier in the last century that in order for them to survive and prosper personally, they needed to accept the dependence syndrome. The countries they led became client states of the foreign wealthy individuals, corporations and donor states. Being able to thrive on the sweat and blood of foreigners through aid and loans, the new African leadership no longer got inspiration to advocate the right of self-determination which was so popularly utilised during the struggle against colonial rule. Instead, these leaders travelled expensively far and wide to foreign capitals with begging cups seeking handouts and other assistance from the rich. National assets and corporations and utilities were staked out and alienated to foreign international bidders, not always the highest, depending on what kickbacks the leaders' negotiators were able to receive from the potential new owners. In their zeal to industrialise, parcels of land were meted out, and invasions of the environment freely permitted without regard to the needs of ecology and future generations.

The greed and ambitions of the persons closest to the leadership knew no bounds. In order to get rich quickly without working, the economic disease of corruption came to be accepted as normal. In some instances, it was harnessed as a legitimate tool for retaining political power. The freedom fighters and the liberators who had come to power with such promises and hope for the masses easily abandoned their original missions in preference to personal comfort and wealth. Thus, in Uganda, the NRM abandoned two of its major policies which had endeared it to the population. These were the Ten-Point Programme and the idea of electing or appointing leaders on merit. The idea of fighting vigorously against corruption was abandoned in preference to the retention of political power. Another principle which was abandoned by the NRM was the concept that the government of Uganda should be broadcasted and non-sectarian.

It is nowadays commonly whispered that the leadership is riddled with blatant ethnicism, nepotism and personal patronage and that employment and appointment in public service depends on one's loyalty to the NRM leadership and not to the nation of Uganda.

The NRM High Command accused previous Presidents including President Godfrey Binaisa of meddling in commercial and trade transactions instead of leaving them to line ministries. Available evidence shows that the present NRM leadership cannot be acquitted of a similar charge. The NRM leadership is accused of having abandoned its socialist, nationalistic and popular policies in preference for ultra capitalist economic ones in which the NRM top leaders or those closest to them benefit personally. The leadership stands accused of having allowed the economy to develop in such a way as to leave the peasants still acutely poor or poorer still while those in its inner circle, their friends and foreign associates have harvested the greatest rewards from the wealth of Uganda. It is one of the bitterest ironies of the NRM philosophies that every five years or so, the same leadership with alleged coercion and bribery, corruptly uses the same poor, the ignorant and the peasants to be sustained in power.

It is therefore not surprising that in the labyrinth of governance, executive power can be used to enhance and direct development. Conversely, executive power can be used to create such undesirable conditions that an enlightened population perceives them as intended not only to disadvantage but to frighten it as well. It was observed that in the 2006 elections, the majority of Ugandans yearned for change and could have easily voted overwhelmingly for an opposition candidate, but the majority of them also feared for their lives if the NRM leadership were not to be returned to power. Caution prevailed over valour and most of the NRM leaders were returned to Parliament in those elections although in the process some 80 NRM cadres were defeated by multipartists and independents.

It is not often appreciated that failure or neglect to exercise executive power can be as harmful as abusing it. We have already alluded to the weak or lukewarm attempts of the appropriate authorities in government to respond effectively to allegations of corruption and abuse of office in public affairs.

From time to time, the Press have investigated, discovered and reported several or more holders of public offices who have indulged in corrupt practices or who have the mentality of "*get rich quick*" and do so or, who are connected with shoddy or corrupt schemes and organizations, the acts and behaviour of which are contrary to the leadership code. Many such reports are often ignored by those concerned and, those which are acted upon yield very few positive results. Society can no longer tolerate a situation where holders of public office who are supposed to act impartially and justly in the public interest have enjoined that interest to one of theirs, their family or friends to the extent that the two have become inseparable.

The proper exercise of executive power means a radical departure from the prevailing attitudes, whether official or unofficial, which appear to condone wrong-doing and reward corruption in public administration. A radical transformation of the public service and accountability is long overdue because this is another clear case of unconstitutionality.

CAN UGANDA JUDGES ENGAGE IN JUDICIAL ACTIVISM TO UPHOLD AND PROTECT HUMAN RIGHTS?

The intermittent allegations of corruption, abuse of office against ministers, public servants and the Judiciary, whether true or false, can only undermine the fabric of society and weaken faith in public administration and the administration of justice. Where persistent allegations of corruption are directed against the Judiciary by such organs as Parliament, members of Cabinet, the office of the Inspector General of

Government, and the Press, the undermining of the judicial institution can be catastrophic. Belief that it is no longer independent or impartial makes the Judiciary virtually useless as far as the application of the law and the rendering of justice are concerned. Loss of faith and trust in the Judiciary by the general public is as grave an occurrence as the discovery that he Executive is authoritarian or Parliament has been rendered a rubber stamp by the other organs of government.

The Constitution and the laws of Uganda endeavoured to place the Judiciary at a pedestal. The Constitution endowed it and its personnel with great privileges and immunities. In turn, it is expected to administer the law and render justice to all manner of people without fear, favour or illwill. Great responsibilities are thrust upon the Judiciary in the name of and for the benefit of the people. Any judges who are corrupt can never administer the law or render justice to all impartially or without favour to anyone. Secondly, any Judiciary which has been consistently undermined by members of other organs of state or of the public with general accusations which are unsubstantiated will lack the courage and the credibility to do justice and a Judiciary which is conceived as tainted by corruption, abuse of office or incompetence is not a Judiciary that is likely to perform its duties happily or efficiently.

The laws and regulations of Uganda and judges' etiquette contain provisions and measures to ensure that judges and judicial officers who are corrupt or incompetent can be easily weeded from the system. Where there is evidence that a judge or a judicial officer is corrupt or unfit to hold office he or she should be identified named and dealt with in accordance with the law. If we are to have a respected, independent, impartial and vigorous Judiciary, no one, let alone members of Cabinet or Parliament or the Inspector General of Government should hesitate any longer before bringing the evidence they possess to the appropriate officers and organs of state so that, they take immediate action in making further enquiries, disciplining and removing from office the culprits. For anyone to make wild and unsubstantiated allegations which effectively

undermine the institution of the Judiciary and continues to hide behind those generalised accusations is as bad as those who are corrupt and dishonest whether they be judges or judicial officers. Therefore, let those who make accusations stand up and be counted, present evidence and show their belief in a clean, bold and impartial Judiciary by insisting that the undesirables in it are removed therefrom at the earliest opportunity.

Whoever has no evidence against any named judge or judicial officer or evidence which they are able to present either to relevant bodies or to the public should be strongly advised to keep their peace if they genuinely believe in and wish to sustain an effective, impartial and independent judiciary in this country. There have been magistrates and local government councillors who have been charged with and convicted of corruption or abuse of office. They were given the right to be heard or explain themselves. Some magistrates in the lower grades and several in the higher grades have also been similarly disciplined. Many have been dismissed from the Judiciary. There may be others who have so far evaded detection. Let the nation pursue them by exposing and investigating them legally and thoroughly by all means. However, for the generalised accusations to persist against the judiciary indiscriminately and embrace as they do, all magistrates, judges and justices of the courts of judicature without any of them named or charged, does, to my mind, verge on the irresponsibility and is a clear symptom of lack of faith in all our public institutions. The innocent in the Judiciary must also be vigorously defended and assisted to uphold the standards and integrity of the institution. Those who make false accusations against Judicial officers are doing a great disservice to the administration of justice in this country. However, regrettably, it must be acknowledged that there are real weaknesses and incidents of corruption in the Judiciary which both the Judiciary itself and the appropriate government organs have failed to tackle.

PROTECTION OF HUMAN RIGHTS BY JUDGES

Can Ugandan judges engage in judicial activism to advance the recognition and protection of human rights? The answer ought to be in the affirmative. The laws and judicial rules allow them to do so. They only require commitment and courage to do justice and interpret human rights laws liberally. In its report, the Uganda Commission of Inquiry into Violations of Human Rights in Uganda observed rather ominously;

> *''A country may have the best written bill of rights in the world, but if the state organs, and institutions and, leaders at all levels, and every individual in the country are not committed and do not pay serious attention to them. Human rights as so guaranteed are not worth the paper (s) they are written on.'*

Allegations that persons have been tortured and detained without trial under the NRM government in Uganda are most disturbing. For this is a government which came to power riding on the promise of establishing law and order, the rule of law and respect for and protection of human rights. The Universal Declaration of Human Rights, 1948, contains a provision to the effect that,

> *'' Every individual and every organ of society shall strive by teaching and education to promote respect for human rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance."*

Returning to the Commission's report, its statement that:

> *''Another key issue in the perpetuation of the cycle of violence in Uganda has been that of ignorance of human rights by either the law enforcement officers, state agents or their victims''* and again,
>
> *''The assumption that 'those who do not oppose are safe or that only those who have offended the regime or who belong to the wrong ethnic groups need only worry' is as dangerous and fallacious as it is disastrous in Uganda", is a reminder to all Ugandans that none is immune from being a victim of human rights violations.*

Ugandans remember with a deep sense of shame and regret that a Chief Justice of Uganda lost his life in the cause of human rights. In the same period and later, many citizens including members of legal profession perished too. In a previous work entitled ''*Constitutional Obligation in Developing Countries*.'' I wrote that in the face of massive violations of human rights, a spate of litigation would follow with individuals and groups challenging the conduct of governments. Facing political reality, the courts tended to uphold the governments' stand in almost all the cases. In considering the actual suspension or abolition of the constitutions themselves, the courts came to be guided by a new method of changing legal norms, namely, the act of revolution. From such cases as **Sallah v.The Attorney General Awoonor William Abedemal, Uganda v. Commissioner of Prisons**, ***ex parte* Matovu, Madzimbabuto v. Lardner-Burk** and **The State v. Dosso** national courts along the length and breadth of the globe in the developing countries declined to contemplate any challenge against the violators of constitutions and human rights. It is reasonable to argue that these decisions, though couched in legal language, were not juridical but political. Nevertheless, they could have gone the other way too.

There is a series of other cases which invalidated the revolutions and outlawed government acts which had violated or intended to violate people's human rights, but it is also fair to say that many judges in this category were convinced that neither the revolutions nor the incumbent administration they were adjudicating about would last beyond their judgments.

With all the guarantees prescribed by the Uganda Constitution for the independence and power of the Judiciary and the protection of individual rights and freedoms, there was always hope that if ever that Constitution and the hard fought for human rights were threatened, the courts would curb that tendency or punish the violators.

Article 126 (1) of the Constitution provides that judicial power is derived from the people and shall be exercised by the courts established under the Constitution in the name of the people and in conformity with laws and with values, norms and aspirations of the people. Clause 2 of the same Article directs courts that when adjudicating cases of both a civil and criminal nature, they shall, subject to the law, apply the following principles:

a) Justice shall be done to all irrespective of their social or economic status;

b) Justice shall not be delayed;
c) Adequate compensation shall be awarded to victims of wrongs
d) Reconciliation between parties shall be promoted and
e) Substantive justice shall be administered without undue regard to technicalities.

To reinforce the independence and powers of the judiciary, Article 128 (1) provides that in the exercise of judicial power, the courts shall not be subject to the control or direction of any person or authority. No person shall interfere with the courts or judicial officers in the exercise of their judicial functions. All organs and agencies of the state shall accord to the courts such assistance as may be required to ensure the effectiveness of the courts. A person exercising judicial power shall not be liable to any act or omission by that person in the exercise of judicial power. The salary, allowances, privileges and retirement benefits and other conditions of service of a judicial officer or other person exercising judicial power shall not be varied to his or her disadvantage. Some of these guarantees and expectations have been ignored, and in some instances breached with impunity by several agents of government.

Lastly, the office of a judge in the courts of judicature may not be abolished when there is a substantive holder of that office. Upon appointment, a judicial officer takes

two solemn oaths by which he or she contracts with the people of Uganda to administer justice without fear, favour or ill-will in compliance with the Constitution and the laws of Uganda. Impartiality is the essence of administration of justice. Judicial officers sit as impartial arbitrators between two or more parties in dispute. They must treat all parties, be they individuals, organizations, government or the state, equally. It must also be stressed that judges are duly bound to resolve disputes on the basis of evidence produced before them and the judicial oath. For a judicial officer to base his or her decision on that officer's sympathy or with the support or favour of either or more parties to the dispute is unconstitutional and contrary to the laws of Uganda and the Judicial Oath. Occasionally, judges and judicial officers make mistakes and when they do, there are elaborate procedures for appeals and review.

Writing a forward to the **Commonwealth Human Rights Law Digest**, published by **Interights**, Justice A. R. Gubby, a former Chief Justice of Zimbabwe who was dismissed for his fight to uphold the human rights of the people of Zimbabwe, expressed an opinion on the importance judges should attach to the recognition of international norms and standards in upholding and protecting individual and society's rights. He wrote that;

> *"It is beyond argument that judicial decisions emanating from Commonwealth Courts, whose reputation for the advancement of human rights is high, provide invaluable information and guidance. They point to progressive changes and innovations in international human rights law with which a municipal judge should strive, where possible to bring domestic law into harmony. A judicial decision has great legitimacy, and will command more respect if it accords with international norms that have been accepted by many jurisdictions than if it is based upon the parochial experience or foibles of a particular judge or court."*

There can be no doubt that in Uganda, courts have the power and are constitutionally protected to deal effectively with disputes brought before them alleging

violations of human rights. In a number of decided cases, the Ugandan courts have professionally and bravely done precisely that.

We are one of the several countries in the world where judges and courts have, from one government to another, been the subject of the displeasure and scathing criticism from other public institutions for upholding the laws and Constitution of the country and for providing legal sanctuary and succour to victims of violations of human rights. From the late and much lamented Chief Justice, Ben Kiwanuka, who dared to adjudicate fairly in a case involving a dispute between an individual and the mighty military government and died for it, to the courage of the late honourable judge Kityo of the High Court who declared illegal a decree of Idi Amin to be a joke and no-law at all, Uganda courts, judges and magistrates have endeavoured vigorously to uphold the rule of law and individual liberty.

An analysis of Uganda laws and rules of court as well as examination of the recent court decisions illustrate, quite clearly, that Uganda Courts, have not only the jurisdiction, the power and courage to intervene in cases where the rights and freedoms of citizens are allegedly violated or the exercise of government powers challenged but have been prepared to grant appropriate remedies.

The courage and principled stand that are characteristic of the Uganda Courts generally have not been without their critics. In my recently published book on **"Constitutional and Political History Of Uganda, From 1894 To The Present,"** I deal with this matter.

I narrate the case of **General Tinyefuza v. Attorney General**, Const. App. No. 1 of 1997 (S.C), (unreported) which is a case of a senior Army Officer who petitioned the court that both the Constitution of Uganda and the act of the President of the Republic in assigning him civilian duties outside the army allowed him to retire from the force without any further act on his part. The case went all the way to the

Supreme Court which held that for an army officer to resign from his commission he had to comply with the rules and regulations governing army officers which, in this case, General Tinyefuza had not done.

Government and its supporters welcomed the decision as just, principled and nationalistic. Government opponents condemned it as unjust, anti-people and cowardly and as having denied General Tinyefuza his constitutional rights. In January 2000, the same Supreme Court, in the case of **Ssemwogerere v. Attorney General,** held that the Constitutional Court erred in law when it denied itself the jurisdiction to hear that case and ordered to hear the case. The decision was widely condemned by certain elements supportive of Government. At the same time, the opposition parties welcomed it as just and as symbolizing the impartiality and independence of the Ugandan Judiciary.

It would appear from the different reactions to the two judgments and others, that in Uganda, courts are perceived and hailed as independent, impartial and free when one wins a case before them but as timid and partisan when one loses. Petitioners have had mixed fortunes. Some have lost while others have won in those petitions. Some of the losers have been government supporters while others have belonged to opposition groups. Yet, some individuals on the Government side have condemned these petition results as being anti-government and biased against the National Resistance Movement. Nothing could be further from the truth.

Courts are enjoined by the Constitution to adjudicate disputes impartially. They must treat all parties, be they individuals, organizations, government or the state, equally. They resolve disputes brought before them on the evidence produced and the law applicable. Judges must render balanced judgments with compassion, fairness and justice.

A recent decision by one of the High Court learned judges, Justice J. P. M. Tabaro, will suffice to illustrate the point. On 12/06/2002 lawyers applied for a writ of *Habeas Corpus Subjiciendum* for production of one Lt. Benjamin Ahimbisibwe who was allegedly being detained illegally in Makindye Military Barracks. The *affidavit* in support of the applicant sworn by his wife showed that the applicant had been arrested on 04/06/2002 at Bombo Barracks and transferred to Makindye Barracks where he was being detained without trial. When the Court assembled on the 19/06/2002 for the purpose of hearing the application, the court was informed that the applicant had been returned to Bombo Barracks and no record of proceedings was produced in Court to show that any court martial trial had been conducted or any lawful decision taken about him. Having cited the Constitutional and legal provisions applicable, the learned judge said,

> *"The Constitution is the Supreme Law of Uganda and has binding force on all authorities and persons throughout Uganda … It is my finding that the respondents have not shown that the applicant is in detention in accordance with the laws of Uganda … In view of this courts' finding that the applicant is unlawfully detained, the application for release of the applicant is granted with costs. On failure to produce the applicant before court. I wish to observe that such orders (for the production of the applicant before court) are not negotiable. I would humbly add that they are vital for democratic governance and observance of the rule of law, which are fundamental for the lawful exercise of authority by any person or institution in our country."*

Like that of Justice Tabaro, numerous decisions by other Uganda judges are to be found in the courts archives, libraries and chambers, protecting, declaring, amplifying and outlawing activities which violate the rights and freedoms of the individual and the community as prescribed in the Constitution and the Laws of Uganda. As recently as 2002, a Uganda correspondent of the newspaper *"The East African" remarked proudly*

that Ugandans have trust in their Judiciary because it is vigilant in the protection of their human rights."

THE PRESENT CHALLENGES TO PROPER AND GOOD GOVERNANCE

Article 2 (i) of the Uganda Constitution provides that this Constitution is the supreme law of Uganda and shall have binding force on all persons and authorities in Uganda.

Article 2 (ii) provides that if any other law of custom is inconsistent with any of the provision of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency be void.

In my reasons for the findings of the court in **Petition No. 1 of 2006**, I cite the case of **Speaker of the National Assembly v. De Like**, 1999 (4) S.A. 863 (SCA) in which the South African Supreme Court emphatically declared:

> *"'The Constitution is the ultimate source of all lawful authority in the country. No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution. Any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorized by the constitution is entitled to the protection of the court."*

Further the Constitution provides harsh measures for any one who dares act outside its provisions.

Article 3 provides;

(1) It is prohibited for any person or group of persons to take or retain control of the Government of Uganda, except in accordance with the provisions of this Constitution.

(2) Any person who, singly or in concert with others, by any violent or other unlawful means, suspends, overthrows, abrogates or amends this Constitution or any part of it or attempts to do any such act, commits the offence of treason and shall be punished according to law.

(3) *This Constitution shall not lose its force and effect even where its observance is interrupted by a government established by the force of arms; and in any case, as soon as the people recover their liberty, its observance shall be re-established and all persons who have taken part in any rebellion or other activity which resulted in the interruption of the observance, shall be tried* in accordance with this Constitution and other laws consistent with it.

The Trial on Indictments Act, Cap. 23, Section 14 provides that;

(1) The High Court may at any stage in the proceedings release the accused person on bail, that is to say, on taking from him or her a recognizance consisting of a bond, with or without sureties, for such an amount as is reasonable in the circumstances of the case, to appear before the court on such a date and at such a time as is named in the bond.

Article 120 (3) provides for the office of the Director of Public Prosecutions whose functions are;

(a) to direct the police to investigate any information of a criminal nature and to report to him or her expeditiously;

(b) to institute criminal proceedings against any person or authority in any court with competent jurisdiction other than a court martial;

(c) to take over and continue any criminal proceedings instituted by any other person or authority;

(d) to discontinue at any stage before judgement is delivered, any criminal proceedings to which this article relates, instituted by himself or herself or any other person or authority; except that the

Director of Public Prosecutions shall not discontinue any proceedings commenced by another person or authority except with the consent of the court.

(5) In exercising his or her powers under this article, the Director of Public Prosecutions shall have regard to the public interest, the interest of the administration of justice and the need to prevent abuse of legal process.

Article 23 of the Constitution which deals with personal liberty provides, *inter alia*;

(3) A person arrested, restricted or detained shall be informed immediately, in a language that the person understands, of the reasons for the arrest, restriction or detention and of his or her right to a lawyer of his or her choice, and if not earlier released,

(5) (a) the next-of-kin of that person shall, at the request of that person, be informed as soon as practicable of the restriction or detention;

(b) the next-of-kin, lawyer and personal doctor of that person shall be allowed reasonable access to that person; and

(c) that person shall be allowed access to medical treatment including, at the request and at the cost of that person, access to private medical treatment.

(6) Where a person is arrested in respect of a criminal offence-

(a) the person is entitled to apply to the court to be released on bail, and the court may grant that person bail on such conditions as the court considers reasonable;

(b) in the case of an offence which is triable by the High Court as well as by a subordinate court, if that person has been remanded in custody in respect of the offence for sixty days before trial, that person shall be released on bail on such conditions as the court considers reasonable.

(c) in the case of an offence triable only by the High Court, if that person has been remanded in custody for one hundred and eighty days before the

case is committed to the High Court, that person shall be released on bail on such conditions as the court considers reasonable.

I have reproduced the above Constitutional and legal provisions relating to the liberty of the individual because nearly all of them came or should have come into play following the arrest of the PRA suspects in the precincts of the High Court, Kampala. The arrest drama by the security forces now infamously known as the Black Mambas was the second such invasion of the temple of justice. The occurrence and its aftermath led to a near confrontation between the Executive and the Judiciary and culminated in the total humiliation and capitulation of the first arm of government namely Parliament, the Executive being the second and the Judiciary third arms of government. This regrettable episode in the history of Uganda should never have occurred if the actors in the other two arms of government had interpreted their respective roles correctly, and in the spirit of give and take and reconciliation, acted, guided by the doctrine of separation of powers, the rule of law and constitutionalism.

The episode does not necessarily illustrate that Uganda leaders do not understand the meaning and culture of the rule of law and constitutionalism. Rather, it depicts an Executive that is bent on ignoring what it knows to be the right course both in national and international law and culture but instead embarks on the principle that might is right and majoritism is always the answer to every possible social, legal and political problem. It is an administration which is driven by what it perceives as victory through political power regardless of what the Constitution, laws or final decisions of the courts or indeed the citizens of Uganda think.

The events leading to 1st March 2007 which date will henceforth be known as the Bloody Thursday because there was blood spilled and it saw many senior cadres, officers and agents of the NRM lose their senses and in frenzy, cast out reason to the winds in preference to brute force.

The laws that have been quoted show quite clearly that once suspects are under the jurisdiction of the court, other state agencies of whatever description may not interfere with the courts' functions. They can only make out a case for their continued detention the suspects and ask the court to make an order of continued detention. Ultimately it is only the court which has exclusive jurisdiction and discretion to order their continued detention or release on bail conditionally or unconditionally. Moreover, courts do not act irresponsibly or capriciously. Judges are as patriotic and concerned as any other citizen or political or military leaders. They too are concerned about the security of their country and of their compatriots. They listen carefully and judiciously, weigh the evidence, the mitigating circumstances and the character of the suspects before ordering either their detention or release. They are mindful of the liberties of citizens as spelt out in the Constitution and laws of Uganda. Indeed, to release anyone without taking into account all these matters involved in one way or another, would tantamount to irresponsibility.

It is thus grossly unfair to argue that it was wrong for the Constitutional Court to order the release of the PRA suspects because they are dangerous. It is equally unfair to accuse the courts of being unwise for granting bail to suspects who were also regarded as harmless by the executive which was urging them to obtain release from detention by seeking amnesty. It appears not to have occurred to anyone that the effect of amnesty is the same as that of bail since either would secure the release of the suspects conditionally but nevertheless they would be free and at large. In consequence therefore, the issue turns out to be based on what the Executive perceives as the final authority to release or not release suspects, the Judiciary or the mighty Executive. In the final analysis the dispute is not about security of the state but the power of the government.

The consequences of such self-created standoff does not auger well for the nation, for as was reported, Ministers find it difficult to accept the truth of what occurs in society, preferring instead to see facts and events through opaque political glasses

which distort issues for the benefit of some gullible members of the support club. Members who intelligently see things differently are branded traitors and become liable to be severely reprimanded or disciplined. It is sad that the free spirit and independence which previously attracted many Ugandans to the membership and support of the NRM are increasingly being wiped out. It is doubly tragic that the wiping clean of the political slate of opposition has encompassed NRM members of the honourable Parliament who are the overwhelming majority in the House. Whereas before Members of Parliament would consider their priorities to be first service to the nation, second service to the constituency, third royalty to the party and fourth service to family and other members of society, today those priorities have been reversed. NRM Members of Parliament must both in public and Parliament support the position and policies of their party, whether right or wrong and failure to support wrong decisions or policies of that party constitutes an offence for which one must be disciplined.

Lovers and seekers of freedom and democratic governance must recognize and salute the courage and commitment to the nation and the rule of law of those NRM Members of Parliament who stood their ground and spoke in favour of freedom and the defence of the independence of the Judiciary knowing fully well the wrath that would be visited upon them from some of their leaders. Can there be any doubt any more that Parliament has been turned into a rubber stamp through the machinisations of certain members of the Executive who are determined to legitimize questionable decisions and policies. Over the recent decades, the power of Parliament to legislate or bring the executive to account has slowly been eroded to the extent that to-day, it is no longer a Parliament but the tool of the Executive in its authoritarian pursuits. A member of the ruling party must do what he or she is bloody told. Some of us who were architects and builders of the National Resistance Movement in its early and evolutionary stages could never have believed that events of to-day would ever occur while we are still alive and the NRM is in full charge of the country's administration.

One of the saddest and unacceptable phenomena which were witnessed after the bloody Thursday is the total inability of ministers to rise to the occasion when a crisis threatens in the absence of the President. The facts and circumstances of what occurred on that occasion were ably and accurately narrated by the learned Deputy Chief Justice who happened at the time to be Ag. Chief Justice and the Principal Judge, both of whom were actually present, unsuccessfully tried to mediate and witnessed the assault by the security forces on the High Court. The meeting which heard the testimonies of the two senior managers of the Judiciary was attended by a number of senior government Cabinet ministers and others including the minister who afterwards issued a public Parliamentary statement. Those who were present at that meeting and heard the minister's statement afterwards could not believe their ears regarding the contents of the statement. It contained inaccuracies and showed quite clearly that the minister disbelieved both his learned Deputy Chief Justice and the Principal Judge. He disbelieved their version probably in preference to that told to him by members of the security forces who stormed the High Court. In other countries, even worst governed ones, it is normal practice, courteous and a culture of respect to believe and act on what the Chief Justice and the Principal Judge have stated. The truthfulness of their evidence should not be questioned.

Despite the evidence to the contrary, the Minister believed and published a statement that the security operatives behaved and acted with maximum restraint, professionally and outside the precincts of the High Court building. It took a TV camera shot and regrets and assurances from the President or Uganda to unclothe the inaccuracies in the minister's statement. The government, its agents and supporters categorically denied that the country was nearing a crisis and scoffed off my suggestion to the contrary as alarmist. Thereafter, the minister, the government and the whole nation took more than a week in all efforts to steam off the crisis. It is reported that the President himself cut short his trip abroad to join those desperately trying to normalize the situation. Indeed, it took His Excellency's own efforts to come out with an acceptable response even though it seems that under the present governance, the

word apology has been expunged from the political dictionary useable in Uganda. This is very sad because in human terms, the word apology is a useful weapon in disarming one's critics and opponents. Apparently, this simple and effective weapon has been hidden from the cadres and advisers of the governments of Uganda for a long time. There is a false belief that to apologise is to admit that one did wrong or that it is a sign of weakness. How incredible a belief it is. After all, members of the government and especially its agents are human and to apologise for one's errors is natural and acceptable and in many cases, is a catalyst for healing and reconciliation.

Incidentally, it is noteworthy that when the Judiciary resolved to lay down tools to underscore its deep concern about the inroads in its independence and authority, it was acutely aware that the action would inconvenience members of the public, so it deliberately fixed its action to last from Monday the 5th to Friday 9th, March. The action was completed within the limited period deliberately determined by the Judiciary itself before hand. It will be recalled that there was an attempt on Wednesday to shorten that period and the Judiciary resisted. It is therefore erroneous for the Press or anyone else to suggest or believe that the Judiciary stopped its action because of intervention by anyone outside it. Permit me to quote from to-day's Press news; *"Hundreds of lawyers yesterday gathered at the High Court in Kampala where they staged the last of the ceremonies marking their three-day strike protesting the siege by security forces of the premises of the High Court two weeks ago. The lawyers were backed up by Chief Justice – Benjamin Odoki, Principal Judge, James Ogoola and court registrars in cleansing the court and judiciary of the effects of the siege which they regard as a desecration of their honour. The learned group held prayers and walked around the premises after which they held discussions in a tent erected in the compound. They instituted a committee to investigate the March 1st court siege and prosecute government, military and police officials who masterminded it…. Former ULS President, John Matovu suggested that the probe compiles evidence pinning big people in government and the military circles and keeps it for future prosecution when they get out of power….ULS President, Oscar Kihiika remanded lawyers of their duty to fight the*

reemergence of 'Aminism'. Chief Justice, Benjamin Odoki and Principal Judge, James Ogoola, thanked lawyers for the solidarity they showed the Judiciary during the strike. One of the lawyers of the PRA suspects… also produced a blood stained shirt and necktie as evidence he intends to use against the transferred Kampala Police Commander, Ivan Nkwasibwe who reportedly beat him up during the High Court siege by security forces two weeks ago. Kiyemba also showed the scar he sustained from the stabbing."

In conclusion, I would like to observe that the courage to decide according to the country's long term interests rather than what is expected by those to be affected by the decision, is not shared by many people. However, it is the quality, conviction and courage of the Judiciary that maintains a country in democratic constitutionalism and prevents it from slowly turning into an autocracy.

At a meeting I attended with the Ag. Chief Justice and the Principal Judge which was also attended by senior Cabinet ministers including the learned Attorney General following bloody Thursday, I read to the distinguished participants in that meeting a verse from the Bible, Eccl. Chap 9 verse 18 which reads, ***"Wisdom is better than weapons of war".***

END