

THE INDEPENDENCE OF THE JUDICIARY: AN ASSESSMENT OF THE REALITY OF THE CONSTITUTIONAL DOCTRINE IN UGANDA

*Alexander Ssensikombi*¹

INTRODUCTION

The Judiciary is the third arm of government and Article 129 (1)² establishes Courts in their order of Precedence as (a) the Supreme Court; the Court of Appeal; (c) the High Court; and (d) such other subordinate courts as Parliament may by law establish including *Qadhi* Courts of Marriage, divorce, inheritance of property and guardianship as may be prescribed by Parliament.

French jurist Montesquieu, following attempts by Aristotle³, John Locke⁴ provided a framework in the doctrine of separation of powers; ⁵ he was concerned with preservation of personal liberty after recognising that those that hold power have a tendency to abuse it and therefore as a matter of consequence, governments should be checked internally by creating centres of power. He recognised three main organs and their functions that is to say the executive to ensure security, legislature to enact laws and judiciary to settle disputes.

AN INDEPENDENT JUDICIARY

*“It is beyond debate that an effective administration of justice requires an independent judiciary. Independence of the Judiciary is intimately linked to the rule of law. The Rule of Law demands that people and especially those in authority should act according to established principles of law. And whoever deviates, whatever his or her position must be punished by the appropriate authority”*⁶

The independence of the judiciary is a new concept for third world countries as during the colonial era there was no respect or regard accorded to the judiciary. The function of the judiciary is to dispense justice in accordance with the law. It is also responsible for balancing interests of individuals and the state. In the 1995 Constitution the Judiciary is the organ which is entrusted with checking adherence to the law within the state. Independence of the Judiciary mainly comprises two

¹ LLB Undergraduate, 2017 A73024@students.ucu.ac.ug | assensikombi@gmail.com. This presentation was first made at a symposium on Constitutional Law assessing how far off the paper the doctrine of Judicial Independence is in Uganda.

² The Constitution of the Republic of Uganda, 1995

³ Aristotle, politics xxx book iv.(B. Jowett trans,1995).Aristotle states functions of the state without which bodies should administer them.

⁴ Locke, treaties by the government.pg 382.(p.laslett ed.1970)Locke recognises functions of the bodies..

⁵ Montesquieu, The Spirit of the law BK XI . CHAPTER SIX.

⁶ Tumwine-Mukubwa GP (2011) The Judiciary as the Guardian of the Constitution p 156 (extracted from Okumu-Wengi, Founding the Constiution of Uganda, Essays and Materials)

major elements namely; Independence of the Judiciary as an independent organ from the other organs of the state and Independence of the individual judge; thus judicial independence simply means that the judicial arm of government and individual judges are left free to operate without undue pressure or interference from either the executive or legislature⁷.

AN IDEAL JUDICIARY⁸

Article 126 (1) of the Constitution of the Republic of Uganda⁹ 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 values, norms and aspirations of the people

Article 126 (2) directs Courts that when adjudicating cases of both 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

In Uganda the doctrine of the independence of the judiciary is enshrined under Chapter Eight of the Constitution¹⁰ and it states

“Judicial officers in exercise of their functions, all organs to accord the courts assistance, immunity of the courts shall be independent in exercise of judicial power, no person to interfere with courts or judicial officers, finances of the judiciary to be charged on the consolidated fund, self-accounting and offices that should not be abolished”.

This doctrine of the independence of the judiciary was stated in the case of **Masalu Musene & 3 Ors v. Attorney-General¹¹ ; Mpagi-Bahigeine JA** (as she was then); “Judicial officers are charged with protecting the fundamental rights and freedoms of citizens. In performance of their duties they are entrusted in checking the excess of the executive and legislature. These duties require insulation from any influence direct/indirect that may warp their judgment or cause them to play on hands of corrupt elements”. The necessity for any court independent is a right to fair hearing¹²

⁷ David Harris, “the right to fair hearing - trial in criminal proceedings as a human right” (1967)intl 44§ comp.l.q.352,354.

⁸ G. W. Kanyeihamba (2010) Constitutional and Political History of Uganda; From 1894 to present

⁹ 1995 (as amended)

¹⁰ Article 128, the 1995 Constitution of the Republic of Uganda.

¹¹ Constitutional petition no.5 of 2004

¹² Article 28; Constitution of the Republic of Uganda.

although article 128 does not address this. The independence aspect requires decisions of court to be respected and upheld by other organs of government.

The judiciary is viewed as the weakest organ among the three organs as stated in the case of **Evans v. Gore**¹³ the judiciary is the weakest and all possible care must be taken to ensure it defends itself against other arms.

The issue in the Masalu Musene case (supra) was to address the question of taxation of the salary of some judicial officers and as to whether any taxation thereto was constitutional. The Petitioners (a Registrar of the Supreme Court, Chief Magistrate and the other two being Magistrates, Grade One respectively) sought to challenge certain provisions of the Income Tax Act, Cap 340 as being unconstitutional for taxing salaries, allowances, privileges, retirement benefits and other conditions of services of judicial officers. A brief history is that prior to the 1995 Constitution, when the cabinet realised the erosive effect taxation was having on the poor pay of the justices and judge, it decided to grant an exemption from taxation to relieve them of their financial worries¹⁴. The privilege was extended for the period of 1990-97 but was not extended to other judicial officers including the petitioners. The Income Tax Act was silent on exemption but the Justices and Judges were protected under the Constitution. The protection/exemption however did not extend to other judicial officers including the new judges; hence the Petition challenging the application of s. 4 (1) of the Income Tax Act to Judicial officers and the interpretation accorded to Articles 128 (7) and 254 (2) as being inconsistent with 128 (7) which is all embracing of judicial officers.

There can be no doubt that Courts have the power and are constitutionally protected to deal with disputes brought before them alleging violation of human rights. In a number of decided cases, Courts have professionally and bravely done precisely that¹⁵. Today the courts have tried to exercise their independence amidst pressure from the two arms.

FACETS OF THE DOCTRINE OF THE INDEPENDENCE OF THE JUDICIARY.

- **Constitutional deposition of judicial power in Uganda.**

Article 126(1)¹⁶ states “judicial power is derived from people and shall be exercised by courts in the name of people and in conformity with the law, with values and norms of the people”. **Article 127**¹⁷ states that “parliament shall make laws for participation of people in the administration of justice”. Thus judicial power does not flow from the crown/ president as this provision is meant to ensure courts act in

¹³ 253 US 245(1920)

¹⁴ This was done under S. 12 (2) of the Income Tax Decree, 1974

¹⁵ G. W. Kanyeihamba (2010) Constitutional and Political History of Uganda

¹⁶ The Constitution of the Republic of Uganda, 1995 (as amended)

¹⁷ *ibid*

line with aspirations of people as **Article 1(1)**¹⁸ places power in the people and this power includes judicial power. **Article 128 (5)(6)** that provides for remuneration of judicial officers and financing the judiciary shall all be from the consolidated fund.

- **Constitutional provisions for independence of judiciary.**

*“I think that the independence of the Judiciary and the Rule of Law are very difficult to sever; it is the role of the judiciary in practice to uphold the rule of law and to do that they have to be independent of the outside influence”*¹⁹

Article 128(1)²⁰ states that “exercise of judicial power in courts shall not be subject to control / direction of any person or authority” this sets principles on which the doctrine lies as in **Masalu Musene case; as stated by Twinomujuni JA**; eight pillars in Article 128 are a single package and are about the independence of the judiciary .one cannot remove anyone without adversely affecting others.

These safeguards or pillars are;

1. **Guaranteed Independence**

*“It is paramount to note that Judges have the ultimate responsibility for decisions regarding freedoms, rights and duties of natural and legal persons within their jurisdiction. The independence of each individual judge safeguards every person’s right to have their case decided solely on the basis of the law, the evidence and facts, without any improper influence”*²¹.

Article 128(2) stipulates that no person shall interfere with judicial functions .Article 128(3) further states that all organs in the state are to accord such assistance to ensure effectiveness of courts. **In Wilson Masalu Musene & 3 ORS V Attorney-General**²²: **Mpagi-Bahigeine JA** stated “Maintenance of judicial independence as enshrined in Article 128 is upon the public support for judicial process to run effectively and independently. It is the public respect for that respect for that principle that sustains it. The government has to reinforce and facilitate the effectiveness of the Judiciary. The system that expects its judicial officers to lead decent lives and is often saying so at all public fora but at the same time fails to enforce the constitutional protection applicable to them is bound to render the independence of the judiciary unattainable as the corruption vermin would quickly set in”.

Twinomujuni JA stated “Judiciary to be effective needs assistance from all but especially the executive and legislature. This assistance must be necessary and not

¹⁸ *ibid*

¹⁹ Lord Phillips (Lord Chief Justice) – the House of Lords Select Committee on the Constitution; 14th Report of Session 2005-06, Meeting with the Lord Chief Justice HL 213 (2006) Q7.

²⁰ *1995 constitution*

²¹ <http://www.legislationline.org/topics/topic/9>

²² Constitutional Petition no.5 of 2004.

that it violates the independence of the judiciary as in the case of **Uganda Law Society v. Attorney-General**²³.

The Judicial arm of the Constitution must be independent, because as they ensure that the state bodies act under the law (thereby enforcing the rule of law), inevitably, they will come into constitutional conflict with the executive. The Independence and impartiality of the Judiciary is also linked inextricably to the administration of justice²⁴

2. Judicial Immunity

*"It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favour and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences"*²⁵

Just as the public interest in free debate in parliament justifies the rule of absolute privilege for things said in the course of parliamentary debates, so the public interest in the administration of justice justifies similar protection for judicial proceedings. No action will lie against a judge for any acts done or words spoken in his or her judicial capacity in the court of justice²⁶

Article 128 (4) provides that a person exercising judicial powers shall not be liable to any action /suit for any act/ omission in exercise of judicial power. The **Judicature Act**²⁷ **S.46(1)** provides for immunity too and states that a judge, commission or other person acting in the judiciary shall not be liable to be sued in any civil court for any act/omission in discharge of his /her judicial functions whether in or out their jurisdiction. Thus judges shall not decide cases in fear of civil or criminal action against him. In **Evans v. Gore**²⁸. **The US Supreme Court** cited the last degree important for a judicial officer to completely be remembered independently with nothing to influence or control after him except his God and conscience.

In **Maliyam Adekur & Anor v. Joshua & Attorney General**²⁹ the petitioners sought to make Attorney General liable for actions of a Magistrate who had tried them following their arrest³⁰. The petitioners alleged inter alia that the magistrate failed to protect their constitutional right to marry each other to the exclusion of any custom.

²³ Constitutional Petition no.18 OF 2005

²⁴ Mark Ryan (2014) *Unlocking Constitutional and Administrative Law*, p. 330

²⁵ *Scott v. Stansfield* (1868) LR 3 Ex. 220, 223 (Kelly CB)

²⁶ A W Bradley & K D Ewing (2011) *Constitutional & Administrative Law* p. 369

²⁷ Cap 13

²⁸ 253 US 245(1920)

²⁹ Constitutional Petition no. 1 of 1997

³⁰ the first petitioner refused to be inherited by her brother in law pursuant to the itesot local customs and instead eloped with the second petitioner and were arrested and charged before the magistrate's court.

Counsel for the petitioners argued that the second respondent was liable for the acts of the judicial office (the magistrate) under Article 250 of the 1995 Ugandan Constitution. The constitutional court held that a person exercising judicial power shall not be liable to any action or omission by that person in the exercise of judicial power; the Magistrate was therefore not guilty of any omission or wrongdoing. Similarly in **Serapio Rukundo v. Attorney-General**³¹ the Constitutional Court held inter alia that no action can lie against government in respect of any act done in discharge of judicial functions of the Attorney General.

3. Self-Accounting

ARTICLE 128(5)³²; is to effect the administration expenses of the judiciary including salaries, allowances, gratuities and pensions payable to persons serving in the judiciary. **Article 128(6)** states that the judiciary shall be self-accounting and deal with minister responsible for finance. This is to ensure self-accounting and control over judicial funds such that welfare of judicial officers is not placed at the mercy of the judicial officers instead at mercy of the legislature and executive.

4. Remuneration

Article 128(7)³³; this is to effect salary, allowances privileges and retirement benefits and other conditions of service as a judicial officer or person exercising judicial power not be varied to his/her disadvantage. In **Masalu Musene's case**³⁴, **Mpagi-Bahigeine, JA** stated that 'judicial officers cannot engage on other business so as to bridge the financial vacuum besetting them, corruption will be nurtured by the system that fails to pay judicial officers well. The principle of independence of the judiciary will become nugatory and mere mockery as lawyers will be less willing to join the bench in preference for lucrative chambers. Corruption will therefore be nurtured by a system that fails to pay its judicial officers well and insulate them from the corrupting public'.

This article [128 (7)] is however limited to only those allowances and privileges attained in the exercise of judicial power or function by a judicial officer. This was clearly illustrated in the case of **Julia Sebutinde v. Attorney-General**³⁵ where the appellant³⁶ was seeking reference from the Constitutional Court on whether the appellant's remuneration as the chairperson of the Commission of Inquiry into the allegations of corruption in the Uganda Revenue Authority (URA) is exempted from taxation by virtue of 128 (7). The appellant was at the time a Judge of the High Court of Uganda who was appointed in March 2002 by the Minister of Finance to chair a

³¹ Constitutional Petition no. 3 of 1997

³² The Constitution of the Republic of Uganda, 1995

³³ Ibid

³⁴ *Musalu musene and 3 ors v Attorney-General* Constitutional Petition no.5 of 2004

³⁵ Constitutional Reference no. 05 of 2005

³⁶ The reference was arising from High Court Tax Appeal no. 007 of 2003

commission of inquiry into allegations of corruption in URA. She was paid a honorarium of Ug Shs. 9 million per month; however from October, 2002, URA started deducting Pay As You Earn (PAYE) from her honorarium. The appellant protested against the taxation pointing out that as a sitting judge, her income was not liable to taxation as it was protected by Article 128 (7) of the Constitution. The Commissioner-General refused to lift the tax or refund what had already been deducted. The Constitutional Court found that the income derived from other activities outside the judicial officer's terms and conditions of service is not protected. Therefore her remuneration as chairperson of the commission of inquiry was not exempted from taxation. The Court further held that a Commission of Inquiry is not a Court and nor does it exercise judicial power within the meaning of Article 126 (1) and 128 (7) of the Constitution of Uganda.

5. Security of Tenure

At the apex of the principle of judicial independence is the security of tenure; judges cannot be dismissed because they are unpopular with the government. The historic tenure on which judges hold office is *ad vitam aut culpam*, which means that they cannot be removed except on grounds of misconduct³⁷.

Article 128(8)³⁸ states, that the office of the chief justice, deputy chief justice, justice of the Supreme Court, justice of Appeal or judge of the high court shall not be abolished when there is a substantive holder of that office. This provision is made stronger by **Article 144(1)** which adds tenure and security. **Article 144(2)** a judicial officer can be removed from office only for inability to perform office functions arising from infirmity of body/mind, misbehaviour, in competence even this removal must strictly comply with procedure in **Article 144(4-7)** the net requirements under this Article is that the security of tenure of judicial officers should not be under threat.

In the case of **Fox Odoi & Anor v. Attorney-General**³⁹ the Constitutional Court held that the procedure for the removal from office of a judicial officer under Article 144 (2) of the Constitution is that a tribunal must be appointed to investigate the question of removal of a judicial officer from office. The question of appointment must be referred to the president by a specific body. It is only when the tribunal recommends a removal that the President can proceed to effect the removal of the judicial officer. This is the only procedure to be followed and no other procedure is permissible⁴⁰. The Court therefore noted that the effect of ss. 19 (1) and 20 (1) of the

³⁷ A W Bradley & K D Ewing (2011) Constitutional & Administrative Law (15th edition)

³⁸ The Constitution of the Republic of Uganda, 1995

³⁹ Constitutional Petition no. 8 of 2003

⁴⁰ The Petitioner sought to challenge various sections [(ss. 19 (1), 20 (1), 35 (B) and (D)]of the Leadership Code Act, 2002 (Act no 17 of 2002) as being inconsistent with certain articles [(ART 60(8) AND 169 (9)] of the Constitution

Leadership Code Act⁴¹ which enjoin the President to implement the decision of the Inspectorate of Government to remove an officer from office is to fetter the discretion accorded to the President under the Constitution in the question of removal of officers contrary to Articles 60 (8) and 169 (9) of the Constitution.

6. Judicial Appointment

UNDER Article 147(1) (a), the judicial service commission advises the president in the appointment of top judicial officers. And the justice of the Supreme Court **under Article 147(2)** is independent and shall not be subject to direction or control of any person/authority. The mode for appointment seeks to discourage judicial officers from seeing themselves beneficiaries of presidential prerogatives so they can at all times administer justice without fear that who appointed will without assigning any reason disappoint when he deems fit.

7. Amendment of Article 128(1) must be subject of a referendum.

Under Article 260(2)(g), Article 128(1) the pillars above on independence of the judiciary shall not be amended unless;-its supported by 2nd and 3rd readings in parliament by not less than two thirds of all members of parliament ,-has been referred to a decision of the people and approved by them in a referendum. In the Masalu Musene case, **Twinomujini, JA** noted that the constituency who framed the constitution were apprehensive that other two (2) strong arms of government might one day seek to destroy the 8 pillars of an independent judiciary.to him Article 260(2)(g) goes on to show that the court of appeal were prepared to establish and retain the independence of the judiciary.

8. Judicial Discipline (Judicial Code of conduct)

The code has six (6) principles that encourage determination of the judiciary. They include; independence, propriety, integrity, equality, competence and diligence. The principle of independence requires that a judicial officer shall not be influenced either directly or indirectly extraneous influence, inducements, pressures, threats, interference from any quarter for any reason and they will attempt arising from outside the judicial process. Thus this code gives independence at individual level too **thus Article 149** which requires judicial officers to take oath in the **4th schedule**⁴² before assuming office is to ensure judicial power is exercised in accordance with the constitution and dispense justice without fear or favour.

AN ASSESSMENT OF THE PRINCIPLE OF INDEPENDENCE OF THE JUDICIARY IN UGANDA

(Is the principle of Judicial Independence present in Uganda?)

⁴¹ 2002

⁴² The Constitution of the Republic of Uganda, 1995

According to Prof. G. W Kanyeihamba in his paper at the 5th Annual Judges conferences⁴³ stated that *“...By independence is meant that the courts and judges are free to function without fear from or favor to any individual or authority. Independence or lack of it must not be confused with limitation of jurisdiction. The fact that Parliament has the power and often exercises it, to limit the jurisdiction of courts, does not mean that judicial independence is affected thereby. The limitation of judicial powers may be politically unjust and could lead to arbitrary actions being taken by persons other than judges, but it does not involve an encroachment on the independence of the Judiciary”*.

In light of the above there is considerable evidence to show that the principle of independence of the judiciary is a more of a sweet ideal than a reality and hardly the position in Uganda, below is a discussion to show that:-

Referendum (Political systems) Act 2000

In June 2004, in the case of **Paul K. Ssemwogerere v. Attorney-General**⁴⁴ the constitutional court handed down a judgment ruling that the Referendum (Political Systems) Act 2000 was unconstitutional this provoked harsh criticism from the President directed specifically at the court and judiciary. In his speech he was quoted to have said that *“the major work for the Judges is to settle chicken and goat theft cases but not determining the country’s destiny”*. This was because he was not happy with the way they had decided the case that was not decided in his favour⁴⁵, as head of state his comments as per his speech that was reprinted in The Monitor⁴⁶. Clearly the judiciary’s decision was not respected as laid out in art. 128(2) where no person or authority is expected to interfere with the courts.

“ ...In June 2004 the judiciary was forcefully reminded of this [that power is vested in the President not the people] when, after the Court of Appeal forgot its place in this ‘democracy’ and declared invalid the Referendum (Political Systems) Act of 2000, an angry Museveni informed them and the nation at large that the ‘major work for the judges is to settle chicken and goat theft cases but not determining the country’s destiny (sic)’ - Dr. Busingye Kabumba⁴⁷

The principle of judicial independence was also tested in recent times and it appears that the “government” – the executive in this case failed miserably to stand up to the

⁴³ at Imperial Botanical beach Hotel, Entebbe (2001)

⁴⁴ Constitutional Appeal no. 3 of 2000

⁴⁵ In a televised speech delivered on Sunday 27 June 2004, President Museveni stated:

“A closer look at the implications of this judgment [...] shows that what these judges are saying is absurd, doesn’t make sense, reveals an absurdity so gross as to shock the general moral of common sense. [...]In effect what this means, is that this court has usurped the power of the people [...]. This court has also usurped the power of parliament, to amend the constitution. Government will not allow any institution even the court to usurp the power of the constitution in any way”

⁴⁶ The Monitor, 30 June 2004 titled ‘Museveni mad with Judges over nullifying 2000 referendum act’

⁴⁷ The illusion of the Ugandan Constitution; <https://africlaw.com/2012/09/27/the-illusion-of-the-ugandan-constitution/>

test. In the case of *Uganda Law Society v. Attorney-General*⁴⁸ In this Petition, Dr. Kiiza Besigye was accused with 22 others and jointly charged for treason under the Penal Code Act. Dr Besigye was in addition charged with rape alleged to have taken place in 1997, the accused persons were committed to the High Court for bail application and 14 of them were granted the same but because of certain alleged acts of security personnel at court premises bail papers could not be processed. The said security personnel entered some offices and interrupted the court's normal duty of processing bail, as a result the accused had to be taken to prison. Court held that the above acts contravened the independence of the judiciary. It is important to note that Justice Engwau JA, noted in his judgment that under art.128(3) of the constitution, all organs and agencies of state are required to accord to the courts such assistance as may be required to ensure effectiveness of the courts. The independence of the judiciary was yet again abused⁴⁹.

Withdrawal of Judges

The treason case of Dr. Besigye was heard by Justice Edmond Ssemua Lugayizi who was the sitting judge withdrew from the case as a result of the military interference. He gave no reason as to his withdraw but it was evident that he felt his life was in danger.

On 2 December 2005, High Court Judge Remmy Kasule found that Besigye had raised 'serious issues as to whether the military court has powers to try him' and ordered the army to stop the Court Martial proceedings. He refrained, however, from ordering Dr Besigye's release.

On 3 February 2006, Judge John Bosco Katutsi withdrew from hearing the treason case citing pressure and allegations being put about that he was politically biased. In his place, Justice Vincent Kagaba was assigned the treason case. Shortly after, the treason trial was postponed until after the presidential elections of 23 February 2006. The above points exhibit abuses the principles of judicial independence; and with insecurity, judges and other judicial officers cannot exercise their duties comfortably.

The above events clearly show that the independence of the Judiciary was undermined and many judicial officers cannot comfortably exercise their judicial

⁴⁸ Constitutional Petition no. 18 of 2005.

⁴⁹ After the above events of the abuse of court Chief Justice Benjamin Odoki and Inspector General of Government (IGG) Faith Mwendha condemned the deployment of the Joint Anti Terrorism Team (JATT). Justice James Ogoola who was the Principal Judge then to pen a poem about the High Court siege which he stated was 'the most naked and grotesque violation of the twin doctrines of the rule of law and the independence of the Judiciary', the extent and content of which was simply 'unprecedented'. He said the armed commandos had unleashed 'terror' and that '[n]ot since the abduction of Chief Justice Ben Kiwanuka from the premises of Court during the diabolical days of Idi Amin had the High Court been subjected to such horrendous onslaught as witnessed last Wednesday'. He said this 'most reprehensible affront to the independence of the judiciary' had had a chilling effect on the administration of justice in the country

function that the makers of our constitution fought to safe guard under Articles 126 and 128.

Corruption and Abuse of office (Judicial misconduct)

“When I walk into a court room I see the judge for who he is----an ordinary man with extraordinary power. But he is my judge and he belongs to me-----to serve my case, my cause, with sound and just rulings. I give him the presumption of decency but should he stray from this role and become one of those tyrants, who sits up there like a maddened emperor, I may disrobe him, without his clothing he is a disgusting sort. His skin is usually too white, bleached like a daisy that has been smothered under the manure pile. He will wear funny little pink pajamas tonight at bedtime, with patterns of little jumping teddy bears, and he'll make some excuse to his wife for his bedtime failure who if truth were known is only pleased that he has consigned himself to his own bedside. I don't create such a vision of the man out of disrespect for his office but I have no intention of respecting an office held by a man who disrespects justice, seeing him as he most likely is permits me to know my power. It belongs to me and I don't intend to deliver it to him---- which doesn't mean I shall disobey his orders, display my contempt or otherwise misconduct myself. There is a profound difference between respecting a judge's rulings and enduing the unjust ones.”⁵⁰

Some judicial officers have been the very culprits of undermining judicial independence. Many judges are corrupt and delay cases intentionally. Others are simply lazy and take years writing judgments which in the end lead to delaying of justice for people who in confidence entrust their cases to be solved by the judiciary. This has caused public scorn of the institution and individual judicial officers.

Any judges who are corrupt can never administer the law or render justice to all impartially or without fear or favour of anyone. Secondly, any judiciary which has been consistently undermined by members of other organs of the 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 efficiently⁵¹

Hindrances to the Proper Functioning of the Judiciary

Emphasis should be put on majorly two aspects – Lack of Funding and Appointment of Judges⁵².

⁵⁰ Gerry Spense (2006) Win Your Case: How to Present, Persuade, and Prevail--Every Place, Every Time (St. Martin's Press) [ISBN 0-312-36067-3](https://www.amazon.com/Win-Your-Case-How-Present-Persuade-P prevail/dp/0312360673)

⁵¹ Advisory Panel of Eminent Commonwealth Judicial Experts - *Report of Mission*; Nairobi, Kenya, May 2002

⁵² It is important to note that the IBARHA also made these observations as obstacles to the proper functioning of the Judiciary.

“We must remind ourselves that for peace and stability of a country, the observance of the rule of law, the protection of human rights and security of our constitutional democracy, there is need for an independent, effective and efficient judiciary. Furthermore, weaknesses in the judiciary pose a threat to any constitutional democracy, the rule of law, the capacity to stem the tide of corruption and the creation of a peaceful, stable and legal friendly climate”.

Irene Ivujo – Association of Female Lawyers in Uganda- FIDA Uganda

Lack of Funding (Absence of Financial Independence)

There is a severe lack of funds available to the Judiciary in Uganda. According to Justice James Ogoola, PJ (as he was then), the Judiciary’s budget was subject to severe cuts⁵³. This cut in funding has consequences both for court facilities, such as the library, and for the administration of justice. This in turn has led to a backlog of cases at all levels of the Judiciary. In December 2006, the Deputy Registrar of the Criminal Division, Roy Byaruhanga, warned that it could take up to 300 years to clear the backlog of cases should the current conditions prevail⁵⁴. This has serious implications for Uganda’s prisoners, many of whom are on remand awaiting trial. The rosy safeguards envisaged in the constitution are simply provisions that are embedded in the same and are not enforced; thus human rights of persons are equally abused in the process.

Ogoola in a report⁵⁵ warned that the lack of financial independence he *‘whittle[s] down the independence of the Judiciary as an institution’*. He said that the financial situation of the Judiciary had reduced it to a position akin to that *‘of a beggar going cup in hand to the Executive and the Legislative arms of the State in order to be able to perform its constitutional duty’*. This is very unfortunate because **Article 128 (5)**⁵⁶ stipulates that the administrative expenses of the Judiciary, including all salaries, gratuities and pensions payable to or in respect of persons serving in the judiciary, shall be charged on the consolidated fund. The judiciary collects a lot of monies in forms of court fees, fines and more, however, the judiciary still receives low funding from the government; the judiciary is the arm characterized by under staffing and this has been raised by many persons in the judiciary including former Chief Justice Odoki who noted that the judiciary is marred with challenges such as failure by the executive to provide an adequate working environment for judicial staff, poor pay and relegating the judiciary among the second or third best priorities of government, suffice to mention the meager resources that are allocated to the judiciary compared

⁵³ The years in question are 2003, 2004

⁵⁴ I Mufumba/ E Gyezaho, *‘300 Years to Clear Case Backlog – Judiciary’*, The Monitor, 16 December 2006.

⁵⁵ Judicial independence undermined, 2007

⁵⁶ The Constitution of the Republic of Uganda, 1995

to other organs of government⁵⁷. This is proof that there is still a long journey ahead to judicial independence.

Appointing Judges

The lack of judges is to be distinguished from a failure to appoint. The budget for judicial appointments is passed by Parliament, whereas appointments are made by the Judicial Services Commission whose members are appointed by the President. The process of appointing judges is politicized⁵⁸. Where the government is perceived to appoint deferential judges – or friends – to the bench, it damages trust in the judiciary, regardless of whether the judges are in fact biased in their rulings. In many countries the executive (is widely perceived to) decisively influence who are appointed as judges – even when there are rules and institutions in place to prevent this from happening⁵⁹. The Chairperson of the Uganda Judicial Officers Association (UJOA) stated that because of the judges' political affiliations, the public could sometimes predict the judgment of each judge on a panel before the actual ruling was made⁶⁰. Another issue which was raised with the delegation is that if political appointments are vetoed there is a failure to appoint any judges. The consequence of such inaction can be seen in the Ugandan Supreme Court. Following the death of one Supreme Court Justice and the retirement of another, the quorum of seven Judges to handle constitutional appeals is not met. It is understood that the appointment process has stalled at the Presidential level and that there are a number of appeals are pending⁶¹. This undermines the independence of the judiciary and negates public confidence in the public who use the Courts as temples of justice.

In Conclusion

The threats and actual breaches of the concepts of independence of the judiciary in Africa litter thousands of pages of the Continent's legal history. At the same time, every constitution of most of the African states (including Uganda) provides for the role of impartiality and Independence of its judiciary as well as sanctity and respect for judicial pronouncements⁶²; however this concept in Uganda is still more prominent on paper than in reality as the judiciary has been undermined on several occasions as has already been discussed. Its independence has been undermined and this has led to a deterioration of public confidence in the Courts. The Country's history offers a vivid illustration that interference with the Judiciary is not so alien a

⁵⁷ Chief Justice Benjamin Odoki deplored that the Judiciary was funded 'like a small department' and warned that the 'alarming shortage of judges' had undermined the proper administration of justice in the country.109 Deputy Chief Justice Laetitia Mukasa-Kikonyogo spoke of a 'crisis in the judiciary' created by the shortage of judges

⁵⁸ According to the Uganda Judicial Officers Association (UJOA), 98 percent of judges' appointments since 1997 have been political

⁵⁹ Gloppen (2014) *Courts, Corruption and Judicial Independence*, p.71

⁶⁰ A Mubiru, 'Judges' Appointments Annoy Judicial Officers', *New Vision*, 17 August 2006.

⁶¹ *Judicial Independence undermined*, 2007

⁶² Kanyeihamba, G.W (2010) *Constitutional and Political History of Uganda: from 1894 to present*

concept after all. The period of tension and lawlessness of the late 1960's led the Judiciary to make decisions that have had far reaching implications to date – they created “Ghosts” as Prof. Oloka-Onyango⁶³ calls them that have haunted the Country's constitutional jurisprudence for decades.

Despite the total abuse of the Rule of Law, Human Rights and Democracy; it is only prudent to commend the judicial officers who have defied the norm of “business as usual” and have stayed ‘thirsty’ for the very principles enshrined in the Constitution despite the over increasing pressure from executive and legislature. Some of the judicial officers have come out to condemn the interference with the judiciary by other organs of state.

Recommendations

The government should ensure that the Judiciary is accorded with the monetary and human resources which will enable it to function without the risk of having its independence curtailed, and which will allow it to clear the backlog of cases.

The procedure for the identification of candidates for judicial office should be conducted in a transparent manner from outset to completion. The criteria for [potential candidates should be in-line with the UN Basic Principles on the Independence of the Judiciary⁶⁴.

The government of Uganda ought to abide by judicial decisions which is fundamental to the maintenance of the rule of law. Any disagreement over court decisions should be settled within the channels provided for by law⁶⁵. When court decisions are not respected the Judiciary loses its independence as the judicial officers cannot be in position to properly carry out their duties.

The Executive should respect the boundaries of the separation of powers and the independence of the judiciary. Any criticism of judicial decisions should not amount to pressure, influence or harassment of the judiciary. The executive should refrain from attacking judges personally.

“Just as the Courts must apply Acts of Parliament whether they approve of them or not, and give effect to lawful official decisions whether they agree of them or not; so Parliament and the Executive must respect Judicial decisions whether they approve of them or not, unless or until they are set aside”⁶⁶

⁶³ See generally Oloka-Onyango, J (2015): Ghosts and the Law

⁶⁴ <http://www.ohchr.org/EN/ProfessionalInterest/pages/IndependenceJudiciary.aspx>

⁶⁵ Judicial Independence undermined, A Report on Uganda, 2007

⁶⁶ Lord Bingham, Re.McFarland [2004] UKHL 17

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