



**ISLAMIC UNIVERSITY
IN
UGANDA**

**COMPARATIVE LAW
JOURNAL**

IUIUCLJ

IUIUCLJ. VOL 6, ISSUE 2, 2019

A CRITICAL ANALYSIS OF THE PREREQUISITES OF AN INDEPENDENT AND EFFECTIVE JUDICIARY IN UGANDA

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Abstract

This piece of work explains the prerequisites of an independent and effective judiciary from the Ugandan perspective. The major elements of judicial independence in the Constitution¹ and other relevant legislation are analyzed. Judicial independence is subdivided into two namely; individual and institutional independence. Further, this work refers to judicial and academic authorities where the subject has been discussed in considerable detail. Whereas the concept of judicial independence has many prerequisites, in this paper they are generally categorized into four major categories namely; , the State must guarantee judicial independence by entrenching clauses in the Constitution on the tenure, security, emoluments and independence of judges and secondly, the State should surrender through constitutional provisions the function of administering justice to the judiciary. It should also guarantee fundamental rights and freedoms of individuals in the Constitution. This is important especially in cases of conflict of interest between the State and an individual or group of citizens collectively. Thirdly, there must be relative non-partisanship on the part of the judiciary in adjudication of disputes where individual rights are in conflict with those of the State and last but not least is the attendant prerequisites which must be in place viz; Rule of law, Separation of powers, creating awareness to the people and the open court requirement.

The paper analyzes the above mentioned elements pointing out their workability and/or implement- ability to have an independent and effective judiciary the Ugandan context.

“A country without a respected judiciary is a country with no honor, or justice. This is because people believe in a judiciary which is independent, respected, fearless and impartial. This explains why the Constitution and laws of Uganda made provisions to ensure that there is apparent and real integrity, reputation and transparency of the Courts and judicial officers.”²
-Justice Kanyeihamba-³

Introduction

With reflection on the above authoritative statement on independence of judiciary, this study analyses the prerequisites of an independent and effective judiciary from the Ugandan perspective.

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¹ The Constitution of Republic of Uganda, (1995 as amended.)

² Kanyeihamba, G.W., A speech delivered to the Uganda Parliamentarians' Seminar on Peaceful Transition and Constitutionalism, March 18, 2004 p.15.

³ Justice Prof. George Kanyeihamba is an outspoken constitutional law expert and former Justice of Supreme Court of Uganda.

The judiciary is the third arm of the government, under the doctrine of separation of powers the other two being the legislature which makes the law, and the executive which enforces the law.⁴ The judiciary is clothed with a constitutional mandate to *inter alia* administer justice through resolving disputes between citizen and citizen and between the State and citizens, interpret the Constitution and other laws of the land, promote rule of law, contribute to maintenance of order in society, protect human rights (of individuals and groups), develop and implement training programmes for the development of judiciary staff, as well as collect government revenue accruing from courts among others.⁵

In any given country, the judicial system is an essential check and balance on the other branches of government ensuring that the laws of the legislature and the acts of the executive comply with the constitution governing the land. To this end, the judiciary plays a central role in the administration of justice. In order to ensure proper administration of justice, an independent and impartial judiciary must be in place. In addition, the principle of separation of powers which is the bedrock upon which the requirements of judicial independence and impartiality rests must also be guaranteed.⁶

Brief Background

The judicial arena in Uganda like elsewhere in the developing countries has had both triumphant moments as well as challenges in execution of its role. Accordingly, many developing African countries are characterized by lack of respect for the rule of law and independence of the judiciary.⁷ Thus, Judges have been intimidated into giving rulings favorable to the government, forced to resign their positions, and in the worst cases they have even been killed.

For instance, the first Ugandan Chief Justice, Benedicto Kiwanuka, was murdered by the Amin regime for not cooperating with the regime's illegal actions.⁸

In 2004 another incident occurred where 22 individuals were charged with treason and misprision of treason and consequently they were remanded in custody. On 16th November, 2006, the High Court granted bail to 14 of them. Immediately thereafter, the High Court was surrounded by security personnel adorned in black garments who interfered with the preparation of bail documents and the 14 were re-arrested and taken back to jail. On 24th November, 2006, all the Claimants were taken before the military General Court Martial and were charged with offences of unlawful possession of firearms and terrorism. Both offences were based on the same facts as the previous charges for which they had been granted bail by the High Court. All Claimants

⁴ Chapters 6, 7, & 8, and of the Constitution of Republic of Uganda, 1995.

⁵ Ibid..

⁶ Attorney General v. David Tinyefuza, Supreme Court Constitutional Appeal No.1 of 1997 (U),per Justice Kanyeihamba

⁷ Twesiime, M., K., The Independence and Accountability of the Judiciary in Uganda: Opportunities and Challenges, in the Independence of the Judiciary and the Rule of Law: Strengthening Constitutional Activism in East Africa 22 (Frederick W. Jjuuko ed., 2005).

⁸ Ibid.

were again remanded in prison by the General Court Martial. The Uganda Law Society petitioned the Constitutional Court of Uganda challenging the interference of the court process by the security personnel and also the constitutionality of conducting prosecutions simultaneously in civilian and military courts. The Constitutional Court ruled that the interference was unconstitutional.⁹

In a statement, Chief Justice Odoki said that the judges considered the siege of the High Court as an apparent attempt to intimidate the judiciary.¹⁰

Thus, the executive has sometimes not taken benevolently the judiciary resisting its undue influence.¹¹ It is also true that a number of judges, once pressured, will succumb to the pressure, and a few, especially in the lower rungs of the judiciary, used their positions to enrich themselves through selling favors to litigants, which undermines the efficacy of the justice system.

The other threats to independence of judiciary in Uganda is characterized by:- the defiance of court orders, Direct interference with the discharge of judiciary's duties, Repeated criticism of judges and court decisions, and Allegations that some members of the judiciary have been pressured to collude with the police where opposition politicians have been arrested.¹²

In Democratic Republic of Congo, 315 judges were dismissed by the President without following established procedures and it was held that these dismissals constituted an attack on the independence of judiciary.¹³

In Swaziland, the High Court judges were harassed for the way they handled a case involving the King and his teenage fiancée, his soon-to-be tenth wife. The judges were issued instructions from the Royal Palace to drop the case or resign. The judges, however, defied the instruction.¹⁴

Last but not least, in 2001, the Chief Justice and a number of senior judges from Zimbabwe were harassed and forced to resign for attempting to uphold the rule of law and citizens' rights with respect to the seizure of white farms by the Mugabe regime.¹⁵ In another report, it was stated that harassment of the judiciary continues, where

⁹ Katabazi and 21 Others v Secretary General of the East African Community and Another (Ref. No. 1 of 2007) [2007] EACJ 3 (1 November 2007).

¹⁰ Ogoola, J., (2008), *Songs of Paradise, A Harvest of Poetry and Verse*, Word Alive Publishers, Kampala. (Justice Oogola called it the 'rape of the Temple of Justice'.

¹¹ Mutaizibwa, E., *Government Accuses Judges of Supporting Dr. Besigye*, THE MONITOR, December 24, 2005.

¹² IBA, 2007, *Judicial Independence Undermined: A Report on Uganda*, See also: Human Rights Watch, March 5, 2007: Uganda: Government Gunmen Storm High Court Again, Security Forces Used to Intimidate Judiciary in Case of "PRA Suspects"

¹³ In Mundy Busyo and Others v. Democratic Republic of Congo

¹⁴ Voice of America News, *Swazi Judge Defies King's Order to Drop Abduction Case*, FEDERAL INFORMATION NEWS DISPATCH, Nov. 1, 2002.

¹⁵ Amnesty International, *Zimbabwe: An Assessment of Human Rights Violations in the Run-Up to the March 2005 Parliamentary Elections*, Mar. 15, 2005, at 1, available at

<http://web.amnesty.org/library/index/ENGAFR460032005?open&of=ENG-ZWE>.

“Zimbabwe’s crisis over the rule of law, triggered by repeated flouting of court orders, harassment of judicial officers and politicization of police remains unresolved.¹⁶ That as it may be, for the judiciary to function effectively, the institution of the judiciary as a whole must be independent by being separate from government and other concentrations of power.

The principal role of an independent judiciary is to uphold the rule of law. For the judiciary is to exercise a truly impartial and independent adjudicative function, it must be protected from other governmental institutions, political organizations, and other non-governmental influences.¹⁷ It should be noted that judicial independence or immunity is not a privilege of the individual judicial officer. It is the responsibility imposed on each officer to enable him or her to adjudicate a dispute honestly and impartially on the basis of the law and the evidence, without external pressure or influence and without fear of interference from anyone. The core of the principle of judicial independence is to guarantee liberty of the judicial officer to hear and decide the cases that come before the courts and no outsider be it government, individual or even another judicial officer should interfere, with the way in which an officer conducts and makes a decision.¹⁸

It is upon this background that this piece of work analyzes the prerequisites of an independent and effective judiciary in Uganda.

Working Definitions

The word ‘*prerequisite*’ means something required as a prior condition.¹⁹ On the other hand, ‘*judicial independence*’ refers to the ability of a judge to decide a matter free from pressures or inducements. *Judicial independence* may also be defined as the autonomy of a given judge or tribunal to decide cases applying the law to the facts. It also means independence from political influence whether exerted by the political organ of the State, or by political parties, or the general public, or brought in by the judges themselves through their involvement in politics.²⁰ While it constitutes a vital safeguard, institutional independence is not sufficient for the right to a fair trial to be respected on every occasion. Unless individual judges are free from unwarranted interferences when they decide a particular case, the individual right to receive a fair

¹⁶ Amnesty International, *Zimbabwe: An Assessment of Human Rights Violations in the Run-Up to the March 2005 Parliamentary Elections*, Mar. 15, 2005, at 1, available at <http://web.amnesty.org/library/index/ENGAFR460032005?open&of=ENG-ZWE>, cited in Rugege, S., *Judicial Independence in Rwanda*, Paper Presented at the Judicial Independence and Legal Infrastructure: Essential Partners for Economic Development Conference, University of Pacific, McGeorge School of Law, Sacramento, California, October 28, 2005.

¹⁷ Justice F. B. William Kelly, *An Independent Judiciary: The Core of the Rule of Law*, p. 2. (Available on: c:\pdf\an_independent_judiciary.rtf).

¹⁸ The Court of Appeal in *Aggrey Bwire v. Attorney General and Judicial Service Commission* CA No.09/2009 relied on – *R v. Beauregard*, Supreme Court of Canada, (1987) LRC (Const) 180 at 188 per Chief Justice Dickson.

¹⁹ *Concise Oxford Dictionary*, 10th Edn, p.64948.

²⁰ Mimeo: Maina, C., P., *Independence of the Judiciary in Tanzania: Many Rivers to Cross*, p.1.

trial is violated. The judge must be seen to be independent; have a right and duty to decide cases before them according to the law, free from fear of reprisals of any kind.²¹

This independence pertains to the judiciary as an institution (independence from other branches of power, referred to as institutional independence) and to the particular judge (independence from other members of the judiciary, or individual independence).²²

Prerequisites of an Independent and Effective Judiciary

First and foremost, the State must guarantee independence of judiciary by entrenching clauses on the appointment, tenure, security of emoluments as well as independence of judges.

In that regard, Chapter 8 of the Constitution establishes the judiciary.²³ Chapter 8 contains elaborate provisions on appointment, security of tenure, security of emoluments as well as independence of judiciary. Hereunder, the paper analyses each of these elements to bring to light the reality and workability of these provisions in Uganda today.

The Process of Appointment of Judicial Officers

The judicial function is not wholly, and in fact rarely, automatic. Rather it is a creative one and thus it is necessary to recruit highly trained, competent, ethical and intelligent men and women, reflective of the society they serve, and to pay them substantial salaries. This element of creativity, the special adjudicative function which judges play and their role in society makes their job of particular importance to a balanced society. This is even more so where a judge's reasons and decisions become precedents because of the effect these decisions will have on subsequent cases and the development of the law. In Uganda, the Judicial Service Commission (JSC)²⁴ is largely responsible for overseeing judicial appointments with approval of executive and parliament. The initial selection process has significant connotation on the independence of judiciary. To have a superior judiciary, it is obvious that greatest care and diligence must be taken at the initial stages of selection and appointment process. Accordingly, persons selected for judicial office shall be individuals of integrity, ability and appropriate training or qualifications in law. Any method of judicial selection must safeguard against judicial appointments for improper motives.

²¹ Principle 2 of UN Basic Principles: The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect from any quarter or for any reason. However, many judges suffer subtle pressure, ranging from killings and torture to extortion, transfer, proceedings for carrying out their duties and unlawful removal from office.

²² Rugege, S., Judicial Independence in Rwanda, Paper presented at the Judicial Independence and Legal Infrastructure: Essential Partners for Economic Development conference, University of the Pacific, McGeorge School of Law, Sacramento, California, October 28, 2005.

²³ Constitution of Republic of Uganda, 1995 (as amended).

²⁴ Article 146 of the Constitution.

In the selection of judicial officers, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.²⁵

According to Kanyeihamba; the Parliament, the JSC and President can determine the composition of the Judiciary and the persons who will be appointed, which is different from controlling its independence. This is because the ethics of the legal profession and the strict discipline of Bar etiquette are the controlling force behind the judiciary.²⁶ Thus, the President has power to influence the activities of the JSC. This is because the President appoints members of JSC.²⁷

In the period 2012-2015, Uganda faced a crisis of judicial officers. There was neither a Chief Justice nor a Deputy Chief Justice following the retirement of the holders of these two offices. The JSC had selected and recommended potential candidates for these two vital posts but the President ignored it. The President later appointed Justice Kavuma as the Deputy Chief Justice without approval of JSC.²⁸ On the other hand, it was the President's intention to reappoint Justice Odoki as the Chief Justice in defiance of the constitutional age limit provision.²⁹ However, luck was not on the side of the Justice Odoki following the majority of the Constitutional Court judges' decision that it was contrary to the constitutional provisions for Odoki to hold office while he had attained the retirement age.³⁰

It should be noted that Justice Odoki who had played a pivotal role in the Uganda's 1995 constitutional making process. It has never been clear why Odoki accepted this reappointment contrary to the letter and spirit of the constitution and the advancement of the democratic process and socio-economic wellbeing of the people.³¹ Yet he was aware that his term had expired and it required constitutional amendment to maintain his stay in office. However, some constitutional commentators have stated that the crisis

²⁵ See: Basic Principles of Judicial Independence, Principle 10.

²⁶ Kanyeihamba, G.W., (2006), *Kanyeihamba's Commentaries on Law, Politics and Governance*, Renaissance Media Ltd, Kampala.

²⁷ Article 142(1) read together with Article 146 (2).of the Constitution of republic of Uganda, 1995.

²⁸ Hon. Justice S.B.K.Kavuma is believed to be a cadre judge given his close association to the ruling party-NRM.

²⁹ *Karuhanga v. Attorney General Constitutional Petition No.0039 of 2013 (U)* (available at <http://www.ulii.org/ug/judgment/constitutional>). The court declared the reappointment of Odoki as Chief justice after attaining retirement age was unconstitutional. The act of the President disregarding the advice of the JSC was inconsistent with Article 147(1)(a).The President wrote a letter on July 9th 2014 to the Chairman Justice Ogoola directing that Mr. Odoki be given a two year contract in order to maximize the services of the human resource. The President also ordered that the four retired Justices be recalled back to the Bench. Justice Odoki's reappointment was meted with serious criticism from the law society and legislator who vowed to take the matter to court on grounds that the Constitution does not allow reappointment of a Chief justice. This was in contravention of the principles of independence of judiciary, democratic governance, rule of law and the general principles of rule of law.

³⁰ The decision of His Excellency the President of Uganda to reappoint retired Chief Justice Benjamin Odoki as Chief Justice of Uganda was in contravention of Articles 130, 133, 142(1)(2)(3), 143(1), 144(1)(a), 147(1) (a0(2) of the Constitution of Republic of Uganda as amended.

³¹ Odoki, B., J., *The Challenges of Constitution-Making and Implementation in Uganda*, p.281 (available on <http://www.constitutionnet.org/files/Ok.B.Challenges> (accessed on 8th February, 2016.)

was intended because the President was looking for a person who could secure his stay in power in the recently held 2006 presidential elections. He fell prey to the President Museveni's insatiable desire to cling to power for life.³²

Further, the appointment of Kavuma as Deputy Chief Justice was questioned since he was erroneously appointed to the same office by the retired Chief Justice Odoki on 24th June 2013. All attempts to block his approval by Parliament were frustrated by Court of Appeal's refusal to endorse and cause list the petition only to be over taken by events. The Chief Justice did not have powers to appoint since he was an ordinary citizen.

In analysis, a transparent and accountable appointment process of judicial officers is a necessary attribute for an independent judiciary.

Security of Tenure of Judicial Officers

The essence of security of tenure as a vital aspect in securing the individual independence of judges is that the tenure of judicial officers must be secured against interference by the executive or other appointing authority in a discretionary or arbitrary manner.³³ According to the Basic Principles on the Independence of the judiciary, judges whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or expiry of their term of office where such exists.³⁴ One major requirement for guaranteeing security of tenure is that, once appointed or elected as a judge, one should only be dismissed on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law.³⁵ The Judge affected must be afforded a full opportunity to be heard.³⁶ Another key factor in ensuring security of tenure is the duration of the term of office of the judges.

Accordingly, Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or expiry of their term of office, where such exists. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge. 18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

³² Jackie Asimwe (an advocate and leading Good Governance Activist) in an interview with The Independent, Friday, 26th July, 2013, by Akello, J., Odoki Speaks on his Reappointment

³³ Naluwairo, R., *Military Courts and Human Rights: A Critical Analysis of the Compliance of Uganda's Military Justice with the Right to an Independent and Impartial Tribunal*, AHRLJ, Vol.12, No.2, 2012, p.4.

³⁴ Principle 12 Basic Principles on Independence of the Judiciary, adopted on 6th September 1985; UN Doc A/conf./121/22/Rev 11 B.

³⁵ Para 20 Human Rights Committee General comment 32

³⁶ In *Mundy Busyo and Others v. Democratic Republic of Congo* where 315 judges were dismissed by the President without following established procedures, the HRC held that these dismissals constituted an attack on the independence of judiciary.

Adequate and Security of Emoluments

The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and age of retirement shall be adequately secured by law.³⁷ This means that the salary of all judges should be adequate, fixed and secure and not subject to arbitrary change by any branch of government. The objectives, of course, are to ensure judges are not subject to temptation, are not unduly worried or distracted by their present and future financial state, and that judicial remuneration is sufficient to attract the most competent and qualified citizens into the judicial ranks. The Chinese adage that “a high salary for officials gives you a clean government” has held true in most of the major common-law jurisdictions.

In Uganda, a Presidential Directive to enhance the remuneration of judicial officers both in service and retirement was issued. This directive has never been implemented and as a result the remuneration and benefits of judicial officers compared to the other arms of the State is deplorable. Judicial officers are poorly paid and those in retirement or who fall ill, live a helpless and miserable life. Yet judicial officers forsake all and sacrifice their time to the service of the judiciary and the country. They thus deserve to be well remunerated while in service and upon retirement.³⁸ The final major essential condition for ensuring the independence of judicial officers is financial security. The essence of financial security as an essential condition for securing the independence of a tribunal is the right to salary and pension should be established by law and not subject to arbitrary interference by executive in a manner that could affect judicial independence.³⁹ The legitimate test for determining the independence of a particular tribunal is that:-

“An individual who wishes to challenge the independence of a tribunal need not prove actual lack of independence; instead, the test for this purpose is the same as determining whether a decision maker is biased. The question is whether an informed and reasonable person would perceive the tribunal as independent... The perception must however be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees.

However, judicial officers in Uganda do not receive adequate in comparison with some other public servant pay in spite of the sacrifice they make to serve the nation. For example, salary package of the Executive Director of URA, Executive Director of KCC

³⁷ Article 128(5) The administrative expenses of the judiciary, including all salaries, allowances, gratuities and pensions payable to or in respect of persons serving in the judiciary, shall be charged on the Consolidated Fund.

³⁸ This is as per the Statement of the President of Uganda Law Society, 7th May, 2013, it is now 2016; two years down the road the situation has never changed.

³⁹ Naluwairo, R., (supra)

who are by far the highest paid public servants in Uganda. In addition to being underpaid, judicial officer's emoluments are subject to taxation.⁴⁰

The requirement that a tribunal must appear to reasonable observers to be impartial is the embodiment of the important principle that in the administration of justice, justice must not only be done but should manifestly and undoubtedly be seen to be done.⁴¹ This principle is very important for instilling public confidence in the ability of the tribunal to execute its functions in a neutral manner. I now turn to the other limb of funding of judiciary as an institution.

He further pointed out that the true intent of the Legislature in enacting **S. 9 (1), (1) and (6) of the Judicial Service Act** was to ensure or enable judicial officers to enjoy security of tenure and to entrench that position in law, considering the gravity of the situation that would befall a judicial officer removed from office – **Barnwell v. A.G of Guyana (1994) 3 LRC 30 and 31**. Thus the parent Act requires that in order to discipline a judicial officer or remove him from the performance of his judicial functions, at least 2/3 majority of the members of the judicial service commission besides the Attorney General, the Chief Government Legal Advisor had to be present.

Entrenching Clauses on Independence of judiciary

Article 126(1) of the Constitution provides for judiciary as the only branch of the State which holds judicial powers. It provides that 'judicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with the law and with values and norms and aspirations of the people.' Article 129(1) specifically states that judicial power shall be exercised by the courts.

On the other hand Article 128 guarantees independence of judiciary from external interference by providing that 'in the exercise of judicial power, the courts shall be independent and shall not be subject to the control or direction of any person or authority. That no person or authority shall interfere with the courts or judicial officers in the exercise of their functions and all organs and agencies of the State shall accord to the courts such assistance as may be required to ensure the effectiveness of courts.'⁴²

Another important aspect of independence of judiciary is protection of judicial officers in the course of execution of their duties. Immunity of judicial officers entails; a judicial officer shall not be liable to be sued in any civil court for any act done or ordered to be done by that person in the discharge of his or her duties whether within the limits of his

⁴⁰ In **AG v. Musene Wilson & 3 Ors**, the issue was whether taxation of a Judge's salary was a diminution of his compensation contrary to the above provision. The Supreme Court held that Judges are not immune from sharing with other citizens the material burden of the government, and therefore their payment of a non-discriminatory tax laid generally on all citizens was not a diminution of Judges' salaries.

⁴¹ Lord Hewart in **R v. Sussex ex parte Mc Carthy** (1924) 1 KB 256 at 259.

⁴² Article 128 reiterated in the case of **Hon. Sam Kutesa and 2 others v. Attorney General of Uganda**, Petition No.46 of 2011 Constitutional Reference No.54 of 2011, per Mpagi-Bahigeine, JA.

or her jurisdiction.⁴³ In the same vein, the Penal Code Act further provides that ‘a judicial officer is not criminally responsible for anything done or omitted to be done in his or her judicial functions, although the act done in excess of his or her judicial authority or he is bound to do the act omitted.’⁴⁴ This protection offered to judicial officers while exercising their judicial role enhances their independence.

Judicial independence or immunity is not a privilege of the individual judicial officer. It is the responsibility imposed on each officer to enable him or her to adjudicate a dispute honestly and impartially on the basis of the law and the evidence, without external pressure or influence and without fear of interference from anyone. The core of the principle of judicial independence is the complete liberty of the judicial officer to hear and decide the cases that come before the courts and no outsider be it government, individual or even another judicial officer should interfere, with the way in which an officer conducts and makes a decision.⁴⁵

However, in real life, in most cases what always happens is the contrary as can be seen from a few of the selected examples; Reminiscent of the deployment of JATT (Joint Terrorist Team) at High Court on 16th November 2005, on 1st March 2007 around 60 police officers, some with sniffer dogs were deployed on the premises of High Court and roads around the court sealed off. As soon as the PRA suspects signed their bail papers, the troops stormed the court chambers and a scuffle ensued. Shortly thereafter, the suspects were thrown into the back of the pick-up and whisked away.

Furthermore, the Government has on several occasions disregarded judicial decisions. For instance, on 16th November 2005, the High Court granted bail to the PRA (Peoples Redemption Army) accused but JATT rearrested them. On 2nd December 2005, High Court ordered a cessation of the hearing against PRA accused. And on 31st January 2006 the Constitutional Court declared the Court Martial hearings against Dr. Besigye and other PRA accused. Similarly, the Constitutional Court order of 11 January 2007 to release the PRA accused fell on deaf ears.

It should be noted that several instances of violation of the above provisions of independence of judiciary have been perpetrated by the executive where the judiciary does not gratify the interests of the Executive and sometimes the Legislature hence undermining the independence of judiciary. And whereas these are very good provisions, the true test of judicial independence only comes when judges are led by their understanding of the law, the findings on the facts and the pull of conscience to a

⁴³ Section 46 of the Judicature Act, Cap.13, Laws of Uganda, 2000.

⁴⁴ Section 13 of the Penal Code Act, Cap.120, Laws of Uganda, 2000.

⁴⁵ R v. Beaugard, Supreme Court of Canada, (1987) LRC (Const) 180 at 188 per Chief Justice Dickson cited in His Worship Aggrey Bwire v. Attorney General and Judicial Service Commission CA No.09/2009.

decision which is contrary to what the other branches of government or other powerful interests in society want.⁴⁶

Adequate Funding of the Institution of Judiciary

The judiciary requires adequate funding for it to effectively and independently execute its day to day activities. Recently, the Chief Justice decried the poor funding of the judiciary and stated that it was the only underfunded arm of government. This financial year the judiciary requested for Shs.333 billion, but received Shs.77bn, which is only 23% of the sector's requirements. This allocation which is only 0.6% of the national budget which is supplemented by Shs.8 billion from JLOS making a total of Shs.85bn. The judiciary was allocated only 0.6% (Shs.85 billion) of the national budget 2015/2016 budgetary allocation which is meager.⁴⁷

Accordingly, Mbazira states that it is widely acknowledged that funding and facilitation of the judiciary has an impact on the level of the independence of the judiciary. This cut in funding has consequences on court facilities such as library, provision of stationary, and equipment which in turn negatively impacts the administration of justice. This is because a poorly funded and ill equipped judiciary will not be able to dispense justice in a timely manner, which may lead to the loss of public confidence in the judicial system. In addition, Justice Ogoola warned that the lack of financial independence whittles down the independence of the judiciary as an institution. The judiciary in Uganda has been reduced to a beggar going cup in hand to the Executive and the Legislature in order to be able to perform its constitutional duty.⁴⁸ Therefore, for Uganda to have an independent judiciary there must be adequate funding.

The state must guarantee fundamental rights and freedoms and surrender through constitutional provisions the administration of justice to the judiciary where there is conflict of interest between the State and the citizen(s).

The independence of courts in Uganda is guaranteed in chapter 4 of the Constitution which is known as the Bill of Rights. Herein, there are numerous provisions on enforcement of rights. It provides that 'fundamental rights are inherent and not granted by the state'.⁴⁹ And 'shall be respected, upheld and promoted by all organs and agencies of government and by all persons.'⁵⁰ The Constitution also contains an inclusive clause to cater for rights not expressly provided for to the effect that 'rights, duties, declarations and guarantees relating to the fundamental and other human rights and

⁴⁶ Kirby, M., 1998, *Independence of the Judiciary-Basic Principle, New Challenges*, Paper delivered at the International Bar Association Human Rights Institute Conference, Hong Kong, 12-14 June 1998.

⁴⁷ Aluma, C., Uganda: *Justice Katureebe Decries Low Funding to Judiciary*, The Monitor, 10th December, 2015.

⁴⁸ Mufumba, I., and Kitimbo, I., *Judiciary Needs Financial Autonomy*, The Monitor 18/December 2006.

⁴⁹ Article 20(1)

⁵⁰ Article 20(2)

freedoms specifically mentioned in this chapter shall not be regarded as excluding others not specifically mentioned'.⁵¹

The constitution allows any person who claims that his or her rights have been violated to seek redress in a court.⁵² The constitution also introduces the concept of public interest litigation whereby 'any person may bring an action against violation of another person's or group's human rights. This helps previously unrepresented groups and interests to have their voices heard by the judiciary.

The protection of human rights is dependent on the guarantee that judges will be free and will reasonably be perceived to be free to make impartial decisions based on the facts and the law in each case, and to exercise their role as protectors of the Constitution, without any pressure or interference from other sources, especially government.⁵³ In order to maintain public confidence in the administration of justice and the promotion of the rule of law, it is not enough for a court to be independent. It is equally important that a court be seen to be independent. Accordingly, the test for independence is whether a reasonable, informed person would perceive that a court is independent.⁵⁴ The custodians of law and justice reside in the institution of judiciary. As an arm of the state the judiciary is supposed to be independent and unencumbered by the whims of policy makers and implementers.⁵⁵

The Supreme Court of Canada made this point clear in the case of *Mackin v. New Brunswick (Minister of Finance)*⁵⁶ by holding that "in order for independence in the constitutional sense to exist, a reasonable and well-informed person should not only conclude that there is independence in fact, but should also find that the conditions are present to provide a reasonable perception of independence." According to the Court only objective legal guarantees are capable of meeting this double requirement.

The Court noted further that judicial independence is the "lifeblood of constitutionalism in democratic societies"⁵⁷ and is "one of the pillars upon which our constitutional democracy rests."⁵⁸ Yet the judiciary is the most vulnerable of the three branches of government. It has no means by which it can generate revenue to sustain itself. It is

⁵¹ Article 45

⁵² Article 50 thereof provides that 'any person who claims that a fundamental or other right or freedom has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation.

⁵³ Préfontaine, D. C., Q.C. & Lee, J., The Rule of Law and the Independence of the Judiciary, Paper prepared for World Conference on the Universal Declaration of Human Rights, the International Centre for Criminal Law Reform and Criminal Justice Policy 1822 East Mall, Vancouver, B.C. Canada Montreal, December 7, 8, & 9, 1998, p.10.

⁵⁴ Drolet, K., Submissions of the Senior Presiding Justice of the Peace to the 2010 Judicial Compensation Commission, Part 1: Constitutional and Legislative Overview of the Commission Process, Drolet Law Firm, Eldred Barristers, Business Suite 415 – 171 West Esplanade, North Vancouver, British Columbia, Canada, V7M 3J9. Accessed on: http://www.justice.gov.yk.ca/pdf/Submission_of_Senior_Presiding_Justice_of_the_Peace.pdf.

⁵⁵ Kabwegyere, B. T., The Politics of State Formation and Destruction in Uganda, 1st edition, East Africa Literature Bureau, Nairobi, Kenya and Dar es Salaam, 1974, p.227.

⁵⁶ (2002) Supreme Court of Canada (SCC) 13 at paras. 38 and 40.

⁵⁷ *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13 at para. 34.

⁵⁸ *Ell v. Alberta*, 2003 SCC 35 at paras. 18-19.

entirely reliant on the other branches of government for almost all its most basic and practical needs.

In instances of violation of any of the rights provided for under this section, the aggrieved individual is entitled to a fair, speedy and public hearing before an independent and impartial tribunal established by law.

Nevertheless, challenges arise where the dispute is between the powerful State and an individual. In most cases, the judiciary has stood its ground and decided the dispute according to the facts and the law. This comes with a lot of criticism and victimization of judicial officers who uphold the rule of law. A good example is the case of **Uganda Law Society v. Attorney General**.⁵⁹ In that case the security forces of Uganda Government, on 16th November 2005 besieged the High Court of Uganda in order to re-arrest prisoners, including some in this petition, and beat them up after which they were re-arrested and driven back to detention centres in Kampala. This court held that such conduct contravened articles 23(1) and (6), 28(1), 128(1)(2) and (3) of the Constitution. The judges in this case were accused by the executive for sympathizing with Besigye whereas others received threats of deaths.⁶⁰

Another good example can be found in the case of *Osotraco (U) Ltd. v. Attorney General*⁶¹ where *Osotraco (U) Ltd* sought to enforce his right to the suit property against wrongful infringement by Government. Court ordered the defendant and its servants to give vacant possession of the suit property to the plaintiff in not more than thirty days from the date of pronouncement of the judgment. The trial Judge referred to an Indian case of *The trial Judge referred to an Indian case of Nagendra Rao and Co. v. State of A.P.*⁶² *Sahai, J.* said inter alia that: - “No legal or political system today can place the state above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of the officers of the state without any remedy. The modern social approach is to do away with archaic state protection and place the state or the Government at par with any other juristic legal entity.”

The trial judge also referred to **Byne v. Ireland and the Attorney General**⁶³ where *Walsh, JSC.*, stated that where the people by the Constitution create rights against the state or impose duties upon the state, a remedy to enforce them must be deemed to be also available. It is the duty of the state to render justice against itself in favour of citizens as it is to administer the same between private individuals. The English Common law practices, doctrines or immunities cannot qualify or dilute the provisions of the Constitution. On appeal, the Court of Appeal⁶⁴ upheld the trial judge’s findings by granting a permanent injunction against the government to vacate the suit premises

⁵⁹ Constitutional Petition No.18 of 2005.

⁶⁰ *Supra*.

⁶¹ H.C.C.S No. 1380 of 1986

⁶² 4 AIR (1994)S.C. 2663 R.OH

⁶³ (1972) 1R 241 at 282.

⁶⁴ *Attorney General v. Osotraco Ltd. Civil Appeal No.32 of 2002 (Justice Mpagi–Bahigeine,JA).*

in favour of Osotraco. For the first time in Uganda, Court granted an injunction against the government which was unheard of. In protecting an individual against the government, the High Court displayed a high level of maturity and independence.

Rule of Law as a prerequisite for judicial independence

Wade and Bradley explain that the rule of law is a mark of a free society.⁶⁵ This is because rule of law seeks to maintain the balance between the opposing notions of individual liberty and public order. In every state reconciling human rights with the requirements of public interests can only be attained by the existence of independent Courts, which can hold the balance between the citizen and the state and compel governments to conform to the law. The reconciliation of rule of law with such supremacy is achieved through an independent judiciary.⁶⁶

Every democratic society calls for a strong and independent judiciary. More importantly still, it has to be underpinned by a commitment by the State to the rule of law. In this regard, the Learned Author Lord Bingham stated that:

“The core of the principle is that all persons and authorities within the state should be bound by laws publically made...”⁶⁷Whereas the Parliament is responsible for publicly enacting law, it is only through acting within the confines of the law made by Parliament that the Executive can ensure that the rule of law is maintained.⁶⁸Within this working definition of rule of law as per Lord Bingham, we obtain what is called separation of powers. The three branches of the state are delineated. In Uganda, the Judicial Service Commission has exclusive authority to initiate the appointment of a judicial officer and should not be interfered with by either the executive or the Legislature. By providing a tripartite process in appointing of judicial officer to the higher bench, there is a constitutional distinction between roles of the Judicial service Commission and the Executive and the Legislature. The Judicial service initiates the process, the President appoints on the advice of the Judicial service commission and the Legislature approves appointment.⁶⁹ The principle of separation of powers ensures that different powers are given different roles. It is through separation of powers that society holds state institutions accountable. In reference to separation of powers between the Legislature, Judiciary and Executive, Justice Grossin observes that:-

“one crucial consequence of the structural separation of power is that branches can into conflict with each other. This is of course a possibility that cannot exist where power is concentrated in a single set of hands, (yes the branches can come into conflict with each other). But that is the price we pay for our commitment to rule of law. In Uganda, judicial independence is safeguarded in a number of ways-first, there is an independent

⁶⁵ Bradley, A., W., et al, Constitutional and Administrative Law. Longman, London and New York, 1993, pp.77.

⁶⁶ Ibid.

⁶⁷ Lord Bingham, The Rule of Law, 2011, p.8.

⁶⁸ Lord Justice Grossin, The Judiciary: The Third Branch of the State, 2014 (available on: judiciary.gov.uk).

⁶⁹ Ibid.

judicial appointments Commission. Although other branches of the State are involved, the tripartite process is meant to safeguard the independence of the judiciary.⁷⁰

It should be noted that the proper and effective functioning of any State committed to rule of law depends on its branches understanding and being respectful of each other's roles and functions. This is the only basis from which the branches can work together within a framework of separation of powers to maintain the rule of law.

Separation of Powers

Montesquieu envisaged absolute independence of the judiciary.⁷¹ The doctrine of separation of powers is very vital prerequisite in safe guarding the independence of the judiciary as well as checking the excesses thereby creating conducive environment in which the judiciary adequately functions. In Uganda, the doctrine of separation of powers has been abused by the other organs frequently.⁷² The judiciary in Uganda is part and parcel of the state within the framework of the doctrine of separation of powers. Under the doctrine of separation of powers, the legislature is supposed to make the laws, the judiciary to interpret and administer them and the executive to enforce them.⁷³ Therefore, the judiciary occupies a special position in any democratic society. For the judiciary to be able to undertake its functions fairly and impartially, it is required to be independent of the other two organs of the State and independent from political and other societal pressures. Noteworthy, the judiciary comprises the institution of courts and judicial officers. As one of the major organs of the State it is vested with the exercise of judicial power; that power which the State exerts in the administration of justice as opposed to the power it possesses to make laws and the power of executing them. It is the power to decide controversies between subjects of the State, or between the State itself and its subjects in determination of legal rights. Thus, the State surrenders judicial power to the judiciary to inquire into disputes and then give binding, authoritative and enforceable decisions.⁷⁴

Accordingly, judicial power plays a pivotal role in observance of basic and fundamental human rights. The doctrine of separation of powers is the heart of constitutionalism thus no state can realize its duties if it does not adhere to the doctrine of separation of powers basing on constitutional stipulations. The Supreme Court of Uganda stated that:-

“The doctrine of separation of powers demands and ought to require that unless there is the clearest case calling for intervention for the purpose of determining the constitutionality and legality of actions or the protection of liberty of an individual

⁷⁰ Ibid.

⁷¹ Op cit.

⁷² Ogoola, J., *Songs of Paradise, A Harvest of Poetry and Verse*, Word Alive Publishers, Kampala, 2008. on the rape of the temple of justice.

⁷³ Loveland, I., *Constitutional Law, A Critical Introduction*, 2nd Edition, Butterworths, London, p.47.

⁷⁴ Ibid.

which is presently or eminently threatened, the courts may refrain from entering arenas not assigned to them by the Constitution or laws of Uganda. It cannot be over emphasized that it is necessary in a democracy refrain from entering areas of dispute best suited for resolution by other government agencies. The courts should intervene only when those agencies have exceeded their powers or acted unjustly causing injury thereby.⁷⁵ It is vital to note that for the society to thrive under an environment of freedom, democracy, justice and respect for human rights, it is important for that society to have and believe in a culture of a respected, independent, impartial and fearless judiciary. The independence of the judiciary should not be absolute but a mechanism of checks and balances should be observed so that no single organ of the State acts in contravention of the Constitution without being stopped by the rest of the other two organs.

A system of checks and balances- the doctrine of Separation of Powers

The need for separation of powers arises not only in political decision making but also in the legal system, where an independent judiciary is essential if the rule of law is to have any substance.⁷⁶

According to the doctrine of separation of powers, within a system of government based on law, there is the legislative, executive, and judicial functions to be performed. This threefold division of labour, between the legislator, an administrative official, and independent judge, is a necessary condition for the rule of law in modern society and therefore for democratic governance itself.⁷⁷ The separation of powers means at least three different things: That the same person should not form part of more than one of the three organs of government, that one organ should not control or interfere with the work of another, and that government should not exercise the functions of another.

We must never forget that the only real source of power that we as judges can tap is the respect of the people. Only where an independent judiciary exists, can judges decide cases impartially and justly, because “the rule of law” requires that a judge not be apprehensive of repercussions or retaliation from outside influences. The history of the judiciary around the world demonstrates that the greatest danger of interference comes from other government institutions or political parties. An independent judiciary must not only be independent of these and other influences, but also it must appear to be independent. This is so because a court can only be truly accepted as a just one if it has the confidence of the public that it is just and fair. This concept gives rise to the famous adage “justice must not only be done, but also must be seen to be done.”

“The doctrine of separation of powers demands and ought to require that unless there is the clearest case calling for intervention for the purpose of determining the

⁷⁵ Attorney General v. David Tindefuza, Supreme Court Constitutional Appeal No.1 of 1997 (U).

⁷⁶ A.W.Bradley and K.D., Ewing, Constitutional and Administrative Law, 13th edition, 2003, Pearson Education Ltd, England, p.78.

⁷⁷ Ibid.

constitutionality and legality of actions or the protection of liberty of an individual which is presently or eminently threatened, the courts may refrain from entering arenas not assigned to them by the Constitution or laws of Uganda. It cannot be over emphasized that it is necessary in a democracy refrain from entering areas of dispute best suited for resolution by other government agencies. The courts should intervene only when those agencies have exceeded their powers or acted unjustly causing injury thereby.”⁷⁸

The doctrine of separation of powers is very vital in safe guarding the independence of the judiciary as well as checking the excesses thereby creating a conducive environment in which the judiciary can adequately promote rule of law. In Uganda, the doctrine of separation of powers has been abused by the other organs frequently as will be seen late the following chapters.

Communicating the Law to the People/creating public awareness

It is difficult sometimes to explain the law and the legal system to the public. But it is their law and their system and those who are involved in the system, judges, lawyers, prosecutors, police and corrections personnel, must all reach out to make such explanations, and to do so in comprehensible language. To make a justice system responsive to the general population requires a system whose members are willing to engage in two-way communication with the people. It requires a justice system with personnel dedicated to the basic principles of justice for the people, adequately supported by state officials and legislators who also fully endorse these principles, to make real the dream of all peoples for a fair justice system.

The ‘Open Court’ Requirement

The ‘open Court’ practice is perhaps one of the most important safeguard for an independent judiciary which exists in virtually all democratic societies.⁷⁹ This principle requires that justice be dispensed in open court so that every member of the public has a right to enter any court at any time a trial is in progress. In many jurisdictions, the media and the justice system have developed guidelines or principles relating to media reporting and the nature of the approved contact between the courts, police, and lawyers participating in a trial process. The objective is to allow the press to communicate to the public what takes place in the courtrooms. The courts normally restrict dissemination of information and publication only to the extent necessary to ensure the parties have a ‘fair trial’.

The open court principle gives to the public the right to be present to assess the manner in which justice is being dispensed in their courts, including an assessment of whether the judges are acting independently and in accordance with the law.⁸⁰ It is true that not

⁷⁸ Attorney General v. David Tinyefuza, Supreme Court Constitutional Appeal No.1 of 1997 (U).

⁷⁹ There are, of course, limited exceptions relating mainly to young offenders and the judicial discretion exercised to maintain security and order in the court as part of the guarantee of a fair trial

⁸⁰ As above (n 36).

all interested citizens can attend a small courtroom for this principle to be effective. However, Uganda gives the press the right to attend, as agent for the people, to publish comments and reports on court proceedings.⁸¹ The open court principle also requires that a court give full recorded reasoned reasons for its decisions, for the benefit of the parties and for the public record. In addition to such reasoned decisions being useful to the parties in their assessment of justice being done, it is also useful to the public for the same reason. In Uganda, all court proceeding and court records are available to all members of the public, including the press, so that justice will not only be done, but will also “be seen to be done.”⁸² Thus, one of the prerequisites of an independent judiciary is that there must compliance with the open court practice.

Conclusion

In light of the above discussion, one might therefore plausibly conclude that Uganda adequately provides for prerequisites of an independent and effective judiciary in her legislation at least on paper but observance and adhering to these provisions still remains a dream.

In final analysis, the lack of an independent Judiciary in Uganda has paved the way to the myriads of problems affecting the Judiciary ranging from lack of courage and temptation to corruption in deciding political cases, appointment of judges, security of tenure and remuneration, institutional autonomy, judicial accountability, adequacy of resources for the courts, media and societal pressure and scope of judicial power greatly affects the Judiciary.

Way forward

The Uganda government must take steps to ensure, enforcement of the law providing for independence of judiciary and to enable the judiciary administer justice without fear or favour.

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⁸¹ This is embedded in right to access to information as provided for in Article 42 of the Constitution, and Access to Information Act 6, of 2005.

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