

CHALLENGES FACING THE JUDICIARY IN UGANDA

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DECLARATION

I **Kamusiime Bright** declare that this dissertation is my original work and that where other works have been quoted, it is indicated. This work has never been submitted to this or any other University for the award of a Degree.

APPROVAL SHEET

This is to certify that this research report presented by **Kamusiime Bright** titled the Critical Analysis on Challenges Facing the Performance of Judiciary in Uganda has been under my supervision and is now ready for submission with my approval.

Research Supervisor

SARAH TABOSWA

Signature

~~Taboswa~~

Date

27/5/2014



HOD pub/comp law

27/5/14

DEDICATION

I dedicate this work to **Ainomugisha Isabella Williams** my niece who at her tender age of 3 years is concerned about my life as she always prays for me before going to her bed. This work is also dedicated to my parents **Late John M. Tibategyeza** who fought not to live for long but to leave a land mark and we all survive on his sweat under the supervision of our mother **Mary Tibategyeza**. It is through your tireless efforts, love, desire and hardships that I achieve this degree.

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I acknowledge the many sources and published materials I consulted while preparing this report and the details of which I have given in the notes to each chapter.

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CHAPTER ONE

1.0 The Background to the Study.

The study is based on the performance of Judiciary in administering justice and the fostering of the Democratic Principles in light of Articles 3 and 128 of 1995 Constitution of Republic of Uganda. Tracing the history of the Judiciary is like trying to relate a cup of water dipped out of a stream to a particular source, it may be easy to find the beginning of the stream but tracing the origin of a single part of it from among all the possible tributaries is much more complicated. Perhaps, it is for this reason that historians tread so carefully when they are carrying out their research work. Therefore the history of Judiciary in Uganda predates Colonialism.

Under the Colonial Judicial System, it was imposed on the traditional rules in Uganda as well as administrative system was also imposed without consulting them. The 1902 Order in Council and the 1900 Buganda Agreement presented the Colonial Constitutional Framework. On the other hand under Pre- colonial Uganda, each community enjoyed its own legal system, which was based on custom and usages. Elders, clan leaders and Kings enforced the customs.

Apparently, there is no other literature as to how the Traditional Judicial Courts sought to promote democracy in their locality. What is clear, are the decisions of Judicial Officers were met with compliance from the subjects and impacted the necessary local democratic principles.

In Uganda and other Colonial African Countries, the Colonialists practiced racial discrimination in all spheres of life in their territories. In the giving of jobs, Ugandans were employed as clerks in urban areas and chiefs in rural areas. The chiefs exercised both the Judicial and administrative roles.

Therefore since they were imposed on Africans who were not elected by the people, they were handmaidens to the colonial higher level. The Judicial System and as microscopic level, it could not at all uphold the Democratic Principles of Uganda. At the National level, the Courts destroyed the implication of customary laws and usages. For instance African customary marriage was regarded as women purchase and not a wife of valid marriage as was indicated in

Rex vs. Amkeyo¹. Where in this case the issue was whether the paying of bride price could be considered as purchase of woman. The Court held that the paying of bride price was regarded as purchase of a woman since women were as chattels to be appropriated.

The exercise of racial discrimination by whites, lack of independence of the Judiciary and impartial economic dominance in Uganda brought about the struggle for democratic rights of self-governance.

This later resulted into the rise of different forces in form of Political Parties and their influential Political Leaders. These Political Parties included, Kabaka Yekka (KY) led by the Kabaka of Buganda backed by the Buganda monarchists. The Uganda People's Congress (UPC) led by Dr. Apollo Milton Obote backed by Protestant Missionaries and the Democratic Party (DP) led by Benedict Kiwanuka backed by the Catholic Missionaries.

In 1962, Uganda attained her independence in a peaceful way without resorting to war. Under the 1962 Constitution, the chief Justice was supposed to be appointed by the president acting on the Prime Minister's advice². By this, the chief justice fell into the claws of the Executive; this was selfish wisdom of the executive. This was the same during the colonial era because Judges acted as the Queen's mouthpiece; they also worked for the continuance of their service. The examination of the execution of Judicial functions under the 1962 Constitution helps in realization that the concept of Judicial independence is a challenge.

More challenges on Judicial independence are realized under the 1967 Constitution, which had a number of provisions curtailing the autonomy of Judges, the Director of Public prosecutions and Attorney General. The president was given power to nominate and appoint the Chief Justice under Article 84(1). The Judges were to be appointed by the President on the advice of the Judicial Service Commission as provided for under article 84 (2). Article 89 stated that no appeal on the interpretation of the Constitution would lie beyond the High Court of Uganda and that all other appeals would not go beyond the court of Appeal of East Africa.

¹ (1917) EALR P14

² Article 91(1) of the 1962 Constitution of Uganda

When Amin assumed power on 25 January 1971, changed Uganda's Constitutional order. The regime had a lot of impact on the execution of Judicial functions. Legal notice number 1 of 1971, which brought Amin into power, suspended several Articles of the Constitution including article 1 which was to the effect that the Constitution was the Supreme Law of the land in Uganda. Others include article 3 and 63 of the 1967 Constitution which required the alteration of this Constitution to be referred to the parliament and parliament's powers of making laws respectively. Ipso Facto the military ruler became the Supreme Law of the country and law maker. More so, he conferred quasi-judicial power to the military and paramilitary institutions. Such as the military tribunal, state research Bureau and armed forces of the police inter alia³.

"One can recall an almost total merger of power under Idi Amin, where the executive and legislative powers were completely fused and vested in one man and where the other branch, the judiciary was intimidated to ineffectiveness"⁴.

The independence signified hope for restoration of magnified democracy which inter alia included political empowerment of Uganda; Sovereignty of the people, periodic elections, representative governance, establishment of institutional mechanism of governance which operate within the principle of checks and balances, adherence to the cardinal doctrine of independence of Judiciary, separation of powers and observance of fundamental human rights.

After the achievement of 1962 independence, the struggle for democracy continued where by forces accused each other for being dictatorial and undemocratic yet they had thought that by achieving independence, it would be the end of dictatorial governance.

The courts in reaction to this affirmed the validity of the 1966 Constitution aimed at promoting democracy. However, the Executive in endorsing the 1966 Constitution did it without consulting the will of the people and the legislative body whose term had expired derogating the fundamental Democratic Principle of attainment of power by the court of the people and connote a recycle of Colonial dictatorial imposition of race on Ugandans.

Despite the promulgation of various Constitutions like the 1962 Constitution, 1966 Constitution

³ Mutibwa P. "Uganda since Independence. A story of Unfilled hopes" 1992 2nd Edition page 19

⁴ F.W. Jjuuko "Separation of powers" a reality of myth (unreported at 9

and the 1967 Constitution, which clearly demonstrated the State Power among the Executive, Legislature and the Judiciary; the exercise of Judicial Power in the face of Democratic Principles were reviewed to be positive.

However, the new Constitutional Framework, instead of providing the State with a new means of self-governance became a source of contradiction especially between the Executive and the Judiciary, which led to the promulgation of the 1995 Constitution under the Movement System aimed at resolving the problems in Uganda.

1.1 Introduction

Justice is one of the most cherished aspects of life, in all human societies. Where justice is absent, democracy is also absent. To ascertain this, it is necessary to find out whether the Judiciary enjoys independence from the other arms of government that is; the Executive and the Legislative arms to ensure the protection of the fundamental rights and freedoms of individuals. There is need to have in place a well-established independent Judiciary of the Executive and legislature.

Judicial independence has a great role to play in capacity building of democracy. Without an independent Judiciary which can dispense justice with impartiality, the idea of democracy is a mockery and remains a challenge. This research concerns itself with our Constitutional history and the operation of the judiciary there under. Principally, it is concerned with the independence of the Judiciary under article 128 of the 1995 Constitution.

The independence of the judiciary has been a matter of controversy in Uganda yet without it; people's rights are in jeopardy. This research seeks to establish the extent to which the 1995 Constitution promotes judicial independence.

1.2 Statement of the problem

The most emphasized aspects of Constitutionalism is Judicial independence and one of the most sustained Constitutional struggles in Uganda's history is the struggle for Judicial independence. The laws on the Judicial independence have remained in statutory books without practical application. This is because the Judicial arm of government has never been free from the

Executive and Legislative arms of government making it difficult for the Judiciary to execute its duties with an independent mind. For people to recognize and appreciate the Judiciary's work, the Executive and legislature must be at a distance.

1.3 Objective of the study

1. To establish the performance of judiciary in the administration of justice since 1995 Constitution.
2. To critically analyze the challenges facing judiciary under the 1995 Constitution.
3. To find out the appointment and security of tenure of judicial officers in Uganda

1.4 Hypothesis guiding the research study

1. The independence of the Judiciary under the 1995 Constitution of Uganda has remained an important statutory provision with no practical implementation and realization.
2. Lack of an independent Judiciary has impaired the development of Constitutionalism and the rule of law in Uganda, which has consequently denied democracy and justice to people of Uganda.
3. Alien as it is, the concept of Judicial independence is necessary in Uganda for the protection of human rights and the rule of law to be enhanced.

1.5 The scope of the study

This study focuses mainly on the challenges facing the performance of judiciary in Uganda since 1995 Constitution. Before showing the trend of affairs regarding Judicial independence, the study analyses the nature and purpose of an independent Judiciary in a democratic state. The last item in the scope of this study is findings, conclusion and recommendations. This is the arrangement of chapters respectively. The above are areas of interest for the purpose of this research.

1.6 Significance of the Study

The significance of the study is aimed at enlightening the Executive and Legislature of their duty not to interfere with the Judiciary in the execution of its duties. It is also aimed at reminding the Judiciary of its Constitutional right to stay independent from the Executive and Legislative Arms

of Government in the execution of its functions provided under article 128 (1) & (2) of the 1995 Constitution. This study therefore, will be useful to the readers in ascertaining the challenges facing the independence of the Judiciary and how such challenges can be dealt with. It will also be helpful for the key players like Parliament and Executive in avoiding to pass laws with clawbacks, and will encourage others in the legal fraternity to research more on the topic.

1.7 Methodology of Research

A number of study techniques have been employed in order to arrive at well-researched conclusions so as to handle this subject. This information is produced by library textbooks, articles and other written materials pertinent to the field under study. Newspapers have also been a relevant source as the articles contained therein offer up-to date information on the subject matter. A historical approach has enabled to ascertain the reason as to why a lot of concern is attached to judicial independence.

1.8 Literature Review

Chiefs in Buganda at various levels had the duty to adjudicate disputes, make laws and to ensure the enforcement of these laws. According to him there never existed the doctrine of separation of powers as proposed by Montesque⁵. He however, fails to show the extent or level to which the doctrine of separation of powers was adhered to by the colonial government. There is also more to investigate about the topic in question since Haydon's literature is concerned with only pre-colonial and colonial governments.

It is argued that level of democracy that the people of America enjoy, can only be accessed by fostering the rule of law, Constitutionalism and the independence of the Judiciary. He further contends that the appointment of Judicial Officers by the President may compromise the independence of the Judiciary⁶. According to him therefore, if the Executive and legislative arms of government, commit themselves to respect judicial decisions, then there can be Judicial Independence.

⁵ Haydon Law and Order in Uganda 1960, African Law Series 2nd Edition pp 16

⁶ Professor F.W Jjuuko Separation of Powers a Reality or a Myth un reported page 9

It is argued that if any country is to enjoy high levels of justice and democracy, there should be an independent Judiciary; that where the Constitution is respected, there would be said to exist Constitutionalism and rule of law which are the roots that support Judicial independence⁷.

He further contends that it is only an independent Judiciary that can point out the anomalies in the law or the legislature to act upon them for amendment or reform.

However, the professor's literature is very brief and this makes it difficult to appreciate the importance of the independence of the Judiciary. There is therefore, a need to update Judicial literature based on prevailing circumstances.

It is pointed out that unconstitutional ways of acquiring power is a major threat to the independence of the Judiciary simply because the rule of law is always absent in such situations⁸.

He further states that in East Africa, each Chief Justice was appointed by the President of each country at their absolute discretion in backing his view that judges enjoy security of tenure once appointed into office. However, he fails to realize that the absolute appointment of the Chief Justice by the President is likely to compromise Judicial independence.

In discussing the independence of the judiciary under the 1967 Constitution of Uganda, it is observed the fact that the president is advised by the Judicial Service Commission in appointing Judges is a fair compromise between the need to protect public or national interests and the doctrine of Judicial independence⁹.

However, it envisages the problem which is likely to culminate from the President's appointment of Judicial Officers which may subsequently limit the independence of the Judiciary.

In general analysis the above literature on Judicial independence is narrow to enlighten on the independence of the judiciary under the current Constitution 1995 having not been based on the 1995 Constitution, the literature is insufficient to determine the level of Judicial independence in Uganda.

⁷ Professor G. W. Kanyeihamba Constitutional Law and Government in Uganda 1975 Published by E. African Literature Bureau, Nairobi, Kampala and Dar es salaam 1st Edition page 284

⁸ Professor Kiapi Abraham Theory of Government and Constitutional Law of in E. Africa 1975 Published by E. African Law Series 2nd Edition page 49.

⁹ Obola Ochola The Uganda Constitutional Law since independence Makerere Faculty of Law lot 144-146

CHAPTER TWO

LEGAL FRAME WORK

2.0 Introduction

This chapter shall focus on the domestic legislations relating to the doctrine of Judicial Independence and legal structures responsible for the promotion of Judicial Independence in Uganda since 1995 Constitution.

2.1 The Constitution of Republic of Uganda 1995 as amended.

Article 126(1) 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 conformist with law and with the values, norms and aspirations of the people. It further states under clause 2, that in adjudicating cases of both civil and criminal nature, the courts shall, subject to the law apply the principles of natural justice to all irrespective of their social or economic status, justice shall not be delayed, adequate compensation shall be awarded to victims of wrongs, reconciliation between parties shall be promoted and substantial justice shall be administered without undue regard to technicalities.

Article 128 specifically is on the independence of Judiciary and clause (1) states 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. Clause (3) provides that all organs and agencies of the state shall accord to the courts such assistance as may be required to ensure the effectiveness of the courts.

Article 144 of the Constitution of Uganda (1995) provides and establishes the tenure of office of Judicial officers. Article 144(1) provides for the duration of the term of office in case Judicial officer wants to retire from service.

Article 144(2) provides the grounds a judicial officer may be removed from office.

Article 144(7) defines a Judicial officer as Chief Justice, Deputy Chief Justice, the Principal Judge, a Justice of the Supreme Court, a Justice of Court of Appeal or a Judge of the High court.

The other provisions of Article 144 provide for the grounds the president can remove a judicial officer from his office and the procedure to be followed. It is a must that this procedure be followed. This means that any other ground upon which a judicial officer may purportedly be removed is null and void. The Constitution contemplated this challenge and thus this provision.

The Constitution states that a judicial officer will only be removed from his/her office by the president if the issue of such removal has been referred to a tribunal appointed under clause (4) of Article 144 and the tribunal has recommended to the president that such Judicial officer be removed.

Article 144(5) provides that if the issue involving the removal of a Judicial officer is referred to a tribunal under the same article the president shall suspend the Judicial officer from performing the functions of his/her office. This provision is aimed at promoting discipline and Judicial ethics. This also manifests the marginalization of Judicial officers in that, one is suspended from his/her office before any investigations.

2.2 The Judicature Act Cap 13

Section 46(1) provides that a judge or commission or other person acting Judicially 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 or its Judicial functions whether or not within the limits of his or her or its jurisdiction.

2.3 The Leadership Code Act 2002

Specifically section 3(d) which states that the inspectorate shall investigate and report on any allegations of high handed, outrageous, infamous or disgraceful conduct or any other behavior or conduct on the part of a leader in accordance with the definition of the words high handed outrageous, disgraceful conduct and infamous to be provided for by the regulations to be made by the minister.

2.4 The Local Council Courts Act 2006

Section 3 of this Act is on the establishment of local council courts and it provides that there is established a Local council Court at every Village, Parish, Town, Division and Sub-county level.

Section 13 is on the powers of local council court. It provides that without prejudice to any other powers, a Local Council court may make an order for any one or more of the following reliefs; reconciliation, declaration, compensation, restitution costs, apology, attachment and sale, and in case of infringement of a bye-law or ordinance, impose a fine, community service or any other penalty authorized by that bye-law or ordinance.

2.5 The Criminal Procedure Code Act Cap 116

Section 48 of this Act gives the High Court powers to call for and examine the record of any criminal proceedings before any magistrate's court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of the magistrate's court. This is to ensure that justice is impartially administered to all without any illegality.

2.6 The Inspectorate of Government Act 2002

S. 3 (1) of the Act establishes the office of the Inspectorate of Government and that it shall consist of the Inspectorate General of Government and two Deputy Inspectors-General. Section 8 (1) is on the functions of the Inspectorate; among which is to promote and foster strict adherence to the rule of law and principles of natural justice in administration. In order for that office to foster rule of law and principles of natural justice, such an office must be independent. Section 10 of the Act states that the Inspectorate shall be independent in the performance of its functions and shall not be subject to the direction or control of any person or authority and shall only be responsible to parliament.

2.7 The Uganda Code of Judicial Conduct (published by Judicial Integrity Committee 2003)

Under principle 1.1, a Judicial Officer shall exercise the Judicial function independently on the basis of his/her assessment of the facts, and in accordance with conscientious understanding of the law, free of any direct or indirect extraneous influences, inducements, pressures, threats or interference from any quarter or for any reason.

2.8 Structures responsible for Judicial Independence

2.8.1 Parliament

Article 77(1) establishes the parliament of Uganda while Article 79 gives the functions of parliament which include powers to make laws on any matter for peace, order, development and good governance of Uganda. Clause 3 of Article 79 provides that parliament shall protect this constitution and promote the democratic governance of Uganda. In order to have an independent Judiciary, it is the duty of parliament to make laws which create working environment conducive for the independence of the Judiciary.

At times however, legislature puts itself in a superior position to defeat the performance of the Judiciary. The historical case of **Lyagoba V Balasonga**¹⁰ is very clear on this point. The cause of Action was Constituted as follows; Busoga had been accepted a semi-federal type of government under the Independence government which was among the many settlements just before Uganda's independence in 1962. However, the method of electing the Kyabazinga was left unsolved by the second Marlborough Conference which was held in London.

A resolution was passed by the District Council that the Council would be made up of 84 members, 67 of which would be elected directly and 6 members specially elected and 11 members would be hereditary chiefs of Busoga. This was contrary to the Constitution by then which had a provision to the effect that specifically atleast 90% of the membership of the district council be elected directly¹¹. The district Council's resolution passed on 10th August 1962.

The council was dissolved on 26th Sept 1962, elections or the District Council were conducted. Two days later the council sat to select six special members. William Nadiope was then elected Kyabazinga of Busoga. Dissatisfied members petitioned on ground that the six specially elected members were unlawful members according to Article 72(2) of the 1962 Constitution.

Court heard both sides of arguments and held that the council's composition was unlawful. Nadiope was refused from acting as Kyabazinga of Busoga. On 1st March 1963 Parliament met to pass the Busoga (Validation) Act which reversed the decision of the High Court. Immediately

¹⁰ [1963] E.A 57

¹¹ Article 72(2) 1962 Constitution

the six specially elected members of the council were restored and Nadiope was as well confirmed Busoga's Kyabazinga. This case reveals the legislature's superiority over the Judiciary and its outcome was in breach of the Constitution and undermined Independence of the Judiciary as well.

2.9 The role of the Judicial Service Commission in the administration of Justice and independence of the Judiciary

Article 146 of the Constitution provides that there shall be a Judicial Service Commission which shall consist of chairperson and deputy chairperson who shall be persons qualified to be appointed supreme court justices. One person nominated by the Public Service Commission, two advocates of not less than 15 years in practice nominated by the law society, one justice of supreme court nominated by President and two members of the public nominated by the President and the Attorney General as an ex officio member of the commission.

However, the President has a lot of influence because he appoints the greatest percentage of the commission members. More so, he can remove any member from the commission for their inability. Article 146(7) (c) of the 1995 Constitution is to the effect that the president's decision to remove any member is not required to be approved by any category of people. This avails evidence that the operation of this commission is at the control of the executive.

A body such as the Judicial Service Commission that plays a role in the running of the Judiciary and its functions, approval of the appointment of Judicial Officers under article 142 of the Constitution, needs to be independent from any other institutions or authorities for the realization of the concept of judicial independence.

2.10 The Inspector General Role in the Promotion of Judicial Independence.

There shall be an inspectorate of government. The inspectorate of government shall consist of the Inspector General of Government, and such a number of Deputy Inspectors of General as Parliament may by law prescribe¹².

¹² Article 223 (1) & (2) (a) (b) of the Constitution of 1995

The functions of the inspector General of Government include promotion and fostering of strict adherence to the rule of law and the principles of Natural Justice in the administration, elimination of corruption, abuse of office, the promotion of good governance, the enforcement of the Leadership Code and the stimulation of public awareness about the values of Constitutionalism inter alia. The Inspector General of Government shall not be subject to the direction of any person or authority and shall only be responsible to parliament. He/she is also supposed to ensure that each organ of government respects the other.

However, this is a big dream and challenge if the office of the Inspector General of government itself cannot enjoy independence. The president has a lot of influence in government decision making with the help of his advisors. There is no doubt therefore that he must appoint a submissive inspectorate of government to protect his political interests. The former Inspector General of Government Jotham Tumwesigye's appointment (now Supreme Court Justice) by the President was due under the Constitution but the circumstances that surrounded his appointment caused the public to raise an image of impartiality on the appointee's part.

It is approved that a person who was the National Political Commissar of the National Resistance Movement cannot be impartial enough and discharges the functions of such an office with an independent mind. Some people went as far as describing the Inspectorate General of Government as he then was, as misplaced. This undermined the Ugandans' confidence in the office of the inspectorate General of Government and subsequently doubted the effectiveness of this office to promote the doubled concept of Judicial independence and the rule of law in Uganda.

CHAPTER THREE

DATA ANALYSIS

3.0 Introduction

The 1995 Constitution has faced a number of challenges. Among these include the determination of the extent to which it promotes the independence of the Judiciary.

This famous belief among other factors provokes us to examine the Constitutional provisions in light of the prevailing circumstances and their legal connotations to the functioning of the Judicial arm of government. This arm of government may be said to be between rocks and hard surface.

3.1 Independence of the Judiciary under a democratic state:

For independence of the Judiciary under a democratic state, there must be separation of powers. The doctrine of separation of powers means the distribution of functions to the three arms of government the executive, the legislative and the Judiciary such that those powers do not rest in one arm of government under the same person or group of persons. The doctrine requires that no organ of government should exercise the powers of the other and that no person should be involved in more than one arm of government, neither should any organ influence the acts of other organs.

The doctrine charges the Executive with the formulation and implementation of policies, the legislature is charged with enacting laws or provisions having the force of law and the Judiciary is responsible for the interpretation of the law and its application.

In Uganda the Constitution provides under article 128 (1) a

'In the exercise of judicial powers the courts shall be independent and shall not be subject to the control or direction of any person or authority.'

"No person or authority shall interfere with the courts or judicial officers' in the exercise of their judicial functions.

On getting political independence, so many African States included a provision in their Constitutions about the separateness of the three arms of government; with checks and balances for better governance. The issue of checks and balances is not found or implied anywhere in Ugandan Constitution yet it is the Supreme law of the land as stipulated by article 2 (1) of the 1995 Constitution of Uganda.

3.2. The impact of the appointment of Judicial officers on the Independence of the Judiciary.

In the case of **Attorney General V Maj. Gen. David Tinyefuza**¹³ the Constitution court comprised of five Justices led by Manyindo J. ruled that Maj. Gen. David Tinyefuza had for long ceased to be an army officer. The learned Justices reached their verdict after a diligent study of the laws and circumstances that related to the case. On appeal one of the Justices his lordship Justice G.W. Kanyeihamba had just been appointed by the president as Justice of the Supreme Court. This appointment was duly made under Constitutional provisions.

Before the hearing, counsel for the respondent raised a preliminary objection to the effect that Justice Kanyeihamba should disqualify himself from the hearing the appeal because he had been a presidential adviser and a staunch movementist, thus by virtue of his previous post, he had interest in the appeal. This is covered under the notion of natural justice.

Kanyeihamba J. however declined to disqualify himself on the ground that his appointment was duly made under the Constitution. This was a new precedent, it indeed showed that the challenges of the Judiciary are not only external but also internal factors exist. When the appeal was still pending, it raised a lot of public concern and the questioning of Judicial independence.

Kanyeihamba's failure to disqualify himself raised a number of legal questions considering the relevance of the case: such questions were: could Justice Kanyeihamba be impartial considering his previous post as presidential advisor and a staunch movement cadre among others. Such questions may easily lead one to believe that the Judiciary is still an extension of the executive, even though some Judges have boldly interpreted the law according to their professional understanding.

¹³ Constitutional Appeal No. 1 of 1997

This case is an apparent yardstick for Judicial independence in Uganda. Why a different decision after anonymous Constitution court decision? Indeed Maj. Gen. Tinyefuza though the Judiciary was independent, he was only to be told that this arm of government was not independent.

In real life it's difficult to find a Judge who will execute his duties without putting into consideration his appointer. More so, when the latter is interested in the issue at hand, it's indeed a great challenge to Judicial Independence.

3.3. The Impact of the Executive and Legislature on the Exercise of Judicial Powers and Administration of Justice.

Chapter eight of the 1995 Constitution has a number of provisions which set out the nature and general framework of the Judiciary. Such provisions will be discussed on the concept of Judicial independence.

“In the exercise of judicial powers, the courts shall be independent and shall not be subject to the control or direction of any person or authority”¹⁴. Article 129, (1) (c) and such subordinate courts as parliament may by law establish, including Qadhis Courts for marriage, divorce, inheritance of property and guardianship, as may be prescribed by parliament. This article leaves out the Magistrate Courts and Local council courts but there are established by the Magistrate Courts Act Cap 70 and the Resistance Council Statute 1988 respectively.

However, just like the president thinks, the people may decide on national issues through refrenda other than technical knowledge, the same could be the position where LC's are used to adjudicate other than learned Judges. This undermines the concept of Judicial independence. In reality there has not been judicial independence indeed the question remains whether it will ever happen in third world. Pseudo-democracies where the right of the military and the word of the president supercedes every thing.

The makers of the Constitutions correctly observed the need to have an independent Judiciary. They tried to envisage the various circumstances that may hinder Judicial independence and consequently included provisions therein trying to promote and protect Judicial independence.

¹⁴ Article 128 (i) of the 1995 Constitution of Uganda

But this trial has not come to fruition. The legislative powers need to favour the judiciary if this is to be realized.

In the case of **Ssemwogerere and Z. Olum V. Attorney General**¹⁵. This was hinged on whether parliament respected Constitutional rules when conducting business. The litmus test for parliament credibility was when it passed the Referendum and other Provisions Act 1999 allegedly without the requisite quorum. The speaker of Parliament the Late Francis Ayume, had ruled that there was quorum based on people who had signed the attendance register but not those actually present in the chamber. In September 1999 Ssemwogerere and Olum petitioned the Constitutional court to declare the Act null & void. They argued that the Act was not valid because it was enacted without quorum and it was enacted after the expiry of the date stipulated on the Constitution. The petition was thrown out on a technicality that because the petitioners could not use parliamentary records in evidence without permission of the speaker *inter alia*¹⁶.

On Friday 25th June 2004, the Constitutional court ruled that referendum Act (2000) was null & void. According to the summary of the judgment the passing of the Referendum (Political system) Act 2000 by parliament on 7th June 2000 was in contravention of Articles 89 and 90 (1) of the Constitution for failure to follow the voting procedure and to refer the Bill to the relevant parliamentary committees respectively, the Justices agreed that the Act was therefore unconstitutional and thus null and void. The holding of the referendum under the referendum (Political System) Act 2000 before passing a law under Article 269 of the Constitution to set free political parties and organization, contravened article 69 of the Constitution. Parliament had no authority to pass the Act after the expiry of the period stated in Article 271(2) without first amending that provision of the Constitution. The referendum held under the Act was invalid. No political system under article 69 of the Constitution was put in place¹⁷. The president's efforts to hold a special meeting with the cabinet and addressing the nation on the 27th June 2004 with utterances such as "these mistakes shall be sorted out legally and politically" on the Constitutional court ruling reveals the undermining of the Judiciary in its efforts to interpret the Constitution, leaving Judicial independence at stake. This also reveals the protection of political interests of the government.

¹⁵ Constitutional Appeal No. 1 of 2000 (SC) unreported

¹⁶ The Sunday Vision July 4th 2004 page 4

¹⁷ The New Vision Wednesday June 30th 2004 page 3

Like any other legal person, the state has the right to appeal where it feels aggrieved by the judgment. However an appeal by the state in circumstance generated to Tinyefuza's case where all justices unanimously reach the same conclusion tantamount to judicial intimidation so that appellate court reaches a different verdict. Thus, interfering with independence of Judiciary. In most cases though, the state comes out as the victor and this is hinged on unceremonious amendments of laws. The executive and legislative have greatly interfered with the concept of Judicial independence as seen in the above analysis.

Judges are to dispense justice without fear of any legal consequences in case of any omission of an act by such a judicial officer in the exercise of his powers¹⁸. If the Judicial officers were to be held liable for any act or omission committed in the exercise of their Judicial functions, their independence and confidence would have been undermined.

Where a judge makes a decision per-incurium, the aggrieved party may apply for certiorari, Judicial review or appeal against the decision. The aggrieved fails to access justice that is only if the decision is passed by the final court of appeal¹⁹. An example is the case where Julia, Sebutinde J salary was subjected to tax after a political-judicial controversy in the URA probe.

The administrative expenses of the Judiciary including salaries, allowances, gratuities, pensions payable to judicial officers shall be charged on the consolidated grounds.²⁰ Judicial officers will feel secure if their remuneration is commensurate with their jobs. The contention of article 128(5) is intended to ensure that the Judiciary remains independent; it is still doubtful whether Judicial officers can become economically satisfied where the other organs of government are full of corruption. Ideally, the level of corruption in the Judiciary should be less compared to other institutions in the country. According to the vice president of Uganda then, remarked that corruption cannot be fought if the Judiciary is not independent and efficient.²¹ But politics have infiltrated this arm of government to the extent that those dispensing Justice are politically not independent (Steven Kavuma's Case)

¹⁸ Article 128 (4) of the Constitution of Uganda 1995

¹⁹ Ibid Article 132 (1)

²⁰ Ibid A 128 (5)

²¹ Minister of Local Government...Bidandi Ssali at Grand Imperial Hotel on 11th December 1997

Article 128(6) and (7) of the 1995 Constitution of Uganda, makes the Judiciary self-accounting and capable of dealing directly with the ministry of finance in relation to its finances.

This enhances impartiality, confidence and independence among Judicial officers when executing their duties. The facilitation of the Judiciary with necessary equipment is still poor. A number of magistrate's courts in rural areas lack court furniture, libraries and law reports for reference. All this curtails effective performance of the judiciary and is an important case for analyzing legal lacunae in judgments. It should be noted that Article 128(8) seems not to extend to magisterial courts because expressly these courts are not included. Many cases are adjudicated by these courts, hence their participation in the administration of justice is of paramount importance. Article 128 (8) creates therefore, a lot of uncertainty as to whether Magisterial courts cannot be abolished when there is a substantive holder of that office. This is not idle analysis given the fact that the magistrates G2 do not handle cases involving summary procedure by law.

3.5 The relevance of the Chief Registrar's to Judicial independence.

Under Article 145(1) - (2) The Constitution of Uganda 1995 provides for the office of the Chief Registrar of the Judiciary who has to be appointed by the President on the advise of the Judicial Service Commission. Article 145(1) and (2) does not state the Chief Registrar's functions. However, besides the ordinary functions like keeping the records of the Judiciary, he/she is also supposed to raise all the complaints of Judicial officers. Such a person should have the mandate of judicial officers so as to hold this office. Presidential appointment therefore, is envisaged to deprive the Judiciary of the opportunity to have someone who can boldly speak out their problems. It is most likely that the President's appointee would always prefer to talk about what is calculated to appease the executive but not the real problems of the Judicial officers and the Judiciary as an independent arm of government. For Judicial officers, the issue of time spent on the training should be taken into consideration.

3.6 The Efficacy of the Qualification of Judicial officers to promote Judicial independence.

The importance of Article 143 of the Constitution of Uganda 1995 as far as Judicial Independence is concerned lies in the fact that this job is preserved for eligible professionals. Thus owing to the fact that judges at different levels have professional confidence in what they

do, the judiciary can easily be shielded from the executive and the legislature's interference. Numerously it has come to notice that he who works with professional confidence can rarely be intimidated by any other person. This however is only rather theoretical belief that may not be easily authenticated practically. Therefore there is a proof that professional judges still stand a number of challenges in dispensing Justice with an independent mind. A case in point is **Kibuka Musoke.J.** in the case of **Winnie Byanyima V Ngoma Ngime**²² and **Kasibante Moses V Kantongole Sigh**²³. The above cases attracted Public criticisms, threats and intimidation irrespective of the above; Kibuuka Musoke.J. handled the matter professionally

²² Civil Revision No. 9/2001

²³ Election Petition No. 23 of 2011

CHAPTER FOUR

4.0 Introduction

This chapter shall focus on findings, conclusion and recommendations of the study.

4.1.0 Findings

4.1.1 Corruption

Although there is a law in place to fight the vice (Anti Corruption Act) corruption has remained a challenge in the Judiciary. Some judicial officers are too corrupt to the extent of causing court files to disappear from court registries. Police investigators also delay to investigate some cases due to economic promises, expert witnesses like doctors, baristic experts, handwriting experts etc at times produce fake reports as a result of corruption. This has created mistrust in the eyes of the members of the public. For example former High Court Judge Okumu Wengi was removed from Judicial office due to corruption allegations which were later proved.

4.1.2 Intimidation and threats

One of the main challenges being faced by Judicial officers is intimidation and threats spearheaded by state agents like Resident District Commissioners (RDC), State House Workers, Government Officials and Security Personnel. Yet it is the duty of all organs and agencies of the state to accord courts such assistance as may be required to ensure the effectiveness of the court.²⁴ The case of **Dr. Kizza Besigye and others V Attorney General.**²⁵ is a good illustration on the point of intimidation. In this case, Kizza Besigye and 22 others were charged with treason before the High Court of Uganda at Kampala and they applied for bail which was granted by Lugayizi J. They were later re-arrested by security operatives (black mambas) as they were leaving court premises. The event which was described by Principal Judge James Ogola (as he then was) as a rape of the temple. The constitutional court held that such acts were unconstitutional and undermined the independence of Judiciary.

²⁴ Article 128 (3)

²⁵ Constitution Petition No. 07 of 2007

4.1.3 Insufficient machinery

Judicial officers are not fully facilitated to perform their duties, and in addition to that, the number of Judicial officers is very small and this explains why they have backlog cases. Magistrates are not given some facilities like the Judges and Justices, yet they perform the same duty of adjudicating cases. For example magistrates are not given vehicles, security and even their removal from office is not clearly provided by constitution. This is why they are easily threatened and intimidated by politicians and state representatives like RDCs

4.1.4 Finances

It is important to note that Article 128(6) provides that the Judiciary shall be self accounting and may deal directly with the ministry responsible for finance in relation to its finances. However, this does not mean that Judiciary is given enough funds to run its activities. Due to financial constraints, the government has been very slow in recruiting Judicial officers despite public demand. Even salaries and other benefits given to Judicial officers are very minimal and that is why high qualified persons in the legal fraternity prefer to work privately.

4.1.5 Sensitization

Members of the public need to be informed about the performance of the Judiciary. If workshops and training are embarked on, members of the public will know how and where to complain in case of misconduct on the side of a judicial officer. This will minimize corruption and other sorts of misconduct in the Judiciary and this will promote the independence of Judiciary. Prof. Kanyihamba argues that one of the tests for determining whether or not a country enjoys a high standard of Justice is the independence of the Judiciary.²⁶

²⁶ Professor W. Kanyihamba Constitutional law and Political History of Uganda Since 1894 published by Centenary Publishing Ltd 1st Edition 2002 page 291

4.1.6 Interference by the Executive

Although Article 128 gives independence to the Judiciary, at times the Executive interferes in its duties more especially where the interests of the Executive in a matter before court have taken a different direction and the decision is not in its favour.

This has been seen on many occasions and the case of **Thomas Kwoyelo V Uganda**²⁷ illustrates this position. In this case, Kwoyelo was among the members of a rebel group known as the Lords Resistance Army (LRA) in Northern Uganda. He and others were arrested and charged in the International crimes division of the High Court sitting at Gulu. However, they applied for amnesty which was granted to the group except Kwoyelo hence this petition on the ground that he was unconstitutionally discriminated against. The constitutional court ruled that it was unconstitutional for the Director of Public Prosecution to continue prosecuting Kwoyelo since he was supposed to be treated like his counterparts. Despite constitutional court ruling, Kwoyelo remained in detention.

There is also a recent case of **Elias Lukwago V Attorney General and others**.²⁸ In this case Lord Mayor Elias Lukwago was removed from his office on allegations of misconduct and incompetence in the meeting convened by the Minister for Kampala on 25th November 2013. It so happened that before the meeting, Lukwago had earlier secured interim order stopping the meeting which order was ignored by the Minister. The resolution for the removal of the Lord Mayor was moved and supported by the required number of counselors. His seat was declared vacant and Kampala Capital City Authority (KCCA) Executive Director communicated the same to electoral Commission to organize fresh election to replace the vacancy which the electoral commission did hence this application seeking to injunct the same. While granting the order, Lady Justice Lydia Mugambe expressed that “if court order can be ignored by the minister and describes it as an authentic document without any steps taken to consult the Court that issued the order, then that is the direct interference with the independence of the Judiciary and must stop”²⁹

²⁷ Constitutional Petition No. 36/11

²⁸ Misc. Application No. 94/14

²⁹ Supra

4.2.0 Conclusion

It was pointed out at the beginning of this dissertation that the question under analysis is the independence of the Judiciary under the Constitution of the Republic of Uganda 1995.

It has been established that the doctrine of separation of powers cannot be achieved in Uganda given the challenges on the Judiciary that call for checks and balances in a way that one arm of government cannot work without the two other arms of government as illustrated by Benjamin Odoki J. as he then was using the three cooking fire stones.

It has also been established that Judicial independence was however, given little attention by our colonial masters, the British because of their selfish interests, they sought to make laws, enforce them and punish whoever was in breach of the established laws. The colonial government therefore set a precedent in Uganda when the executive and legislature never respected the doctrine of separation of powers and the independence of the Judiciary. Although Uganda has not yet fully attained the concept of Judicial Independence, it has made some steps at least to enact laws providing for Judicial independence. However, a lot needs to be accomplished.

4.3.0 Recommendations

4.3.1 Appointment

In the appointment of Judicial Officers, it should be recommended that those who intend to serve as Judicial Officers seek the mandate of the electorate as the system is evident in the United States of America. This should not be the work of the President because as established by the study, it has compromised with the independence of the Judges in executing their duties. Case in point is the High Court Judge AS. Choudry who in the case of **Baleke Kayira Peter and another V AG and another**³⁰ Quoted president's statements instead of relying on the law, facts and circumstance of the case while delivering his judgment.

³⁰ Civil Suit No 179 of 2002

4.3.2 Reduction on the appointing powers of the Executive

In response to article 146 of the Constitution, there should be a reduction on the appointments of the President on the Judicial service commission. Sixty percent of members of this commission is the majority which is supposed to show efficiency. If this percentage is reduced to twenty percent, then the President will not be able to influence the majority members in the execution of their functions.

4.3.3 Facilitation of the Inspector General of Government's office.

The offices of the inspector General of Government should be given more facilities and independence so as to investigate the threats made to Judicial independence. The appointment of the inspector of government should be left to the public for effective representation.

4.3.4 Sensitization.

As established by this study, local councils hold and may continue to hold Judicial power, Executive and legislative powers. However, the officials of these councils need sensitization programmes like workshops and seminars so as to acquire sufficient knowledge on the concept of rule of law and separation of powers.

4.3.5 Removal of Judicial Officer from office.

The removal of Judicial officers from office on grounds laid under the Constitution should not be investigated by a tribunal that is an appointee of the President being a requirement of Article 144(3). This will avoid bias by the President for resistance where such a tribunal is appointed by the Judicial Service Commission.

4.3.6 Parliament

Parliament should stop enacting laws with claw back clauses, which tend to oust the function of the court. Court's power to review any cases before it as provided for under Article 50 by the Constitution should be mandatory.

4.3.7 Remuneration

The remuneration of judicial officers should be increased³¹. The Judges and magistrates should be given enough facilities to ease their work. Having realized by the study that one of the mechanisms used by the Executive to erode the Judiciary's independence, is the latter's control over finances and general decision regarding the welfare of judicial officers; principle Judge Herbert Ntabgoba in centre for basic research workshop Report 10 of 2000 says,

“Even if we took the expression interfere by its direct meaning there individuals or authorities that interfere with our magistrates in exercise of judicial functions; cases of political leaders who are often heard threaten to hold demonstrations about matters pending there is indirect interference and more grave. Take a case of tools of trade, Transport, accommodation, books and a living wage. To deny them such tools is the greatest of all interference because without them they can't discharge their judicial functions”.

Such tools should therefore be availed to Judicial officers at all costs for an independent judiciary to exist.

4.3.8 Prerogative powers given to the Executive under Article 121.

The prerogative powers exercised by the president are unconstitutional in a free democratic state. Thus all the provisions which confer to the President such powers should be repealed.

In the performance of its functions, the judiciary should be independent and subject only to the constitution and the law, and it should be obligatory for all citizens to abide by Judicial decisions.

4.3.9 Precedents.

Historical constitutional cases should be reviewed where history now indicates miscarriage of justice like the “**Busoga Validation Act and the Uganda Vs Grace Stuart Ibingira**” because they set a dangerous unconstitutional precedent which are likely to be followed by future proceedings.

³¹ Under the Article “Judiciary must be independent” Sunday Vision July 4th 2004 page 4.

4.3.10 Spirit of respect between Executive and Legislature.

The Executive and the legislature should develop a spirit of respect for Judicial decisions even where the verdict reached does not favour them. For example Lukwago's case (supra)

4.3.11 Adherence of professional ethics

Judicial officers should always stick to their professional ethics and interpret the law not according to what the Executive wants but what justice requires.

4.3.12 Legal framework transformation

The legal system should be transformed to suit the cultures, norms and customs of the people, instead of following the alien nature of the law which is not favouring both the educated and non-educated as in aspects like the alien orientation of the introduced criminal justice system. Failure of much of the statute law to take into account Uganda cultural norms and the language, dress and the procedure of the courts.

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