

23RD COMMON WEALTH CONFERENCE 2023

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Preamble

- I must first ask what it means to say someone is accountable for their actions. In many areas accountability means that, just like football managers, an individual who fails to perform satisfactorily in their job should be sacked or should resign. Some people have called this form of accountability, ‘sacrificial accountability’, meaning that the only solution is for the individual concerned to no longer continue in their role.

Preamble – Cont,d 1

- In the case of the judiciary, however, safeguards are needed to ensure that judges are free to make their judicial decisions without fear or favour and thus to preserve their independence. For example, if a politician or senior judge felt able to sack a particular judge, or remove them from a case, simply because they did not like the decision reached, the principle of judicial independence would be greatly undermined and there could be no possibility of a fair trial.
- It could also lead judges to make decisions they felt might be more acceptable to whoever had the right to decide whether they should continue serving as judges or be promoted.

Preamble – Cont,d 2

If, for instance, the permanent or continued appointment of a part-time temporary judge was in some way determined by one of the parties to the case, there would be a real risk that independent and impartial judicial decision-making could be subverted by self-interest.

- Judicial independence is now universally recognized as one of the hallmarks of constitutional democracy and rule of law. It is accepted that an independent judiciary is the key to upholding the rule of law in a democratic society. Judicial independence requires that an individual judge be unconstrained by collegial and institutional pressures when deciding a question of fact and law.

The Global Concept of Judicial Independence and Accountability

- International human rights law, international humanitarian law, international criminal law, and other international standards relevant to the rule of law, the administration of justice, and corruption, all include an obligation of States to ensure access to a competent, independent, impartial and accountable judiciary.
- Judicial officers who violate the code of conduct and the principles entrenched in the Bangalore Principles of Judicial conduct, 2002 are liable to judicial accountability for their conduct.

The Global Concept of Judicial Independence and Accountability – Cont,d 1

- The Preamble to the UN Human Rights Council resolution on Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, most recently adopted in 2015, includes the following paragraph:
- Stressing the importance of ensuring accountability, transparency and integrity in the judiciary as an essential element of judicial independence and a concept inherent to the rule of law, when it is implemented in line with the UN Basic Principles on the Independence of the Judiciary and other relevant human rights norms, principles and standard (Human Rights Council, resolution 29/6 (2015)).

The Global Concept of Judicial Independence and Accountability – Cont,d 2

- Judges who commit a criminal offence may be subject to an investigation by the Office for Judicial Complaints and may be subject to a disciplinary sanction in accordance with the relevant statutory provisions. Apart from this, however, it is clear that judges are not subject to this ‘sacrificial accountability’. However, they are subject to a different form of accountability, which has been referred to as ‘explanatory accountability’.
- Put simply this form of accountability means that individuals can be asked to give an account as to why they have behaved in a particular way. The judiciary is subject to this form of accountability in a multitude of ways. Taken together, these ensure a considerable degree of accountability.

What constitutes Judicial Accountability?

- Fair trial rights
- Right to effective remedy and reparation
- Administration of justice, rule of law, and anti-corruption
- Judicial violations of human rights and of international humanitarian law

To whom is the Judiciary accountable?

- In considering different forms of accountability mechanisms and procedures it is useful to consider the persons to whom the judiciary as a whole, and individual judges, should ultimately be accountable.

Society it serves

- The judiciary as an institution is accountable to society to ensure that all judicial decisions are in fact made independently and impartially, with integrity and free of corruption and to this end society reasonably expects the judiciary to take action against individual judges who engage in misconduct that compromises these values.

State

- While States may adopt different modalities of delivering accountability to individual victims of judicial misconduct in order to respect judicial independence, such victims must in all cases have access to an effective remedy and reparation, if not from the individual judge then from the State as a whole.
- Under international law, the judiciary like other organs of the State is not only responsible for applying internal law of the State, but also for upholding internationally protected human rights and international humanitarian law.

State – Cont,d 1

- This is an obligation for which the judiciary is effectively accountable to the population of the State of which it is a part, to individuals and other entities affected by any exercise of jurisdiction beyond the ordinary territory of its State, and through the State's responsibility to other States under international law.
- The judiciary is accountable to the other branches of government - legislative or executive - in the same sense as it is accountable to society more generally: it must be able to demonstrate that judicial decisions are based on legal rules and reasoning, and fact-finding based in evidence, in an independent and impartial way free from corruption and other improper influences.

State – Cont,d 2

The principle of judicial independence precludes, on the other hand, any claim that the judiciary should be accountable to the executive or legislature in the sense of "responsible" or "subordinate" to those branches of government.

Uganda's Perspective

- Uganda's legislation has established safeguards for Judicial Independence and accountability. There are several legislations, court pronouncements, policies, among others, providing for this. I highlight some of the relevant provisions and decisions of courts on each principle and later on address the existing safe guards; their strengths and weaknesses and way forward.

Judicial Independence

- Article 128 (1) of the Constitution 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.” And Article 128 (2) provides that, “No person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions.”
- The purpose here is the complete liberty of the judicial officer to impartially and independently decide cases that come before the court and no outsider be it government, individual or other judicial officer should interfere with the manner in which an officer makes a decision. [Per Chief Justice Dickson in **The Queen vs. Beauregard**, Supreme Court of Canada, (1987) LRC (Const.) 180 at 188].

Judicial Discretion

- The judiciary is designed to be independent; therefore, judicial officers must have discretion in order for the legal system to function properly.
- Discretion refers to the power or right given to an individual to make decisions or act according to her/his own judgment.
- Judicial discretion is therefore the power of a judicial officer to make legal decisions based on her opinion - but I hasten to add - *but within general legal guidelines*.
- In Black's Law Dictionary 5th Edition, "judicial and legal discretion" is defined as "discretion *bounded by the rules and principles of law, and not arbitrary, capricious, or unrestrained.*"

Judicial Discretion – Cont,d 1

- Judicial discretion does not therefore provide a license for a judge to merely act as he or she chooses.
- Ideally, judicial decisions will involve minimal discretion as judges apply proven facts to the established law, and a case could be given to any judge and the results would be the same. However, legal issues are not always clearly defined as black and white, right and wrong. It is not possible to create laws for every possible issue that could come up in a given case.
- Judicial officers must make many discretionary decisions within each case that influence the outcome of the case or the legal recourse of the parties. [See: **Natayi vs. Barclays Bank of Uganda Ltd** (MA No. 263 of 2013) UGHCLD 60 (14 June 2013); **Kaweesa vs. Mugisha** (CIVIL APPEAL NO. 28 OF 2013) [2014] UGHCLD 21 (22 April 2014)].

Judicial Discretion – Cont,d 2

- Under the doctrine of the separation of powers, the ability of judges to exercise **discretion** is an aspect of judicial independence.
- Nevertheless, while a judicial officer may have the discretion to decide the issues and outcomes within a case, this does not mean he or she will always make the right decision.
- Sometimes, judges misunderstand the law or pertinent facts and make an unfair decision.
- Therefore, while much deference is given to the judge's decision, an erroneous judicial decision may be overturned through the appeals process in order to maintain the integrity of the legal system.

Judicial Discretion – Cont,d 3

- *A question however remains: if a judicial officer intentionally misuses this discretion to reach their own purposes, is the officer in any way liable/accountable or are they immune to questioning?*

Judicial Immunity

- In Uganda judicial immunity is enshrined in **Article 128 (4) of the Constitution** which provides: “**A person exercising judicial power shall not be liable to any action or suit for any act or omission by that person in the exercise of judicial power.**”
- In **H/W. Aggrey Bwire vs. AG & Judicial Service Commission, SCCA No. 8 of 2010**, Kitumba JSC agreed with the Court of Appeal statement 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 basis of the law and the evidence, without external pressure or influence and without fear of interference from anyone.

Judicial Immunity – Cont,d 1

- It is clear that the court acknowledged that immunity and independence are interlinked. But what is perhaps even more critical to note is that these privileges come with responsibility – the liberty is to be used honestly and impartially.
- I am aware that judicial independence and judicial accountability have long been viewed as being in tension with each other. The assumption is that any effort to strengthen judicial independence makes it difficult to hold judges accountable, and that any accountability initiative undermines judicial independence.
- The starting point is to understand that independence and the related principle of immunity on the one hand and accountability on the other are not ends in themselves. These principles are for purposes of ensuring fair, impartial and effective justice. Whereas independence can bolster judicial courage exercised by judges called upon to rule in difficult cases, accountability can bolster the integrity judges demonstrate in their performance on the bench.

Judicial Immunity – Cont,d 2

- There is also no doubt that respect and confidence in the judiciary, which is one of the four public policy grounds for independence of the judiciary is rooted in the integrity of judicial officers. It is therefore important that one sees judicial accountability as crucial to judicial integrity.
- The purpose of Article 128 on judicial immunity is to bolster judicial courage, Articles 147 and 148 on accountability bolster judicial integrity. Each of these principles is a means to the same end – ensuring a fair, impartial and effective judicial system. Whereas I am in no doubt that judicial immunity is the substratum upon which any judicial system is built, I am also in no doubt that immunity is not an end in itself.
- The concept of judicial immunity is only applicable to judicial acts properly so called. The concept cannot extend to acts not qualified as judicial although performed by a judicial officer.

Judicial Immunity – Cont,d 3

Even if so qualified, judicial immunity is not applicable where a body constitutionally mandated to investigate the propriety of a judicial act appropriately exercises the said mandate and in effect invokes the principle of judicial accountability. This is because judicial independence and immunity are not intended to be a shield from public scrutiny.

Judicial Accountability

- Judicial Accountability can be defined as the cost that a judge expects to incur in case his/her behavior and/or decisions *deviate too much from a generally recognized standard*.
- The *Law Reform Commission of Western Australia, Complaints Against Judiciary Report (Project No.102 available at <http://www.Irc.justice.wa.gov.au> accessed on 5 March 2023)*, states that, judicial accountability refers to judges being answerable for their actions and decisions to the community to whom they owe their allegiance.
- The need for judicial accountability has now been recognized in most democracies.

Judicial Accountability – Cont,d 1

- And judicial accountability has today become a catch word all over the world.
- Judges can no longer oppose calls for greater accountability on the ground that it will impinge upon their independence.
- P D Finn, in *The Abuse of Public Power in Australia: Making our Governors our Servants* ((1994) 5 (1) *Public Law Review*, 43) states that the accountability of the judiciary cannot be seen in isolation.
- It must be viewed in the context of a general trend to render governors answerable to the people in ways that are transparent, accessible and effective.

Judicial Accountability – Cont,d 2

- The rule of law is not a self-effecting concept and therefore requires a strong, independent and accountable Judiciary.
- Judges, can only do their job well in promoting the rule of law by, among other things, accepting restraints imposed on them by the doctrine of accountability in Article 126 of the Constitution. 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 conformity with the values, norms and aspirations of the people.

Judicial Accountability – Cont,d 3

- Judges are accountable to the Constitution and to the law which they must apply honestly, independently and with integrity.
- Recognizing the perceived tension between judicial independence and judicial accountability, Justice Michael Kirby of the High Court of Australia rightly stated that the important question should be: *How can accountability be improved but in a way that does not weaken the adherence of the judge, and society, to the principles of judicial independence?* (A text from a lecture delivered in Brisbane on 6th October 2001 at the University of Queensland and the Commonwealth Legal Education Association).

Judicial Accountability – Cont,d 4

- This principle is captured in Article 147 (2) of the Constitution thus: **“In the performance of its functions, the Judicial Service Commission shall be independent and shall not be subject to the direction or control of any person or authority”**.

Abuse of Judicial Authority

- The Judicial Service Commission Regulations do not define what constitutes abuse of judicial authority. **Black's Law Dictionary (5th edition at page 760)** defines “judicial authority” as the power and authority appertaining to the office of a judge. On the other hand, “abuse” is defined as everything which is contrary to good order established by usage; departure from reasonable use; immoderate or improper use.
- What then constitutes abuse of judicial authority is improper/ inappropriate use of the power of a judicial office. This must be differentiated from a judicial officer's error in law which can only be the subject of appeal.
- The preservation of an independent judiciary requires that judges not be exposed to personal discipline on the basis of case outcomes or particular rulings, other than in extreme or compelling circumstances.

Abuse of Judicial Authority – Cont,d 1

- An independent judge is one who is able to rule as he or she determines appropriate, without fear of jeopardy or sanction. So long as the rulings are made in good faith, and in an effort to follow the law as the judge understands it, the usual safeguard against error or overreaching lies in the adversary system and appellate review. As the courts have often said, the disciplinary process should not be used as a substitute for appeal.
- Due to the possible threat to judicial independence, it has been suggested that legal error should be dealt with only in the appellate process and never should be considered judicial misconduct.
- Proceedings before the Judicial Service Commission are not in the nature of and do not culminate into a civil suit. The JSC is not a court of law.
- It is perhaps arguable that a judge, though acting within his powers, might be shown to have acted so perversely or so irrationally that what he did should not be treated as a judicial act at all.

Abuse of Judicial Authority – Cont,d 2

- In such a case the remedy of his removal from office would be available. I doubt whether it would be in the public interest that his conduct should be open to debate in a private action.
- On the other hand, an appellate court has no mandate to discipline a judicial Officer and indeed a party who appeals against a decision of a Judicial Officer is not alleging abuse of judicial authority.
- What therefore must be emphasized is that in a bid to protect judicial independence and judicial officers from uncalled for disciplinary action for judicial decisions, judicial accountability should not be undermined.
- I am of the view that it can never be said that a judicial officer should never be investigated for abuse of judicial discretion.

Abuse of Judicial Authority – Cont,d 3

- Judicial Independence has an important corollary – judicial accountability. Indeed, whereas **Article 128 (4)** of the **Constitution** provides that a judicial officer shall not be liable for any action in exercise of judicial power, abuse of judicial power cannot qualify as exercise of judicial authority deserving protection.
- The tough question therefore is: **how can we balance judicial independence and judicial accountability?** And which institutional structures can contribute to maintaining the desirable balance? It is in recognition of the need to balance independence and accountability that the Constitution carries Article 128 which clothes judicial officers with independence and immunity on the one hand and **also** Articles 147 and 148 which empower the Judicial Service Commission to exercise disciplinary control over judicial officers.

Abuse of Judicial Authority – Cont,d 4

- Judicial officers cannot oppose calls for accountability on the ground that it will impinge upon their independence. Independence and accountability must be sufficiently balanced so as to strengthen judicial integrity. Whereas independence bolsters judicial courage, accountability bolsters the integrity a judge demonstrates in the exercise of judicial discretion.
- Institutions such as the Judicial Service Commission, which are legally mandated to discipline judicial officers, cannot be prevented from doing their work by a judicial officer citing judicial immunity. This is because proceedings before the JSC do not constitute an action or “suit” envisaged under **Article 128 (4)** of the **Constitution** from which a judicial officer is protected.
- Preferring charges against a judicial officer by the JSC for purposes of effecting Articles 147 and 148, is in and of itself, in tandem with **Article 128 (4)** of the Constitution thus proper and not in violation of the Constitution.

Abuse of Judicial Authority – Cont,d 5

- Once a judicial officer is notified of a complaint lodged against them before the JSC for abuse of judicial authority cannot answer that call with the shield of judicial immunity (**Attorney General v Nakibuule Gladys Kisekka [2018] UGSC 30 (11 July 2018)**)

Summary of Interventions to Safeguard Judicial Independence and Accountability in Uganda

Legislative interventions

- The Constitution of the Republic of Uganda, 1995 (as amended) [on the procedures of appointment and promotion of Judges; the terms and conditions of judicial tenure; and judicial conduct and discipline]
- Administration of Judiciary Act, 2020 [on financial autonomy and court administration]

Summary of Interventions to Safeguard Judicial Independence and Accountability in Uganda

Institutional framework

- Judicial Service Commission
- Judiciary Council

THANK YOU FOR LISTENING

