

INTERNAL MEMO

To: Hon. Justices of the Supreme Court
Hon. Justices of the Court of Appeal
Hon. Judges of the High Court

From: The Chief Registrar

Date: June 24, 2014

Subject: **JUDICIARY'S PROPOSALS ON THE AMENDMENT OF THE CONSTITUTION**

My Lords,

You may recall that a Judges' meeting was specially convened on 23rd April 2014 to discuss the Judiciary's Amendments to the Constitution, for onward submission to Government.

Your proposals were consolidated in a position paper on Constitutional Amendments, which the Hon. The Chief Justice submitted to Government.

The position paper on Constitutional Amendments is attached for your information.


Gadenya Paul Wolimbwa
CHIEF REGISTRAR

Copy to:

- The Hon. The Ag. Chief Justice
- The Hon. The Principal Judge
- The Secretary to the Judiciary
- The President, UJOA

Ref. CR/J.3

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CJ/A.1

FOR ANY CORRESPONDENCE ON
THIS SUBJECT PLEASE QUOTE No.....



**CHAMBERS OF THE CHIEF JUSTICE
SUPREME COURT OF UGANDA
P. O. BOX 6679
KAMPALA
UGANDA**

16 May 2014

Hon Minister
Ministry of Justice and Constitutional Affairs
KAMPALA

Dear Minister

THE JUDICIARY'S PROPOSED CONSTITUTIONAL AMENDMENTS

This is to forward to you the Judiciary's proposed Constitutional Amendments.

The Justices and Judges met on 25th April 2014 and among other things, considered constitutional amendments, specifically on Chapter 8 of the Constitution which affects the Judiciary.

The recommendations of the Judiciary are hereby forwarded to you for consideration by Government as it prepares a Bill to amend the Constitution.

Yours sincerely

A S Nshimye
AG. CHIEF JUSTICE

Copy to: Hon Attorney General
Attorney General's Chambers
KAMPALA

Hon Deputy Attorney General/Minister of State
Ministry of Justice and Constitutional Affairs
KAMPALA

The Secretary to the Judiciary
Courts of Judicature
KAMPALA

The Chief Registrar
Courts of Judicature
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Encl.

COMMENTS OF THE JUDICIARY ON THE
PROPOSED CONSTITUTIONAL
AMENDMENTS

May 2014

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A. INTRODUCTION AND BACKGROUND

The Government of Uganda is in the process of amending the Constitution to bring it in line with realities and future aspirations of Uganda.

The Judiciary, as an arm of the State, is a key stakeholder in the constitutional dispensation of Uganda. Mindful of its important role in the Constitutional dispensation of Uganda and aware of the need to strengthen the independence of the Judiciary, the Judiciary convened a special meeting of Judges on April 24 2014 to consider possible areas for amending the Constitution, especially Chapter 8 of the Constitution. The Judges considered, *inter alia*, the role of the Chief Justice in the Judicial Service Commission; expansion of the bench; retirement and removal of judges from office; composition and structure of the Coram of the appellate courts; de-linking the processes of appointment of Judiciary administrative staff and generally strengthening of the courts. Below therefore are the key recommendations of the Judiciary on the proposed amendment of the Constitution.

B. CHAIRPERSON OF THE JUDICIAL SERVICE COMMISSION

Currently, the Judicial Service Commission is chaired by a person who is qualified to be appointed a Justice of the Supreme Court other than the Chief Justice, the Deputy Chief Justice and Principal Judge.¹

The framers of the constitution had good reasons to remove the Chief Justice and Deputy Chief Justice from the Judicial Service Commission at the time of drafting the Constitution. These reasons included personalisation of appointments and promotions by the Chief Justice; high handiness by the Chief Justice; victimisation of staff by the Chief Justice and over control of the Judiciary by the Chief Justice.²

However, there are divergent views on the matter. A section of their Lordships suggested that this position should be changed for the following reasons:

- The Chief Justice should be at the centre of appointments if he or she is to have meaningful control of the affairs and management of the Judiciary.
- All Judicial Service Commissions in East African countries and most countries in Africa are chaired by the Chief Justice. Uganda thus needs to harmonise its position

¹ Constitution of the Republic of Uganda 1995, art 146(2)(a)

² Report of the Uganda Constitutional Commission.

on the chairperson of the Judicial Service Commission with other countries of comparative jurisdiction and same level of development in Africa.

- The Chief Justice must have a say and control over the disciplinary matters in the Judiciary.
- The Judicial Service Commission is under the Chief Justice in terms of hierarchy and it is only right that the Chief Justice should be its head.
- The Chief Justice, as head of the Judiciary, should be at par with the other heads of the organs of Government, who have full control of their arms of Government. A case in point is the Parliamentary Commission which is chaired by the Speaker.
- The Judicial Service Commission needs to be managed by a full time Commission and this is only possible if the Chief Justice is the Chair of the Judicial Service Commission.

But there were other Lordships, who felt that the *status quo* should be maintained for the following reasons, namely:

- The Chief Justice does not have to be the Chairperson of the Judicial Service Commission, in order to effectively control the Judiciary. The Chief Justice has many administrative apparatus and mechanisms to effectively manage the Judiciary.
- Having the Chief Justice as the head of the JSC may lead to a situation where only persons who are favoured by the Chief Justice are the ones who are appointed to the bench.
- An independent and strong Judiciary needs an equally strong and independent Judicial Service Commission, which is not subject to the control and direction of the Chief Justice.
- The office of the Chief Justice should be democratic.
- The Judicial Service Commission is meant to be independent so that it can discipline everyone including the Chief Justice.
- An independent Judicial Service Commission avoids institutional bias.
- The absence of the Chief Justice from the Judicial Service Commission safeguards internal Judiciary staff against the excesses and whims of the Chief Justice.

Recommendation

Their Lordships considered the pros and cons of the Chief Justice being the head of the Judicial Service Commission and it was agreed that the Chief Justice should not be the Chair and or a member of the Judicial Service Commission.

C. REPRESENTATION OF THE JUDICIARY ON THE JUDICIAL SERVICE COMMISSION

The Judiciary is represented on the Judicial Service Commission by a Justice of the Supreme Court, who is nominated by the Justices of the Supreme Court. The Judiciary's representative is supposed to cater for the interests of the lower and upper bench of the Judiciary on the Judicial Service Commission.

However, the lower bench rarely interacts with the upper bench to share the challenges and concerns in as far as the mandate of the Judicial Service Commission is concerned in dealing with the concerns or matters of the lower bench. For brevity, the lower bench feels that they are marginalised and that the Judiciary's representative does not effectively represent them on the Judicial Service Commission.

Recommendation

Their Lordships recommend that the lower bench should be represented by a judicial officer nominated by Registrars and Magistrates under the auspices of the Uganda Judicial Officers Association.

The upper bench should continue to be represented by a Justice of the Supreme Court and therefore, the Judiciary should have two representatives on the Judicial Service Commission.

D. REPRESENTATION OF PUBLIC SERVICE COMMISSION ON JUDICIAL SERVICE COMMISSION

Currently, the Public Service Commission (PSC) is represented on the Judicial Service Commission by a Commissioner to advise the Commission on public service policy, like it does to other Constitutional Commissions.

Recommendation

Their Lordships recommended that the *status quo* should be maintained given that changing this position would negate the role of the PSC in informing and shaping public policy in the recruitment, promotion, discipline and remuneration of judicial officers in light of the fact that the judicial officers are public servants.

E. NUMBER OF JUSTICES OF THE SUPREME COURT AND COURT OF APPEAL

Currently, the number of the Justices of the Supreme Court and Court of Appeal is provided for under the Judicature Act, Cap 13. The number of the Justices of the Supreme Court and

Court of Appeal was recently increased from 7 to 11 in the case of the Supreme Court and 9 to 15 in the case of the Court of Appeal.³

Despite this increase in the number of Justices, there is still need to increase the number of Justices of the Supreme Court to 15 and the Justices of the Court of Appeal to 28 to handle the increasing litigation and case backlog in the courts.

However, this increment can only be done by amending the Judicature Act. The process of amending an Act of Parliament takes no less than two years. Given the lengthy processes of reforming laws, it is advised that a shorter process be put in place to increase the number of justices of the Court of Appeal and Supreme Court.

Recommendation

Their Lordships recommend that the number of justices of the Supreme Court and Court of Appeal should be increased by a resolution of Parliament.

F. MINIMUM YEARS OF EXPERIENCE BY A HIGH COURT JUDGE

Currently, the minimum years for one to qualify to be appointed a judge of the High Court is ten years' experience as an advocate or a judge of a court having unlimited jurisdiction in civil and criminal cases. The framers of the constitution thought that a person with ten years' experience would have the necessary experience and exposure in adjudication.

Recommendation

Their Lordships recommend that the *status quo* should be maintained because the country has a pool of well-trained and experienced lawyers from which good standing advocates and judges can be appointed as High Court judges. Besides, seven years' experience is too short for one to gain the experience, exposure and knowledge to serve as a Judge of the High Court.

G. APPOINTMENT OF ACTING JUSTICES OF THE SUPREME COURT AND COURT OF APPEAL

Currently, whenever there is vacancy in the Coram of the Supreme Court and Court of Appeal, the President acting on the advice of the Chief Justice and Judicial Service Commission appoints Acting Justices to fill the Coram in the Supreme Court and Court of Appeal.⁴ This process is lengthy leading to delays to complete cases in the appellate courts.

³ The Judicature (Amendment) Act No 9/2011.

⁴ Constitution of Uganda 1995, art 131(2) and 142(2).

Recommendation

To shorten the process of appointing acting Justices, their Lordships recommend that judges of the High Court be acting justices of the court of Appeal and Justices of Appeal be acting Justices of the Supreme Court so that whenever there is a need for acting justices the process is one of assigning and not necessarily an elaborate process of appointing.

Secondly, that the Chief Justice, should be given power to appoint Acting Judges from within the courts of record to fill temporary vacancies in the Court of Appeal, Constitutional Court and the Supreme Court whenever there is need to raise the Coram of judges.

H. MEMBERSHIP OF THE DEPUTY CHIEF JUSTICE IN THE SUPREME COURT

Currently, the Deputy Chief Justice is not a member of the Supreme Court (but rather is a member of the Court of Appeal)⁵ and decisions of the Court of Appeal are reviewed by the Supreme Court and in this case by judges who are junior to the Deputy Chief Justice.

Recommendation

Their Lordships are of the view that the Deputy Chief Justice should be a member of the Supreme Court. In this position, he or she will deputise the Chief Justice effectively; guide the entire Judiciary and this will augur well with the hierarchy in the Judiciary.

Their Lordships further recommend that the Court of Appeal should be headed by another Justice referred to as the President of the Court of Appeal.

I. SEEKING OF ADVISORY OPINION BY THE ATTORNEY GENERAL

There is no provision in the Constitution that requires the Attorney General to seek an advisory opinion on questions of law and constitutional interpretation except if the Attorney General petitions the Constitutional Court under article 137 of the Constitution. This limits the Attorney General from seeking the opinion of the Supreme Court on constitutional matters, which may not be in dispute but require clarity and if clarity is sought by way of petition, the process would be lengthy and bring in strangers to the action.

In Kenya, the Attorney General can seek an advisory opinion from the court on any matter relating to county governments.⁶ Similarly in the East African Community, partner states can

⁵ Ibid. art 134(1).

⁶ Constitution of the Republic of Kenya, 2010, article 163(6).

seek an advisory opinion from the East African Court of Justice⁷. Within the East African Community, it is important that our laws should be harmonised to be in line with the East African Community Treaty and partner state laws.

Currently, you can only go to the Supreme Court under the slip rule to clarify matters that have been before the court but not introducing new matters. A case in point is the AG vs. Susan *Kigula and 417 others*, where the Attorney General sought an opinion from the Supreme Court on the interpretation and application of the decision on all mandatory sentences.⁸

Recommendation

Their Lordship recommended that there is need to have a provision in the Constitution which authorises the Attorney General to seek an advisory opinion from the Supreme Court provided the opinion is binding on the Attorney General, as a non-binding opinion would undermine the independence of the Judiciary.

In alternative, their Lordships agreed that the Attorney General can petition the Constitutional Court under article 137 of the Constitution, which would give interested parties an opportunity to participate in the proceedings as friends of court.

J. REMOVAL OF A JUDGE ON GROUNDS OF ILL-HEALTH

Currently, under the Constitution, a judge can be removed from office for inability to perform the functions of his or her office arising from infirmity of body or mind. The current composition of the tribunal on health matters affects the timely removal of a judge from office because their recommendations are not informed by the Medical Board.

Recommendation

Their Lordships recommend that the affected judge should be referred to the Medical Board by the Tribunal appointed under article 144 of the Constitution which shall act on the report to decide whether or not to remove a judge from office.

⁷ Treaty establishing the East African Community 1999, art 36 (as domesticated by the East African Community Act No 13/2002).

⁸ *Attorney General v Susan Kigula & 417 Others*, Constitutional Appeal No. 3/2006.

K. RETIREMENT AGE

According to article 144(1)(a) and (b), the retirement age for a Chief Justice, Deputy Chief Justice, Justice of the Supreme Court and Court of Appeal is 70 years while the retirement age for a High Court judge is 65 years.

Judges retiring at the age of 65 and 70, as the case may be, are still capable of performing their duties with distinction. Besides, the quality of a judge increases with age and experience, which may be lacking in much younger people. In addition, Ugandan judges who have retired from service are normally hired by other countries to serve as judges, who benefit from judges they never trained, mentored and coached. This leaves the country with a burden of recruiting and training new judges who hardly serve for ten years before reaching the retirement age.

Recommendation

Their Lordships recommend that the retirement for the Chief Justice, Deputy Chief Justice, Justice of the Supreme Court and Court of Appeal be raised to 75 years and the retirement age of a High Court judge be raised to 70 years.

L. CORAM OF THE SUPREME COURT IN CONSTITUTIONAL APPEALS

Currently, the Coram of the Supreme Court when sitting to hear appeals from the Constitutional Court comprises of a full bench of all members of the court. There is however, divergent opinion from the Supreme Court whether the Coram of the Supreme should be the full bench of 11 justices or 7 justices, as it has been in the past before the number of Supreme Court justices was increased from 7 to 11.

Recommendation

Their Lordships recommend that the Coram of the Supreme Court when hearing appeals from the Constitutional Court should not be tied to the full bench but fixed at no less than 7 members of the court.

M. DELINKING APPOINTMENT OF ADMINISTRATIVE STAFF FROM PSC' PROCESSES

Currently, the administrative staff of the Judiciary are appointed by the Judicial Service Commission as well as the Public Service Commission which creates double allegiance and distorts the delivery of justice. Besides, it makes it difficult to control and discipline staff who are not appointed by the Judicial Service Commission.

Recommendation

Their Lordships recommend that with the exception of the Secretary to the Judiciary, all the administrative staff of the Judiciary should be recruited by the Judicial Service Commission.

N. SPECIAL COURTS FOR TERRORISM

The International Crimes Division of the High Court was established to try cases of terrorism.⁹ The International Crimes Division has so far tried five cases of terrorism successfully under the existing structures. The creation of a court to try terrorism cases may not be financially feasible in light of the few cases the courts may be faced with.

Recommendation

Their Lordships recommended that the current structure be maintained in addition to empowering the International Crimes Division to try terrorism cases. Furthermore, their Lordships felt that as much as possible only courts of Judicature under the leadership of the Ugandan Judiciary should deal with determining the rights and freedoms of the people and that establishing special courts would undermine this.

O. APPOINTMENT OF ACTING JUDGES

Currently there is no provision that provides for appointment of acting judges on short term basis to deal with case backlog and emergencies, a matter which has aggravated the growth of case backlog. Yet in other jurisdictions like Malaysia, acting judges can be appointed from serving judicial officers and advocates on a short term basis to assist the courts in dealing with case backlog. Malaysia and other countries with similar provisions have been able to contain the growth case backlog and managed to establish a robust court system to expeditiously resolve cases. Uganda, which suffers from chronic case backlog in the High Court could benefit from this provision to reduce case backlog as well as cutting down on the average lead time for resolving land cases and capital cases which stands at 34 months and 24 months respectively.

⁹ The High Court (International Crimes Division) Practice Directions, Legal Notice No. 10/2011.

Recommendation

Their Lordships recommend that the President acting on the advice of the Chief Justice and the Judicial Service Commission should be given powers to appoint acting judges on a short term basis to deal with case backlog.

AG. CHIEF JUSTICE