THE PRACTICABILITY OF THE CONCEPT OF JUDICIAL INDEPENDENCE IN EAST AFRICA : SUCCESSES, CHALLENGES AND STRATEGIES[♣]

By

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1.0 INTRODUCTION

It is now trite that an independent judiciary is a central pillar for democratic governance.[1] This essential idea was, perhaps, best articulated by the philosopher Montesquieu, when in his *Spirit of Laws,* he observed as follows:

> When the legislative and executive powers are united in the same person or body, there can be no liberty, because apprehension might arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
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> Again, there is no liberty, if the judiciary power be not separate from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

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[1] See, generally, ECS Wade and GG Phillips (1977) *Constitutional and Administrative Law*; CF Strong (1966) *Modem Political Constitutions;* CH Mcllwain (1947) *Constitutionalism, Ancient and Modern;* MJC Vile (1967) *Constitutionalism and the Separation of Powers* (1967); WB Glyn (1965) *The Meaning of Separation of Powers;* and AT Vanderbilt (1953) *The Doctrine of Separation of Powers and its Present Day Significance.*

> There would be an end of everything, were the same man or the same body, whether of the nobles or the people, to exercise those three powers, that of enacting the laws, that of executing the public resolutions, and of trying the cases of individuals.[2]

The judiciary is thus conceived as a vital means of ensuring that government does not descend into tyranny, and that power is continued to be exercised responsibility, to enhance the common good and to safeguard the liberties of the individual.

At the same time, with the above conceptualization of the separation or distribution of powers, the judiciary appears to emerge with the weakest position. Indeed, as Montesquieu noted, '[o]f the three powers above mentioned, the judiciary is next to nothing.'[3]
Similarly, in a now famous passage in the Federalist No.78, Alexander Hamilton outlined at some length, his views regarding the weakness of the judiciary relative to the other branches of government:

> Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. *The Executive not only dispenses the honours, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever.* It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.
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> This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive … And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.[4] [Emphasis added]

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[2] B De Montesquieu *Spirit of Laws,* 152.
[3] B De Montesquieu *Spirit of Laws,* vol i, 186.
[4] Alexander Hamilton, *The Federalist Papers: No.78* available at http://avalon.law.yale.edu/18th_century/fed78.asp

It is evident, from Hamilton's articulation of the relative weakness of the judiciary, that the two main powers it lacks are those of the sword (held by the Executive) and the purse (held by the Parliament). In assessing the current health of the concept of judicial independence in Africa, this paper begins with a brief outline of the historical background to the concept of the independence of the judiciary, as a means of contextualizing the present-day safeguards that have been established. It then examines contemporary international normative standards regarding the appointment, tenure and removal of judges, as critical aspects of judicial independence and autonomy. Using the Hamiltonian prisms of the sword and the purse, the paper then reflects upon the current state of judicial independence in East Africa. Finally the paper offers some thoughts as to strategies for enhancing and consolidating the autonomy of the third branch of government.

2.0 BRIEF HISTORY AND CONTEXT

It is relevant, for a contextual appreciation of judicial independence, to have regard to its origin in the United Kingdom, which, through colonization, has had a disproportionate influence upon the structure and practice of the judiciaries in many contemporary jurisdiction, including in Africa.[5]

In this regard, it may be noted that for a long time, from the reign of King Edward I (1272-1307) until that of Charles I (1625-1649), judges kept their offices only for such time at the monarch willed it, that is to say *quam diu nobis placuerit.*[6] During the constitutional crisis of 1640-1641, in which Charles I and the Parliament jostled for supremacy, one of the issues presented to the King in January of 1641 by Parliament was that in future, judges be appointed on the understanding that they would remain in those positions for as long as they exhibited proper conduct, that is to say, *quam diu se bene gesserint.*[7] The King acceded to this request in July 1641 in a speech to both Houses of Parliament.[8]

Although this commitment held for some time, the pendulum swung between these two positions – during the King's pleasure and during good behaviour[9] – until the Act of Settlement of 1701 finally established the doctrine that judges would hold office during good behaviour.[10]

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[5] See, generally, W Holdsworth (1956) *History of English Law*; A 56); A Kiralfy (1958) *Potter's Historical Introduction to English Law*; S Milsom (1969) *Historical Foundations of the Common Law*; W (1969); T Plucknett (1956) *Concise History of the Common Law*; F Pollock and F Maitland (1898) *History of English Law*; G Radcliffe and G Cross (1964) *The English Legal System*; D Stenton (1964) *English Justice 1066-1215*; W Stubbs (1913) *Select Charters of English Constitutional History*; R Van Caenegem (1973) *The Birth of English Common Law*.

[6] JH Smith 'An independent judiciary: the colonial background' 124 *University of Pennsylvania Law Review* 1104 (1976), at 1105, available at http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=5002&context=penn_law_review

[7] Smith (1976) at 1106.

[8] Smith (1976) at 1107.

[9] Smith (1976) at 1107-1109.

[10] Smith (1976) at 1110; M Shapiro, 'Judicial independence: the English experience' 55 *North Carolina Law Review* (1976) 577 at 621 (albeit stating 1702 as the year in which the Act of Settlement was enacted).

This notwithstanding, a challenge to judicial independence remained, insofar as, at the time all judges' commissions were vacated upon the death of the Monarch who had appointed them to those offices.[11] This issue would only be definitively settled in 1760 when George III proclaimed that, henceforth, judges would remain in office for as long as they exhibited good conduct, and that they tenure would continue even after the death of the Monarch who appointed them or the death of that Monarch's heirs or successors.[12]

It is noteworthy that this progress in English law was not necessarily transmitted to territories Britain colonized. Thus for instance, in America,[13] the Act of Settlement did not have application and, as a general rule, judges held office during the pleasure of the English Crown.[14] This situation was aggravated when, in the State of Massachusetts, the King of England assumed responsibility for paying Judges of the State, taking this power away from the State.[15] Indeed, one of the specific grievances recounted by the American revolutionaries in the 1776 American Declaration of Independence against King George III of England was the issue of judicial independence:

> He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers.
>
> He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.[16]

Writing about the same time, John Adams, one of the American Founding Fathers, made critical observations regarding the vital role that an independent judiciary had to play in safeguarding the liberty of the individual:

> The dignity and stability of government in all its branches, the morals of the people, and every blessing of society depend so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both, as both should be checks upon that.[17]

In the event, after the successful revolution, the United States Constitution of 1787 enshrined judicial independence as a cardinal pillar of the framework of government. To this end, Article III of

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[11] M Shapiro, 'Judicial independence: the English experience' 55 *North Carolina Law Review* (1976) 577 at 621; Smith (1976) at 1110.
[12] Smith (1976) at 1110.
[13] See, generally, SD Gerber (2011) *A distinct judicial power: the origins of an independent judiciary 1606-1787* and J Crowe (2012) *Building the judiciary: Law, courts, and the politics of institutional development.*
[14] DP Currie 'Separating judicial power' Vol 61, No.3 *Law and Contemporary Problems* (1998) at 9 available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1091&context=lcp.
[15] Currie (1998) at 9, citing B Black 'Massachusetts and the Judges: Judicial Independence in Perspective' Vol.3, No.1 *Law and History Review* 101 at 115-19.
[16] The American Declaration of Independence, 4 July 1776, available at http://www.constitution.org/us_doi.pdf
[17] John Adams (1776) *Thoughts on Government.*

the Constitution provides that the judges, both of the supreme and inferior courts, 'shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office'.[18]

This deliberate safeguard under the Constitution, has been explained by Alexander Hamilton, one of the foremost founding fathers of the United States, and a leading exponent of America's constitutional design and values, in the following terms:

> According to the plan of the convention, all judges who may be appointed by the United States are to hold their offices DURING GOOD BEHAVIOR; which is conformable to the most approved of the State constitutions and among the rest, to that of this State. Its propriety having been drawn into question by the adversaries of that plan, is no light symptom of the rage for objection, which disorders their imaginations and judgments. The standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.[19]

The African colonial experience of judicial power has a number of parallels with the American colonial experience. In Africa too, the more progressive aspects of judicial independence that had already been established in the United Kingdom were not extended to the colonized States.[20] As Vyas has observed:

> Independence of the judiciary is a relatively new concept for Third World countries. During the colonial era, the judiciary was an integral branch of the executive rather than an institution for the administration of justice. The colonial administration was mainly interested in the maintenance of law and order. It had no respect for the independence of the judiciary or for the fundamental rights of the ruled. The judiciary was that part of the structure which enforced law and order. It was therefore identifiable as an upholder of colonial rule. To an average citizen, the judiciary, as an instrument of control of the executive power, lacked credibility and therefore enjoyed little respect. The judiciary was viewed with suspicion.[21]

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[18] Article III, Section I, United States Constitution.

[19] Alexander Hamilton, *The Federalist Papers: No.78* available at http://avalon.law.yale.edu/18th_century/fed78.asp

[20] See, generally, International Commission of Jurists, *The Independence of the Judiciary and the Legal Profession in English-Speaking Africa* (1988); PKA Amoah, 'Independence of the Judiciary in Lesotho: A Tribute to Judge Mofokeng' (1987) 3(2) *Lesotho Law Journal* 21; L Shimba, 'The Status and Rights of Judges in Commonwealth Africa: Problems and Prospects' (1987) 3(2) *Lesotho Law Journal* 1; JF Scotton, 'Judicial Independence and Political Expression in East Africa - Two Colonial Legacies' (1970) 6 *East African Law Journal* 1, K Roberts-Wray, 'The Independence of the Judiciary in Commonwealth Countries' in JND Anderson (ed) (1963) *Changing Law in Developing Countries* 63; AT Denning, 'The Independence and Impartiality of Judges' (1954) 71 *South African Law Journal* 345; SB Pfeiffer, 'The Role of Judiciary in Constitutional Systems of East Africa' (1978) 10 *Case Western Reserve Journal of International Law* 11 and B Laskin, 'Some Observations on Judicial Independence' (1977) 3 *Commonwealth Law Bulletin* 673; E Dumbutshena, 'The Judiciary, the Executive and the Law' (1987) 3 (2) *Lesotho Law Journal* 237.

[21] Y Vyas 'Independence of the Judiciary: A Third World Perspective' 11 *Third World Legal Studies* (1992) 127 at 131.

Unlike the American experience, however, the independence moment did not mark a significant break from this problematic posture. Writing in 1992, for instance, Vyas unfortunately notes that, post-independence, the judiciary in many African countries retained its colonial character as an instrumentality of Executive power:

> This attitude unfortunately did not change with independence, because in many Third World countries the judiciary has continued to be manipulated, in a variety of ways, by the executive. It is in this context that the doctrine of independence of the judiciary has acquired new importance in the Third World countries.[22]

This antipathy towards the notions of constitutional democracy, including judicial independence, arising from a notion that these were nothing more than bottlenecks to 'development' was perhaps most succinctly expressed by the first Ghanaian President, Kwame Nkrumah, who famously quipped: '*Seek ye first the political kingdom, and all things will be added unto you*'.[23] This is a point to which we shall return shortly.

3.0 RELEVANT INTERNATIONAL LEGAL FRAMEWORK

A number of soft and hard international legal instruments are applicable with regard to the appointment, tenure and removal of judges.

These include the Universal Declaration of Human Rights (UDHR) of 1948; the International Covenant on Civil and Political Rights (1966); the International Bar Association Minimum Standards of Judicial Independence (1982); the UN Basic Principles on the Independence of the Judiciary (1985);[24] the Latimer House Guidance on Parliamentary Supremacy and Judicial Independence (1998); and the Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government (Commonwealth Latimer House Principles) of 2003.[25]

Under Article 10 of the Universal Declaration of Human Rights (UDHR) of 1948, everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Similarly, according to Article 14 (1) of the ICCPR, it is provided that all persons shall be equal before the courts and tribunals. Further, in the determination of any criminal charge against him, or

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[22] Vyas (1992) at 131.

[23] TP Melady (1961) *Profiles of African leaders* at 133 cited in JB Diescho 'The paradigm of an independent judiciary: Its history, implications and limitation in Africa' at 25. See also, generally, AM Akiwumi 'Towards an independent and effective judiciary in Africa' available at http://213.55.79.31/adf/adfiv/documents/speeches_and_presentations/speech_akiwumi.htm

[24] Endorsed by the UN General Assembly in 1985.

[25] Adopted by the Commonwealth Heads of Government in Abuja in 2003 and are available at http://thecommonwealth.org/sites/default/files/history-items/documents/LatimerHousePrinciples.pdf

of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.[26] This provision has been further elaborated by General Comment No.32 of the Human Rights Committee,[27] which replaces the earlier General Comment No.13 of the same Committee.[28]

In addition, under Article 7(1) of the African Charter on Human and Peoples' Rights it is provided that provides that every individual must have the right to have his cause heard, including the right to be presumed innocent until proved guilty by a competent court or tribunal; and the right to be tried within a reasonable time by an impartial court or tribunal. In addition, under Article 26 of the Charter, States must guarantee the independence of the Courts. In *Civil Liberties Organization, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria,*[29] the African Commission on Human and Peoples' Rights emphasized that there should be no derogation from Article 7, insofar as that Article constitutes 'minimum protection' for citizens.

Further, in its Resolution on the Respect and Strengthening on the Independence of the Judiciary,[30] adopted at its 19th Ordinary Session in Burkina Faso, the African Commission called upon African States to: i) repeal all their legislation which are inconsistent with the principles of respect of the independence of the judiciary, especially with regard to the appointment and posting of judges; ii) provide, with the assistance of the international community, the judiciary with sufficient resources in order to enable the legal system fulfil its function; iii) provide judges with decent living and working conditions to enable them maintain their independence and realize their full potential; and iv) incorporate in their legal systems, universal principles establishing the independence of the judiciary, especially with regard to security of tenure.

Although the majority of instruments which elaborate the standards for judicial independence at the international level are soft law instruments, as opposed to 'hard' international law documents, they nevertheless have strong legal effect, either as customary international law (created by State Practice combined with *opinion juris)* and other forms of proximity or relation to existing 'hard' law (especially Article 14 of the ICCPR), but also insofar as, together, they represent normative consensus which makes it difficult to sustain the legality of opposing positions.[31]

3.1 Appointment of judges

[26] Article 14 (1), ICCPR.
[27] Human Rights Committee, General Comment 32, Article 14 (Ninetieth Session, 9-27 July, 2007), CCPR/C/GC/32, 23 August 2007.
[28] Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994); available at https://www1.umn.edu/humanrts/gencomm/hrcom13.htm
[29] *Communication No. 218/98,* decision adopted during the 29th Ordinary session, 23 April – 7 May 2001.
[30] Available at http://www.achpr.org/sessions/19th/resolutions/21/
[31] See, generally, B Kabumba (2014) *Soft law and legitimacy in international law.*

Selection of judges must be based on merit.[32] Persons selected for judicial office must be individuals of integrity and ability with appropriate training or qualifications in law.[33]

As the Human Rights Committee has noted in its General Comment No.32, the requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception.[34] This requirement of independence is directly related to the procedure and qualifications for the appointment of judges.[35] As such national constitutions should set out clear criteria for the appointment and promotion of judges.[36]

Similar emphasis on objective criteria for the selection of judges was placed in the 2009 Report of the Special Rapporteur on the Independence of Judges and Lawyers, Mr. Leandro Despouy. In that report, the Special Rapporteur noted that in order to secure the independence of judges and the selection of the most suitable candidates, it was important to establish and apply objective criteria in the selection of judges.[37] According to the Special Rapporteur, these objective criteria should relate particularly to qualifications, integrity, ability and efficiency.[38] In this regard, 'competitive examinations conducted at least partly in a written and anonymous manner can serve as an important tool in the selection process'.[39] According to the Special Rapporteur:

> As a complement to a selection and nomination process that uses objective criteria to select judges, other procedures may be implemented to enhance the public certainty on the nominee's integrity. Such could be the holding of public hearings where citizens, non-governmental organizations or other interested parties, are able to express their concern or support for particular candidates.[40]

In the same vein, the Commonwealth Latimer House Principles of 2003 require that judicial appointments be made on the basis of clearly defined criteria and by a publicly declared process which should ensure equality of opportunity for all who are eligible for judicial office and appointment on merit; that appropriate consideration being given at all times for the need for the progressive attainment of gender equity and the removal of other historic factors of discrimination.[41]

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[32] IBA Minimum Standards, Para 26. It is for this reason that with the possible exception of certain provinces in Switzerland and the United States, judges all over the world are appointed rather than elected – See WH Taft 'The Selection and Tenure of Judges' (1913) *Faculty Scholarship Series* Paper 3946 at 420, available at http://digitalcommons.law.yale.edu/fss_papers/3946

[33] UN Basic Principles on the Independence of the Judiciary, Para 10.

[34] HRC, General Comment No.32, Para 19. See also Communication No. 263/1987, *Gonzalez del Rio v. Peru*, para. 5.2.

[35] HRC, General Comment No.32, Para 19.

[36] HRC, General Comment No.32, Para 19.

[37] Report of the Special Rapporteur on the Independence of Judges and Lawyers, A/HRC/11/41 (24 March 2009) at Para 30, available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.41_en.pdf

[38] As above.

[39] As above.

[40] Report of the Special Rapporteur on the Independence of Judges and Lawyers, Para 31.

[41] Commonwealth Latimer House Principles, 2003, Principle iv (a).

Any method of judicial selection must safeguard against judicial appointments for improper motives.[42] According to the IBA Minimum Standards, participation in judicial appointments and promotions by the executive or legislature is not inconsistent with judicial independence provided that appointments and promotions of judges are vested in a judicial body in which members of judiciary and the legal profession form a majority.[43] Further, under the Standards, appointments and promotions by a non-judicial body will not be considered inconsistent with judicial independence in countries where, by long historic and democratic tradition, judicial appointments and promotion operate satisfactorily.[44]

Part-time judges should be appointed only with proper safeguards.[45] Judges should not be appointed for probationary periods except for legal systems in which appointments of judges do not depend on having practical experience in the profession as a condition of the appointment. [46] The institution of temporary judges should be avoided as far as possible except where there exists a long historic democratic tradition.[47]

The number of the members of the highest court should be rigid and should not be subject to change except by legislation.[48]

In the selection of judges, there should be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.[49]

3.2 Tenure of judges

In order to safeguard the independence of judges, their term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement must be adequately secured by law.[50]

Under the UN Basic Principles, judges, whether appointed or elected, must have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.[51] According to the IBA Minimum Standards, Judicial appointments should generally be for life, subject to

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[42] UN Basic Principles on the Independence of the Judiciary, Para 10.
[43] IBA Minimum Standards, Para 3 (a).
[44] IBA Minimum Standards, Para 3 (b).
[45] IBA Minimum Standards, Para 25.
[46] IBA Minimum Standards, Para 23 (a).
[47] IBA Minimum Standards, Para 23 (b).
[48] IBA Minimum Standards, Para 24.
[49] UN Basic Principles on the Independence of the Judiciary, Para 10.
[50] UN Basic Principles on the Independence of the Judiciary, Para 11; HRC, General Comment No.32, Para 19.
[51] UN Basic Principles on the Independence of the Judiciary, Para 12; HRC, General Comment No.32, Para 19.

removal for cause and compulsory retirement at an age fixed by law at the date of appointment.[52] Although the historical standard, as noted in Section 2.0 above, was that judges hold office 'during good behaviour' which could essentially mean a life appointed, contemporary standards envisage that the law may stipulate a retirement age for judges. As the Institute for Democracy and Electoral Assistance (IDEA) has observed:

> However, life tenure subject to removal only on the grounds of misbehaviour may mean that very elderly people continue in office as judges despite declining health. Moreover, turnover can be slow, and vacancies irregular, which potentially raises the stakes—and uncertainty—of each appointment. For example, Oliver Wendell Holmes was 90 years old when he retired from the US Supreme Court. To avoid such situations, almost every country—including, for example, Canada, Germany, India, Kenya, the Netherlands and South Africa—now has a compulsory retirement age for judges. Judicial retirement ages vary: for example, it is 62 years in India and 70 in the Netherlands. The optimum retirement age is difficult to specify.[53]

Further, promotion of judges, wherever such systems exists, must be based on objective factors, in particular ability, integrity and experience.[54]

In addition, the assignment of cases to judges within the court to which they belong must be an internal matter of judicial administration.[55] Under the IBA Minimum Standards, division of work among judges should ordinarily be done under a predetermined plan, which can be changed in certain clearly defined circumstances;[56] in which case, the exclusive responsibility for case assignment should be vested in a responsible judge, preferably the President of the Court.[57] According to the Standards, in countries where the power of division of judicial work is vested in the Chief Justice, it is not considered inconsistent with judicial independence to accord to the Chief Justice the power to change the predetermined plan for sound reasons, preferably in consultation with the senior judges when practicable.[58]

Relatedly, under the IBA Minimum Standards, the power to transfer a judge from one court to another must be vested in a judicial authority and preferably must be subject to the judge's consent, such consent not to be unreasonably withheld.[59] Similarly the Human Rights Committee has noted the importance of having clear standards governing the promotion, transfer, suspension and cessation of the functions of judges.[60] According to the Committee, a situation where the functions

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[52] IBA Minimum Standards, Para 22.
[53] Institute for Democracy and Electoral Assistance (2014), *Judicial Tenure, Removal, Immunity and Accountability* at 4.
[54] UN Basic Principles on the Independence of the Judiciary, Para 13.
[55] UN Basic Principles on the Independence of the Judiciary, Para 14.
[56] IBA Minimum Standards, Para 11 (a).
[57] IBA Minimum Standards, Para 11 (c).
[58] IBA Minimum Standards, Para 11 (b).
[59] IBA Minimum Standards, Para 12.
[60] HRC, General Comment No.32, Para 19.

and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.[61]

Institutionally, it is the duty of the State to provide adequate financial resources to allow for the due administration of justice,[62] and court services should be adequately financed by the relevant government.[63] In the same vein, the Executive must not have the power to close down or suspend the operation of the court system at any level.[64] At an individual level, judicial salaries and pensions must be adequate and must be regularly adjusted to account for price increases independent of executive control.[65] To this end, the position of the judges, their independence, their security, and their adequate remuneration shall be secured by law.[66] Further, under the IBA Minimum Standards, judicial salaries must not be decreased during the judges' services except as a coherent part of an overall public economic measure.[67] These standards are similarly reflected in the Commonwealth Latimer House Principles of 2003, which emphasize that arrangements must be in place for appropriate security of tenure and protection of levels of remuneration;[68] and that adequate resources must be provided for the judicial system to operate effectively without any undue constraints which may hamper the independence sought.[69]

The judiciary must be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and must not be compelled to testify on such matters.[70]

3.3 Removal of judges

The proceedings for discipline and removal of judges should ensure fairness to the judge and adequate opportunity for hearing.[71]

Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges must enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.[72]

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[61] HRC, General Comment No.32, Para 19. See also Communication No. 468/1991, *Oló Bahamonde v. Equatorial Guinea*, para. 9.4.
[62] IBA Minimum Standards, Para 10.
[63] IBA Minimum Standards, Para 13.
[64] IBA Minimum Standards, Para 18 (b).
[65] IBA Minimum Standards, Para 14.
[66] IBA Minimum Standards, Para 15 (a).
[67] IBA Minimum Standards, Para 15 (b).
[68] Commonwealth Latimer House Principles, 2003, Principle iv (b).
[69] Commonwealth Latimer House Principles, 2003, Principle iv (c).
[70] UN Basic Principles on the Independence of the Judiciary, Para 15.
[71] IBA Minimum Standards, Para 27.
[72] UN Basic Principles on the Independence of the Judiciary, Para 16.

In addition, under the UN Basic Principles, a charge or complaint made against a judge in their judicial and professional capacity must be processed expeditiously and fairly under an appropriate procedure.[73] The judge must have the right to a fair hearing.[74] Similarly, the Commonwealth Latimer House Principles of 2003 emphasize that, in addition to providing proper procedures for the removal of judges on grounds of incapacity or misbehaviour that are required to support the principle of independence of the judiciary, any disciplinary procedures should be fairly and objectively administered.[75] To this end, disciplinary proceedings which might lead to the removal of a judicial officer should include appropriate safeguards to ensure fairness.[76]

According to the 1982 IBA Minimum Standards, the procedure for discipline should be held *in camera* provided that the judge may request that the hearing be held in public, subject to final and reasoned disposition of this request by the disciplinary tribunal.[77] Under the same Standards, judgments in disciplinary proceedings, whether held *in camera* or in public, may be published.[78] Under the UN Basic Principles, however, only the examination of the matter at its *initial* stage must be kept confidential, unless otherwise requested by the judge.[79]

According to the UN Basic Principles, judges must be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.[80] On this point, the IBA Minimum Standards seem to afford greater protection. Under the IBA Standards, the grounds for removal of judges must be fixed by law and must be clearly defined.[81] In addition, under the IBA Standards, a judge must not be subject to removal unless by reason of a criminal act or through gross or repeated neglect or physical or mental incapacity they have shown themselves manifestly unfit to hold the position of judge.[82] The higher standard is reflected under the Human Rights Committee's General Comment No.32, according to which judges may be dismissed only on *serious* grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law.[83] As the Human Rights Committee has noted, States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for, among other

[73] UN Basic Principles on the Independence of the Judiciary, Para 17.
[74] UN Basic Principles on the Independence of the Judiciary, Para 17.
[75] Commonwealth Latimer House Principles, 2003, Principle vii (b).
[76] Commonwealth Latimer House Principles, 2003, Principle vii (b).
[77] IBA Minimum Standards, Para 28.
[78] IBA Minimum Standards, Para 28.
[79] UN Basic Principles on the Independence of the Judiciary, Para 17.
[80] UN Basic Principles on the Independence of the Judiciary, Para 18. See also Principle iv of the Commonwealth Latimer House Principles of 2003 ('Judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that *clearly* renders them unfit to discharge their duties').
[81] IBA Minimum Standards, Para 29 (a).
[82] IBA Minimum Standards, Para 30.
[83] HRC, General Comment No.32, Para 20.

things, the suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them.[84]

The dismissal of judges by the executive, that is to say, before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary.[85] The same is true, for the dismissal by the executive of judges alleged to be corrupt, without following any of the procedures provided for by the law.[86]

All disciplinary, suspension or removal proceedings must be determined in accordance with established standards of judicial conduct.[87] According to the IBA Minimum Standards, such standards of conduct may either be promulgated by law or in established rules of court.[88]

Under the IBA Minimum Standards, the Executive may participate in the discipline of judges only in referring complaints against judges, or in the initiation of disciplinary proceedings, but not the adjudication of such matters.[89] The power to discipline or remove a judge must be vested in an institution, which is independent of the Executive.[90] In addition, under the Standards, the power of removal of a judge should preferably be vested in a judicial tribunal.[91] According to the Standards, the Legislature may be vested with the powers of removal of judges, preferably upon a recommendation of a judicial commission.[92]

In systems where the power to discipline and remove judges is vested in an institution other than the Legislature, the tribunal for discipline and removal of judges shall be permanent and be composed predominantly of members of the Judiciary.[93]

Nevertheless, the head of the court may legitimately have supervisory powers to control judges on administrative matters.[94]

Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review.[95] This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.[96]

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[84] HRC, General Comment No.32, Para 19.
[85] HRC, General Comment No.32, Para 20. See also Communication No. 814/1998, *Pastukhov v. Belarus*, para. 7.3.
[86] HRC, General Comment No.32, Para 20. See also Communication No. 933/2000, *Mundyo Busyo et al v. Democratic Republic of Congo*, para. 5.2.
[87] UN Basic Principles on the Independence of the Judiciary, Para 19.
[88] IBA Minimum Standards, Para 29 (b).
[89] IBA Minimum Standards, Para 4 (a).
[90] IBA Minimum Standards, Para 4 (a).
[91] IBA Minimum Standards, Para 4 (b).
[92] IBA Minimum Standards, Para 4 (c).
[93] IBA Minimum Standards, Para 31.
[94] IBA Minimum Standards, Para 32.

4.0 CURRENT STATE OF JUDICIAL INDEPENDENCE IN EAST AFRICA: BETWEEN THE PURSE AND THE SWORD

To revert to Hamilton's conceptualization of the weakness of the judiciary or its status as the least dangerous branch[97] of government, the threats to judicial independence can be understood in terms of the sword (mainly through executive power) and the purse (through both parliamentary and executive power).

4.1 The Sword

One can distinguish, in this respect, between the 'hard' sword or outright and direct force, violence and intimidation of the judiciary on the one hand; and the 'soft' sword which manifests itself in high-minded calls for cooperation, 'ideological parity' and other forms of support from the judiciary. We examine each of these in turn.

4.2.1 The 'hard' sword

An old example of the wielding of the Executive sword is said to be the United States case of *Worcester v. Georgia.*[98] Following Chief Justice John Marshall's decision in that case, which concerned Native American relations, President Andrew Jackson is reported to have said: 'John Marshall has made his decision; now let him enforce it!' This would be a stark example of the Hamilton's conceptualization of the judiciary as ultimately, lacking the sword held by the Executive.

The same trend has been evident in Uganda, with the outright defiance of a number of court orders. For instance, notwithstanding a Court order to withdraw from the premises of the *Daily Monitor* newspaper in 2013, the police continued to occupy the premises in contempt of the directive.[99] Similarly, in 2013 Hon. Frank Tumwebaze, blatantly continued with a meeting called to impeach the Lord Mayor, Erias Lukwago, in contempt of an order from the High Court prohibiting the same.[100] The lawyer who delivered the same had his clothes torn and suffered heavy assaults from the police who had cordoned off the venue of the meeting.[101] The trend was also evident in the refusal by the

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[95] UN Basic Principles on the Independence of the Judiciary, Para 20.
[96] UN Basic Principles on the Independence of the Judiciary, Para 20.
[97] But see, *contra*, Alexander Bickel (1962) *The least dangerous branch: The Supreme Court at the Bar of Politics.*
[98] 31 U.S. (6 Pet.) 515 (1832).
[99] http://www.bloomberg.com/news/articles/2013-05-23/uganda-police-siege-enters-fourth-day-as-forces-snub-court
[100] *Lukwago v. Attorney General and Another* Civil Application No.6/2013.
[101] http://www.observer.ug/news-headlines/33281-lawyer-sues-seven-policemen-over-torture

then State Minister of Land, Hon. Aidah Nantaba to honour the courts' jurisdiction in respect of land matters.[102]

Conversely, the above examples speaks to the danger of the sword when turned against the judicial branch. In Uganda's history, perhaps the starkest and most infamous example in this regard is the kidnap and murder of Chief Justice Ben Kiwanuka in 1972, during the Idi Amin regime.

This trend was similarly discernible when in June 2004, following the invalidation of the Referendum (Political Systems) Act of 2000 by the Constitutional Court, the President said that: "major work for the judges is to settle chicken and goat theft cases but not determining the country's destiny (sic)'.[103]

Later, on 1 March 2007, after the High Court had granted bail to suspected rebels of the Peoples' Redemption Army (PRA), a band of armed men, dressed in black and apparently called the 'black mamba' cordoned off the Court and prevented the release of the suspects as per the Court order.[104]

More recently, on 10th August 2016, another group of vigilantes was mobilized to frustrate attempts to initiate a private prosecution of the Inspector General of Police, General Kale Kayihura under the Anti-Torture Act. The group harassed and intimidated lawyers who turned up at the Chief Magistrates Court in Makindye, who had to take refuge in the chambers of the Chief Magistrate, His Worship Richard Mafabi. To the Judiciary's credit, this was met by a strong response from the Chief Justice Bart Katureebe, who reminded the country that they faced a choice between respect for the rule of law, or an alternative anarchical existence. Unfortunately the trend of court sieges seems to be unabated – the most recent being the mobilization of a crowd by Hon Kato Lubwama, whose presence in Parliament is being challenged on the grounds of inadequate academic qualifications.

This trend is by no means unique to Uganda, or to the East African region, given the recent raids on the homes of Justices of the Supreme Court in Nigeria, conducted ostensibly as part of an anti-corruption crusade.

4.2.2 The 'soft' sword

Aside from the 'hard' sword manifested in circumstances such as those enumerated in the preceding section, the sword is also manifested in 'softer' ways, normally couched by appeals to broader visions laid out by the Executive branch.

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[102] *Charles Muganzi V Nantaba Aidah Erios*, Miscellaneous Cause No. 21 of 2013.

[103] See Ignatius Ssuuna 'Judges favour Ssemo, says Museveni' *The Daily Monitor* 30 June 2004 available at http://allafrica.com/stories/200406290924.html

[104] Rachel L Ellet (2013) *Pathways to Judicial Power in Transitional States: Perspectives from African Courts* at 2. This was itself a replay of an earlier siege by the same armed group on the Court in 2005, in respect of the same suspects.

This trend was evident in the early post-independence period in Uganda, when a number of commentators expressed views in the *Transition* magazine to the effect that, for newly independent countries, the judiciary had to have 'ideological parity' with the executive branch.

A recent reincarnation of this idea may be said to be the remarks attributed to President John Pombe Magufuli, on the occasion of the celebration of the Law Day in Dar es Salaam on Thursday February 4th, 2016. With the then Kenyan Chief Justice Dr Willy Mutunga in attendance, President Magufuli is quoted as having told the various judges assembled that:

> I have decided that this country will move ahead and it will move ahead … There are bizarre things going on in the country which I cannot tolerate … I must take action.
>
> I am worried that even the people I am firing because of corruption will easily secure freedom despite watertight evidence against them. [105]

The President is further said to have directed Chief Justice Mohammed Chande Othman to take stern action against underperforming Judges and Magistrates, saying it was time everybody performed competently and effectively.[106]

The 'ideological parity' idea seems to have been re-awakened in Kenya, where the incoming Chief Justice David Maraga is reported to have told judges that the 'concerns' by the President over certain orders made by Judges in Kenya were valid in so far as such orders may have affect certain 'development projects' and funding.[107] Asking the Judges to 'bear in mind the consequences of their orders' the Chief Justice is quoted as follows:

> The President and his deputy have a point on these orders and they have challenged us to be fast in issuing judgments as we do to injunctions.[108]

In Uganda too, the shadow 'ideological parity' as a 'soft' manifestation of the Hamiltonian sword appears to inform a number of pronouncements from the Head of State. For example, in October 2005, directed Judges and Magistrates to stop issuing eviction orders against land occupants, warning of 'punitive action' against such judicial officers.[109] More recently, in 2014, His Excellency again cautioned the judiciary against granting bail to persons charged with capital offences, warning that they risked provoking both the army and the citizen:

> I think there is a big mistake here. You are provoking the population. You should scrutinize this issue. Bail given repeatedly by people charged with treason like this Kipoi ... They just go around

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[105] http://www.thecitizen.co.tz/News/1840340-3063408-lrhekaz/index.html
[106] http://www.thecitizen.co.tz/News/1840340-3063408-lrhekaz/index.html
[107] http://www.standardmedia.co.ke/article/2000220625/chief-justice-david-maraga-vows-to-do-away-with-the-rotten-eggs
[108] http://www.standardmedia.co.ke/article/2000220625/chief-justice-david-maraga-vows-to-do-away-with-the-rotten-eggs
[109] http://www.newvision.co.ug/new_vision/news/1115729/museveni-stops-land-evictions

> that they want to overthrow government with arms. But we are specialists in arms. We arrest these people and bring them to you and you give them bail. You are trying to provoke the army to shoot them for resisting arrest. Now who is responsible for Kipoi. We have people who helped us arrest him and we have put them at risk. Then there are the 25 we arrested from Congo and the story of the black Mamba ... With Besigye, it is like a joke. Why does somebody commit the same offence repeatedly and are given bail repeatedly. Judges can use their discretion to fight impunity …
>
> You are judges but you are Ugandans first. People were forced to fight to bring your roles back. Bail for capital offences… what is the hurry? You should not provoke people.[110]

4.2 The Purse

In terms of the second aspect of power under Hamilton's construction – the purse – this too may be seen to operate at two levels: i) the institutional level and ii) the individual level.

4.2.1 Institutional level

At an institutional level, the Judiciary is grossly underfunded. This was highlighted by the then Acting Chief Justice Steven Kavuma, in his speech during celebrations to mark the new law year, 2015/2016:

> While we continue to note with appreciation the Government recent positivity towards the improvement in funding the Judiciary, we are duty bound to express our concern 14 over the fact that whereas the three arms of the State, of which the Judiciary is one and the 3rd, are complementary to one another, the current National resource allocation to it is still far from being satisfactory. While the Executive and Parliament got 95% and 4.4% share of the National Budget in the Financial Year 2013/2014 respectively, the Judiciary got a miserable 0.6% share to cater for all its financial needs in terms of salaries and wages, capital development and re-current expenditure. *The funds provided could not meet even a half of the basic needs of the Institution.* Important aspect of urgent needs like court sessions; sufficient funding of land justice; and for payment of rent; and utilities, building of new courts and investing in technology and anti-corruption efforts could not be adequately funded because of the limited resources. If we want the Judiciary to perform and deliver, Uganda needs to invest in the Judiciary by giving the institution the tools to do its work. The above pathetic position in the share of the National Budget by the Judiciary must be drastically altered.[111] [Emphasis added]

Similarly, Parliament Watch Uganda has noted the dire straits the Judiciary finds itself in as a result of this underfunding:

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[110] http://www.statehouse.go.ug/media/news/2014/01/28/president-museveni-cautions-judges-bail-capital-offences
[111] http://www.judiciary.go.ug/files/downloads/Speech%20of%20CJ%20New%20Law%20Lawyer%20-2015%20FINAL.pdf

> 53% of Court houses throughout the country are housed in Judiciary owned buildings while the rest of the courtrooms are either rented premises or building of local administration in the respective districts. The Court of Appeal in Kampala is renting a building where there is a bar on one floor, a bank on another and a restaurant on the other. The security of the judicial officers in such circumstances cannot be guaranteed.[112]

This problematic situation was also remarked upon in the Auditor General's report for the financial year ending June 30 2015, in which it was noted that not only were the Judiciary's multi-year expenditure commitments to rent not authorized by Parliament, such delayed rental payment could lead to the 'possible eviction of the Courts, to the embarrassment of the Judiciary'.[113] Indeed the embarrassment envisaged by the Auditor General was experienced in March this year when, in the course of the proceedings in *Amama Mbabazi v Electoral Commission, Yoweri Kaguta Museveni and the Attorney General*[114] before the Supreme Court, lawyers and the general public were advised to answer nature's call from the neighbouring premises (most of which were residential) owing to a water shortage in the Court's rented premises.[115] In the same month, the ceiling of the building occupied by the Court of Appeal caved in, and it was only fortunate that no judicial officers were hurt in the process.[116]

It is evident from the above enumeration that the Judiciary is feeling the pinch of the purse – which is a direct and practical affront to its institutional capacity to dispense justice independently.

4.2.2 Individual level

Aside from the institutional level pressures, are the individual realities faced by judicial officers, ranging from the possibility of judicial appointment in the first place (both to municipal courts but also to regional, continental and international courts) as well as in terms of possibilities for advancement. Related to this is the issue of transfer policies and duty stations, with those nearer urban centers being preferred.

These realities, and their implications for the financial wellbeing of the individual judicial officer are also a manifestation of the power of the purse, although in this case this power does not necessarily emanate from Parliament but rather from the President, the Judicial Service Commission and other officials and bodies with a role in this respect. In either case, it is another source of direct and indirect pressure upon the independence of the judicial officer.

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[112] http://parliamentwatch.ug/2015/04/28/courtroom-space-frustrating-administration-of-the-judiciary/#.WBnFR9V97IU

[113] Office of the Auditor General, Report Of The Auditor General On The Financial Statements of The Judiciary Department For The Financial Year Ended 30th June 2015 available at http://www.oag.go.ug/wp-content/uploads/2016/03/THE-JUDICIARY-DEPARTMENT-REPORT-OF-THE-AUDITOR-GENERAL-2015.pdf

[114] Presidential Election Petition No.1 of 2016.

[115] http://www.monitor.co.ug/News/National/Toilet-crisis-hits-Supreme-Court/688334-3121880-v7ra7uz/index.html

[116] http://www.observer.ug/news-headlines/43277-twed-towers-ceiling-caves-in-again

5. Impact of the Sword and the Purse on Judicial Independence

In this section, we briefly consider the impact of these above pressures and forces – the sword and the purse – on judicial functions.

5.1 Corruption

In the first place, the pressure of the purse, at the institutional and individual levels has a direct correlation to the tendency of judicial officers to be corrupt and unethical.

Although judicial corruption is notoriously difficult to prove, several investigations and studies have consistently ranked the Judiciary as one of the most corrupt institutions in the country.[117]

At a personal level, as a Lecturer supervising third year students on field attachment, I listened in amazement as a student narrated how counsel had stuffed a bag with Ugx 100,000,000 for the sole purpose of bribing a Judge before whom he had a matter. The student, innocently or naively (as the case may be) recounted this incident as one of the learning points from the attachment: '*I have learnt that in practice, it is not enough to do legal research. You should also be prepared, if necessary to bribe the Judge*'. Incidentally, the judicial officer in question rejected the attempt to bribe her, and as the student tells it, the spurned lawyer described her as being '*very stupid to refuse money*' during their drive back to chambers.

Similarly, according to a study conducted by the Centre for Public Interest Law:

> In yet another case in Gulu, the Magistrate was said to have been so blatant that he opted to hear the case of the defendant first even when the rules dictate that it is the plaintiff to first present his case. In many Magistrates' courts, litigants are allegedly punished for hiring lawyers to process bail applications. This is taken as denying the Judicial Officers an opportunity to directly extort money from prisoners. In some jurisdictions it is now common knowledge that an accused person should show up with a lawyer to argue their bail application.[118]

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[117] See, for instance, http://www.aljazeera.com/programmes/africainvestigates/2014/12/uganda-temples-injustice-201412913517224628.html; http://www.theinsider.ug/magistrates-take-bribes-via-mobile-money/; http://www.parliament.go.ug/new/index.php/about-parliament/parliamentary-news/154-law-society-petitions-parliament-over-bribery-in-the-judiciary; https://www.brookings.edu/research/combating-judicial-corruption-in-uganda/.

[118] Centre for Public Interest Law (CEPIL), 'In dire straits? The State of the Judiciary Report 2016 available at http://www.judiciary.go.ug/files/downloads/SOJ%20Four%20Final%20Report_V5_Final_12P.pdf at page 24.

5.2 A cowed judiciary which resorts to various stratagems to avoid a clash with the Executive

Lord Atkin in his dissent in *Liversidge v Anderson* (1941) famously said:

> I view with apprehension the attitude of judges who on a mere question of construction, when face to face with claims involving the liberty of the subject, show themselves more executive-minded than the executive.

Unfortunately, particularly where the sword is displayed, but also where the power of the purse is employed, the attitude which caused Lord Atkin such apprehension is manifested.

This takes various forms: i) a rigid and manifestly unjust insistence on technicalities;[119] ii) the Act of State doctrine (a favourite of the colonial courts especially in British African dominions);[120] iii) the Kelsen theory (favoured especially by Ugandan and Pakistani courts);[121] iv) and old and recently resurrected favourite – the political question doctrine.[122]

Invariably, whatever the form or ruse adopted, the result is the judicial deference to Executive (and in some cases Parliamentary) fiat, with a necessary abdication of the judicial role as envisaged under the Constitution. Where the judges would have protected the liberties of the citizen, or indeed asserted their own independence and autonomy, through these and other mechanisms, the judges are forced to acquiesce in a variety of injustices and usurpations. This not only whittles away at popular sovereignty, it also ultimately further entrenches the judiciary's own subservience and weakness - ranged against the powers of the sword and the purse.

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[119] With respect to presidential election petitions, see for instance the cases surveyed in O Kaaba 'The challenges of adjudicating presidential election disputes in domestic courts in Africa' (2015) 15 African Human Rights Law Journal 329-354. These include: *Mwai Kibaki v Daniel Toroitichi Arap Moi* Court of Appeal Civil Application 172 [Election Petition 1of 1998] in which the petition was dismissed on grounds of the failure to prove an attempt to personally serve the respondent (a sitting President) prior to substituted service via notice in the Gazette; *Rally for Democracy and Progress & Others v Electoral Commission of Namibia & Others* [High Court] Case A01/2010 where the petition filed at 16.30 on the final day under the rules, was dismissed on grounds of another rule which required all documents to be filed before 15.00; and *John Opong Benjamin & Others v National Electoral Commission & Others* SC 2/2012 [Supreme Court of Sierra Leone Judgment of 14 June 2013] in which the petition was dismissed on grounds of a delay in payment of security for costs as well as the failure to indicate the lawyers' contact details on a separate form as required by the law. It is noteworthy that, in the case of Tanzania, such cases cannot even be handled by the Courts, by virtue of Article 41 (7) of the Constitution: 'When a candidate is declared by the Electoral Commission to have been duly elected in accordance with this Article, then no court of law shall have any jurisdiction to inquire into the election of that candidate'.

[120] See, for instance, *Thomas Cook and James Charles Cook v Sir James Gordon Sprigg* [1899] A.C 572; *Rex v. Earl of Crewe* [1910] 2 K. B. 576; *Sobhuza v. Miller* (1926); *The Attorney General of Southern Nigeria v Holt* [1915] A.C 599; *In re Southern Rhodesia* [1919] A.C 211; *Amodu Tijani v The Secretary of the Southern Provinces of Nigeria* [1921] 2 A.C 399 and *Mukwaba & Ors v. Mukubira & Ors*, Civil Case No. 50 of 1954, (1952-6) ULR 74.

[121] See, for instance *State v Dosso*; *Ex Parte Matovu*; *Andrew Kayiira*, *Asma Jilani*, *Ssempebwa* and others.

[122] See, for instance, *Hon. Miria Matembe v. Attorney General*; *The Institute of Public Policy Research (IPPR) (Uganda) v The Attorney General*; *Centre for Health, Human Rights and Development (CEHURD) V AG*. The Supreme Court, led by the Chief Justice Bark Katureebe, is again to be commended for the most recent rejection of the application of the Political Question Doctrine in the *CEHURD* case, directing the Constitutional Court to consider the case on its merits, as per its mandate to interpret the Constitution, rather than using the doctrine as a ruse to avoid this responsibility.

5.0 CONCLUSIONS AND RECOMMENDATIONS

This paper has provided a brief historical account of the development of the notion of judicial independence as a critical aspect of democratic and constitutional governance, before providing an elaboration of the international standards relating to judicial independence, with particular regard to appointment, tenure and removal of judges; and finally assessing the current realities with regard to the concept of judicial independence in East Africa.

In large part, many African countries appear to have adopted and provided for these principles in their Constitutions. It is evident, therefore, that perhaps the greatest challenge to judicial independence in Africa today does not lie so much in the text of the Constitutions and other relevant law – but rather in their implementation (or lack thereof). The letter of the law might be recognized, but its spirit in various jurisdictions comes under constant challenge - especially from seemingly omnipotent Executives.

Ultimately, therefore, the most effective, enduring and sustainable safeguard of judicial independence can only be the willingness of the Judicial branch to actively engage in the unending struggles of democracy-seeking forces in their jurisdictions. Judges are often torn between two extremes, expressed in the Latin maxims *Inter Arma Leges Silent* (in the face of arms, the law is silent) on the one hand; and *Fiat justitia Ruat Coelum* (do justice even though the sky may fall) on the other. Chief Justice Ben Kiwanuka – a notable judicial martyr – evidently chose the latter, while the Courts in such cases as *Ex Parte Matovu* and others appear to have opted for the former. However, there might be another approach, one which seems to be the spirit of Article 3 of the Uganda Constitution, which envisages the application of the doctrine of necessity (reflected upon by the Privy Council in the *Madzimbamuto* case arising from Ian Smith's Unilateral Declaration of Independence). This approach is which recognizes the reality of constituent power but retains a fidelity to the objective legality, and which would compel all State actors to work towards re-establishing a truly democratic order or further growing and entrenching a culture of constitutionalism and democracy.[123]

This is an incremental strategy that requires Judges to be committed to a transformative, progressive and *emancipatory* jurisprudence – a jurisprudence that is pro-people rather than pro-power [as envisaged by Article 126 (1) of the Uganda constitution]. It is an approach that would require the judiciary to ally with and work with progressive forces such as those that may be within bar,[124] the academia and the citizens themselves. In the end, however, it is an approach that may require Judges to be willing to sacrifice comforts, and their liberty – for the cause of judicial independence and

[123] This is consistent with the 'struggle approach' to human rights advocated by Professor Christof Heyns.
[124] The experiences of Bar-Bench collaboration and struggle is evident, particularly in the Pakistani jurisdiction where lawyers and judges jointly protested attempts to cull judicial power – see, for instance, http://www.dawn.com/news/1271703

autonomy, including, if need be, a willingness to pay the ultimate price, as Chief Justice Ben Kiwanuka did those many years ago.