

The Linkage between Judicial Independence,
Immunity and Accountability under the Uganda
Judicial System.

By Professor Tibatemwa-Ekirikubinza (Ph.D)

Justice of the Supreme Court

Calls for the Question:

How do we balance independence
discretion and immunity on the one
hand with accountability on the
other?

Note

- Judicial Independence,
- Judicial Immunity
- Judicial Discretion
- Judicial Accountability
- Are core to the Administration of Justice.

But remember

- The Judiciary's most important asset is the reputation of its officers!

Question

How do we balance immunity, independence and discretion on the one hand with accountability on the other?

Focus on Article 128 vs Articles 147 and 148

Article 128 of the Constitution

- Independence of the Judiciary.
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- (4) A person exercising judicial power shall not be liable to any action or suit for any act ... (done) in the exercise of judicial power.

Mandate of the JSC: Article 147 (1) and 148:

- 147 (d) to receive and process people's ... complaints concerning the administration of justice and ... to act as a link between the people and the Judiciary.

Article 148 provides *inter alia* that:

- Subject to the provisions of this Constitution, the Judicial Service Commission may ... exercise disciplinary control over persons holding [judicial office].

Case Law

- Applying the principles to case Law

Constitutional Appeal No.2 of 2016

- Facts
- A judicial officer issued a decree pursuant to a judgment and later a warrant of attachment in respect of the same matter.
- Thereafter she received a letter from a firm of Advocates protesting the attachment of some of the plots that had been included in the warrant of attachment.
- This letter indicated that the land did not belong to the judgment debtor but to their client, M S, who was not a party to the civil suit from which the warrant of attachment ensued.

Recall

- The JO responded to the complaint on the same day by recalling the warrant in respect of the property, without calling the parties in the matter.
- She contended that this was to avoid objector proceedings.
- She then copied the letter recalling the warrant to all the parties including the judgment creditor.

protest

- The judgment creditor wrote to the JO protesting the recall of the warrant.
- The JO advised the complainant to file a formal application.
- The judgment creditor subsequently lodged a complaint against the Judicial Officer with the Judicial Service Commission (JSC).

Complainant

- Alleged fraudulent frustration of the execution process by the JO when she administratively vacated a warrant of attachment and sale of property that had been issued by her.
- Further alleged that the JO, together with other persons mentioned in the complaint, were involved in a corrupt agreement to deny her, as the decree holder in the suit, her right to execute the judgment against the person she had sued, a person who was resident outside Uganda and had no other known property.

JSC acted

- The JSC notified the JO about the complaint and required her to make a reply
- The JO denied any wrong doing; contending that the recall was a judicial administrative act exercised in her judicial discretion during the execution management process; for good cause.

Charges

- Subsequently, the JSC served the JO with a plea taking notice. The JO had been charged with abusing judicial authority
- When the JO appeared before the JSC Disciplinary Committee, she objected to the plea taking.
- She informed the Committee that the complainant was a non-existent person. The Disciplinary Committee promised to investigate the matter and to inform her of their findings.
- Later the Disciplinary Committee informed the JO that it had verified the existence of the complainant

prima facie

- The Committee determined that the complaint disclosed a prima facie case meriting full investigation as to the truth of the allegation.
- The JSC then ordered her to take plea on the charges and adjourned the matter to another day for plea taking.
- Following this, the JO filed a petition in the Constitutional Court to the effect that preferring charges against her by the JSC, in respect of a judicial act (the recall of a warrant), contravened the principle of Judicial Independence.
- The Constitutional Court ruled in favor of the JO.

Appeal by the Attorney General

- The Attorney General filed an appeal in the Supreme Court on the ground that the Constitutional Court erred in declaring that preferring charges against the JO by the JSC contravened Article 128 which clothed JOs with Judicial Independence.

Counsel for the AG submitted

- That although independence of the judicial officer is a main aspect of judicial independence, judicial independence has the potential to act as a shield behind which judges have the opportunity to conceal possible unethical behavior.
- That therefore, judicial officers who violate the code of conduct and the Bangalore Principles of Judicial conduct, 2002 are liable to account for their conduct (judicial accountability).
- Counsel invoked Article 147 of the Constitution which empowers the JSC to exercise disciplinary control over JOs.

Counsel for the JO

- Submitted that Article 147 should not be invoked to undermine Article 128 which guarantees immunity of judicial officers for actions done in the exercise of their duty because Judicial Independence/ immunity is the substratum upon which any judicial system is built.
- Further that Judicial independence will not be realized where there is a threat of disciplinary action when a judicial officer makes a wrong decision.

Court pointed out

- Judicial independence is a critical feature of the Judiciary.
- An independent judiciary is the key to upholding the rule of law in a democratic society and is a hallmark of constitutional democracy
- Judicial independence is the complete liberty of the officer to impartially decide cases and no outsider be it government, individual or other judicial officer should interfere with the manner in which an officer makes a decision.
- Aims at protecting decision-makers from intimidation and outside interference
- Aims at ensuring fairness and equal protection of the rights of all parties.

COURT LINKED DISCRETION AND INDEPENDENCE

- The ability of judges to exercise **discretion** is an aspect of judicial independence.
- Judicial discretion is the power of a judicial officer to make legal decisions based on her opinion/judgment – but - *within general legal guidelines.*
- So – the discretion is *bounded by the rules and principles of law, and is not arbitrary, capricious, or unrestrained.”*
- Discretion does not therefore provide a license for a judge to merely act as they choose.

not arbitrary, capricious, or unrestrained.”

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

JUDICIAL IMMUNITY

- Counsel for the AG conceded that Article 128 (4) of the Constitution provides immunity to a judicial officer.
- Argued that however immunity did not mean that the judicial officer could not be subjected to disciplinary proceedings. Accountable to the JSC
- In support of this argument, counsel relied on the Bangalore Principles of Judicial conduct, 2002
- **Judges are accountable for their conduct to ... appropriate institutions to maintain judicial standards (and the institutions) are themselves independent and impartial and are intended to supplement and not to derogate from the existing rules of law and conduct which bind the judge**

Articles 128 vs 147, 148

- AG also contended that had the Constitutional Court read Article 128 together with Articles 147 (d) and 148, they would have come to the conclusion that judicial immunity is not absolute

JO

- On the other hand, the JO argued that Article 128 (4) is couched in mandatory terms and that as long as a judicial officer is performing their duty under judicial oath, they are immune and such immunity is absolute.
- Further argued that had the legislature intended to limit this immunity it would have clearly stated so in Article 147 which provides for the functions of the Judicial Service Commission.
- that as long as the officer was performing a judicial act, they should not appear before the Commission for disciplinary action.

Court Pointed out that

- The concept of judicial immunity is based on four public policy grounds.
- One of the grounds is maintenance of judicial independence.
- Another (equally important ground) is respect and confidence in the judiciary.
- Confidence in the judiciary is dependent on integrity of judicial officers

continue

- Judicial independence or immunity is to enable a JO adjudicate a dispute honestly and impartially on the basis of the law and the evidence, without fear of interference from anyone. (My emphasis)
- **** We must acknowledge that immunity and independence are interlinked.
- **But** what is perhaps even more critical to note is that these privileges come with responsibility – the privileges must be used honestly and impartially.

the tension between independence and accountability

- In dealing with with the tension Court noted that:
- judicial independence and judicial accountability have long been viewed as being in tension with each other.
- The assumption is that
 1. any effort to strengthen independence makes it difficult to hold judges accountable, and
 2. that any accountability initiative undermines judicial independence.

the starting point

- Must 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.

Respect for the Judiciary

- There is no doubt that respect and confidence in the judiciary is rooted in the integrity of judicial officers.
- It is therefore important that one sees judicial accountability as crucial to judicial integrity.
- Thus Article 128 must be read together with Articles 147 and 148 – cardinal rule of constitutional interpretation: **Constitution to be read as an integrated and cohesive whole and no one particular provision destroying the other but each sustaining the other.**

consequently

- Whereas judicial immunity is the substratum upon which any judicial system is built, that immunity is not an end in itself.
- And a body constitutionally mandated to investigate the propriety of a judicial act can appropriately exercises the said mandate and in effect invoke the principle of judicial accountability.
- This is because independence and immunity are not intended to be a shield from public scrutiny - do not shield a judicial officer from accountability.

Uganda as a Constitutional Democracy

- I must emphasize that in a democratic polity, it is inconceivable, that any person, whether an individual or an authority, exercises power without being answerable for the exercise.
- Judicial accountability like judicial independence has thus come to be recognized as a bulwark of the Rule of Law.

Accountability?

- Griffith G, defines accountability as a person being answerable for their actions and decisions to some clearly identified individual/body
- As noted by Chief Justice Bart Katureebe in his address at the 18th Annual Judges Conference in Uganda:
- **As Judges, we can only do our job well in promoting the rule of law by, among other things, ... accepting restraints imposed on us by the doctrine of accountability in Article 126 of the Constitution.**
- Katureebe CJ also referred to the Commonwealth (Latimer House) Principles on the Three Branches of Government which provide that: “Judges are accountable to the Constitution and to the law which they must apply honestly, independently and with integrity.”

What is Judicial Accountability?

- Court defined Judicial accountability as:
- The cost that a judge expects to incur in case their behavior and/or decisions deviate too much from a generally recognized standard.
- Judicial accountability refers to judges being answerable for their actions and decisions to the community to whom they owe their allegiance. (see *The Law Reform Commission of Western Australia, Complaints Against Judiciary Report*)

Universal

- The need for judicial accountability has now been recognized in most democracies.
- 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.
- 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.

The Michael Kirby Question

- Recognizing the perceived tension between judicial independence and judicial accountability, Justice Michael Kirby 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?” (High Court of Australia)
- I opine that the answer lies in: *the establishment of institutions which as envisaged by the Bangalore Principles are themselves independent and impartial.*

clearly identified body

- It is this principle that is captured in Article 147 (2) of the Constitution thus: **“ ... the Judicial Service Commission shall be independent and shall not be subject to the direction or control of any person or authority”**.
- The JSC is a clearly identified body to which judicial officers are accountable.
- Indeed Justice Michael Kirby (infra) argues that a judge is, by law, accountable to the public through the disciplinary process.
- I subscribe to the same view.

ABUSE OF JUDICIAL AUTHORITY?

- Abuse of judicial authority is improper 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.

Operationalisation of the Constitutional Mandate of the JSC

- In line with Constitutional Articles 147 and 148 and Section 5 the Judicial Service Act, the Judicial Service Commission Regulations, 2005 were promulgated.
- Regulation 23 stipulates the offences which warrant disciplinary action by the Judicial Service Commission.

AG

- The appellant argued that the Constitutional Court erred in holding that inviting the JO to respond to the complaint was unconstitutional.
- The actions of the Commission were based in the Constitution.
- That the Constitutional Court did not address their minds to the constitutional mandate of the Commission.
- Where a judicial officer's conduct is *ultravires* the Uganda Code of Judicial Conduct and the Bangalore Principles on Judicial Conduct, then such a judicial officer has to account for the misconduct.

JO

- On the other hand, JO argued that since recalling of a warrant was acceptable judicial practice, it was not abuse of judicial authority
- That disciplinary action before the Commission contravened the respondent's right to absolute immunity in the exercise of judicial duties.
- Supported his argument with the holding of Denning LJ that:
- **... no action is maintainable against a Judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The orders which he gives ... cannot be subject of civil proceedings against him. No matter that the judge was ... actuated by envy, hatred and malice, and all uncharitableness, he is not liable to an action (Sirros v Moore)**

Court

- Agreed with Lord Denning that a judicial officer cannot be subjected to a civil suit for exercise of judicial discretion
- But the pronouncement is not applicable to the work of a body constitutionally mandated to investigate the conduct of a judicial officer.
- The absolute immunity that Lord Denning was referring to is immunity from civil action – in line with Article 128 (4).

What is a Civil Suit?

- An ordinary proceeding in a court of justice, by which one party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence ...
- So - Judicial Immunity is the immunity of a judge from civil liability arising from the performance of judicial duties (Black Law Dictionary, 9th Ed at pg 8)
- Proceedings before the JSC do not constitute suit envisaged under Article 128 (4).
- The JSC is not a court of law and the question of lifting immunity does not arise

Appellate Court vs JSC

- “Judicial independence is the judge's right to do the right thing or, believing it to be the right thing, to do the wrong thing.”
- An appellate court has no mandate to discipline a Judicial Officer and indeed a party who appeals against a court decision is not alleging abuse of judicial authority.

appellate court cannot discipline

- What therefore must be emphasized is that in a bid to protect judicial officers from uncalled for disciplinary action for judicial decisions, judicial accountability should not be undermined
- What is critical is that the right balance between independence and accountability must be maintained

Investigate!

- It can't be said that an officer should never be investigated for abuse of discretion.
- However, this should be backed with extrinsic evidence and not mere speculation.
- And as stated by Gibson L. James “**only the thoughtless and lazy prefer total independence or total accountability.**” (in his article, Balancing Independence and Accountability of State Court Judges)

Corollary

- Judicial Independence has an important corollary – accountability. Indeed, whereas **Article 128 (4)** provides that a judicial officer shall not be liable for 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?**
- To balance independence and accountability the Constitution carries Article 128 **and** ALSO Articles 147 and 148

Conclusion 1

- A judicial officer once 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.
- It is not the correctness or merit of the judicial decision that would be the subject of the investigation by the commission, but rather whether the decision resulted from improper exercise of judicial power

Conclusion 2

- A JO who has been summoned to respond to complaints should comply and place their defence before the JSC
- Decisions of the JSC can then be referred to court under Judicial Review Proceedings or to the Constitutional Court, whichever is appropriate

But what is integrity?

- Judicial integrity is not defined in international human rights law, but it is a topic that is addressed in the domestic legislation dealing with the judiciaries of several countries.
- Integrity refers to concepts of moral behavior and honesty in the judge's personal and professional life.

Integrity in practice

- In outlining what integrity would look like in practice, the Bangalore Principles state that “a judge should ensure that his or her conduct is above reproach in the view of a reasonable observer.”

Take Home: Judicial Integrity!

- A respectable judiciary is indispensable to justice in our society.
- A judge should maintain high standards of conduct so that the integrity of the judiciary may be preserved.

a practical matter

- Judicial integrity is important as a practical matter, to enhance the likelihood of compliance with court decisions.
- Courts, in our system, elaborate principles of law in the course of resolving disputes.
- The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments.
- The citizen's respect for judgments depends in turn upon the **absolute** integrity of the issuing court.

Take Home

- Accountability is critical if we are to ensure integrity
- It is essential that the public has faith not only in the intellectual ability of judges but also in their fairness, impartiality, and incorruptibility
- **Again: The reputation of its officers is the Judiciary's most important asset.**

THANK YOU

