

# THE ROLE OF JUDICIAL OFFICERS IN UPHOLDING THE LAW VALUES AND NORMS OF THE PEOPLE IN ACCORDANCE WITH THE CONSTITUTION

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## 0.0. INTRODUCTION/OBSERVATION ON THE THEME

- 0.1. The theme of this conference is “Judicial Ethics, Integrity and Accountability” as a precondition for improved access to justice and sustainable development. *Ethics* and *integrity* could be, and is usually, interrogated in the narrow sense of what is pertaining to dishonesty and corruption. But another angle starts from the viewpoint that the judicial function is a service. The consumers of the service value it in terms of the *efficiency* with which it is delivered, the *speed* of delivery, the *reliability* of the provider, the extent to which the service is *user-friendly*, and its *cost*. The integrity of the judiciary as an institution lies in its capacity to deliver the expected value. The role of judicial officers is to enhance the capacity of the institution to actualise the value. Doing so without being policed<sup>1</sup> is, in my opinion, the essence of *ethics* and *integrity*.
- 0.2. A judicial officer, and the judiciary, can advertise the judicial services to build confidence, but only through

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<sup>1</sup> “ Policed” includes the provision of the various prescriptions in local and international instruments such as the Codes of Conduct, the Bangalore Principles and the Guidelines under the African Charter on Human and People’s Rights.

demonstrating that justice is being accorded impartially and from a standpoint of independence.

0.3. Like all service providers, the judiciary cannot be immune to consumers' option for alternatives in case of dissatisfaction. This is evident from the increasing voluntary privatisation of dispute settlement. The State may also take steps that shrink the judicial market. But seeking alternatives is a misguided adventure if the consumers have not played their due part in enabling the capacity of the institution. This can be through funding, through the necessary cooperation, and through respecting the independence and dignity of the institution. Therefore the role of consumers, including the State, in facilitating the transmission of value is an important aspect of the narrative on ethics and integrity. I am aware that this dimension of ethics and integrity has been extensively canvassed before. However, the dialogue should continue if only for emphasis. But this appears marginal to the assignment given by my invitation to which I must now revert.

## **1.0. JUDICIAL POWER AND THE JUDICIAL FUNCTION**

1.0. Is judicial power derived from the people as declared by Article 126(1) of the Constitution? In the national conversation that led to a constitutional consensus, the people expressed misgivings about the then state of the judiciary; lack of reasonable access, discrimination in favour of class, susceptibility to political influence and corruption being some of the ills identified. They envisaged a judiciary with which they could identify and belong. That is a partial explanation for their declaration that judicial power is derived from the people.

1.1. From the philosophical angle, one does not have to subscribe to the realistic school<sup>2</sup> to notice that judicial officers are vested with extensive powers whose performance in some respects can bring about the same results as that which can be achieved by the legislature.<sup>3</sup> But then such judicial power is not backed by a direct mandate of the people through a ballot. It was therefore necessary to restate in Article 126(1) the sovereignty of the people from whom all power, including judicial power, is derived to emphasize that even without the backing of the vote, the people consent to the exercise of judicial power on their behalf. Some politicians, basking in the glory of people's support through a vote, tend to denigrate the popular legitimacy of judicial power. They should always be reminded of the Article 126(1) declaration by the people themselves.

## **2.0. VALUES, NORMS, ASPIRATIONS**

2.0. Judicial power is to be exercised in conformity with the law and with the values, norms and aspirations of the people. In simple terms, an aspiration is the object of desire or ambition; how the people would want their lives to be. As to *values* and *norms*, I am in a similar predicament as St. Augustine who lamented that he understood the meaning of time until someone asked him to explain it.<sup>4</sup> The aid of sociological commentaries has to be enlisted. These carry a consensus that values are a set of beliefs; abstract conceptualizations that some forms of behaviours are

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<sup>2</sup> Revisit the writings of O.W. Holmes (The Path of Law) and K. Llewellyn (The Common Law Tradition)

<sup>3</sup> John Harrison, Legislative Power and Judicial Power "[2016] University of Minnesota Law School Publication sourced at <http://scholarship.uwn.educomm/22>.

<sup>4</sup> Cited in John Harrison op.cit n.3.

good, right, ethical, moral and desirable.<sup>5</sup> Values evolve naturally in a community. Some may eventually be enshrined in written norms/rules or in instruments such as constitutions. Treatment of humans with *dignity* is an example<sup>6</sup> of a value that is reflected in various instruments.

- 2.1. Values are reinforced and sustained by norms which are rules of social control. They are standards of behaviour to which members of a community are expected to conform. Deviation attracts sanctions ranging from mild ones such as disapproval to physical penalties. Norms that have not been transposed into formal legal expression can be referred to as practices or customs. Norms that evolve into legal principles are laws; customary or common law, or statutes when codified. By way of demonstrating the apparent abstractions is the example of the economic values of most African communities. These were centred on communality of ownership of property, with male family or clan heads acting as trustees and protectors. Some norms arising from this are the rules of primogeniture (males kept into the line of succession because they were the accepted protectors of the property) and the exclusion of females from inheritance to property. Norms are therefore part of culture which embraces a wide range of human phenomena over knowledge, beliefs, art, customs and other capabilities.<sup>7</sup>

### **3.0. THE ROLE OF THE JUDICIAL OFFICERS**

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<sup>5</sup> Valentine Wahoho, "Cultural Values and Norms: How they relate to law." sourced at [www.academic.edu/1149420/cultural-Values-And-Norms-And-How-They-Relate-To-Law](http://www.academic.edu/1149420/cultural-Values-And-Norms-And-How-They-Relate-To-Law) Values give rise in the sense of a *lex naturalis* as advanced by T. Aquinas in his writings including *Summa Theologica*

<sup>6</sup> Objective III of the National Objectives and Directive Principles.

<sup>7</sup> Gabriel Idang, *African Culture and Values* (2015) Vol.16 Phronium, Pretoria, sourced at [www.sciels.ng.za](http://www.sciels.ng.za)

- 3.0. The role of judicial officers in upholding the law has been canvassed at large. This address will concentrate on that role in the context of the judicial function's recourse to values and norms in shaping and developing the law to accord with justice and people's aspirations.
- 3.1. As pointed out above, law is derived from values of the people in that people's beliefs, expectations, behaviour, and actions can be incorporated into the law, or, used to adopt the law to those values. For example, the value attached to fairness and justice gave rise to norms that reject the exercise of power, including judicial power, in an arbitrary or capricious manner thus supplanting the autocracy of absolute monarchies in favour of decentralised authority of chiefs and elders, and subsequently, elective democracy.
- 3.2. Values have shaped much of private law. In the area of commercial relations, the value attached to private accumulation of wealth has had to be developed in the context of higher values attached to honesty and fairness. This gave rise to the norm obliging people to keep their bargains so that trade and commerce is sustained in the society's interests. Witness also the gradual transformation from the dominance of mercantilist values that respected only bargains, to situations where the values of integrity and honesty have come up to influence the law. With such values in the background, judicial officers are moving in the direction of enforcing a promise seriously intended even if it is not bargained for in the mercantilist sense. Therefore, people's values over integrity in human interactions gave rise and continue to

reinforce principles such as *injurious reliance* upon, or *legitimate expectations* from, a promise seriously made.

- 3.3. Most of the principles labelled equity are in place because judicial officers had to temper the strictness of established principles with the values of the people at a given time. In the context of the value of fairness, aversion towards trickery/sharp practices, plus exploitation of vulnerable groups became a sub-set of values that gave rise to principles such as those relating to unconscionable bargains, abuse of fiduciary relations, unjust enrichment, and estoppel.
- 3.4. It therefore becomes clear that to administer justice, judges have had, and should continue to have their decisions informed by the people's values. Without nourishment from values, legal principles would be reduced to abstract propositions that are fossilised and remain behind development.<sup>8</sup>
- 3.5. Some questions arise from the above proposition. In a concrete fact-situation, what are the values for consideration by a judicial officer? How are the values to be determined? Can there be conflicts in values? How are the conflicts to be resolved? These are complex issues in discourse which judicial officers grapple with successfully but oftentimes subconsciously. Values, norms and aspirations are not clearly identifiable and separate vehicles driving the shape of legal principles.<sup>9</sup> A judicial officer need not pronounce the value basis of a decision but **the decision should be informed by the people's**

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<sup>8</sup> Judge A.O. Allsop, "Values in Law; How they Influence and Shape the Application of Law." Sourced at [www.Fedcurt.gov.au](http://www.Fedcurt.gov.au).

<sup>9</sup> Allsop op.cit

**beliefs and expectations.** Norms can be discerned from the evidence. In a particular case, the pleading and the evidence in support might assist to visualize the value behind it. A man pleads and leads evidence that under Kikuyu custom, as the brother of a deceased father, he has a better right to custody of the deceased's child than all persons, however rich, but who have no blood relationship to the child.<sup>10</sup> The value that can be visualized is the Kikuyu/African attachment to blood relationships and the importance to the child's future in being able to identify with and belong to a "family." This provides guidance to the judicial officer that the justice of the principle of *the welfare of, or, the best interests* of the child should be administered with due regard to the Kikuyu norm.

3.6. Judicial intuition is an important factor since judicial officers are part of society. But discretion and intuition have to be guided by the written law, and, what is just and fair. Complications will arise in cases of conflicts. There could be conflicts, for example, between individual and community values, religious against secular values, values and norms that remain behind social change, and so on. The judicial function is to locate a balance that tilts to justice with due regard to the people's expectations. To this we shall revert.

#### **4.0. THE REPUGNANCY OF THE REPUGNANCY TEST**

4.0. A brief review of the colonial approach to people's values and norms is now appropriate. The objective is to question the legitimacy of the *Repugnancy Clause* under the current constitutional dispensation. **It is submitted that**

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<sup>10</sup> R GM (An Infant) 1957) EA 714 (K)

**the Repugnancy Clause is a condescending law whose foundation, though not clearly expressed was the perceived inferiority of indigenous norms to those derived from foreign values.** The French version was more honest. Instead of pretensions over *justice, equity and good conscience*, the people's values and norms were worth consideration so long as they were not "contrary to the principles of French civilisation."<sup>11</sup> The 'repugnancy discretion' was used by colonial judges to declare as barbaric norms that they could not appreciate.<sup>12</sup>

- 4.1. The *Repugnancy Clause* has survived In recent times, it has been cited<sup>13</sup> and its purpose explained in *Lukwago vs. Kizza and Another*, and applied in *Kiwawu vs. Serunkuma and Namazzi*<sup>14</sup> where the High Court upheld the values and norms of the Baganda community against intra-clan marriages. The learned judge reasoned that the custom did not cause "aversion and disgust", and was not against "the principles of good behaviour and what is reasonable and fair", thus passing the repugnancy test. The justice of *Kiwawu* notwithstanding, it is proposed that the **Repugnancy Clause retains a colonial conceived repugnancy and should be abandoned.**<sup>14</sup>

## 5.0. THE CONSTITUTION AS THE BASIC GUIDE

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<sup>11</sup> Mikawo E.Kiye, "The Repugnant and Incompatibility tests and Customary Law In Anglophone Cameroon" (2015) Vol.15(2) African Studies Quarterly 85, sourced at [www.asq.afric.ufl.ed/files/volume-15-issue-2-kiye.pdf](http://www.asq.afric.ufl.ed/files/volume-15-issue-2-kiye.pdf).

<sup>12</sup> See *Male & Others vs. R. Cr.Apps. 18-20 of 1957 (HCU)* where the Gishu norm of applying force to males that were reluctant to undergo circumcision was pronounced barbaric without due inquiries into the valued behind circumcision as a custom and the positives of applying force to reluctant candidates.

<sup>13</sup> *Lukwago vs. Kizza and Another* [1999] 2 EA 142 (SCU)

14. [2007] 1 ULR 509 (HCU)

15. It has been abandoned in Kenya where section 2(4) of the Constitution states that any law including customary law that is inconsistent with the constitution is invalid. It is the constitution that provides the taste. Similarly, in South Africa it is the constitution that is the guide.



5.0. **It is also submitted that Judicial Officers could abandon the Repugnancy Clause and still remain within their proper role of upholding the law, values, and norms of the people.** In sections 3.5 and 3.6 of this address, there has been some attempt at guidelines. Over and above those guidelines are the values enshrined in the constitution such as the human rights. Besides the enumerated rights, other constitutional provisions that can be used by judicial officers in upholding people's values and norms are the following:

- (i) It is a *National Objective* that *cultural and customary values which are consistent with fundamental rights and freedoms, human dignity, democracy and with the constitution may be developed and incorporated in aspects of Uganda life.* The State is required to promote and preserve those cultural values and practices which enhance the dignity and well-being of Ugandans.<sup>16</sup>
- (ii) The right to culture is among the fundamental human rights;<sup>17</sup>
- (iii) The rights of the people are not restricted to those enumerated in the constitution. Therefore, others can be derived from values and norms of society;<sup>18</sup> and
- (iv) The institution of cultural leaders is recognised by chapter sixteen of the constitution. It may exist *in accordance with the culture, customs and traditions* of the people to whom it applies.

5.1. The constitution as a basis of ultimate reference has advantages. One is that in **exercising her role, a judicial officer would be more cautious not to evaluate the people's values and norms through the prism of the common law, or, to test them according to some imagined standard of what approximates natural justice, equity, and good conscience.** *Re GM (An Infant)*<sup>19</sup> which

has been mentioned above, is an example of assessing values through the lens of the common law. The applicant claimed custody of the child of his deceased brother. At the relevant time, the child was being maintained by a wealthy volunteer who had no blood relationship with it. The applicant relied on a Kikuyu norm that entitled him to custody against all strangers in blood. The court reasoned that due to the *repugnancy clause*, it was entitled to inquire into what the applicant's rights were under native law, and then, inquire as to what would be the rights of a person in that position under English Law. Custody was awarded to the applicant on the basis that under English Law relating to custody of an illegitimate child, blood relatives had a better right to custody.<sup>20</sup> As already mentioned, without the repugnancy test, the court would probably have had to evaluate the worth of the Kikuyu norm in the context of values attached to blood relationships. In this context, the welfare of the child is determined not only in terms of material comfort, but in terms of growing with, and attachment to, the African "family."<sup>21</sup>

- 5.2. Related to the above is another advantage that values and norms would be upheld as independent sources of binding rules without fetters of repugnancy, but subject to the written law and the constitution. In *Kiwawu vs. Serunkuma and Namazzi*,<sup>22</sup> instead of searching for elements of "aversion" and "disgust" in the Baganda norm/custom against marriage between persons of the same clan, the court could have simply interrogated the values behind the norm, and balanced it against the value for individual freedoms taking into account the expectations of the

community to be affected. Conceptualising degrees of consanguinity widely evolved when the community was still small and was socially differentiated according to clans that occupied geographical territory. Therefore, every member of the clan was regarded as a relative, giving rise to the norm against inter-clan sexual relations and marriage. Whether this conceptualisation had been supplanted by social change, or, offended the law, was the question to be answered.

- 5.3. A third advantage therefore is the possibility of adaptation to changing circumstances instead of outright rejection on the ground of repugnancy. Adaptation was done by the Constitutional Court of South Africa in *Shilubana and Others vs. Nwamitwa*<sup>23</sup> The Royal family and Traditional elders of the *Valoyi* community decided that in accordance with the new constitutional dispensation, a daughter of the *Hosi* (Chief) who died without a male issue could become *Hosi*. This was contrary to the established norm that restricted succession to only males within the royal lineage. The decision was challenged as being contrary to the well established custom of the *Valoyi*. Of serious concern was that if a female succeeded, the next *Hosi* would not be fathered by a *Hosi*.
- 5.4. The decision of the Royal family and Traditional leaders was upheld as being in consonance with developments brought about by the post-apartheid constitutional dispensation. The court reasoned that people's values and norms are flexible and capable to adaptations to changing circumstances. It is a matter of conjecture whether on the facts, without the move by the royals themselves, the same decision would have been made. Therefore the caution

advised by the same court in another of its judgements is worth remembering by all judicial officers. It was advised that:

*“...it is important to ensure that customary law’s congruence with our constitutional ethics is developed in a participatory manner, reflected by the voices of those who live the custom. This is essential to dispel the notion that constitutional values are foreign to customary law and are being imposed on the people living under customary law against their will.”<sup>24</sup>*

## **6.0. DEALING WITH CONFLICTS**

6.0. That leads to a discussion as to the role of the judicial officer faced with values and norms in situations of conflict. The adopted constitutional values of *equality and equal protection, human dignity, freedom and privacy* tend to question the continuing legitimacy of several of the people’s values and norms. Examples are the beliefs relating to the status of traditional leaders, attitudes towards gender discrimination, polygamy, aversion to homosexuality and *abortion*.

6.1. From the viewpoint of constitutional values, the norms of ascendancy to kingship are restrictive and have a gender bias. Recognising the strong attachment, the people have over their kings and clan leaders, the constitution has attempted to save the norms notwithstanding several constitutional values.<sup>25</sup> The people may remain closely attached to norms that have outlived their value legitimacy. Literally no Muganda dares question the worth of the norm against intra-clan marriages even though its consanguinity logic might, in many instances, no longer hold. In such situations, it is suggested, **a judicial officer**

**should not rush to declare the ascendancy of the constitutional values unless reinforced by attitude changes.**<sup>26</sup>

- 6.2. In particular cases of norms unjustly contravening constitutional values, a court should strike them down with appropriate rationalisation. For example male primogeniture had value in traditional families. This is because property was collectively owned by the family with the head of the family, a male, being trustee and guardian. Succession was concerned with perpetuation of lineage rather than dispersal of the estate. The heir took over guardianship of the property plus the responsibilities of looking after all the surviving dependants including the widows. But colonialism ushered in the distortions of privatisation of property, and then, its dispersal in absolute upon succession. The heir grabs what is due to him and disappears to his own homestead. Under the changed circumstances, male primogeniture is no longer legitimate and can be struck down in favour of equality and human dignity.<sup>27</sup>
- 6.3. Globalisation, is impacting people's values and norms fundamentally due to the demonstration effect of "modernity." The communitarian aspect of African family life is waning, social norms of collective upbringing of children towards good behaviour do no longer hold, and *equality, human dignity* and *freedom* oftentimes breeds impunity. Social and moral values are in constant conflict with norms arising out of the demonstration effect. While the constitution has broadened the range of rights and freedoms, social and moral values that have not adjusted to change pause serious conflicts that must be addressed

by judicial officers. To take homosexuality as an example, outright judicial decriminalisation would be a move too ahead of the serious aversions rationalised along a variety of arguments including the biblical objectives of sexual relations. When the judiciary in South Africa made the move<sup>28</sup> to the extent of legalising same sex marriages, it was because decriminalisation was anchored in section 9(3) of their constitution which prohibits discrimination on the ground of *sexual orientation*.<sup>29</sup> The history behind the provision is a strong lobby of white gays and lesbians who had suffered suppression by the apartheid regime. The majority went along, albeit begrudgingly, due to the exigency of dismantling the injustices of the regime. But regardless of the constitution and judicial action, people's values in South Africa do not appear to have changed. Social discrimination and hate action including rape of alleged lesbians to, allegedly, detoxify them of their deviation continues.<sup>30</sup>

- 6.4. **It is suggested that in some conflict situations, a judicial officer could administer justice by exploiting the fundamental values such as those that relate to individual freedom, equality, privacy, and human dignity in order to redress injuries inflicted on minority groups whose values and norms are regarded by the wider community as deviant.** If a criminal is not to be denied of his rights, there is no reason why a person should be denied the same rights just because society regards his conduct deviant even in situations where the public interest is not adversely affected.

## **7.0. UPHOLDING ASPIRATIONS**

7.0. Aspirations for human development and social justice are universal. Regardless as to whether the aspirations are documented or not, they imply duties and responsibilities on everyone including the State to work towards a just and free society. In Uganda, the social and economic aspirations imply a responsibility on the State to ensure that:

- (a) All development efforts are directed to the maximum social and cultural well-being of the people; and
- (b) All Ugandans rights and opportunities and accesses to education, health services, clean and safe water, work, decent shelter, adequate clothing, food security, and pension and retirement benefits.<sup>31</sup>

7.1. The question is whether a judicial officer is bound to give effect to such aspirations, and if so, how? This address will not enter the contentious discourse as to whether the *National Objectives and Directive Principles* are justiciable, the enforceability of social and economic rights, and the *separation of power* rule that isolates judicial officers from so-called policy decisions. This is particularly so because, unlike other jurisdictions such as Kenya and South Africa, such aspirations are not formalised into rights. Nevertheless, despite such constraints, **it is contended that a court could adopt a position that gives effect to some of the aspirations that are derivatives of express rights.** For example, the plight of people displaced by internal conflicts, and natural calamities can be addressed from the view point of their right to life and protection of human dignity which entitles to people in such vulnerable situations to shelter and food.<sup>32</sup> The un-rationalised absence of infrastructural facilities and services in parts of

the country compared to other parts can be adjudicated in terms of equality and freedom from discrimination in addition to other rights that might be relevant to the facts. This is in recognition of the fact that the values, norms and aspirations of the people are interdependent and are conceived for a better life, which, *sustainable development* entails.

## **8.0. PARTICIPATION OF THE PEOPLE**

8.1. The constitution requires Parliament to make law for the participation of the people in the administration of justice. This provision was meant to enhance the actualisation of the declaration that judicial power is derived from the people. It would enhance the people's sense of belonging to the judiciary. In the context of this address, such participation might assist a judicial officer to give effect to the people's values and norms where relevant. Further, in many African societies, the justice system was participatory amongst members of the community and decisions were aimed at reconciliation and restitution.<sup>33</sup> The people's participation was envisaged to incorporate such aspects to the judicial function. The question is whether this is tenable. How can it be implemented in the interest of justice?

8.2. One form of participation is via the assessors' advice in criminal trials. This participation has, over time been eschewed to turn assessors into lay judges whose opinions can be disregarded. There could be lessons from the jury systems of other countries, with caution that these evolved in contexts peculiar to those countries. Any suggestions must be tentative and subject to intensive study. In criminal trials, for instance, the system of assessors could be revised to extend membership that can give binding advice on the penalties, at least to underscore the people's values attached to compensating



victims of crimes. What is important is to start a dialogue as to how the constitutional command can be obeyed.

The CONCLUSION is an apology because the address could be condemned transmitting more theory than practical guidelines. When as a student, I used to lament in a similar manner in the presence of one of my teachers, he would promptly respond; *there is no practice without a theory.*