

**EFFECTIVENESS OF JUDICIAL REVIEW AND ITS APPLICATION IN
THE COURT SYSTEM OF UGANDA**

BY

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DECLARATION

I confirm that this dissertation is from entirely from my own findings and has never been produced by anybody else for any award in any institutions al sources and quotations have been acknowledged.

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APPROVAL

This is to satisfy that his dissertation has been done under my supervision and submitted to the school of law for examination with approval.

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DEDICATION

This work is dedicated to my beloved parents for their sacrifice, my brothers, sisters, friends, classmates who supported me and the University which helped me financially in my education and working on this research , God bless you all.

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I thank the Almighty God for enabling me maneuver through all the hard times and trying moments I have had in life. My dream of this award would not have become true without His guidance, protection and assurance that all things are possible if you believe in him. I acknowledge the management of Kampala international university.

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ABSTRACT

The study determined the effectiveness review and its application in the court system of Uganda, it was guided by the following objectives, to determine how effective judicial review has been protecting people 's rights in regard to the constitution of the republic of Uganda, to identify the challenges facing the independence of judiciary and how this affects dispensation of justice, to draw strategies and solution to improve the effectiveness and performance of the judiciary in Uganda. The study utilized will be qualitative in nature as, according to Leedy, this methodology is aimed at description. Qualitative research is used in several academic disciplines, including political science, sociology, education and psychology. This study utilized a descriptive approach as it will be necessary to observe and describe the challenges of creating the appropriate laws in regards to legal profession. Thus the researcher will utilize a descriptive approach on the Judicial Review and its application on the courts system a case study of Kampala Uganda. Judicial review, is not only an integral part of the Constitution but is also a basic structure of the Constitution which cannot be whittled down by an amendment of the Constitution and the judiciary is the best placed government organ to implement judicial review. It is, as illustrated, a fundamental right in law. The study concluded that the 1962 and the 1967 Constitutions guaranteed fundamental rights and freedoms. Therefore, violation of human rights in post-independence Uganda was not solely due to weaknesses or absence of constitutional and other legal guarantees of those rights. It is because of the political turmoil that characterized Uganda that the Constitution was enacted to protect fundamental and other rights among other things. The study recommended that the researcher urges the government, the Judicial Service Commission and the Judiciary to investigate alleged collusion between the police and judicial officers. In any event, the Judiciary should take precautions so as not to become an (unwilling) participant in what might amount to arbitrary detention. As an immediate measure, the Judiciary should allow the deposition of sureties to the court to prevent a possible abuse of the bail procedure. Judicial review is however not the only remedy available for enforcement of fundamental rights and freedoms under the Constitution. Under article 50 if any person who claims that a fundamental or other right or freedom guaranteed under the Constitution has been infringed or threatened, he is entitled to apply to a competent court for redress which may include compensation.

CHAPTER ONE

INTRODUCTION AND BACKGROUND

1.0. Introduction

Judicial review describes the process by which the courts exercise a supervisory jurisdiction over the activities of the public authorities in the field of public law. The primary method by which this control is exercised is through the application for judicial review¹. Advocates filed this application for Judicial Review reliefs by way of Notice of Motion under Articles 42, 44, 28(I) and 50 of the 1995 Constitution, S. 3 of the Judicature (Amendment) Act No. 3 of 2002 and Rules 3,4,6,7 & 8 of the Judicature (Judicial Review) Rules 2009, the Uganda Law Society Act Cap 276.

The system of judicial review applies principles of administrative law to all areas of government activities². It helps to ensure that decisions of public authorities conform to legal principles and observe fair procedures. The grounds for seeking judicial review were reformulated by Lord Diplock³ under three heads namely. illegality, irrationality and procedural impropriety. In many countries including Uganda, judicial review is a key means of protecting fundamental rights and liberties and ensuring that citizens are not unjustifiably denied of these rights. It is asserted that "an Act of Parliament which seeks to restrict or eliminate judicial review will not find favor with the courts."⁴ Techniques of judicial review are often used to enforce the constitution.⁵

1.1 Background of the study

According to the Black's Law Dictionary at page 852, judicial review is defined as a court's power to review the actions of other branches or levels of government; especially the court's

¹ Clive Lewis, *Judicial Remedies in Public Law*. 4th edn, Sweet and Maxwell. 2009, Pg 9 and Lord Denning; *The Closing Chapter*, Oxford University Press. Pg. 117-124.0

² The system was inherited from Britain. 1.1 Massey; *Administrative Law* 6th Edition. Pg. 238.

³ *Council of Civil Service Unions (CCSU) V Minister of State for the Civil Service* (1985) AC 374, HL and Jonathan Manning, *Judicial Review Proceedings, A Practitioners's Guide to Advice and Representation*. 2nd Edn. LAG Education and Service Trust Limited. Pg.119.

⁴ *R v Medical Appeal Tribunal ex p. Gilmore* 1957 1 Q. B. 574.pg. 583

⁵ Anthony Bradley, *Judicial Review Human Rights and their Protection in Public Law*, 2011, Lecture Notes, Themes in Legislative Studies Week 12- Judicial Review <http://studyonline.sas.ac.uk/course/view.php?id.> Pg.1 and id. Manning, pg. 121

power to invalidate legislative and executive actions as being unconstitutional. Secondly, a court's review of a lower court's or administrative body's factual or legal findings. In Uganda, judicial review finds its basis in the Constitution, the Judicature Act Cap 13 and the Judicature (Judicial Review) Rules 11/2009. Article 42 of the Constitution provides that any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have the right to apply to a court of law in respect of any administrative decision taken against him or her. In *Ridge v Baldwin* (1964) AC 40, it was held that a decision reached in violation of the principles of natural justice especially one relating to the right to be heard is void and unlawful.

The Judicature Act Cap 13.

Section 36 (1) provides that the High Court may upon an application for judicial review, make an order, as the case may be, of;

- a) mandamus, requiring any act to be done;
- b) prohibition, prohibiting any proceedings or matter; or
- c) certiorari, quashing any decision of the lower tribunal.

1. Section 36(2) also provides that no order of mandamus, prohibition or certiorari shall be made in any case in which the High Court is empowered by the exercise of the powers of review or revision contained in this or any other enactment to make an order of like effect as the order applied for where the order applied for would be rendered unnecessary. The different orders that are made pursuant to judicial review under section 36 Of the Judicature Act Cap 13. All the remedies granted for judicial review are discretionary and are defined as hereunder;

2. Mandamus is defined in the Blacks Law Dictionary on page 973 as a writ issued by a superior court to compel a lower court or a government officer to perform mandatory or purely ministerial duties correctly.

3. Prohibition on the other hand is defined at page 1228 of the dictionary, as a law or order that forbids a certain action.
4. Certiorari at page 220 of the dictionary is defined as an extraordinary writ issued by an appellate court at its discretion, directing a lower court to deliver the record in the case for review.

The power of the courts in Uganda before 1995 was “strictly limited to the interpretation of the law as enacted by Parliament.”⁶ There was no special court charged with the duty to interpret either the constitution or to review legislation.

During the constitution making process, special considerations arose in respect of the interpretation and application of the Constitution. These considerations included a wide range of potential matters including “relations between organs of the State, questions about the constitutionality of laws passed by Parliament and actions taken by the executive and the officers who serve it.”⁷ The views of the people were such that the role of interpreting the Constitution would best be served by the courts given the history of political turmoil in Uganda.

In 1995, with the advent of a new constitutional order, provision was made within the constitution and the existing court structure for a constitutional court to interpret the constitution. Accordingly, article 137(1) of the Constitution establishes the Court of Appeal as the constitutional court and gives it jurisdiction to deal with questions relating to the interpretation of the constitution.

According to Elliot, the constitutional foundations of judicial review may be traced to “the requirement that the executive exercises its power fairly, reasonably and consistently with the scheme which Parliament in the first place prescribed in the enabling legislation.”⁸ Wolfe argues

⁶ Peter Walubiri “Towards a New Judicature in Uganda: From Reluctant Guards to Centurions of Justice” Peter M. Walubiri (ed) Uganda: Constitutionalism at Cross Roads (Uganda Law Watch Kampala 1998) 135-208 at 138.

⁷ Id. Odoki Report pg. 426

⁸ Mark Elliot, *The Constitutional Foundations of Judicial Review* (Hart Publishing Oxford 2001) 2.

that 'judicial review is firmly rooted in the obligation of the judge to prefer the constitution to an ordinary statute in cases where the two conflict.'⁹

In terms of judicial review therefore, a person who alleges that an Act of Parliament or any other law or anything in or done under the authority of any law is inconsistent with or in contravention of a provision of the Constitution may petition the constitutional court for a declaration to that effect and for redress where appropriate.

Therefore in the constitutional context, judicial review refers to the power of the courts to control the compatibility of legislation and executive acts with the terms of the constitution.¹⁰ This power is now contained in article. The advantage of having a specialized and centralized court dealing with constitutional matters can be found in the ability of such a court to distinguish constitutional issues from the "technical legalisms they often come wrapped within."¹¹ Constitutional Court has judicially struck down Acts of Parliament in exercise of this power for being in contravention of the Constitution. 16 Accordingly, in the constitutional setting of Uganda; the constitutional court is entrusted with the duty to test the constitutional validity of Acts of Parliament.

1.2 Statement of the problem

Apart from damages, what the aggrieved citizen wants from the court is relief under one of more of the following headings: (a) an order invalidating an administrative decision, (b) an order to desist from or to discontinue some course of action and (c) an order to command the fulfillment of a legal obligation. While the present system of remedies offers such relief, it does not do so in the most effective manner possible. A ruling that an administrative decision is invalid may be obtained either by seeking an order of certiorari or by proceedings for a declaration. These two remedies which cannot be sought in the same proceedings are by no means completely interchangeable. They differ in their effect, since certiorari operates to quash the decision complained of, while a declaration, as its name implies, merely declares the true legal position. In many instances this distinction may not matter, since a public authority is hardly likely to

⁹ Christopher Wolfe *The rise of modern judicial review: from constitutional interpretation to judge made law* (Littlefield Adams Quality Paperbacks, London 1994) at 76

¹⁰ Eric Barendt, *An introduction to constitutional law* (Oxford University Press London 1998) 17.

¹¹ Christopher F. Zurn *Deliberative Democracy and the Institutions of Judicial Review* (Cambridge University Press, New York, 2007) at 85.

ignore a judicial declaration of the law. Difficulties may arise, however, in cases where statute makes an administrative authority's decision final⁵ and provides no means for reconsideration. In such situations the declaration may be inappropriate, for should the administrative decision be incompatible with the law as declared by the court, there would be no means of resolving the ensuing impasse.⁶ It will quash the administrative decision, thereby conferring implicit authority to reconsider the matter.

1.3 Research objectives

- i. To determine how effective judicial review has been protecting people's rights in regard to the constitution of the republic of Uganda.
- ii. To identify the challenges facing the independence of judiciary and how this affects dispensation of justice.
- iii. To draw strategies and solution to improve the effectiveness and performance of the judiciary in Uganda.

1.3.1 Research Questions

- i. What is the effective judicial review has been protecting people's rights in regard to the constitution of the republic of Uganda?
- ii. What are the challenges facing the independence of judiciary and how this affects dispensation of justice?
- iii. What are strategies and solution to improve the effectiveness and performance of the judiciary in Uganda?

1.4 Scope of the study

The study will examine the judicial review and its application in the courts system

1.4.1 Content scope

Judicial independence is guaranteed in Article 128 of the Constitution. The Chief Justice, the Deputy Chief Justice, the Principal Judge and judges of the Supreme Court, Court of Appeal and High Court are appointed by the President acting on the advice of the Judicial Service Commission and with the approval of Parliament.¹² Judges remain in office until they are 70 years old and may retire on reaching the age of 60.¹³ Article 144 of the Ugandan Constitution stipulates that judges may be removed by the President only on the grounds of inability to perform the functions of his or her office arising from infirmity of body or mind; misbehavior or misconduct; or incompetence¹⁴.

The Judicial Service Commission

The Judicial Service Commission is a constitutional body that advises the President on judicial appointments and regulates the Judiciary. It is required to be independent and shall not be subject to the direction or control of any person or authority¹⁵. Its members are appointed by the President with the approval of Parliament and must be of high moral character and proven integrity¹⁶.

1.5 Methodology

Methodology utilized will be qualitative in nature as, according to Leedy,¹⁷ this methodology is aimed at description. By utilizing qualitative methodologies the research is able to evaluate both formal and normative aspects of political activity. Qualitative research is used in several academic disciplines, including political science, sociology, education and psychology. According to Peshkin in Patton, it usually serves one or more of a set of four purposes: description, interpretation and evaluation of a hypothesis or problem.

¹² The constitution of Uganda 1995, Article 142(1)

¹³ Ibid, Article 144(1)

¹⁴ Ibid, Article 144(2)

¹⁵ Ibid, Article 147(2)

¹⁶ Ibid, Article 146(5).

¹⁷ Established on 2001: 148

According to QSR, qualitative research “is used to gain insight into people’s attitudes, behaviors, value systems, concerns, motivations, aspirations, culture, or lifestyles.” QSR continues to explain qualitative research as a method of making informed decisions in both business and politics.

This study will utilize a descriptive approach as it will be necessary to observe and describe the challenges of creating the appropriate laws in regards to legal profession. Thus the researcher will utilize a descriptive approach on the Judicial Review and its application on the courts system a case study of Kampala Uganda. The descriptive approach may be considered as inductive, according to Rhodes as conclusions are drawn from repeated observations that is letting facts speak for themselves.

1.5.1 Reliability of the instrument

Reliability is the measure of the degree to a research instrument yields consistent results after repeated trials. According to Christensen, reliability of the questionnaire, the researcher employed the methods of expert judgment and pretest in order to test and improve the reliability of the questionnaire.

1.5.2 Data gathering procedures

According to Krishnaswarni data are facts, figure and other relevant materials, past and present that serve as bases for the study and analysis. He further states that data may be classified into primary and secondary sources. The researcher will obtain an introductory letter from the School of law of Kampala International University Kampala, Uganda, which he will present to the heads of legal institutions, heads of government ministries and authorities and leaders of judicial system which will involve in the study. The researcher therefore will develop rapport, sought for consent and appointments with respective respondents to obtain the information.

1.5.3 Ethical considerations

To ensure that ethics is practiced in the course of the study as well as utmost confidentiality for the respondent and the data provided by them, the following will be done. (1) Coding of questionnaire (2) The respondent will be requested to sign the informed consent ;(3) Authors

mentions in the study will acknowledge within the text;(4) finding will be presented in a generalized manner.

1.6 Significance of the study

The significant role played judicial review and enhancement of its application in courts system in Uganda is acknowledged. However, it should be clarified that this study discusses the extent of judicial review with the sole purpose of illustrating the role of the courts system at the stage of indicting the accused. The discussion is not affected by whatever conclusion might be reached by the Supreme Court.

Several Supreme Court Rules also apply to applications for judicial review. Researchers will also need to be familiar with them. In discussing Uganda's experience, the study will draw also on examples from other countries in and outside Africa that have dealt with the judicial review in courts system in Uganda.

The overall objective of the study is to highlight the discourse surrounding the judicial review and its application, and to contextualize it in Africa. In the process, the study seeks to unpack the elements and versions associated with mechanism played by judicial review in order to understand and assess the reasons for the lack of consensus surrounding its application.

The study seeks to demonstrate that, ultimately, the Judicial review, properly understood, does not and should be adhere to the principles of Judicial review and its application on how to analysis cases in Uganda, by exploring the concepts of resolutions of cases in courts system, the international and national versions of the Judicial reviews express the magnitude of its application.

1.7 Literature Review

1.7.1 Introduction

A judicial review is a legal procedure that takes place in the Supreme Court. In a judicial review, a Supreme Court judge reviews a decision that has been made by an administrative tribunal or an administrative decision maker.

There is a tendency in the current literature to focus on epistemological arguments (both for and against) to the neglect of functionalist arguments which are more commonly found amongst practitioners. Being clear about the purpose of judicial review is crucial in navigating the various debates about the legitimacy, competence, and effectiveness of judges. Reasons offered for judicial review appear to shape both its institutional reach and jurisprudential trajectory. Each of these justifications is briefly examined in turn.

1.7.2 Related Literature

Despite the flourishing of judicial rights across the world, scepticism is not in short supply. Critiques range from concerns over the democratic legitimacy and institutional competence of courts to the effectiveness of rights protections. This article takes a step back from this debate and asks why should we establish or persist with judicial review. For reasons of theory, methodology, and practice, it argues that closer attention needs to be paid to the motivational and not just mitigatory purposes for judicial review. The article examines a range of epistemological reasons (the comparative advantage of the judiciary in interpretation) and functionalist reasons (the attainment of certain socio-political ends) for judicial review and considers which grounds provide the most convincing claims in theory and practice.

The voluminous debate on judicial review stretches back to the US Supreme Court's iconic judgment in *Marbury v. Madison* in 1803¹⁸ and, more locally, to a similar decision by the Norwegian Supreme Court in 1820.¹⁹ However, it is a question worth revisiting in light of ongoing theoretical contestation and contemporary legal developments. The question of why we need judicial review is never far from the minds of those engaged in constitutional reform processes and efforts to extend the adjudicative reach of international human rights regimes.²⁰ If judicial review is to be defended, an interrogation and articulation of its potential value in general seems necessary at the outset. It is not sufficient to offer up a list of fine-grained

¹⁸ *Marbury v. Madison* 5 U.S. 137 (1803) (U.S. Supreme court). However, US state courts had exercised this power much earlier: see Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (Farrar, Straus and Giroux 2009).

¹⁹ Eivind Smith, „Constitutional courts as “positive legislators”-Norway” (International Academy of Comparative Law, XVIII International Congress of Comparative Law 2010).

²⁰ Note that the question posed here is not one of standard legal method, which can be answered by pointing to legal sources: the “constitution of X says so,” or „Article 2 of the ICCPR says so”

mitigatory reasons that serve only to soften critiques.²¹ Moreover, establishing motivational reasons creates and frames the space for a serious encounter with different critiques: it ensures that the debate is not operating at cross-purposes.

Constitutional provisions are often written in rather general terms. The courts give those terms meaning in the course of deciding whether individual statutes are consistent or inconsistent with particular constitutional provisions. But as a rule, particular provisions can reasonably be given alternative interpretations. And sometimes a statute will be inconsistent with the provision when the provision is interpreted in one way, yet would be consistent with an alternative interpretation of the same provision.²²

To compound matters, interpretive differences are not confined to disagreement between the different branches of government. Judges can be divided amongst themselves: synchronically (majorities, minorities, and separate opinions), hierarchically (differing views between upper and lower courts), or diachronically (reversal of earlier decisions).

The odyssey of *Sherbert v. Verner* in the United States exhibits dramatically all three features.²³ In the case, a South Carolina government agency refused to grant unemployment benefits to Mrs. Sherbert, a member of the Seventh Day Adventist Church. While local job opportunities were available, she claimed that such employment was not possible because it required working on a Saturday, the Sabbath in her religious denomination. By a majority of 7 to 2, the US Supreme Court held in its 1963 judgment that a law or rule which substantially interferes in *effect* with the free exercise of religion can only be justified on two grounds: it constitutes a “compelling state interest” and no „alternative forms of regulation” are available. Applied to the facts, they found in favour of Mrs Sherbert.²⁴

The doctrine stood for 27 years but in 1990, the same court, by a majority of 5 of 4, loosened or abandoned the strict scrutiny test in *Employment Division, Department of Human Resources v.*

²¹ Andrew petter, ‘taking Dialogue theory much too seriously (or perhaps charter dialogue isn’t such a Good thing after all) (2007) 45 Osgoode Hall law Journal 147, 147.

²² Mark Tushnet, *Weak courts, strong rights: judicial review and social welfare rights in comparative constitutional law* (Princeton university press 2008), 20.

²³ Tushnet, *ibid* 20, uses to simply illustrate disagreement over time, but it constitutes a striking example of all three forms of judicial disagreement.

²⁴ *Sherbet v. verner* 374 U.S. 398 (supreme court of the united states), 403 (justice Brennan for the majority).

Smith. In overruling the Oregon Supreme Court, which had found that the use of the drug peyote in a Native American church ritual could not constitute grounds for employment dismissal and the subsequent denial of unemployment benefits, they found that interferences were only invalid if imposed with the *intention* of harming religion.²⁵ In effect, the Court confirmed the alternative logic and interpretation of the original *Sherbert* dissenters.

Beyond revealing intra-judicial disagreement within courts, across courts, and over time, the case reveals even more about the extent of the disagreement. First, the US Congress emphatically disagreed with the 1990 decision and passed the Religious Freedom Restoration Act (unanimously in the House and by 97 to 3 in the Senate). Yet, in a subsequent ruling, the US Supreme Court partly overturned the Act on the basis that Congress sought to usurp the Court's interpretive power over the constitution.²⁶

The diachronic direction of judicial disagreement was not predictable. It is often assumed that courts are unidirectional and dynamic, such that rights protections expand over time²⁷. Here, the right to religious freedom was significantly curtailed by the Court and its greatest impact appears to have fallen on minority religions: Judaism, Islam, and Native American religion. Thirdly, the form of legal reasoning was not foreseeable. Predominant legal theories of interpretation did not correspond with their protagonists in the Court. The most famed originalist, Scalia, devoted not a hairbreadth of analysis to the intention of the Framers of the US Constitution. Rather, he placed great weight on contemporary circumstances and the turmoil the *Sherbert* rule would create in a society characterized by religious diversity.²⁸ It is the dissenting minority that invokes the originalist claim, along with other arguments, and it is Justice Blackmun who returns to the struggle of the founding fathers to win and constitutionalize religious liberty.²⁹

²⁵ *Employment division, department of human resources v. smith* 494 U.S. 872 (1990) (Supreme Court of the United States), at 878, justice scalia, writing for the majority.

²⁶ The law could apply to federal government but not to the states and local government

²⁷ Indeed, mark tusnet (n 49), makes this point repeatedly in his book despite his gesturing towards this case as an example of reasonable disagreement.

²⁸ *Employment division, department of human resources v. smith*, p.888.

²⁹ "I do not believe the founders thought their dearly bought freedom from religious persecution a "luxury," but an essential element of liberty and they could not have thought religious intolerance "unavoidable," for they drafted the religion clauses precisely in order to avoid that intolerance." Ibid. p. 909.

Such puzzling dissensus also extends to the international level. The European Court of Human Rights and UN Human Rights Committee have divided along similar lines on religious freedom. In one instance, they came to dramatically different conclusions concerning the same applicant and the same issue. In *Mann Singh v. France*, the Court found a challenge to the prohibition on the wearing of a turban in a driver's licence photo to be a "manifestly ill-founded" claim³⁰. Yet, the Human Rights Committee in *(Mann) Singh v. France*, found a violation of religious liberty for a ban on the use of a turban for a passport photo.³¹ It held that the State's objective of identification for public safety was irrational. If the applicant always wore a turban, a "turban-less" image would not assist officials wishing to identify him.

This extended vignette on religious freedom exposes reasonable disagreement in its different forms in the variegated and shifting landscape of judicial review. In the two dominant doctrinal approaches surveyed, strict and deferential review on religious interference seem reasonable on first blush. Although the former is clearly more protective of individual rights, the ebb and flow of these cases seem to raise real questions over the comparative advantage of the judiciary.

Isolated cases, however, do not hammer nails into the coffin of an argument. The epistemological claim is more measured: judges are more likely to arrive at a better interpretation. Such a strategy permits a proponent of judicial review like Dworkin to both defend the institution and criticize individual judgments,³² particularly those of the current U.S. Supreme Court. While conceding that judges will "inevitably disagree", he asserts that the reasoning of the present majority in a range of decisions "cannot be justified by any set of principles that offer even a respectable account of our past constitutional history".³³ The move

³⁰ *Mann Singh v. France*, application no 4479/07 (judgment 13 November 2008) (ECHR).

³¹ *Singh v. France* Communication no 1928/2010, decision on the Merits, UN Doc. CCPR/C/108/D/1928/2010 (2013) (UN Human Rights Committee)

³² This distinction is sometimes overlooked by critics. For example, Wojciech Sadurski (n48), appears to mischaracterize Dworkin in this way.

³³ Ronald Dworkin, "Bad Arguments: the Roberts court & religious schools" the new York review of books Blog. Indeed, the unified legislature and cross-political alliance that sought the restoration of the *sherbet test* suggests that the supreme court might have erred significantly.

also allows Dworkin to maintain his notion that almost all cases will contain the “right” or “best” answer, even if only discernible by a Herculean super judge.³⁴

Proponents of judicial review tend not to travel too long down that path. Rather, they point to certain defining features of judicial review that suggest that courts will arrive at better answers. It is a “forward-looking” method that presumes “favorable conditions” generates “a good outcome”.³⁵ It is categories these as the: (i) authenticity of case-based review; (ii) the semipublic mode of deliberation; and (iii) the form of decision-making. Each will be examined in turn. These epistemic arguments may be compelling but deserve close consideration. They all draw on particular institutional attributes of courts, and as the legal process school in particular has sought to emphasize, institutional features may not consistently correlate with the quality of judicial reasoning.³⁶

³⁴ Ronald Dworkin, “my reply to Stanley Fish (and walter benn michaelis): please Don’t talk about objectivity Any more” in WJT Mitchell (ed) *the politics of interpretation* (university of Chicago press 1989), 287.

³⁵ On discussion of this method generally, see jon elster: „clearing and strengthening the channels of constitution making” in tom Ginsburg (ed.) *comparative constitutional design* (Cambridge university press Cambridge 2002), 15, 17.

³⁶ On this point, see Lon Fuller, „the form and limits of adjudication” (1978) 92 *Harvard law review* 353

CHAPTER TWO

THE JUDICIAL REVIEW AND ITS APPLICATION

2.0 The situations where judicial review is applied

2.1 Residential Tenancy Act issues

A landlord has given notice to a tenant to move out. A Dispute Resolution Officer at the Residential Tenancy Board has heard the case and agrees with the landlord. The tenant can apply for judicial review of that decision.

2.2 Compensation Act issues

The Workers Compensation Appeals tribunal has made a decision that a worker has not suffered a permanent disability. The worker can apply for judicial review of that decision.

2.3 Time limits for applying for a judicial review

Time limits are very important in judicial review applications as they are for all court procedures. Under the Administrative Tribunals Act, the time limit for filing an application for judicial review in court is 60 days from the date of the decision. If a Lawyer do not file a Lawyer judicial review application within the time limit, a Lawyer may lose a Lawyer right to apply.

However, the 60-day time limit does not apply to all administrative tribunals. A Lawyer should not delay in filing a Lawyer application a Lawyer may find that a Lawyer have missed an important deadline. Sometimes the court will grant an extension of the time, but there is no guarantee that it will do so. When deciding whether to grant an extension, the judge will consider the amount of time that has gone by and the reason for missing the deadline.

Consult a Lawyer as soon as a Lawyer receive a decision from a tribunal or decision maker. A Lawyer can help a Lawyer decide whether a Lawyer have a good case for judicial review and can advise a Lawyer about the time limit that applies to a Lawyer application.

2.4 The Judicial Review Procedure Act

The Judicial Review Procedure Act of BC sets out the procedure for judicial review of provincial tribunal decisions. This Guidebook and the Judicial Review Procedure Act only cover judicial review of decisions made by provincial tribunals.

The procedure for reviewing decisions of federal tribunals is set out in federal legislation called the Federal Court Act and in the Federal Court Rules.

A decision of the Immigration and Refugee Board dismissing a claim for refugee status is an example of a federal tribunal decision. This Guidebook does not provide any information about judicial reviews of federal tribunal decisions.³⁷

Guidebooks

A judge has a wide range of discretionary powers when dealing with applications for judicial review of decisions or actions. The Judicature Amendment Act sets out some of those powers.³⁸ At an early stage, the judge may also be asked to make an interim order preserving the status quo until the review is complete. Again the Judicature Amendment Act makes specific provision for interim relief.³⁹

In judicial review proceedings the documents are critical. The court decides the matter by examining all the paper generated within the relevant organization and put in evidence by the parties, which may include: decision papers, memoranda between officials and Ministers/advisers and decision-makers; Cabinet papers/minutes; Board/Council meeting papers/minutes; diary notes; file notes; correspondence;

And by evaluating the sworn affidavit evidence of the decision-maker and those involved in the process.

At the conclusion of the case, a judge may:

³⁷ Guidebooks for representing A lawyer self in Supreme Court civil matters.

³⁸ Section 4 of the judicature Amendment Act Cap 13.

³⁹ Section 8 of the judicature Amendment Act.

Make declarations about the way a decision was made or action taken (eg declare that certain things that ought to have been done were not done, or that some matter taken into account by the decision-maker was not relevant);

Set aside the decision as unlawful (and thus restoring the position prior to the decision having been made);

Direct the person who made the decision or took the action to reconsider and redetermine the matter, and may give directions as to how this should be done (eg taking into account certain relevant matters).

Relief, or the remedy, is entirely discretionary. An applicant may make out his or her case but not persuade the court to take any steps as a consequence. The most common form of remedy is an order setting aside a decision, coupled with an order requiring reconsideration by the decision maker, or resulting in that anyway. This can lead to the same ultimate outcome when a decision maker reconsiders the matter lawfully. Thus in some cases a successful claimant in judicial review can win the battle, but lose the war.

We are seeing more claims for “substantive” forms of relief, with a degree of success; for example compensation for breach of a fundamental right (including the right to natural justice)⁴⁰ and restitution where charges have been unlawfully levied.⁴¹

2.5 The court allow a judicial review

There is no automatic right to judicial review. The court will not allow a judicial review in every case. In general, the court will only allow a judicial review in limited circumstances. A judge will not allow a judicial review to correct a technical error made by the tribunal if the judge does not think that the error caused any harm or prejudice to a Lawyer. However, the court will intervene if the tribunal did not give a Lawyer a procedurally fair hearing, it will also intervene if the tribunal had no authority to deal with the subject matter of a Lawyer case.

2.6 A judicial review is not a “re-hearing”

⁴⁰ Upton v. Green (No.2) HRNZ 179 (HC); Binstead v. Northern region domestic violence Approval Panel [2002] NZAR 865 (HC)

⁴¹ Waikato regional Airport Ltd & Ors v. Attorney General [2004] 3 NZLR 1 (PC)

A judicial review is not a re-trial or a rehearing of a Lawyer case. The judge does not focus on whether he or she would have made a different decision from the one made by the tribunal. In a judicial review, the judge generally focuses on determining whether the tribunal had the authority to make a particular decision and whether the tribunal exercised that authority.

2.7 The standard of review

The “standard of review” is an important legal concept in judicial review hearings. The standard of review tells the judge how serious an error has to be before the decision can be reviewed. In other words, the judge uses it to decide whether the tribunal made a type of error that warrants court intervention.

2.8 There are different standards of review for different kinds of tribunals.

For example, there is a very high standard of review for some kinds of tribunals. Even if the Supreme Court judge hearing a judicial review disagrees with the tribunal’s decision, he or she will not reverse the tribunal’s decision unless the decision was “patently unreasonable.” For other tribunals, the standard of review is one of “correctness.” In all cases, the court will generally not overturn a tribunal’s decision if it was based on credibility (i.e., the tribunal believed one witness over another).

It is important to know what standard of review applies so that a Lawyer can properly argue a Lawyer case in the Supreme Court. A Lawyer must review the statute that governs a Lawyer particular legal issue (such as the Residential Tenancy Act), as well as sections 58 and 59 of the Administrative Tribunal Act. It is also a good idea to consult with a Lawyer to understand what standard of review applies in a Lawyer case.

2.9 A decision made by the court

In a judicial review, the remedies a court can give are limited. The court may not have the authority to give a Lawyer the remedy that a Lawyer would like. The court will usually set aside the decision of the tribunal and order it to hear a Lawyer case again, applying the proper

principles of law. Just because a Lawyer win a Lawyer judicial review hearing does not mean that a Lawyer will win when the tribunal hears a Lawyer case again.

Deciding to apply for judicial review, Lawyer should immediately collect and organize all Lawyer documents from the tribunal proceedings. Write down all the information Lawyer remember from the tribunal proceedings. Lawyer should have the tribunal's decision in writing. If Lawyer do not have it, request it as quickly as possible.

The documents Lawyer prepare and file in the court registry tell the court and the other parties in Lawyer case about:

- i. the facts or evidence Lawyer intend to rely on;
- ii. the legal grounds of Lawyer claim;
- iii. the argument a Lawyer will be making in court.

Copies of the documents a Lawyer file in the court registry must be served on the tribunal, the Attorney General of BC, and the other parties in a Lawyer case. For example, if a Lawyer is a tenant asking for judicial review of a Dispute Resolution Officer's decision under the Residential Tenancy Act, a Lawyer will have to serve copies of a Lawyer documents on the landlord, the Dispute Resolution Officer, and the Attorney General.

The documents a Lawyer will need are described below. The CLAS Guide provides a Lawyer with instructions on how to complete them. The Guidebook called Starting a Civil Proceeding in Supreme Court will also help a Lawyer complete some of these documents. Make sure a Lawyer use the CLAS Guide published after July 1, 2010. The old Guide is out of date.

2.10 The petition

If a Lawyer is the person applying for a judicial review, a Lawyer are called the petitioner and a Lawyer must file a petition. All other parties who appeared before the tribunal are also called respondents. For more information about petitions, see the Guidebook called Starting a Civil Proceeding in Supreme Court.

The *CLAS Guide* contains information on how to prepare a Lawyer petition and a sample completed petition.

The petition sets out the specific order a Lawyer are asking the court to make and identifies the various statutes and rules that a Lawyer are relying on in a Lawyer's application for judicial review. It also sets out the basic facts about a Lawyer's case, including a description of the petitioner and the respondents, the tribunal involved, and what the tribunal decided.

2.11 The petitioner's affidavit

As the petitioner, a Lawyer must also file an affidavit, which is sworn evidence (i.e., evidence that a Lawyer have sworn is true) in writing. A Lawyer affidavit is an important document and must be carefully prepared. It is a serious offence to swear an affidavit that contains information a Lawyer know is false. The *CLAS Guide* tells a Lawyer how to prepare a Lawyer affidavit and shows a Lawyer an example.

Generally, a Lawyer affidavit can only contain information (i.e., evidence) that the tribunal considered when it made its decision. A Lawyer cannot include evidence that the tribunal did not see or hear, such as new information that a Lawyer have discovered since a Lawyer tribunal hearing.

Remember that a Lawyer affidavit is not an argument. A Lawyer affidavit sets out the relevant facts and explains what happened in the tribunal hearing.

Attach to a Lawyer affidavit any important documents a Lawyer refer to in the affidavit or that are relevant to a Lawyer case. The documents have to be numbered and are called exhibits. For more information about affidavits, see the Guidebook called *Starting a Civil Proceeding in Supreme Court*.

2.12 Filing the documents in court

A Lawyer must file the petition and affidavit in the Supreme Court registry and pay the court fee. Make copies of the affidavit and the petition for a Lawyer self and every respondent. The court registry keeps the original affidavit and petition and gives the copies back to a Lawyer with the

registry stamp on them. The court registry staff can answer questions about the format of the documents or the number of copies a Lawyer will need. However, the registry staff cannot give legal advice.

2.13 Fees

When a Lawyer file a Lawyer petition and affidavit at the court registry, a Lawyer will have to pay the applicable registry filing fees. If a Lawyer can't afford the filing fee, ask the registry staff for instructions on applying to the court to have the fee waived. This is called an application for indigent status.

2.14 When judicial review can be granted as a remedy

In *Owor Arthur & others v Gulu University*,⁴² Justice Kasule stated that, "the essence of judicial review jurisdiction is for the court to ensure that the machinery of justice is observed and controlled in its exercise by those inferior bodies in society that happen to be vested with the legal authority to determine questions affecting the rights of subjects. Such bodies or individuals have a duty to act judicially..... The overriding purpose of judicial review is to ensure that the individual concerned receives fair treatment, if that lawful authority is not abused by unfair treatment. It is not for the court to take over the authority and the person entrusted to that authority, by substituting its own decision on the merits of what has to be decided....."

Further, in *Kasibo Joshua V Commissioner of Customs U.R.A. HCMA 44/2007*, Justice Kiryabwire held that the prerogative orders made in pursuance of judicial review look to the control of the exercise of an abuse of power by those in public offices, rather than the final determination of private rights which is done in a normal civil suit. He held further that judicial review is not concerned with the decision, but the decision-making process, an assessment of the manner in which the decision is made and it is not an appeal and the jurisdiction is exercised in a supervisory manner; not to vindicate rights as such, but to ensure that public powers are exercised in accordance with the basic principles of legality, fairness and rationality.

⁴² 78 HCMA 18/[2007]

Finally, in the case of *His Worship Aggrey Bwire v Attorney General*,⁴³ it was held that judicial review can only be granted on three grounds:

- i. Illegality
- ii. Irrationality
- iii. Procedural impropriety

It was further held that the first two grounds are known as substantive grounds of judicial review because they relate to the substance of the disputed decision. Procedural impropriety is a procedural ground because it aims at the decision making procedure rather than the content of the decision itself and none of the afore-mentioned grounds were applicable to the proceedings or decision of the committee.

2.15 Procedure

An application for any of the prerogative orders shall be made by way of application,⁴⁴ which is by notice of motion which must be served on the other party personally according to rule 6 of the same rules.

In contrary this HON. Mr. Justice Paul K. Mugamba⁴⁵ assessed the judge and addressed: "this is an application for judicial review contained in a Notice of Motion filed by the applicant herein. The motion is accompanied by an affidavit as well as a statement. In the application the applicant contends as hereunder:

"The respondent being a corporation with capacity to take quasi judicial decisions and action and capable of being sued".

The respondent has taken an unlawful, illegal, biased and unjust decision and action trampling the rights of the applicant to develop and enjoy the exclusive use of its property comprised in leasehold Register Volume 3843 Folio 23 Kyadondo acquired from Block 248 Plot 203, a plot of

⁴³ CACA No. 9/[2009]

⁴⁴ Rule 3(1) of the judicature (judicature review) rules No.11/2009

⁴⁵ Miscellaneous Cause No. 232 OF 2008.

land overseeing lake Victoria at Kawuku in Kampala District belonging to and registered in the names

This Honorable Court is enjoined with jurisdiction to make declarations and issue judicial review by way of certiorari, mandamus, Prohibition and Permanent Injunction and to award damages against the respondent to quash its unlawful, illegal, biased and unjust decision; The decision and actions of the respondent are wrong in fact and in law, unlawful, illegal, unjust and biased;

The decision and actions of the respondent are in excess of its jurisdiction, are ultra vires and relates to property over which it has no legal rights, functions and duties;

The decision and actions of the respondent were taken in breach of the principles of natural justice, without affording the applicant and other relevant public institutions a right to be heard, and with bias;

By reason of the said decision of the respondent, the applicant has been deprived of the right to develop and use its private property, has and continues to suffer immense financial loss and damages of its reputation, while its director has and continues to suffer personal incarceration; and It is urgent, just and equitable that the remedies sought in this application be granted.' IGG & Another vs. Attorney General & 2 Others⁴⁶. The applicants sought to be substituted for the Attorney General or in the alternative be joined as parties. One of the grounds of this application was that Misc. Cause No. 63 of 2014 was brought against the wrong person. The respondents raised three preliminary objections to the application. The first was that the applicants lacked locus standi to bring the application, secondly that the applicants were estopped from prosecuting this application and thirdly that the interim order was illegal the same having been issued without notice. While overruling all the preliminary objections, the judge held: the duty of the court in judicial review is to confine itself to the question of legality.

The doctrine of estoppel cannot arise as the set of facts and parties are not the same as the facts of UVETISO case. The interim order was null and void the same having been issued without notice.

⁴⁶ 82HCMNo.744 of 2014 99/1/2015); Before Justice Masalu Musene (NAKAWA)-reported by jane mugala.

CHAPTER THREE

CHALLENGES FACING THE INDEPENDENCE OF JUDICIARY AND HOW IT AFFECTS DISPENSATION OF JUSTICE IN COURTS SYSTEM IN UGANDA

3.0 Introduction

Decision-making by government is the focus of a range of accountability mechanisms, review by the courts being the most formal and demanding. That review process is designed not only to determine the lawfulness of the action under scrutiny but also to fashion guidelines on legality issues which will be of assistance to primary decision-makers and other review bodies. Given their stature and authority,⁴⁷ it can be expected that in the exercise of their judicial review jurisdiction, the courts have an obligation to define with some precision the standards they are imposing on public administration. That has not always been achieved. In defence of the courts, judicial review is a dynamic area of jurisprudence and the range of matters subject to the court's jurisdiction is broad and continually expanding to match developments in public administration. Nonetheless, given the courts position as the final arbiter of judicial review standards, these features of the jurisdiction only emphasize the need for the courts to exercise vigilance in the performance of this aspect of their task.⁴⁸

This paper discusses some current and future challenges to judicial review by the courts in light of the courts standard-setting role. The discussion concerns not only the elasticity of the legal standards but also the administrative context in which review occurs.

3.1 Challenges encountered in enhancing judicial review

Development of new grounds of review

Another challenge to those involved with judicial review arises from the emergence of new legal concepts and administrative law standards not easily related to the codified grounds, typified by

⁴⁷ Robin Creyke AIAL FORUM No. 37

⁴⁸ Professor of Law, Australian National University; Special Counsel Phillips Fox Lawyers; Commissioner, ACT Independent Competition and Regulatory Commission; Member, Administrative Review Council.

those in the Administrative Decisions (Judicial Review).⁴⁹ This creates several difficulties. Codification of the judicial review grounds in the 1970s was intended to be all embracing and to provide more clearly defined precepts for those in public administration. Courts and tribunals were given the supplementary function of fleshing out the grounds. That task, as Justice von Doussa described it was

*.....to develop coherent and explicable legal principles which provide administrators, the public, and their legal advisers, with clear guidelines whilst at the same time retaining sufficient flexibility to allow an appropriate balance between the public and private aspects of the public interest in the infinite variety of circumstances that come before the courts.*⁵⁰

Traditionally, it was accepted that a court could review a matter only if it came within one of the codified grounds of review.⁵¹ Applicants needed to be able to tie their claim to a ground in section 5, 6 or occasionally 7 of the ADJR Act or face exclusion from the court. At the same time, from its inception some room was allowed for flexibility with the inclusion of grounds such as “otherwise contrary to law”⁵² and “any other exercise of a power in a way that constitutes abuse of power”.⁵³ In the years following the introduction of the ADJR Act it was clearly understood that these concessions justified the rejection of applications for review unless an applicant could bring a claim within one of the legislative grounds.

Subsequently, that principle appears to have been abandoned. Today it is more common to find new legal standards broadly accommodated under various ADJR Act grounds of review, some might say by stretching the grounds beyond their intended territory. This development imposes dual burdens on decision-makers: first, they must gauge which of the existing grounds to rely on, and here guidance has not been consistent; second, the decision-maker is faced with the need to apply disparate factual and legal tests depending on which ground is chosen.

⁴⁹ Act 1977 (Cth) (ADJR Act)

⁵⁰ Justice John von Doussa „Natural Justice in Federal Administrative Law “paper presented at a seminar by the Australian Institute of Administrative Law, Darwin, 7 July 2000, .3

⁵¹ For example, *Australian Broadcasting Commission Staff Association v Bnner* (1984) 2 FCR 561; *Johnson v Federal Commissioner of Taxation* (1986) 11 FCR 351 per Toohey J at 354. In *Johnson*, the Income Tax

⁵² ADJR Act s 5(1)(j)

⁵³ ADJR Act s 5(2)(j)

There are now, in effect, several new legal standards, breach of which will lead to a finding of invalidity by the courts. None are listed in the statutory judicial codes.⁵⁴ The novel grounds include a failure to give a „proper, genuine and realistic consideration⁵⁵ to a matter, the probative evidence rule,⁵⁶ and the duty to enquire.⁵⁷

There are others.

A failure to give proper, genuine and realistic consideration to a matter has variously been said to be unreasonable,⁵⁸ a failure to follow lawful procedures, a failure to consider a relevant matter, an error of law,³⁶ a breach of procedural fairness, or a breach of the non-dictation rule.⁵⁹ Similarly a decision-maker who has not met the standard embodied in the probative evidence rule has been said to breach procedural fairness, and to have made an error of law. The duty of inquiry has founded invalidity on the basis of a breach of the duty to follow statutory procedures, a failure to take account of relevant matters,⁶⁰ breach of procedural fairness,⁶¹ unreasonableness,⁶² and error of law. Imposition of additional requirements such as these imposes a considerable burden on decision-makers, not least because the elements of the particular ground chosen must be established and these vary widely.

To continue to accept the continued expansion of the grounds in this manner negates the value of the codification of the judicial review grounds and a quarter of a century of jurisprudence explaining and clarifying those statutory standards. Blurring the boundaries of the existing grounds by using them as host to novel legal concepts not envisaged by the drafters of the codified grounds tends to return courts to the indeterminate standards captured in Lord Diplock's

⁵⁴ ADJR Act; see also Administrative Decisions (Judicial Review) Act 1989 (ACT); Judicial Review Act 1991 (Qld); Judicial Review Act 2000 (Tas)

⁵⁵ This development has been firmly rejected in the migration jurisdiction (*Minister for Immigration, Multicultural and Indigenous Affairs v Anthonypillai* (2001) 106 FCR 126 AT[59] and [86])

⁵⁶ *Mahon v Air New Zealand Ltd* [1984] AC 808; *Minister for Immigration v Pochi* (1980) 31 ALR 666.

⁵⁷ For example, *Benjamin v Repatriation Commission* (2001) 64 ALD 411.

⁵⁸ *Friends of Hinchinbrook Society Inc v Minister for Environment & Ors* (1997) 142 ALR 632.

⁵⁹ *Ibid*; *khan v minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291 (per Wilcox, Madgwick JJ; Hill J, dissenting).

⁶⁰ *Lek v Minister for Immigration and Ethnic Affairs* (1993) ALR 455.

⁶¹ *Mahon v Air New Zealand Ltd* [1984] AC 808; *Nand v Minister for Immigration and Ethnic Affairs* (1988) 14 ALD 527

⁶² *PRASAD v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 AT 169-170. See also *Luu v Renevier* (1989) 19 ALD 521.

judgment in *Council of Civil Service Unions v Minister for the Civil Service* (illegality, irrationality, and unfairness)⁶³ and ~~does~~ nothing to promote the approach advocated in the passage of Justice von Doussa.

To stem this development necessitates attention being paid to this expansion of the grounds. If agreement could be reached about whether these novel grounds or concepts should be accepted in their own right - a matter which will require legislative attention - that would be a start. In the interim, if these grounds are not to be banished it would be helpful if consensus could be reached as to which of the existing grounds is to act as host for these emerging concepts. That should not be too difficult, given their flexibility - a quality aptly captured by Professor Carol Harlow when she referred to unreasonableness - as "the judge's flexible friend."⁶⁴

3.2 Structured public deliberation

The final argument for judicial review is that courts can help structure public deliberation on rights through its role in the "constitutional order". In explaining this functional motivation, the researcher will first dismiss two related claims: democracy and rule of law.

3.2.1 Democracy

It is not uncommon to find functional arguments that judicial review constitutes or promotes democracy.⁶⁵ The strong form of the claim is that the two are synonymous. According to Dworkin, the „defining aim of democracy“ is „that collective decisions ... treat all members of the community, as individuals, with *equal concern and respect*“, and the latter is what judicial review achieves.⁶⁶ The moderate form is that judicial review enhances democratic representation, participation or deliberation, especially for disenfranchised or marginalized groups.

Both contentions seem problematic. As to the strong form, collapsing judicial review into a single category of democracy unhelpfully dissolves longstanding analytical categories. It either

⁶³ [1985] AC 374 at 410-411.

⁶⁴ Comment made at the ANU's Public law weekend, 1 november 2002, Canberra, during her presentation of a paper delivered at that conference, to be published

⁶⁵ Sable (n 153). See also Rosenfeld (n 153), p. 1339, on the role of constitutionalism in challenging conflicts towards peaceful resolution.

⁶⁶ Sable (n 153). P. 164.

shifts the debate over the democratic legitimacy of judicial review to another linguistic space or occludes important democratic concern with judicial review.⁶⁷ It is more practical to restrict our understanding of democracy to ensuring “equal voice and decision-making”. This can be contrasted with mechanisms that seek to realize “equal concern and respect”, which may be justifiable on democratic *or* other grounds.

As to the moderate form, the researcher remains unconvinced that the contribution of judicial review to democracy is really a motivating rather than a mitigatory factor. It can be argued, with some persuasion, that judicial review does make an empirical contribution to the practice of representative,⁶⁸ participatory, and deliberative democracy. For some individuals and groups, it may constitute the only form of democratic participation. However, as judicial review also acts to restrict certain aspects of democracy (such as majoritarianism), its overall contribution or effect may be potentially negligible. Thus, the researcher struggle to see improved democracy as a driving argument for motivating judicial review.

The possible exception to this stance might be that courts are sometimes called upon to play a larger role in society, where it is specifically required. For example, Geoff Budlender argues that courts in South Africa must be part of the process of “democratization” of society: they possess this “function” alongside other pillars. Another approach is to see democracy as an external requirement in rights interpretation and enforcement. We require courts to incorporate democracy in their proceedings and vision as a way of achieving the material and participatory elements of social rights.

3.2.2 Rule of law

Equally, the idea of rule of law is raised as a justification for judicial review. It often serves as a shorthand for both expressing and validating the idea of constitutional democracy. However, as an analytical concept, it operates poorly as a defense of judicial review. In English at least, it fuses the idea of rule *through* law (all power must be exercised in accordance with law the *et al legal*) with rule *by* law (all laws must conform to constitutional values and such disputes shall be

⁶⁷ Tushnet (n 49). The Longevity of a constitution will invoke some sort of pressure for adaption to changing social conditions.

⁶⁸

settled by law - the *etat de droit*). The former conception has no relevance to judicial review: it legitimizes only judicial scrutiny of executive compliance with general laws. The latter and substantive conception merely echoes the more precise idea of accountability for constitutional or treaty commitments.

The most convincing use of rule of law to defend judicial review is the demand for legal coherence in the face of hermeneutic anarchy. In politically fragmented regimes with dispersed powers, legal certainty may be elusive if each constitutional entity can articulate and act upon its own constitutional interpretation. Indeed, it may be prudential for these entities to cooperate through a system of authoritative judicial review, which minimises transaction costs and safeguards desired interpretations. The need for legal certainty was acutely felt in the early constitutional debates in the United States.⁶⁹ In the context of federalism, Congressman Webster stated:

Could anything be more preposterous than to make a government for the whole Union, and yet leave its power subject, not to one interpretation, but to thirteen, or twenty-four, interpretations? Each (government) at liberty to decide for itself, and none bound to respect the decisions of others.⁷⁰

This “fragmentation”-based argument for judicial review *might* also apply in political systems characterized by strict separation of governing powers between a president and legislature. It would *certainly* apply in the highly decentered context of international relations, avoiding the anarchy of multiple State interpretations subject to the constraint that more powerful actors may strategically defect from such an interpretive regime (e.g. through non-compliance or reservations) or refrain from the initial commitment.⁷¹

Legal fragmentation may occur even in more centered systems, such as a Westminster parliamentary system. The choice is not always simply between the legislature and the courts as

⁶⁹ Friedman 9n30, p.34 („judicial review emerged..as the solution to the problem of how to ensure that the wilful, and often recalcitrant, states complied with the laws of the union”).

⁷⁰ Debates in congress, 21st congress, 1st Sess. (1830), 6:78, cited in Keith E. Whittington, *Political Foundations of Judicial Supremacy: the presidency, the supreme court, and constitutional Leadership in U.S. History* (Princeton University Press, 2007), p.8.

⁷¹ In international law, the United States is perhaps a preeminent example. It regularly invokes international law but rarely commits to the adjudicative regime and when it does, often defects.

to who will provide legal coherence and certainty. In some areas, law may remain vague, thin, contradictory, or obsolete but political, public or private actors may lack incentives, resources, or time to help resolve the uncertainty. The result is everyday legal pluralism which judges may be called on to resolve. The breadth of this phenomenon varies within and across a legal system but indeterminacy is, nonetheless, an inherent feature of law.⁷²

This indeterminacy can continue even when one branch of government is given the final authority over law or the constitution or treaty. A form of dialogue exists although one institution may dominate. Even in the United States, where the court jealously guards its final interpretive authority, a form of dialogue exists between the courts and government over time and issues.⁷³ Conversely, under a traditional system of parliament sovereignty with no judicial review, the British courts have developed and enforced constitutional norms.⁷⁴

3.2.3 Structured public debate

The way to capture some of the underlying ideas of judicial review as a promotional tool for democracy or the rule of law is again to think of courts in institutional rather than textual terms. In this case, the interaction of institutions is as important as their legal production and outcomes. Instead of viewing the exercise of rights interpretation as mere resolution of doctrine and disputes, it can be equally understood as the facilitation of a “constitutional order”. It is a space in which society in general and actors in particular narrow the applicable rules of interpretation and find a common ground to debate and settle law in relations defined by flux rather than constancy. This is precisely the case where there is space for *ex post* adjustment of a constitution or treaty.

The general notion of a constitutional order is well articulated by Sabel. He speaks not specifically of political constitutions but rather of a particular legally-sanctioned power relation. A constitutional order is to be distinguished from two other relational forms in society:

⁷² Torstein Eckhoff and Jan Helgesen, *Rettskildelære*, 5th edition (universitetsforlaget, 2001).

⁷³ Tushnet (n 49). The longevity of a constitution will invoke some sort of pressure for adaption to changing social conditions. Even ardent originalists such as Justice Scalia struggle to maintain the façade of consistent originalism:

⁷⁴ *R v Secretary of state for the Home Department ex Adam*; *R v Secretary of state for the Home Department ex p Limbuela*;

horizontal market exchange and vertical hierarchy.⁷⁵ It represents background architecture of social and political rules that create and frame power and governance mechanisms. In Sabel's view, the virtue of a constitutional order is that it helps mediate conflicts and overcomes inertia that develop in vertical and horizontal orderings of power. For example, in contracts, commercial parties may bypass negotiation on detailed supply arrangements and instead create a constitutional order with an open-ended contract that sets the parameters for on-going supply.

These arrangements create frameworks in which parties negotiate and deliberate within the shadow of legal sanction. Sabel contends that the „monitoring” dimension reduces the possibility of duplicity” but that its „central function is to regularize consultation between the parties so as to minimize the cost of mistakes and maximise the possibility of introducing improvements that benefit both.¹²⁴ Likewise, constitutional orders possess a jurisprudential role. Through different forms of „jurisprudence” they help negotiate change over time - especially where exchange may be unfair or bureaucratic hierarchies too slow.⁷⁶

The idea of a constitutional order is not exclusive. Parliaments, executives, and a range of regulatory and oversight institutions, create such frameworks for on-going deliberation, consensus building, and jurisprudence creation, whether formal or customary, written or oral. In the field of water regulation, for example, a legislature may eschew detailed regulation and plump for elected water councils with the authority to decide on local policy within parameters.⁷⁷

Arguably, courts provide a useful mechanism for such an order, and not only in interpretation of statutory, common and customary law but also in constitutional and international law. Courts can shape public deliberation and provide a jurisprudence that provides both institutional memory and a body of principles that can help solve future disputes. At its functional core, the presence of a court with judicial review powers presses citizens and political actors to deliberate on rights in a particular way: it narrows the space of potential rights claims; excludes certain types of arguments; favours principled reasoning; ensures some consistency with prior reasoning; enables a modicum of reflection; and pushes actors to match reasons and principles with others in the

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⁷⁶ Sable (n 153). Rosenfeld (n153), p.1339, on the role of constitutionalism in challenging conflicts towards peaceful resolution.

⁷⁷ Sable (n153), p.164.

constitutional orders.

In many instances, a court will not review a dispute or problem; but the shadow of the legal sanction structures the space for public deliberation. The fact that the court can have a final or decisive word changes the shape of the political discussion. The rights dimension demands consideration. This can arguably trigger both debates over moral understandings of rights and legal discussions over how a court should or may judge. The threat of judicial review concentrates the mind of the body politic.⁷⁸

Friedman's history of the US Supreme Court provides such an example. He finds that over the *longue duree*, the court largely matches public opinion, but not because the court is a relentless majoritarian actor. Rather, over time, the structured engagement between the court and the public produces a form of consensus. In his words:

Judicial review serves as a catalyst for the American people to debate as a polity some of the most difficult and fundamental issues that confront them. It forces the American people to reach answers to these questions, to find solutions - often compromises that obtain broad and lasting support. And it is only when the people have done so that the Court tends to come in line with public opinion.

This is consistent with many contemporary studies on the impact of public opinion triggered by judgments of the US Supreme Court and some other national courts (Russia and South Africa).

While early observational and experimental studies cast significant doubt on the capacity of judges to lead public opinion or to do so without polarisation, a wave of subsequent studies paint a much more nuanced picture. Courts can lead public opinion but the direction and intensity of attitudinal shifts varies amongst different individuals and groups and certain factors condition the general effects. Importantly, shifts in public opinion *can be diachronically* complex as charted by Friedman. For instance, Ura finds a short-term and negative thermostatic reaction flowing from the US Supreme Court's decision in *Roe v Wade* but a long-run movement towards the court's positions, suggesting that legitimization effects can be slow to materialize.⁷⁹

⁷⁸ Another benefit, which Sable does not discuss, may be that it allows the original consensus to be continually recreated and reformed in new circumstances without incurring the transaction costs. This idea is present in Thornhill's (n158), historical and sociological overview of the development of judicial review.

⁷⁹ Sable (n 153)

Burke and Carter identify in a similar fashion how judges can usefully structure this public deliberation, drawing in essence on a court's informational exposure, decisional seclusion, and legal method. Tracking the emotionally charged *Schiavo* case concerning the right of a husband to request termination of life support for his spouse, they conclude that:

The political process never pinpointed what the "the subject" was in a way that allowed people on both sides of the issue to come to closure. Lawyers and judges, on the other hand, proceeded to articulate precise and neatly sequenced questions, each one framed so that the answer, whether one agreed with it or not, seemed plausible. You will also see in the legal process, an openness to new ideas, new information, and the abiding sense that neither side was "right", or "the winner" until the process finally ended, over 15 years after it began qualities clearly absent in the debate outside the courtroom. Likewise, international relations scholars identify this function of international review in triggering change. International courts serve as an external signaling device to trigger an appropriate domestic response.⁸⁰ „contribute to political change by delegitimizing circumspect arguments used by powerful state actors”,⁸¹ and provide an „authoritative (re)interpretation of what the law means.”⁸²

In this sense, the process is analogous to Rawls's idea of considered judgments: courts help reduce problematic biases and inconsistencies in public reasoning. Considered judgments are those which are made „under conditions in which our capacity for judgment is most likely to have been fully exercised and not affected by distorting influence.”⁸³ Courts can push society at least towards a „narrow reflective equilibrium”: actors will be forced to trim or discard claims that make it difficult to cohere „general convictions, first principles and particular judgments.”⁸⁴ Courts could even move actors towards a „wide” reflective equilibrium, the best conception of justice after all alternatives have been weighed. Although, as argued in section 2, there are clear limits to positing that political or judicial institutions may reach ideal or best conceptions of justice as embodied in constitutional rights.⁸⁵

⁸⁰ Moravcsik (n 169), 238.

⁸¹ Karen Alter, „Agents or trustees? International Courts in their political context”(2008) 14 European Journal of International Relations 33,35.

⁸² Ibid

⁸³ John Rawls, justice as Fairness: A Restatement (Harvard University Press, 2001), S10

⁸⁴ IBID S10.3

⁸⁵ In proportionality and reasonable tests, courts are often called upon to consider different policy alternatives.

Contemporary constitutionalism has also added a further element to this deliberation the promotion of constitutional values. Robertson argues that contemporary constitutions are marked by this ideational ambition: "My claim is that constitutional review is a mechanism for permeating all regulated aspects of society with a set of values inherent in the constitutional agreement the society has accepted".⁸⁶ The South African constitution is commonly described in this vein, as a transformative constitution; and South African judges have recognised partly this transformative role in diffusing their values through their reasoning and remedial relief.⁸⁷ Arguably, many of the constitutions of the third wave democracies and some of the second wave democracies fall within this transformational category; as do recent international human rights treaties such as the Convention on the Rights of Persons with Disabilities.

Again though, it is possible to imagine alternatives to a court. Yet possibly, the institutional features of judicial review provide functional reasons why it might be an important body to play in framing public deliberation and decisions over rights. Instead of seeing legal precedent as a form of retrograde moral reasoning, it can be re-framed as a form of institutional memory: providing a baseline for future interpretations. If courts are also disposed to adjusting and updating their interpretations as appropriate, then a fine (but sometimes messy) balance might be achieved.⁸⁸ Moreover, the bias towards principle-based reasons provides a means to ensure mutually acceptable forms of public deliberation. The debate is less about policy ends or means but about the consistent application of particular principles, which forces opponents to narrow and alter the frame of ideological disagreement.

⁸⁶ David Robertson, *The Judge as political Therapist: Contemporary constitutional Review* (Princeton University Press, 2010), 7

⁸⁷ Pius Langa, „Taking dignity seriously-judicial reflections on the optional protocol to the ICESCR“ (2002) 27 *Nordic Journal of Human Rights* 29

⁸⁸ There is sometimes a protest that this legal certainty and the principle of retroactivity. A threshold of legal certainty is important:

CHAPTER FOUR

STRATEGIES AND SOLUTIONS TO IMPROVE THE EFFECTIVENESS AND PERFORMANCE OF JUDICIARY IN UGANDA

4.0 Introduction

This was set to determine the strategies and solutions to improve the effectiveness and performance of the judiciary in Uganda for which the researcher intended to find out how satisfactorily the strategies and solutions and the degree at which they stand when compared to the effectiveness and performance of the judiciary in Uganda.

Regardless of the increasing evidence of the pervasiveness of judicial corruption, legal provisions continue to emphasize, both at the international and at the national levels, securing the independence of the judiciary through constitutional provisions. The real challenge, which is to clean up a corrupt judicial service by increasing the accountability, remains unmet. Corruption in the judiciary is a complex problem and it needs to be confronted through a variety of approaches. For example, in Venezuela where 75% of the population reportedly distrusts the judicial system, a US\$120 million reform programme aims, inter alia, to eliminate corruption by opening up the system, with public trials, oral arguments, public prosecutors and citizen juries. But in many former British colonies in Asia and Africa, where these are standard features of the system, the judiciary nevertheless is perceived to be corrupt.

4.1 Strategies to improve the effectiveness *and* performance of judiciary in Uganda

Need to introduce an evidence-based approach

With regard to the causes for judicial corruption or the perception of judicial corruption, the participating Chief Justices concluded that this is not only fueled by first-hand experiences of judges or court staff asking for bribes but also by a series of circumstances that are all too easily interpreted as being caused by corrupt behaviour rather than the mere lack of professional skills or a coherent organization and administration of justice. Such indicators include episodes such as delays in executing court orders, the unjustified issuing of summons and granting of bails.

prisoners not being brought to court, the lack of public access to records of court proceedings, files disappearing, unusual variations in sentencing, delays in delivering and giving reasons for judgment, high acquittal rates, the apparent conflict of interest, prejudices for or against a party, witness or lawyer, whether individually or as a member of an ethnic, religious, social, gender or sexual group, immediate family members of a judge regularly appearing in court, prolonged service in a particular judicial station, high rates of decisions in favour of the executive, appointments perceived as resulting from political patronage, preferential or hostile treatment by the executive or legislature, frequent socializing with particular members of the legal profession, the executive or the legislature, with litigants or potential litigants, and post-retirement placements.⁸⁹

However, the Chief Justices agreed that the current knowledge of judicial corruption was not adequate enough to base remedies upon. They all agreed that there was a need for more evidence about types, causes, levels and impact of corruption. Even in those countries where surveys had been conducted, the results were not sufficiently specific. Generic questions about the levels of corruption in the courts do not reveal the precise location of the corruption and will therefore be easily rejected by the judiciary as grounds for the formulation of adequate counter measures and policies. They agreed that there was a strong need for the elaboration of a detailed survey instrument that would allow the identification not only of the levels of corruption, but also the types, causes and locations, of corruption.

They were convinced that the perception of judicial corruption was to a large extent caused by malpractice within the other legal professions. For example, experiences from some countries show that the court staff or the lawyers pretend to have been asked for the payment of a bribe by a judge in order to enrich themselves. Surveys in the past did not sufficiently differentiate between the various branches and levels of the court level. Such an approach inevitably had to lead to a highly distorted picture of judicial corruption since the absolute majority of contacts with the judiciary were restricted to the lower courts. Also the survey instruments used seem so far to have not taken into account that the perception of corruption might be strongly influenced by the outcome of the court case. Generally speaking, the losing party is by far more likely to put

⁸⁹ Stevens, Robert (1993) *The independence of the Judiciary: The View from the Lord Chancellor's Office*. Oxford: Oxford UNIVERSITY Press

the blame for its defeat on the other party bribing the judge, in particular when its lawyer tries to cover up his own shortcomings.

Furthermore, service delivery surveys usually rely exclusively on the perceptions or experiences of court users, while they do not try at all to use insider information, which easily could be obtained by interviewing prosecutors, investigative judges and police officers. Existing instruments do also seldom try to further refine the information obtained in the survey by having the data discussed in focus groups and/ or by conducting case studies on those institutions which seem to be particularly susceptible to corruption.

Set of preconditions necessary to curb corruption in the judiciary

The Judicial Group agreed that a set of preconditions has to be put into place before the concrete measures to fight judicial corruption can be. Most of them are directly connected to the attraction and the esteem of the judicial profession.

a. Fair remuneration

First of all, the low salaries paid in many countries to judicial officers and court staff must be improved. Without fair remuneration there is not much hope that the traditional system of paying “tips” to court staff on the filing of documents can be abolished. However, adequate salaries will not guarantee a corruption free judiciary. Countless examples of public services all over the world prove that regardless of adequate remuneration, corruption remains a problem. An adequate salary is a necessary, but not sufficient condition for official probity.⁹⁰ Another element is the workload. An excessive workload will impede the judge to ensure the quality of his work which eventually will make him lose interest in his job and make him more susceptible to corruption. In addition to remuneration, service conditions and thereby living standards might be improved. However, examples from some developing countries suggest that the state tends often to provide a great part of the remuneration in form of extras such as housing, car and personnel, while the salary paid hardly seems enough to maintain those extras. Such a situation can have an extremely negative effect since: (i) the state suggests the adequacy of a living standard that goes

⁹⁰ Moskos, Upholding Integrity among justice and security forces, in A Global Forum against Corruption, Final Conference Report, 63

beyond what the judge would be able to afford if he were paid only his salary. Consequently he gets used to a living standard that goes far beyond what he will be able to maintain once he retires. Such a situation may as a matter of fact contribute to the temptation of adopting corrupt practices since the judge might feel tempted to accumulate sufficient resources to be able to maintain his social status also during retirement.⁹¹

In order to come up with a realistic, focused and effective plan of action to prevent and contain judicial corruption effectively, the judicial group recommended first of all developing a coherent survey instrument allowing for an adequate assessment of the types, levels, locations and remedies of judicial corruption. It was established that there is a need to establish a mechanism to assemble and record such data and, in appropriate format, to make it widely available for research, analysis and response.

b. Transparent procedures for judicial appointments

Further, it was felt that more transparent procedures for **judicial appointments** were necessary to combat the actuality or perception of corruption in judicial appointments (including nepotism or politicization) and in order to expose candidates for appointment, in an appropriate way, to examination concerning allegations or suspicion of past involvement in corruption.⁹²

The Judicial Group concluded furthermore that there is a need for the adoption of a transparent and publicly known (and possibly random) procedure for the **assignment** of cases to particular judicial officers to combat the actuality or perception of litigant control over the decision-maker. Internal procedures should be adopted within court systems, as appropriate, to ensure regular change of the assignment of judges to different districts having regard to appropriate factors including the gender, race, tribe, religion, minority involvement and other features of the judicial office-holder. Such rotation should be adopted to avoid the appearance of partiality⁹³.

⁹¹ Buscaglia, Edgardo 9001), An Analysis of the causes of corruption in the judiciary, legal and judicial reform branch. Washington DC: the World Bank.

⁹² Different examples of corruption-driven discrimination against the weakest economic or political groups refer to Buscaglia, Edgardo, 2001. Paper presented at the world Bank conference on justice. St. Petersburg, Russia, July 3-6, 2001 at p.59; to Buscaglia, Edgardo. 1997.

⁹³ Buscaglia, Edgardo and William Ratliff (2001), Law and Economic in developing countries. Palo alto, CA Stanford University Press

c. Adoption and monitoring of judicial code of conduct

In order to ensure the correct behaviour of judicial officers, the Judicial Group urged for the adoption of judicial codes of conduct. Judges must be instructed in the provisions established by such a code and the public must be informed about the existence, the content and the possibilities to complain in case of the violation of such conduct. Newly appointed judicial officers must formally subscribe to such a judicial code of conduct and agree, in the case of a proven breach of the code of conduct, to resign from judicial or related office.⁹⁴

Representatives from the Judicial Association, the Bar Association, the Prosecutor's Office, the Ministry of Justice, the Parliament and the civil society should be involved in the setting of standards for the integrity of the judiciary and in helping to rule on best practices and to report upon the handling of complaints against errant judicial officers and court staff.

d. Declaration of assets

Moreover, rigorous obligations should be adopted to require all judicial officers publicly to declare their assets and the assets of their parents, spouse, children and other close family members. Such publicly available declarations should be regularly updated. They should be inspected after appointment and monitored from time to time by an independent and respected official.⁹⁵

4.2 Solutions to improve the effectiveness and performance of judiciary in Uganda

Implementation of the Strategic Investment Plan

The Judiciary will soon launch its fourth strategic investment plan whose overall goal is to have an excellent Judiciary that delivers justice for all. Our mission is to administer justice to all people in Uganda in an independent, impartial, accountable, efficient and effective manner.

The transformation of the Judiciary will be guided by four strategic objectives namely:

⁹⁴ Buscaglia, Edgardo (2001), "A Governance-based Analysis of judicial corruption: perceptual vs. objective indicators" international review of Law and Economic. Elsevier Science (June)

⁹⁵ Refer to Buscaglia, Edgardo (1996), law and economics of development, new Jersey: JAI Press.

Rehabilitation of judicial infrastructure, strengthening information communication technology; strengthening the legal and regulatory process for the Judiciary and building the institutional and human resource capacity of the Judiciary. At the end of the plan, we hope to increase public confidence in the Judiciary from 45% to 65% and to enhance the adjudication of cases. This plan is to be incorporated into the National Development Plan.

The plan is ambitious both in commitments and cost. The plan will cost 920 billion shillings over the next four years with annual requirements of 230 billion shillings, which is less than 50% of the current budget of the Judiciary. Our immediate challenge is to mobilise resources from Government and Development Partners to fund the ambitious plan.⁹⁶

Today it is accepted that Courts play an active role in governing a nation, beyond resolving disputes. It is submitted that justice is the purpose of government and that therefore funding the administration of justice is the obligation of a state. I therefore urge and request the Government to fund the 4th Strategic Investment Plan of the Judiciary, which has an impact on the achievement of the National Development Plan II.⁹⁷

Increasing the efficiency of the courts

There is no doubt that the rate of litigation and enforcement of the law is increasing faster than the courts can process the cases. The increase in the workload of the court and our urgent desire to clear for case backlog calls for interventions to speed up disposal of cases in a just and fair manner. To achieve this objectives, we shall implement the following measures to increase the throughput of the courts.⁹⁸

Appointment of acting Justices and Judges

We shall prioritize recruitment of 100 Magistrates Grade I, 10 Senior Magistrates Grade I, 10 Principal Magistrates Grade 1, 32 Chief Magistrates, 10 Assistant Registrars, 14 Deputy

⁹⁶ Buscaglia, Edgardo (2001), "A Governance-based analysis of judicial corruption: perceptual vs. objective indicators" international review of law and economics. Elsevier science (june) at 45-50

⁹⁷ Hon chief justice uwise's opening address at the first federal integrity meeting held in Abuja, October 26th-27th 2001

⁹⁸ The study covers ten countries in Africa, Asia and Latin America. This study was designed and conducted at the center for international Law and Economic Development-CILED- at the University of Virginia School of Law (USA)

Registrars, 6 Registrars, 14 High Court Judges, and have full complement for the Court of Appeal and the Supreme Court⁹⁹.

Even if appointed, these justices and judges are going to be a drop in the ocean in view of the high case load and backlog. I will therefore petition H.E The President and the Judicial Service Commission to appoint acting judges under article 142(2)(c) of the Constitution, on short term contracts to help us clear backlog. For emphasis,

Article 142(2) (c) provides thatWhere the Chief Justice advises the Judicial Service Commission that the state of business in the Supreme Court, Court of Appeal or the High Court so requires the President may, acting on the advice of the Judicial Service Commission, appoint a person qualified for appointment as a justice of the Supreme Court or a justice of Appeal or a judge of the High Court to act as such justice or judge even though that person has attained the age prescribed for retirement in respect of that office.

I shall also propose that whenever judges are given other assignments that take them away from the bench, suitable replacement should be appointed in an acting capacity so that the work of the court does not stall. I do not expect to be told that there is no money for them.

Elimination of Case Backlog

Upon my appointment, I committed to finding a solution to the problem of case backlog. But it was necessary to establish the extent of the problem. We had a Committee headed by Justice Dr. Henry Adonyo which dug into the problem and gave us a report detailing exactly how many cases were in the backlog category and in which court they are. That formed the basis for planning on how to solve the problem. I then appointed another Committee headed by Justice Richard Butera to study the earlier report and recommend solutions to the problem. This Committee is due to present its report next month. Armed with these two carefully compiled

⁹⁹ Hon Chief Justice Uwaise's Opening address at the first Federal integrity meeting held in Abuja, October 26th-27th 2001

reports, we shall then embark on the journey to look for resources, human and financial, to deal with case backlog. The target is not to reduce it but to eliminate it altogether.

Piloting Performance Management

Last year, I informed the country that we were developing a tool to institutionalize performance management in the Judiciary. The tool is ready for piloting in the Supreme Court, Court of Appeal, the High Court and selected Magistrates Courts.

The performance tool that we are going to implement will assist us in sound planning, monitoring of the performance of the judiciary, increasing the capacity of the courts and ensuring that we meet the needs of the people. Our ultimate objective is establishing a world class Judiciary that is accessible, efficient, transparent, independent and professional in discharging its functions.

The performance enhancement system *is* IT based and therefore, requires a robust case management system to work effectively. Your Excellency, the Judiciary last year launched its ICT strategy for the next five years to automate the Judiciary. The ICT strategy requires 42 billion shillings over five years. Government has been supportive (albeit in words) in encouraging the Judiciary to automate. However, no budgetary provision has been made for implementing the Strategy. I call upon the Government to fund the Judiciary's ICT strategy not for the sake of having ICT systems in the Judiciary, but to improve Uganda's competitiveness to do business, which is critical to the transformation of Uganda into a middle income and even a first class country. The Doing Business Index rated Uganda poorly in attracting foreign and domestic investment among others for lacking a robust case management system and delays in adjudication and enforcement of decisions. We therefore have an opportunity to hit two birds with one stone, Namely that ICT will improve the efficiency of the courts and that for the country at large, ICT in the Judiciary, will boost Uganda's business competitive to attract FDI, which is critical to the transformation of Uganda. Things like lost files, paper files on the floor because of lack of funds to buy cabinets, should be a thing of the past.

I want to acknowledge so far the support that UNDP and SUGAR has promised to give the Judiciary to automate. The UNDP has earmarked one million dollars towards automating the

courts and DFID, through the SUGAR project, has earmarked five hundred thousand dollars to develop a case management system for the Anti-Corruption Court among others.

Fighting Corruption

An efficient and corruption free Judiciary is fundamental to the sound administration of justice and enjoyment of the rule of law in an open and democratic society like ours in Uganda, where each Ugandan has equal access and opportunity to participate in the governance of society and enjoy the equal application of the law. In 2017, we shall continue to enforce a zero tolerance campaign against corruption, though must emphasize that fighting corruption needs the commitment and willingness of every one to report cases of corruption¹⁰⁰.

We shall therefore, work with the people, civil society organizations and the government at large as our touch light for flashing out this cancer of corruption are the people. I want to encourage and assure victims of corruption, that we shall protect and assist them to report cases against Judiciary staff at the various points in the country and that no stone, however, high or low, will be spared until the Judiciary is free from this cancer.

I appeal to members of the Uganda Law Society as well as members of the Public to desist from offering bribes to judicial officers and staff. Bribes undermine the administration of justice, as decisions arrived at through corrupt methods erode legitimacy of the courts and lawyers and instead perpetuate conflicts in society. It is therefore in the interest of justice that the Bar must take center stage in fighting corruption and holding the Bench to the highest professional standards of propriety and integrity. Campaigns such as Bell the Cat must be carried out with vigor. Recognition of the best performing judicial officers should be rolled out to inspire and retain judicial officers of integrity on the bench while at the same time, kicking out the rotten apples¹⁰¹.

¹⁰⁰ The assessment of judicial integrity and capacity will be conducted following the recommendations made by the second meeting of chief justices on "strengthening judicial integrity" held in February 2001 in Karnataka state, India

¹⁰¹ Alberto Ades y Rafael di Tella, 1996. "The causes and consequences of Corruption: A review of recent Empirical contributions", IDS Bulletin 27.

Internally, I have established the Inspectorate of Courts primarily to deal with corruption. We shall continue to strengthen the Inspectorate to have a deeper reach, visibility and access to the most vulnerable who are affected most by corruption. The Inspectorate, must get out of the comfort of their offices to confront corruption in its various forms through on spot visits, open meetings (*Barazas*), thorough evaluation of judicial records, visits to prisons and engagements with JLOS institutions and Local Authorities. Resources permitting, we shall establish Inspectorate Offices and Public Relations Offices at Regional levels with fulltime officers to ease reporting and solving of corruption cases.

I have further instructed the Secretary to the Judiciary to introduce and provide a name and title tag for every staff of the Judiciary for identification purposes. This will help in complaints handling by identifying personnel involved in particular misconduct on the one hand and verifying which complaints are malicious or baseless on the other¹⁰².

Reform of the Law and business processes

As I informed you, I appointed a Committee chaired by Justice Tsekooko (JSC retired) to make proposals for reforming laws that were impacting negatively on the administration of justice causing unnecessary delay. The objective of the Civil Justice Reforms are among others, to maximize cost effectiveness, expeditious disposal of cases, reasonable proportionality between economy, fairness between the parties, facilitation of settlement of disputes and proper use of scarce resources for the courts (human and financial and otherwise).

The Committee has made wide ranging proposals to reform the Trial on Indictment Act, the Magistrates Courts Act, the Civil Procedure Act and Rules to introduce Skelton arguments, limit interim applications, limit interlocutory appeals, and concentrate on hearing of the main cases. I am also considering a proposal to limit influx of appeals to maximize judges' time and resources of the court¹⁰³.

¹⁰² Buscaglia, Edgardo (2001), "A Governance-based Analysis of judicial corruption: perceptual vs. objective indicators" international review of law and economics. Elsevier science (June)

¹⁰³ CIET international, corruption in the police, judiciary, revenue and land services, presidential commission of inquiry against corruption, Tanzania 1996

We shall simplify the current system of pleadings which is too technical and adopt the common sense approach where pleadings are a short and plain statement of the claim showing that the plaintiff is entitled to the relief sought. The Supreme Court of California says that **the plaintiff should only set forth the essential facts of his case with reasonable precision and with particularity sufficient to acquaint a defendant with the nature, source and extent of the cause of action.** It is argued that drafting pleadings in this way helps the defendant to know the potential exposure in the litigation and prepares him for settlement negotiations¹⁰⁴.

Increased use of Alternative Dispute Resolution (ADR)

ADR will continue to play an increasing role in the settlement of civil disputes. The mediation registry has over the last few years trained and sensitized judicial officers and members of the legal fraternity on how to use ADR. The University of Pepperdine through the Strauss Institute in the USA, has also trained judicial officers in ADR. To move ADR forward, we need to build a professional cadre of mediators and house and pay them in the courts to handle mediation on a fulltime basis. Judges and Registrars will only supplement mediators. Our goal is to have ADR in the Court of Appeal, High Court and Magistrates Court to help these courts deal with matters.

Institutionalization of targets

Last year, we introduced targets for judicial officers to improve the performance of the Judiciary. Targets are beginning to take root and inspiring competitiveness among judicial officers. Many judicial officers are keen to achieve their monthly and annual targets. In this coming year, we shall establish an information management system to collect real time statistics on the performance of judicial officers. This will help us to measure compliance with targets and most importantly, take corrective measures, to improve compliance and raise productivity. We shall put in place a good quality assurance programme to ensure that judicial officers do not simply dismiss or rush through cases to meet targets. Additionally, we shall continue to support Judicial Officers to do their work with ease by providing tools, equipment and favorable working

¹⁰⁴ Langseth, petter, 200. Integrated vs Quantitative methods, lessons learned; 2000 (presented at NORAD Conference, Oslo, 21 October 2000).

environment for them to work. The recent launch and publication of the Criminal Bench book and the Civil Bench book are among the many interventions, we intend to put in place to boost judicial performance¹⁰⁵.

Checking absenteeism

Absenteeism costs the Judiciary one day per week. Losing one fifth of the working time not only escalates case backlog but it is moral corruption, where officers earn a salary without working. I have, therefore, introduced attendance registers to ensure regularity of attendance at the courts.

This year, I intend to intensify adhoc visits to courts, to ensure that judicial officers are at their stations. Judicial officers must be away from the stations after getting permission from their superiors. And where any Judicial Officer intends to be away from the Station and has had cases fixed, that Officer must ensure that the parties and/or their Counsel are informed in advance of the intended absence. That saves everybody's time and resources¹⁰⁶.

Tailored Training for Judiciary Staff

Tailored training to enhance adjudication skills and conflict resolution abilities of judicial officers will be prioritized by the Judicial Studies Institute. Trainings must however be done in an organized manner so that they do not interfere with the day to day running of the courts. JSI should explore options of training staff after work and using electronic / web based training of judicial staff to reduce unnecessary movement, expenditure on training and disruption of the court calendar. Much as we must have the training, we must endeavor to spend more time on our core activity i.e. adjudication of cases¹⁰⁷.

Strict application to justice standards

¹⁰⁵ Makenzieupholding integrity among justice and security forces, in A global; Forum against Corruption, Final Conference Report, 63

¹⁰⁶ Messick, Reducing court delays: five lessons from the United States, The World Bank PREMnotes, Dec.1999, No.34,

¹⁰⁷ Steven, Robert (1993)The Independence of the judiciary: The view from the lord chancellor's office.Oxford:Oxford University Press.

- Through the Justice Law and Order Sector, we have developed and agreed on justice standards with other JLOS stakeholders. These standards are extracts from the law and the Bill of Rights and are intended to ensure that courts observe the right to fair trial. For example, the standards provide that:
- Cases shall be heard on day to day basis
- Courts shall ensure that the entire criminal proceedings of a non-capital nature take less than four months.
- Courts shall prioritize cases of children.
- After committal, a capital case shall take a maximum of 12 months.
- The court shall minimize frequent adjournments of the cases.
- The court shall ensure that hearing of minor offences commence on the day of plea and
- Police shall summon witnesses promptly.

Plea bargaining in criminal cases

Plea bargaining has been instrumental in reducing case backlog in the High Court. Last year, the High Court completed 2,010 capital cases through plea bargaining within a short time and at less than one third of the cost of trying cases through the normal system, and 1,124 inmates have registered to plea bargain. In 2017, the Judiciary, will commit considerable resources to sensitize the public and the inmates about the benefits of plea bargaining and carry out more sessions in the High Court¹⁰⁸.

Magistrates, who handle more than 70% of the criminal cases, but hardly use plea bargaining will benefit from customized training by the Judicial Studies Institute, Pepperdine University and International Justice Mission of Uganda.

¹⁰⁸ The Inspectorate of Government of Uganda, building integrity to fight corruption to improve service delivery, Uganda 1999

Let me take this opportunity to thank the Hon the Principal Judge Hon Dr Justice Yorokamu Bamwine for a job well done in having plea bargaining take root in our criminal Justice system.

Improving Governance in the Judiciary

Governance in the Judiciaries world over has not been a major preoccupation of Judiciaries. However, with the demands for improved service delivery, accountability and heightened customer demands against reducing budgets for Judiciaries, improving governance is taking center stage in the administration of justice, where more is being demanded of courts.

Good governance is celebrated for improved transparency resulting in higher value for money; accountability resulting respect for and meeting customer needs; fairness; probity or ethical conduct of court business; corporate social responsibility and improved performance of the Judiciary.

I note that the Judiciary has not performed optimally due to inadequacies in managing our human resources, unclear reporting lines, poor accounting, uncompetitive employee remuneration, poor communication and corruption.

Therefore, in 2017, the Judiciary will focus on strengthening governance by running the administration of justice with integrity, transparency, accountability and respect for the law, procedures and policies governing the management of public institutions. The Judiciary will commit to open government (transparent government), consultative leadership, and stakeholder engagement; zero tolerance to corruption and gender mainstreaming to ensure that the courts meet their objectives. Judicial officers and Judiciary staff, who fail to meet the values of the institutions will be helped to change or punished if their conduct violates the law. Courts will have more Open Days and closer interaction with the public. I have encouraged the public to directly contact my office and I have learned a lot about the problems people face with our justice system¹⁰⁹.

Innovations in the administration of Justice

¹⁰⁹ Richard C. LaMagna, changing a culture of corruption, US Working Group on organized Crime, 1999

In the last year we experimented innovations, more specifically plea bargaining, appellate mediation and small claims procedure to deal with the most pressing problems of delay. These innovations will continue to be rolled out in new areas and act as a source of catalyst for new innovation to address the challenges of uncertainty, cost and inequality common in the administration of justice today¹¹⁰.

The Harvard Business Review says that the broad appeal of smart phones stems from how they deliver multiple elements , **including reducing effort, saves time, connects, integrates, variety, fun , entertainment, provides access and organizes.** We too, should develop products that can address **our litigants' needs from a multiple perspective**¹¹¹.

4.3 Conclusion

The advantages of the integrated approach has already produced positive results, as manifested through the international impact indicators included in this paper. The present study has shown how the joint effects of organizational, procedural, economic, social control and legal factors are able to explain significantly the yearly changes in the frequencies of corruption within the pilot countries included here.

Such a scenario provides innovative ways for individuals to redress grievances whenever their rights are infringed in ways that show social sustainability and social control of institutional reforms. In this way, the present paper proposes a method that goes further than other mainstream approaches, while it also identifies the main governance-related advantages of improving dispute resolution mechanisms. As shown above, methodological advantages include (i) a reduction in the outcome-related uncertainty faced by litigants; (ii) an increase in the access of marginalized groups to a framework within which solutions to their conflicts can emerge as a result of a participatory consensual approach through social control mechanisms; (iii) less likely abuse of procedural and substantive judicial discretion due to the more predictable application of rules to resolve a conflict; (iv) lower direct cost of access for users of public institutions. in

¹¹⁰ World bank, Philippine country management unit east Africa Asia and pacific region, combating corruption in the Philippines, Philippines, may 2000, report no.20369-PH

¹¹¹ UN Anti-corruption Tool Kit, Global Programme against Corruption, 2001.

general and of solving disputes in particular; and finally (v) the provision of more transparent procedures and management of disputes.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

Judicial review is not only an integral part of the Constitution but is also a basic structure of the Constitution which cannot be whittled down by an amendment of the Constitution and the judiciary is the best placed government organ to implement judicial review. It is, as illustrated, a fundamental right in law.

5.1 Conclusions

Judicial review is not only an integral part of the Constitution but is also a basic structure of the Constitution which cannot be whittled down by an amendment of the Constitution and the judiciary is the best placed government organ to implement judicial review. It is, as illustrated, a fundamental right in law.

The 1962 and the 1967 Constitutions guaranteed fundamental rights and freedoms.

Therefore, violation of human rights in post-independence Uganda was not solely due to weaknesses or absence of constitutional and other legal guarantees of those rights. It is because of the political turmoil that characterized Uganda that the Constitution was enacted to protect fundamental and other rights among other things.

The fundamental task of the Constitution was to strengthen the enforcement institutions of human rights and to establish new ones which have been empowered to defend human rights.¹¹² It guarantees all the rights as contained in major international declarations and covenants on the human rights to which Uganda is signatory including the African Charter on Human and People's Rights.¹¹³

¹¹² Odoki Report, pg.169.

¹¹³ OAU Document CM-1149(XXXVI) 2(1981), Addis Ababa, Ethiopia.

In order to ensure that Acts of Parliament are enacted within the confines of the constitution and specifically to ensure that fundamental rights and freedoms are protected, judicial review was entrenched in article 137 and as illustrated has been effectively applied to protect the freedom of expression.

Accordingly, in exercising its legislative duty under article 79, Parliament should ensure that Acts which contravene fundamental rights and freedoms of individuals including the freedom of expression are not passed because the constitutional court shall invoke its power under article 137 to check the constitutionality of those Acts.

The government has consistently argued, in light of the several legislation enacted to regulate the media, that if the machinery of information has no guidance, security will be undermined, society will not be properly guided, government programmes will be derailed and development will not occur.

In terms of protecting the freedom of expression in Uganda, the power of Government to regulate or control the media was not greatly diminished by the decisions of the courts or in the formed legal framework including the repealed Electronic Media Act and the Press and journalist Act. The reason for this is that protection of the fundamental human rights is a primary objective of every democratic constitution and as such is an essential characteristic of democracy. In particular, protection of the right of freedom of expression is of great significance to democracy. "It is the bedrock of democratic governance. Meaningful participation of the governed in their governance, which is the hall mark of democracy, is only assured through optimal exercise of freedom of expression".¹¹⁴

The fundamental rights and freedoms are entrenched in the Constitution and the enjoyment of those rights and freedoms can only be limited if they infringe on the rights of others or if they are justifiable in a free and democratic society. The proposal by government to require registration of newspapers for example would certainly be declared unconstitutional if it were to be enacted into law.

¹¹⁴ R V Zundel (1992) 10 C.C.R (2nd) 193 and Edmonton Journal v Alberta (AG) (1982) 2 SCR 1326

To ensure that the freedom of the judiciary is protected according to the Constitution and from a drafters' perspective, the government should revisit the media laws and media policy. The government is enjoined to uphold the Constitution including the Bill of Rights in Chapter Four and in particular article 29. It is recommended therefore that the government policy on the media needs to be concisely stated. A clear statement of the legislative objective would ensure questions discussed in the cases above do not arise. Further action with respect to the legal regime ought to be undertaken whether in the form of further regulation, deregulation, or a general review. The weaknesses of the regulatory mechanisms employed in the regulation of the media needs to be resolved.

The above cases pose policy considerations which the government should clearly address including;

- a) Does the government want a self-regulating media or not?
- b) What is the role of government in the control and regulation of the media?
- c) Is the government proposing to reclaim the power to control and regulate the media?

The current media laws are weak but there is room for improvement. The proposal by Cabinet to amend the Press and Journalists Act is not a call for draconian laws to control the media but it is necessary for clear indications on the duties and responsibilities of the media amidst weak state institutions to be stated such as those stipulated in the Public Order Management Bill, 2013.

The government also needs to repeal the archaic and redundant laws such as sedition or cease to apply them as has been done in many other Common Law jurisdictions including Canada, England, Australia, India and Kenya. Uganda's legal regime respecting freedom of expression is characterized by; (a) archaic and outdated restrictions (such as sedition) which only serve to undermine the enjoyment of the rights and in effect lead to a retardation of the democratization process and (b) weak and inappropriate regulatory mechanisms such as the media council.

It is recommended that the current legal regime governing media freedom needs to be reformed taking into account the decisions of the constitutional and Supreme courts and to address

emerging challenges including effects of globalisation. The effect of amendment or repeal is that the laws will be brought into conformity with the Constitution.

The government has acknowledged the effects of globalisation on the freedom of expression e.g. by enacting the Uganda Communications Act¹¹⁵ but developments in the media need to be watched on a permanent basis and require rapid and coordinated responses. Having in place archaic laws are not the means of achieving such objectives. New legal rules to address emerging challenges need to be developed. Specifically, further development of the legal regime pertaining to the freedom of expression in order to ensure its sustainability is paramount. The existence of an enabling legal regime and an appropriate political climate for free expression will ensure maximum enjoyment of that right.

It is reported that human rights are political by nature and therefore, they require the political will to implement and public scrutiny to maintain them. Thus, Uganda

Commission of Inquiry into violations of human rights has observed

"A country may have the best written Bill of Rights, but if the state organs and institutions, leaders at all levels, and every individual in the country are not committed and do not pay serious attention to them, human rights as so guaranteed are not worth the papers they are written on".¹¹⁶

Government is well aware of the inherent nature of the freedom of expression under article 29 (1) (d) and the duty of government agencies to respect, promote and uphold this freedom. However, government also notes that this right is not absolute and where the right poses a threat to peace and public safety, then the right must be regulated accordingly within the ambit of article 43.

5.3 Recommendations

The researcher urges the government of Uganda to immediately ensure the closure of any remaining safe houses. Where such detention centres exist, the Government is urged to mount

¹¹⁵ Id.

¹¹⁶ Id Kanyeihamba pg.85.

independent investigation to determine the persons responsible and bring them to justice. The Legation was able to ascertain that the organisations it met are highly competent and motivated and are for the most part unafraid to speak out against the government's attacks on the independence of the Judiciary. The delegation learned that fundamental rights contained within the Ugandan Constitution are challenged in court by lawyers and NGOs. By contrast there is an absence of any challenge to Ugandan Courts to apply international human rights law. Uganda has ratified a variety of regional and international human rights treaties,¹¹⁷ yet the delegation was told that they are hardly ever invoked in domestic courts.

The researcher urges all sectors of civil society to hold the Ugandan government accountable to the standards defined in the Constitution and in its regional and international treaties. Where remedies have been exhausted domestically, cases should be brought before international monitoring bodies, such as the African Commission and Court for Human and Peoples' Rights, the UN Human Rights Committee.

The researcher urges the government to accord the Judiciary the monetary and human resources which will enable it to function without the risk of having its independence curtailed, and which will allow it to clear the backlog of cases. The procedure for the identification of candidates for judicial office should be conducted in a transparent manner from outset to completion. The criteria for potential candidates should be in-line with the UN Basic Principles on the independence of the Judiciary.

The researcher urges the government, the Judicial Service Commission and the Judiciary to investigate alleged collusion between the police and judicial officers. In any event, the Judiciary should take precautions so as not to become an (unwilling) participant in what might amount to arbitrary detention. As an immediate measure, the Judiciary should allow the deposition of sureties to the court to prevent a possible abuse of the bail procedure.

Judicial review is however not the only remedy available for enforcement of fundamental rights and freedoms under the Constitution. Under article 50 if any person who claims that a fundamental or other right or freedom guaranteed under the Constitution has been infringed or threatened, he

¹¹⁷ Supra Section 6.

is entitled to apply to a competent court for redress which may include compensation. However this depends on strengthening of the institutions that are charged by the state to promote these rights and freedoms including the Uganda Human Rights Commission.¹¹⁸

Although the role of the constitutional court in determining the constitutionality of every Act of Parliament is lauded, this might not necessarily be effective because not all the Acts enacted by Parliament are subjected to judicial review.

Scholars have also warned that the “interpretation of the Constitution is primarily concerned with the recognition and application of constitutional values and not with a search to find the internal meaning of statutes.”¹¹⁹

The judicial review role of the constitutional court is important because it prevents Constitution from being amended or overtaken by a legislative enactment of Parliament.

Whereas judicial review is not the only safeguard for protecting the freedom of expression, it is an important feature for the development of constitutionalism in Uganda and as discussed above, it has played a prominent part in ensuring that freedom of expression is enjoyed by citizens according to the Constitution.

¹¹⁸ Id the constitution articles 51 and 52.

¹¹⁹ Tumwine-Mukubwa G.P. 'Ruled from the grave : challenging Antiquated constitutional Doctrines and values in commonwealth Africa' in J.Oloka-Onyango (ed) Constitutionalism in Africa: Creating Opportunities, Facing challenges (fountain publishers, kampala, 2001) pp 287-307

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