THE INDEPENDENCE OF THE JUDICIARY AND ITS ROLE IN SAFEGUARDING THE RULE OF LAW AND CONSTITUTIONALISM IN SOUTH AFRICA, KENYA, AND UGANDA

BY

DENNIS EDWIN MUKONO

Submitted in accordance with the requirements of the degree of

MASTER OF LAWS

at the

UNIVERSITY OF SOUTH AFRICA

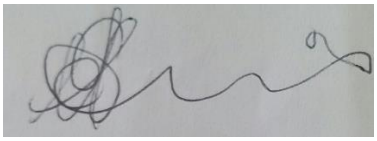
DEPARTMENT OF CONSTITUTIONAL AND INTERNATIONAL LAW

SUPERVISOR: ADV SAUL PORSCHE MAKAMA

DATE: 15 APRIL 2025

ACADEMIC HONESTY DECLARATION

I declare that '**Independence of the Judiciary and its role in Safeguarding the Rule of Law and Constitutionalism in South Africa, Kenya and Uganda,'** is my original work and that all sources that I have used or quoted have been indicated and acknowledged by means of complete references.

SIGNATURE: 

Dennis Edwin Mukono

Student Number: 56926367

ABSTRACT

The rule of law and constitutionalism are the pillars that support constitutional democracies. It is the judiciary that ensures that the rule of law and constitutionalism remain intact. For the judiciary to do so, it must be independent, therefore the role that an independent judiciary plays cannot be overemphasised.

This dissertation examines the independence of the judiciary and its critical role in safeguarding the rule of law and constitutionalism in three selected countries: South Africa, Kenya, and Uganda. The study aims to understand how judicial independence varies in different political and legal contexts and its impact on the upholding of democratic principles.

This study also looks at the varying levels of judicial independence of the chosen countries. With its 1996 constitution hailed as one of the most progressive documents, South Africa represents a well-established democracy with a stable legal framework and strong institutions ensuring judicial independence. The study examines how the judiciary in South Africa has been a key pivot of its constitutional democracy in upholding democratic principles, protecting human rights, and ensuring checks and balances within the government.

The legacy left by the colonizers in Kenya, particularly when it came to the judiciary, was very poor.

They left a weak judiciary, and the post-independence leaders did not do much to change the *status quo*. The promulgation of the 2010 Kenyan constitution was welcomed and timely. It reduced arbitrariness in governance and established an independent judiciary. This research focuses on some successes and challenges of Kenya's judiciary in maintaining and upholding the rule of law despite political pressures.

Uganda offers a contrasting perspective with its judiciary operating in an environment where there are several challenges that include authoritarian tendencies, the shrinking of political and civic spaces, and the ongoing frustration of the judiciary to achieve full judicial independence. The study investigates the judiciary's efforts to uphold constitutionalism and the rule of law amidst executive interference and systemic challenges.

This research highlights the effect that the constitutions of the featured countries have on their respective judiciaries. The study focuses on a number of factors, including models of funding, the effect of politics and ideology on the judiciary, transformative constitutionalism, etc. The study also explores the mechanisms implemented to strengthen judicial independence and its effectiveness in promoting justice and accountability.

The research provides insights into the critical role of an independent judiciary in maintaining the balance of power, protecting human rights, and maintaining democratic stability. The findings underscore the need for continuous efforts to maintain judicial independence as a means of ensuring the rule of law and upholding constitutional governance in South Africa, Kenya, and Uganda.

Abstract in Kiswahili

MUHTASARI

Utawala wa sheria na Ukatiba ndio nguzo ambazo demokrasia ya kikatiba inaegemea. Mahakama inajukumu la kuhahakikisha kwamba utawala wa sheria na ukatiba vinadumu. Ili mahakama iweze kufanya hivyo, ni lazima iwe huru, hivyo basi, jukumu ambalo mahakama huru inatekeleza ni la muhimu sana.

Tasnifu hii inachunguza uhuru wa mahakama na jukumu lake muhimu katika kulinda utawala wa sheria na ukatiba katika nchi tatu zilizochaguliwa: Afrika Kusini, Kenya na Uganda. Utafiti huu unalenga kuelewa jinsi uhuru wa mahakama unavyotofautiana katika miktadha tofauti ya kisiasa na kisheria na athari zake katika kuzingatia kanuni za kidemokrasia.

Utafiti huu pia unachunguza viwango tofauti vya uhuru wa mahakama katika nchi zilizochaguliwa. Katiba ya Afrika Kusini ya 1996 inasifiwa kama moja wepo ya nyaraka zenye mwelekeo mzuri zaidi, Afrika Kusini inawakilisha demokrasia iliyoimarika na mfumo thabiti wa kisheria na taasisi imara zinazohakikisha uhuru wa mahakama. Utafiti huu unachunguza jinsi mahakama nchini Afrika Kusini imekuwa nguzo kuu ya demokrasia yao ya kikatiba katika kuzingatia kanuni za kidemokrasia, kulinda haki za binadamu, na kuhakikisha udhibiti na usawa ndani ya serikali.

Urithi ulioachwa na wakoloni nchini Kenya ikija kwa suala la mahakama ulikuwa duni sana. Waliacha mahakama dhaifu na viongozi waliokuja madarakani baada ya uhuru hawakufanya jitihada kubadilisha hali hiyo ilivyokuwa na kuleta mabadiliko. Kutangazwa na kuweko rasmi wa katiba ya Kenya ya 2010 lilikuwa ni jambo lililopokelewa na lililofika kwa wakati muafaka. Ilipunguza ubadhilifu katika utawala, na ilichangia kwa kuwepo ama kuanzisha mahakama huru. Utafiti huu unaangazia baadhi ya mafanikio na changamoto za mahakama ya Kenya katika kudumisha na kuzingatia utawala wa sheria licha ya mashinikizo ya kisiasa.

Uganda inatoa mtazamo tofauti, mahakama yake inafanya kazi katika mazingira yenye changamoto kadhaa kutoka kwenye serikali yao, baadhi yake zikiwa ni, mwelekeo wa kiimla, kusinyaa kwa nafasi za kisiasa na kiraia, na mkanganyiko wa mahakama kufikia uhuru kamili. Utafiti huu unachunguza juhudi za mahakama

kudumisha katiba na utawala wa sheria wakati ikiingiliwa katika utendaji wake pamoja na changamoto za mfumo.

Utafiti huu unaangazia ufanisi ambao katiba za nchi zilizoangaziwa zinayo kwa mahakama zao. Utafiti huu unazingatia mambo kadhaa ikiwa ni pamoja na, mifano ya ufadhili, athari za siasa na itikadi katika mahakama, mabadiliko ya katiba na kadhalika. Utafiti huu pia unachunguza mikakati iliyochukuliwa kuimarisha uhuru wa mahakama na ufanisi wake katika kukuza haki na uwajibikaji.

Utafiti huu unatufahamisha juu ya jukumu muhimu la mahakama huru katika kudumisha uwiano kupitia kwa mamlaka yao, kulinda haki za binadamu, na kudumisha utulivu wa kidemokrasia. Matokeo haya yanasisitiza haja ya juhudi endelevu za kudumisha uhuru wa mahakama kama njia ya kuhakikisha utawala wa sheria na kudumisha utawala wa ukikatiba nchini Afrika Kusini, Kenya, na Uganda.

KEY TERMS

Judiciary; Rule of Law; Constitutionalism; Judicial Independence; Separation of power; Judicial power; Judicial review; Judicial funding, constitutional supremacy; Transformative Constitutionalism.

ACKNOWLEDGEMENTS

I am profoundly grateful to the Most-High God for the gift of life and the strength to achieve this milestone. My deepest thanks go to my parents, Baba Jeronimo Madimwa Onalo and Mama Clare Leonida Madimwa, whose love, kindness, generosity, and unwavering discipline have shaped me into who I am today.

To my siblings, your constant encouragement and belief in me have been a source of immense motivation, and for that I am so grateful.

A special thank you to my Supervisor, Adv. Saul Posche Makama, for his invaluable guidance and support throughout this journey.

TABLE OF CONTENTS

ABBREVIATIONS AND ACRONYMS

ABA	American Bar Association
ANC	African National Congress
BBI	Building Bridge Initiative
CALS	Centre for Applied Legal Studies
CC	Constitutional Court
CCJE	Consultative Council of European Judges
CJ	Chief Justice
DA	Democratic Alliance
DCJ	Deputy Chief Justice
EFF	Economic Freedom Fighters
ENCJ	European Networks of the council of the Judiciary
EU	European Union
IEBC	Independent Electoral and Boundaries Commission
GCB	General Council of the Bar
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
JCC	Judicial Conduct Committee
JLOS	Justice Law and Order Sector
JSC	Judicial Service Commission
KANU	Kenya African National Union
KSH	Kenya Shillings

KY	Kabaka Yekka/Kabaka Only
LASPNET	Legal Aid Service Providence Network
LSK	Law Society of Kenya
MCA	Members of the County Assembly
NA	National Assembly
NEDLAC	National Economic Development and Labour Council
NRM	National Resistance Movement
OCJ	Office of the Chief Justice
ODM	Orange Democratic Movement
OHCHR	Office of the High Commissioner for Human Rights
SCA	Supreme Court of Appeal
UJOA	Uganda Judicial Officers Association
ULS	Uganda Law Society
UNGA	United Nations General Assembly
UN	United Nations
UNHRO	United Nations Human Rights Office
UPDF	Uganda People's Defence Forces
UPC	Uganda people's congress
USA	United States of America
WJP	World Justice Project

CHAPTER 1

GENERAL INTRODUCTION AND OVERVIEW OF THE STUDY

The judiciary is an integral institution in any constitutional democracy. It has been described in some quarters as the backbone of constitutional democracies, and this rings true in countries with established democracies, among them the USA, Great Britain, etc. Writing for the American Bar Association, Alexander Wohl asks the following: 'is there any aspect of our republic more essential to its effectiveness and continuity than the independence of our nation's courts and their ability to uphold the Rule of Law?'[1]

In order to have a truly independent judiciary, there should be a separation of powers between the arms of government with checks and balances.[2] The judiciary is charged with the responsibility of making sure there is order in society, whether the decision or clarity required is about a question of law, politics, or social values etc.[3] The judiciary has a responsibility to fulfil its duties, or else anarchy would reign supreme.[4] According to Wohl, 'it is the judiciary that has the awesome responsibility of not only ensuring that law and order is maintained, but also that the struggles the citizens engage in - whether over law, ideas, politics, or social values—are resolved peacefully, sensibly, and fairly.[5]

The purpose of this study is to demonstrate the need for adherence to constitutional values. South African constitution is the bedrock of their constitutional democracy, and its judiciary has in most cases interpreted it in a way that advance the country's constitutional democracy, and while Kenya's constitution mirrors many provisions of

---

1 Alexander Wohl, 'The Role of Courts in Our Society': *(American Bar Association 01 June2017)* <https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2016-17-vol-42/vol-42-no-3/introduction-the-role-of-courts-in-our-society/> accessed on 10/10/2022.

2 Cornell Law School, 'Separation of Powers,' <https://www.law.cornell.edu/wex/separation_of_powers_0 > accessed on 26/08/2024.

3 Alexander Wohl, 'The Role of Courts in Our Society': *(American Bar Association 01 June2017)* <https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2016-17-vol-42/vol-42-no-3/introduction-the-role-of-courts-in-our-society/> (accessed on 10/10/2022).

4 Pavel CE, "the Rule of Law and the Limits of Anarchy" (2021) 27 Legal Theory 70.

5 Alexander Wohl, 'The Role of Courts in Our Society' *(American Bar Association 01 June2017)* <https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2016-17-vol-42/vol-42-no-3/introduction-the-role-of-courts-in-our-society/> accessed on 10/10/2022.

the South African constitution, they still have to take deliberate steps that will guarantee greater freedom and advancement of gender-based issues among others. Ugandan constitution, just as the South African and Kenyan constitutions, has a dedicated chapter on the bill of rights; however, the judiciary in Uganda continues to face challenges of executive interference and autocratic tendencies. This study seeks to offer the view that, Kenya and Uganda can take a leaf from South Africa in addressing and implementing the provisions of their constitution that will broaden their democratic spaces, establish more independent judiciaries and reinforce the judiciary's position as a fulcrum of safeguarding the rule of law and constitutionalism in their respective countries.

Therefore, this study views an independent judiciary as the glue to a truly democratic state, and that only an independent judiciary free of influence can uphold people's rights, guard against arbitrary abuse of power by the powerful, and safeguard the rule of law and constitutionalism.

1.1 Background of the study

An independent judiciary is key in any democratic society that claims respect for rights and liberties.[6] It is a necessity for people who want an egalitarian society with accountable leadership, where everyone is equal before the law.[7] In essence, an independent judiciary is necessary for ensuring that the rule of law is respected; it is a custodian of democracy. A few pillars make the judiciary truly independent, including the principle of separation of powers, meaning that no other arm of government should encroach on or interfere with another.

Judges decide cases based on facts and the law. This simply means that members of the bench must carry out their sacred duty without pressure or influence from anyone. As captured in a publication by the United Kingdom (UK) judiciary:

> It is vitally important in a democracy that individual judges and the judiciary are impartial and independent of all external pressures so that those who appear before them and the wider public can have confidence that their cases will be decided fairly and by the law.[8]

According to the office of the high commissioner for human rights (OHCHR) 'only an independent judiciary can render justice impartially based on law, thereby also protecting the human rights and fundamental freedoms of the individual.'[9] Therefore, the judiciary's independence is an important element of constitutional democracy, specifically in safeguarding the rule of law and constitutionalism. Among the key features of a functioning democracy are independent institutions that carry out their duties without fear or favour. These institutions ensure that there is accountability in government. The doctrine of separation of powers is a fundamental principle that divides the government into three separate branches, each with separate and

---

6 OHCHR, 'Basic Principles of the Independence of the Judiciary,' (06/09/1985) https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence- judiciary> accessed on 27/08/2024.

7 Rule of Law Education Centre, 'No One is Above the Law,' <https://www.ruleoflaw.org.au/principles/equality-before-the-law/ > accessed on 27/08/2024.

8 UK judiciary, 'Independence from what and whom?'<https://www.judiciary.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/independence/> accessed on 24/01/2022.

9 United Nations Human Rights office, 'The basic principle on the independence of the judiciary.' <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary> accessed on 11/11/2022.

independent powers.[10] The rationale underlying the doctrine of the separation of powers is not to allow power to be concentrated in an individual or group of persons or a single institution and to prevent any tyrannical or arbitrary use of power; in other words, people or institutions are prevented from being prosecutors and judges in their own cases.[11] The separation of powers ensures that those who draft/make the laws are different from those who put them into effect. Therefore, the separation of powers refers to the division of governmental responsibilities into distinct branches to limit any one branch from exercising the core functions of another.[12] The intent is to prevent the concentration of power in one entity and to provide for checks and balances.[13]

The legislature, the executive, and the judiciary constitute the three arms of government. The legislative branch is responsible for enacting the laws of the state and appropriating the money necessary to operate the government.[14] The executive branch is responsible for implementing and administering the public policy enacted and funded by the legislative branch,[15] and finally, the judicial branch is responsible for interpreting the constitution and laws and applying their interpretations when deciding on cases brought before it.[16]

While the concept of judicial independence may vary from one jurisdiction to another, the key running element in all jurisdictions is that judicial independence is the cornerstone of the rule of law. This is reinforced by the idea that courts should not be subject to improper influence from the other branches of government, or private or partisan interests.[17] The United Nations General Assembly (UNGA) recognised this

---

10 Cornell Law School, 'Separation of Powers,' <https://www.law.cornell.edu/wex/separation_of_powers_0 > Accessed on 27/08/2024.

11 Britannica, The Editors of Encyclopaedia, 'Separation of Powers' <https://www.britannica.com/topic/separation-of-powers> Accessed on 27/08/2024.

12 Britannica, The Editors of Encyclopaedia, 'Separation of Powers' <https://www.britannica.com/topic/separation-of-powers> Accessed on 27/08/2024.

13 National Conference of State Legislature, 'Separation of powers--an Overview' < https://www.ncsl.org/about-state-legislatures/separation-of-powers-an-overview> accessed 22 March 2022.

14 National Conference of State Legislature, 'Separation of powers--an Overview' <https://www.ncsl.org/research/about-state-legislatures/separation-of-powers-anoverview.aspx> accessed 28/03/2022.

15 National Conference of State Legislature, 'Separation of powers--an Overview' <https://www.ncsl.org/research/about-state-legislatures/separation-of-powers-anoverview.aspx> accessed 28/03/2022.

16 National Conference of State Legislature, 'Separation of powers--an Overview' <https://www.ncsl.org/research/about-state-legislatures/separation-of-powers-anoverview.aspx> accessed 28/03/2022.

17 Mia Swart, 'Independence of the Judiciary' (*Oxford Constitutions March 2019*)

in the 2004 declaration on the “essential elements of democracy,” stating the need to develop a competent, independent, and impartial judiciary and accountable government institutions.[18]

South Africa under apartheid did not have an independent judiciary; the legal system under apartheid served as a handmaid of the then government. South Africa has made significant steps since the end of apartheid, and its transition to a democracy has set the stage for an equitable society that aims to uphold the rule of law and protect individual rights. In South Africa, the evils of apartheid were so grave that operating in a democracy is something to be cherished. The end of apartheid marked the beginning of a new era of an egalitarian society where equality, human rights, and justice have become important values to the nation, and its judiciary has been at hand to safeguard these values. The ability to participate in a democratic process, where every citizen's voice can be heard and respected, is no doubt something to be admired.

The judiciary plays a crucial role in this process, ensuring that laws are interpreted fairly and that justice is served equitably. The judicial authority is outlined in most democratic constitutions. Section 165 of the South African Constitution of 1996 states that the judicial authority of the republic is vested in the courts.[19] It further states that the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour, or prejudice.[20] To further underline the importance and the authority of the judiciary, it is stated that no person or organ of the state may interfere with the functioning of the courts.[21]

Under the constitution of Kenya of 2010, judicial authority is stipulated under Article 159, which states in part that judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this

<https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e339#lawmpeccol-e339-div1-6> accessed 28 March 2022.

18 Adopted 20 December 2004, the resolution was officially published in 2005. Available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/59/201&Lang =E. accessed on 28/02/2022. See also DRI, international consensus: Essential elements of democracy.

19 Section 165(1) of the South African constitution of 1996.

20 Section 165(2) of the South African constitution of 1996.

21 Section 165(3) of the South African constitution of 1996.

Constitution.[22] Article 159(2)[23] goes further by stating that, in exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(*a*) justice shall be done to all, irrespective of status; and

(*b*) justice shall not be delayed.

Article 128 of the Ugandan constitution outlines the authority and the independence of the judiciary, stating, in part, that in the exercise of judicial power, the courts shall be independent and shall not be subject to the control or direction of any person or authority.[24] Furthermore, it states that no person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions.[25]

The judiciary is entrusted with the responsibility of protecting the respective countries' constitutional democracy. The supremacy clause in South Africa's constitution of 1996 states that the constitution is the supreme law of the republic, that law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.[26] In all liberal democratic systems, the principle of judicial independence is accorded universal recognition. The requirement that judges should be independent in their decision-making is seen as the pillar of democratic societies. According to Berkinshaw-Smith:

> "Judiciaries must be politically impartial and immune from political interference if democracy is to be consolidated in countries in transition from authoritarian rule. Without an independent judiciary, there can be no rule of law, and without the rule of law, there can be no democracy."[27]

The remuneration of members of the bench is also a key component in making sure that the judiciary remains truly independent. According to Thomas E Plank,

> "The most obvious affirmative institutional element that promotes long-term independence is compensation. First, compensation must be fixed. Neither the

22 Article 159(1) of the constitution of Kenya of 2010.
23 Article 159(2) of the constitution of Kenya of 2010.
24 Article 128(1) of the Uganda's constitution of 1995 with amendments through 2017.
25 Article 128(2) of the Uganda's constitution of 1995 with amendments through 2017.
26 Section 2 of the South African constitution of 1996.
27 Berkinshaw C Smith, *Judges and democratization: Judicial independence in new democracies, (*1st edition, Routledge 2018)10.

legislature nor the executive may reward or punish judges through salary manipulation in response to decisions in particular cases."[28]

The process of appointing judges is equally important. The composition of the Judicial Service Commission, a body responsible for vetting and appointing judges, should be well-constituted to make sure that the people appointed to interpret the law and preside over cases are individuals of integrity and with impeccable character.[29]

Having judges who adopt a transformative constitutionalism approach and are bold in defending the constitution is a pointer that can gauge how robust a particular democracy is. This underlines the role that the judiciary can and must play in new democracies like Kenya, Uganda, and South Africa.

In examining the independence of the judiciary, this study also explores the separation of powers and highlights how it is of paramount importance in safeguarding human rights and fundamental freedoms. The separation of powers implies that there will be accountability because it is characterised by checks and balances. According to Fahed Abul-Ethem, 'The independence of the judiciary of any state striving to protect human rights, is the only guarantee of fairness in the state, and is the main building block of justice.'[30] The separation of powers is a key element in making the judiciary independent. It is a tripartite conception of how the government is organised.[31] It can be described as a doctrine of constitutional law under which the three branches of government, namely, the executive, the legislative, and the judiciary, are kept separate.[32]

---

28 Thomas E Plank, 'The Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia,' (1996) 5 Wm & Mary Bill Rts J, 1,29. available at (https://scholarship.law.wm.edu/wmborj/vol5/ iss1/2/) pg 29-30.

29 Canadian Judicial Council, 'Ethical Principles for Judges' <https://cjc-ccm.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf> accessed on 31/03/2022.

30 Fahed Abul-Ethem, 'The role of the judiciary in the protection of human rights and development: A Middle Eastern perspective,' (2002) 26 issue 3, Fordham Int'l LJ, 761, 766.

31 National conference of state legislatures, captures the following of separation of powers, as referring to the division of government responsibilities into distinct branches to limit any one branch from exercising the core functions of another. The intent is to prevent the concentration of power and provide for checks and balances. Also available at <https://www.ncsl.org/research/about-state-legislatures/separation-of-powers-an-overview.aspx> accessed on 30/11/2022.

32 Legal Information Institute, 'Separation of powers' <https://www.law.cornell.edu/wex/separation_of_powers> accessed on 12/12/2022.

The concept of separation of the powers is attributed to Baron de Montesquieu.[33] He constructed a naturalistic account of the various forms of government and the causes that made them what they were and that advanced or constrained their development.[34] It has been argued that the separation of powers is the very essence of constitutionalism and 'a universal criterion of constitutional government.'[35] Montesquieu identified these three sorts of power which he said exist in every government, and, as captured in an article by Jaclyn Ling-Chien Neo, the separation of powers is necessary such that "there can be no liberty when the legislative and executive powers are united or if the judicial power is not separated from either."[36]

The principle of the separation of powers goes a long way to making the work of the judiciary easier, with the public having trust in the judiciary and being confident that justice will prevail. Where there is an independent judiciary that adjudicates cases fairly and impartially, even litigants who may not have had their cases decided in their favour will take comfort from the fact that a judiciary carrying out its sacred obligation will hear and deliver judgment fairly based on merit(s) and the law.

In Kenya, there was an initiative to try to amend the constitution of 2010, through what was dubbed the "*Building Bridges Initiative"*(BBI).[37] While some viewed the BBI as able to correct some of the negative issues posed by Kenyan politics, some felt that the way the BBI was initiated and presented was unconstitutional.[38] Among the articles that made the BBI somewhat controversial was a section that contained the provision of the setting up the office of the ombudsman; had the BBI passed with this provision,

---

33 Montesquieu expounds his theory of separation of powers to set forth the governmental organization in order to safeguard the political liberty. He believed that the separation of powers among the different organs of the government is the best safeguard against tyranny. available at<https://www.scholarshipsads.com/montesquieus-doctrine-of-separation-of-powers/> accessed 12/12/2022.

34 Wil Waluchow, 'Constitutionalism' *(Stanford Encyclopaedia of Philosophy 20 Dec 2017)* <https://plato.stanford.edu/archives/spr2018/entries/constitutionalism> accessed on 10/10/2022.

35 Vile M. J. C. Constitutionalism and the Separation of Powers (Oxford: OUP, 1967), 97; E. Carolan, The New Separation of Powers: A Theory of the Modern State (Oxford: OUP, 2009), 18.

36 Neo L-C J, "Autonomy, deference and control: Judicial doctrine and facets of separation of powers in Singapore," 2018, (National University of Singapore) pg. 463.

37 Citizen TV Kenya, 'BBI decision' *(Citizen TV 20 August 2021)* <(https://www.facebook.com/watch/?v=390589462458145>/ accessed 30/11/ 2022.

38 David Ndii & others v Attorney General & others [2021] eKLR available at <https://www.brookings.edu/blog/africa-in-focus/2021/08/19/is-the-bbi-ruling-a-sign-of-judicial-independence-in-kenya/> accessed on 24/01/2022.

it would have meant that judges reported to the ombudsman appointed by the executive, clearly flying in the face of independence of the judiciary and the principle of the separation of powers.

The then Kenyan CJ, David Maraga said that the ombudsman would entrench executive control, making the judiciary answerable to a person appointed by the executive.[39] In a ruling in the Kenya Court of Appeal, Justice Kiage was of the view that the BBI, as it was constituted at the time and the procedure followed to bring it, went against the constitution.[40] Justice Kiage, equated the proposed amendments of the constitution to a scenario in one of Shakespeare's plays.[41] "It matters not whether you carve Caesar as a dish fit for the gods, or hew him as a carcass fit for hounds, the cuts are mortal either way."[42] He was of the view that chopping up the constitution and allowing in provisions that may have entrenched executive control over the judiciary would be against the very constitution the judiciary swore to uphold. According to Yaniv Roznai, 'Constitutions often impose limitations on amending constitutional subjects, provisions, principles, rules, symbols, or institutions through the formal constitutional amendment provision.'[43] Roznai is of the view that a process of a constitutional amendment can be unconstitutional.[44] Otiende Amollo argued that a constitutional amendment could be unconstitutional for a number of reasons, among them, 'not having followed the constitutionally provided procedure to amend it, or a provision introduced to the constitution may be unconstitutional.'[45]

---

39 Carolyne Tanui, 'Proposed Judiciary Ombudsperson under BBI Will Entrench Executive Control: Maraga' (*Capital FM News 11 December 2020*) <https://www.capitalfm.co.ke/news/2020/12/proposed-judiciary-ombudspersonunder-bbi-will-entrench-executive-control-maraga/> accessed on 28/02/2022.

40 *David Ndii & others v Attorney general & others.*

41 William Shakespeare's play "Julius Caesar." Words spoken by Marcus Brutus in Act 2, Scene 1, Brutus discussing the assassination of Julius Caesar with his fellow conspirators, Brutus is trying to justify the assassination by arguing that it doesn't matter how they kill Caesar—whether they do it in a noble manner ("as a dish fit for the gods") or in a brutal, dishonourable way "as a carcass fit for hounds" the result will be the same: Caesar will be dead.

42 Citizen TV Kenya, 'BBI decision' *(Citizen TV 20 August 2021)* <(https://www.facebook.com/watch/?v=390589462458145> accessed on 22/04/2022.

43 Roznai Y, Unconstitutional Constitutional Amendments (Oxford University Press 2017), pg 6.

44 Roznai Y, "Unconstitutional Constitutional Amendments—the Migration and Success of a Constitutional Idea" (2013) 61 Am J Comp L 657.

45 Kenyan Parliament, 'Dramatic face-off as MP Otiende Amollo lectures John Mbadi on matters BBI' *(Kenyan parliament 29 April 2021)* <https://www.youtube.com/watch?v=sviPTkGHvP0> accessed on 29/04/2022.

1.2 Research Problem Statement

The legal problem that this research seeks to address stems from the historical facts that have had an impact on the featured countries: South Africa, Kenya, and Uganda. The historical events in South Africa, Kenya, and Uganda have significantly shaped their judicial systems, influencing the development of their legal frameworks and discourse. This research seeks to address the challenges and implications of judicial independence and why this independence is important in safeguarding these principles in South Africa, Kenya, and Uganda. Despite constitutional guarantees, the judiciary in Kenya and Uganda still face significant challenges, including political interference and inadequate funding, among others. These challenges undermine the judiciary's ability to function impartially and effectively, thereby threatening the rule of law and the protection of fundamental rights and freedoms.

In South Africa, the legacy of apartheid and the transition to democracy have highlighted the judiciary's role in promoting equality and justice, however issues such as unfair attacks on the judiciary need to be addressed, disobedience of court orders and more importantly the question of the financial autonomy of the judiciary needs to be seriously considered. The issue of financial autonomy has been highlighted by members of the judiciary, including Justice Zondo CJ.[46]

In 2023, Mr. Lamola, the then Minister of Justice and Correctional Services, pointed out that it is incumbent on all organs of State to assist and protect the judiciary to ensure its continued independence, impartiality, dignity, accessibility, and effectiveness.[47] He emphasised that an important part of this responsibility for organs of the State is to ensure that the judiciary is adequately resourced to undertake its constitutional mandate.[48] The judiciary is supported by a number of core staff, such as registrars and researchers with the necessary skills, and it has a sizable allocated budget. According to the Department of Justice, the overall departmental allocation for

---

46 SABC 'Chief Justice Zondo calls for independent judiciary,' (08/12/2023) <https://www.youtube.com/watch?v=BeBU8Df8Gsw> accessed on 25/12/2023.

47 Minister Ronald Lamola: 'Office of the Chief Justice Dept Budget Vote 2023/24' <https://www.gov.za/news/speeches/minister-ronald-lamola-office-chief-justice%C2%A0dept-budget-vote-202324-09-may-2023> accessed on 12/10/2024.

48 Minister Ronald Lamola: 'Office of the Chief Justice Dept Budget Vote 2023/24' <https://www.gov.za/news/speeches/minister-ronald-lamola-office-chief-justice%C2%A0dept-budget-vote-202324-09-may-2023> accessed on 12/10/2024.

the year 2024/25 stood at R25.164 billion.[49] This allocation is to support critical operations across the justice department, including court services, state legal services, the National Prosecuting Authority, and other auxiliary and associated services.[50] The challenge however, is that the budget is never enough to cater for all the needs of the judiciary.

The legacy of colonisation in Kenya left nothing to write home about, it served to marginalize and control the masses using their administrative system.[51] In post-independence, Kenya experienced ethnic and political tensions and clashes, with the most notable conflict being the post-election violence of 2007-2008, which laid bare the deep-seated ethnic divisions and political instability.[52] The Kenyan judiciary has faced challenges such as accusations of corruption, political interference, resource constraints, and case backlogs. These issues can lead to a lack of confidence in the judiciary among the members of the public. Furthermore, there seems to be a strained relationship between the judiciary and other arms of government, particularly the executive.[53] While the arms of governments do not necessarily have to be cozy with each other, it is usually important that they have a good working relationship.

The question of adequate funding of the judiciary still needs to be addressed. In 2019, there was an outcry by the Kenyan judiciary, where Chief Justice David Maraga came out and stated that the lack of funding was frustrating the work of the judiciary.[54] He stated further that the refusal by the president to appoint judges was hindering the

---

49 Minister Thembi Simelane: 'Justice and Constitutional Development Dept Budget Vote 2024/25,' < https://www.gov.za/news/speeches/minister-thembi-simelane-justice-and-constitutional-development-dept-budget-vote> accessed on 12/10/2025.

50 Minister Thembi Simelane: 'Justice and Constitutional Development Dept Budget Vote 2024/25,' < https://www.gov.za/news/speeches/minister-thembi-simelane-justice-and-constitutional-development-dept-budget-vote> accessed on 12/10/2025.

51 Sally Engle Merry, 'Review: Law and Colonialism,' (1991) Vol. 25, No. 4, Law & Society Review 889, 892.

52 Human Rights Watch, 'Ballots to Bullets,' < https://www.hrw.org/report/2008/03/16/ballots-bullets/organized-political-violence-and-kenyas-crisis-governance> (accessed on 01/10/2022).

53 Jeff Otieno, 'Kenya: Bad blood between executive & judiciary worries Kenyans,' <https://www.theafricareport.com/142661/kenya-bad-blood-between-executive-judiciary-worries-kenyans/> Accessed on 10/10/2024.

54 Duncan Miriri, Humphrey Malalo 'Kenya Starving Judiciary of Funds, Chief Justice Says' *(Reuters 4 November 2019)* <https://www.reuters.com/article/ozatp-ukkenya-politics-idAFKBN1XE1OY-OZATP> accessed 22 March 2022.
also available Nation TV Kenya, 'CJ David Maraga Accuses Executive of Frustrating Judiciary's Work' *(Nation media 4 November 2019)* <https://www.youtube.com/watch?v=_ABSW1dJQRY> accessed on 22/03/2022.

proper functioning of the judiciary.[55] The refusal by the president to appoint the judges came despite the nominated judges having passed through the vetting process by the Judicial Service Commission (JSC).[56] The law society termed this a gross violation of the constitution.[57]

According to Maraga CJ, the appointment of, and the subsequent commencement of the work by, the judges would have helped ease the backlog of cases in the judiciary.[58] This lack of appointment by the final appointing authority, as well as the issues of funding, raised serious questions about how well the judiciary should be facilitated to carry out its work.

Uganda, on its part, had a history of coup d'états, and the autocratic rule of leaders like Amin did not exactly put Uganda on the path to democracy. Among the ills that continue to bedevil Uganda are heavy-handedness from security personnel and, at times, sheer disregard for the courts' authority.[59] Uganda's judiciary has operated under difficult circumstances, including interference by politicians and having to work with limited resources. The question of the funding of the judiciary in Uganda has been a thorny one, with the former chief justice coming to the fore, lamenting about how their work is being hampered by a lack of proper funding.[60] It was the view of the

---

55 Judah Ben-Hur, 'LSK Terms Uhuru's Failure to Appoint Judges as Gross Violation of the Constitution' *(Standard media 2 September 2020)* <https://www.standardmedia.co.ke/nairobi/article/2001384913/lsk-terms-uhurusfailure-to-appoint-judges-as-gross-violation> accessed on 28/02/2022.

56 Japheth Ogila, 'CJ David Maraga Blames President Uhuru for the backlog of cases, decries disregard of Court orders' *(Standard Media 18 June 2020)* <https://www.standardmedia.co.ke/nairobi/article/2001374421/president-uhurus-uta-do-attitude-paralysing-courts-cj-maraga?fbclid=IwAR3UYyfG-nL8x-TnSiVHNVhMKe_i4j4DqVv5xKVyu9h3t8J56s2KkjwA4VE> accessed on 28/04/2022.

57 Judah Ben-Hur, 'LSK Terms Uhuru's Failure to Appoint Judges as Gross Violation of the Constitution' *(Standard media 2 September 2020)* <https://www.standardmedia.co.ke/nairobi/article/2001384913/lsk-terms-uhurusfailure-to-appoint-judges-as-gross-violation> accessed on 28/02/2022.

58 Japheth Ogila, 'CJ David Maraga Blames President Uhuru for the backlog of cases, decries disregard of Court orders' *(Standard Media 18 June 2020)* <https://www.standardmedia.co.ke/nairobi/article/2001374421/president-uhurus-uta-do-attitude-paralysing-courts-cj-maraga?fbclid=IwAR3UYyfG-nL8x-TnSiVHNVhMKe_i4j4DqVv5xKVyu9h3t8J56s2KkjwA4VE> accessed on 28/04/2022.

59 Observer Uganda, 'Museveni on why the government will continue to disobey court orders,' (21/09/2022) <https://observer.ug/news/headlines/75255-museveni-on-why-govt-will-continue-to-defy-court-orders> accessed on 27/10/2022.

60 African legal information institute, 'Judicial independence infringed when Uganda's Chief Justice has to 'plead' for funds' *(20 March 2020)* < https://africanlii.org/articles/2020-03-20/carmel-rickard/judicial-independence-infringed-when-ugandas-chief-justice-has-to-plead-for-funds-constitutional-court> accessed on 10/11/2022.

judges that the judiciary was not being regarded as an equal arm of government. In their remark, the court said the system made the judiciary very much the junior branch of the three arms of government, and often reduced the Chief Justice 'to pleading for funds from the executive'.[61]

Lack of proper funding and the control of the said funds can hurt the work of the judiciary, and, by extension, undermine the principles of democracy. Proper and adequate funding ensures that the judiciary can play its rightful role in safeguarding democracy, the rule of law, and constitutionalism. The judiciary should be able to attract quality individuals as judges to carry out the sacred duty of deciding matters before them, and they must work well assured that they will be well remunerated. This research seeks to explore the extent to which judicial independence is maintained in these countries, the factors that impede it, and the impact of these challenges on the rule of law and constitutionalism. By looking at the historical contexts, the legal frameworks, and the current practices, this study will look into the effectiveness of judicial independence in promoting democratic governance and protecting human rights. The findings will contribute to the broader discourse on judicial reform, where necessary, and the strengthening of democratic institutions.

1.3 Research questions

The primary research question of the study is: Whether an independent judiciary plays a part in safeguarding the rule of law and constitutionalism? In order to supplement the primary research questions, the following secondary questions will be addressed,

What characterises an independent judiciary?

What role does the proper funding of the judiciary play in ensuring an independent judiciary?

What role do courts play in transformative constitutionalism?

How do politics and ideology affect the work of the judiciary?

---

61 Carmel Rickard, 'Judicial independence infringed when Uganda's Chief Justice has to 'plead' for funds - constitutional court,' 20/03/2020 < https://africanlii.org/articles/2020-03-20/carmel-rickard/judicial-independence-infringed-when-ugandas-chief-justice-has-to-plead-for-funds-constitutional-court> accessed on 10/11/2022.

1.4 Aim of this research

The main aim of this research is to highlight the importance of an independent judiciary, point out those deficits that undermine that independence, and explore the approaches that can be adopted to make the judiciary truly independent. The research looks at the aspects that make the work of the judiciary easy in its role of safeguarding the rule of law and constitutionalism. The study explores the seriousness employed to make the judiciary independent. This is as outlined in the Kenyan constitution under article 160,[62] and in Uganda's constitution as captured under article 128.[63] It also looks at the independence of South Africa's judiciary as outlined in the South African Constitution of 1996.[64]

This study explores the pillars that make for a credible independent judiciary. It looks at the commitment with which the benches carry out their sacred duties, the confidence they inspire as a result, and whether they prove true or not to the timeless creed coined by Lord Hewart that says, 'Justice must not only be done but must be seen to be done.'[65] Among other things, the study explores the theoretical and philosophical approaches that can be truly adopted to make the judiciary an independent arm of government.

1.5 Significance of the research

Every democratic society requires strong institutions that can withstand challenges. The judiciary is a key institution, and its independence is paramount to the life and sustainability of a democratic state, and the protection of the rights of ordinary citizens.

When a judiciary is independent, it can decide on matters without fear, favour, or prejudice. It, ultimately, boils down to the question of what importance is brought about by an independent judiciary. The benefits of an independent judiciary ensure that democracy will be protected and countries can have robust civil societies that can champion the rights of the masses. The wider public can rest assured that, when

62 Article 160 of the Kenyan constitution of 2010, Independence of the judiciary.
63 Article 128 of the Ugandan constitution of 1995 with amendments through 2017.
64 Section 165 of the south African constitution of 1996, Judicial Authority.
65 This dictum was laid down by Lord Hewart**,** the then Lord Chief Justice of England in the case of *Rex v Sussex Justices. R v Sussex Justices, ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER Rep 233).

they have a matter that has to be determined by a court, it shall be determined fairly. In brief, the judiciary must not be beholden to anybody. When it comes to funding the judiciary, it is important that South Africa, Kenya, and Uganda set budgets enough to cater to the financial needs of their judiciaries.

1.6 Scope of this research

This research highlights the strides made by democratic states, with particular focus on the chosen states of this study, namely South Africa, Kenya, and Uganda. Emphasis will be on the role that an independent judiciary plays in safeguarding the rule of law and constitutionalism. The study takes a brief historical look and analyses the state of their judiciaries from the days of colonisation and post-colonization, and the strides made thus far. It looks at the theoretical and philosophical aspects that shape the understanding of an independent judiciary. It further looks at the status of the judiciary during apartheid in South Africa, and, later, the role that the judiciary has played and continues to play in post-apartheid South Africa since the dawn of democracy. Emphasis is on the adopted constitutions of the featured countries and the prominent role the judiciary plays or should and must play.

This research neither attempts to be exhaustive nor will it be presented so as to comprehensively offer arguments in particular contexts of the chosen themes, but rather, it will add to the central viewpoints that tend to dominate our contemporary legal understanding of the rule of law and constitutionalism. It also looks at the doctrine of the separation of powers and assesses how this affects judicial independence. The question of the funding of the judiciary is looked at with the aim of establishing the effect it has on judicial independence. The research further looks at transformative constitutionalism and the progress that has been made in the three featured countries to use the law to transform their societies. Finally, the issue of politics and ideology is looked at to see how these affect the work of the judiciary.

1.7 Research methodology

This research is based on a qualitative methodology; it employs a case study method, employing multiple case studies with an embedded approach. It will be taking an aspect and comparing it with similar aspects in the featured jurisdictions. This will be based on the previous and ongoing events in these countries that have put a spotlight

on the principles of the separation of powers, and also on having their independence tested.

This research looks at the question of the funding of the judiciary in Uganda, Kenya, and South Africa, exploring the controversy surrounding the funding of the judiciary in Kenya and Uganda.[66] A comparison of the funding models in South Africa, Kenya, and Uganda is therefore undertaken.

Among the sources utilized herein are the constitutions of these respective countries, the existing laws, international instruments, published journal articles, theses and dissertations, books, conferences, peer-reviewed research, etc.

1.8 Brief description of key terms

1.8.1 The judiciary

The judiciary is the branch of government that administers justice according to the law. The term is used to refer broadly to the courts, the judges, magistrates, adjudicators, and other support personnel who run the judicial systems. The courts apply the law, settle disputes, and punish lawbreakers according to the law.[67]

1.8.2 Judicial Authority

This is the power available to the judiciary exercised via the courts and tribunals. According to the Kenyan Constitution of 2010, judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.'[68]

---

66 African legal information institute, 'Judicial independence infringed when Uganda's Chief Justice has to 'plead' for funds' *(20/03/2020)* <https://africanlii.org/articles/2020-03-20/carmel-rickard/judicial-independence-infringed-when-ugandas-chief-justice-has-to-plead-for-funds-constitutional-court>accessed on 10/11/2022.

67 Queensland Parliament, 'Role of the Judiciary' (July 2015) <https://documents.parliament.qld.gov.au/explore/education/factsheets/Factsheet_5.1_RoleOfTheJudiciary.pdf> accessed on 12/12/2022.

68 Article 159(1) of the Kenyan Constitution of 2010.

Under the South African Constitution, section 165 provides for the judicial authority, it specifies where the power emanates and how it is to be exercised.[69]

In Uganda, the exercise of judicial authority is envisaged under Article 126 of Uganda's constitution. It states that judicial power is derived from the people and shall be exercised by the courts established under this constitution in the name of the people and in conformity with the law and with the values, norms, and aspirations of the people.[70]

1.8.3 Judicial Independence

Judicial independence is the ability of members of the bench to operate free from pressures, inducements, or any form of influence. Judicial independence encompasses both institutional and personal independence, among other things. The independence of the judiciary includes how the judges are nominated and appointed,[71] which bodies are responsible for the vetting of judges before they are appointed,[72] the tenure of office and job security of judges,[73] the remuneration of judges, financial autonomy, etc.[74]

Personal independence for judges involves their professional approach and the freedom they possess in making judicial decisions, this denotes that judges carry out

---

69 165 (1) The judicial authority of the Republic is vested in the courts.
(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
(3) No person or organ of state may interfere with the functioning of the courts.
(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.
(6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.

70 Article 126(1) of the Uganda's constitution of 1995 with amendments through 2017.

71 Section 174 of the South African Constitution of 1996.

72 Section 174(3) of the South African constitution of 1996, check also at Article 172(1) (a) of the Kenyan Constitution of 2010, The Judicial Service Commission shall promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice and shall—
(*a*) recommend to the President persons for appointment as judges.

73 Article 168(1) of the Kenyan constitution of 2010, see also section 176(1)(2)(3) of the South African constitution of 1996.

74 Section 176(3) of the South African constitution of 1996.

their duties without undue influence from external sources, whether governmental, private, or public.[75]

1.8.4 The rule of law

The rule of law denotes a durable system of laws, institutions, norms, and community commitment that delivers accountability, just law, open government, and access to impartial justice.[76]

The concept of the rule of law is understood with reference to the theory of the British jurist, Albert Venn Dicey. A summary of the rule of law according to Dicey, as posited in his book *Introduction to the Study of Law of the Constitution (1885),*[77] provides that the rule of law has three characteristics:

> 'First, because the law is supreme, all public power must be exercised in terms of empowering provisions, secondly, everyone is equal before the law, and finally, the courts are responsible for applying the laws of a country. If all three conditions are met, then the rule of law is established within a state.'[78]

Under the rule of law, there are different facets, including the concept of the principle of legality. The principle of legality denotes that every decision that is taken must be based on stipulated law. The court in *Fedsure*, stipulated that the principle of legality, as an incidence of the rule of law, is what determines whether public bodies act lawfully or not.[79] An essential aspect of the rule of law requires that all exercises of public power must be lawful and that public power must be exercised within the provisions of the authorising legislation. According to Hoexter, the principle of legality requires that all exercises of public power, including non-administrative action, conform to certain accepted minimum standards.[80]

---

75 David S. Law, 'Judicial Independence,' (*Encyclopaedia Britannica)* <https://www.britannica.com/topic/judicial-independence> accessed 10/10/2024.

76 World Justice Project, 'What Is the Rule of Law?' <https://worldjusticeproject.org/about-us/overview/what-rule-law> accessed on 10/10/2022.

77 Dicey AV and S. WEC, Introduction to the study of law of the constitution (Macmillan 1967).

78 Dicey AV and S. WEC, Introduction to the study of law of the constitution (Macmillan 1967).

79 *Fedsure Life Assurance ltd and others v Greater Johannesburg transitional Metropolitan Council and others* (CCT7/98) [1998] ZACC 17 1999(1) SA 374; 1998 (12) BCLR 1458 paragraph 56(CC).

80 Cora Hoexter, 'The principle of legality, South Africa Administrative law' (2004) 8 Macquarie LJ 165, available at <http://classic.austlii.edu.au/au/journals/MqLawJl/2004/8.html> (accessed on 09/09/2022).

1.8.5 Separation of powers

The separation of powers refers to the division of government responsibilities into distinct branches to limit any one branch from exercising the core functions of another.[81] According to Makama, the separation of powers is paramount. He is of the view that it is important for the establishment and maintenance of political liberty. He captures the following about the separation of powers:

> 'It may be concluded that the objective of the doctrine is to ensure good governance and to restore and maintain peace and the rule of law in a state. The separation of powers guarantees fairness and justice within the state and its society which cannot be achieved where power is concentrated in the hands of a single body.'[82]

The separation of powers also takes a different form depending on the adopted theory of a particular jurisdiction, and this may include formalism or functionalism, or a mix of the two.[83] Montesquieu states that: 'The political liberty of the subject is a tranquillity of mind arising from the opinion each person has of his safety. To have this liberty, it requires the government to be so constituted, such that one man need not be afraid of another.'[84] He goes on to state that:

> "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."[85]

The separation of powers is so important that, in essence, the smooth running of government is dependent on it. Montesquieu was of the view that, when power is concentrated in one person or a single body, it can easily breed tyranny. On equality, Montesquieu states:

---

81 National Conference of State Legislature, 'Separation of powers--an Overview' <https://www.ncsl.org/research/about-state-legislatures/separation-of-powers-anoverview.aspx> accessed on 11/11/2022.

82 Saul Posche Makama, 'Constitutionalism and judicial appointment as a means of safeguarding judicial independence in selected African jurisdictions' (LLM dissertation, University of South Africa 2012) pg.38.

83 Ronald J. Krotoszynski, Jr. Transcending formalism and functionalism in separation of powers, 64 Duke L.J. 1513-69(2015). Available at <http://scholarship.law.duke.edu/dlj/vol64/is s8/2/> accessed on 12/11/2022.

84 Secondat MCde, Nugent T and Secondat MCde, *The spirit of laws.* (London 1750) pg. 221.

85 Secondat MCde, Nugent T and Secondat MCde, *The spirit of laws.* (London 1750) pg. 221.

> "As distant as heaven is from the earth, so is the true spirit of equality from that of extreme equality. The former does not imply that everybody should command, or that no one should be commanded, but that we obey or command our equals. It endeavours not to shake off the authority of a master, but that its masters should be none but its equals."[86]

1.8.6. Constitutionalism

According to the Stanford Encyclopaedia of Philosophy, *"Constitutionalism*" is the idea, often associated with the political theories of John Locke and the founders of the American republic, that government can and should be legally limited in its powers, and that its authority or legitimacy depends on its observing those limitations.[87]

1.8.7 Transformative constitutionalism

Transformative constitutionalism is a constitutional principle fashioned by Professor Karl Klare. He describes transformative constitutionalism as the process of using the values set by a constitutional framework of a state to usher in a change in the social, legal, economic, or political systems.[88]

Klare is of the view that politics, the law, and economic rights are interwoven. According to him, the Constitution comprehends that "political freedom and socio-economic justice are inextricably intertwined and, therefore, draws a close connection between political and socio-economic rights."[89]

1.8.8 Judicial Funding

In the context of an independent judiciary, it is important that the judiciary should be well-resourced, but, more importantly, that it must be able to control its own purse. This financial autonomy enables the judiciary to carry out its programmes seamlessly

---

86 Secondat MCde and Nugent T, *The Spirit of Laws. Translated by Nugent. the Second Edition,* Batoche Books (Canada 1752) pg. 132.

87 Waluchow, Wil, "Constitutionalism", *The Stanford Encyclopedia of Philosophy* (Spring 2018 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/spr2018/entries/constitutionalism/> accessed on 04/09/2022.

88 Karl E Klare, 'Legal Culture and Transformative Constitutionalism,' [1998] SAJHR 146, 153.

89 Karl E Klare, 'Legal Culture and Transformative Constitutionalism,' [1998] SAJHR 146, 153.

as it sees fit. With financial autonomy, the judiciary can hire more judges, build and operationalise courts in places where there is a need, etc.

1.9 Structure of the Study and Outline of the Chapters

Chapter one of this research outlines the general introduction, background, problem statement, the research question, the aim of the study, and the methodology to be adopted to help reach the intended purpose. This chapter also provides a brief overview of the key concepts to be examined.

Chapter two focuses on the principles of the rule of law and constitutionalism and how they are applied in South Africa, Kenya, and Uganda. The research takes a historical background through which these countries have been, and a comparison is made with the present realities.

Chapter three focuses on the independence of the judiciary. The research study explores the factors that make up an independent judiciary. The focus is also on the challenges faced by the judiciary in the countries being studied, and examines how they are possibly affected by them.

Chapter four focuses on the question of judicial funding. Great emphasis is put on the need for the judiciary to have adequate funds and the importance of the financial autonomy of the judiciary, which means that the judiciary should be in control of its own purse.

Chapter five focuses on the concept of transformative constitutionalism. It looks at the constitution as a force that drives social change while promoting justice, equality, equity, and other aspects of human rights. It frowns upon a *status quo* that wants to maintain an unjust society. Most importantly, it seeks to transform society by addressing past injustices and inequalities.

Chapter six focuses on the role that ideology and politics play in society and their influence on the judiciary.

Chapter seven is a general conclusion of the study; it briefly summarises the key findings of the study, highlighting their significance and offering recommendations.

CHAPTER 2

THE APPLICATION OF THE RULE OF LAW, AND CONSTITUTIONALISM IN KENYA, UGANDA, AND SOUTH AFRICA

2.1 Introduction

In this chapter, the focus is on the concepts of the rule of law and constitutionalism as applied in South Africa, Kenya, and Uganda. The study takes a historical look at the countries being studied, highlights the strides they have made, and simultaneously identifies issues that may impede the implementation of the rule of law and constitutionalism. The rule of law and constitutionalism are the pillars on which human rights and democracy stand; they are the irreducible minimums for a free society where everyone is equal before the law, under whose prescripts no arbitrary use of power is allowed. These two concepts relate to one another as they pertain to the authority of the state, how the state officials and institutions should operate, and what must be done to restrain them. A comparison is at times made between the two concepts. According to Ten:

> Constitutionalism and the Rule of Law are related ideas about how the powers of government and state officials are to be limited. The two ideas are sometimes equated. But constitutionalism, generally understood, usually refers to various constitutional devices and procedures, such as the separation of powers between the legislature, the executive and the judiciary, the independence of the judiciary, due process or fair hearings for those charged with criminal offences, and respect for individual rights, which are partly constitutive of a liberal democratic system of government.[90]

While Constitutionalism and the Rule of law are not the same, they are interlinked and important in helping to achieve a harmonious society.[91] Reynolds argues that Constitutionalism is the practical science of designing and balancing institutions of

---

90 C.L Ten, 'Constitutionalism and the Rule of Law,' in A Companions to Contemporary Philosophy, Vol 2, 2nd Edition, *Robert E. Goodin Philip Pettit and Thomas Pogge* (Blackwell Companions to Philosophy 2007).

91 Noel B Reynolds, 'Constitutionalism and the Rule of Law,' (1986) Brigham Young University, <https://scholarsarchive.byu.edu/cgi/viewcontent.cgi?article=2470&context=facpub> Accessed on 30/01/2024.

public power and authority to prevent monopolies of power or the emergence of tyranny.[92] He posits further that, despite the continuing attempts to ground constitutions in moralistic political theories, they are best understood as formalizations of citizenry agreements to manage their affairs under the rule of law following rules formulated by their legislatures and applied by their judges.[93]

Constitutionalism, as it is commonly understood, refers to a number of constitutional practices and mechanisms, and it is treated as a synonym for the legal enforcement of constitutional rules, or perhaps a subset of those rules regarded as a desirable, maybe even a necessary, feature of a constitutional order.[94] The principles of Constitutionalism include the Separation of Powers, Responsible and Accountable Government, Popular Sovereignty, an Independent Judiciary, Individual Rights, and the Rule of Law.[95] It is through constitutionalism that a true democratic society is created. Constitutionalism frowns on authoritarianism and absolutism. On the other hand, the 'Rule of Law' embodies a set of norms that characterise a legal system. It is such that steps taken or decisions made must be based on the provided law, fairly and equally applicable to everyone. According to the American Bar Association, no one is exempt from the rule of law, everyone is treated equally before the law, everyone is held responsible to the same laws and there are transparent and fair procedures when enforcing laws, an independent judicial system, and everyone is guaranteed their human rights.[96]

2.2 A brief explanation of the concept of the rule of law

The rule of law is of utmost importance with regard to the functioning of society. It prescribes what should be the best practice for a harmonious society. It has, however, at times been invoked to suit arguments of some people in different areas and in

---

92 Noel B Reynolds, 'Constitutionalism and the Rule of Law,' (1986) Brigham Young University, <https://scholarsarchive.byu.edu/cgi/viewcontent.cgi?article=2470&context=facpub> Accessed on 30/01/2024.

93 Noel B Reynolds, 'Constitutionalism and the Rule of Law,' (1986) Brigham Young University, <https://scholarsarchive.byu.edu/cgi/viewcontent.cgi?article=2470&context=facpub> Accessed on 30/01/2024.

94 N. W. Barber, 'The Principles of Constitutionalism,' (OUP, 2018) 1.

95 Maru Bezezew, 'Constitutionalism,' (2009) Vol. 3 No.2, Mizan law review, 358.

96 ABA, 'Rule of Law,' <https://www.americanbar.org/groups/public_education/resources/rule-of-law/#:~:text=Many%20countries%20throughout%20the%20world,rights%20are%20guaranteed%20for%20all.> accessed on 27/10/2022.

different capacities to align with whatever agendas they may want to achieve.[97] According to Sellers, developing societies seek to establish the rule of law, well-regulated societies seek to preserve it, and most governments claim to maintain it, whatever the nature of their actual practices.[98] This means that the rule of law has a universal value. It has been endorsed by the United Nations. The United Nations General Assembly (UNGA) has it that 'Human Rights, the Rule of Law and Democracy' are the universal and indivisible core values and principles with which they identify.[99]

Originally attributed to Aristotle, the rule of law was defined as 'a government by laws and not by men.'[100] Scholars, judges, and lawyers in various countries, particularly in recent years, have laboured to define in detail the meaning of this concept. There is consensus that the concept is difficult to define in a way that captures all of its meaning.[101] According to Stein, the phrase "rule of law" is often invoked to support a variety of political agendas intended to persuade a person or persons, depending on the idea they want to advance.[102] Stein is of the view that speakers from different points of the spectrum have different views of what constitutes the rule of law. This ranges from government leaders to judges, scholars, lawyers, and speakers of different backgrounds who invoke the rule of law as both the means to an end and as an end in itself.[103]

Justice Anthony Kennedy, a former U.S Supreme Court Judge, observed that the term "rule of law" is often invoked yet seldom defined.[104] The definition of the rule of law as

---

97 Robert Stein, 'Rule of Law: What Does It Mean?' (2009) vol 18 MINN J INT'L L 293, 296. available at <https://scholarship.law.umn.edu/faculty_articles/424> accessed on 25/7/2022.

98 Mortimer Sellers and Tadeuz Tomaszewski, 'Rule of Law in Comparative Perspective,' (3rd ed springer 2010) 1.

99 United Nations General assembly, U.N.G.A. /RES/61/39, 18 December, 2006, on "The rule of law at the national and international levels." *Cf.* A/RES/62/70; A/RES/63/128.

100 F A Hayek, *The Constitution of liberty*, (Vol XVII the Definitive Edition, The University of Chicago Press, 2011) 243.

101 American Bar Association, 'What is the rule of law?' <https://www.americanbar.org/advocacy/rule_of_law/what-is-the-rule-of-law/> accessed on 09/09/2022.

102 Robert Stein, 'Rule of Law: What Does It Mean?' (2009) vol 18 MINN J INT'L L 293, 296. available at <https://scholarship.law.umn.edu/faculty_articles/424?'> accessed of 25/07/2022.

103 Robert Stein, 'Rule of Law: What Does It Mean?' (2009) vol 18 MINN J INT'L L 293, 296. available at <https://scholarship.law.umn.edu/faculty_articles/424?'> accessed on 25/7/2022.

104 Anthony M. Kennedy, Assoc. Justice, U.S. Supreme Court, Address at the 20th Sultan Azlan Shah Law Lecture: Written Constitutions and the Common Law Tradition (Aug. 10, 2006) available at <https://perma.cc/6TK8-PZRU> accessed on 25/07/2022.

outlined in the 2004 Report of the Secretary-General of the United Nations is as follows:

> The rule of law refers to a principle of governance in which all persons, institutions, and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.[105]

The rule of law is considered among the key concepts that determine the quality and good governance of a country. In other words, it means that everybody is subjected to the law and that no one, including the government, is above it. This, consequently, translates into the protection of fundamental rights, the accessibility of justice for all, and just laws enacted/made to serve the interest of society.[106]

According to Stein, the principles that make the rule of law are both procedural and substantive.[107] Procedural aspects prescribe, for example, that the law must be the supreme law of the land, publicly promulgated, equally enforced, and the adjudication of which must be by an independent judiciary.[108] Procedural rules require, further, that the laws must be fairly and equally applied, and that the separation of powers must be observed in the enactment and adjudicative processes.[109] It makes sense that the substantive nature of the rule of law must be just and consistent with the norms and standards of international human rights in alignment with international human rights

---

105 U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict societies*, 6, U.N. Doc. S/2004/616 (Aug. 23, 2004).

106 World Justice Project, 'Factors of the Rule of Law,' <https://worldjusticeproject.org/our-work/research-and-data/factors-rule-law> Accessed on 15/11/2023.

107 Robert Stein, 'What Exactly Is the Rule of Law?' (2019) 57 Houston law review 185,188 available at <https://scholarship.law.umn.edu/faculty_articles/698> accessed on 25/07/2022.

108 Robert Stein, What Exactly Is the Rule of Law? Houston law review,57 185 (2019), pg 188 available at <https://scholarship.law.umn.edu/faculty_articles/698> accessed on 25/7/2022.

109 Robert Stein, 'What Exactly Is the Rule of Law?' (2019) 57 Houston law review 185,188 available at https://scholarship.law.umn.edu/faculty_articles/698.

law. Stein further states that the rule of law requires the avoidance of arbitrariness in the law.[110]

Many thinkers have played a part in shaping our understanding of the rule of law and how it should be applied. This has, in turn, contributed to shaping and maintaining free societies. Some American Supreme Court justices have played a part in helping define the 'rule of law.' Justice Kennedy has expressed in different ways what constitutes the rule of law.[111] In 2006, in an address to the American Bar Association (ABA), Justice Kennedy gave the following as the minimum for a society governed by the rule of law:

> The Rule of law is superior, it binds the government and its officials, it rests upon known general principles applicable on equal terms to all persons,[112] precisely, everybody is subjected to it and no one is above it, from the most prominent in society to the poor of the poorest, everyone is equal before the law.[113]

Justice Kennedy continued to emphasize the moral component of the rule of law, pointing out that individuals should be free to participate in the creation of laws that govern them and that laws should respect and preserve the equality, dignity, and human rights of all people.[114]

2.3 Rule of law vs "rule by law": the experience of South Africa, Kenya, and Uganda

The rule of law, by its basic definition, is where the law applies equally to everybody and everyone is subject to the law regardless of his or her position.[115] On the other hand, 'rule by law' denotes a chaotic society where laws are employed as instruments of authority rather than to achieve justice and safeguard individual rights and

---

110 Robert Stein, 'What Exactly Is the Rule of Law?' (2019) 57 Houston law review, 185,188, available at https://scholarship.law.umn.edu/faculty_articles/698.

111 Robert Stein, Rule of Law: What Does It Mean? (2009) 18 MINN. J. INT'L L. 293,299 available at https://scholarship.law.umn.edu/faculty_articles/424.

112 Kennedy A, 'Written Constitutions and the Common Law Tradition', 20th Sultan Azlan Shah law Lecture, 2006, pg 261 available at https://perma.cc/6TK8-PZRU accessed on 5/07/2022.

113 Kennedy A, 'Written Constitutions and the Common Law Tradition', 20th Sultan Azlan Shah law Lecture, 2006, pg 261 available at https://perma.cc/6TK8-PZRU accessed on 5/07/2022.

114 Kennedy A, 'Written Constitutions and the Common Law Tradition', 20th Sultan Azlan Shah law Lecture, 2006, pg 261 available at https://perma.cc/6TK8-PZRU accessed on 5/07/2022.

115 Jurist, 'Legal News and Commentary,' < https://www.jurist.org/rule-of-law-materials/#:~:text=The%20rule%20of%20law%20is,are%20enforced%20equally%20and%20impartially.> accessed on 20/03/2024.

liberties.[116] According to the Stanford Encyclopedia of Philosophy, 'Rule by Law' connotes the instrumental use of law as a tool of political power.[117] It means that a state uses law to control its citizens, but tries never to allow law to be used to control it.[118] It is associated with the debasement of legality by authoritarian regimes.[119] Here, the elites do not account for their actions; they arbitrarily trample on people's rights, and not much can be done by anyone. Under 'Rule by Law,' the existing laws may be selectively enforced to target specific groups or individuals and, generally, to serve the interests of those in power. In contrast, under the rule of law, legal decisions are made based on properly enacted or established laws, and these are applied consistently and equally to all. Fundamental rights and freedoms are guaranteed and protected, and most importantly, there is the existence of an independent and impartial judiciary safeguarding those rights.

2.3.1 "Rule by law" in South Africa

South Africa is a constitutional democracy run by the rule of law, but it has also experienced "rule by law," associated with colonization and apartheid, which were systems that dehumanized the majority of South Africans. The conditions in both of these regimes were intolerable, and the majority of the laws passed during colonization and apartheid were never rational or founded on the concepts of human rights and dignity. A society that is governed by the law must adhere to a minimum set of widely recognized norms. Enacting and enforcing just laws, creating an environment that facilitates the public's access to impartial justice, and holding the public and private sectors accountable are just a few of the principles that World Justice Projects outlines.[120] Both throughout colonization and during the Apartheid era, these ideals were non-existent. Apartheid-era South Africa was characterised by laws that divided people based solely on race. No black

---

116 Stanford Encyclopedia of Philosophy, 'Rule by Law,' (Fall 2023 Edition), Edward N. Zalta & Uri Nodelman (eds) <https://plato.stanford.edu/entries/rule-of-law/> Accessed on 27/08/2024.

117 Stanford Encyclopedia of Philosophy, 'Rule by Law,' (2016) <https://plato.stanford.edu/entries/rule-of-law/> Accessed on 25/11/2023.

118 Stanford Encyclopedia of Philosophy, 'Rule by Law,' (2016) <https://plato.stanford.edu/entries/rule-of-law/> Accessed on 25/11/2023.

119 Stanford Encyclopedia of Philosophy, 'Rule by Law,' (2016) <https://plato.stanford.edu/entries/rule-of-law/> Accessed on 25/11/2023.

120 World Justice project, 'What's the rule of law?' <https://worldjusticeproject.org/about-us/overview/what-rule-law> accessed on 20/09/2022.

person was allowed to date or marry a white person.[121] The Apartheid regime also introduced the "Pass Law". Commonly referred to as *Dompas*, this was a document that black people had to carry to prove their identity. These *Dompasses* were also used to curtail the movement of black people.[122] South Africans were subjected to this abuse for decades until 1994 when they regained their freedom.[123]

Under Apartheid South Africa, the majority of black people passed through untold suffering under the most evil system ever conceived by a human mind.[124] For decades, racist laws that entrenched white supremacy controlled the country's black majority.[125] The apartheid government had laws that perpetuated segregation, oppression, and midwifed the indignity of the black masses.[126] Just like the situation that existed during colonisation, apartheid was also characterised by unjust laws that took away people's rights. The negative effects of apartheid are still felt to this day.[127] Apartheid laws forced different racial groups to live separately and develop separately, putting them into a typical unequal society. It criminalised all interracial marriages and social integration between racial groups.[128] These laws included, the Population Registration Act of 1950, an Act which demanded that people be registered according to their racial group. This meant that the department of home affairs had records of people according

---

121 World Children's Prize, 'Apartheid was Legalized Racism,' <https://worldschildrensprize.org/apartheidegalracism> accessed on 20/03/202.

122 Pass or *Dompas* was used during Apartheid to track the movement of the oppressed black masses.

123 Up until 1994 South Africa, was under Apartheid having also been under colonization, both these systems arbitrarily applied the law, the laws at the time served the to advance white privilege inequality and segregation, black masses were subjugated some killed under those systems.

124 Apartheid can be described as a system that is morally indefensible, tramples on people's rights, dehumanizes human beings, and breeds hatred. Put simply nothing good can be written about it, it can be summed up as an evil systemic.

125 Erin Blakemore, 'The harsh reality of life under Apartheid in South Africa' (10/09/2021) <https://www.history.com/news/apartheid-policies-photos-nelson-mandela> accessed on 27/07/2022.

126 History.com editors, 'Apartheid' (03/03/2020) <https://www.history.com/topics/africa/apartheid#:~:text=Apartheid%20(%E2%80%9Capartnes%E2%80%9D%20in%20the,existing%20policies%20of%20racial%20segregation> accessed on 27/07/2022.

127 Nic Cheeseman and Jonathan Fisher, 'How colonialism committed Africa to fragile authoritarianism,'(02/11/2019) <https://qz.com/africa/1741033/how-colonial-rule-committed-africa-to-fragile-authoritarianism-2/> accessed on 27/07/2022.

128 South African history online, 'A history of apartheid in South Africa,' (06/05/2016) <https://www.sahistory.org.za/article/history-apartheid-south-africa> accessed on 27/072022.

to their skin colour, whites, coloureds, blacks, Indians or Asians, making it easy for the apartheid government to treat them differently according to their population group.[129]

2.3.2 'Rule by law' in Kenya

Gosewinkel rightfully argues that the laws in place during colonization were intended to subjugate the masses, break their spirit, and dominate them completely.[130] There were ordinances passed by colonial governments to ensure that the masses were controlled.[131] These laws perpetuated discrimination and exploited black people through unfair labour practices. In 1902, the British colonisers introduced 'Hut taxes' in Kenya. A hut tax system required families to pay a specified amount to the government for each hut or dwelling they owned.[132] Because of the lack of money to pay this tax, the natives were compelled to seek wage employment to earn the money necessary to pay that tax. A fine was imposed if one failed to pay the 'Hut tax', and, if those fines went unpaid, the punishment was forced labour. This situation provided British settlers with a readily available source of cheap labour, precisely forcing them to work for white settlers.[133]

The unfair labour practices meant that black people worked under harsh conditions and were not fairly remunerated**.** According to Merry, 'laws were passed in various colonies to regulate labour contracts, land tenure, vagrancy, and desertion, and they also served to control social activities that impinged on work.' [134] In Kenya, *Kipande,* or Pass, was an identification system enforced through the 1906 Masters and Servants Ordinance. This controlled the natives' movement and tracked their labour record. The

---

129 South African history online, 'A history of apartheid in South Africa,' (06/05/2016) <https://www.sahistory.org.za/article/history-apartheid-south-africa> accessed on 27/072022.

130 Gosewinkel, Dieter, 'Conquest and Subjugation: Hierarchies of Citizenship Rights between Colonization and Decolonization (1900–1950)', Struggles for Belonging: Citizenship in Europe, 1900-2020 (Oxford, 2021; online edn, Oxford Academic, 23/12/2021),<https://doi.org/10.1093/oso/9780198846161.003.0005> accessed on 12/02/2023.

131 Sally Engle Merry, 'Review: Law and Colonialism,' (1991) Vol. 25, No. 4, Law & Society Review 889, 892.

132 Paukwa, 'History of Tax in Kenya,' (21/08/2019) <https://paukwa.or.ke/kecurrency-taxes-taxes-taxes/> Accessed on 08/04/2024.

133 Paukwa, 'History of Tax in Kenya,' (21/08/2019) <https://paukwa.or.ke/kecurrency-taxes-taxes-taxes/> Accessed on 08/04/2024.

134 Sally Engle Merry, 'Review: Law and Colonialism,' (1991) Vol. 25, No. 4, Law & Society Review 889, 892.

Kipande system became law in 1915 and was implemented in 1919.[135] It required all natives to wear a neck collar on which a metal containing a red book was hung.[136] The pass or *Kipande* contained personal information that included the native's name, fingerprints, ethnicity, employment history, the signature of his or her current employer, and the rules restricting movement.[137] The Natives were divided and isolated from one another; they were also confined in overcrowded reserves that curtailed their movements.[138] These laws applied by the colonisers are the kind that can be described as "rule by law" rather than the rule of law.[139] To achieve their goal, the colonisers employed the services of collaborators to aid them in governance, which, in essence, was a tactic to control the masses. According to Cheeseman and Fisher:

> Colonial governments typically lacked enough officials to effectively run their territories. To maintain political stability, they, therefore collaborated with – or subordinated – existing leaders and power structures. In many cases, this involved funding and arming willing collaborators to enable them to exert greater control over their communities. These leaders were expected to manage their communities and prevent a rebellion against colonial rule.[140]

Laws that were put in place were not rooted in fairness or accountability, but were ruthlessly enforced and supposed to be followed religiously. As Stein puts it, 'laws must establish and safeguard the constitutional structures necessary to build a free society in which all citizens have a meaningful voice in shaping and participating in enacting the rules that govern them.'[141] It can be concluded that not every society with

---

135 Peter Karari, 'Modus Operandi of Oppressing the "Savages": The Kenyan British Colonial experience,' (2018) 25 No1 Peace and Conflict Studies Journal: Vol. 25: No. 1, Art 2, 1, 6 available at: https://nsuworks.nova.edu/pcs/vol25/iss1/2.

136 Peter Karari, 'Modus Operandi of Oppressing the "Savages": The Kenyan British Colonial experience,' (2018) 25 No1 Peace and Conflict Studies Journal: Vol. 25: No. 1, Art 2, 1, 6 available at: https://nsuworks.nova.edu/pcs/vol25/iss1/2.

137 Peter Karari, 'Modus Operandi of Oppressing the "Savages": The Kenyan British Colonial experience,' (2018) 25 No1 Peace and Conflict Studies Journal: Vol. 25: No. 1, Art 2, 1, 6 available at: https://nsuworks.nova.edu/pcs/vol25/iss1/2.

138 Peter Karari, 'Modus Operandi of Oppressing the "Savages": The Kenyan British Colonial experience,' (2018) 25 No1 Peace and Conflict Studies Journal: Vol. 25: No. 1, Art 2, 1, 6 available at: https://nsuworks.nova.edu/pcs/vol25/iss1/2.

139 Robert Stein, 'Rule of Law: What Does It Mean?' (2009) vol 18 MINN J INT'L L 293, 299. available at https://scholarship.law.umn.edu/faculty_articles/424.

140 Nic cheeseman and Jonathan Fisher, 'How colonialism committed Africa to fragile authoritarianism,'(02/11/2019) <https://qz.com/africa/1741033/how-colonial-rule-committed-africa-to-fragile-authoritarianism-2/> accessed on 27/07/2022.

141 Robert Stein, 'Rule of Law: What Does It Mean?' (2009) vol 18 MINN. J INT'L L 293, 300. available at https://scholarship.law.umn.edu/faculty_articles/424.

established laws is governed by the rule of law; in some cases, it may be by "rule by law." According to Waldrow:

> The Rule of Law is supposed to lift law above politics. The idea is that the law should stand above every powerful person and agency in the land. Rule by law, in contrast, connotes the instrumental use of law as a tool of political power. It means that the state uses law to control its citizens but tries never to allow law to be used to control the state.[142]

In a system governed by the rule of law, the established laws are made known, which helps create order and predictability in society. According to Kennedy

> Law must devise and maintain systems that make it known to all persons of their rights, empowering them to fulfil just expectations and seek redress of grievances without fear or worry of facing a penalty or retaliation.[143]

In other words, the law must be readily available, known to people, and easily enforced. And, in the event that one wants to seek redress or have grievances, then one can easily find recourse to justice. All of these principles mentioned here can be made possible only when there exists an independent judiciary.

2.3.3 "Rule by law" in Uganda

The colonisers employed 'divide and rule' tactics to keep the natives in check. These tactics implemented by the British created deep divisions within the country.[144] The Buganda kingdom was pitted against the rest of the country, and this created severe inequalities in the economy, education, and infrastructure between the people in Northern and Southern Uganda.[145] The illegal and illegitimate tactics did not end only

---

142 Jeremy Waldron, "The Rule of Law", *The Stanford Encyclopedia of Philosophy* (Fall 2023 Edition), Edward N. Zalta & Uri Nodelman (eds.) <https://plato.stanford.edu/archives/fall2023/entries/rule-of-law/> accessed on 08/04/2024.

143 Anthony M. Kennedy, Assoc. Justice, U.S. Supreme Court, Address at the 20th Sultan Azlan Shah Law Lecture: Written Constitutions and the Common Law Tradition pg. 261 (Aug. 10, 2006) available at <https://perma.cc/6TK8-PZRU> accessed on 08/04/2022.

144 Colette Armitage, 'The residuals of colonial rule and its impact on the process of racialisation in Uganda,' < https://cers.leeds.ac.uk/wp-content/uploads/sites/97/2016/04/The-residuals-of-colonial-rule-and-its-impact-on-the-process-of-racialisation-in-Uganda-Colette-Armitage.pdf> accessed on 08/04/2024.

145 Colette Armitage, 'The residuals of colonial rule and its impact on the process of racialisation in Uganda,' <https://cers.leeds.ac.uk/wp-content/uploads/sites/97/2016/04/The-residuals-of-colonial-rule-and-its-impact-on-the-process-of-racialisation-in-Uganda-Colette-Armitage.pdf> accessed on 12/01/2024.

with the colonisers; they were also experienced under the rule of Idi Amin.[146] Amin wielded power with an iron fist; in fact, he was a power unto himself. Probably one of the most well-documented examples of racial discrimination in Uganda's history was when he expelled Asians.[147] The expulsion of Indians from Uganda happened in 1972.[148] Amin made an autocratic move when he unilaterally decided that the Asians must leave Uganda. Whatever Amin decided became 'law' and was, at times, violently implemented. He ruled directly, shunning the delegation of power.[149] There is usually no road map under "rule by law"; here, everything goes, leaders make laws and arbitrarily apply them; they are not accountable to anyone. In contrast, the rule of law establishes an orderly society that is founded on properly enacted laws, where leaders are accountable and where courts give reasons for their decisions.

It is worth noting that there are jurisdictions that have laws which are, in most cases, strictly enforced, but, in some of those cases, the people never participated in their enactment.[150] North Korea is an example. The role of law in North Korea is not envisaged to serve a greater goal of regulating society. The polity in that country is structured to serve the narrow interest of protecting its leader, Kim Jong Un and his family dynasty - the Kim dynasty.[151] In this, arguably one of the most closed societies in the world, the law is still perceived as a tool to protect or safeguard narrow interests. At times, decisions are made by decree, specifically to guarantee the leadership of the Workers' Party of Korea (WPK) under the firm grip of the Kim dynasty.[152] To be

146 Idi Amin was Ugandan President who came to power after toppling Milton Obote in a military coup in 1971.

147 Colette Armitage, 'The residuals of colonial rule and its impact on the process of racialisation in Uganda,' <https://cers.leeds.ac.uk/wp-content/uploads/sites/97/2016/04/The-residuals-of-colonial-rule-and-its-impact-on-the-process-of-racialisation-in-Uganda-Colette-Armitage.pdf> accessed on 12/01/2024.

148 Thomas Brown, 'Ugandan Asians 50 Years Since their Expulsion from Uganda' (31/08/2022) <https://lordslibrary.parliament.uk/ugandan-asians-50-years-since-their-expulsion-from-Uganda/> Accessed on 20/12/2023.

149 The Editors of Britannica encyclopedia, Idi Amin <https://www.britannica.com/biography/Idi-Amin> accessed on 20/07/2024.

150 Dae Un Hong, 'North Korea Laws since 2016: What they imply for the country's future' (2024) 3 Journal of East Asian Studies 45. (25/02/2021)<https://www.38north.org/2021/02/north-korean-laws-since-2016-what-they-imply-for-the-countrys-future/> accessed on 27/7/2022.

151 Atsuhito Isozaki, 'Understanding the North Korean Regime,' (April 2017) <https://www.wilsoncenter.org/sites/default/files/media/documents/publication/ap_understandingthenorthkoreanregime.pdf> accessed on 01/01/2023.

152 Atsuhito Isozaki, 'Understanding the North Korean Regime,' (April 2017) <https://www.wilsoncenter.org/sites/default/files/media/documents/publication/ap_understandingthenorthkoreanregime.pdf> accessed on 01/01/2023.

precise, the law in North Korea has been used to institutionalise Kim Jong Un's rule.[153] Under Kim's rule, North Koreans have seen severe human rights violations that include arbitrary executions, and restrictions of civil and political liberties, others include restrictions on the freedom of expression, association and assembly, the curtailment of religion, independent media, and civil societies. Additionally, trade unions and organised political opposition are not only non-existent, but they are also prohibited.[154] The 'rule by law' in this part of the world has been imposed to strike fear among the population, and severe sentences have been imposed for flimsy reasons.[155] It then goes without saying that having laws in place does not necessarily mean the rule of law is in place.

2.4 Application of the rule of law in Kenya, South Africa, and Uganda

2.4.1 The post-colonization situation in Kenya and its impact on the law

The British colonisation of Kenya started in 1920 and ended in 1963.[156] On December 12, 1963, Kenya officially attained its Independence.[157] According to Matthews and Coogan, when the colonizers finally relinquished power to the Kenyan people, they left a demoralized judiciary, a violent, oppressive, and corrupt police force, and a contemptuous and venal bureaucracy.[158] Jomo Kenyatta became Kenya's first Prime Minister following the departure of the British colonialists. On December 12, 1964, he was elected president of the Republic of Kenya, with Jaramogi Oginga Odinga as his vice president. The British preferred Mr. Oginga to take over as president, but, in a gesture of selflessness, he (Mr. Oginga) insisted that Jomo Kenyatta, who was in detention at the time, be released so that he could lead the country to

153 Dae Un Hong, 'North Korea Laws since 2016: What they imply for the country's future' (25/02/2021) <https://www.38north.org/2021/02/north-korean-laws-since-2016-what-they-imply-for-the-countrys-future/> accessed on 27/7/2022.

154 Human Rights Watch,'Human Rights in North Korea,' (05/06/2018) <https://www.hrw.org/news/2018/06/05/human-rights-north-korea> accessed on 16/09/2022.

155 Human Rights Watch, 'North Korea:Abusive rule 10 years after Kim Jong IL' (16/12/2021) <https://www.hrw.org/news/2021/12/16/north-korea-abusive-rule-10-years-after-kim-jong-il> accessed on 16/09/2022.

156 University of Central Arkansas,British Kenya (1920-1963) <https://uca.edu/politicalscience/dadm-project/sub-saharan-africa-region/british-kenya-1920-1963/#wrap> Accessed on 20/01/2023.

157 The Editors of Encyclopaedia Britannica 'Jamhuri day', <https://www.britannica.com/topic/Jamhuri-Day> accessed on 24/09/2022.

158 Kim Matthews & William H. Coogan, 'Kenya and the Rule of Law: The Perspective of Two Volunteers,' (2008) 60 Me L Rev 561,564.

independence.[159] Mr. Kenyatta and Mr. Oginga's partnership did not survive long, as the two leaders battled over perceived ideological differences. Mr. Jaramogi Oginga stepped down as Vice President in 1966.[160]

What emerged after Odinga's exit from government was misrule that saw the elite seeking to preserve their leadership positions. A modified authoritarian rule took center stage for the next forty years before Kenya had a semblance of democracy.[161] The Kenyan elite who took over power from the colonisers did not see the need to change to a new system of governance that would ensure freedom and a free society for all.[162] They saw no need to seek true democratic ideals that would bring about a free society based on the rule of law. Instead, the country saw the continuation of the same colonial methods characterised by a complete absence of liberalism and massive human rights violations.[163] According to Sayer, post-colonial leaders took a path to self-preservation and the consolidation of power to serve personal ends.[164] The post-independence leaders did little to inspire confidence; in fact, some were determined to hang on to power. According to Matthews and Coogan, 'Kenyans endured years of post-colonial governmental predation, as those in power behaved like their British forbears: they robbed, killed, and ruthlessly defended their positions.'[165]

President Jomo Kenyatta amended the constitution to give himself wider powers.[166] According to Kangu, the law under President Kenyatta was amended to do away with

---

159 Barrack Muluka, 'Jomo and Jaramogi: A tale of Kenya's enduring political dynasties'<https://www.standardmedia.co.ke/article/2000228496/jomo-and-jaramogi-a-tale-of-kenya-s-enduring-political-dynasties> accessed on 01/01/2023.

160 Elimu, 'Prominent Kenyan Leaders – Jaramogi Oginga Odinga,' https://learn.e-limu.org/topic/view/?c=45&t=830 accessed on 01/01/2022.

161 Kim Matthews & William H. Coogan, 'Kenya and the Rule of Law: The Perspective of Two Volunteers,' (2008) 60 Me L Rev 563.

162 Kim Matthews & William H. Coogan, 'Kenya and the Rule of Law: The Perspective of Two Volunteers,' (2008) 60 Me L Rev 563.

163 Makau Mutua, Justice under Siege: The Rule of Law and Judicial Subservience in Kenya, (Feb 2001) Vol 23 No.1 University at Buffalo School of Law, 96-97.

164 G Sayer, 'Independence and After,' (2004) Oxfam Digital Repository, 22, 25 available at <https://oxfamilibrary.openrepository.com/bitstream/handle/10546/125850/bk-country-files-kenya-part3-010104-e en.pdf;jsessionid=B436A36B61059109DB71C7E8BA4E50DE?sequence=20> accessed on 10/01/2023.

165 Kim Matthews & William H. Coogan, 'Kenya and the Rule of Law: The Perspective of Two Volunteers,' (2008) 60 Me L Rev 564.

166 Mutakha Kangu, 'An interpretation of the constitutional framework for devolution in Kenya: a comparative approach'(LLD Thesis, University of the Western Cape, 2014) 99.

regional governments and to centralise power in the office of one imperial presidency.[167] Both parliament and the judiciary were reduced to institutions subservient to the executive, personified by the imperial presidency. These institutions ceased to play any meaningful role of checks and balances.[168] The power that Jomo Kenyatta had was so wide that he could even call for a state of emergency without the approval of parliament.[169] It then goes without saying that the prevailing atmosphere just after colonisation did not inspire confidence. A key arm of the government, like the judiciary, was not considered independent because it worked under the whim of imperial powers that the succeeding presidents had created for themselves.

2.4.1.1 The Kenyan constitution's impact on the rule of law

The current Kenyan Constitution was promulgated in 2010; it states that sovereign power is to be exercised by the people through the constitution.[170] By implication, the constitution prescribes that the government shall be based on the rule of law. The preamble states the following in part, 'the people of Kenya are cognisant of the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law, adopt, enact and give the Constitution to themselves and their future generations.'[171] This part captures the objectives of the people of Kenya speaking through their constitution, stating the kind of society they desire.

The work of the judiciary could not be more important when it comes to the question of safeguarding the rule of law. In what must be seen as a deliberate measure to entrench the rule of law in society, members of the bench are advised on the importance of their interpreting the law correctly. Article 259(1) of the Kenyan constitution states that, when courts interpret the law, it is important that they do so in

---

167 Mutakha Kangu, 'An interpretation of the constitutional framework for devolution in Kenya: a comparative approach' (LLD Thesis, University of the Western Cape, 2014) 99.

168 Mutakha Kangu, 'An interpretation of the constitutional framework for devolution in Kenya: a comparative approach' (LLD Thesis, University of the Western Cape, 2014) 99.

169 Kim Matthews & William H. Coogan, 'Kenya and the Rule of Law: The Perspective of Two Volunteers,' (2008) 60 Me L Rev 564.

170 Chapter 1(1) of the Kenyan constitution, states that, all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.

171 In the Preamble of the Kenyan constitution of 2010.

a manner that promotes the rule of law.[172] The following is captured under article 259(1):

> This Constitution shall be interpreted in a manner that
>
> a**.** promotes its purposes, values and principles;
>
> b**.** advances the rule of law, and the human rights and fundamental freedoms
>
> in the Bill of Rights;
>
> c**.** permits the development of the law; and
>
> d**.** contributes to good governance.

The rule of law has a direct and, at times, indirect effect on many important aspects of society. This ranges through politics, governance, the process of enacting laws, court processes, etc. The rule of law has an indirect impact on how a country will fare economically, as the daily happenings in a country can inform investors about whether or not it is a good environment to do business. The Kenyan constitution provides that the rule of law is a national value and principle. Article 10(2) of the Kenyan constitution mentions the following, among other things, as national values: patriotism, national unity, the sharing and devolution of power, the rule of law, democracy and the participation of the people.[173] It further includes human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, and the protection of the marginalized.[174] These values bind all state organs, state officers, public officers and all persons. The constitution requires all the listed persons and institutions to take into account these values whenever they apply or interpret the Constitution,[175] and whenever they enact, interpret, or apply any law.[176] Courts are, therefore, under obligation to consider these values as stipulated under Article 10(1) read together with Article 259(1) of the constitution whenever they interpret the law.

---

172 Article 259(1) of the Kenyan Constitution of 2010.
173 Article 10(2)(a) of the Kenyan Constitution of 2010.
174 Article 10(2)(b) of the Kenyan Constitution of 2010.
175 Article 10(1)(a) of the Kenyan Constitution of 2010.
176 Article 10(1)(b) of the Kenyan Constitution of 2010.

2.4.1.2 Kenyan politics and governance under the rule of law

Kenyan politics are both an exciting spectacle to watch and follow and, equally, a cause for concern, especially when it comes to elective politics. Kenyans go to the polls every five years to elect their leaders, as per the stipulation of the law.[177] During the General Elections, Kenyans exercise their civic duty in electing the president, members of Parliament (MPs), Members of the Senate, Governors, Women Representatives and Members of the County Assembly (MCA). The contestation in Kenyan politics is a cutthroat affair where politicians go all out to put themselves in positions of winning, doing whatever they can, ethically or otherwise, to secure victory.

The most fiercely contested position in Kenyan politics is the presidency; the "winner takes all" scenario that characterises the presidential election makes it a do-or-die contest.[178] Some politicians who aspire for the top seat in Kenya start campaigning as early as the end of the previous election cycle in what is seen as a never-ending battle for the statehouse (the presidency).[179] Described by some as a 'high-stakes affair, the politicians concerned are always eager to protect both their careers and their significant business interests.'[180]

From all the media coverage, it would seem that "politics" is always present on the lips of most Kenyans. There is a widespread perception that most Kenyans are passionate about politics, but the legacy left by colonisation, of dividing people into groups, has created a negative ethnic grouping, especially when it comes to politics, and this has seen Kenyans vote along ethnic lines.[181] Kenya has always been seen as a stable country in a region where most countries were, and still are, in crisis, but, the violence that erupted after the election of 2007 exposed Kenya as a country that is not immune

177 Article 101 and article 136(2)(a) of the Kenyan constitution of 2010.

178 "Winner takes all" scenario, in this context is used to describe the nature of political competition in Kenya, the winner enjoys all the benefits and the entrapments upon assuming office while the losing party leaves empty handed, regardless of the number of votes they received.

179 Mark Leon Goldberg: Kenya's High Stakes Presidential Election,' (28/07/2022) <https://www.undispatch.com/kenyas-high-stakes-presidential-elections/> accessed on 01/01/2023.

180 International Crisis Group, 'Kenya's 2022 election: High stakes,' (09/06/2022) <https://www.crisisgroup.org/africa/horn-africa/kenya/b182-kenyas-2022-election-high-stakes> accessed on 07/08/2022.

181 Reuters, 'Kenyan politicians struggle to break ethnic voting patterns,' (05/08/2017) <https://www.reuters.com/article/us-kenya-elections-ethnicity-idUSKBN1AL049> accessed on 07/08/2022.

from the dangers that may be posed by the many dynamics that are part of its historic past. These dynamics include the land question, the issue of tribalism and ethnicity, and the challenges brought about by politics and politicians, some of whom, for obvious reasons of 'divide and rule,' drum up support based on tribal lines.[182]

Since independence, Kenyan politics have been characterised by tribalism, but it was after the fiercely contested election of 2007 that serious chaos erupted. Kenya's presidential election in 2007 had Mr. Mwai Kibaki and Mr. Raila Odinga as the main competitors.[183] Mr. Kibaki had served as Kenya's third president after being elected overwhelmingly in 2002. However, Kibaki faced an uphill task of winning a second term as the projections in the build-up to the election showed him trailing behind Mr. Raila Odinga.[184] During the vote-counting process, there was a bit of tension; the results that had been tabulated earlier on indicated that Mr. Kibaki was going to lose the election. The opposition party, Orange Democratic Movement (ODM), led by Raila Odinga, was confident of winning after the initial stage of counting of the votes showed him leading by a considerable margin.[185]

Things changed quickly at the eleventh hour of the counting and the tallying of the results. According to Human Rights Watch, in the closing hours of the tabulation process, a lead of over one million votes for the opposition candidate Raila Odinga evaporated under opaque and highly irregular circumstances, and this resulted in a razor-thin margin of victory for Mr. Kibaki, the incumbent president at the time.[186] Violence flared up when Kibaki was announced as the winner.[187] The ensuing violence

---

182 DW News, 'In Kenya, politics split on ethnic divide,' (26/10/2017) <https://www.dw.com/en/in-kenya-politics-split-on-ethnic-divide/a-37442394> (accessed on 29/07/2022.

183 Raila Odinga, is Kenya's opposition leader, he is also Kenya's former Prime Minister.

184 Mail and Guardian, 'Kenya President Falls Behind in Opinion Poll.' (07/12/2007) < https://mg.co.za/article/2007-12-07-kenya-president-falls-behind-in-opinion-poll/> Accessed on 15/01/2023.

185 Daniel Wallis and Katie Nguyen 'Opposition leads Kenyan election count' (Reuters, 28/12/2007)<https://www.reuters.com/article/us-kenya-election-idUSL27107920071228>(accessed on 29/07/2017).

186 Human Rights Watch, 'Ballots to Bullets,' < https://www.hrw.org/report/2008/03/16/ballots-bullets/organized-political-violence-and-kenyas-crisis-governance> (accessed on 01/10/2022).

187 Reuters, 'Protests erupt as Kenyan leader wins vote,' < Protests erupt as Kenyan leader wins vote | Reuters> accessed on 30/09/2022.

saw the death of over 1000 people, with hundreds of thousands internally displaced.[188] The violence and chaos that ensued were unlike anything previously seen since Kenya's independence. The violence quickly turned into tribal targets. It was so bad that a commentator in one of the local daily papers, considering how much sway Mr. Raila Odinga had on the people agitating, said that he (Mr. Raila) should prevail on the masses to avert bloodshed.[189] According to Mr. Gaitho, it was a chance for Mr. Odinga to display statesmanship, not brinkmanship.[190] Gaitho pointed out that it was only Mr. Odinga who could prevail on the angry masses to stop the violence and save the country from the bloodshed.[191]

The violence pitted major tribes, mainly the Kikuyus, allied to President Kibaki, and the Luos, and those allied to them. However, as described by Lafargue and Katumanga, the anger and chaos started as a political conflict, which could be described as a *"civil coup d'état."* Most rioters consisted of jobless youths.[192] In the initial days, the conflict took the form of a social revolt, especially among the youth who believed that Mr. Raila Odinga was the only candidate who hearkened to their plight.'[193] There were reports from some election observers that the election was not free and fair. Lambsdorff, the Chief European observer, was of the view that the election was flawed.[194] Koki Muli, a co-chair of the Kenya Election Domestic Observation Forum, said that she was in the room when:

---

188 Moira Fratta 'post-electoral violence in Kenya: more than 1000 people killed and 300,000 displaced' (28/02/2008) <https://reliefweb.int/report/kenya/post-electoral-violence-kenya-more-1000-people-killed-and-300000-displaced> (accessed on 29/07/2022).

189 Katie Nguyen, 'News maker: Odinga in fight of his life over "stolen" poll' (03/01/2008) <https://www.reuters.com/article/us-kenya-violence-odinga-idUSL0347095720080103> (accessed on 29/12/2023).

190 Katie Nguyen, 'News maker: Odinga in fight of his life over "stolen" poll' (03/01/2008) <https://www.reuters.com/article/us-kenya-violence-odinga-idUSL0347095720080103> (accessed on 29/07/2022).

191 Katie Nguyen, 'News maker: Odinga in fight of his life over "stolen" poll' (03/01/2008) <https://www.reuters.com/article/us-kenya-violence-odinga-idUSL0347095720080103> (accessed on 29/07/202).

192 Jérôme Lafargue et Musambayi Katumanga, 'Kenya in Turmoil: Post-Election Violence and precarious Pacification,' (2008) Vol 38 East Afr Rev, <https://journals.openedition.org/eastafrica/665> accessed on 29/07/2022.

193 Jérôme Lafargue et Musambayi Katumanga, 'Kenya in Turmoil: Post-Election Violence and precarious Pacification,' (2008) Vol 38 East Afr Rev, <https://journals.openedition.org/eastafrica/665> accessed on 29/07/2022.

194 Jefferey Gettleman, 'Disputed Vote Plunges Kenya into Bloodshed,' (31/12/2007) <https://www.nytimes.com/2007/12/31/world/africa/31kenya.html> accessed on 29/07/2022.

> the election commission was presented with dozens of suspicious tally sheets, some missing signatures, others missing stamps and most of them were from the president's stronghold of central Kenya. In some areas, more people voted for the president than there were registered voters.[195]

It is worth emphasising that in an ideal democratic society governed by the rule of law, such conflicts would have been averted if the aggrieved party would have been confident of finding redress in the courts of law. However, that was not the prevailing atmosphere at the time. Some people had no confidence in the judiciary and felt an electoral case presented before the court would not have been fairly adjudicated.[196] Raila Odinga's ODM party refused to accept the results and declined to go to the courts, claiming that the judiciary was firmly under the control of the then government and that any ruling would be heavily biased.[197] President Kibaki was quickly sworn in for a second term minutes after the then electoral commission of Kenya chairman, Mr. Kivuitu, declared him the winner amid violence and claims of vote rigging.[198] This ignited even more violence across major cities. When the dust settled, over 1,000 people had been killed, hundreds of thousands displaced from their homes, and a number of suspects indicted at the International Criminal Court (ICC) for bearing high responsibility for the violence that ensued.[199]

What occurred during that post-election violence were serious international crimes.[200] Some people suggested that those suspected of being responsible should have been

---

195 Jefferey Gettleman, 'Disputed Vote Plunges Kenya into Bloodshed,' (31/12/2007) <https://www.nytimes.com/2007/12/31/world/africa/31kenya.html> accessed on 29/07/2022.

196 Steve Crabtree and Bob Tortora, 'Lacking Faith in Judiciary, Kenyans lean towards the Hague,' Gallup (05/08/2009) <https://news.gallup.com/poll/122051/lacking-faith-judiciary-kenyans-lean-toward-hague.aspx> (accessed on 01/10/2022).

197 Gerhard Anders and Olaf Zenker, *Transition and justice: Negotiating the terms of new beginnings in Africa*, (Wiley-Blackwell 2015) 177.

198 Voice of America, 'Kibaki Wins 2nd Term in Kenya's Election; Riots and Protests Greet Announcement,' (27/10/2009) <https://www.voanews.com/a/a-13-2007-12-29-voa29-66813692/256123.html> accessed on 03/08/2022.

199 Clar Ni Chonghaile and David Smith, 'Court order four Kenyans to stand trial over 2007 election violence,' (23/01/2012) <https://www.theguardian.com/world/2012/jan/23/court-kenyans-trial-election-violence (accessed on 03/08/2022).

200 Government of Netherlands, 'International Criminal Court,' Crimes against humanity are acts committed as part of a widespread or systematic attack directed against any civilian population, such as murder, deportation, torture and rape. The ICC prosecutes the perpetrators even if the crimes were not committed in times of war. <https://www.government.nl/topics/international-peace-and-security/international-legal-order/the-international-criminal-court-icc#:~:text=Crimes%20against%20humanity%20are%20acts,committed%20in%20times%20of%20war> accessed on 29/07/2022.

charged locally through a local mechanism, while some believed that the International Criminal Court (ICC) was best placed to handle the case. Some Kenyans had doubts as to the impartiality of the Kenyan courts or local mechanisms, with some people raising concerns of interference if they were to be charged locally.[201] At the time, there was not much confidence in the judiciary, as some described it as susceptible to corruption and that it could not render fair verdicts.[202] The perception that Kenyan courts would not render fair verdicts and the subsequent taking over of the 2007 electoral violence cases by the International Criminal Court was a low moment for Kenya as a country. It was a tacit acknowledgment that there was something wrong with the Kenyan judicial system. This did not inspire confidence, and ultimately, something had to be done.

The promulgation of the 2010 constitution signalled a new dawn. It represented hope and was hailed across the country as the birth of the second Kenyan Republic.[203] Constitutions are probably the most important documents that describe and prescribe how a state is to be governed. The Merriam-Webster dictionary describes a constitution as being 'the basic principles and laws of a nation, state, or social group that determine the powers and duties of the government and guarantee certain rights to the people.'[204] A constitution is also described as the mode in which a state or society is organised, especially the manner in which sovereign power is distributed.[205] According to the Human Rights Channel, a constitution provides rules about how the country is run:[206]

> It ensures that the state's power is dispersed between different bodies and individuals and that citizens' rights are upheld. It provides the basis for governance in a country,

201 Katie Nguyen, 'Kenyan voters fret over graft but who is listening,' (07/12/2007) <https://www.reuters.com/article/lifestyle-kenya-election-corruption-col-idCAL063976420071207> accessed on 29/11/2023.

202 Katie Nguyen, 'Kenyan voters fret over graft but who is listening,' (07/12/2007) <https://www.reuters.com/article/lifestyle-kenya-election-corruption-col-idCAL063976420071207> (accessed on 29/07/2022).

203 Michael Onyiego,'The landmark Moment as New Kenyan Constitution Takes Effect,' (26/08/2010) < https://www.voanews.com/a/kenyas-new-constitution-signed-into-law--101632883/124592.html> Accessed on 20/12/2023.

204 Merrian-webster dictionary, 'definition of Constitution,' <https://www.merriam-webster.com/dictionary/constitution> accessed on 15/07/2022.

205 Merrian-webster dictionary, 'definition of Constitution,' <https://www.merriam-webster.com/dictionary/constitution> accessed on 01/01/2023.

206 Human Rights Channel, 'What is a constitution,' (10/09/2014) <https://human-rights-channel.coe.int/asset-what-is-a-constitution-en.html> accessed on 15/07/2022.

> which is essential to making sure that everyone's interests and needs are addressed. It determines how laws are made, and details the process by which the government rules.[207]

In most jurisdictions, the constitution is the supreme law. This is, in most cases, explicitly stated in the founding provisions of the constitution. For example, Article 2(1) of the Kenyan constitution states: 'This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.[208] Kenyans gave themselves a constitution in 2010, and, in what was seen as giving power to and strengthening institutions of governance, it included for the first time structures of devolved government, which meant that there was going to be a decentralised government, referred to as counties, contained under chapter 11 of the Kenyan constitution.[209] The new constitution also gave the judiciary some much-needed authority, which would see the judiciary take up its position as an independent arm of government. Justice Mutunga, the former Kenyan Chief Justice, wrote the following about the judiciary:

> It is time for the judiciary of Kenya to rise to the occasion, and shake off the last traces of the colonial legacy. As I see it, this involves a number of strands or approaches. There must be no doubt in the minds of Kenyans, or of us, about our impartiality and integrity. No suspicion that we defer to the executive, bend the law to suit our long-term associates or their clients or would dream of accepting any sort of bribe.[210]

From Mutunga's article, it can be concluded that, prior to the promulgation of the 2010 constitution, the judiciary had not been truly independent. Justice Mutunga was of the view that the judiciary should shake off its doubted image and establish itself as capable of holding the executive accountable and making contributions to Kenya's jurisprudence.

When deciding the 2017 presidential election petition case, the Kenyan Supreme Court seemed to have heeded Justice Mutunga's advice. The 2017 Kenyan presidential election was hotly contested. In the petition contesting the outcome of the

---

207 Human Rights Channel, 'What is a constitution,' (10/09/2014) <https://human-rights-channel.coe.int/asset-what-is-a-constitution-en.html> accessed on 15/07/2022.

208 Article 2(1) of the Kenyan constitution of 2010.

209 Chapter 11 of the Kenyan constitution of 2010.

210 Willy Mutunga, 'Kenya: a new constitution: Willy Mutunga on the culmination of almost five decades of struggles,' (2013) Vol 65, Pluto Journals, 20, 22.

elections, doubts were raised that challenged the election's legitimacy.[211] The court issued a decision that annulled the election, describing the process as neither transparent nor verifiable.[212] The court further singled out the country's electoral commission for the shortcomings.[213] The Kenyan judiciary stood firm and applied the law in that election petition, deciding against an incumbent president. That was the first time in Africa that a court had nullified the re-election of a sitting leader.[214] The Kenyan judiciary asserted itself as a defender of the rule of law and as a custodian of its constitutional democracy.

2.4.2 The Application of the Rule of Law in South Africa

The principle of the rule of law is among the founding provisions of the South African constitution.[215] Chapter 1, Section 1 of the South African constitution states the following:

> The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality, and the advancement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the constitution and the rule of law.
>
> (d) Universal adult suffrage, a national common voters' roll, regular elections, and a multi-party system of democratic government, to ensure accountability, responsiveness, and openness.

---

211 Jason Burke, 'Kenyan election annulled after result called before votes counted, says court' (20/09/2017)<https://www.theguardian.com/world/2017/sep/20/kenyan-election-rerun-not-transparent-supreme-court> accessed on 03/08/2022.

212 *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR.* Presidential Election held on 8th August 2017 declared invalid, null and void. IEBC ordered to conduct a fresh Presidential Election within 60 days.

213 Jason Burke, 'Kenyan election annulled after result called before votes counted, says court' (20/09/2017)<https://www.theguardian.com/world/2017/sep/20/kenyan-election-rerun-not-transparent-supreme-court> accessed on 03/08/2022.

214 Laura Smith-Spark and Farai Sevenzo, ' Kenya Supreme Court nullifies presidential election, orders new vote', (02/09/2017) <https://edition.cnn.com/2017/09/01/africa/kenya-election/index.html> accessed on 03/08/2022.

215 South African constitution of 1996.

The constitution is the supreme law in South Africa. Captured under section 2 (the supremacy clause), it states that the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.[216] The constitution being supreme and the rule of law being the founding value of the constitution means that its application in all spheres of government cannot be derogated from.

2.4.2.1 South African constitution on the rule of law

Section 9(1) of the Constitution of the Republic of South Africa provides that everyone is equal before the law and has the right to equal protection and benefit of the law.[217] For a society to work in harmony, everybody must obey the law. Everybody within the borders of a country governed by the rule of law is subject to the laws of that land. The law protects everyone, and conversely, the people under it will be liable in the event of a civil wrong or may be criminally liable in case they commit a crime. It follows then that the law must be respected by all and sundry regardless of one's position or status.

Any derogation from the prescripts of the rule of law means a slip down a wrong path that may shake the very foundation of a free society. The South African legal system and the courts, in particular, have stood firm and have decided cases guided by nothing but the law. Such was the case of the famous traditional leader of the Aba-Thembu tribe, King Buyelekhaya Dalindyebo.[218] Traditional leadership is provided for under section 211 of the South African Constitution of 1996.[219] Despite wielding considerable power among the communities they govern, the traditional leaders are still subject to the constitution. Section 211(1) of the South African Constitution of 1996 provides that 'the institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.'[220] In a few words, this section emphasises that the traditional leaders are subject to the constitution and never above it.

---

216 Section 2 of the South African constitution of 1996.
217 Section 9(1) of the South African constitution of 1996.
218 Buyelekhaya Dalindyebo, a traditional leader of the Aba-Thembu tribe in post-Apartheid South Africa.
219 Section 211 of South African Constitution of 1996.
220 Section 211(1) of the South African Constitution of 1996.

It is against this backdrop that King Buyelekhaya Dalindyebo found himself in hot water after taking the law into his own hands. The charges against him included arson, kidnapping, assault, and defeating the course of justice.[221]In this case, King Dalindyebo allegedly kidnapped and assaulted some of his 'subjects'; he further threatened one of the parents of the victims, warning him not to report the matter to authorities.[222] In court, the King argued that he had acted in the best interests of his subjects when he committed the crime, an argument the Supreme Court of Appeal rejected.[223] He was reminded that, in customary law, a King ensures the maintenance of law and order, protects the life and security of his people, and acts compassionately with due regard to the dignity of his subjects.[224] King Dalindyebo's actions were tantamount to taking the law into his own hands. The Supreme Court of Appeal pointed out that the constitutional order does not tolerate that kind of criminal conduct, emphasising a basic principle that everyone is subject to the rule of law regardless of his or her position or status. In the judgment, the court pointed out the following:

> The lesson that cannot be emphasised enough is that persons in positions of authority, such as the appellant, are obliged to act within the limits imposed by the law and that no one is above the law. The Constitution guarantees equal treatment under the law. The appellant behaved shamefully and abused his position as King.[225]

A similar case relating to the respect of the rule of law involved former South African president, Mr. Jacob Zuma, when he disobeyed the South African Constitutional Court order to appear before the commission of inquiry into state capture, on 29th June 2021 he was found guilty of contempt of court,[226] and was subsequently sentenced to 15 months in prison.[227] The commission of inquiry in the application charged Mr. Zuma with contempt of court. The applicant in the case was The Zondo Commission (*secretary of the judicial commission of inquiry into allegations of state capture,*

---

221 *Dalindyebo v S 2015 2015 (090) (ZASCA).*

222 *Dalindyebo v S 2015 2015 (090) (ZASCA)[75].*

223 *Dalindyebo v S 2015 2015 (090) (ZASCA)[77].*

224 *Dalindyebo v S 2015 2015 (090) (ZASCA)[77].*

225 *Dalindyebo v S 2015 2015 (090) (ZASCA)[82].*

226 Mr. Jacob Zuma was found guilty of contempt of court after failing to honour the order of the Constitutional Court that he should appear before the commission of inquiry into state capture, which was also referred to as the Zondo commission.

227 Karyn Maughan & Sheldon Morais, 'Jacob Zuma found guilty of contempt of court, sentenced to 15 months in jail (29/06/2021) <https://www.news24.com/news24/southafrica/news/jacob-zuma-found-guilty-of-contempt-of-court-sentenced-to-15-months-in-jail-20210629> accessed on 29/07/2022.

corruption, and fraud in the public sector, including organs of State v Zuma, hereafter referred to as the Zuma case). In this case, the secretary to the commission mentioned the following in seeking the Constitutional Court to hear the matter:

> Considering Mr. Zuma's former and current political position in South Africa, the applicant submits that his conduct constitutes a particularly egregious affront on judicial integrity, the rule of law, and the Constitution itself.[228]

The applicant made the argument that the Constitutional Court is the rightful guardian of the Constitution and the Judiciary, and it is, therefore, appropriate for it to respond to what was seen as Mr. Zuma's calculated efforts to undermine the rule of law, the administration of justice and public trust in the Judiciary.[229] The applicant's argument was that the rule of law was being undermined and that it was important that the Constitutional Court listened to the case on an urgent basis. The following points were made in the application:

> Firstly, Mr. Zuma's conduct poses a grave threat to the administration of justice and the rule of law. Secondly, Mr. Zuma is an influential political figure who wields the power to inspire others to defy the courts. Thirdly, the public and forceful nature of Mr. Zuma's defiance compounds the risk posed to the rule of law. Fourthly, Mr. Zuma's contempt of the court order is ongoing as he continues to ignore the summons issued by the Commission which has a limited lifespan.[230]

Not obeying the court order and his deliberate failure to go back to the Zondo commission was a challenging moment for the courts. As a former head of state under whose tenure the alleged corruption and plunder had happened, he had an obligation to help the commission get to the bottom of what happened. By refusing to return to the Zondo commission, Mr. Jacob Zuma chose a perilous path that would bring him into collision with the highest court in South Africa. In delivering judgment in Zuma's contempt case, the Constitutional Court invoked the case of *De Lange v Smuts and*

---

228 *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* 2021 (18) ZACC[7] (here in there after Zuma case).

229 *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* 2021 (18) ZACC[7].

230 *The Zuma case, para 8.*

Others.[231] Ackerman J, related the matter at hand to a previous case that concerned the correctness of a declaration of constitutional invalidity of subsection (3) of section 66 of the Insolvency Act 24 of 1936 ("the Insolvency Act") made by Conradie J in the Cape of Good Hope High Court, on 29 August 1997, it read as follows:

> "If a person summoned as aforesaid, appears in answer to the summons but fails to produce any book or document which he was summoned to produce, or if any person who may be interrogated at a meeting of creditors in terms of subsection (1) of section sixty-five refuses to be sworn by the officer presiding at a meeting of creditors at which he is called upon to give evidence or refuses to answer any question lawfully put to him under the said section or does not answer the question fully and satisfactorily, the officer may issue a warrant committing the said person to prison, where he shall be detained until he has undertaken to do what is required of him, but subject to the provisions of subsection (5)."[232]

In a majority judgment read by Judge Ackermann, the court held that the subsection concerned was unconstitutional only to the extent that it authorises a presiding officer who is not a magistrate to issue a warrant committing an examinee at a creditors' meeting to prison.[233] Judge Ackermann emphasised the view that the right to freedom and security of the person has a substantive as well as a procedural aspect.[234] With respect to the substantive aspect, Judge Ackermann was of the view that the only issue was whether there was just cause for the power to commit a person to prison under the subsection.[235] The substantive aspect ensures that a deprivation of liberty cannot take place without satisfactory or adequate reasons for doing so, as outlined in section 12(1) (a) of the constitution.[236] The precise meaning of the provision is that the deprivation of freedom may not occur arbitrarily. There must be a connection between the deprivation and some objectively determinable purpose.[237] He concluded

---

231 *De Lange v Smuts NO and Others (CCT26/97) [1998] ZACC 6; 1998 (3) SA 785; 1998 (7) BCLR 779 (28 May 1998).*

232 *De Lange v Smuts NO and Others (CCT26/97) [1998] ZACC 6; 1998 (3) SA 785; 1998 (7) BCLR 779 (28 May 1998) para [1].*

233 *De Lange v Smuts NO and Others (CCT26/97) [1998] ZACC 6; 1998 (3) SA 785; 1998 (7) BCLR 779 (28 May 1998) para [98].*

234 *Lange v Smuts NO and Others (CCT26/97) [1998] ZACC 6; 1998 (3) SA 785; 1998 (7) BCLR 779 (28 May 1998) para [17].*

235 De Lange v Smuts NO and Others (CCT26/97) [1998] ZACC 6; 1998 (3) SA 785; 1998 (7) BCLR 779 (28 May 1998) para [22].

236 Section 12(1)(a) of the South African Constitution of 1996

237 De Lange v Smuts NO and Others (CCT26/97) [1998] ZACC 6; 1998 (3) SA 785; 1998 (7) BCLR 779 (28 May 1998) para [23].

that the power to commit recalcitrant witnesses at insolvency hearings served an important public objective: to ensure that insolvents and other persons who are in a position to give important information relating to an insolvency do not evade supplying it.[238]

It was against this backdrop that the Constitutional Court acted when the contempt case concerning former South African President, Mr Jacob Zuma, came before it, and committed him to prison.[239] The judgment against Mr Jacob Zuma was a first where a former head of state was sentenced to serve time in prison. It had far-reaching implications, but, more importantly, it sent a message that no one was above the law. The judgment started with a quote from former president Mr. Nelson Mandela at the inauguration of the Constitutional Court on 14 February 1995, a message directed to the judges of the Constitutional Court: "We expect you to stand on guard not only against direct assault on the principles of the Constitution but against insidious corrosion."[240]Omphemetse Sibanda gave the following view of Mr. Mandela's words: "Mandela's words were a clarion call to judges of the court to protect the rule of law as a duty."[241] President Mandela's words were put to action when Justice Sisi Khampepe spoke when delivering the majority judgment in Zuma's case:

> My duty, as I pen this judgment, is cloaked in the duty and loyalty that I owe to our Constitution and the rule of law that undergirds it. I find myself left with no option but to commit Mr. Zuma to imprisonment in the hope that doing so sends an unequivocal message: in this, our constitutional dispensation, the rule of law, and the administration of justice prevails.[242]

---

238 *De Lange v Smuts NO and Others (CCT26/97) [1998] ZACC 6; 1998 (3) SA 785; 1998 (7) BCLR 779* (28 May 1998) para [34].

239 the judicial commission of inquiry into allegations of state capture, corruption and fraud in the public sector including organs of the state.

240 http://db.nelsonmandela.org, 'Speech by President Nelson Mandela at the inauguration of the Constitutional Court' on 14 February 1995. Available at <http://db.nelsonmandela.org/speeches/pub_view.asp?pg=item&ItemID=NMS228&txtstr=constitutional%20court> accessed on 01/08/2022.

241 Omphemetse S Sibanda, 'Jacob Zuma sentence a triumph for the rule of law, but dissenting judgment provide ammo for supporters' (Daily Mavericks 29/06/2021) <https://www.dailymaverick.co.za/opinionista/2021-06-29-jacob-zuma-sentence-a-triumph-for-rule-of-law-but-dissenting-judgments-provide-ammo-for-supporters/> accessed on 30/07/2022.

242 *The Zuma case para 141.*

Justice Khampepe noted the precarious position the Constitutional Court found itself in, having to deal with issues occasioned by Mr. Jacob Zuma's defiance, referring to what she called, "a series of direct assaults, as well as calculated and insidious efforts launched by former President Jacob Gedleyihlekisa Zuma, to corrode the court's legitimacy and authority."[243] In the court's reasoning, the judiciary wanted to send a message that any action that interferes with the rule of law will not be tolerated, and, while some people sympathised with Zuma, his actions came across as a disregard for court processes and a challenge to its authority.

The sentence by the court sent a message that such actions will not be tolerated, and a warning that, in case such a kind of action should come up in the future, then it will be dealt with firmly. According to the court, a coercive order was not going to be the right punishment considering the circumstances outlined, among them the position Mr. Zuma had previously held, the example he has to set as a former occupier of the highest office in South African Government, and the moral message he sends to those that follow him.[244] According to the majority, a coercive order, such as a conditional suspended sentence, "would likely be a *brutum fulmen* (an empty threat) and, for that reason, inappropriate."[245] Thus, the court decided to go for a committal sentence. The effect of the judgment demonstrated that everybody is subject to the law, and the courts are prepared to affirm the position that the judicial process is effective. In their words: 'Orders of court bind all to whom they apply.'[246]

2.4.3 Application of the Rule of Law in Uganda

2.4.3.1 A challenging path towards the rule of law in Uganda

The Ugandan Constitution is the Supreme law and the anchor of the rule of law in Uganda. Article 2 of the Uganda Constitution establishes the supremacy of the constitution as the highest law in the country, applying to all individuals and authorities within Uganda.[247] The courts in Uganda have been enjoined in Uganda as the authority in matters concerning the interpretation of law, The Constitution of Uganda provides the courts with the authority to interpret the Constitution and other

243 *The Zuma case para 1.*
244 *The Zuma case para 97.*
245 *The Zuma case para 146.*
246 *The Zuma case para 59.*
247 Article 2(1) of the Ugandan Constitution of 1995 with amendments through 2017.

laws as outlined in Article 137 of the Ugandan constitution which states that any question regarding the interpretation of the Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court.[248] The judiciary, in its role of legal interpretation, must ensure that laws are applied fairly and consistently, upholding the principles of justice and the rule of law. However, there have been instances where judicial decisions have been ignored or instances where the executive was seen to be meddling in judicial matters, hence undermining the judiciary's independence.[249] Carmel Rickard, pointed out the case of Geofrey Mucunguzi, the resident district commissioner of Ntungamo in western Uganda, who was scheduled to appear in the magistrate's court on 9th January 2024 to face charges of theft and house-breaking. However, Mr. Mucunguzi refused to attend, claiming that the courts were corrupt and that he was not accountable to them.[250] President Museveni also seemed to meddle in judicial matters when he wrote a letter to the CJ to investigate a controversial judicial decision authorising the auctioning of the national mosque, even implying that the CJ should ensure the decision was overturned.[251] While Museveni's need to help may be well-intentioned, his asking the judiciary to overturn a decision without proper recourse flies in the face of a constitutional order. Such incidents have the potential to undermine the rule of law and the administration of justice.

2.4.3.2 Ugandan constitution on the rule of law

The rule of law has its foundation in the Ugandan constitution. It is worth pointing out that the Ugandan constitution of 1995 is the supreme law. The Supremacy of the Constitution is provided for under Article 2. It stipulates that the constitution is the supreme law of Uganda and it has a binding force on all persons and authorities in Uganda.[252]The constitution further lays down the foundation for every law in Uganda. As provided under Article 2(2), which talks to its supremacy. If any other law or any

248 Article 137 of the Ugandan Constitution of 1995 with amendments through 2017.

249 Carmel Rickard, 'New challenges to judicial independence in Uganda,' (11/01/2024) <https://africanlii.org/articles/2024-01-11/carmel-rickard/new-challenges-to-judicial-independence-in-uganda> accessed on 20/09/2024.

250 Carmel Rickard, 'New challenges to judicial independence in Uganda,' (11/01/2024) <https://africanlii.org/articles/2024-01-11/carmel-rickard/new-challenges-to-judicial-independence-in-uganda> accessed on 20/09/2024.

251 Carmel Rickard, 'New challenges to judicial independence in Uganda,' (11/01/2024) <https://africanlii.org/articles/2024-01-11/carmel-rickard/new-challenges-to-judicial-independence-in-uganda> accessed on 20/09/2024.

252 Article 2(1) of the Ugandan Constitution of 1995 with amendments through 2017.

custom is inconsistent with any of the provisions stipulated in the Constitution, then the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void.[253] As a democratic society under the rule of law, the constitution provides for equality. It is provided that everyone is equal before the law. Article 21 states that all persons are equal before and under the law in all spheres of political, economic, social, and cultural life and in every other respect and shall enjoy equal protection of the law. [254]

The constitution provides further, under Article 21(2), that nobody should be discriminated against based on his or her ethnicity, sex, religion, color, social or economic status.[255]

The Leadership and governance in Uganda are through consent. This means that it is the people who give a mandate to their leaders. Article 103 of the Ugandan constitution covers that aspect of universal suffrage. It states in part that the election of the president shall be by universal adult suffrage through a secret ballot.[256] Of more importance is the establishment of the institution responsible for protecting the Ugandan rule of law - the judiciary. The constitution establishes judicial authority and its independence. This is provided for under Article 128.[257] The judiciary is then charged with the responsibility of safeguarding the rule of law through the interpretation of the law and giving it meaning.

2.4.3.3 Ugandan politics and governance under the rule of law

Uganda has had a fragile political system since gaining independence, marked by deadly coups in which the winners took over with the barrel of a gun.[258] Creating a state that is truly democratic has proven to be challenging. Additionally, because the military has sway over politics and governance in Uganda, striking a balance between militarism and the establishment of a constitutional order has proven to be a tricky affair. It follows then that Uganda's transition to constitutional democracy has been lengthy and occasionally traumatic for many of its citizens. When the British colonisers were leaving Uganda, there was a concerning question about how Uganda

253 Article 2(2) of the Ugandan Constitution of 1995 with amendments through 2017.
254 Article 21(1) of the Ugandan Constitution of 1995 with amendments through 2017.
255 Article 21(2) of the Ugandan Constitution of 1995 with amendments through 2017.
256 Article 103 of the Ugandan Constitution of 1995 with amendments through 2017.
257 Article 128 of the Ugandan Constitution of 1995 with amendments through 2017.
258 Global security.org 'The military under Amin,' <https://www.globalsecurity.org/military/world/uganda/amin-2.htm> accessed on 01/08/2022.

was to be governed. This was the case because of different groups with competing interests.[259] The competing interests included the people of the Buganda Kingdom, who wanted a return to the status of an independent kingdom that they had enjoyed before the colonisers arrived,[260] and then there was the question of the 'Acholi tribe,' who have faced serious marginalization, both during colonisation and after the departure of the colonisers.[261] Just before the British colonisers handed over power, there was a negotiated compromise. This compromise saw the government formed by an unlikely alliance of Milton Obote of the Uganda People's Congress (UPC) and Buganda's kingdom under Kabaka, the Yekka Party (KY).[262] This was an alliance that was mooted to deal with the influence of Benedicto Kiwanuka of the Democratic Party (DP).[263]

Early on, in the would-be power handing over process, fissures emerged between the Buganda Kingdom and other tribes within Uganda. The Buganda kingdom wanted autonomy with their king as their leader, while the rest of the players from other parts of Uganda and the departing colonial officials desired a unitary state.[264] When the colonialists organized elections in 1961 to constitute a government that would take over from them, the Buganda Kingdom boycotted them because their demands had not been taken into account.[265] This boycott necessitated negotiations between the Buganda Kingdom and the rest of the political actors, which included the leaders of the main political parties, the Uganda People's Congress (UPC) and the Democratic

259 The Buganda kingdom never wanted to be an integral part of Uganda. After independence It wanted to revert back its status as an independent kingdom which it enjoyed before colonial rule. It was forcibly united with the other kingdoms and traditional centers of power by the British to form Uganda.

260 Godfrey Mwakikagile, 'Uganda: A Nation in transition: Post-colonial analysis' (05/08/2012) New African Press.

261 Hannes Tornberg, 'Ethnic Fragmentation and Political Instability in Post-Colonial Uganda,' Understanding the Contribution of Colonial Rule to the Plights of the Acholi People in Northern Uganda, Lunds University, <https://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=3357725&fileOId=335775 >accessed on 12/08/2024.

262 Buganda represents the former kingdom on the western side of Busoga and the people of Buganda kingdom are known as Baganda, Uganda is the Swahili term which originally was intended to identify the former kingdom of Buganda. The British, however, adopted the term "Uganda" to apply to the entire protectorate.

263 Asiimwe S M, 'Constitutionalism, Democratisation and Militarism in Uganda,' Nkumba Bus J, Vol 15, (2016) 179, 180.

264 Asiimwe S M, 'Constitutionalism, Democratisation and Militarism in Uganda,' Nkumba Bus J, Vol 15, (2016) 179, 179.

265 Asiimwe S M, 'Constitutionalism, Democratisation and Militarism in Uganda,' Nkumba Bus J, Vol 15, (2016) 179, 179.

Party (DP). The negotiations reached a compromise in which they agreed that the Buganda Kingdom was to be made a semi-autonomous region.

The above agreement, to have the Buganda kingdom given semi-autonomous status, meant that Uganda's constitutionalism was at the time founded on a group and individual compromises rather than being rooted in democratic principles and national interests.[266] The *Baganda* (the people from the Buganda kingdom) are the largest ethnic group in Uganda,[267] and their participation in the election was important.
After the negotiated comprise, King Kabaka Mutesa agreed to the Buganda kingdom being part of a united Uganda. In the election that was organized, he went on to form an alliance with Mr. Milton Obote. The KY-UPC alliance brought Milton Obote to power.

Mr. Obote and his UPC party formed the first post-colonial government with Kabaka Yekka or KY. Through constitutional amendments, they created the position of president and head of state, which was given to Fredrick Mutesa, King of Buganda, while Obote assumed the position of Prime Minister.[268] The relationship between Obote and Mutesa did not last long; in 1966, the prime minister abrogated the constitution and deposed President Mutesa, and quickly started drawing up a new constitution that hardly followed the principles of the rule of law. Lawmakers were intimidated to vote for the hurriedly drawn up constitution, which was dubbed the "pigeonhole" constitution.[269] According to Asiimbi:

> It was a "pigeonhole" constitution because members of parliament found copies of it in their compartments or pigeonholes hours before they debated it. The pigeonhole constitution was passed the very day it was tabled in parliament, which the prime minister turned into a constituent assembly without elections.[270]

---

266 Asiimwe S M, 'Constitutionalism, Democratisation and Militarism in Uganda,' Nkumba Bus J, Vol 15, (2016) 179, 179.

267 Yasiin Mugerwa, 'Baganda, Banyankore, Basoga dorminant tribes,' 16/01/2021 <https://www.monitor.co.ug/uganda/news/national/baganda-banyankore-basoga-dominant-tribes-1644626> accessed on 24/12/2022.

268 Monitor Newspaper, 'Election of Kabaka Muteesa as president of Uganda,' (01/08/2021) <https://www.monitor.co.ug/uganda/special-reports/uganda-50/election-of-kabaka-muteesa-as-president-of-uganda-in-1963-1522190> accessed on 01/08/2022.

269 Asiimwe S M, Constitutionalism, Democratisation and Militarism in Uganda, Nkumba Bus J, Vol 15, (2016) 179, 180.

270 Asiimwe S M, Constitutionalism, Democratisation and Militarism in Uganda, Nkumba Bus J, Vol 15, (2016) 179, 180.

2.4.3.4 Challenges to the rule of law in Uganda

The majority of Uganda's experiences have been military regimes and coups, with instances where military personnel have swapped their fatigues in favour of suits and entered the political sphere. The rule of law that forms the foundation of a constitutional democratic state has proven to be elusive. While it is not bad for military personnel to leave the Army and venture into politics, it is, however, important that the military itself remains apolitical and does not interfere with the democratic process. For Uganda, things have been a little different. Their military has, for a long time, been a feature in their politics.[271] General Idi Amin Dada came to power through a *coup d'état* in 1971. Amin deposed Obote, overthrew any semblance of constitutional order, and established militarism in Ugandan politics.[272] Hundreds of thousands died under Amin's rule. It was an era of terror.[273] In the course of his repressive reign, he acquired the name "the Butcher of Uganda."[274] He was 'the authority' unto himself. According to Twinomugisha:

> President Amin was the supreme law and all legislative, executive, and judicial powers vested in him and his military council. No action could be instituted against the government for injuries sustained as a result of what they called "the maintenance of public order and security." There was no separation of powers, and the president enacted laws by decree and implemented them.[275]

The judiciary, on its part, had no voice. It was so emasculated that it could hardly keep a check on the excesses of General Amin's regime.[276] According to Asiimwe, the

---

271 Ugandan military has been involved in politics; military started intervening in politics not long after the country's independence in 1962.

272 Global security.org 'The military under Amin,' <https://www.globalsecurity.org/military/world/uganda/amin-2.htm> accessed on 01/08/2022

272 Biographics, 'Idi Amin: The butcher of Uganda,' (25/10/2018) <https://www.youtube.com/watch?v=GrxQYbk2LBI> accessed on 06/08/2022.

273 Global security.org 'The military under Amin,' <https://www.globalsecurity.org/military/world/uganda/amin-2.htm> (accessed on 01/08/2022)

274 Biographics, 'Idi Amin: The butcher of Uganda,' (25/10/2018) <https://www.youtube.com/watch?v=GrxQYbk2LBI> accessed on 06/08/2022.

275 Ben Kiromba Twinomugisha, 'The role of the judiciary in the promotion of democracy in Uganda, African,' African Human Rights Law Journal, Vol 9, 1,2.

276 Asiimwe S M, Constitutionalism, Democratisation and Militarism in Uganda, Nkumba Bus J, Vol 15, (2016) 179, 181.

judiciary was too emasculated to guarantee the rights and freedoms of the people.[277] Amin's rule was characterised by caprice. He ruled by decree; his, was a reign of terror that oversaw the extra-judicial killing of over 300,000 people. He was paranoid and nobody around him was safe.[278]

With the help of the Tanzanian Army, the Uganda National Liberation Army (UNLA), an alliance of various rebel groups that were against Amin's rule, staged a hostile takeover and overthrew him, signalling the continuation of the militarization of the Ugandan state.[279] After the overthrow, there was a series of events that culminated in the national election of December 1980, which was won by Milton Obote. This election was designed to return Uganda to democratic rule following eight years of dictatorship and warfare under the ousted Idi Amin.[280]

The 1980 Ugandan elections were disputed, and Mr. Yoweri Museveni, who had come third in those elections, decided to go to the "bush."[281] Museveni led the National Resistance Army (NRA), an armed wing of the National Resistance Movement (NRM), which fought a guerrilla war that brought him to power in 1986, in yet another military arrangement. Later on, Mr. Museveni became the president of Uganda, a position he still holds after winning a sixth term in a disputed election of 2021.[282] After Museveni assumed power, his government published Legal Notice No. 1 of 1986, suspending parts of the constitution and establishing the National Resistance Council (NRC) as the legislative body, headed by the president.[283] Among other things, the decree banned multi-partyism. In 1995, Uganda promulgated a new constitution, which still maintained the ban on multi-partyism, but the referendum of 2005 restored the multi-

277 Asiimwe S M, Constitutionalism, Democratisation and Militarism in Uganda, Nkumba Bus J, Vol 15, (2016) 179, 181.

278 Marco Margaritoff, The Life of Idi Amin, the 'Butcher of Africa' Who Ruled 1970s Uganda (27/11/2022) <https://allthatsinteresting.com/idi- amin-dada> accessed on 01/08/2022.

279 Monitor, 'How Mbarara Kampala Fell into Tanzanian Army, (27/04/2012) <https://www.monitor.co.ug/uganda/magazines/people-power/how-mbarara-kampala-fell-to-tanzanian-army-1570886> Accessed on 08/04/2024.

280 The Christian Science Monitor, 'Obote regains Uganda Presidency but disputes, challenges remain,' (15/12/1980) <https://www.csmonitor.com/1980/1215/121539.html> accessed on 02/08/2022.

281 The Bush in this case means becoming a rebel that would fight the existing government with an aim of overthrowing it.

282 Aljazeera, 'Museveni, one-time critic of clinging to power, wins sixth term,' (16/01/2021) https://www.aljazeera.com/news/2021/1/16/museveni-clings-on-as-one-of-africas-longest-serving-leaders accessed on 08/08/2022.

283 Asiimwe S M, Constitutionalism, Democratisation and Militarism in Uganda, Nkumba Bus J, Vol 15, (2016) 179, 181.

partyism that had been banned for nearly 20 years.[284] Prior to the 2005 constitutional amendments, there were hardly any principles of the rule of law and constitutionalism that would have made it possible to lobby or agitate for political pluralism.[285]

There has always been an atmosphere of concern in Uganda over the extent of the powers wielded by the military on matters concerning civilians. Since 2002, military courts in Uganda have prosecuted a number of civilians for offences under the criminal code, such as murder, possession of arms, and armed robbery.[286] A Constitutional Court ruling in 2006 held that military prosecutions of civilians were unlawful.[287] Human Rights Watch also raised concerns, pointing out that such a court was not competent to prosecute civilians.[288] That ruling, upheld on appeal by the Supreme Court in January 2009, was consistent with international law, which specifies that military tribunals are not competent courts to try civilians accused of peacetime criminal offences.[289]However, despite all of that, the military never buckled, and they have continued carrying out those prosecutions and passing sentences.[290]

Article 14, paragraph 1, of the International Covenant on Civil and Political Rights states in part:

> 'All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law,

---

284 Reliefweb, 'Uganda: Referendum ends 20-year ban on political parties' (01/08/2005) https://reliefweb.int/report/uganda/uganda-referendum-ends-20-year-ban-political-parties accessed on 01/08/2022.

285 Sam S Mutabazi, 'Switching Roles in Pursuit of Democracy in Uganda: the performance of civil society and media in the absence of political opposition,' (2009) 41 Les Cahiers d'Afrique de l'Est - East Afr Rev <https://journals.openedition.org/eastafrica/584> (Accessed on 30/11/2023).

286 Human Rights Watch, 'Righting Military Injustice, Addressing unlawful Uganda's prosecution of civilians in military courts,' (27/07/2011) <https://www.hrw.org/report/2011/07/27/righting-military-injustice/addressing-ugandas-unlawful-prosecutions-civilians> accessed on 02/08/2022.

287 *Amon Byarugaba, and others v Attorney General, Constitutional petition 0044 of 2015.*

288 Human Rights Watch, 'Righting Military Injustice, Addressing unlawful Uganda's prosecution of civilians in military courts,' (27/07/2011) <https://www.hrw.org/report/2011/07/27/righting-military-injustice/addressing-ugandas-unlawful-prosecutions-civilians> accessed on 02/08/2022.

289 International Covenant on Civil and Political Rights, (Adopted 16 December 1966 entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 14.

290 The Independent, 'Army court has no power to try civilians – Constitutional court,' (20/12/2022)<https://www.independent.co.ug/army-court-has-no-power-to-try-civilians-constitutional-court/> accessed on 10/02/2023.

everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law.'[291]

This Article also outlines the judicial guarantees accorded to anyone subject to the criminal jurisdiction of a State. While the covenant does not explicitly refer to military courts, Federico Andreu-Guzman is of the view that article 14 of this covenant constitutes the mainstay of the Human Rights Committee's doctrine on military courts.[292]

There have been concerns from human rights groups on the issue of the military prosecuting civilians. Human Rights Watch was concerned that not only have many civilians been convicted by courts that did not meet international standards of competence, independence, and impartiality, but also that military courts have routinely violated fundamental fair trial rights, such as the right to present a defence, the right against self-incrimination, and the prohibition on the use of evidence procured by torture.[293] The Constitutional Court, for the second time in less than two years, ruled that military courts have no power to try civilians.[294] The court held that acts of charging civilians in the military courts were unconstitutional and contrary to Article 28(1) of the constitution.[295]

2.5 Constitutionalism and its effect on governance

According to the Stanford Encyclopedia of Philosophy, *"Constitutionalism*" is the idea, often associated with the political theories of John Locke and the founders of the American republic, that government can and should be legally limited in its powers, and that its authority or legitimacy depends on its observing those limitations.[296]

---

291 International Covenant on Civil and Political Rights, (Adopted 16 December 1966 entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 14.

292 Federico Andreu-Guzman, 'Military Jurisdiction and International Law,' (Advanced edition) Vol II (Chapters 1-7) pg 1.

293 Human Rights Watch, 'Righting Military Injustice, Addressing unlawful Uganda's prosecution of civilians in military courts,' (27/07/2011) https://www.hrw.org/report/2011/07/27/righting-military-injustice/addressing-ugandas-unlawful-prosecutions-civilians accessed on 02/08/2022.

294 *Rtd Captain Amon Byarugaba and Others v Attorney General (Constitutional Petition 44 of 2015) [2022] UGCC 11* (15 December 2022).

295 Article 28(1) of Ugandan Constitution of 1995 with amendments through 2017.

296 Stanford encyclopaedia of Philosophy, 'Constitutionalism,' (Spring edition 2018) para 1 <https://plato.stanford.edu/archives/spr2018/entries/constitutionalism/> accessed on 04/09/2022.

Constitutionalism is a principle denoting the legal enforcement of constitutional limits, or, more importantly, a subset of those limits seen as a necessary feature of a constitutional order, often associated with safeguarding a broad sphere of individual liberty against the encroachment by public power.[297] According to the Stanford encyclopedia, a government should be legally limited in its powers, and its authority or legitimacy depends on its observance of those limitations.[298]

Constitutionalism can also be described as a principle that a government, in exercising its power, does so following a body of laws. According to Maru Bazezew, constitutionalism can be defined as the doctrine that governs the legitimacy of government action, implying something far more important than the idea of legality that requires official conduct to be in accordance with pre-fixed legal rules.[299] Thus, constitutionalism checks the legitimacy of government actions with regard to the decisions they take. In other words, it makes sure that government officials conduct their public duties in accordance with set laws. According to Pierre De Vos, constitutionalism describes a society in which elected politicians, judicial officers and government officials must all act in accordance with the law that derives its legitimacy and power from the constitution itself.[300] However, in all fairness, Constitutionalism goes beyond good constitutions, beyond the actions of government and the constitutionality of its officials, and equally goes beyond set laws. It must encompass the consent of the ruled. It is a balance of power between all the relevant groups and parties within a polity so that whoever governs does so with the consent of the governed. It is through an entrenched constitutionalism that a nation's constitution truly serves as the supreme law, reflecting and governing governmental actions for the benefit of its people.[301]

---

297 Tom Ginsburg, Mark D. Rosen and Georg Vanberg, *Constitutions in times of financial crisis,* (Cambridge University Press: 08 June 2019) <https://www.cambridge.org/core/books/abs/constitutions-in-times-of-financial-crisis/constitutionalism-as-limitation-and-license/79FE9AAC2CA2EB69C0CE221EE0517A39> 07/08/2022.

298 *Stanford Encyclopedia of Philosophy*, 'constitutionalism,' *(substantive revision Jun 9, 2022) para 1* < https://plato.stanford.edu/entries/constitutionalism/> accessed on 07/08/2022.

299 Maru Bezezew, 'Constitutionalism,' (2009) Vol. 3 No.2, Mizan law review, 358.

300 Pierre De Vos and others, *South African Constitutional Law in Context,* (4th edition, Oxford University press 2014).

301 Rizine R. Mzikamanda, 'Constitutionalism and the Judiciary: A Perspective from Southern Africa,'<https://www.justice.gov.za/alraesa/conferences/2011malawi/constitutionalism-and-the-judiciary_mzikamanda.pdf> accessed on 26/10/2022.

Fombad is of the view that 'an important bulwark of constitutionalism is the existence of an efficient and effective mechanism controlling and compelling compliance with the letter and spirit of the constitution.'[302] Constitutionalism is concerned with how a government is established, with sufficient power to realise a community's shared purposes and to implement the programmes for which a specific government is elected by voters.[303] An aspect that is key here is the structure of the government, looked at from the prism of those who govern vis-a-vis the governed, such that power is not applied arbitrarily. According to De Vos, this means that constitutionalism is closely related to the notions of democracy and theories of governance.[304]

2.5.1 Application of Constitutionalism in Kenya

Constitutionalism and the rule of law are related, as has been previously mentioned. Both are predicated on the necessity of defining and upholding the boundaries of state power, and these are accomplished primarily through the legal system. According to McIwain, 'in all its successive phases, constitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government.'[305] Before the 2010 constitution was enacted, Kenya's governance was far from ideal. The presidents in office at the time were known as "imperial presidents" because they not only had a great deal of power, but they also instilled fear in the populace and were almost impossible to challenge.[306] There was indistinctness between the government's arms. The 2010 Kenyan constitution drafters recognized the importance of clearly defining the boundaries between each branch of government. According to Article 2 of the Kenyan Constitution, the Constitution is the ultimate law of the Republic, and it applies to all individuals and state bodies at all levels of government.[307] Furthermore, Article

---

302 Charles Manga Fombad "Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa," (2007) 55 Am J Comp L 1.

303 Pierre De Vos and others, *South African Constitutional Law in Context,* (4th edition, Oxford University press 2014).

304 Pierre De Vos and others, *South African Constitutional Law in Context,* (4th edition, Oxford University press 2014).

305 Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca, NY: Great Seal Books, 1947) p. 21.

306 Mai Hassan, 'Continuity despite change: Kenya's new constitution and executive power,' (2013) vol. 22, No. 4, Department of Government, Harvard University, Cambridge, 587,587.

307 Article 2(1) of the Kenyan constitution of 2010.

2(2) makes it clear that no one may exercise or claim state authority unless specifically authorised by the constitution.[308]

The supremacy clause imposes limits on state powers; it states that any action inconsistent with what the constitution provides is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid.[309] It was, therefore, important that an aspect of independence of each arm of government be well defined so that no arm of government might encroach on another.

The executive is charged with the responsibility of governing, but they govern while conscious that the power they exercise emanates from people. This is as provided by Article 129 of the Kenyan constitution.[310] More importantly, constitutionalism demands not only that the government be sufficiently limited in a way that guards the people from arbitrary rule but also that there should be safeguards to ensure the government stays on the correct path of operating within the constitutional limits.

2.5.1.1 Challenges to constitutionalism and the judiciary in Kenya

While the Kenyan judiciary has stayed vigilant, playing its role as the anchor of Kenya's constitutional democracy, regrettably, there have been incidents where the judiciary has had to express frustration. An example of this was the failure by President Uhuru Kenyatta to appoint judges who had been recommended to him by the JSC. A lack of adequate funding for the judiciary to carry out its programmes is also part of the challenges the Kenyan judiciary has faced.[311] Justice Maraga lamented about the lack of adequate funding, he also mentioned that there were case backlogs that had accumulated because of the lack of enough judges to handle them.[312] Here, the Kenyan judiciary was short-staffed and, secondly, there were not enough funds to enable the judiciary to handle its affairs. The judiciary, by its unique nature, is the pillar

308 Article 2(2) of the Kenyan constitution of 2010.
309 Article 2(4) of the Kenyan constitution of 2010.
310 Article 129 of the Kenyan constitution of 2010 provides that: Executive authority derives from the people of Kenya and shall be exercised in accordance with this Constitution.
311 Nation TV, 'Maraga blames Uhuru for delaying to appoint 41 Judges,' (08/06/2020) <https://www.youtube.com/watch?v=S4bKYfqPq0U> accessed on 26/10/2022.
312 Nation TV, 'Maraga blames Uhuru for delaying to appoint 41 Judges,' (08/06/2020) <https://www.youtube.com/watch?v=S4bKYfqPq0U> accessed on 26/10/2022.

of a democratic state; it keeps everybody accountable. However, its mandate may be frustrated if it does not receive adequate funding to carry out its programmes.

Justice Maraga expressed optimism about what he considered to be a new beginning, praising the Kenyan constitution of 2010 as one of the best in the world. Nevertheless, he emphasized that the constitution's proper implementation is essential to achieving the goals of constitutionalism.[313] He argued that no matter how progressive a constitution may seem, it would be meaningless if the Bill of Rights, which guarantees people's freedom and liberties, were not carried out as the constitution dictates.[314] Maraga pointed out that 'a constitution that does not set out to achieve or one that is not implemented to achieve the aspirations and values of the society can be described as a constitution without constitutionalism.'[315]

The pressure that comes with adjudicating a presidential election petition in Kenya is immense, especially considering that a majority of the citizens await in anticipation of the court's decision. The Kenyan Supreme Court has the exclusive jurisdiction to hear Presidential election petitions.[316] Despite the complex nature of the presidential election case, the Supreme Court has to decide the case within 14 days of receiving the petition.[317] In 2017, the Supreme Court found that Mr. Uhuru Kenyatta and his Deputy President were not properly elected per the provisions of the Kenyan constitution of 2010. The court ordered the electoral body, the Independent Electoral and Boundaries Commission (IEBC), to conduct a fresh presidential election within the strict confines of the law within 60 days.[318] This ruling demonstrated the court's commitment to a democratic order when it upheld the constitutional principles of the rule of law.[319] Cases that seem to test the mettle of the judiciary are usually politically inclined.

---

313 Nation TV, 'Maraga blames Uhuru for delaying to appoint 41 Judges,' (08/06/2020) <https://www.youtube.com/watch?v=S4bKYfqPq0U> accessed on 26/10/2022.

314 NTV Kenya, 'CJ Maraga: I have no problem with President Uhuru,' Nation TV (23/08/2020) <https://www.youtube.com/watch?v=xb0LoEBc6_o> accessed on 26/10/2022.

315 NTV Kenya, 'CJ Maraga: I have no problem with President Uhuru,' Nation TV (23/08/2020) <https://www.youtube.com/watch?v=xb0LoEBc6_o> accessed on 26/10/2022.

316 Article 163(3)(a) of the Kenyan Constitution of 2010.

317 Article 140(2) of the Kenyan Constitution of 2010.

318 *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR Petition 1 of 2017) [2017] (KLR).*

319 *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR Petition 1 of 2017) [2017] (KLR).*

In January 2024, the Kenyan Court of Appeal decided against President William Ruto's affordable housing initiative.[320] The court declined to prolong an injunction that would have allowed the government to continue collecting the controversial housing levy. This is a levy that was being enforced by the Kenyan government in a bid to raise money to build affordable houses for low-income earners. 1.5% of the gross income was to be deducted every month from workers. This was introduced under the Finance Act 2023.[321] A number of decisions that went against the government seemed to anger President Ruto, who accused the judiciary of being corrupt and working with the opposition to sabotage his agenda.[322] The president's allies also attacked the judiciary, with some legislators saying that Ruto was the one who received the mandate from the people and not the judiciary.[323]

2.5.2 Application of Constitutionalism in Uganda

The people of Uganda have suffered violations of their human rights as a result of military interference. This has had detrimental effects on the development of a true democratic state. When considering the situation from a historical perspective, it can be concluded that the Ugandan judiciary works under difficult conditions. It has, however, striven to render decisions that uphold the rule of law, represent societal needs, and stand as a voice of reason despite numerous obstacles. It can be argued that the principles of governance based on constitutionalism and the rule of law have not yet been fully embraced by the Ugandan government. Accountable governments prepared to uphold the values of constitutionalism and the rule of law cannot be mentioned in the same sentence as militarism. To realise the prescripts of constitutionalism, all arms of government must work toward that common purpose. This includes supporting the judiciary in its mandate to deliver justice. It is also important that everyone obey court orders. Upholding human rights is a good starting place.

320 *Okiya Omtata and others v Attorney General and others petition No. E181 of 2023.*

321 Article 84 of the Financial Act No. 4 of 2023.

322 Stephen Letoo, 'President Ruto Sustains Attacks on Judiciary, Claims It's Being Used to Sabotage Govovernment,' (02/01/2024) <https://www.citizen.digital/news/president-ruto-sustains-attacks-on-judiciary-claims-its-being-used-to-sabotage-govt-n334110> accessed on 04/02/2024.

323 Citizen Tv, 'Ruto, allies attack Judiciary over housing levy ruling,' (27/01/2024) <https://www.youtube.com/watch?v=uYamXLWCFKU> accessed on 06/01/2024.

2.5.2.1 Challenges facing constitutionalism and the judiciary in Uganda

President Museveni ascended to power in 1986 after carrying out a coup *d'état* on the government of General Tito Okello Lutwa. Museveni exchanged military fatigues for civilian clothes, becoming both the leader of the civilian population and the Commander in Chief of the army that brought him to power, a position he still holds thirty-eight (38) years later, which makes him the longest-serving president in East Africa.[324] He was acclaimed with great euphoria when he assumed power. He made popular promises to restore order to Uganda's leadership and to establish a just society, but these assurances were rarely fulfilled.[325] In the years that have passed, Ugandans have experienced 'a guided democracy'[326] and there is a genuine apprehension about what some consider a military state.[327] Uganda has a constitution with provisions that, if implemented, would make it one of the ideal societies to live in. The Ugandan constitution outlines a reverence for the rule of law and values that speak about the entrenchment of the principles of constitutionalism, but these values have not been fully adopted. The judiciary has called out the state's excesses in several incidents, but the Ugandan government has sometimes ignored or been reluctant to follow court orders.[328] Constitutionalism is rooted in the idea that laws constrain the state, and courts will issue orders to limit the state's excesses when approached.

The judiciary is supposed to be the backbone that safeguards the rule of law and constitutionalism, but there are times when the judiciary has been second-guessed by President Museveni. While celebrating the life of Ben Kiwanuka, the first Chief Justice of Uganda, an issue concerning the rule of law was raised by Advocate Bernard Oundo, Uganda's Law Society President, who lamented the flouting of laws by a

---

324 Patience Atuhaire, 'Uganda's Yoweri Museveni: How an ex-rebel has stayed in power for 35 years,' BBC (10/05/2021) <https://www.bbc.com/news/world-africa-55550932> accessed on 26/10/2022.

325 Fred Muvunyi, 'Yoweri Museveni: 30 years in power,' DW (29/01/2016) <https://www.dw.com/en/ugandas-president-museveni-seeks-another-term-after-30-years-in-office/a-19011412> accessed on 27/10/2022.

326 Guided democracy, is characterised by a democratic government that functions as a *de facto* authoritarian government, they are usually legitimized by elections but do not change the state's policies, motives, and goals.

327 Guided democracy in this case in a process where those who undertake it are not really committed in executing the principles of a true democracy but it is a window dressing for the consumption of the outsiders.

328 Anthony Wesaka, 'Lack of respect for court orders worrying,' (19/03/2021) <https://www.monitor.co.ug/uganda/oped/commentary/lack-of-respect-for-court-orders-worrying-3328724> accessed on 06/01/2024.

section of government agencies, especially the armed forces. He pointed out that they were not respecting and implementing court orders.[329] Mr Oundo pointed out that it was important for the rule of law, constitutionalism and a functioning democracy that court orders must be obeyed.[330] When he gave his address, President Museveni warned that the state would continue to ignore court orders; he argued that there was a 'lack of convergence of principles of justice.'[331] He raised doubts and asked from whom the judiciary wanted independence?[332] The President went on to say that the independence that the judiciary was asking for was a veneer of wanting to do things that may not be in line with what the majority in society would want.[333] Museveni went on to tell the judiciary that they could not be independent of the Ugandan people.[334]

The elephant in the room in Uganda's politics and governance is the question of the role of the military. The rule of law and constitutionalism, by their very nature, do not envisage a military power that controls the many important structures of governance or society; in fact, it frowns upon the control of society by the military. According to Johnson, militarism has traditionally been regarded as a phenomenon of the political right, associated with aggression in foreign policy and with reactionary politics and authoritarian government at home.[335]

Since its independence and self-rule from colonial rule, Uganda has never had a peaceful transfer of power from one president to another. All the successive regimes that have come since independence have arrived through the barrel of a gun and have left or been forced out through similar means. Thus, Uganda has had its fair share of

---

329 Observer Uganda, 'Museveni on why the government will continue to disobey court orders,' (21/09/2022) <https://observer.ug/news/headlines/75255-museveni-on-why-govt-will-continue-to-defy-court-orders> accessed on 27/10/2022.

330 Observer Uganda, 'Museveni on why the government will continue to disobey court orders,' (21/09/2022) <https://observer.ug/news/headlines/75255-museveni-on-why-govt-will-continue-to-defy-court-orders> accessed on 27/10/2022.

331 Observer Uganda, 'Museveni on why the government will continue to disobey court orders,' (21/09/2022) < https://observer.ug/news/headlines/75255-museveni-on-why-govt-will-continue-to-defy-court-orders> Accessed on 27/10/2022.

332 Observer Uganda, 'Museveni on why the government will continue to disobey court orders,' (21/09/2022) <https://observer.ug/news/headlines/75255-museveni-on-why-govt-will-continue-to-defy-court-orders> Accessed on 27/10/2022.

333 Observer Uganda, 'Museveni on why the government will continue to disobey court orders,' (21/09/2022) < https://observer.ug/news/headlines/75255-museveni-on-why-govt-will-continue-to-defy-court-orders> Accessed on 27/10/2022.

334 Observer Uganda, 'Museveni on why the government will continue to disobey court orders,' (21/09/2022) < https://observer.ug/news/headlines/75255-museveni-on-why-govt-will-continue-to-defy-court-orders> Accessed on 27/10/2022.

335 Matthew Johnson, *Militarism and the British Left, 1902–1914*,' (2013) Palgrave Macmillan, Available at < https://doi.org/10.1057/9781137274137_1> accessed on 27/10/2022.

strongmen who continue to rule to this day.[336] A society that wants to establish or live on democratic principles based on the rule of law and constitutionalism can never envisage being ruled both as a democratic state and as a military junta; it just cannot work.[337]

International law prohibits the prosecution of civilians in military courts. The Committee on Human Rights, the Committee against Torture, and the Committee on the Rights of the Child have taken a position that civilians should not be tried in military courts. This is mentioned in general comment 32, Article 14: Right to equality before courts and tribunals and to a fair trial.[338] It does not envisage military courts trying civilians.[339] In that discussion, the committee raised concerns about the repeated failure of military courts to adhere to fair trial procedures. The committee's apprehension was that such courts were established to enable exceptional procedures to be applied that do not comply with set standards of justice.[340] Among others, the concerns raised by the UN working group on arbitrary detention included the fact that, by the nature of their work, the military officials are obedient to their superiors. This point brings to focus the centrality of a judge's independence. In a few words, the officials in the military court can hardly exercise independence as ordinary judges can.

Another point of concern raised by the UN working group on arbitrary detention included the fact that military tribunals are often used to deal with political opposition groups, journalists, and human rights defenders.[341] The above points to a lack of independence of the personnel who adjudicate the said cases. In Uganda, the military has been accused of torturing the suspects and staging arrests fashioned to resemble kidnappings, only for the suspects suddenly to appear in the military court facing

---

336 Patience Atuhaire, 'Uganda's Yoweri Museveni: How an ex-rebel has stayed in power for 35 years,' BBC (10/05/2021) <https://www.bbc.com/news/world-africa-55550932> accessed on 26/10/2022.

337 Peace Science Digest, 'Militarism is a Threat to Democracy,' <https://warpreventioninitiative.org/peace-science-digest/militarism-is-a-threat-to-democracy/> accessed on 08/04/2024.

338 UN Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007).

339 UN Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007).

340 UN Human Rights Committee, 21st Session, *General Comment No. 13: Article 14 (Administration of justice)*, 1 January 1984, para. 4.

341 UN Human Rights Council, 27th Session, *Report of the Working Group on Arbitrary Detention*, 30 June 2014, A/HRC/27/48, paras. 66-67.

charges.[342] An example was the case with Robert Kyagulanyi, popularly known as Bobi Wine, an opposition politician who was arrested, faced torture, and later emerged in a military court facing treason charges among others.[343]

Military courts have routinely violated fundamental fair trial rights, such as the right not to be tortured, the right to present a defense, the right against self-incrimination, and the prohibition of the use of evidence procured by torture, etc. Mr. Robert Kyagulanyi accused the military of torture. He alleged that security officers beat him and squeezed his testicles until he lost consciousness.[344] An accused is entitled to a fair hearing, which is provided for under Article 28 of the Ugandan Constitution.[345] It states that, in the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.[346] Accusations of torture and other mistreatment fly in the face of the constitution, specifically Article 24 of the Ugandan constitution.[347]

Judges are the guardians of the law, so, therefore, it is critical that the judiciary as a whole and its members maintain their independence, resist outside pressure, and remain unaffected by circumstances. In Article 128 of the Ugandan constitution, it is stated that, in the exercise of judicial power, the courts shall be independent and shall not be subject to the control or direction of any person or authority.[348] While there are instances where some have claimed that some parts of the judiciary in Uganda are more malleable to the executive, it is important to point out that, largely, the judiciary has stood firm and made judgments against the State.[349] In a *Habeas Corpus*

---

342 Halima Athumani, **'**Uganda's Security Agencies Accused of Torture, Disappearances of Civilians,' VOA (22/03/2022) <https://www.voanews.com/a/uganda-security-agencies-accused-of-torture-disappearances-of-civilians/6496166.html> accessed on 06/01/2024.

343 Aljazeera, 'Bobi Wine recounts 'torture by Ugandan soldiers,' (03/09/2018) <https://www.aljazeera.com/news/2018/9/3/bobi-wine-recounts-torture-by-ugandan-soldiers> accessed on 09/02/2023.

344 Aljazeera, 'Bobi Wine recounts 'torture by Ugandan soldiers,' (03/09/2018) <https://www.aljazeera.com/news/2018/9/3/bobi-wine-recounts-torture-by-ugandan-soldiers> accessed on 09/02/2023.

345 Article 28 of Ugandan constitution of 1995 with amendments through 2017.

346 Article 28 of Ugandan constitution of 1995 with amendments through 2017.

347 Article 24 of Ugandan constitution of 1995 with amendments through 2017.

348 Article 128(1) of the Uganda's constitution of 1995 with amendments through 2017.

349 Derrick Kiyonga & Joel Mukisa, 'Court Martial Ruling: A positive for criticized constitutional court.

AD subjiciendum application brought against Uganda's Attorney General,[350] the applicants sought that orders be issued requiring the respondents, their servants, agents, and/or officers acting under their orders to produce/bring Mr. Kyagulanyi Sentamu Robert and Barbra Kyagulanyi Itungo before the Court for appropriate orders.[351]

Briefly, the case was as follows:

> The 1st applicant was a Presidential candidate in the national election that had just been concluded. The 1st and 2nd applicants had, for a number of days, been confined at their home in Magere, Kasangati Town Council in Wakiso District, where security operatives, including the Police and Ugandan People's Defence Forces (UPDF) officers had refused them permission to leave their home. The commanding officers of the said security agencies had not given any reasons for the detention of the applicants at their home. The respondents and/or their servants, agents or persons acting under them were detaining the applicants illegally. Since their arrest, the applicants had not been allowed access to their lawyers, family, doctors or anyone from the outside world; they had neither been produced in any court of law nor released by the respondents. They argued that the continued illegal detention of the applicants was further infringing on their right to personal liberty, among other rights, under the 1995 Constitution.[352]

In the judgment, the judge quoted *Hon. Sam Kuteesa V Attorney General*, a constitutional petition, where it was held that the subject of the preservation of personal liberty is so crucial to the constitution that any derogation from it can be done only as a matter of unavoidable necessity. It was stated that:

> The Constitution ensures that such derogation is just temporary and not indefinite. The Constitution has a mechanism that enables the enjoyment of the right that has been temporarily interrupted to be reclaimed through the right to the order of habeas corpus which is inviolable and cannot be suspended, as well as through the right to apply for release on bail.[353]

---

350 *Kyagulanyi Sentumu Robert and another v Attorney General and 2 others (Miscellaneous Cause 16 of 2021) [2021] UGHCCD 1*

351 *[2021] UGHCCD 1.*

352 *Kyagulanyi Sentumu Robert and another v Attorney General and 2 others (Miscellaneous Cause 16 of 2021) [2021] UGHCCD 1.*

353 *Hon. Sam Kuteesa v Attorney General [2012] UGCC 2.*

In the end, the judge concluded that the restrictions imposed on the applicants were unlawful and ordered that they be lifted and the personal liberty of the applicants be restored.[354] It can be concluded that, while the judiciary in Uganda strives against all odds to be counted as a pivot for the rule of law, the influence and the excesses of the state do not make it easy. The influence of the current government and the eminent force that they tacitly present through the presence of the military suggests that the society and institutions of governance are always under pressure to go with what the government wants.[355] In such a society, it is difficult to establish an independent judiciary, as its efforts and decisions will likely be frustrated by the military if it goes against the wishes of the state. The judiciary is a key arm of government, and as such, it is important that it remains independent and must be respected. It is the difference between anarchy and a constitutional order.

2.5.3 Application of Constitutionalism in South Africa

2.5.3.1 Constitutionalism in South Africa

South Africa, with one of the most progressive constitutions in the world, has striven to apply the legal enforcement of constitutional limits. South African courts have decided cases involving the Bill of Rights whenever they have been brought before them. This has frequently been viewed as a necessary component of a constitutional order that protects rights such as equality, dignity, individual freedom and liberties, among others. Constitutionalism stands at the core of legality, which means that whatever decision or action taken must be rooted in law. In administrative matters, for example, when taking administrative action, it is important that the decision maker applies his/her mind guided by the stipulated requirements. According to Foran:

> A person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters, which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider.

354 *Kyagulanyi Sentumu Robert and another v Attorney General and 2 others (Miscellaneous Cause 16 of 2021) [2021] UGHCCD 1.*

355 Liam Taylor, 'How the Army is swallowing the Ugandan State,' (15/08/2022) <https://foreignpolicy.com/2022/08/15/uganda-museveni-military-army-state-power/> accessed on 05/02/2023.

> If he does not obey those rules, he may truly be said, and is often said, to be acting unreasonably.[356]

A constitution must establish a stable framework for the exercise of public power, which prescribes what public officers can and cannot do, but, at the same time, the constitution must be a flexible document that grows and develops, reflecting the changing values and principles of a society. According to Strauss, a living Constitution is one that evolves, changes over time, and adapts to new circumstances without being formally amended. [357] Waluchow argues that constitutions are also meant to be long-lasting, to serve the values of continuity and stability in the basic framework within which the contentious affairs of law and politics are conducted.[358]
The two concepts above require judicial officials who are conscious of what the law demands and, at the same time alive to the prevailing factual circumstances of the societies they find themselves in.

The South African judiciary has been at the forefront of ensuring that the rule of law and constitutionalism are alive and well. The judiciary has been, and continues to be, the bulwark for safeguarding rights and the interests of society. Its sole purpose is to interpret the constitution and the laws in a way that will advance justice and meet the dictates of society. The constitution is the pillar on which the members of the bench stand; in other words, they owe their loyalty and duty to the constitution. They are called to interpret and apply the provisions of the constitution, mindful of the history of a difficult past, and equally conscious of a future that the constitution envisages. The preamble of the South African constitution states the following:

> We, the people of South Africa, Recognise the injustices of our past; Honour those who suffered for justice and freedom in our land; Respect those who have worked to build and develop our country; and believe that South Africa belongs to all who live in it, united in our diversity. We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to -

---

356 Michael Foran, 'The constitutional foundations of reasonableness review: artificial reason and wrongful discrimination,' Edinb Law Rev 26.3 (2022): 295-305.

357 David Strauss, 'The living constitution,' University of Chicago Law school, (27/09/2010) <https://www.law.uchicago.edu/news/living-constitution> accessed on 25/11/2023.

358 Wil Waluchow, 'Constitutionalism,' (18/05/2023) <https://plato.stanford.edu/entries/constitutionalism/> accessed on 25/11/2023.

> Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
>
> Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
>
> Improve the quality of life of all citizens and free the potential of each person; and
>
> Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.[359]

If the preceding preamble of the constitution as a living document is to be taken and applied to reflect those values, then, to their credit, South African courts have striven to do so. The courts have stood firm in affirming the letter of the law, checking other arms of government, and making sure government officials do not arbitrarily abuse the power delegated to them by the constitution. They play a role as the interpreters of the law;[360] they break down the law and give its full intent.[361]

2.5.3.2 Challenges to the application of constitutionalism in South Africa

One of the pillars of constitutionalism is the principle of the separation of powers. This principle derives from the view that power should not be concentrated in a single body/person, or institution. The separation of powers, therefore, refers to the division of government responsibilities in different branches to limit any one branch from exercising the core functions of another.[362] Apart from avoiding the concentration of power in one body/person, it also provides for checks and balances.[363] There have been both positives and negatives as South Africa has charted a new path after

---

359 Preamble of the South African Constitution of 1996.

360 Muskan Sharma and Nishka Bharat Asarpota , *Role of Judges in the Art of Interpretation of Statutes*, 4 (4) IJLMH Page 826 - 839 (2021), < https://www.ijlmh.com/paper/role-of-judges-in-the-art-of-interpretation-of-statutes/#> accessed on 12/02/2023.

361 Muskan Sharma and Nishka Bharat Asarpota , *Role of Judges in the Art of Interpretation of Statutes*, 4 (4) IJLMH Page 826 - 839 (2021), < https://www.ijlmh.com/paper/role-of-judges-in-the-art-of-interpretation-of-statutes/#> accessed on 12/02/2023.

362 National conference of state legislatures, separation of powers: An overview, (21/05/2021) <https://www.ncsl.org/about-state-legislatures/separation-of-powers-an-overview#:~:text=Separation%20of%20powers%2C%20therefore%2C%20refers,provide%20for%20checks%20and%20balances.> accessed on 30/11/2023.

363 National Council of State Legislatures. 'Separation of powers: An Overview,' 01/05/2021 < <https://www.ncsl.org/about-state-legislatures/separation-of-powers-an-overview#:~:text=Separation%20of%20powers%2C%20therefore%2C%20refers,provide%20for%20checks%20and%20balances.> accessed on 09/02/2023.

gaining its freedom. After decades of authoritarian, racially discriminatory governance under apartheid. South Africa's 1996 constitution established a multi-party democracy and rights-based constitutionalism.

As a departure from previous restrictive legislation, the South African parliament has passed and the executive has implemented a series of transformative laws that have breathed new life into the legal system. While the democratic experiment in South Africa has largely gone well, there have nonetheless been some challenges that have emanated from its politics. Some of the challenges that have emerged have been due to a dominant party and the manner in which South African politics is organised.[364]

Since the dawn of democracy in 1994, South Africa has been under the leadership of the ANC. Despite its declining support base, the African National Congress is still the most dominant political party in South Africa. Many owe allegiance to the ANC owing to the role it played in ushering in freedom that aided in the birth of a new nation after apartheid.[365] However, the ANC's dominance has meant that there have been blurred lines between the roles the ANC plays as a government and as a political party. The blurred lines have been in the way the legislature and executive operate. This has been a concern considering that the party structure that deploys members to parliament has an influence on them and also on the president, who is the head of the executive, so there has been a thin line between the party and the Government. The blurred lines between ANC's members of parliament and the executive have left a lot to be desired. The outcome is that accountability has suffered under the altar of party loyalty. For instance, members of parliament allied to the ANC have in the past voted according to the direction of the party and not necessarily by following their consciences. The adoption in parliament of the Nkandla "report" that "exonerated" President Jacob Zuma of all wrongdoing in the R250 million Nkandla scandal was a

364 ANC is the dominant party in South Africa, they are also formed the Government after winning the elections in 2019.

365 The African National Congress (ANC) is a social-democratic political party in South Africa. A liberation movement, it came to power in 1994 after a protracted struggle for freedom against apartheid, it has governed the country since 1994 after the first post-apartheid election.

case in point that showed that ANC members were loyal to the party as opposed to being accountable.[366]

2.5.3.3 South African Judiciary as a voice of reason

The judiciary has stood as a voice of reason and the moral conscience of South Africa. The constitution gives the legislature the authority to hold the executive to account. The constitution, under section 55 (2), provides that the National Assembly must provide for mechanisms to ensure that all executive organs of state in the national sphere of government are accountable.[367] Courts have been called upon to regulate and check the exercise of power by the executive and the National Assembly. According to Andrew-Befeld, this is because both had failed to act lawfully and fulfil their constitutional obligations, thereby necessitating judicial intervention.[368]

The conflicted nature of the ANC's majority in parliament and its inability, at times, to hold the executive accountable led to the judiciary having to call out the speaker of the National Assembly.[369]

In *EFF v The Speaker of the National Assembly* the court decided that the National Assembly had failed to play its role of holding the president accountable.[370] The court held that the resolution passed by the National Assembly absolving the President from compliance with the remedial action taken by the Public Protector in terms of section 182(1)(c) of the Constitution was inconsistent with sections 42(3), 55(2)(a) and (b) and 181(3) of the Constitution and was invalid. Andrew-Befeld posits that, when all failed, the judiciary did not.[371] This led to some politicians having to accuse the judiciary of

366 Pierre De Vos, 'Why Report of Nkandla Ad Hoc Committee is of No Legal Relevance,' Constitutionally Speaking, (19/11/2014) <https://constitutionallyspeaking.co.za/why-report-of-Nkandla-ad-hoc-committee-is-of-no-legal-relevance/> accessed on 25/11/2023.

367 Section 55(2)(a) of the South African constitution of 1996.

368 Andrew-Befeld, 'South African courts: Are they guilty of judicial overreach or merely upholding the rule of law?' (07/09/2021) < https://www.iol.co.za/news/politics/opinion/south-african-courts-are-they-guilty-of-judicial-overreach-or-merely-upholding-the-rule-of-law-751c156c-cbf9-480c-bce5-1d71c7952ab4> Accessed on 14/02/2023.

369 *EFF v Speaker of the National Assembly and Others; DA v Speaker of the National Assembly and Others 2016 (CC) 11.*

370 *EFF v Speaker of the National Assembly and Others; DA v Speaker of the National Assembly and Others 2016 (CC) 11 (CC) [105].*

371 Andrew-Befeld, 'South African courts: Are they guilty of judicial overreach or merely upholding the rule of law?' (07/09/2021) <https://www.iol.co.za/news/politics/opinion/south-african-courts-are-they-guilty-of-judicial-overreach-or-merely-upholding-the-rule-of-law-751c156c-cbf9-480c-bce5-1d71c7952ab4> accessed on 14/02/2023.

overreach.[372] According to Befeld, the doctrine of the separation of powers is at the epicentre of the preservation of constitutional democracy. He pointed out that the separation of powers between the executive, judiciary and legislative branches of the government is essential to the preservation of democracy.[373] He further stated that the principle of the separation of powers is the most ancient and enduring element of constitutionalism.[374]

The accusation brought against courts of departing from the non-interventionist position that characterises the separation of powers, was not necessarily true. According to section 172(1)(a) of the constitution, the courts are empowered to act as guardians in protecting and promoting the constitutional values and principles against all who may violate them.[375] The courts have the power to declare as invalid any law or conduct that is inconsistent with the Constitution.[376] The courts have intervened in cases where there have been failures by other arms of government to act lawfully.[377]

The matter involving the Public Protector's report on public coffers money spent at Mr. Jacob Zuma's Nkandla homestead and the subsequent remedial action touched on the obligation of the National Assembly to hold the President accountable. Among the issues in the case was the refusal of the president to implement the report's remedial action.[378] Light was also shown on Parliament for its refusal to hold President Zuma to account.[379] Mogoeng Mogoeng CJ, started by stating that the constitutional vision

---

372 Andrew-Befeld, 'South African courts: Are they guilty of judicial overreach or merely upholding the rule of law?' (07/09/2021) < https://www.iol.co.za/news/politics/opinion/south-african-courts-are-they-guilty-of-judicial-overreach-or-merely-upholding-the-rule-of-law-751c156c-cbf9-480c-bce5-1d71c7952ab4> accessed on 14/02/2023.

373 Andrew-Befeld, 'South African courts: Are they guilty of judicial overreach or merely upholding the rule of law?' (07/09/2021) <https://www.iol.co.za/news/politics/opinion/south-african-courts-are-they-guilty-of-judicial-overreach-or-merely-upholding-the-rule-of-law-751c156c-cbf9-480c-bce5-1d71c7952ab4> accessed on 14/02/2023.

374 Andrew-Befeld, 'South African courts: Are they guilty of judicial overreach or merely upholding the rule of law?' (07/09/2021) < https://www.iol.co.za/news/politics/opinion/south-african-courts-are-they-guilty-of-judicial-overreach-or-merely-upholding-the-rule-of-law-751c156c-cbf9-480c-bce5-1d71c7952ab4> Accessed on 14/02/2023.

375 Section 172(1)(a) of the South African Constitution of 1996.

376 Section 172(1)(a) of the South African Constitution of 1996 states that, when deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.

377 The Constitutional Court held that Zuma and the speaker of the national assembly breached the Constitution by failing to implement the Nkandla report's findings.

378 *EFF v Speaker of the National Assembly and Others; DA v Speaker of the National Assembly and Others 2016 (CC).*

379 *EFF v Speaker of the National Assembly and Others; DA v Speaker of the National Assembly and Others 2016 (CC).*

was a decisive break from the unchecked abuse of State power and resources that was virtually institutionalized during the apartheid era.[380] To achieve this goal, he pointed out that the country adopted accountability, the rule of law and the supremacy of the Constitution as values of South Africa's constitutional democracy.[381]

A brief summary of the case is that the Public Protector made findings against Mr. Jacob Zuma. The case involved the undue enrichment of Mr. Jacob Zuma's homestead. The Public Protector, Thuli Madonsela, found that some improvements on Mr. Jacob Zuma's homestead had been unlawfully upgraded using public funds. The report recommended that Mr. Zuma had to personally pay back money to the National treasury equivalent to the value of the upgrades that were not security-related. When the report was tabled in Parliament, the ANC-dominated *ad hoc* committee that was chosen to look into the matter came up with a report that exonerated President Jacob Zuma from paying for the said upgrades.[382] De Vos described that move as 'not unexpected,' referring to it as a need for, 'ANC MPs to protect the President in order to retain their jobs and to have any chance of promotion in future.'[383] In a few words, ANC MPs act as a collective following the cue of the position taken by the party.

The court stated that it was important for everybody to act on the decisions of the constitutionally mandated bodies whenever they are made. Chief Justice Mogoeng pointed out that, 'No binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly.'[384] Precisely, it has legal implications and must be complied with.[385] This particular fact speaks to the respect for the rule of law. The court stated that the foundational value of the rule of law demands of us, as a law-abiding people,

---

380 *EFF v Speaker of the National Assembly and Others; DA v Speaker of the National Assembly and Others 2016 (11) (CC) [1].*

381 Section 1(c) and (d) of the South African Constitution of 1996.

382 Pierre de Vos, 'why report of Nkandla Ad hoc committee is of no legal relevance,' 19/11/2014 <https://constitutionallyspeaking.co.za/why-report-of-nkandla-ad-hoc-committee-is-of-no-legal-relevance/> accessed on 11/02/2023.

383 Pierre de Vos, 'why report of Nkandla Ad hoc committee is of no legal relevance,' 19/11/2014 <https://constitutionallyspeaking.co.za/why-report-of-nkandla-ad-hoc-committee-is-of-no-legal-relevance/> accessed on 11/02/2023.

384 *EFF v Speaker of the National Assembly and Others; DA v Speaker of the National Assembly and Others 2016 (11) (CC) [74].*

385 *EFF v Speaker of the National Assembly and Others; DA v Speaker of the National Assembly and Others 2016 (11) (CC) [74].*

to obey decisions made by those clothed with the legal authority to make them or else approach courts of law to set them aside, so that they may validly escape their binding force.[386]

The court faulted the National Assembly in the manner in which they approached the Public Protector's report, considering the implication it had with the head of state being implicated in it. The court pointed out that, on a proper construction of its constitutional obligations, the National Assembly was duty-bound to hold the President accountable by facilitating and ensuring compliance with the decision of the Public Protector. The exception would be where the findings and remedial action were challenged and set aside by a court.[387] The court held that the National Assembly should have ensured that the President complied with the remedial action taken against him. According to the court, not doing so was inconsistent with its obligations to scrutinize and oversee executive action and to maintain oversight of the exercise of executive powers by the President as stipulated by the constitution.[388] The National Assembly was found to have neglected its duty, especially in failing to address or intervene in Mr. Zuma's compliance with the remedial action outlined in Section 8(2) of the Public Protector Act.[389]

The court also held that the President's failure to comply with the remedial action taken against him by the Public Protector was inconsistent with his obligations to uphold, defend, and respect the Constitution as the supreme law of the republic. He was ordered to comply with the remedial action taken against him by the Public Protector.[390]

386 *EFF v Speaker of the National Assembly and Others; DA v Speaker of the National Assembly and Others 2016 (11) (CC) [75].*

387 *EFF v Speaker of the National Assembly and Others; DA v Speaker of the National Assembly and Others 2016 (11) (CC) [97].*

388 Section 55(2)(a) and (b) of the South African Constitution of 1996.

389 *EFF v Speaker of the National Assembly and Others; DA v Speaker of the National Assembly and Others 2016 (11) (CC) [104].*

390 *EFF v Speaker of the National Assembly and Others; DA v Speaker of the National Assembly and Others 2016 (11) (CC) [103].*

2.5.3.4 Disobedience of court orders by other Arms of Government

In safeguarding the rule of law and constitutionalism, courts in South Africa have also had a fair share of frustrations that, among other things, included disobedience with regard to court orders. When former Sudan President, Mr. Omar Al-Bashir, arrived in South Africa for the African Union summit in 2015, he was a wanted man. Al-Bashir had been indicted by the International Criminal Court (ICC) on charges of genocide and crimes against humanity. It was pointed out that South Africa, as a signatory to the Hague-based International Criminal Court, was obligated to arrest him and hand him over to the ICC.[391] The deliberate failure by the South African government to arrest Mr. Al-Bashir was an example of disobedience of a court order. The Court expressed its displeasure, stating that:

> Having regard to the principle of separation of powers between the executive, legislative and judicial arms of the state, it is in any event clear that this court would not have concerned itself with policy decisions which in their nature fall outside its ambit. As a court, we are concerned with the integrity of the rule of law and the administration of justice.[392]

The case was a hot potato that pitted the executive against the judiciary; this case tested the resolve of the judiciary. In this particular case, it was expected that the orders of the judiciary would have been fully executed, but that is not what happened. The South African Government ignored the court order and allowed for the safe passage of Mr. Al-Bashir. This was tantamount to undermining the work of the judiciary. It should be understood that the judiciary does not have an army behind it, but it expects that all arms of government should work by complementing the work and duties of one another.

---

391 The Guardian, South African court rules failure to detain Omar al-Bashir was 'disgraceful','(16/03/2016) <https://www.theguardian.com/world/2016/mar/16/south-african-court-rules-failure-to-detain-omar-al-bashir-was-disgraceful> accessed on 27/10/2022.

392 *Southern African Litigation Centre v Minister of Justice and Constitutional Development 2015 5 SA 1 (GP) para 30.*

2.6 Lessons to be learned from Kenya, South Africa and Uganda on the application of the rule of law and constitutionalism

There is no doubt as to the importance of the rule of law and constitutionalism in Kenya Uganda, and South Africa, and more importantly, the role the judiciary plays in ensuring an orderly society. The lesson from Kenya is that the judiciary can stand firm and decide cases based on the provisions of the law. The Kenyan constitution of 2010 gave the Kenyan judiciary a new look, shaking off its negative past that had been characterised by doubt from its citizens. From the assessment of the previous events, it can be said that an independent judiciary deciding cases fairly inspires confidence. The health of a constitutional democracy depends on courts interpreting and correctly applying the law. It may as well be the difference in creating order in society, with people trusting that justice will be done. The judiciary can also be an instrument of discord, sowing seeds of distrust and breeding anarchy if it chooses to tread a path that protects the narrow interests of a few.

Uganda has faced tumultuous times; her citizens have experienced a mixture of relief but largely they continue to live with serious apprehension. The reality is that the military presence looms large in Uganda and, as days have gone by, it has increasingly appeared that the military wants to dominate the day-to-day activities of the country. The judiciary plays a critical role in Uganda, although at times some of the judiciary's personnel have been accused of being in favour of the regime. Ugandan leaders have to decide which governance system they want. The meddling by the military in the lives of the citizens does not inspire confidence. The judiciary must be independent and not operate in an environment of fear or apprehension of what may come their way should they rule in a way that does not favour a certain side. The judiciary owes allegiance to the people and to the constitution, and this should be their guiding light.

The South African judiciary is a pillar of the country's constitutional democracy. Despite the myriad challenges bedeviling the country, the judiciary in South Africa stands out as a beacon of hope. It has decided cases that have shaped the course of the country. The judiciary has thus far demonstrated that its duty and loyalty when deciding cases is to the constitution alone. The personnel in the judiciary understand the difficult past that the country went through and they know that it is incumbent on them to guard the free society at hand.

2.7 Conclusion

Constitutionalism is seen in the prism of a state, characterized by, among other things, principles such as state sovereignty, the separation of powers, and a democracy designed to be of service "to the people and by the people" to put it aptly in the words of the famous former American President Lincoln.[393] There are institutions fashioned to aid the achievement of the values of the rule of law and constitutionalism: Institutions like the Public Protector or the Ombudsman, the Auditor General, and electoral bodies of the respective countries aid in promoting democracy and accountability. The judiciary, on the other hand, usually guards against any excesses of the other arms of government. Under constitutionalism, the law limits the actions of those in authority, and they are allowed to act only as far as the law allows them. Constitutionalism frowns on the excesses of the State.

The 'rule of law,' it can be argued, is the cornerstone of constitutional democracies. This is underscored by the role it plays in creating sanity in leadership and governance. Fundamentally, the rule of law is one of the three essential elements of modern constitutionalism, along with the protection of human rights and the separation of powers, which check and limit the power of government as far as they can go in the decisions they make.

The rule of law and constitutionalism cannot work within a military state. While the military is important in securing peace and the interests of a country, democratically promulgated constitutions do not envisage the military playing an active role in civil or administrative matters. A civilian administration governs by following the democratically enacted laws. The military is important in the security cluster, but theirs, is a responsibility to protect the country from external aggression and must not interfere in democratic decision-making processes. When it comes to the judiciary, members of the bench must have exceptional qualities, be men and women of impeccable character, and operate with integrity. It is an open secret that the judiciary is the last line of defence in safeguarding the rule of law and constitutionalism.

393 The reference is attributed to Abraham Lincoln's Gettysburg's address.

CHAPTER 3

JUDICIAL INDEPENDENCE IN KENYA, SOUTH AFRICA, AND UGANDA

3.1 Introduction

Judicial independence is seen as a characteristic of individual judges or as a characteristic of the judiciary as a whole. This connotes personal independence as well as institutional independence. Judicial independence is the ability of members of the bench to operate free from pressures, inducements, or any form of influence. The judiciary is associated with courts; however, in this chapter, courts do not refer to the buildings where people go to find justice but rather the court as an institution, and it includes Magistrates, Judges and other officers who are responsible for the functioning of the judicial system. It further involves the rules by which the courts operate to bring justice and how the judges are nominated and appointed. According to the Bingham Centre for the Rule of Law, persons appointed as judges must be suitable for the role they are to perform.[394] The tenure of office and job security of judges must also be guaranteed, according to the Office of the High Commissioner for Human Rights (OHCHR). Judges, whether appointed or elected, shall have a guaranteed tenure until a mandatory retirement age or the expiry of their term of office.[395] However, judicial independence does not mean that judges do whatever they want. In a 2006 State of the Judiciary address, Missouri Chief Justice Michael Wolff stated that:

> Judicial independence should not be interpreted, either by the public or by any judge, to mean that a judge is free to do as he or she sees fit. Such behavior runs counter to our oaths to uphold the law, and any attempt to put personal beliefs ahead of the law undercuts the effectiveness of the Judiciary as a whole. Better stated, "independence" refers to the need for courts that are fair and impartial when reviewing cases and rendering decisions. By necessity, it also requires freedom from outside influence or political intimidation, both in considering cases and in seeking the office of judge. Courts are not established to follow opinion polls or to try to discern the will of the people at any

394 Bingham Centre for The Rule of Law, 'The Appointment, Tenure and Removal of Judges under Commonwealth Principles,' <https://binghamcentre.biicl.org/documents/38_van_zyl_smit_2015_commonwealth_compendium.pdf> Accessed on 05/04/2024.

395 OHCHR, 'Basic Principles on the Independence of the Judiciary,'(06/09/1985) <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary> Accessed on 05/04/2024.

given time but rather are to uphold the law. The people rely on courts to protect their access to justice and to protect their legal rights.[396]

It is worth noting that there is not a one-fit-all mechanism to judicial independence. There may be different combined aspects, measures and conditions that can vary from one country to another. This means that countries may have to find their own balance depending on their circumstances. A number of factors may occasion the balance here. According to the United Nations, these factors may include historical, political, legal, and social contexts in which the judiciary operates.[397]

Personal independence consists of the way judges carry themselves, it also includes freedom in how they reach decisions.[398] The Office of the High Commissioner for Human Rights (OHCHR) is of the view that 'only an independent judiciary can render justice impartially based on law, thereby also protecting the human rights and fundamental freedoms of the individual.'[399] While there are many factors that contribute to judicial independence, this chapter focuses on a few, including the separation of powers, the role of the Judicial Service Commission in ensuring judicial independence, and the judiciary's funding.

3.2 The Separation of Powers as key to judicial independence

The separation of powers lays the ground for judicial independence. Among the key features of a functioning democracy are independent institutions that carry out their duties without fear or favour. It follows then that the concept of the separation of powers among the arms of government makes accountability possible.

Baron Charles de Montesquieu, an 18th-century philosopher, coined the term "Separation of Powers" to describe the various forms of government as well as the causes that made them what they were and how, in their context, advance how

---

396 Michael A. Wolf, Chief justice of the Supreme Court of Missouri, State of the Judiciary address Jan. 25, 2006, during a joint session of the General Assembly in Jefferson City, Mo.

397 United Nations office on drugs and crime, 'The main factors aimed at securing Judicial Independence,' <https://www.unodc.org/e4j/zh/crime-prevention-criminal-justice/module-14/key-issues/1--the-main-factors-aimed-at-securing-judicial-independence.html> Accessed on 26/04/2023.

398 Legislation on line, The Independence, Efficiency, and Role of Judges' *(Adopted by the Committee of Ministers on 13 October 1994)* <https://www.legislationline.org/documents/id/7986> accessed on 10/10/2022.

399 United Nations Human Rights office, 'The basic principle on the independence of the judiciary.' <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary> accessed on 11/11/2022.

governments can be kept free of corruption.[400] The separation of powers is a model that divides the government into separate branches, each of which has separate and independent powers.

The rationale behind the doctrine of the separation of powers is to prevent a scenario where power is concentrated in an individual or group of persons or a single institution. The goal is to prevent tyrannical or arbitrary use of power, which means that people or institutions are barred from serving as prosecutors and judges in their own cases.[401] The separation of powers ensures that those who draft or create laws are distinct from those who implement them. As a result, the separation of powers refers to the division of government responsibilities into distinct branches in order to prevent one branch from carrying out the core functions of another. The intention is to prevent the concentration of power in one entity and to provide for checks and balances.[402]

The legislature, the executive, and the judiciary constitute the three arms of government.[403] The legislative branch is responsible for enacting the laws of the state.[404] The executive branch is responsible for implementing the enacted laws and administering the public policy,[405] the judicial arm is in charge of interpreting and enforcing the constitution and laws, as well as deciding cases before it based on the law.[406] Based on the many dynamics that characterise the operation of government, it

400 18th century philosopher who constructed a qualitative view of the various forms of government, and of the causes that made them what they were and how their setting they constrained or advanced their development.

401 Being a prosecutor and a judge in one's own case denotes lack of objectivity and impartiality.

402 National Conference of State Legislature, 'Separation of powers--an Overview' <https://www.ncsl.org/research/about-state-legislatures/separation-of-powers-anoverview.aspx> accessed 22 March 2022.

403 The Judicial Learning Center, 'The constitution,'<https://judiciallearningcenter.org/the-constitution/> accessed on 30/11/2023.

404 South African Government, 'National Legislature (Parliament) <https://www.gov.za/about-government/government-system/national-legislature-parliament#:~:text=Parliament%20is%20the%20legislative%20authority,are%20open%20to%20the%20public.> accessed on01/04//2022). See also Friedrich Ebert Foundation, 'Working structures of Parliaments in East Africa,' <https://library.fes.de/pdf-files/bueros/kenia/01704content.pdf> accessed on 01/04/2024.

405 National Conference of State Legislature, 'Separation of powers--an Overview' <https://www.ncsl.org/research/about-state-legislatures/separation-of-powers-anoverview.aspx> accessed 28/03/2022.

406 National Conference of State Legislature, 'Separation of powers--an Overview' <https://www.ncsl.org/research/about-state-legislatures/separation-of-powers-anoverview.aspx> accessed 28/03/2022.

is widely assumed that only an independent judiciary can protect individuals; an independent judiciary administers equal justice without fear or favour.[407]

In the Commonwealth Latimer House Principles, it is provided that Commonwealth countries' Parliaments, Executives and Judiciaries are the guarantors, in their respective spheres, of the rule of law, the promotion and protection of fundamental human rights and the entrenchment of good governance based on the highest standards of honesty, probity and accountability.[408] According to the Latimer House principles, the judiciary must be "independent, impartial, honest, and competent" to protect the rule of law and administer justice.[409] The question of the appointment of judges is key in ensuring an independent judiciary. To maintain the public's confidence in the judiciary, the people appointed must possess such qualities as being competent, incorruptible, honest, and of integrity. The goal of judicial appointment processes should be to provide a trustworthy method of finding individuals who possess these attributes and to do so in a manner that is legitimate.

Judicial authority is entrusted to the judiciary, and it is exercised via the courts and tribunals. According to the Kenyan Constitution of 2010, judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under the Constitution.'[410] Under the South African Constitution, section 165 prescribes how the judicial authority is to be exercised.[411] It states that the

---

407 Raunak Raj Tiwari, 'Judicial Independence: Separation of Power,' 4 (3) International Journal for Law Management and Humanities (IJLMH) Page 2448 – 2463 (2021).

408 Commonwealth Latimer House Principles, 'Principles on the three Branches of Government,'(November 2003) available at <https://www.cpahq.org/media/dhfajkpg/commonwealth-latimer-principles-web-version.pdf> accessed on 10/04/2022.

409 Commonwealth Latimer House Principles, 'Principles on the three Branches of Government,'(November 2003) available at <https://www.cpahq.org/media/dhfajkpg/commonwealth-latimer-principles-web-version.pdf> accessed on 10/04/2022.

410 Article 159(1) of the Kenyan Constitution of 2010.

411 Section 165 of the South African constitution of 1996. Section (1) The judicial authority of the Republic is vested in the courts.
(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
(3) No person or organ of state may interfere with the functioning of the courts.
(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.
(6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.

judicial authority of the Republic is vested in the courts.[412] It further provides that the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.[413] In Uganda, the exercise of judicial authority is envisaged under Article 126 of the constitution. It states that judicial power is derived from the people and shall be exercised by the courts established under this constitution in the name of the people and in conformity with the law and with the values, norms, and aspirations of the people.[414]

3.3.1 Judicial Independence in Kenya

The question of judicial independence in Kenya is provided for in the Kenyan constitution of 2010. Article 160 of the Kenyan constitution stipulates that the Judiciary, as constituted by Article 161(1), shall be subject only to the constitution and the law and shall not be subject to the control or direction of any person or authority.[415] Judicial authority captured under Article 159 of the constitution provides that the authority is derived from the people and shall be exercised by the courts and tribunals established by or under the constitution.[416] It is clear that the Kenyan courts' power emanates from the constitution. A number of factors, including how judges are appointed, funded, tenured, disciplined, and dismissed, determine the judiciary's independence.

3.3.1.1 The importance and relevance of the Judicial Service Commission in Kenya

The Judicial Service Commission is provided for under article 171 of the Kenyan constitution of 2010.[417] The JSC is among the commissions and Independent offices envisaged under Article 248 of the constitution.[418] According to Article 249(1), the main objectives of the commissions are: to protect the sovereignty of the people; secure the observance by all State organs of democratic values and principles; and promote constitutionalism.[419] Among its work, Kenya's JSC is responsible for promoting and facilitating the independence and accountability of the judiciary and the efficient,

412 Section 165(1) of the South African constitution of 1996.
413 Section 165(2) of the South African constitution of 1996.
414 Article 126(1) of the Uganda's constitution of 1995 with amendments through 2017.
415 Article 160(1) of the Kenyan constitution of 2010.
416 Article 159 of the Kenyan constitution of 2010.
417 Article 171 of the Kenyan constitution of 2010.
418 Article 248 of the Kenyan constitution of 2010.
419 Article 249(1) of the Kenyan constitution of 2010.

effective, and transparent administration of justice.[420] Article 172 of the Kenyan constitution of 2010 provides that the Judicial Service Commission shall promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice, and it shall recommend to the president persons to be appointed as judges.[421] In principle, they have the responsibility of vetting and interviewing prospective candidates and recommending to the President those they deem fit for appointment.[422] As a show of transparency, the JSC hearings are held in public, thus encouraging the public to participate.

3.3.1.2 Composition of the Judicial Service Commission in Kenya

According to Article 171(2) of the Kenyan constitution, the JSC is made up of 11 members. The members of the JSC are as follows:

The Chief Justice, who is the Chairperson,

One Supreme Court Judge,

One Court of Appeal Judge,

One High Court Judge,

One Magistrate,

The Attorney General,

Two Advocates (one woman and one man),

One person nominated by the Public Service Commission, and

One woman and one man to represent the public, not being lawyers, appointed by the President with the approval of the National Assembly.[423] Also included on the JSC list is the Chief Registrar of the Judiciary (a non-voting member) who acts as the Secretary to the Commission.[424]

The core function of the JSC in Kenya is to promote and facilitate the independence of the judiciary, as well as to make it an accountable institution. Among the key functions it handles apart from presiding over the appointment process of judges is to

---

420 Walter Khobe Ochieng, 'The Composition, Functions and Accountability of the Judicial Service commission from a comparative perspective,' in Ghai JC *Judicial Accountability in the New Constitutional (eds)* (ICJ –Kenya 2019).

421 Article 172(1)(a) of the Kenyan constitution of 2010.

422 Article 172(1)(a) of the Kenyan constitution of 2010.

423 Judicial Service Commission, 'The Membership,' <https://www.jsc.go.ke/index.php/jsc-overview/> accessed on 05/04/2024.

424 Article 171(3) of the Kenyan constitution of 2010.

hear cases brought against judges. It also looks at the conditions of service of judicial officers and oversees the promotion and transfer of judges. All these factors, viewed cumulatively, can be said to promote the independence of the judiciary. It is through the JSC and its independence that courts can then deliver impartial justice without fear, favour, or prejudice.

Apart from the CJ and the Attorney General, members of the JSC serve for a term of five years and are eligible to be chosen for another five years. The Chief Justice and the Attorney General are members of the commission by virtue of their offices, and, as such, serve as commissioners as long as they hold those positions. This composition of the JSC not only offers a balance in personnel but also brings in different considerations that may be key in the appointment process. Judges in the JSC from the superior courts and a magistrate from the magistrate courts represent the different Superior Courts and Magistrate courts, respectively. The composition also includes Advocates representing the Bar; there is representation from the Civil Service with a person representing the Public Service Commission, and finally, a man and a woman chosen from members of the public to represent the interests of the public.

3.3.1.3 Appointment of judges in Kenya

The president appoints Judges in Kenya following the mechanisms outlined in the constitution. Article 166(1) of the constitution provides that the president shall appoint the Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission and subject to the approval of the National Assembly.[425] The constitution further provides that the president appoints all other judges in accordance with the recommendation of the Judicial Service Commission.[426] Owing to the preceding facts, it is clear that the JSC plays an important role of interviewing, vetting, and assessing prospective candidates before recommending them for appointment. The President and the National Assembly come in after the JSC has done the due diligence of vetting the prospective candidates for appointment.

425 Article 166(1)(a) of the Kenyan constitution of 2010.
426 Article 166(1)(b) of the Kenyan constitution of 2010.

In Kenya, the superior courts are the High Court, the Court of Appeal, and the Supreme Court. The Supreme Court is the Apex court, and, as such, the persons to be appointed to that court are expected to perform well in the discharge of their mandate. Persons to be appointed must be of high moral character, have integrity, and must be impartial in carrying out their duties.[427] They must be well qualified, holders of a law degree from a recognised university, or advocates of the High Court of Kenya, or possess an equivalent qualification in a common-law jurisdiction.[428] For one to qualify for appointment to the High Court or the Court of Appeal, one must have at least ten years' experience as a superior court judge[429] or at least ten years' experience as a distinguished academic or legal practitioner or such experience in another relevant legal field.[430] One qualifies to be considered for appointment as a judge if one has held the qualifications mentioned in Article 166(4) (a) and 166(4) (b) for a period amounting to ten years.[431]

For one to be appointed as the Chief Justice or as a Judge of the Supreme Court, he/she must have at least fifteen years' experience as a judge of a superior Court,[432] or at least fifteen years' experience as a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal field.[433] A person also qualifies for appointment if he/she holds qualifications specified in Article 166(3) (a) and 166(3)(b) for a period amounting, in the aggregate, to fifteen years.[434] As seen from the required experience, the constitution envisaged the appointment of seasoned people who have been on the bench for a considerable amount of time, or distinguished academics, or legal practitioners who have been in practice for the stipulated duration.

The Chief Justice or the Deputy Chief Justice appointees must possess the same qualifications as other Superior Court Judges. This is as stipulated under Article 166(2) of the constitution. These qualifications include being a holder of a law degree from a

427 Article 166(2)(c) of the Kenyan constitution of 2010.
428 Article 166(2)(a) of the Kenyan constitution of 2010.
429 Article 166(4) (a) of the Kenyan constitution of 2010.
430 Article 166(4) (b) of the Kenyan constitution of 2010.
431 Article 166(4) (c) of the Kenyan constitution of 2010.
432 Article 166(3) (a) of the Kenyan constitution of 2010.
433 Article 166(3) (b) of the Kenyan constitution of 2010.
434 Article 166(3) (c) of the Kenyan constitution of 2010.

recognized university, or being an advocate of the High Court of Kenya, or possessing an equivalent qualification in a common-law jurisdiction. One must have at least fifteen years' experience as a superior court judge,[435] or he/she must have at least fifteen years' experience as a distinguished academic, judicial officer, legal practitioner, or such experience in other relevant legal fields.[436] One can also qualify if he/she has the qualifications specified in paragraphs (a) and (b) of article 166, for a period amounting, in the aggregate, to fifteen years in practice and as an academician.[437] Among other qualities, they consider that the person should be of high moral character, have integrity, and be impartial.[438]

The experience required for Court of Appeal Judges is at least ten years' experience as a superior court judge or at least ten years' experience as a distinguished academic or legal practitioner or such experience in other relevant legal fields or an aggregate of the two mentioned above qualifications amounting to at least ten years.[439] For the High Court, a minimum of ten years of experience is required as a superior court judge, professionally qualified magistrate, distinguished academic/legal practitioner, or having combined experience and following a similar procedure as that followed during the appointment of judges of the Supreme Court. This is as provided by Article 166(5) of the constitution.[440]

435 Article 166(3)(a) of the Kenyan constitution of 2010.
436 Article 166(3)(b) of the Kenyan constitution of 2010.
437 Article 166(3)(c) of the Kenyan constitution of 2010.
438 Article 166(2)(c) of the Kenyan constitution of 2010.
439 Article 166(4) of the Kenyan constitution of 2010.
440 Article 166(5) of the Kenyan constitution of 2010.

3.3.2 Judicial Independence in South Africa

The South African judiciary is an independent arm of government, headed by the Chief Justice. According to the Constitution Seventeenth Amendment Act, the Chief Justice is the head of the judiciary with the responsibility of developing norms and standards for the performance of judicial functions in all courts.[441] Section 165 of the South African constitution provides for the judicial authority of South African courts.[442] It provides that the judicial authority of the republic is vested in the courts.[443] It states further that the courts are independent and subject only to the constitution and the law, which they must apply impartially and without fear, favour or prejudice.[444] This position was emphasised by Justice Kampepe in the *Secretary of the Judicial Commission of inquiry into allegations of state capture, corruption, and fraud in the public sector, including organs of State v Zuma.* She said that it was disappointing that the Court had to expend limited time and resources on defending itself against iniquitous attacks.[445] She, however, pointed out that theirs, as a court, is allegiance to the Constitution alone.[446]

The South African constitution provides that no person or organ of state may interfere with the functioning of the courts.[447] However, it is worth noting that the South African Judiciary is under the Department of Justice. According to documents from the DOJ, the Department of Justice is responsible for overseeing the administration of justice in the interests of a safer and more secure South Africa. The core function of the Department of Justice and Constitutional Development is to give effect to the constitutionally mandated requirement that South Africa has a fair, equitable, and accessible system of justice.[448] Judges must be independent and decide cases based

441 Constitution Seventeenth Amendment Act, 2012 amends the Constitution to further define the role of the Chief Justice as the head of the judiciary; to provide for a single High Court of South Africa, to provide that the Constitutional Court is the highest Court in all matters. to further regulate the jurisdiction of the Constitutional Court and the Supreme Court of Appeal; and to provide for the appointment of an Acting Deputy Chief Justice.
442 Section 165 of the South African Constitution of 1996.
443 Section 165(1) of the South African constitution of 1996.
444 Section 165(2) of the South African constitution of 1996.
445 *The Zuma case, paragraph 1.*
446 *The Zuma case, paragraph 1.*
447 Section 165(3) of the South African constitution of 1996.
448 South African Department of Justice's mandate.

on the law after assessing the facts of the case. There must be enough safeguards so that no person can interfere with their work. There should be no inducements, threats or pressures from anyone, whether within the judiciary or outside.

3.3.2.1 The importance and relevance of the Judicial Service Commission in South Africa

South Africa's Judicial Service Commission (JSC) is a creature of the South African Constitution of 1996. The Judicial Service Commission was established in terms of section 178 of the Constitution and consists of 23 members.[449] The Judicial Service Commission (JSC) plays an important role in safeguarding judicial independence in South Africa. The JSC is responsible for vetting and interviewing candidates before it recommends them for appointment.[450] The JSC also plays an advisory role. Section 178(5) of the constitution provides that the JSC may advise the national government on any matter relating to the judiciary or the administration of justice.[451] The JSC is also responsible for hearing disciplinary matters against judges brought before it.[452] The work of the JSC is crucial in upholding the rule of law and ensuring that the South African judiciary remains independent, impartial, and effective.

3.3.2.2 Composition and work of Judicial Service Commission in South Africa

The thinking behind the composition of the JSC members is to bring broader representation of stakeholders, ranging from legal practitioners, public servants, lawmakers, and judges, etc. According to section 178(1), the JSC consists of the Chief Justice, the President of the Supreme Court of Appeal, one Judge President, two practising Attorneys nominated from within the attorneys' profession to represent the

---

449 The Office of the Chief Justice of South Africa, 'About the JSC,' <https://www.judiciary.org.za/index.php/judicial-service-commission/about-the-jsc> Accessed on 27/08/2024.

450 Department of Justice, 'The Judicial Service Commission,' <https://www.justice.gov.za/faq/faq-jsc.html#:~:text=The%20JSC%20was%20established%20in,to%20the%20administration%20of%20justice.> accessed on 27/08/2024.

451 Section 178(5) of the South African constitution of 1996.

452 Department of Justice, 'The Judicial Service Commission,' <https://www.justice.gov.za/faq/faq-jsc.html#:~:text=The%20JSC%20was%20established%20in,to%20the%20administration%20of%20justice.> accessed on 27/08/2024.

profession as a whole, and appointed by the President**,** two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President, one teacher of law designated by his/her profession, four permanent delegates to the National Council of Provinces, six members of the National Assembly, four members designated by the President, and the Minister of Justice. The Judge President is designated by the other Judge Presidents. The constitution further provides that at least three members of the National Assembly must come from opposition parties. The four presidential appointments are picked after consultation with the leaders of all the political parties in the National Assembly. The JSC advises the government on any matters relating to the judiciary or the administration of justice. The JSC helps maintain the judiciary's independence from political and other external influences.

3.3.2.3 Appointment of Judges in South Africa

The President, as head of the executive, appoints the Chief Justice and the Deputy Chief Justice after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly.[453] He/she also appoints the President and Deputy President of the Supreme Court of Appeal.[454] The Minister of Justice and Correctional Services appoints magistrates on the advice of the Magistrates' Commission.[455] The constitution states further that the President must appoint the judges of all other courts on the advice of the Judicial Service Commission.[456]

Before the coming into effect of the 1996 constitution, judges were appointed from the senior ranks of the Bar. This determination was usually made by the Judge President, depending on the needs of the division concerned.[457] The Judge President assessed the needs of the division, identified a candidate with appropriate qualities, and made a recommendation to the Minister of Justice. If the justice minister was satisfied,

453 Section 174(3) of the South African constitution of 1996.

454 Section 174(3) of the South African constitution of 1996.

455 The Magistrate's Commission is a statutory body established in terms of the Magistrates Act, 1993.

456 Section 174(6) of the South African constitution of 1996.

457 Siyo L and Mubangizi JC, 'The independence of South African judges: A constitutional and legislative perspective,' (2015) vol.18, n.4 Potchefstroom Electronic Law Journal (PELJ) <https://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812015000400004#back_fn16> accessed on 28/08/2024.

he/she would agree to the recommendation and forward the name(s) to the President for appointment.[458]

The appointment process back then did not involve input from other members in the legal fraternity, the judiciary, or the civil society, public scrutiny was also non-existent. Established values of transparency and accountability in South Africa's legal culture did not feature anywhere.[459] The framers of the Constitution recognised this and went for a more transparent and accountable way of appointing judges. The new model under the 1996 constitution is a departure from the past. Under the new dispensation, for one to be appointed as a judge, one must not only be a fit and proper person with qualities such as integrity, but one must also be independent.[460]

The previous method of appointment did not involve a rigorous process of interviewing and vetting candidates. In the new model, interviews are done in public, candidates are assessed on a number of issues, and asked questions on a variety of topics, and this brings out a clear picture of their qualities. After the interviews, the JSC meets in a committee and votes on the candidates. The list is then forwarded to the president for appointment. The appointments that the president makes are from a list of nominees forwarded to him/her from JSC, with three names more than the number of appointments to be made.[461]

Guidelines used by the JSC when considering candidates for judicial appointment provide that, for one to be appointed a judge under the current dispensation, one must be well qualified. This concerns not only the candidate's academic and professional qualifications, technical competence, skills, and temperament, it also looks at the candidate's legal knowledge and experience.[462] He/she must also be fit and proper.

---

458 Siyo L and Mubangizi JC, 'The independence of South African judges: A constitutional and legislative perspective,' (2015) vol.18, n.4 Potchefstroom Electronic Law Journal (PELJ) <https://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812015000400004#back_fn16> Accessed on 28/08/2024.

459 Chris Oxtoby, 'The Appointment of Judges: Reflections on the Performance of the South African Judicial Service Commission,' (2021) Vol. 56(1) J Asian Afr Stud, 34,35.

460 Section 174(1) of the South African constitution of 1996.

461 Section 174(4)(b) of the South African constitution of 1996.

462 Summary and Explanation of the criteria and guidelines used by the JSC when considering candidates for judicial appointment. Available at <https://www.lssa.org.za/wp-content/uploads/2023/05/20230417-Criteria-for-Judicial-Appointment-JSC-Approved.pdf> accessed on 04/02/2024.

This relates to a candidate's overall suitability for appointment to the bench and may include factors such as integrity, knowledge, scholarship, experience, dignity, humility, courtesy, judgement, wisdom, independence, character, courage, forensic skills, capacity for articulation, diligence, energy, and industry.[463] The fit and proper requirement is in line with section 174(1) of the South African Constitution, which provides that "any appropriately qualified woman or man who is a fit and proper person" is eligible for an appointment as a judge.[464] Another important criterion that is looked at is a candidate's independence, his/her ability to make his/her own decisions independently. He/she must also be courageous, fair-minded, and have good judgment. Race and gender are also considered when making the appointment. This speaks to the diversity of South African society. It is stated that the appointment must reflect the racial and gender composition of South Africa.[465] This last aspect is in contrast to what the judiciary was before the 1996 constitution, when white males dominated the legal profession.[466] However, the JSC has indicated that the stated goals of diversity and representation are more than merely an exercise of increasing the number of black individuals and women on the bench. The people to be appointed must have the values and visions that are in line with the explicit social justice commitments embodied in the Constitution.[467]

The South African Constitution created a Constitutional Court. This is the highest Court with regard to all constitutional matters in South Africa, and the final court of appeal on all matters. The Constitutional Court has 11 justices. Apart from the Chief Justice, who heads it, there is also the Deputy Chief Justice and nine other Justices.[468] The judges must be well qualified and experienced in dealing with matters that come their

---

463 Summary and Explanation of the criteria and guidelines used by the JSC when considering candidates for judicial appointment. Available at <https://www.lssa.org.za/wp-content/uploads/2023/05/20230417-Criteria-for-Judicial-Appointment-JSC-Approved.pdf> accessed on 04/02/2024.

464 Section 174(1) South African Constitution of 1996.

465 Summary and Explanation of the criteria and guidelines used by the JSC when considering candidates for judicial appointment. Available at <https://www.lssa.org.za/wp-content/uploads/2023/05/20230417-Criteria-for-Judicial-Appointment-JSC-Approved.pdf> accessed on 04/02/2024.

466 Penelope Andrews, 'The South African Judicial Appointments Process,' (2006) VOL. 44, NO. 3 City University of New York, 565,567.

467 Penelope Andrews, 'The South African Judicial Appointments Process,' (2006) VOL. 44, NO. 3 City University of New York, 565,567.

468 Section 167(1) of the South African constitution of 1996.

way. The truth is that cases that come before Supreme Courts are complex in their nature, and not many easy cases appear before the Supreme Courts.

While the qualification criteria are the same for all Constitutional Court judges, the South African Constitution, however, makes a distinction between the appointment of the Chief Justice and the Deputy Chief Justice and the appointment of the rest of the Constitutional Court judges. The President appoints the Chief Justice and the Deputy Chief Justice after consultation with the JSC and the leaders of parties represented in the National Assembly. According to Manyatera, the president, as the head of the executive, has considerable influence in the appointing process. Manyatera points out that 'the consultation requirement does not mean the President is bound by the views of the political party leaders.[469] The president may exercise discretion when making the appointment, and such was the case when President Cyril Ramaphosa appointed Justice Zondo as the Chief Justice. The constitution provides that the list of nominees presented to the president must include three names more than the number of appointments to be made.[470] Section 174(4)(b) further provides that the President may make appointments from the list, and must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made.[471] Despite the JSC having recommended the appointment of Justice Mandisa Maya to the position of Chief Justice, the president exercised his discretion, as provided for by section 174(4) of the constitution, and opted for Justice Zondo.[472] According to Manyatera, the only limitation placed on the executive in respect of the appointment of Constitutional Court judges is that 'the President of the Republic is restricted to the list of nominees prepared by the JSC.'[473] While the president is required to appoint only those people on the list recommended to him/her by the JSC, he/she may decline to appoint should he/she not be satisfied or have a reservation

469 Gift Manyatera, 'A critique of the superior courts judicial selection mechanisms in Africa: The case of Mozambique, South Africa and Zimbabwe,' (LLD Thesis, University of Pretoria 2015) 147.

470 Section 174(4)(a) of the South African Constitution of 1996.

471 Section 174(4)(b) of the South African Constitution of 1996.

472 Rebecca Davis, 'Ramaphosa's appointment of Zondo as Chief Justice shows strategic smarts at last,' (Daily Mavericks)10/03/2022 <https://www.dailymaverick.co.za/article/2022-03-10-ramaphosas-appointment-of-zondo-as-chief-justice-shows-strategic-smarts-at-last/> accessed on 28/08/2024.

473 Gift Manyatera, 'A critique of the superior courts judicial selection mechanisms in Africa: The case of Mozambique, South Africa and Zimbabwe,' (LLD Thesis, University of Pretoria 2015) 147.

about a nominee. In such an eventuality, the constitution provides that the president must advise the JSC with reasons, if any of the nominees are unacceptable and any appointment remains to be made.[474]

In 1998, the late Chief Justice Ismail Mohamed introduced additional guidelines for the selection and appointment of judges. These guidelines were adopted by the JSC, and they were referred to as the Mohamed guidelines. The guidelines were as follows: the applicant for the position of a judge had to be a person of integrity, with the necessary energy and motivation, competent both technically as a lawyer, and with respect to the capacity and ability to give expression to the values in the constitution. A person to be considered must also have appropriate potential, so that any lack of technical experience could be made up by intensive training; and, in the broader perspective, it needed to be considered whether the applicant's appointment would be symbolic in sending a message to the community at large.[475] Additionally, it is important that he/she has acted as a judge, and through acting as a judge, his/her record of accomplishment is then assessed during the interviews. The appointment process in South Africa seems to be a bit stringent and characterised by requirements that make sure that those who make it to the bench are well qualified and ready for the task. An important requirement developed by the commission is that an applicant must have acted as a judge in that court and delivered a satisfactory level of performance.[476]

While the interviews by the judicial service commission are usually done publicly and carried out in the full glare of the media, allowing the public to follow and participate, a crucial part of how commissioners deliberate and vote is usually not shown to the public. The process of scrutiny and deliberation is usually done behind closed doors and away from the cameras.

---

474 Section 174(4)(b) of the South African constitution of 1996.

475 Judges Matters,'JSC Judicial Criteria for appointment,' <https://www.judgesmatter.co.za/jsc-judicial-criteria-for-appointment/> accessed on 05/04/2024.

476 Judges Matters,'JSC Judicial Criteria for appointment,' <https://www.judgesmatter.co.za/jsc-judicial-criteria-for-appointment/> accessed on 05/04/2024.

3.3.3 Judicial Independence in Ugandan

In Uganda, just as in Kenya and South Africa, the question of the independence of judges is addressed in its constitution, where a number of elements, including how the judges are appointed, their security of tenure, and how they may be removed from office, etc, are addressed. Article 128 of the Ugandan constitution provides that in the exercise of judicial power, the courts shall be independent and shall not be subject to the control or direction of any person or authority.[477] In reinforcing their independence, Article 128(2) points out that no person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions. In the exercise of their judicial function, the judiciary must receive much-needed support from all organs and agencies. In this regard, the Ugandan constitution provides that all organs and agencies of the State shall accord the courts such assistance as may be required to ensure the effectiveness of the courts.[478]

Uganda's code of judicial conduct prescribes that the conduct of judicial officers should inspire confidence. According to article 2.2 of Uganda's code of judicial conduct, a judicial officer shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the legal profession, the litigants, and the public in the impartiality of the Judicial Officer and of the judiciary.[479]For the judicial officers to operate with integrity, there must exist an environment that gives them the confidence to do so, they must also have come to office in a way that is above board. Judicial independence is seen in a number of things, including how judges are appointed and how they may be removed from office.

3.3.3.1 The importance and relevance of the Judicial Service Commission in Uganda

The Ugandan Judicial Service Commission is a creature of the constitution and is established under Article 146 of the constitution.[480] The Ugandan constitution provides that the JSC shall be independent and shall not be subject to the direction or control

477 Article 128(1) of the Ugandan constitution of 1995 with amendment through 2017.
478 Article 128(3) of the Ugandan constitution of 1995 with amendment through 2017.
479 Article 2.2 of Uganda Code of Judicial Conduct.
480 Article 146(1) of the Ugandan constitution of 1995 with amendment through 2017.

of any person or authority.[481] The mandate of the JSC in Uganda is to help in the recruitment exercise of judicial officers and regulate their conduct. As part of their work, they advise the President in the exercise of the President's power to appoint persons to hold judicial office provided for under 147(3). It also includes the power to exercise disciplinary authority and to remove judicial officers from office.[482] The JSC also advises the Government on improving the administration of justice.[483]

3.3.3.2 Composition and the role of the Judicial Service Commission in Uganda

The Ugandan JSC is composed of nine members. As provided by Article 146(2) of the constitution, the JSC consists of a Chairperson and a Deputy Chairperson with the qualifications necessary for appointment as Justices of the Supreme Court. The constitution also specifies that the Chief Justice, the Deputy Chief Justice, and the Principal Judge are not eligible to be selected as the chair.[484] The constitution provides further, that the chairperson and deputy chairperson must be persons who qualify to be appointed as justices of the Supreme Court.[485] The constitution further provides that the chairperson's office shall be full-time, and a person shall not engage in private legal practice while holding that office.[486]

The members of the commission are provided for under Article 146(2) of the constitution. These include, a person nominated by the Public Service Commission, two advocates of not less than fifteen years' experience, nominated by the Uganda Law Society, one judge of the Supreme Court nominated by the President in consultation with the judges of the Supreme Court, the justices of the Appeal Court and judges of the High Court. The list further includes the Attorney General as an ex officio member of the commission.[487] Finally, the list of commissioners includes two members of the public, who shall not be lawyers, nominated by the President.[488] The president also appoints the secretary of the commission on the advice of the JSC.[489]

---

481 Article 147(2) of the Ugandan constitution of 1995 with amendment through 2017.
482 Article 147(1)(a) of the Ugandan constitution of 1995 with amendment through 2017.
483 Article 147(1)(e) of the Ugandan constitution of 1995 with amendment through 2017.
484 Article 146(4) of the Ugandan constitution of 1995 with amendment through 2017.
485 Article 146(2)(a) of the Ugandan constitution of 1995 with amendment through 2017.
486 Article 146(6) of the Ugandan constitution of 1995 with amendment through 2017.
487 Article 146(3) of the Ugandan constitution of 1995 with amendment through 2017.
488 Article 146(2)(c) of the Ugandan constitution of 1995 with amendment through 2017.
489 Article 146(8) of the Ugandan constitution of 1995 with amendment through 2017.

When interviewing and vetting potential individuals for judicial appointment, the JSC bases its thinking mostly on the integrity of the candidates as well as adherence to the Ugandan Code of Judicial Conduct. The Uganda Code of Judicial Conduct provides a compass of what judges should possess.[490] The preamble to the Uganda code of judicial conduct provides that 'Uganda Courts of Judicature are established by the Constitution to exercise judicial power in the name of the people of Uganda in conformity with law and with the values, norms and aspirations of the people, and are enjoined to administer substantive justice impartially and expeditiously.'[491]

3.3.3.3 Appointment of Judges in Uganda

Judicial appointments in Uganda follow set criteria. This is done after the Judicial Service Commission has vetted and recommended judges to the President of the Republic for appointment, as set out in Article 147 of the Ugandan constitution.[492] Just as in other jurisdictions, there are specified requirements for one to be appointed as a judge. Academic qualifications and experience of a prospective candidate matter. Qualities of a judge, such as propriety, are key because the public looks up to them to uphold rights and liberties, delivering justice and safeguarding the rule of law. This means that judicial officers must behave in a manner that upholds the image of the judiciary as an institution. The preceding point is in line with the Bangalore Principles of Judicial Conduct, where Principle 1.5 provides that a judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.[493]

According to Article 142(1) of the constitution, the Chief Justice, the Deputy Chief Justice, the Principal Judge, a Justice of the Supreme Court, a Justice of Appeal and a Judge of the High Court shall be appointed by the President acting on the advice of the Judicial Service Commission and with the approval of Parliament.[494] One requirement for appointment as a Chief Justice is that he/she should have served as a justice of the Supreme Court of Uganda or of a court having similar jurisdiction. One

490 Uganda Judicial Code of Conduct requires judicial officers to have attributes that include, Independence, Impartiality, Integrity, propriety, equality competence and diligent etc.
491 Preamble of Uganda Code of Judicial Conduct.
492 Article 147 of the Ugandan constitution of 1995 with amendments through 2017.
493 Principle 1.5 of the Bangalore Principles of Judicial conduct.
494 Article 142(1) of the Ugandan constitution of 1995 with amendments through 2017.

also qualifies if he/she has practised as an advocate for a period not less than twenty years before a court having unlimited jurisdiction in civil and criminal matters.[495]

To qualify for appointment as a deputy Chief Justice or Principal Judge, the constitution provides that he/she must have served as a justice of the Supreme Court or as a justice of the Court of Appeal.[496] One may also qualify if he/she has served as a judge of the High Court or a court of similar jurisdiction to such a court or have practised as an advocate for a period not less than fifteen years before a court having unlimited jurisdiction in civil and criminal matters.[497] One qualifies for appointment as Justice of the Supreme Court if he or she has served as a justice of Appeal or a judge of the High Court, or a court of similar jurisdiction. He/she can also be eligible if he/she has practised as an advocate for a period not less than fifteen years before a court having unlimited jurisdiction in civil and criminal matters.[498]

For appointment to the position of judge of the Court of Appeal, a person must have served as a judge of the High Court or a court having similar or higher jurisdiction. A person also qualifies if he/she has practised as an advocate for a period not less than ten years before a court having unlimited jurisdiction in civil and criminal matters, or is a distinguished jurist and an advocate of not less than ten years.[499]The Court of Appeal also sits as a constitutional court and the judges here preside over questions of the interpretation of the constitution.[500] It is, therefore, important that they have the knowledge and wherewithal to do so. For appointment as a High Court judge, one qualifies if one has been a judge of a court having unlimited jurisdiction in criminal and civil matters or a court having jurisdiction in appeals from any such court. He/she also qualifies if he/she has practised as an advocate for a period not less than ten years before a court having unlimited jurisdiction in civil and criminal matters.[501] The Centre for Public Interest Law (CEPIL), a civil society organisation, is of the view that more

495 Article 143(1)(a) of the Ugandan constitution of 1995 with Amendment through 2017.
496 Article 143(1)(b) of the Ugandan constitution of 1995 with Amendment through 2017.
497 Article 143(1)(b) of the Ugandan constitution of 1995 with Amendment through 2017.
498 Article 143(1)(c) of the Ugandan constitution of 1995 with Amendment through 2017.
499 Article 143(1)(d) of the Ugandan constitution of 1995 with Amendment through 2017.
500 Article 137(1) of the Ugandan constitution of 1995 with Amendment through 2017.
501 Article 143(1)(e) of the Ugandan constitution of 1995 with Amendment through 2017.

needs to be done to streamline the process of the appointment of judges in Uganda.[502] They have argued that nominations for appointments should be based on merit, taking into consideration the integrity, character, and attitude of those seeking judicial offices.[503] CEPIL further pointed out that clear, merited, and competence-based criteria for assessing candidates must be developed ultimately to restore acceptability and dignity of the institution of the judiciary.[504]

3.4 Tenure of Service and Removal of judges from office

Judicial tenure is an important aspect of judicial independence. Job security enables judges to carry out their duties without the fear of being bundled out of office without a good reason. Despite having the security of tenure, judges are still supposed to carry out their duties with impartiality and professionalism in such a way that no reasonable doubts can be raised about their conduct. Judges remain accountable at all times and must, therefore, preserve the image of the judiciary. They are required to decide cases based on fact and law and must act responsibly, adhering to their code of judicial conduct. Tenure of service insulates judges from abuse by some people who may want to use their positions of authority to frustrate the work of the judiciary. It protects judges from threats of being removed from office prematurely and unfairly. As part of the protection against unfair removal from office, security of tenure also means that salaries given to judges are constant and cannot be varied to their disadvantage.

502 Centre for Public Interest Law, 'Statement on the Appointment of Judicial Officers,' <https://cepiluganda.org/news-blog/statement-on-the-appointment-of-judicial-officers/> Accessed on 01/04/2024.

503 Centre for Public Interest Law, 'Statement on the Appointment of Judicial Officers,' <https://cepiluganda.org/news-blog/statement-on-the-appointment-of-judicial-officers/> Accessed on 01/04/2024.

504 Centre for Public Interest Law, 'Statement on the Appointment of Judicial Officers,' <https://cepiluganda.org/news-blog/statement-on-the-appointment-of-judicial-officers/> Accessed on 01/04/2024.

3.4.1 Tenure of Service and Removal of judges from office in Kenya

Security of tenure is assured to the Kenyan judges, provided they maintain good behaviour. According to the constitution, a judge shall retire from office on attaining the age of seventy years, but may elect to retire at any time after attaining the age of sixty-five years.[505] Article 167(2) provides that the Chief Justice shall hold office for a maximum of ten years or until retiring as stipulated under Article 167(1) or whichever is the earlier.[506] Article 167(3) further provides that, if the Chief Justice's term of office expires before he/she retires under clause (1), the Chief Justice may continue in office as a judge of the Supreme Court.[507] As it stands now, a judge can be removed from office only by a stringent and onerous procedure; the process of removal of judges is stringent because it is designed to safeguard judicial independence. The removal of a judge in Kenya may be initiated only by the Judicial Service Commission acting on its own motion, or on the petition of any person to the Judicial Service Commission.[508] The grounds for removal from office of a superior court judge are captured under Article 168(1) of the Kenyan Constitution of 2010. The grounds stipulated include: a judge's inability to perform the functions of office arising from mental or physical incapacity; a breach of a code of conduct prescribed for judges of the superior courts by an Act of Parliament; bankruptcy; incompetence; or gross misconduct or misbehaviour. [509]

Removal of a judge from office due to mental or physical incapacity occurs when he/she is unable to perform his/her duties, necessitating their departure from office. This ensures the integrity and effectiveness of the judiciary. This serves to ensure the integrity and effectiveness of the judiciary. The mental incapability may be because the judge is experiencing memory loss. This may mean that a judge cannot deliver sound decisions, and, to safeguard the integrity of the judicial system, it then becomes necessary for the judge to leave office. A judge may also be removed from office owing to bankruptcy, misbehaviour, or gross misconduct.[510] Bankruptcy of a judge puts a

505 Article 167(1) of the Kenyan constitution of 2010.
506 Article 167(2) of the Kenyan constitution of 2010.
507 Article 167(3) of the Kenyan constitution of 2010.
508 Article 168(2) of the Kenyan constitution of 2010.
509 Article 168(1) of the Kenyan constitution of 2010.
510 Article 168(1)(e) of the Kenyan constitution of 2010.

judge in a compromising position, meaning that he/she may be easily susceptible to bribes from corrupt litigants. This may reflect badly on the judiciary as an institution, and as such, it becomes necessary that the bankrupt judge be removed from office to safeguard the integrity of the judiciary.

Incompetence and being found guilty of gross misconduct are other issues that may necessitate the removal of a judge from office. An incompetent judge erodes the public's confidence in the judiciary. Judges' decisions have a great impact on people's lives, with a stroke of a pen, they can send someone to the gallows. A competent judge ensures that the right decision is reached based on the facts and evidence presented before them. It would be an injustice if an innocent person were to be jailed based on the sheer incompetence of a judge. Actions of judges that bring the judiciary into disrepute must not be tolerated, and consequently, gross misconduct that seems to soil the image of the judiciary must be dealt with.

To ensure judicial independence, the law has been made in such a way that the power to remove a judge from office is not abused. Article 168(3) states that a petition by a person to the Judicial Service Commission under clause 168(2) shall be in writing, setting out the alleged facts constituting the grounds for the judge's removal.[511] The JSC hears the petition against the judge and, if it is satisfied that the petition discloses a ground for removal under clause 168(1), it will send the petition to the President, who, within fourteen days after receiving the petition, will suspend the judge acting on the recommendation of the JSC.[512] In the case of the removal of a Chief Justice, Article 168(5)(a) provides that the president appoints a tribunal consisting of:

(i) The Speaker of the National Assembly, as chairperson

(ii) Three superior court judges from common-law jurisdictions;

(iii) One advocate of fifteen years standing; and

(iv) Two other persons with experience in public affairs.

Or if it involves the removal of a judge other than the CJ, the president will appoint

511 Article 168(3) of the Kenyan constitution of 2010.
512 Article 168(5) of the Kenyan Constitution of 2010.

(i) a chairperson and three other members from among persons who hold or have held office as a judge of a superior court, or who are qualified to be appointed as such, but, in either case, they must not have been members of the Judicial Service Commission at any time within the immediately preceding three years; (ii) one advocate of fifteen years standing; and (iii) two other persons with experience in public affairs.[513]

Article 168(9) of the constitution provides that the President shall act following the recommendations made by the tribunal after the expiry of the time allowed for an appeal under clause 168(8) if no such appeal is taken. The president shall also act after the completion of all rights of appeal in any proceedings allowed for under clause 168(8) if such an appeal is taken and the final order in the matter affirms the tribunal's recommendations.

Said Chitembwe, a former Judge of the Kenyan High Court, was removed from office in 2023 after the tribunal found that his conduct was in breach of the Code of Conduct and Ethics contrary to article 168(1)(b) and (e) of the constitution. After the revelation of misconduct and impropriety against Judge Chitembwe came to light, the Judicial Service Commission recommended his suspension from his position as a High Court judge to the president. The JSC further recommended that the president form a tribunal to investigate Judge Chitembwe as stipulated under article 168(4) of the constitution.[514] In 2021, Judge Chitembwe faced a number of allegations that amounted to gross misconduct and breach of the code of judicial ethics of judges. Among other things, the allegations against Judge Chitembwe included the acquisition of a proprietary interest in a land parcel involved in a succession case he was presiding over.[515] Another allegation involved him advising parties on the procedure to be followed to have an appeal, which was filed against his judgment, withdrawn.[516] He

513 Article 168(5) (b) of the Kenyan constitution of 2010.

514 The Standard, 'JSC Recommends Suspension of High Court Judge Said Chitembwe, https://www.standardmedia.co.ke/national/article/2001444634/jsc-recommends-suspension-of-justice-said-chitembwe> Accessed on 10/04/2024.

515 Joseph Wangui, 'Suspended judge Juma Chitembwe turns to High Court,' (Daily Nation 15/02/2023) <https://nation.africa/kenya/news/suspended-judge-juma-chitembwe-turns-to-supreme-court-4124444> Accessed on 28/07/2024.

516 Joseph Wangui, 'Suspended judge Juma Chitembwe turns to High Court,' (Daily Nation 15/02/2023) <https://nation.africa/kenya/news/suspended-judge-juma-chitembwe-turns-to-supreme-court-4124444> Accessed on 28/07/2024.

was part of a bench in an impeachment case despite having knowledge that he was related to Mr. Mbuvi Mike Sonko, the petitioner in the case.[517]

In 2022, acting under the provisions of Article 168(5)(b) of the Constitution of Kenya, President Uhuru Kenyatta suspended Judge Chitembwe from office and formed a tribunal to inquire into the matter involving the allegations.[518] In 2023, the tribunal handed over the report to President Ruto.[519] The chair of the tribunal, Judge Mumbi Ngugi, said that the tribunal found the judge guilty of gross misconduct.[520] Judge Chitembwe challenged the findings of the tribunal in the Supreme Court.[521] The Supreme Court dismissed Judge Chitembwe's appeal and upheld the decision of the tribunal. The court found that Judge Chitembwe's conduct undermined the constitutional principle of fair hearing, equality before the law, equal protection and benefit of the law guaranteed under article 50(1) of the constitution and ring fenced under article 25(c) of the Kenyan constitution.[522] Judge Chitembwe was found to have been in contravention of Article 10, 75, 232 of the constitution and regulations 9, 19, 20, and 21 of the Judicial Code of Conduct and Ethics, which amounted to gross misconduct or behaviour. The Court stated in *SC Petition No. E001 of 2023,* that judicial impartiality is a significant element of justice. In order to maintain impartiality where there is a likelihood of conflict of interest, the proper thing to do is to recuse oneself and let the dispute be resolved by another impartial judge.[523] Regulation 20 (1) of the Code of Conduct enjoins judges to "use the best efforts to avoid being in situations where personal interests conflict or appear to conflict with the judge's official duties".[524] Furthermore, the court found that the petitioner had a *sua sponte* duty to recuse

---

517 Joseph Wangui, 'Suspended judge Juma Chitembwe turns to High Court,' (Daily Nation 15/02/2023) <https://nation.africa/kenya/news/suspended-judge-juma-chitembwe-turns-to-supreme-court-4124444> accessed on 28/07/2024.

518 The Kenya Gazette, 'In the matter of the petition for the removal from office of the hon. justice Said Juma Chitembwe, judge of the High Court of Kenya,' GAZETTE NOTICE NO. 5540, Vol. CXXIV—No. 91 (18/05/2022).

519 President.co.ke, 'President Ruto receives a report on conduct of Justice Said Juma Chitembwe,' <PRESIDENT RUTO RECEIVES REPORT ON CONDUCT OF JUSTICE SAID JUMA CHITEMBWE – The Official Website of the President of the Republic of Kenya> accessed on 28/08/2024.

520 Citizen digital, 'President Ruto receives report recommending removal of judge Said Juma Chitembwe,' (07/02/2023)< President Ruto receives report recommending removal of judge Said Juma Chitembwe (citizen.digital)> accessed on 29/08/2024.

521 *SC Petition No. E001 of 2023.*

522 *SC Petition No. E001 of 2023 para 140.*

523 *SC Petition No. E001 of 2023, para 139.*

524 Regulation No. 20(1) of The Judicial Service (Code of Conduct and Ethics) Regulations 2020.

himself from the case or to disclose the nature of the interest in the matter.[525] For failing to recuse himself from the case and not disclosing his relationship with a party to the case but instead proceeding to sit to the end of the case, the Supreme Court agreed with the Tribunal that the petitioner was in breach of Articles 10, 50(1), 75, 232 of the Constitution, and Regulations 9, 19, 20 and 21 of the Code of Conduct and Ethics.

The Supreme Court concurred with the Tribunal's unanimous decision that the judge violated the provisions of Article 168(1)(e) of the constitution.[526] Judge Chitembwe's removal emphasised the importance of upholding judicial independence while ensuring accountability by members of the bench.

3.4.2 Tenure of Service and Removal of judges from office in South Africa

The South African constitution provides that the salaries, allowances, and benefits of judges may not be reduced.[527] Under the South African constitution, a judge of the Constitutional Court is appointed for a non-renewable term of 12 years or until they reach the age of 70, whichever comes first. An exception to this rule is if a judge's term is extended by an Act of Parliament.[528] Other judges hold office until they are discharged from active service in terms of an Act of Parliament.[529] This means that judges will always have that security of tenure provided they maintain good behaviour. The motivation behind the removal of judges for gross misconduct serves to maintain the good image of the judiciary, and that is why the judiciary has a code of judicial ethics that outlines the conduct that is unacceptable and would attract disciplinary measures and sanctions in case of breach.

Disciplinary measures and the removal of judges happen when judges breach the code of conduct of their profession. Proper mechanisms must be in place for such disciplinary hearings because the power to remove and discipline judges affects not only the individual judges but also the whole judiciary. If a judge violates the Code of Judicial Conduct or any other law, such complaints against him/her must be reported

525 *SC Petition No. E001 of 2023, para 139.*
526 *SC Petition No. E001 of 2023 para 159.*
527 Section 176(3) of the South African constitution.
528 Section 176(1) of the South African Constitution.
529 Section 176(2) of the South African constitution.

to the Judicial Conduct Committee (JCC).[530] If the JCC finds the complaint to be serious enough to warrant impeachment, it can propose to the JSC that it review the matter and report to the Judicial Conduct Tribunal. Upon receiving the JSC's proposal, the Chief Justice has the power to appoint a Judicial Conduct Tribunal. According to section 177(1) of the South African constitution, a judge may be removed from office only if:

(a) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and

(b) the National Assembly calls for that judge to be removed by a resolution adopted with a supporting vote of at least two-thirds of its members.

Incapacity, gross incompetence and misconduct are among the things that can lead to the removal of a judge. According to the International Institute for Democracy and Electoral Assistance, an appointment 'during good behaviour' implies that a judge, once appointed, should continue in office for life unless removed for misbehaviour, usually defined in terms of corruption or other breaches.[531] The very purpose the judges are assured of a decent salary that cannot be revised down is to keep them focused on their work and not be susceptible to corruption.

In the event a judge is found in breach of the Code of Judicial Conduct or any other law, he/she must be subjected to disciplinary procedures that may take a number of disciplinary decisions, including the removal from office.

The president, on the advice of the Judicial Service Commission, may suspend a judge who is the subject of a procedure in terms of section 177(1).[532] Section 177(2) provides that the President must remove a judge from office upon the adoption of a resolution contemplated in section 177(1) (b) calling for the removal of a judge.

Judges Hlophe and Motata were the first judges to be removed from office following the breach contemplated under section 177(1) of the South African Constitution.

---

530 The JCC is composed of the Chief Justice, Deputy Chief Justice, and four other Judges appointed by the Chief Justice after consulting with the Minister of Justice and Correctional Services.

531 Elliot Bulmer, 'Judicial Tenure, Removal, Immunity and Accountability,' (2017)2 International IDEA <https://www.idea.int/sites/default/files/publications/judicial-tenure-removal-immunity-and-accountability-primer.pdf > accessed on 16/05/2024.

532 Section 177(3) of the South African constitution of 1996.

An accusation of undue influence was levelled against the former Western Cape High Court Judge President, Hlophe.[533] He was accused of trying to influence two Constitutional Court judges unduly in a matter before them that involved former South African president Jacob Zuma.[534] In 2021, the Judicial Conduct Tribunal found him guilty of gross misconduct, they also found that Hlophe had violated section 165 of the Constitution by attempting to influence justices Jafta and Nkabinde to violate their oath of office.[535]

Retired Judge Motata was also found guilty of gross misconduct following a drunk driving conviction in 2009.[536] On 22 November 2023, the Parliament Portfolio Committee on Justice and Correctional Services resolved by majority to recommend to the National Assembly the removal from office of former Western Cape Judge President John Hlophe and Retired Judge Nkola Motata.[537] In February 2024, the National Assembly, during its sitting, adopted the reports of the Justice and Correctional Services' Portfolio Committee recommending their removal from judicial office.[538] For the motion to impeach a judge, it must have the support of at least two-thirds of the members of the National Assembly.[539] The impeachment motion to remove Judge Hlophe succeeded with 305 votes of the members of the National

---

533 Tania Broughton, 'Hlophe guilty of 'gross misconduct' for trying to influence two ConCourt judges in Zuma case,' - Sunday times, (11/04/2021) < https://www.timeslive.co.za/news/south-africa/2021-04-11-hlophe-found-guilty-of-gross-misconduct-for-trying-to-influence-two-concourt-judges-in-zuma-case/> accessed on 29/08/2024.

534 Tania Broughton, 'Hlophe guilty of 'gross misconduct' for trying to influence two ConCourt judges in Zuma case,' - Sunday times, (11/04/2021) < https://www.timeslive.co.za/news/south-africa/2021-04-11-hlophe-found-guilty-of-gross-misconduct-for-trying-to-influence-two-concourt-judges-in-zuma-case/> accessed on 29/08/2024.

535 The Presidency Republic of South Africa, 'President Ramaphosa Affirms Removal of Judges Hlophe and Motata,' <https://www.thepresidency.gov.za/president-ramaphosa-affirms-removal-judges-hlophe-and-motata> accessed on 12/06/2024.

536 Parliament of South Africa, 'National Assembly Adopts Reports of removal of Judges Hlophe and Motata,' <https://www.parliament.gov.za/press-releases/media-release-national-assembly-adopts-reports-recommending-removal-judges-hlophe-and-motata> accessed on 15/06/2024.

537 South African Parliament, 'Media Statement: Justice Committee Recommends Judge president Hlophe and Judge Motata be Removed From Office (22/11/2023) https://www.parliament.gov.za/press-releases/media-statement-justice-committee-recommends-judge-president-hlophe-and-judge-motata-be-removed-office#:~:text=Parliament%2C%20Wednesday%2C%2022%20November%202023,found%20guilty%20of%20gross%20misconduct> Accessed on 06/01/2024.

538 Marianne Thamm, 'Huge majority of MPs vote to impeach Western Cape Judge President John Hlophe' (Daily Maverick) <https://www.dailymaverick.co.za/article/2024-02-21-huge-majority-of-mps-vote-to-impeach-western-cape-judge-president-john-hlophe/> accessed on 15/06/2024.

539 Section 177(1)(b) Of the South African Constitution of 1996.

Assembly, while 296 members of the National Assembly voted for the removal of Judge Motata.[540]

3.4.3 Tenure of Service and Removal of judges from office in Uganda

In Uganda, the job security of judges is guaranteed. A judge may retire after attaining the age of sixty years, and his/her salary, allowances, privileges, and retirement benefits cannot be varied to his/her disadvantage.[541] The Chief Justice, the Deputy Chief Justice, a justice of the Supreme Court and a justice of Appeal may retire on attaining the age of seventy years.[542] A Principal Judge and a Judge of the High Court may retire on attaining the age of sixty-five years.[543] A Judge may, however, be removed from office due to his or her inability to perform the functions of his or her office arising from infirmity of body or mind, misbehaviour or misconduct, or owing to incompetence.[544] The inability to perform the duties of his/her office may mean that the judge does not have the capacity to do so, and the reasons for removal can range from a judge lacking capacity to due sickness, lack of competence and it can also be due to gross misconduct with incidents like committing a crime, participating in fraudulent activities, etc. It cannot be acceptable that a judge who, in one way or another, defrauds people, or accepts or solicits bribes, can hold a crucial position of presiding over matters of justice.

The process of the removal of a judge is provided for under Article 144(4) of the Ugandan constitution. This process may be initiated by a referral to the President either by the JSC or the Cabinet, with the advice that the President should constitute a tribunal for the purpose of looking into the issues raised against a judge. The persons that make up the tribunal vary, depending on the position of the Judge or justice before it.

---

540 The Presidency Republic of South Africa, 'President Ramaphosa Affirms the Removal of Judges Hlophe and Motata,'<https://www.thepresidency.gov.za/president-ramaphosa-affirms-removal-judges-hlophe-and-motata > accessed on 29/08/2024.

541 Article 128(7) of the Ugandan Constitution of 1995 with Amendments through 2017.

542 Article 144(1)(a) of the Ugandan Constitution of 1995 with Amendments through 2017.

543 Article 144(1)(b) of the Ugandan Constitution of 1995 with Amendments through 2017.

544 Article 144(2) of the Ugandan Constitution of 1995 with Amendments through 2017.

A tribunal formed to listen to an issue or issues raised about the Chief Justice, the Deputy Chief Justice or the Principal Judge, will constitute five persons who are or have been justices of the Supreme Court or have been judges of a court having similar jurisdiction or who are advocates of at least twenty years.[545] In the case of a justice of the Supreme Court or a Justice of Appeal, the tribunal will consist of three persons who are or have been justices of the Supreme Court, or who are or have been judges of a court of similar jurisdiction, or who are advocates of at least fifteen years standing.[546] In the case of a judge of the High Court, the tribunal will consist of three persons who are or have held office as judges of a court having unlimited jurisdiction in criminal and civil matters or a court having jurisdiction in appeals from such a court, or who are advocates of at least ten years.[547]

The constitution further provides, in Article 144(5), that if the question of removing a judicial officer is referred to a tribunal, the President shall suspend the judge from performing the functions of his or her office. A suspension is to make sure that the person does not interfere with the investigations. The law further provides that the President shall remove a judicial officer if the question of his or her removal has been referred to a tribunal appointed under clause 144(4) and the tribunal recommends to the President that he or she be removed from office on any ground described in clause 144(2). In this case, the president acts only on the findings of the tribunal.

Charges against a judge should not be trumped up or fashioned to remove the judge from office without a justifiable reason. In Uganda, Supreme Court Justice Esther Kisaakye faced charges that raised concerns of the United Nations.[548] UN Special Rapporteur on the independence of judges and lawyers, Margaret Satterthwaite, expressed concern about the disciplinary proceedings against Justice Kisaakye, pointing out that they were "procedurally deficient."[549] Satterthwaite was of the

545 Article 144(4)(a) of the Ugandan constitution of 1995 with Amendment through 2017.
546 Article 144(4)(b) of the Ugandan constitution of 1995 with Amendment through 2017.
547 Article 144(4)(c) of the Ugandan constitution of 1995 with Amendment through 2017.
548 UNHCR, 'Uganda: UN Expert concerned about proceedings against Supreme Court Justice Kisaakye,' 31/03/2023 < https://www.ohchr.org/en/news/2023/03/uganda-un-expert-concerned-about-proceedings-against-supreme-court-justice-kisaakye> accessed on 15/04/2024.
549 UNHCR, 'Uganda: UN Expert concerned about proceedings against Supreme Court Justice Kisaakye,' 31/03/2023 < https://www.ohchr.org/en/news/2023/03/uganda-un-expert-

view that the woes against Justice Kasaakye emanated from her dissenting opinion on the 2021 Presidential Election between the main opposition party leader, Bobi Wine, and incumbent president, Yoweri Museveni.[550] In her dissenting opinion, Judge Kisaakye ruled in favour of the opposition leader being given more time to amend his complaint challenging the election results.[551]

Judges are not supposed to face disciplinary measures based on the lawful decisions that they take.[552] Satterthwaite said that, if Justice Kisaakye were to suffer sanctions for attempting to deliver a dissenting opinion in a high-profile case, it would contravene the fundamental principle of judicial independence.[553] Judges have immunity relating to the activities undertaken in good faith in the exercise of judicial functions. According to a UN report, disciplinary proceedings against judges must be based on the rule of law. The proceedings must also be carried out with basic principles aimed at safeguarding judicial independence.[554] The Ugandan constitution also provides that a person exercising judicial power shall not be liable to any action or suit for any act or omission.[555] In other words, proceedings against judges should not be fashioned to punish them unjustifiably.

concerned-about-proceedings-against-supreme-court-justice-kisaakye> accessed on 15/04/2024.

550 UNHCR, 'Uganda: UN Expert concerned about proceedings against Supreme Court Justice Kisaakye,' 31/03/2023 < https://www.ohchr.org/en/news/2023/03/uganda-un-expert-concerned-about-proceedings-against-supreme-court-justice-kisaakye> accessed on 15/04/2024.

551 United Nations Human Rights, Office of the High commissioner, Uganda: UN Expert Concerned about Proceedings against Supreme Court Justice Kisaakye,' <https://www.ohchr.org/en/news/2023/03/uganda-un-expert-concerned-about-proceedings-against-supreme-court-justice-Kisaakye> accessed on 15/05/2024.

552 OHCHR, A/75/172: 'Disciplinary measures against judges and the use of 'disguised' sanctions: report,' 17/06/2020 <https://www.ohchr.org/en/documents/thematic-reports/a75172-disciplinary-measures-against-judges-and-use-disguised-sanctions> accessed on 29/08/2024.

553 UNHCR, 'Uganda: UN Expert concerned about proceedings against Supreme Court Justice Kisaakye,' 31/03/2023 < https://www.ohchr.org/en/news/2023/03/uganda-un-expert-concerned-about-proceedings-against-supreme-court-justice-kisaakye> accessed on 15/04/2024.

554 United Nations, A/75/172: Disciplinary measures against judges and the use disguised sanctions: Special Rapporteur on the independence of judges and lawyers, <https://www.ohchr.org/en/documents/thematic-reports/a75172-disciplinary-measures-against-judges-and-use-disguised-sanctions> accessed on 15/05/2024.

555 Article 128(4) of the Ugandan constitution of 1995 with amendments through 2017.

3.5 Conclusion

The Independence of the Judiciary, as has been observed, is of paramount importance. It is the pillar that upholds a constitutional democracy. Aspects such as appointments, security of tenure, and procedures for dismissing judges form the foundation of an independent judiciary. An analysis of the judicial independence in Kenya, South Africa, and Uganda indicates both successes and challenges in respecting the principles of separation of powers, the selection of judges, and their removal from office. Judges who make it to the bench must have unquestionable character; they must be unflinching in their conviction, and there must be no doubt as to their integrity. Apart from academic qualifications, a good judicial officer should possess virtues such as ethical behaviour, objectivity, fair-mindedness, and also have the ability to exercise good judgment, and, most importantly, they must have a strong adherence to the rule of law.

The appointing process must be above board, and prospective candidates must answer questions to ascertain their suitability. The questions put to these prospective candidates may extend beyond the realm of law; they may include questions on the legal philosophy of a judge. This speaks to a candidate's philosophical approach to interpreting the law. There may also be a need to look at the temperament of a candidate; this speaks to the ability of a judge to remain calm, patient, and respectful even under pressure. Removal of a judge must be based on a breach contemplated in the judicial code of ethics and not on some trumped-up allegations meant to get someone out of office. The matter of the salaries of judicial officials is also key in safeguarding judicial independence, protecting them from those who might want to lure them into traps or corrupt them. Judges must not only be well remunerated, but their salaries must not be revised down to their disadvantage, because such acts may be counterproductive, creating uncertainty and interfering with their morale. A good salary also encourages good, talented people to pursue a career as a judicial official. Lowering salaries could also be counterproductive as it would see the judiciary missing out on talented individuals who would be discouraged from pursuing careers as judicial officers. Judges, therefore, should work assured of their keep.

CHAPTER 4
THE FUNDING OF THE JUDICIARY IN KENYA, SOUTH AFRICA, AND UGANDA

4.1 Introduction

The funding of the judiciary is among the features that determine the judiciary's independence. A judiciary that controls its purse and has autonomy over its budget inspires confidence. It demonstrates that it is free from the control of anyone or anybody. According to the European Network of Councils for the judiciary, adequate funding for the judiciary is a key element in ensuring and safeguarding the independence of the judiciary and judges, because it determines the conditions in which the courts and judges perform their functions.[556] The question of judicial funding is central to the independence of the judiciary. It is mentioned in the UN as one of the key principles of judicial independence, where it is pointed out that it is the duty of each Member State to provide adequate resources to enable the judiciary to perform its functions properly.[557] This chapter focuses on the funding of the judiciary, demonstrating how the funding models of the featured countries affect their judicial independence. The funding of the judiciary encompasses a number of elements, which include the sources of the funds, how they are administered, and how the funds are managed. In this chapter, the focus will be on the sources of funding, the quantity of the amount, and the management of funds to the judiciary in Kenya, South Africa, and Uganda. In general, this chapter will explore how adequate funding or lack of it impacts on or affects the work of the judiciary.

4.2 Funding of the Judiciary in Kenya

The Kenyan constitution provides that there must be a judiciary fund that is administered by the judiciary.[558] The framers of the Kenyan constitution intended that the judiciary must have autonomy over the finances that run it. Article 173(1) of the

---

556 ENCJ, 'Funding of the Judiciary,' <https://www.encj.eu/articles/77#:~:text=Adequate%20funding%20of%20the%20judiciary,and%20judges%20perform%20their%20functions.> accessed on 25/12/2023.

557 UNHR Office of the High Commissioner, 'Basic Principle of the Independence of the Judiciary,' (06/09/1985) <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary> accessed on 06/02/2024.

558 Article 173 of the Kenyan constitution of 2010.

Kenyan constitution provides that 'there is established a fund to be known as the Judiciary Fund which shall be administered by the chief registrar of the Judiciary.'[559] Article 173(2) further provides that the fund shall be used for administrative expenses of the Judiciary and such other purposes as may be necessary for the discharge of the functions of the Judiciary.[560] These provisions talk to the autonomy of the judiciary as it relates to its finances. This helps the judiciary avoid manipulation and interference with their work. The chief registrar has to prepare estimates of expenditure for the following year and submit them to parliament for approval.[561]

In terms of Article 173(4), on approval of the estimates by the National Assembly, the expenditure of the Judiciary shall be a charge on the Consolidated Fund, and the funds shall be paid directly into the Judiciary Fund.[562]The above provisions, as captured in the constitution, ensure that there is an independent judiciary that is not subject to any form of bureaucracy. It is only fair that the judiciary controls its budget and has a say about how and where to spend the money. A situation where the judiciary has to depend on the executive for its budgetary allocation carries the risk of interference with judicial independence. In such instances, the executive may use the power it has over the budgetary allocation to manipulate, cajole, or put pressure on the judiciary.[563]

The judiciary must have adequate funding to execute its programmes successfully.[564] Being in charge of its own money implies that no outsider can influence how the judiciary operates. It is logical that money for the courts originates from a Consolidated Fund. A consolidated fund is a Government account into which all government revenues and funds are paid and from which money is withdrawn to fund all activities

559 Article 173(1) of the Kenyan constitution of 2010.
560 Article 173(2) of the Kenyan constitution of 2010.
561 Article 173(3) of the Kenyan constitution of 2010.
562 Article 173(4) of the Kenyan constitution of 2010.
563 In Kenya, there have been instances where the executive's control over budgetary allocations has raised concerns about potential manipulation or pressure on the judiciary, the executive has fashioned it in such a way that it continues having dominance and an upper hand over other arms of government. In the past the former Chief Justice complained of the judiciary being starved of resources, < https://www.aljazeera.com/economy/2019/11/4/kenyas-top-judge-court-system-is-being-starved-of-funds> Accessed on 05/05/2023.
564 The judiciaries are usually frugal compared to other arms of government; in most cases their budget specifically outline fixed amounts to handle defined cases. They hardly have surplus amounts or have miscellaneous funds, if anything judiciaries in Kenya, South Africa and Uganda have time and again complained of inadequate funding to carry out their programmes.

of government.[565] The money funding the judiciary, therefore, comes directly from the Consolidated Fund.[566] This is a feature of judicial independence that eliminates the necessity for the judiciary to be at the mercy of other branches of government.[567] Being dependent on other arms of government for funding defeats the principle of the separation of powers or creates tension between arms of government. According to Webb and Whittington:

> Money lies at the root of many conflicts between the branches of government. It is at the heart of many policy disputes—as different interests, political parties, and government officials stake out divergent priorities in the raising and spending of public funds - creates substantial institutional tensions within any system of separated powers.

In the eyes of the public, the judiciary can never be seen as truly independent if it has to depend on another body or another arm of government for its funding.
While the executive is in control of the many levers of government, including the collection of revenue and budgetary allocations, it is key that an important arm of government, like the judiciary, remains independent. This independence includes accessing funds for judicial programmes. The framers of the constitution envisaged a conflict between the judiciary and other arms of government, and they saw it fit that the judiciary should be in control of its budget, with money coming directly from the consolidated fund.

The Consolidated Fund is a creation of the constitution, captured under Article 206 of the Kenyan Constitution of 2010.[568] Article 206(2) provides that money may be withdrawn from the Consolidated Fund: only in accordance with an appropriation by an Act of Parliament; in accordance with Article 222 or 223; or as a charge against the Fund as authorised by the Constitution or an Act of Parliament.[569] The constitution further provides that money shall not be withdrawn from any national public fund other

---

565 Parliament of Uganda, 'What is a Consolidated Fund?' <https://www.parliament.go.ug/faq/1176/what-consolidated-fund> accessed on 25/05/2023.

566 It is important that judicial funding must come from consolidated fund it provides is an important safeguard for maintaining the independence of the judiciary.

567 It is important that judicial funding must come from consolidated fund it provides is an important safeguard for maintaining the independence of the judiciary.

568 Article 206 of the Kenyan constitution of 2010 establishes a Consolidated Fund into which money raised or received by or on behalf of the national government is paid.

569 Article of 206(2) of the Kenyan constitution of 2010.

than the Consolidated Fund unless the withdrawal of the money has been authorised by an Act of Parliament.[570] This provision seeks to maintain the independence and integrity of the judiciary.

4.2.1 Challenges experienced by the Kenyan judiciary before the operationalisation of the judicial fund

The judiciary being in control of its purse creates an environment of certainty. The Consolidated Fund is a predictable and stable source of judicial funds and it ensures that the judiciary has control over its programmes and is not subject to manipulation by other arms of government. Prior to the operationalisation of the judicial fund, the Kenyan judiciary had challenges of accessing adequate cash for its programmes.[571] The Kenyan judiciary was, for some time, at the mercy of the executive. In a move that showed the dissatisfaction of the judiciary as it related to funding, the judiciary raised concerns about budget cuts that frustrated the delivery of justice.[572] The budget cuts in the judiciary's budget meant that the operation of the judiciary was interfered with, and this had a negative impact not only on the judiciary as an institution but also on the public, who expected their cases to be expeditiously determined.

In 2019, a standoff ensued between the judiciary and the executive, occasioned by an impossible working environment owing to the frustration visited on the judiciary by the executive. Chief Justice Maraga, then, the head of the judiciary, chose to address the judicial plight via the media.[573] CJ Maraga lamented about the difficult working environment. Among the issues he raised were financial constraints occasioned by budget cuts and the refusal of the president to appoint to office the vetted and recommended judges.[574] He blamed the executive for the under-funding of the

570 Article 173(3) of the Kenyan constitution of 2010.

571 The Judiciary Fund was operationalized in 2022.

572 Judiciary of Kenya, 'Statement by Chief Justice David Maraga on Judiciary Budget Cuts,' (04/11/2019) <https://judiciary.go.ke/statement-by-chief-justice-david-maraga-on-judiciary-budget-cuts/> accessed on 06/1/2024.

573 CJ Maraga Says Executive Frustrating Him and the Entire Judiciary (04/11/2019) <https://allafrica.com/stories/201911050049.html> accessed on 10/05/2023.

574 CJ Maraga Says Executive Frustrating Him and the Entire Judiciary (04/11/2019) <https://allafrica.com/stories/201911050049.html> accessed on 10/05/2023.

judiciary and the consequent undermining of the work of the judiciary.[575] The CJ's frustration was understandable considering the huge backlog of cases that continued to pile up because of a lack of funds and personnel. This meant that he could not move judges around because of the financial constraints. He further pointed out that some judges had been asked to spend money from their pockets for fuelling their cars and were told it would be refunded later.[576] A situation where judges have to fuel their cars from their own pockets puts them in a compromised position because they may then fall prey to corrupt litigants who may take advantage of the situation to corrupt judicial officers, and in return, may want cases to go their way.

A lack of enough funds at the time also interfered with the operationalisation of the Small Claims Courts, the mainstreaming of the Court annexed Mediation and Alternative Justice System. A lack of adequate funds also hurt the sustenance of the *pro bono* scheme.[577] The delivery of justice was halted or slowed down when courts did not operate fully. For example, the Labour Court in Malindi and the Nakuru High Court suspended sittings with public notices sent out, citing budgetary constraints.[578] The consequences of such budgetary cuts went to the essence of the delivery of justice and meant that cases were postponed to later dates, or were transferred to other courts. Cases affected included labour and environmental matters, which ideally needed urgent attention.

4.2.2 Operationalisation of Judicial Fund in Kenya

Kenya's judicial fund was operationalised in 2022, twelve years after the promulgation of the Kenyan constitution of 2010. This is in line with the constitutional provision as provided for under Article 173 of the Kenyan constitution and the Judiciary Fund Act.[579]

---

575 CJ Maraga Says Executive Frustrating Him and the Entire Judiciary (04/11/2019) https://allafrica.com/stories/201911050049.html accessed on 10/05/2023.

576 CJ Maraga Says Executive Frustrating Him and the Entire Judiciary (04/11/2019) https://allafrica.com/stories/201911050049.html accessed on 10/05/2023.

577 Kenyan Judiciary, 'Financial Year 2024/25 Judiciary Draft Budget Report,' <https://www.judiciary.go.ke/wp-content/uploads/2023/10/FY-2024-25-Judiciary-Budget-Report-A-Guide-for-the-Citizen-1-1.pdf> accessed on 25/12/2023.

578 Paul Ogemba and Kamau Muthoni, 'Judiciary on trial as cash crisis hits hard,' (29/10/1019) <https://www.standardmedia.co.ke/amp/article/2001347258/judiciary-on-trial-as-cash-crisis-hits-hard> accessed on 25/12/2023.

579 Judiciary fund Act of 2016, this Act provides for the regulation of the Judiciary Fund and for connected purposes. Established pursuant to the provision of Article 173(5) of the Kenyan constitution of 2010.

The then Treasury Cabinet Secretary, Ukur Yatani, speaking when he was delivering the 2022/23 budget statement, confirmed the commencement of the operationalisation of the Judicial Fund. In his statement, the Chief Justice, Martha Koome, pointed out that the fund had been established and operationalised with the support of the Executive, the Legislature, the Central Bank of Kenya, and the Controller of Budget.[580] CJ Koome further said that the Fund would aid in the planning and timely execution of operations and projects, and further eliminate previous challenges of delayed disbursements or budget cuts.[581] While the operationalisation of the judicial fund is a step in the right direction, it should be noted that the funds thus far still fall short of the estimated budget needed by the Kenyan judiciary.[582] According to Kenya's Judiciary Draft Budget Report, the judiciary received 22 billion Kenyan Shillings as against a resource requirement of 43 billion shillings.[583] The 22 billion shillings translates to 1 percent of the national budget, which falls far short of the desired 2.5 percent that was advocated in the July 2010 Report of the Task Force on Judicial Reforms.[584] The Task Force on Judicial Reforms observed that there was a need to improve the Judiciary's independence, operational autonomy, efficiency, and effectiveness in governance and management.[585] It was further recommended that the annual budgetary allocation to the Judiciary be increased to a minimum of 3.5 percent

580 Dennis Musau, 'Judiciary fund operationalized with Inaugural Ksh 9 Billion Allocation' (12/08/2022) <https://www.citizen.digital/news/judiciary-fund-operationalised-with-inaugural-ksh9b-allocation-n303831> accessed on 25/12/2023.

581 Dennis Musau, 'Judiciary fund operationalized with Inaugural Ksh 9 Billion Allocation' (12/08/2022) <https://www.citizen.digital/news/judiciary-fund-operationalised-with-inaugural-ksh9b-allocation-n303831> accessed on 25/12/2023.

582 Kenyan Judiciary, 'Financial Year 2024/25 Judiciary Draft Budget Report,' <https://www.judiciary.go.ke/wp-content/uploads/2023/10/FY-2024-25-Judiciary-Budget-Report-A-Guide-for-the-Citizen-1-1.pdf> Accessed on 25/12/2023.

583 Kenyan Judiciary, 'Financial Year 2024/25 Judiciary Draft Budget Report,' <https://www.judiciary.go.ke/wp-content/uploads/2023/10/FY-2024-25-Judiciary-Budget-Report-A-Guide-for-the-Citizen-1-1.pdf> Accessed on 25/12/2023.

584 Kenyan Judiciary, 'Financial Year 2024/25 Judiciary Draft Budget Report,' <https://www.judiciary.go.ke/wp-content/uploads/2023/10/FY-2024-25-Judiciary-Budget-Report-A-Guide-for-the-Citizen-1-1.pdf> Accessed on 25/12/2023.

585 Kenyan Judiciary, 'Financial Year 2024/25 Judiciary Draft Budget Report,' <https://www.judiciary.go.ke/wp-content/uploads/2023/10/FY-2024-25-Judiciary-Budget-Report-A-Guide-for-the-Citizen-1-1.pdf> accessed on 25/12/2023.

of the national budget due to inflation and the expansion of the Judiciary.[586] With the allocation of the funds, the Kenyan judiciary was able to reduce case backlogs.[587]

4.3 Funding of the Judiciary in South Africa

The financial autonomy of the South African judiciary is yet to be realised. As things stand, the judiciary still has to depend on the Department of Justice for its financial needs. Chief Justice Raymond Zondo raised concerns about the funding of the South African judiciary. He pointed out that the judiciary does not keep its purse.[588] The office of the Chief Justice and the judiciary are under the Department of Justice and Correctional Services, which means that the judiciary falls under this department. The autonomy of the judiciary is paramount; it instills public confidence and an assurance that the judiciary may not face pressure or threat from anybody. In May 2023, the then Minister of Justice and Correction Affairs, Mr. Ronald Lamola, MP, made an address on the Budget Debate of the Office of the Chief Justice. In his address, the Minister pointed out that the budget of the Office of the Chief Justice (OCJ) that was being tabled comprised, 1.305 billion rand voted for funds and a further direct charge to the National Revenue Fund of R1.125 billion for judges' remuneration.[589] Of these monies, 79.2% of the total voted budget of the Department of Justice was allocated to the core programmes, namely Superior Court Services, as well as Judicial Education and Support.[590]

---

586 Kenyan Judiciary, 'Financial Year 2024/25 Judiciary Draft Budget Report,' <https://www.judiciary.go.ke/wp-content/uploads/2023/10/FY-2024-25-Judiciary-Budget-Report-A-Guide-for-the-Citizen-1-1.pdf> accessed on 25/12/2023.

587 Kenyan Judiciary, 'Financial Year 2024/25 Judiciary Draft Budget Report,' <https://www.judiciary.go.ke/wp-content/uploads/2023/10/FY-2024-25-Judiciary-Budget-Report-A-Guide-for-the-Citizen-1-1.pdf > accessed on 25/12/2023.

588 SABC 'Chief Justice Zondo calls for independent judiciary,' (08/12/2023) <https://www.youtube.com/watch?v=BeBU8Df8Gsw> accessed on 25/12/2023.

589 South African Government, 'Minister Ronald Lamola, Office of the Chief Justice Dept. Budget vote 2023/2024,' < https://www.gov.za/news/speeches/minister-ronald-lamola-office-chief-justice%C2%A0dept-budget-vote-202324-09-may-2023> accessed on 15/03/2024.

Following the negative effects of COVID-19, OCJ, the judicial administration department and many other government departments had to contend with budget cuts. For the efficient delivery of Justice, the Minister was of the view that the OCJ had to ensure the courts remain functional and aligned with the National Development Plan; it was crucial to innovate and develop new operational methods. Ensuring access to justice for everyone is of utmost importance. Given the high levels of poverty and the barriers to accessing justice, it was important that they come up with ways to overcome such hurdles. To make the situation better, they promised an increase in budgetary allocation from 28.1 million in the 2019/20 budget to 33.4 million in the 2021/22 budgetary allocation.[591] To increase access to the judicial system, the department helped the High Court in Mpumalanga to be fully operational in 2019/20, but that has not been enough. The judiciary has been hamstrung by its inability to deliver justice, build courts and deploy judicial officers in places with such needs.[592]

4.3.1 Challenges to the Financial Autonomy of the South African Judiciary

The South African Judiciary has led the way in preserving South Africa's constitutional democracy. This is thanks to the sound judgments they have continually given over the years. This talks to the preparedness of the judges and their independence in carrying out their mandate. This can be attributed to the strong institutions that have been established within South Africa and the respect for the law by the majority of its citizens. There is, however, an aspect of the South African judicial independence that needs to be addressed. This is the question of judicial funding. The South African Judiciary is not totally in control of its purse. There have not been complaints of interference from other arms of government, and this can largely be attributed to the good working relationships among them.

591 Treasury.gov.za, 'Office of the Chief Justice and Judicial Administration,' <https://www.treasury.gov.za/documents/national%20budget/2019/ene/Vote%2022%20Office%20of%20the%20Chief%20Justice%20and%20Judicial%20Administration.pdf> accessed on 29/08/2024.

592 SABC 'Chief Justice Zondo calls for independent judiciary,' (08/12/2023) <https://www.youtube.com/watch?v=BeBU8Df8Gsw> accessed on 25/12/2023.

Concerns about the financial autonomy of the judiciary and inadequate funding were raised by Chief Justice Zondo.[593] These concerns came up during the Judges' conference held in December 2023. The CJ pointed out that there was a need for the South African judiciary to have institutional independence, included in this was the need for the judiciary to control its purse. Speaking to the press, CJ Zondo lamented about how the judiciary was constrained by its inability to hire more judges and deploy them where they are needed. The Chief Justice pointed out that the judiciary had to go to the executive to beg for things that were supposed to be within the domain of the judiciary.[594] He further asked that mechanisms be put in place for the total institutional independence of the judiciary.[595]

While the three arms of government have thus far had a good working relationship, there is, however, no guarantee this will continue perpetually. In other words, the good working relationship is not cast in stone; there is no guarantee that other people who may come to power might not use funding as a way of manipulating the judiciary. South Africa can learn from Kenya with regard to the model of judicial funding. Article 173 of the Kenyan constitution provides for the Judicial Fund.[596] The Kenyan constitution further directs parliament to enact a law that would regulate the Judicial Fund.[597] The Kenyan Judicial Fund was made operational in 2022, giving the judiciary vital financial autonomy. South Africa should adopt this as a model. The South African National Assembly needs to enact a law that will give the judiciary the much-needed autonomy. A law should be enacted to establish a Judiciary Fund, which will be managed by the judiciary itself. In simple terms, the South African judiciary needs financial autonomy. A judiciary that controls its purse is free from involvement by politicians or any other arms of government that may want to manipulate or exert pressure on it.

---

593 SABC 'Chief Justice Zondo calls for independent judiciary,' (08/12/2023) <https://www.youtube.com/watch?v=BeBU8Df8Gsw> accessed on 25/12/2023.

594 SABC News, 'Chief Justice Zondo calls for independent judiciary,' 8/12/2023 <https://www.youtube.com/watch?v=BeBU8Df8Gsw> accessed on 18/12/2023.

595 SABC News, 'Chief Justice Zondo calls for independent judiciary,' 8/12/2023 <https://www.youtube.com/watch?v=BeBU8Df8Gsw> accessed on 18/12/2023.

596 Article 173 of the Kenyan Constitution of 2010.

597 Article 173(5) of the Kenyan Constitution of 2010.

4.4 Funding of the Judiciary in Uganda

In the performance of its duties, the judiciary is obligated to check the excesses of the executive and legislature. These duties require insulation from any direct or indirect influence that may warp their judgment or cause them to play into the hands of corrupt elements."[598] Finance, as has been stated, is sometimes at the heart of loggerheads between arms of government. Disputes can arise for several reasons, these may include budgetary allocations, policy priorities or even because of political manoeuvres to frustrate another arm of government. It is for these reasons that the framers of the constitution in Uganda saw fit to ensure that the source of finance to the judiciary must come from a consolidated fund.

Article 128(5) of the Ugandan constitution provides that the administrative expenses of the judiciary, including all salaries, allowances, gratuities, and pensions payable to or in respect of persons serving in the judiciary, shall be charged to the Consolidated Fund.[599]

4.4.1 Financial Independence of Ugandan Judiciary

In Krispus *Ayena Odongo vs Attorney General & the Parliamentary Commission*, the issue of judicial funding was raised.[600] The crux of that petition was that the judiciary should not be subject to the mercy of the executive with regard to its funding.[601] The petition pointed out that any failure by the legislature to enact a law that addressed the judicial funding would undermine the administration and functioning of the Judiciary.[602] The petitioner pointed out that the administration of the judiciary as it stood fell under the Public Service, which was in contravention of Article 128 of the Ugandan constitution.[603] Article 128 of the Constitution of the Republic of Uganda provides for the independence of the Judiciary in many ways, including the aspect of its finances.[604]

---

598 *Constitutional petition no.5 of 2004, Masalu Musene & 3 Ors v. Attorney-General.*

599 Article 128(5) of the Ugandan Constitution of 1995 with amendments through 2017.

600 *Krispus Ayena Odongo v Attorney General Parliamentary Commission (Constitution petition no.30 of 2017) [2020] UGCA 31] (7 February 2020).*

601 *Krispus Ayena Odongo v Attorney General Parliamentary Commission (Constitution petition no.30 of 2017) [2020] UGCA 31] (7 February 2020).*

602 *Krispus Ayena Odongo v Attorney General Parliamentary Commission (Constitution petition no.30 of 2017) [2020] UGCA 31] (7 February 2020).*

603 Article 128 of Ugandan constitution of 1995 with amendments through 2017.

604 Article 128(5) of the Ugandan Constitution of 1995 with amendments through 2017.

This financial autonomy connotes the freedom for the judiciary to prepare its own budget and, equally, be self-accountable. In *Krispus Ayena Odongo vs Attorney General & the Parliamentary Commission,* the court held that the mode of payment and funding of the Judiciary was unconstitutional and that it was inconsistent with constitutional provisions as written under Article 128 (5) (6) and 154 (1)(a) of the Constitution. The court pointed out that the expenses of the judiciary, just as those of parliament, are supposed to be a charge on the Consolidated Fund.[605]

The sources of funding for the judiciary are crucial to maintaining its independence. It may as well be the difference between whether the judiciary stands its ground and discharges its duty without fear or favour or whether it succumbs to pressure and manipulation. Another important point to note is that adequate resources provided go a long way in aiding the work of the judiciary. Furthermore, it is not only necessary that the judiciary have enough funds to carry out its mandate, but it is also of utmost importance that they control the said funds. It is the duty of other arms of government to make sure that this is a reality.

The United Nations' basic principles on the independence of the judiciary put a positive obligation on member states to provide adequate resources to enable the judiciary to perform its functions.[606] It is in this context that the funding model of the Ugandan judiciary was seen as an impediment to its institutional independence and a clear breach of the provisions under Article 128 of the Ugandan constitution, which states that the judiciary should not be under the control or direction of any person or authority.[607] The question of the control of money by the judiciary strengthens the concept of institutional independence, which, in turn, protects the judiciary from improper influence and pressure. By controlling its purse, the judiciary may decide on issues relating to matters like hiring more staff, placement, etc.

In 2020, Uganda's Constitutional Court found that the independence of the judiciary was in jeopardy because of the way the judiciary's budget was being handled. As it

---

605 *Krispus Ayena Odongo vs Attorney General & the Parliamentary Commission (Constitution petition no.30 of 2017) [2020] UGCA 31] (7 February 2020).*

606 Seventh United Nations Congress on the prevention of crime and treatment of offenders held in Milan from 26 August to 6 September 1985.

607 Article 128(1) of Ugandan constitution of 1995 with amendments through 2017.

stood, the judiciary's funding was in the control of the executive. In a scathing ruling, the court said the system made the judiciary very much the junior branch of the three arms of government, and often reduced the Chief Justice 'to pleading for funds from the executive.'[608] As it had been fashioned, the funds that catered for the judiciary were channelled through the Justice Law and Order Sector (JLOS).[609] JLOS is an organ of government under the Ministry of Justice, and this precisely meant that the judiciary was under the Ministry of Justice and constitutional affairs, which also meant that some government bureaucrats had a final say on what the judiciary should receive or how the funds should be administered. In his ruling, Justice Cheborion stated that, as an arm of government, the judiciary must be able to control its budgeting process.[610] He further stated that Article 128 (1) and (2) and Article 155 (3) of the Constitution must be respected even if there was a lack of a law providing for the administration of the judiciary.[611] The petition pointed out that the Executive and Legislature had failed, neglected or omitted to assist the Judiciary to fulfil its mandate under the 1995 Constitution.[612] The court pointed out that the failure by the Executive and Parliament to take steps in a reasonable time to enact a law to implement the judiciary's autonomy contravened Article 8A of the National objective and directive principles of state policy VIII and Article 128(3) of Uganda's 1995 constitution.[613]

Worth noting is that the Ugandan judiciary derives its power from the people and exercises it in the name of the people, as provided for under Article 126(1) of the constitution.[614] This power the court exercises in conformity with the law, with the values and norms of the people."[615] It then goes without saying that judicial power does not emanate from the executive, and neither is the judiciary an appendage of the executive. In conformity with the principle of the separation of powers, the judiciary should not only be independent, but it must be seen, in the eyes of the public, to be

608 *Uganda Law Society (ULS) v. Attorney General Constitution Petition No.52 of 2017.*
609 Justice Law and Order Sector is a sector wide approach adopted by the Government of Uganda to bring together institutions with closely linked mandates of administering justice and maintaining law and order and human rights, into developing a common vision, policy framework.
610 *Uganda Law Society (ULS) v. Attorney General Constitution Petition No.52 of 2017.*
611 *Uganda Law Society (ULS) v. Attorney General Constitution Petition No.52 of 2017.*
612 *Uganda Law Society (ULS) v. Attorney General Constitution Petition No.52 of 2017.*
613 *Uganda Law Society (ULS) v. Attorney General Constitution Petition No.52 of 2017.*
614 Article 126(1) of Ugandan constitution of 1995 with amendments through 2017.
615 Article 126(1) of Ugandan constitution of 1995 with amendments through 2017.

such. In *Uganda Law Society (ULS) v. Attorney General*, the court observed that an arm of government that is wholly dependent on another arm of government for all its budgetary needs cannot be described as being independent.[616] In that vein, the court pointed out that the involvement of the executive is permitted only as provided under Article 155 of the constitution.[617]

4.4.2 The Operationalisation of the Judiciary Fund in Uganda

In 2020, the Administration of the Judiciary Act came into effect in Uganda. This is in line with the provision of Chapter 8 of Uganda's constitution, as set out in Article 128, providing for the independence of the judiciary. The administration of the judiciary act of 2020 has helped the judiciary have a greater autonomy with regard to its finances and has aided the judiciary in employing more personnel. For some time now, there have been case backlogs in the judiciary, but with the change in the model of funding, it has helped ease them. In July 2023, the Ugandan Parliament increased the number of High Court judges from 83 to 151, after agreeing with Justice and Constitutional Affairs Minister, Hon Norbert Mao, about the need for higher numbers of judges on the bench to ease case backlogs.[618] It is evident from the preceding facts that, when the judiciary is in total control of its finances, it can easily organise its programmes, which will go a long way in facilitating the delivery of justice. This may be in the form of acquiring infrastructure, employing more personnel, etc.

4.5 Lessons learned from the Judicial funding of Kenya, South Africa, and Uganda

An analysis of the Kenyan and Ugandan constitutions shows that there are provisions in their respective constitutions for the judiciary to access funds from the Consolidated Fund. The Consolidated Fund or Consolidated Revenue Fund is a government account in which all government taxes and revenue are remitted, and money from it is accessed through authorised channels to meet government expenses.[619] The framers

616 *Uganda Law Society (ULS) v. Attorney General Constitution Petition No.52 of 2017.*

617 *Uganda Law Society (ULS) v. Attorney General Constitution Petition No.52 of 2017.*

618 Parliament of Uganda, 'MPs approve increase of High Court judges to 151,' (14/07/2023) <https://www.parliament.go.ug/news/6771/mps-approve-increase-high-court-judges-151> accessed on 28/08/2023.

619 Money from the Consolidated Fund may be accessed to meet expenses charged on the Consolidated fund, this may be through the authorization of the constitution or an Act of

of the constitution in the two respective jurisdictions envisaged a judiciary with financial autonomy. The aspect of financial autonomy was fashioned this way by the framers of the constitution to avoid the scenario where the judiciary would be at the mercy of other arms of government. However, there have been challenges and delays in the implementation of this judicial fund in both Kenya and Uganda. In Kenya, after years of concern from stakeholders, the Judicial Fund was made operational in 2022 under President William Ruto's administration.[620] This showed that political will is also important if a society is to move forward as envisioned by the constitution.

Uganda's Administration of Judiciary Act was enacted in 2020.[621] It states the following concerning the expenses of the judiciary: 'all moneys approved by Parliament to defray the expenses incurred in the discharge of the functions of the Judiciary or in carrying out the purposes of this Act shall be a direct charge on the Consolidated Fund.'[622] There has been a concern about inadequate funds available to the Ugandan Judiciary, and some vulnerable groups in Uganda are still starved of justice due to their inability to access the services of the judiciary.

The South African model of funding is a little different; South Africa's Judiciary receives funding through the Ministry of Justice and Constitutional Affairs. The South African judiciary has been hailed for most of the judgments that it has delivered, and South Africa as a country has also been mentioned as a model for democracy in Africa. The lack of meddling by other branches of government must be commended, but this may be attributed to mature politics and a government that is self-reflective in wanting to achieve the society envisioned in the South African constitution of 1996. There remains a concern about its model of funding. The model of funding does not reflect the institutional independence that is desired and required by the South African judiciary. South African former Chief Justice Raymond Zondo is of the view that mechanisms should be put in place to address the question of the institutional independence of the judiciary. Key amongst these is the aspect of funding and the

parliament. Article 154 of the Ugandan constitution with Amendments through 2017 provides for this as well as 206 Article of the Kenyan constitution of 2010.

620 The Kenyan Judiciary, 'Judiciary Fund Operationalised,' (17/08/2022) <https://judiciary.go.ke/judiciary-fund-operationalised/> accessed on 06/02/2024.

621 Administration of the Judiciary Act of 2020.

622 Article 34 of the Administration of the Judiciary Act of 2020.

financial autonomy of the judiciary.[623] Zondo said that many things that have been experienced and witnessed by judges could be fixed if they did not have to rely on the executive for funding.[624] There is a need to have a law that caters for the judicial fund so that the South African judiciary can have its own financial autonomy, because, while the leaders that South Africa has had since 1994 may thus far have been measured, there is no assurance that it will remain that way. Democratic institutions are put in place to safeguard democracy, those very institutions may be the difference that can control power-hungry leaders who have no regard for the law.

4.6 Conclusion

The funding of the judiciary is paramount with regard to the administration of justice. While many countries are experiencing economic difficulties that have led to cuts in their budgets, it is still important that reasonable funding must be made available to the judiciary to help it carry out its important mandate of delivering justice. Delays in the handling of cases in the judiciary may mean compromising a fair trial or violating of rights of those seeking justice or, ultimately, some may suffer irreparable damage.

The mode of funding is also key in safeguarding judicial independence. A judiciary that controls its own purse is free to make decisions that serve the interest of justice. This can include hiring of personnel as well as the decisions of their deployment, depending on where the judiciary thinks such deployment may be required.

Political will is also of crucial importance in facilitating or creating a conducive environment in which the judiciary operates. There is a positive obligation placed on governments to see to it that judiciaries function seamlessly. Parliaments or legislators are required to enact laws that give effect to the provisions of the constitution as they relate to facilitating and providing a good working environment for the judiciary. This includes the enactment of laws that provide for the autonomy of the judiciary.

---

623 SABC, 'Chief Justice Zondo calls for independent judiciary,' (08/12/2023) <https://www.youtube.com/watch?v=BeBU8Df8Gsw> accessed on 06/02/2024.

624 Diane Hawker**,** Zondo to meet Ramaphosa over 'unacceptable' delays in creating a fully independent judiciary, (07/12/2023) <https://www.dailymaverick.co.za/article/2023-12-07-zondo-to-meet-ramaphosa-over-unacceptable-delays-in-creating-independent-judiciary/> accessed on 06/02/2024.

CHAPTER 5

THE NEED FOR TRANSFORMATIVE CONSTITUTIONALISM IN SOUTH AFRICA, KENYA, AND UGANDA

5.1 Introduction

Transformative constitutionalism refers to a change in aspects of the *status quo* that are neither acceptable nor sustainable; it is the discarding of a past that is no longer needed and adopting a change that is in line with the advancement of human rights, personal freedom and liberties.[625] Transformative constitutionalism, as used here, entails changing the mindset of the Legislature, the Executive and the Judiciary to achieve fundamental change. It is a departure from previous practices characterised by the arbitrary application of laws to one of protecting human rights, with courts as the final arbiter.[626] On one hand, transformation refers to a methodical approach of effecting change; on the other hand, constitutionalism highlights the idea of adhering to the core framework of values outlined by a progressive constitution and a governing system that empowers by transforming society for the better, in other words, making it more progressive and inclusive.[627] When these two concepts are combined, this can be referred to as transformative constitutionalism. It is reflected in the way the constitution is interpreted and enforced with a view of changing a nation's political, social and power structures in order to promote democratic participation and egalitarian principles.[628]

While transformative constitutionalism may touch on many principles, this chapter will focus on a few selected fundamental rights in South Africa, Kenya, and Uganda. It will focus on the role the judges play or must play in safeguarding the ideals of the rule of law and advancing the interests of society. It will look at the idea of transformative constitutionalism and its implications in the adjudication of fundamental rights and

---

625 The law, 'Transformative Constitutionalism,' (17/06/2021) <https://thelawexpress.com/transformative-constitutionalism> accessed on 29/12/2023.

626 E Kibet and C Fombad,'Transformative constitutionalism and the adjudication of constitutional rights in Africa' (2017) 17 African Human Rights Law Journal 340-366.

627 Neetishri Sharma, 'Transformative Constitutionalism: A Conceptual Journey from South Africa to India,' (2021)8 Journal of Emerging Technologies and Innovative Research, 783,783.

628 Rosa Solange, 'Transformative constitutionalism in a democratic developmental state, '(2011) 22(3) Stell LR 542-542.

freedoms. This chapter offers the view that there must be a deliberate shift from the previous approach of handling some legal problems, and, further, it offers the view that there must be increased protection of fundamental rights and freedom. The law must be interpreted to give not only formal justice, but, more importantly, there must be substantive justice to achieve an egalitarian society.

5.2 South African Judiciary on transformative constitutionalism

South Africa endured both colonization and apartheid. Both systems were characterised by a violation of rights, amongst which black people suffered disenfranchisement, subjugation, displacement, and dispossession.[629] The dawn of the new constitution promised a positive change, even though the legacy that was left by apartheid still looms large. Previously disadvantaged masses, like everyone else, deserve to have their rights protected and, more importantly, be enabled to live in dignity, and this can be achieved through transformative constitutionalism, which advances positive change that is needed to bring about an egalitarian society. According to Karl Klare:

> Transformative constitutionalism is a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.[630]

Lack of opportunities owing to disenfranchisement in the pre-constitutional order only condemned the black masses to poverty and squalor. It is worth mentioning that the move to a constitutional state is not an automatic change; deliberate measures must be taken to bring about positive changes that are aimed at lifting the majority of the people from those harsh conditions of the past. To give effect to the constitution of South Africa, there must be substantive change from a past characterised by inequality and oppression to a new future that offers equality, equity, and dignity. Part of the preamble of the South African constitution provides that there must be a recognition

---

629 South Africa was under both colonization by Apartheid, both systems were characterized by oppression of black masses, land dispossession and generally unlawful limiting of rights.

630 Karl E Klare, 'Legal Culture and Transformative Constitutionalism,' (1998) SAJHR 14:1, 146-188, 150.

of past injustices and the need to honour those who suffered for justice and freedom and respect those who have worked to build and develop the country.[631] The preamble further points out the need to heal past divisions and to build a society based on democratic values, social justice and fundamental human rights. It also provides for equal protection under the law and the need to improve the quality of life of all citizens and to free the potential of each person.[632]

From the preamble, it is clear that the framers of the constitution envisaged a fair society with equal opportunities. Despite emerging as a progressive democracy and a model for other democratic states in Africa, the substantive equality amongst the majority of South Africans is yet to be achieved, and so there is a need for change. The change envisaged is what Albertyn & Goldblatt described as, 'the movement from the one side of this bridge to the other.'[633] Albertyn & Goldblatt are of the view that the movement from one side of this bridge to the other will require a complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines.[634] They further point out that achieving equality within the transformation project involves the eradication of systemic forms of domination and material disadvantage based on race, gender, class, and other grounds of inequality.[635] To achieve this egalitarian society, all arms of government have to take deliberate measures to address issues such as unemployment, inadequate social security, landlessness, and lack of adequate housing, among others.

Poverty is still a serious challenge in South Africa despite the government's best efforts to address it. Solange posits that redistributive targeting based on favourable laws and policies has had some positive results that have been the reason for a decline in acute destitution.[636] There have been programmes that were initiated by the post-apartheid

631 Preamble of the South African constitution of South Africa.
632 The Preamble of the South African constitution of 1996.
633 Albertyn & Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" 1998 14 SAJHR 248, 249.
634 Albertyn & Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" 1998 14 SAJHR 248, 249.
635 Albertyn & Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" 1998 14 SAJHR 248, 249.
636 Rosa Solange, 'Transformative constitutionalism in a democratic developmental state, '(2011) 22(3) Stell LR 542-542.

government to combat poverty and inequality.[637] These programmes include providing social grants and a social housing programme for the poor. It is a constitutional right that everyone should live in dignity.[638] In essence, the government needs to take deliberate steps to have the majority of the population escape from poverty.

5.2.1 Constitutional Interpretation to achieve substantive equality

The South African constitution mandates that courts interpret the constitution in a way that advances the needs of society. Section 39(1) states that:

> When interpreting the Bill of Rights, a court, tribunal or forum—
>
> (a) Must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>
> (b) Must consider international law; and
>
> (c) May consider foreign law.

Section 39(2) further points out that, when interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.[639] These clauses can be used by the courts to advance the course of transformative constitutionalism through judge-made law.[640] Justice Mlambo points out that section 8(3)(a) and 39 express a clear mandate that, in developing common law, judges shall fulfil the democratic values of human dignity, equality and freedom.[641] In terms of section 8(3)(a):

> When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court, in order to give effect to a right in the Bill of Rights, must apply,

---

637 There have been programs initiated by African National Congress Government, that includes Social grants and building houses for indigents.

638 Section 10 of the South African Constitution of 1996.

639 Section 39(2) of the South African constitution of 1996

640 Judge made law also known as common law is a law established by precedents; it is the law that is made by the judges as a result of the cases heard by the courts (High Courts) and it applies to subsequent cases.

641 Dunstan Mlambo, 'Transformative Social Change and the Role of the Judge in Post-Apartheid South Africa,' 16th Annual Human Rights Lecture, at Stellenbosch University, Delivered on 24/03/2022. Available at <https://www.sun.ac.za/english/Documents/newsclips/Judge%20President%20D%20Mlambo_Stellenbosch%20Human%20Rights%20Lecture_24March2022.pdf> accessed on 20/09/2023.

or, if necessary, develop the common law to the extent that legislation does not give effect to that right.[642]

An analysis of section 8(3)(a) implies that judges should be conscious of the society they live in and reveals that they need to act by creating judge-made law in areas where the law is silent. South African Constitutional Court and other High Courts, by virtue of their judgments and reasoning, develop common law that can then be used in subsequent cases. An example is in the reasoning of the court in *Carmichele v Minister of State Security.* The court held that the State is obligated by the Constitution and international law to protect the dignity and security of women. A man who was awaiting trial for the attempted rape of another woman sexually assaulted the applicant. Despite the seriousness of the alleged crime, the police and prosecutor had recommended that the man be released pending trial. The court found that, in the circumstances, the police's recommendation for the release of the perpetrator amounted to wrongful conduct, giving rise to liability.[643] The court also held that prosecutors, who are under a duty to place before the court any information relevant to the refusal to grant bail, may be held liable for negligently failing to fulfill that duty.[644] The Constitutional Court decided this case with the transformative imperative as is demanded by the constitution.

The constitution places on the state a positive obligation to offer security. This case was a watershed moment in the advancement of transformative constitutionalism. According to Klare and Davis, prior to the *Carmichele* case, courts were reluctant to decide cases in a way that would show a paradigm shift in adjudication to develop common law.[645] Former Chief Justice Langa, in his lecture on transformative constitutionalism, pointed out that 'Under a transformative Constitution, judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values.'[646] From the above, it is clear that the courts can

642 Section 8(3)(a) of the South African Constitution of 1996.
643 *Carmichele v Minister* of *Safety* and *Security 2001 (10) BCLR 995 (CC).*
644 *Carmichele v Minister* of *Safety* and *Security 2001 (10) BCLR 995 (CC).*
645 Dennis M Davis and Karl Klare 'Transformative Constitutionalism and the Common and Customary Law'(2010) Volume 26(3) SAJHR 403. <https://www.tandfonline.com/doi/abs/10.1080/19962126.2010.11864997> accessed on 01/01/2024.
646 Pius Langa 'Transformative Constitutionalism' (2006) 17 Stell LR 351.

interpret the constitution in a way that serves to bring equality, equity, and dignity to the masses.

A lack of adequate housing and the question of landlessness of the black masses are among the issues the judiciary can address using the above developmental clauses. South African society needs not only formal justice but, more importantly, it needs substantive justice that will give birth to a new society that is based on substantive equality. Albertyn and Goldblatt point out that, to achieve equality within the transformation project, there is a need for the eradication of systemic forms of domination and material disadvantage based on race, gender, class, and other grounds of inequality.[647] Klare advocates for a consequentialist approach to legal issues as opposed to a structured, technical, literal, and rule-based approach, which is formalistic in nature. A formalistic approach has been described as not delving much into the inquiry into the true motivation for certain decisions and presenting the law as neutral and objective. Cornell Legal Information Institute gives the following view:

> A descriptive theory of law, legal formalism seeks to discover uncontroversial principles of common law and apply them to the facts at hand. Legal formalism differs from legal realism, as it does not consider the social interests and public policy ramifications of rulings. In this respect, legal formalism is an attempt at creating a rational and scientific legal system, absent of political considerations. [648]

In essence, there has to be a fundamental shift from what was done during apartheid. Back then, courts could not do much to further the cause of defending fundamental rights and freedoms, especially the rights of the marginalised African majority.[649] Klare refers to this issue as a "legal culture," which constrained the way lawyers thought and determined their sensibilities and responses to issues.[650] White judges trained by a legal education system designed to support apartheid did the bare minimum; they

---

647 Albertyn and Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" 1998 14 *SAJHR* 248, 249.

648 Legal Information Institute, 'Legal formalism,' Cornel Law School <https://www.law.cornell.edu/wex/legal_formalism#:~:text=As%20a%20descriptive%20theory%20of,public%20policy%20ramifications%20of%20rulings. > accessed on 28/09/2023.

649 Apartheid created massive inequalities based on race and gender. The violence that the black masses were subjected to constituted gross violations of human rights that contributed to these inequalities.

650 K Klare 'Legal culture and transformative constitutionalism' (1998) 14 South African Journal on Human Rights 146 150.

could not do much to advance substantive justice to the black masses who faced numerous indignities and whose rights were often violated.[651] In other words, a legal culture created to support the apartheid regime was, at least partially, responsible for the authoritarianism and violations of human rights that persisted prior to 1993. Klare calls for a new legal culture that should be all-encompassing and forward-looking.

The former South African Chief Justice, Pius Langa, emphasised the need for a legal culture that equips both the students and those in practice with critical analytical skills, equipping them with skills that go beyond the formal application of the law.[652] In his view, the formalistic way of reasoning alone may not suffice. He pointed out that the constitution, like any law, can be interpreted formally and thus allow judges to avoid engagement with substance and evade the search for justice.[653] In contrast, transformative constitutionalism demands that the constitution must be interpreted to meet the demands of substantive justice.

In summary, the judiciary is the last vestige of hope for those who desperately need justice. It is the pivot on which the constitutional democracy leans; it is the light at the end of a dark tunnel, which, with reasoned judgments, breathes life into an otherwise desperate society in need of justice and transformation.

5.3 The Kenyan Judiciary on transformative constitutionalism

The Preamble of the Kenyan constitution acknowledges the aspirations of 'all Kenyans' for a government founded on the fundamental principles of human rights, equality, freedom, democracy, social justice and the rule of law.'[654] The values and principles that guide the constitution include democracy, public engagement, human dignity, equity, social justice, equality, human rights, non-discrimination, and the protection of the marginalised. The judiciary stands as the backbone of any

---

651 Nelson Mandela Foundation, 'Historical Background the Judiciary,' <https://omalley.nelsonmandela.org/cis/omalley/OMalleyWeb/03lv00017/04lv01495/05lv01505.htm> accessed on 15/04/2024.

652 Pius Langa 'Transformative constitutionalism' lecture delivered at Stellenbosch university 9th October 2006 available at <http://law.sun.ac.za/portal/page/portal/law/index.english/news/2006/Pius%20Langa°/o20Speech.pdf.> accessed on 15/04/2024.

653 Pius Langa 'Transformative constitutionalism' lecture delivered at Stellenbosch university 9th October 2006 available at <http://law.sun.ac.za/portal/page/portal/law/index.english/news/2006/Pius%20Langa°/o20Speech.pdf.> accessed on 15/04/2024.

654 The preamble of the Kenyan constitution of 2010.

constitutional democracy; it interprets laws and protects rights. During the Jomo Kenyatta and Moi eras, the judiciary was overshadowed.[655] Under the previous dispensation, pre the 2010 constitution, Kenya had a weak judiciary that seemed not to want to offend the executive. According to Makau Mutua, the judiciary back then was subservient to the executive.[656] Back then, power was centralised in the executive, and, specifically, the presidency. Both President Jomo Kenyatta and Moi had immense power; Joshua Malidzo described them as forming an imperial presidency.[657] With the promulgation of the 2010 constitution, Kenya experienced a rebirth in terms of the safeguards provided for under the constitution. Amongst those that were strengthened was the judiciary; the constitution assures the judiciary of more independence and, most importantly, the separation of powers among the arms of government.[658]

Transparency International described the constitution as a paradigm shift in the way the court adjudicated cases prior to its promulgation.[659] According to Amnesty International, in the post-election violence of 2007, courts were largely seen as a non-viable avenue of justice because judges were perceived to be part of the executive.[660] The judiciary needed to shake off that tag and gain the confidence of the Kenyan people. An independent judiciary is key to bringing about transformative constitutionalism, the judges must not only be knowledgeable but must be ready to interpret the law in such a way that helps advance and transform society. In essence,

---

655 Joshua Malidzo Nyawa, 'The Broken Promise: Kenyatta's Love for Abusive Constitutionalism and Imperial Presidency [2020] Available at SSRN: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3660631> or <http://dx.doi.org/10.2139/ssrn.3660631> accessed on 15/05/2024.

656 Makau Mutua, 'Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya,' (2001) 23 Human Rights Quarterly 23.1, 96,98.

657 Joshua Malidzo Nyawa, 'The Broken Promise: Kenyatta's Love for Abusive Constitutionalism and Imperial Presidency [2020] Available at SSRN: <https://ssrn.com/abstract=3660631> or <http://dx.doi.org/10.2139/ssrn.3660631> accessed on 15/05/2024.

658 Amnesty International, '2010 Constitution Restored Confidence in a Truly Independent Judiciary,' (2022) < https://www.amnestykenya.org/2010-constitution-restored-confidence-in-a-truly-independent-judiciary/> accessed on 15/05/2024.

659 Amnesty International, '2010 Constitution Restored Confidence in a Truly Independent Judiciary,' (2022) < https://www.amnestykenya.org/2010-constitution-restored-confidence-in-a-truly-independent-judiciary/> accessed on 15/05/2024.

660 Amnesty International, '2010 Constitution Restored Confidence in a Truly Independent Judiciary,' (2022) < https://www.amnestykenya.org/2010-constitution-restored-confidence-in-a-truly-independent-judiciary/> accessed on 15/05/2024.

it is a departure from the deferential culture that was seen under the Jomo Kenyatta and Moi regimes to one which protects and safeguards the rights of everyone.

There are fundamental rights protected by the constitution, and the judiciary has the authority to decide on the protection of those rights in the event that these cases come before them. The Kenya constitution of 2010 has given the judiciary a safeguard that is a departure from the past, where the executive and, especially, the president was a power unto himself.[661]

The constitution envisages everyone as being equal before the law, whether male or female, and no one should be discriminated against.[662] The constitution provides that women have a right to equal treatment and opportunities in all spheres of their social life, and these include the political, economic and cultural.[663] Article 27(8) of the Kenyan Constitution provides for gender equity in leadership positions.

It is provided that the county and national governments have to ensure that neither gender holds more than two-thirds of public positions, whether elected or appointed.[664] Men have, for the most part, been the dominant gender in leadership positions in Kenya. The drafters of the constitution must have had in mind the concern of this continued domination, and they saw it fit to include such a requirement in the constitution, now dubbed the two-thirds gender rule. The Kenyan parliament was supposed to enact a law that addressed the gender rule as per Article 27(8) of the Kenyan constitution.[665] The Kenyan courts have presided over matters that involved gender equity. In 2022, the Court of Appeal held that there was a responsibility on the part of the Judicial Service Commission to ensure that judicial appointments made to all courts reflected the two-thirds gender principle.[666]

---

661 Joshua Malidzo Nyawa, 'The Broken Promise: Kenyatta's Love for Abusive Constitutionalism and Imperial Presidency [2020] Available at SSRN: <https://ssrn.com/abstract=3660631 or http://dx.doi.org/10.2139/ssrn.3660631> accessed on 15/05/2024.

662 Article 27 of the Kenyan constitution of 2010.

663 Article 27(3) of the Kenyan constitution of 2010.

664 Article 27(8) of the Kenyan constitution of 2010.

665 Article 27(8) of the Kenyan constitution of 2010.

666 *Njenga v Judicial Service Commission & 9 others (Civil Appeal 234 of 2017) [2022] KECA 1429 (KLR)*para 54.

5.3.1 Challenges facing transformative constitutionalism in Kenya

Kenya still has to do a lot to improve gender equity in line with the Kenyan constitution of 2010. Over thirteen years since the promulgation of the Kenyan constitution, the gender rule is yet to be fully implemented. Article 27(8) of the Kenyan constitution states that the legislature needs to take steps to implement the gender rule.[667] The gender rule serves to put into effect provisions of Article 27(6) which provide that, to give full effect to the realization of the rights guaranteed under Article 27, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

Women fall into this category of a 'group' of people who have been discriminated against. Men dominate most positions in the Kenyan society. The Kenyan constitution, for the first time, included positions that are to be held only by women. Article 97(1) of the Kenyan constitution provides for the composition of members of parliament. Apart from the two hundred and ninety members of parliament from the two hundred and ninety constituencies,[668] the constitution provides for the election of forty-seven women, each elected by the registered voters of the counties, each county constituting a single-member constituency.[669]

The role of these women representatives is to represent the interests of women and girls in their respective Counties. It is also a needed addition to guarantee the representation of women and girls in the national assembly. They participate in roles such as making laws, discussing government policies, etc. Despite this, the parity of women in leadership positions is still wanting. It has been reported that Kenya trails, among other East African countries, in terms of female representation in parliament.[670] According to a report, the lack of parity in female representation disadvantages women

667 Article 27(8) of the Kenyan Constitution of 2010 states that, the State shall take legislative and other measures to implement the principle that not more than two- thirds of the members of elective or appointive bodies shall be of the same gender.

668 Article 97(1)(a) of the Kenyan constitution of 2010.

669 Article 97(1)(b) of the Kenyan constitution of 2010.

670 Kevin Rotech, 'Kenya trails regional peers in women top leadership positions,' (02/08/2021) <https://www.businessdailyafrica.com/bd/data-hub/kenya-trails-peers-in-women-top-leadership-positions-3495782> accessed on 21/01/2023.

in many areas.[671] The Kenyan parliament is yet to enact a law that addresses the gender parity as demanded by the constitution. Praxides Oduori points out that equal gender representation is clearly supported by the constitutional framework, but there has been elusiveness in the implementation.[672] In 2020, the former Chief Justice, Maraga, wrote an advisory opinion to President Uhuru Kenyatta advising him to dissolve parliament for failing to enact the gender parity law.[673] Justice Maraga's advice emanated from a constitutional provision under Article 261(7), which states that: If Parliament fails to enact legislation in accordance with an order under clause (6)(b), the Chief Justice shall advise the President to dissolve Parliament.[674] Justice Maraga spelt out clearly what the drafters of our constitution envisaged, pointing out that the two-thirds gender rule:

> is an acronym for the constitutional imperative which prohibits any form of discrimination in the appointive and elective positions on the basis of one's gender, grounded on the declaration in Article 27(3) of the Constitution that "Women and men have, the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.[675]

Justice Maraga pointed out that Kenyans understood the possible cultural resistance to the transformational ideas on gender equality that the constitution would face, but the radical mechanism of the dissolution of Parliament under Article 261(7), irrespective of its consequences, would incentivize the political elites to adhere to and fully operationalise the transformational agenda.[676] It is provided that, if Parliament fails to enact legislation in accordance with an order under Article 261(6)(b), the Chief

---

671 Kevin Rotich, 'Kenya trails regional peers in women top leadership positions,' (02/08/2021) <https://www.businessdailyafrica.com/bd/data-hub/kenya-trails-peers-in-women-top-leadership-positions-3495782> accessed on 21/01/2023.

672 Praxides Nekesa Oduori, 'Challenges to the Implementation of the Constitutional Provisions of the two-thirds Gender Rule in the National Assembly of Kenya,' (Masters Dissertation, University of Nairobi, 2016) 56.

673 Chief Justice's advice to the President pursuant to Article 261(7) of the constitution, this was Chief Justice's advice to the President to dissolve parliament for failure to enact the gender rule as demanded by the constitution. Available at <http://kenyalaw.org/kenyalawblog/chief-justices-advice-to-the-president-on-dissolution-of-parliament/> accessed on 21/01/2024.

674 Article 261(7) of the Kenyan Constitution of 2010.

675 Chief Justice's advice to the President pursuant to Article 261(7) para 3. Available at <http://kenyalaw.org/kenyalawblog/chief-justices-advice-to-the-president-on-dissolution-of-parliament/> accessed on 21/01/2024.

676 Chief Justice's advice to the President pursuant to Article 261(7) para 26. Available at <http://kenyalaw.org/kenyalawblog/chief-justices-advice-to-the-president-on-dissolution-of-parliament/> accessed on 21/01/2024.

Justice shall advise the President to dissolve Parliament, and the President shall dissolve Parliament.[677] Despite this, the president did not dissolve parliament, and the gender rule law was not enacted.

The *Consolidated Petition 446 and 456 of 2016* concerned the inequality in appointive positions, specifically with regard to female representation on the Supreme Court bench.[678] The motivation of this case was that, in 2016, there were vacancies in the Supreme Court following the retirement of the Chief Justice, Deputy Chief Justice, and a judge of the Supreme Court. The Judicial Service Commission, the body responsible for overseeing the appointment process, advertised the vacancies and invited applications from qualified and interested persons. After conducting the interviews, the JSC recommended Mr. Maraga for the position of Chief Justice, Ms Phelomina Mwilu for the position of Deputy Chief Justice, and Mr. Lenaola for the position of Justice of the Supreme Court. The petition raised an issue about Justice Lenaola's appointment on the grounds that the JSC should have recommended a woman for appointment instead, and, therefore, that recommendation did not comply with the two-thirds gender principle.

Among the relief sought by the petitioner (National Gender and Equality Commission) was a declaration that the recommendation for the appointment of two (2) persons of the male gender and one of the female gender by the first respondent (JSC) was in violation of the one-third, two-thirds principle.[679] That, in doing this, the first respondent was in violation of the one-third, two-thirds principle in the representation of men and women, and, therefore, the appointment was unconstitutional and null and void. The petition also sought a declaration that the composition of the Supreme Court of Kenya at the time was in violation of Articles 10, 27, and 172(2) (b) of the Constitution of Kenya.[680] They asked for the issuance of an order that the constitutional and statutory breaches rendered the entire bench of the Supreme Court of Kenya untenable as was constituted and, therefore, constitutionally invalid.[681]

677 Article 261(7) of the Kenyan Constitution of 2010.
678 *Consolidated Petition No petition 446 and 456 of 2016.*
679 *Consolidated Petition No petition 446 and 456 of 2016 para 4 (iv).*
680 Article 10, 27, and 172(2) of the Kenyan Constitution of 2010, talks to the National values and the question of equality.
681 *Consolidated Petition No petition 446 and 456 of 2016 para 5(ii).*

In his decision, Judge Mwita pointed out that the foundation and policy considerations behind this requirement must be that the judiciary, under the transformative constitution, should have judges who meet the threshold set by both the constitution and the Judicial Service Act.[682] People to be appointed to the judiciary must not only be competent, they also need to be people of integrity, and the appointments must be made through an open, competitive and transparent process that is in line with the values and principles of the constitution.[683] He stated further that the criteria for such an appointment is competence, before considering any other requirements.[684] The judge pointed out that the petitioners did not accuse the 1st respondent (the JSC) of not having followed the provisions of the constitution and the law in conducting the interviews, and neither did they suggest that a lady applicant performed better than the person who was eventually recommended for appointment.[685] The judge pointed out that the constitution is clear, that one gender should not occupy more than two-thirds of elective or appointive positions. The petitioners had to show that the number of male judges in the Supreme Court was more than two-thirds.[686]

Considering that the Kenyan Supreme Court is composed of seven Judges, the judge pointed out that taking the numbers as they were, two-thirds of seven would give 71.42 percent or 4.66 men, while one-third of seven would give 28.57 percent or 2.33 female.[687] In his view the judge pointed out that there is no decimal point in human beings, and taking the figures to the nearest whole numbers, 4.66 would round off to five men, while 2.33 would round off to two women.[688] It can be argued that the judge took a formalistic approach in the application of the law. Looking at it with transformative lenses, it can be concluded that this judgment did not promote transformative constitutionalism. The clause that was determined here is framed in negative terms and, therefore, it is prohibitive. The language used in that clause is

682 Article 32(2) of the Judicial Service Act 1 of 2011.
683 *Consolidated Petition No petition 446 and 456 of 2016 para 27.*
684 *Consolidated Petition No petition 446 and 456 of 2016 para 28.*
685 *Consolidated Petition No petition 446 and 456 of 2016 para 28.*
686 *National Gender and Equality commission and Adrian Kamotho Njenga v JSC, Attorney general and Justice Isaac Lenaola an Interested party, Petition number 446 off 2016 consolidated with petition number 456 of 2016* para 32.
687 *Consolidated Petition No petition 446 and 456 of 2016 para 33.*
688 *Consolidated Petition No petition 446 and 456 of 2016 para 33.*

peremptory, stating that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

Transformative constitutionalism demands that the judiciary develop the law in a way that advances fundamental rights and brings about positive change. In this case, the judge would still have been correct if he had decided that 4.66 of 7 was more than two-thirds and consequently decided in favour of women having the third seat on the Supreme Court. It was pointed out that the appointments to such positions must be made on merit. The judge correctly pointed out that the first step for one being appointed as a judge is the necessary competence and then other considerations, including gender, will be considered.[689] Article 20(3) of the Kenyan constitution provides that: 'In applying a provision of the Bill of Rights, a court shall - develop the law to the extent that it does not give effect to a right or fundamental freedom: and adopt the interpretation that most favours the enforcement of a right or fundamental freedom.'[690] Article 20(4) further states that: 'In interpreting the Bill of Rights, a court, tribunal or other authority shall promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and the spirit, purport and objects of the Bill of Rights.'[691] To promote equality and equity on the bench, a generous interpretation would have favoured the appointment of a third woman on the Supreme Court bench.

Article 259(1) of the Kenyan constitution encourages a purposive interpretation of the law. A purposive interpretation of the constitution develops common law that advances the rule of law and gives meaning to the provisions in the Bill of Rights. It states that the Constitution shall be interpreted in a manner that promotes its purposes, values and principles.[692] The constitution further provides that it should be interpreted in a way that advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights.[693] Should a purposive interpretation have been adopted, it would also have seen a woman get a third seat on the Supreme Court bench. In the matter of the *Speaker of the Senate & another [2013] eKLR,* the Kenyan Supreme Court

689 *Consolidated Petition No petition 446 and 456 of 2016 para 26.*
690 Article 20(3) of the Kenyan constitution of 2010.
691 Article 20(4) of the Kenyan constitution of 2010.
692 Article 259(1)(a) of the Kenyan constitution of 2010.
693 Article 259(1)(b) of the Kenyan constitution of 2010.

pointed out that the avowed goal of today's Constitution is to institute social change and reform through values such as social justice, equality, devolution, human rights, rule of law, freedom, and democracy.[694] With the retirement of Justice Maraga and the subsequent appointment of Justice Martha Koome as the Chief Justice, the Kenyan Supreme Court now has three female Justices and four male justices.

5.4 Transformative constitutionalism in Uganda

Transformative constitutionalism in Uganda should be looked at from the angle of an emerging democratic state. After tumultuous years characterised by violence, coups, and general apprehension, it can be said that Uganda still has to make strides to be on the path to transforming its society to democratic ideals. On taking over power in 1986, President Yoweri Museveni promised that there was going to be a fundamental shift in the way things are done in Uganda, that it was not merely going to be a change of guard, but it was also going to signal a fundamental transformation of the Ugandan society.[695] According to Carbone, 'Museveni appeared on the scene as a leader responsible for the most welcome sudden and dramatic shift – an almost overnight shift – from chaos to stability, after years of violence and instability.'[696]

However, in a confusing move after taking over power, political parties were banned, giving rise to a no-party system.[697] Museveni said this would provide a platform for more inclusive politics and encourage Ugandans to move beyond divisive tribal rivalries prevalent during the previous three decades.[698] The National Resistance Movement (NRM) promised political reforms and transformative change. The NRM's

694 *The Speaker of the Senate & another [2013] eKLR, Advisory Opinion No. 2 of 2013.*

695 Giovanni Carbone, 'Populism' Visits Africa: The Case of Yoweri Museveni and No-Party Democracy in Uganda,' (2005) <https://www.lse.ac.uk/international-development/Assets/Documents/PDFs/csrc-working-papers-phase-one/wp73-museveni-and-no-party-democracy-in-uganda.pdf> accessed on 06/12/2023.

696 Giovanni Carbone, 'Populism' Visits Africa: The Case of Yoweri Museveni and No-Party Democracy in Uganda,' (2005) <https://www.lse.ac.uk/international-development/Assets/Documents/PDFs/csrc-working-papers-phase-one/wp73-museveni-and-no-party-democracy-in-uganda.pdf> accessed on 06/12/2023.

697 Giovanni Carbone, 'Populism' Visits Africa: The Case of Yoweri Museveni and No-Party Democracy in Uganda,' (2005) <https://www.lse.ac.uk/international-development/Assets/Documents/PDFs/csrc-working-papers-phase-one/wp73-museveni-and-no-party-democracy-in-uganda.pdf> accessed on 06/12/2023.

698 African Research Institute, 'Steady Progress? 30 Years of Museveni and the NRM in Uganda,' (05/02/2016) <https://www.africaresearchinstitute.org/newsite/publications/steady-progress/> accessed on 20/06/2024.

ten-point plan preceded the drafting and promulgation of a new constitution in 1995. It was fashioned to help Ugandans embrace democratic ideals, to transform Uganda from a past of violence to a more secure one, restore and improve social services, and eliminate corruption and sectarianism.[699] While Museveni had many initiatives that sought to uplift the majority of Ugandans, this excitement was short-lived. A promise of assured fundamental rights was not a reality for the majority of Ugandans. In fact, in recent years, there have been accusations levelled against the government regarding torture and the abduction of civilians by security operatives.[700]

Uganda's judiciary has not had it easy either, considering that there is a powerful executive, under the total control of Museveni, that controls most aspects of the Ugandan people. It can be concluded that, despite its best efforts, it is difficult for the judiciary to spearhead the transformation. The Ugandan executive arm of government has been singled out for meddling in the work of the judiciary and infringing on its independence.[701] In 2022, President Museveni questioned why the judiciary wanted more independence.[702] In 2024, the Minister of Justice wrote to a Principal High Court judge asking him to intervene in a matter that had come before the court. The minister approached the senior judge with the intention that the judge, by virtue of his position, would have some influence on the matter. This kind of conduct is clearly unacceptable, especially emanating from a minister of justice.[703] In early 2024, President Museveni wrote a similar letter to the chief justice of Uganda, also requesting him to intervene in a matter. Later, the CJ indicated that this was not the first time it had

699 Muniini K Mulera, 'Ten Point Program of Uganda's Nation Resistance Movement (NRM) -1984,' <https://blog.mulerasfireplace.com/engage/ten-point-program-of-uganda-s-national-resistance-movement-nrm-1984-20426> accessed on 16/06/2024.

700 Fredric Musisi and Derrick Wandera, 'Torture: we have learnt nothing from history,' <https://www.monitor.co.ug/uganda/special-reports/torture-we-have-learnt-nothing-from-history-3723438> accessed on 06/12/2023.

701 Carmel Rickard, 'Executive interference in Ugandan court decisions continues- this time by the justice Minister,' African Legal Information, <https://africanlii.org/articles/2024-03-21/carmel-rickard/executive-interference-in-ugandan-court-decisions-continues-this-time-by-the-justice-minister> accessed on 15/05/2024.

702 Observer, 'Museveni on why govt will continue to defy court orders,'(21/09/2022) <https://observer.ug/news/headlines/75255-museveni-on-why-govt-will-continue-to-defy-court-orders> accessed on 05/06/2024.

703 Carmel Rickard, 'Executive interference in Ugandan court decisions continues- this time by the justice Minister,' African Legal Information, <https://africanlii.org/articles/2024-03-21/carmel-rickard/executive-interference-in-ugandan-court-decisions-continues-this-time-by-the-justice-minister> accessed on 15/05/2024.

happened.[704] Such actions undermine the rule of law and fly in the face of democratic values.

Transformative constitutionalism can be possible only within the purview of constitutional and legislative interpretation. Now, despite having a new constitution, there are concerns about its implementation. Uganda's former chief justice, Odoki, noted that:

> There is a need to establish and nurture democratic institutions to promote democratic values and practices within the country. It is only then that a culture of constitutionalism can be promoted amongst the people and their leaders.[705]

The democratic institutions that Odoki referred to here must be independent, with power emanating from the constitution. Such institutions should also have personnel who come to the office on merit after having been vetted or interviewed by independent bodies. Transformative constitutionalism can be achieved only with a commitment to progressive ideals, respect for fundamental rights and adherence to the values of natural justice. All stakeholders from all arms of government have to work with each other if the dream of transformative constitutionalism is to be realised. Judges have to be independent and free to decide on matters coming before them. The other two arms of government must support the judiciary, and nobody should interfere with its work. The executive should implement policies that advance transformation, and the legislature must make laws that make transformation constitutionalism possible.

5.4.1 Challenges facing transformative constitutionalism in Uganda

A lack of political will is one of the major obstacles to the implementation of transformative constitutionalism. Ojambo argues that President Museveni has used the Ugandan constitution and legislative processes to shore up Uganda as a model of democracy on the international stage. However, domestically, Museveni has

---

704 Carmel Rickard, **'**Executive interference in Ugandan court decisions continues- this time by the justice Minister,' African Legal Information, <https://africanlii.org/articles/2024-03-21/carmel-rickard/executive-interference-in-ugandan-court-decisions-continues-this-time-by-the-justice-minister> accessed on 15/05/2024.

705 Benjamin J Odoki, 'The Challenges of Constitution-making and Implementation in Uganda,' <https://constitutionnet.org/sites/default/files/Odoki,%20B.%20Challenges%20of%20Constitution-making%20in%20Uganda.pdf> accessed on 23/01/2023.

undermined political opposition, fostering a system of patronage and hegemonic governance.[706] Without political will, it will be impossible to fully implement the transformative ambition of the 1995 constitution. Considering the reluctance of some jurisdictions to embrace transformative constitutionalism, Heinz Klug argues that securing the continuous functioning of democracy is just as important a component of transformative constitutionalism as the enforcement of social rights.[707] For there to be a functioning democracy, some values must be embraced. These include open-mindedness, integrity, courage, etc. The separation of powers is equally an important aspect of governance. While the Ugandan judiciary tries its best to set Uganda on a path of constitutional democracy, the real power has always been with President Museveni and the NRM. They are the common denominators as to whether Uganda becomes a constitutional democracy and realises transformative constitutionalism or not. According to Asiimwe, instead of progress, there have been:

> reversals epitomised by the preponderance of abuse of human rights, state failures and loss of hope in the war-ravaged northern part of Uganda, patrimonialism, autocratic tendencies, and manipulations which were reminiscent of the old dictatorships. The last straw came with the shocking amendment of the embryonic constitution to remove presidential term limits, which were entrenched as a lynch-pin for a smooth transfer of power . . . the military siege of the High Court that crowned the reality that militarism remained the anchor of power in Uganda's body politic.[708]

A lack of access to justice for women is also a reason why the transformative agenda, as envisioned in the constitution, remains a mirage. Considering that the majority of less educated people in Uganda are women, they find it difficult to access justice. Some of them are caught up in patriarchal and abusive homes, and their concerns are

---

706 Robert Ojambo, '*The 1995 Constitution as a Tool for Dictatorship in Uganda: An African Dilemma of Constitutionalism***,'** In the book: Democracy and Africanness (pp.3-19) Available at <https://www.researchgate.net/publication/365019627_The_1995_Constitution_as_a_Tool_for_Dictatorship_in_Uganda_An_African_Dilemma_of_Constitutionalism> accessed on 15/06/2024.

707 Heinz Klug, 'Transformative constitutionalism as a model for Africa?' in Philipp Dann, Michael Riegner, and Maxim Bönnemann (eds) *The Global South and Comparative Constitutional Law* (Oxford, 2020) <https://doi.org/10.1093/oso/9780198850403.003.0006> accessed on 23/01/2024.

708 Godfrey Asiimwe, 'Of Fundamental Change and No Change: Pitfalls of Constitutionalism and Political Transformation in Uganda, 1995-2005,' (2014) Vol. XXXIX, No. 2 *CODESRIA*, 21, 21.

rarely addressed.[709] According to Legal Aid Service Providence Network (LASPNET), the technicalities, complexities, and costs involved make it difficult for women to access justice.[710] It is further pointed out that, within the traditional justice and informal justice mechanisms, women are subjected to the same patriarchal norms that contribute to these inequalities and violence.[711] In general, there is a need to bring to an end the environment of fear, arbitrary arrest and frivolous accusation. There should be expanded opportunities where the most vulnerable can have access to justice. The judiciary should be given enough funding to expand programmes such as Legal Aid services to remote places where people in desperate need of it can access them. The judiciary should also be given ample space to carry out its work without external interference.

5.5 Lessons to be learned from South Africa, Kenya, and Uganda on transformative constitutionalism

The constitutions of Kenya, South Africa, and Uganda have provisions that can make transformative constitutionalism possible, The Kenyan Constitution does more than offer checks and balances on the executive. It also contains provisions that have the potential to change the outlook of the Kenyan society. However, for this to happen, Kenyan leaders have to take deliberate steps to enact laws that address issues such as gender inequality, and judges must also interpret laws in a way that advances transformative constitutionalism.

Ugandans gave themselves a constitution in 1995 with amendments through 2017 that has progressive clauses entrenching basic human rights, but not enough has been done to advance the interests of many. Judges in Uganda try to do their best

709 LASPNET Research, 'The Poor, Vulnerable and marginalized fail to Access Justice in Uganda,'(2016) <https://www.laspnet.org/blog/419-the-poor-vulnerable-and-marginalised-fail-to-a access-justice-in-Uganda> accessed on 23/01/2023.

710 LASPNET Research, 'Access to Justice for the poor, Marginalised and Vulnerable people of Uganda,' (2015) https://www.laspnet.org/joomla-pages/reports/research-reports/377-access-to-justice-for-the-poor-marginalised-and-vulnerable-people-of-uganda/file> accessed on 23/01/2023.

711 LASPNET Research, 'Access to Justice for the poor, Marginalised and Vulnerable people of Uganda,' (2015) https://www.laspnet.org/joomla-pages/reports/research-reports/377-access-to-justice-for-the-poor-marginalised-and-vulnerable-people-of-uganda/file> accessed on 23/01/2023.

under difficult circumstances, but they need more support from the government. The ball is squarely in the court of the government; they are the ones with the 'yam and the knife,' in other words, they hold the key to the change that society needs. Transformation will hardly be achieved with the military looking and always eager to involve itself in the day-to-day activities of Ugandan society. That defeats the purpose of a democracy.

The judiciary has established itself as the anchor of South African constitutional democracy. It has been active in advancing transformative constitutionalism, however, much still needs to be done. More resources must be given to the judiciary, as this will help the judiciary extend its services, especially to the marginalised groups of people. Another issue that cannot be swept under the carpet is the matter involving the landless masses – the black South Africans. It is morally unacceptable that black people, who are the majority, continue living in squalor while the land is in the hands of a few. All the arms of government need to come up with a way to address this issue. The judiciaries in all three countries need adequate funding to carry out their programmes to be able to deliver justice to everyone. Justice is of as much importance to a girl in a rural area in need of sanitary towels as it is for politicians in the capital city seeking to increase their salary despite their already bulging wallets.

5.6 Conclusion

Transformative constitutionalism serves as a departure from a past characterised by, among other things, discrimination and inequality, to a new society that adopts positive change that will embrace the values of Human Rights, such as equality, dignity, etc. More importantly, transformative constitutionalism is a vehicle that must be used to achieve substantive justice. It is the present reminder that justice should not only be formalistic but should be substantive. Transformative constitutionalism caters to the basic rights of everyone and, in the process, establishes an egalitarian society that is not only based on equality but also on equitable justice. South African Courts have led the way with common Law that has advanced the course of Human Rights. Transformative constitutionalism is slowly developing in Kenya, but the legislative arm of the Kenyan government will have to play its part in making it possible. The Ugandan judiciary has tried doing its part under difficult circumstances, but for there to be

noticeable change, the government will have to embrace the positive change that champions basic rights for everyone.

CHAPTER 6

POLITICS, IDEOLOGY, AND THEIR EFFECT ON THE WORK OF THE JUDICIARY

6.1 Introduction

The influence of politics in governance is large. It takes a serious commitment to the values espoused in the law to steer a country in the correct direction; factors such as ideology and personal convictions play a part in how judges and magistrates decide cases. People have their own beliefs, philosophical views, and, in general, beliefs based on their upbringing, etc. Members of the bench are not an exception; they live in the same societies/countries as the very people who approach them to have their cases adjudicated. They listen to the debates that shape the national and international conversations. The question then becomes, how do they handle somewhat controversial cases? How do they adjudicate those cases that speak to the ideological view to which they are disposed, or about issues on which they happen to have an opinion?

Members of the bench of the British Supreme Court acknowledged that they recognize that, although the law and the facts of the case are key to the outcome, in decisions that divide judicial opinions, personal factors may play a role.[712] Speaking in an interview with The Guardian, Lord Dyson identified these influences:

> I am not surprised that there are differing opinions, that is inevitable at this level, with the nature of the cases that we hear. They are complicated, they are difficult. Some of them involve questions of judgment and almost philosophy, I mean, approach to life.[713]

There were similar sentiments by Lady Hale,[714] and, as quoted by Rachel J. Cahill-O'Callaghan in an article,[715] Lady Hale gave the view that "everybody comes to the

---

712 The Guardian interviewing some UK Supreme Court Judges, 'Supreme Court does it Deliver Justice?' (25/11/2011) <https://www.theguardian.com/law/video/2011/oct/25/supreme-court-deliver-justice-video> accessed on 23/11/2022.

713 The Guardian interviewing some UK Supreme Court Judges, 'Supreme Court does it Deliver Justice?' (25/11/2011) min 10:30 – 10:50, available at <https://www.theguardian.com/law/video/2011/oct/25/supreme-court- deliver-justice-video> accessed on 23/11/2022.

714 Lady Hale, A British judge who served as President of the Supreme Court of the United Kingdom from 2017 until her retirement in 2020.

715 Rachel J. Cahill-O'Callaghan, 'The Influence of Personal Values on Legal Judgments' (2013) 40 J Law & Soc 596,597.

task with a set of values and perspectives that may lead one to pick different bits of the materials to reason towards an outcome."[716] She pointed out that there are factors of significant importance in cases that divide judicial opinion.[717] As posited by Rachel J. Cahill-O'Callaghan, many factors have been argued to influence judicial decisions,[718] among them are external factors. She points out that there are, 'for example, the norms of the prevailing culture, economy, and internal factors including innate elements of the judge's psychology and personality.'[719] This chapter focuses on the ideological and political views of judges and how such views may influence the decisions they take.

6.2 Influence of Political, Philosophical, and Ideological Views of Judges: Lessons from the USA

Courts are supposed to be apolitical. In other words, theirs is the business of interpreting laws and not doing politics. However, it must be noted that some cases that come before courts have political implications that judges have no choice but to listen to and decide on. The United States of America's Supreme Court has been termed a political institution.[720] Latham describes it as:

> a political institution, not as a trafficker in party votes and electoral stratagems, but as one of the principal holders of public power, responsible to no constituency, and strategically located to slow down or divert those great pivotal movements in American society when the weight of political power shifts from one point and plane to another.[721]

716 Cahill- O'Callaghan RJ, "The Influence of Personal Values on Legal Judgments" (2013) 40 J Law & Soc <https://www.jstor.org/stable/43863011> accessed on 20/12/2023.

717 Cahill- O'Callaghan RJ, "The Influence of Personal Values on Legal Judgments" (2013) 40 J Law & Soc <https://www.jstor.org/stable/43863011> accessed on 20/12/2023.

718 Cahill- O'Callaghan RJ, "The Influence of Personal Values on Legal Judgments" 2013 40 J Law & Soc 598 accessed on 20/12/2023.

719 Cahill- O'Callaghan RJ, "The Influence of Personal Values on Legal Judgments" 2013 40 J Law & Soc 598 accessed on 20/12/2023.

720 Earl Latham, 'The Supreme Court as a Political Institution' (1947) Vol 31, Minn L Rev, 205,207, available at <https://scholarship.law.umn.edu/mlr/1180> accessed on 20/08/2024.

721 Earl Latham, 'The Supreme Court as a Political Institution' (1947) Vol 31, Minn L Rev, 205,207, available at <https://scholarship.law.umn.edu/mlr/1180> accessed on20/08/2024.

Today, it finds itself at the centre of intense political and ideological discourse.[722] According to Zeits, people see the US Supreme Court as another political institution.[723] This view was reinforced with the overturning of a long-standing case of *Roe v. Wade*.[724] It can be argued that, when overturning the *Roe v. Wade* case, the Justices of the US Supreme Court may have been influenced by their ideological views and, by extension, divided along political lines.[725] The appointment of justices to the US Supreme Court in the recent past has become a partisan affair, pitting the Democrats against the Republicans.[726] This was evident in 2016 when the Senate frustrated the nomination of Merrick Garland.[727] The partisan nature of the existing political atmosphere meant that members of the Republican Party, who, at the time, were in control of the Senate, did not schedule a confirmation hearing for Judge Garland.[728] Senator Mitch McConnell, the Senate Majority Leader at the time, together with other members of the Republican Party, took the stance that there was not going to be a Senate confirmation hearing for Obama's Supreme Court nominee.[729] They refused to schedule a confirmation hearing, saying that it was too close to the presidential election and that the new President would be the one to nominate a judge to that Court.[730] Mr. Donald Trump, then the standard-bearer of the Republican Party during

722 Joshua Zeits, 'Supreme Court has Never Been Apolitical,' (04/03/2022) <https://www.politico.com/news/magazine/2022/04/03/the-supreme-court-has-never-been-apolitical-00022482> accessed on 10/06/2023.

723 Joshua Zeits, 'Supreme Court has Never Been Apolitical,' (04/03/2022) <https://www.politico.com/news/magazine/2022/04/03/the-supreme-court-has-never-been-apolitical-00022482> accessed on 10/06/2023.

724 *Roe v Wade* was a long-standing case on Right to Abortion upheld for decades, the US Supreme Court overturned it in 2023.

725 Justices of the Supreme Court are usually nominated by the President of the day, with America having two dominant political parties namely the Democratic party and the Republican party, the Supreme court judges find themselves on the Supreme court Bench courtesy of the Presidents from these parties.

726 Claire Brockway and Bradley Jones, 'Partisan gap widens in views of the Supreme Court,' (07/08/2019)<https://www.pewresearch.org/short-reads/2019/08/07/partisan-gap-widens-in-views-of-the-supreme-court/> accessed on 15/06/2024.

727 Juliet Eilperin & Mike DeBonis, 'President Obama Nominates Merrick Garland to the Supreme Court,' (16/03/2016) <https://www.washingtonpost.com/world/national-security/president-obama-to-nominate-merrick-garland-to-the-supreme-court-sources-say/2016/03/16/3bc90bc8-eb7c-11e5-a6f3-21ccdbc5f74e_story.html> accessed on 25/01/2024.

728 USA's Supreme Court justices are nominated by the president and are invited to the Senate for confirmation hearing.

729 Eric Bradner 'Here is what Happened when Senate Republicans Refused to Vote on Merrick Garland's Supreme Court Nomination,' (19/09/2020) <https://edition.cnn.com/2020/09/18/politics/merrick-garland-senate-republicans-timeline/index.html> accessed on 25/01/2024.

730 Eric Bradner 'Here is what Happened when Senate Republicans Refused to Vote on Merrick Garland's Supreme Court Nomination,' (19/09/2020)

the 2016 American Presidential election, came to power after defeating Hillary Clinton, the Democratic Party candidate. President Trump had the honour of nominating three Supreme Court Justices in his first term.[731] The Justices include Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett. Of the three Justices, it was Justice Brett Kavanaugh whose nomination hearing was bad-tempered. He appeared before the US Senate for his nomination hearing, with allegations of sexual assault hanging over his head.[732] He met a divided Senate with partisan lines drawn between the two leading parties - Republicans and Democrats. Senator Lindsey Graham erupted, he accused the Democrats of authoring the allegation against Kavanaugh and claimed that their intention was to hold the seat and keep it vacant, with the hope that the coming election would see a Democratic Party-sponsored President ascend to power and nominate a liberal justice to the court.[733]

6.3 South African politics and its effect on the judiciary

Politics can have a direct or indirect influence on a number of things in society. This influence may touch on many aspects of society, including judicial appointments. Governments desire a favorable working environment for them to govern, and this may include getting favorable decisions in court, decisions that do not cast them in a bad light. Political parties or governments would not mind having someone on the bench with similar convictions as theirs. In a telling admission, when South African President Ramaphosa appeared at the Zondo commission to give his testimony, there was a revelation that the minutes from the ANC deployment committee discuss the appointment of judges and other senior positions in government.[734] The President

<https://edition.cnn.com/2020/09/18/politics/merrick-garland-senate-republicans-timeline/index.html> accessed on 25/01/2024.

731 NBC News, 'Trump Built Supreme Court Conservative Majority, Loses' (NBC News 03/01/2024) < https://www.nbcnews.com/politics/donald-trump/trump-built-supreme-court-conservative-majority-loses-rcna131956> accessed on 06/06/2024.

732 Mark Sherman, 'A look at the revived allegations against Justice Kavanaugh' (16/09/2019) https://apnews.com/article/impeachments-brett-kavanaugh-christine-blasey-ford-supreme-court-of-the-united-states-deborah-ramirez-0ab183dbb4474c58b2baee739c7d92ae> accessed on 25/12/2023.

733 CNN, 'Lindsey Graham erupts: Kavanaugh hearing an unethical sham,' (27/09/2018) <https://www.youtube.com/watch?v=RTBxPPx62s4> Accessed on 31/12/2023.

734 President Cyril Ramaphosa at the Zondo Commission of enquiry into state capture, ' State Capture Inquiry | ANC Deployment Committee plays a recommendation and reactive role: Ramaphosa' (28/04/2021) <https://www.youtube.com/watch?app=desktop&feature=shared&v=G20vw68rX1Q> accessed on 25,01/2024.

pointed out that, in these discussions, they carry themselves with integrity, and that these recommendations from the deployment committee to the members of the party are merely advisory in nature.[735] The President further noted that, despite the influence of the ANC's deployment committee, it does not and should not have the final say in the appointment of judges.[736]

The President's testimony raised the issue of the influence that the ANC's deployment committee has. There was a concern that the ANC may have a sway on Judicial Service Commission members, considering that some commissioners happen to be members of the ANC deployed to the JSC.[737] Another concern was that the public does not know the discussions within the deployment committee of the ANC, as there was no knowledge as to the criteria used by the ANC deployment committee in weighing in favour of or against candidates.[738] In the defence of the ANC, considering the revelations that came to the fore, the president stated that there was a need for the ruling party to lead on the transformation of the judiciary.[739] The president's argument is plausible, but the question then becomes, what would happen should power fall into the hands of greedy and manipulative actors? Would they be expected to be measured and put the interest of the country before their own? This is a concern because power shifts and may end up in the hands of people who may abuse it.

Politicians constitute a considerable percentage of the JSC commissioners, and so there is a concern about politicians being part of the JSC and the considerable sway they may have in the appointment process. Dene Smuts, a Democratic Alliance (DA)

---

735 President Cyril Ramaphosa at the Zondo Commission of enquiry into state capture, ' State Capture Inquiry | ANC Deployment Committee plays a recommendation and reactive role: Ramaphosa' (28/04/2021) <https://www.youtube.com/watch?app=desktop&feature=shared&v=G20vw68rX1Q> accessed on 25,01/2024.

736 Judge Matters, 'Is there political influence at play in the selection of judges?' 13/08/2022 <https://www.judgesmatter.co.za/opinions/political-influence-selection-of-judges/> accessed on 20/08/2023.

737 Judge Matters, 'Is there political influence at play in the selection of judges?' 13/08/2022 <https://www.judgesmatter.co.za/opinions/political-influence-selection-of-judges/> accessed on 20/08/2023.

738 Judge matters, 'Is there political influence at play in the selection of judges?' 13/08/2022 <https://www.judgesmatter.co.za/opinions/political-influence-selection-of-judges/> accessed on 20/08/2023.

739 President Cyril Ramaphosa at the Zondo Commission of enquiry into state capture, ' State Capture Inquiry ANC Deployment Committee plays a recommendation and reactive role: Ramaphosa' 28/04/2021 <https://m.youtube.com/watch?feature=shared&v=G20vw68rX1Q> accessed on 25/12/2023.

member, brought a private member's bill in which she proposed changes to Section 178 of the Constitution, a section that deals with the JSC.[740] She was of the view that there should be more judges and lawyers on the JSC as opposed to politicians.[741] Threats to judicial Independence may not be obvious, but upon closer examination, it is evident that such concerns of interference by politicians and the executive are well-founded, especially considering the considerable influence and power that the executive holds.

James Spigelman, the Chief Justice of New South Wales, in his address at the 2007 Rule of Law Conference, raised a concern about the potential threat that the executive may pose to judicial independence. He said that:

> The threat to independence from the Executive branch is, of course, particularly acute because the Executive is, in one manner or another, the ultimate source of power for the appointment of judges, for the administration of mechanisms for discipline or removal of judges and the source of funding for all aspects of the administration of justice. The most significant single aspect of the institutional arrangements for judicial independence is the need to insulate, indeed to isolate, the exercise of judicial power from interference or pressure from the Executive branch of government. To a substantial degree this is simply a manifestation of the need to ensure impartiality.[742]

6.3.1 Attacks on Judges by Politicians in South Africa

The work of the judiciary is to interpret the law and give it meaning. Judges decide cases before them by looking at the facts of the case, the evidence, and the relevant law. In so doing, they are the pivot of a constitutional democracy of a country. Their decisions may go in favour of some and may upset some. There have been a number of attacks on the judiciary by politicians. Attacks have the effect of negatively affecting

---

740 News24, 'DA: Reduce the number of political influences on JSC,'(30/06/2013) <https://www.news24.com/news24/da-reduce-political-influence-in-jsc-20130630> accessed on 20/08/2023.

741 News24, 'DA: Reduce the number of political influences on JSC,'(30/06/2013) <https://www.news24.com/news24/da-reduce-political-influence-in-jsc-20130630> accessed on 20/08/2023.

742 An address by Hon James Spigelman,' Judicial Appointments And Judicial Independence (16/09/2007) < https://www.malaysianbar.org.my/article/news/speeches/speeches/the-hon-j-j-spigelman-ac-chief-justice-of-new-south-wales-judicial-appointments-and-judicial-independence> accessed on 26/01/2024.

the judiciary and casting it in a bad light. Some politicians from both the ruling party and the opposition have attacked the South African judiciary. In 2015, the then ANC's secretary general, Mr. Gwede Mantashe, took aim at the North Gauteng High Court and the Western Cape High Court. Mantashe accused them of having a negative attitude towards the government.[743] In an interview on Carte Blanche, Mantashe said that there was a drive, in sections of the judiciary, to create chaos with regard to governance. He went on to say that "We know, if it doesn't happen in the Western Cape High Court, it will happen in the Northern Gauteng; those are the two benches where you always see that the narrative is totally negative and creates a contradiction."[744]

He spoke in reaction to a ruling by the North Gauteng High Court to arrest the then Sudanese president, Omar al-Bashir, who had been indicted at the International Criminal Court (ICC) for war crimes and crimes against humanity, and an arrest warrant had been issued.[745] South Africa, as a signatory to the Rome Statute, has an obligation in terms of Article 86 of the statute to co-operate fully with the court in its investigation and prosecution of crimes within the jurisdiction of the court.[746] Julius Malema, the leader of the Economic Freedom Fighters (EFF), is on record calling magistrate Twanet Olivier corrupt and incompetent.[747] The Ministry of Justice condemned Mr. Malema's comments, stating that, while it was acceptable to criticize the decisions of judges and debate them, it was unacceptable to direct sensational conspiracy theories at judicial officers.[748] They pointed out that such attacks

---

743 Susan Comrie, 'Gwede Mantashe singles out 'problematic courts' (22/06/2015) https://www.news24.com/news24/gwede-mantashe-singles-out-problematic-courts-20150622> accessed on 26/01/2024.

744 Susan Comrie, 'Gwede Mantashe singles out 'problematic courts' (22/06/2015) https://www.news24.com/news24/gwede-mantashe-singles-out-problematic-courts-20150622> accessed on 26/01/2024.

745 *The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09.*

746 Article 86 of the Rome Statute on International Criminal Court, states that, States Parties Shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its Investigation and Prosecution of Crimes within the Jurisdiction of the Court.

747 Judge Matters, 'Judge Matters condemn Julius Malema's comments Against Magistrate Twanet Olivier,' (22/10/2023) <https://www.judgesmatter.co.za/opinions/media-statement-judges-matter-condemns-julius-malemas-comments-against-magistrate-twanet-olivier/> accessed on 25/12/2023.

748 Canny Maphanga, 'Malema condemned for attack on Judiciary officer,' (23/10/2023) <https://www.sabcnews.com/sabcnews/malema-condemned-for-attack-on-judiciary-officer/> accessed on 28/01/2024.

undermined the judiciary. Politicians' attacks on judges or the judiciary undermine the judiciary, diminish the image of judges, and plant doubt in the minds of the public.

6.4 Kenyan politics and its effect on the judiciary

The Kenyan judiciary has faced attacks from many quarters, including the president. The Kenyan president, by virtue of his office, wields a lot of power and influence. The same goes for ministers and politicians in general. The president is also a symbol of national unity.[749] It then goes without saying that the masses hold him/her in high regard. Whatever the president says or does should reflect the unity of a nation. It was, therefore, unfortunate when the president and other members of the executive launched attacks on the judiciary.[750] They levelled unfounded allegations against the judiciary, referring to some judges as corrupt.[751] Since his swearing in, President Ruto was eager to fulfil his campaign promises, but some of these promises faced roadblocks over their illegality. In a bid to implement his campaign manifesto, the Kenyan government introduced some taxes, which some people felt were arbitrary. Busia Senator Hon Okiya Omtatah approached the court to challenge some aspects of the Financial Act of 2023.[752] The law was intended to raise some much-needed revenue amid a high debt burden and fast-depreciating currency. This sparked violent protests, with those opposed to the tax saying that it would further squeeze households at a time of rising living costs.[753]

The Kenyan High Court ruled, in November 2023, that the levy was unconstitutional because it did not offer any rational argument as to why it applied only to workers with

---

749 Article 131(e) of the Kenyan constitution of 2010.

750 President Ruto Launched an attack on the judiciary, referring to judges as corrupt and that they were working with the opposition to sabotage his governments agenda.

751 President Ruto Launched an attack on the judiciary, referring to judges as corrupt and that they were working with the opposition to sabotage his government's agenda.

752 Finance Bill of 2023 was controversial it contained a number of things that some had issues with, this included among others, increase in taxes; despite spirited opposition to it president Ruto assented it into law.

753 Reuters, 'Kenyan court refuses to stay ruling invalidating housing levy,' (26/01/2024) https://www.reuters.com/world/africa/kenyan-court-refuses-stay-ruling-invalidating-housing-levy-2024-01-26/#:~:text=NAIROBI%2C%20Jan%2026%20(Reuters),having%20found%20the%20measure%20unconstitutional.> accessed on 15/06/2024.

employment in the formal sector.[754] In January 2024, the Court of Appeal upheld the decision of the High Court. They ruled that the introduction of the Housing Levy through the amendment of the Employment Act by Section 84 of the Finance Act of 2023 lacked a comprehensive legal framework and that it was in violation of Articles 10, 201, 206, and 210 of the Kenyan constitution.[755] The President came out saying that his plans were being sabotaged through court orders. He referred to the judiciary as corrupt, vowed to disobey the court orders and implement the projects.[756] Chief Justice Martha Koome defended the judiciary against graft accusations by the President. The CJ pointed out that the judiciary is independent in the execution of its mandate.[757]

Attacks on the judiciary, whether by politicians, members of the executive, or legislators, have the potential to diminish people's confidence in the judiciary. There was condemnation following President Ruto's assertions. The Chief Justice, the Law Society of Kenya, and associations representing judges, magistrates, and senior counsels joined their voices calling on the President to back off, warning that the media reports of him vowing to defy the courts could set the country on a dangerous path to anarchy.[758] The truth is that the judiciary cannot properly function if it faces attacks from other branches of government. Such attacks diminish its image and create doubt in the minds of the public, and as a result, reduce people's confidence in the judiciary.

6.5 Ugandan politics and its effect on the judiciary

Uganda as a country has had myriad challenges, but most of them stem from the internal politics in which the military features prominently. Like liberal countries, Uganda's constitution prescribes a vision of 'collective self-determination.'[759]

---

754 Reuters, 'Kenyan court strikes down housing levy, stays ruling until Jan 10,' (29/11/2023 <https://www.reuters.com/world/africa/kenyan-court-strikes-down-housing-levy-finance-law-2023-11-28/> accessed on 15/06/2024.

755 *Okiya Omtata and others v Attorney General and others petition No. E181 of 2023.*

756 The East African, 'Kenyan Court of Appeal Stops President Ruto's housing Levy' (26/01/2024) <https://www.theeastafrican.co.ke/tea/news/east-africa/court-of-appeal-stops-ruto-from-collecting-housing-levy-4504162> Accessed on 30/01/2024.

757 Citizen TV, 'CJ Koome defends Judiciary against claims of capture, says they are independent,' (30/01/2024) <https://www.youtube.com/watch?v=i4hSfQmWQqY> accessed on 30/01/2024.

758 Otieno Otieno, 'The problem with Kenya President Ruto Attacks on the Judiciary,' (08/01/2024) <https://www.theeastafrican.co.ke/tea/news/east-africa/the-problem-with-kenya-president-ruto-attacks-on-judiciary-4485416> accessed on 30/01/2024.

759 Preamble of the Ugandan constitution of 1995 with Amendments through 2017 provides that through their constitution, they are committed to building a better future by establishing a socio-

It further talks of political freedom and socio-economic rights,[760] but for some reason, including politics, some of these rights are not carried out in practice.

6.5.1 Ugandan Military Court accused of settling political scores

The Military court has been accused of having settled political scores against Museveni's opponents. The Military Court has widely been seen as a political tool for President Museveni's government.[761] A number of charges have been brought against opposition politicians in the military court. The opposition leaders who have been charged in this court include Dr Kizza Besigye and Robert Kyagulanyi, also known as Bobi Wine. Mr. Kyagulanyi was charged with the possession of weapons.[762] The charges came after some members of the public, believed to be Kyagulanyi's supporters, pelted the president's motorcade with stones.[763] Mr Kyagulanyi was taken to the Military Court, where he was charged with treason.[764]

There is doubt as to the independence of the Military Court.[765] Under the Uganda People's Defence Forces Act (UPDF Act), the military court is defined as 'a unit disciplinary committee or a court martial.'[766] According to Ronald Naluwairo, the executive and the military hierarchy are in a position to determine or influence certain administrative aspects of military tribunals that relate directly to the exercise of their

---

economic and political order through a popular and durable national Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress.

760 Preamble of the Ugandan constitution of 1995 with Amendments through 2017.

761 The Military in Uganda has been used to order for detention of some of the opposition leaders, among them Dr. Kizza Besigye and Robert Kyagulanyi.

762 Aljazeera; 'Uganda: Pop star-turned-politician charged in military court,' 16/08/2018 <https://www.aljazeera.com/news/2018/8/16/uganda-pop-star-turned-politician-charged-in-military-court> accessed on 25/08/2023.

763 Aljazeera, 'Popular Ugandan opposition MP Bobi Wine charged with treason,' (23/08/2018) <https://www.aljazeera.com/news/2018/8/23/popular-ugandan-opposition-mp-bobi-wine-charged-with-treason > Accessed on 30/12/2023.

764 Aljazeera, 'Popular Ugandan opposition MP Bobi Wine charged with treason,' (23/08/2018) <https://www.aljazeera.com/news/2018/8/23/popular-ugandan-opposition-mp-bobi-wine-charged-with-treason > Accessed on 30/12/2023.

765 Unlike other courts, the Military Court does not have institutional independence, which would be a safeguard that guarantee their independence from the military hierarchy. The Proceedings at the Military Court are presided over by military personnel who swore allegiance to President Museveni.

766 Article 1(p) of the UPDF Act.

judicial function.[767] President Museveni, by virtue of his office as the president of Uganda, is the Commander-in-Chief of the Uganda People's Defence Forces. This is as provided under Article 98(1) of the Ugandan constitution. Article 8(2)(a) of the UPDF Act provides further that the commander-in-Chief may appoint an officer of the Defence Forces, to be known as the Chief of Defence Forces, to be head of the Defence Forces, who shall be responsible for the command, control and administration of the Defence Forces.[768] From the above, it can be logically concluded that by virtue of his position, the president sits atop the administrative functions of the UPDF, which include the military court.

6.5.2 Political interference in the work of the judiciary

In 2017, the President of the Uganda Judicial Officers Association (UJOA) complained of what he described as political interference in the work of the judiciary. He pointed out that such interference denied people free access to justice.[769] During one of UJOA's meetings, they lamented that there was a lot of interference in their work, some of which they described as 'order of doctrine from above.'[770] It was pointed out that accused people were acquitted or given bail based on legal requirements, but they found it frustrating that these people would be re-arrested by undefined powers.[771]

In 2021, the UN issued a statement condemning the crackdown on opposition supporters and their leaders following the disputed general election.[772] According to the UN report, opposition leaders and their supporters had protested against alleged electoral irregularities and the prohibition of gatherings under the guise of

---

767 Ronald Naluwairo, 'Military courts and human rights: A critical analysis of the compliance of Uganda's military justice with the right to an independent and impartial tribunal,' http://www.scielo.org.za/pdf/ahrlj/v12n2/07.pdf Accessed on 30/01/2024.

768 Article 8(2)(a) of the UPDF Act.

769 UJOA is an umbrella body of judicial officers, it is through this body that the judicial officers that discuss critical issues that affect them and try to find solutions that aid them in their profession and in administration of justice.

770 New Vision, 'UJOA deplores political interference in Courts' (03/08/2017) <https://www.newvision.co.ug/news/1459092/ujoa-deplores-political-interference-courts> accessed on 25/08/2023.

771 New Vision, 'UJOA deplores political interference in Courts' 03/08/2017<https://www.newvision.co.ug/news/1459092/ujoa-deplores-political-interference-courts> accessed on 25/08/2023.

772 OHCHR- Uganda: UN Experts extremely concerned at serious rights violation linked to general elections (13/04/2021) <https://www.ohchr.org/en/press-releases/2021/04/uganda-un-experts-extremely-concerned-serious-rights-violations-linked> accessed on 25/08/2023.

preventing the spread of the COVID-19 virus.[773] Mr. Robert Kyagulanyi and others were detained, had not been presented to court, and nobody knew of their whereabouts. Lawyers representing Mr. Kyagulanyi approached the High Court and sought a writ of *habeas corpus ad sub jiciendum* be issued, ordering that the respondents, their servants and agents be produced before the court.[774] The High Court concurred with the applicants. In its order, the court termed the detention as being unconstitutional.[775] The authorities did not immediately act on the court's directions. They continued keeping them in custody and complied with the order only twenty-four hours later.[776]

6.6 Lesson learned from South Africa, Kenya, and Uganda on the influence of politics on the Judiciary

Politics is a prominent feature in Kenya, South Africa and Uganda. While the arms of government must complement each other, there must always be a clear separation of powers so that none enters the province of another. Politicians should be reminded that, while they deal directly with the electorate, the line of work of the judiciary does not allow judicial officers to also stand on podiums defending or justifying their rulings. An independent judiciary is the key that holds together a constitutional democracy. It is important, therefore, that politicians, just as any member of the public, approach the judiciary in a respectful manner. Criticising judicial officers creates a wrong perception in the eyes of the public and diminishes their authority.

The Kenyan judiciary has previously ruled on difficult cases. In 2017, the judiciary annulled the re-election of an incumbent president, citing significant irregularities in

773 OHCHR- Uganda: UN Experts extremely concerned at serious rights violation linked to general elections (13/04/2021) <https://www.ohchr.org/en/press-releases/2021/04/uganda-un-experts-extremely-concerned-serious-rights-violations-linked> accessed on 25/08/2023.

774 *Kyagulanyi Sentamu and another v Attorney General and 2 others (Miscellaneous Cause No. 16 of 2021) [2021] UGHCCD 1 (23 January 2021).*

775 *Kyagulanyi Sentamu and another v Attorney General and 2 others (Miscellaneous Cause No. 16 of 2021) [2021] UGHCCD 1 (23 January 2021).*

776 Carmel Rickard, 'Uganda's security forces wait 24 hours before obeying court order to end opposition leader's house arrest,' (African Legal Information,29/01/2021) <https://africanlii.org/articles/2021-01-29/carmel-rickard/ugandas-security-forces-wait-24-hours-before-obeying-court-order-to-end-opposition-leaders-house-arrest> accessed on 25/08/2022.

the electoral process.[777] Some of these Justices faced many threats and intimidation, but they soldiered on and delivered a judgment that was not popular with some people. The Kenyan judiciary earned respect as agents of justice because, despite the pressure that was upon them, they stuck to their oath of office and delivered a judgment based on facts and the evidence before them.[778]

The South African Judiciary stands as an anchor for the constitutional democracy. Some judicial officers have been criticised by politicians, but they continue to carry out their mandate of safeguarding the interests of the general public.
The Ugandan judiciary has striven to deliver justice under difficult circumstances. The Ugandan president has in the past criticised the judiciary for seeking greater freedom and independence. The Ugandan military is an extension of President Museveni's regime, and he is the only person who can rein it in, and he should, as their involvement in the affairs of the citizen defeats the idea of a democratic society.

6.7 Conclusion

Politics and its influence are major features in societal discourse on the African continent. Politics often shapes the way things are run; it brings power and influence, and governments come to power through political processes. Politics brings the power that those who have it do not want to lose, while those who do not have it strive to acquire it. The administration of justice happens in a context where many dynamics are present, including these contestations of power, and it is important that members of the bench are alive to the fact that they are the pillars that help maintain order and offer continued hope for an orderly society. It is imperative that, when handling both easy and hard cases, they must do so while guided only by the law. Notwithstanding the fact that judges, just like any other people, may have ideological views or political preferences, it is important that whenever they sit to listen to cases, they must decide each case based on merits, and guided by facts and the law.

---

777 *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR.*

778 Yash Ghai, 'Kenya's Judiciary: Agent of Justice under Difficult Circumstances,' (15/05/2018) <https://za.boell.org/en/2018/05/15/kenyas-judiciary-agent-justice-under-difficult-circumstances> accessed on 15/06/2024.

The arms of government must work in a complementary manner; friction of any kind amongst them will mean that there is gridlock that stalls not only the object of the constitution, but also the lives of most citizens. It is worth noting that judges are not politicians; their domain is interpretation and application of the law, and, therefore, it is unfair to target them and unfairly criticise them. The judiciary controls neither the purse nor does it have the power of the sword, they interpret the law only, deliver judgments, and give orders. For a proper functioning society, it is important that orders given by courts must be obeyed. This makes the administration of justice seamless and establishes an orderly society, and of paramount importance, the other arms of government should support the work of the judiciary.

CHAPTER 7

GENERAL CONCLUSION

This research study examined the independence of the judiciary and its crucial role in upholding the rule of law and constitutionalism. It highlighted that the judiciary is the cornerstone of a constitutional democracy and must, therefore, command respect. As an arm of government, it must remain independent and distinct from other arms of government. This independence should be evident in various aspects, including the appointment process, the funding model, security of tenure, and the procedures for dismissing judges, among others. Ultimately, the judiciary is entrusted with the responsibility of safeguarding the rule of law. This study has emphasised the independence of the judiciary and it has sought to show that an independent judiciary is likely to discharge its mandate without fear or favour.

Chapter one of this research provided the background of the study, the research questions, the aim of the study, the methodology applied, and the chapter outline of the research. The key points that formed the basis of this study are the independence of the judiciary, constitutionalism and the rule of law, the research went on to demonstrate why it is important for the judiciary to be independent and how that independence then makes it possible for the judiciary to safeguard constitutionalism and the rule of law.

Chapter two focused on the concepts of the rule of law and constitutionalism as applied in South Africa, Kenya, and Uganda. The research study took a historical look at the mentioned countries, pointing out the strides that they have made in establishing societies that are rooted in the rule of law and constitutionalism. This chapter looked at the application of the rule of law and constitutionalism in South Africa, Kenya, and Uganda. It answered the question of how the judiciary plays a role in safeguarding the rule of law and constitutionalism. This chapter demonstrated that democratic constitutions with clear provisions go a long way to setting precedents on how the country would be governed. Among other things, this chapter showed that the separation of powers and a truly independent judiciary play crucial roles in making sure that a country is indeed grounded on democratic principles based on the rule of

law and constitutionalism. It was demonstrated in this chapter that the rule of law entrenches, among other things, a culture of justification, reasonableness, etc, and that no arbitrary decisions may be taken. In a constitutional democracy based on the rule of law and constitutionalism, everybody is equal before the law, and, regardless of one's status in society, one may face the wrath of the law if one goes against it.

Chapter 3 focused on Judicial independence in South Africa, Kenya, and Uganda. The independence of judges discussed in this chapter included, among other things, the question of judges' appointment, their security of tenure, and how they are dismissed from office. This chapter answered the question of what characterises judicial independence. It looked at crucial aspects that characterise the personnel in the judiciary, such as how the judges are appointed, disciplined, and how they are removed from office and why it matters a lot. As a starting point, the research study looked at the separation of powers as an important principle that makes sure that no arm of government encroaches on another.

This chapter demonstrated why the separation of powers should not be in name only but must also be so in practice, rooted in the very principles it prescribes. This chapter also looked at the quality of people to be appointed to judicial office. Bangalore Principles of judicial conduct prescribe the qualities that a good judge must possess.[779] Judges should possess qualities such as impartiality, integrity, propriety, competence, and diligence, etc. Of importance is that judges should not be hounded out of office unnecessarily, and that is why there must be safeguards to protect judges from unfair dismissal.

Chapter four dealt with the question of judicial funding. The source of finances and the model of funding of the judiciary is equally important to its independence. This chapter showed how judicial funding plays a key role in the independence of the judiciary. This chapter answered the question: What role does the proper funding of the judiciary play in ensuring an independent judiciary? In this chapter, we saw that a lack of proper judicial funding may compromise the independence of the judiciary. One aspect that can compromise the work of the judiciary is inadequate finances, which

779 Bangalore Principles of judicial Independence, adopted by the Judicial Group on Strengthening Judicial Integrity (2002) <https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf> accessed on 15/06/2024.

may mean that the judiciary may not have enough finances to carry out its programmes. This may cause a delay in the delivery of justice. Inadequate finances for the judiciary may also mean that some members may fall prey to unscrupulous litigants who can take advantage of such situations to compromise some judges.
The source of judicial funding is equally important. The Constitutions of Kenya and Uganda have provisions that provide that the judiciary has access to its finances from the Consolidated Fund. Provisions in the constitution that the judiciary's finances should be withdrawn from the consolidated fund obviate the need for the judiciary to depend on the executive for its funding. Most importantly, the judiciary can plan accordingly and properly carry out its programmes.

Chapter five of this research dealt with the need for Transformative Constitutionalism in Kenya, Uganda, and South Africa. This chapter answered the question: What role do courts play in transformative constitutionalism? Transformative constitutionalism in this context refers to the adoption of new ways or approaches of doing things that are acceptable, while discarding the old methods that in no way advance the interests of justice. Transformative constitutionalism serves to promote egalitarian principles. Solange posits that the constitution is interpreted to promote democratic participation and bring a balance in social structures.[780] Judges play a crucial role in advancing transformative constitutionalism; they interpret the constitution to give meaning to important facets of society and, in the process, they advance justice, promote democracy and egalitarianism among other things. Klare termed 'Transformative Constitutionalism' as a long-term project of constitutional enactment, interpretation, and enforcement committed to transforming a country's political and social institutions.[781] Through the interpretation of the law and precedents, courts play an important role in advancing transformative constitutionalism. Transformation tampers with power relationships in such a way that everyone participates and is protected under democratic principles. This, in turn, guides society in an egalitarian direction. In the words of former South African Chief Justice, Pius Langa, 'Under a transformative

780 Rosa Solange, 'Transformative constitutionalism in a democratic developmental state, '(2011) 22(3) Stell LR 542-542.
781 Karl E Klare, 'Legal Culture and Transformative Constitutionalism,' (1998) SAJHR 14:1, 146-188, 150.

Constitution, judges bear the ultimate responsibility of justifying their decisions not only by reference to authority, but also by reference to ideas and values.'[782]

Chapter six focused on Politics and Ideology and their effect on the work of the judiciary. The question was: How do politics and ideology affect the work of the judiciary? People have their own convictions, philosophical views, and, in general, a belief-based upbringing, and what they were/are exposed to. Members of the bench are not an exception; they live in the same societies as other members of the public, and follow the discourses that shape societies, etc. A sticking question in all of this is how judges adjudicate those cases that seem to speak to the ideological view that they may have?

According to Rachel J. Cahill-O'Callaghan, many factors have an influence on judicial decisions.[783] Among them, she mentioned culture, economy, and internal factors, including innate elements of the judge's psychology and personality.'[784]

It is no secret that, in the USA, most of the Supreme Court judges come to office with the support of the main political parties. This is not to say these judges support every agenda of the political parties, but, to some degree, some of them may possess similar ideological views. The overturning of *Roe v Wade* by the U.S. Supreme Court in the *Dobbs v. Jackson Women's Health Organization* case is a perfect example of the ideological leaning of the United States' Supreme Court Justices.[785] Justices appointed by a Republican president are usually more conservative, while those appointed by a president from the Democratic party are more liberal. Bonventre points out that on the crucial, controversial, ideologically charged issues, they usually vote on opposite sides.[786] The ideological composition of the Supreme Court shifted significantly in recent years, especially with the appointment of three conservative justices by President Donald Trump during his first term. A conservative majority on

---

782 Pius Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 351.

783 Cahill- O'Callaghan RJ, "The Influence of Personal Values on Legal Judgments" 2013 40 Journal of Law and society 598.

784 Cahill- O'Callaghan RJ, "The Influence of Personal Values on Legal Judgments" 2013 40 Journal of Law and society 598.

785 *Dobbs, State Health Officer of The Mississippi Department of Health, et al. v Jackson Women's Health Organization et al.*

786 Vincent M. Bonventre, '6 to 3: The Impact of the Supreme Court's Conservative Super-Majority,'<https://nysba.org/6-to-3-the-impact-of-the-supreme-courts-conservative-super-majority/> accessed on 12/10/2024.

the court overturned *Roe v. Wade*, a landmark ruling that had protected the constitutional right to an abortion for nearly fifty years. In deciding this case, the Justices of the US Supreme Court were not only influenced by their ideological views, but they also made their decision along political party lines that characterise the American political fabric.[787] It is worth pointing out that the US Supreme Court has largely remained objective and has not let politics get in the way of its work.[788]

Politics and politicians must not interfere with the work of the judiciary. Politicians must also desist from launching attacks on the judiciary as these diminish the image of the judiciary, create doubt in the mind of the public, and, consequently, reduce people's confidence in the judiciary. While politics form part of society, it should not get in the way of the work of the judiciary. It is incumbent upon every member of society, including politicians, to help the judiciary carry out its mandate. There is no doubt that judges, too, have ideological views, but it is important that, when deciding cases, they must do so guided by nothing other than the facts of the case and the law.

In conclusion:

While judicial independence encompasses many aspects, the lesson learned from Kenya, South Africa, and Uganda is that the question of the appointment and removal of judicial officers is central to judicial independence. The vetting of judges and the interviews can increase transparency and accountability. The candidates for judicial positions are publicly interviewed, ensuring they meet the necessary qualifications and ethical standards. The public gets to participate and express their views about the candidates. Candidates are assessed not only on their knowledge of law but also on their adherence to ethical standards. This includes their past behaviour or record, any conflicts of interest, and their commitment to upholding the law impartially. Public interviews for judicial candidates go a long way in promoting transparency and public confidence in the process.

---

787 Justices of the Supreme Court are usually nominated by the President of the day, with America having two dominant political parties namely the Democratic party and the Republican party, the Supreme court judges find themselves on the Supreme court Bench courtesy of the Presidents from these parties, plus the support of the parties in the Senate.

788 NBC News, 'Trump Built Supreme Court Conservative Majority, Loses' (NBC News 03/01/2024) < https://www.nbcnews.com/politics/donald-trump/trump-built-supreme-court-conservative-majority-loses-rcna131956> accessed on 06/06/2024.

Uganda's judicial appointment process, as outlined in Article 142(1) of the Ugandan constitution, is structured differently; their appointment process involves a collaborative approach where the President appoints Judges on the advice of the Judicial Service Commission and with the approval of Parliament.[789] Requiring parliament to approve the recommended judges adds a layer of scrutiny and accountability; this can help to ensure that appointed judges are not only qualified but also have the confidence of elected representatives. However, it can be argued that such a process may diminish their independence and tacitly make the judges beholden to parliamentarians.

Security of tenure is an important aspect of judicial independence. Uganda could learn from both South Africa and Kenya about the aspect of the security of tenure of judges. This security ensures that judges have a conducive working environment, and they can decide cases without the fear of being unjustifiably hauled out of office. This stability allows judges to make decisions without fear of retribution. Uganda could adopt this approach to protect its judges from arbitrary removal or threats of removal from office based on decisions that they take. In 2023, the Ugandan JSC recommended the removal of Justice Esther Kisaakye from office in what OHCHR described as the removal of a judge from office without due process.[790] The process of removal of judges from office must be stringent in all three countries. This safeguards them from unfair or arbitrary removal. This process also involves a thorough investigation to ascertain the veracity of the claim against a judge.

Independence in appointment means attracting judges with an independent mindset; This, coupled with the principle of the separation of powers, means that judges are committed only to carrying out the provisions of the law, because they are not beholden to anyone, but have a duty to preserve their oath of office. Independent judges reach decisions guided by nothing other than the law. This then creates a judiciary that is bold to make judgments that are rooted in nothing but the law.

789 Article 142(1) of the Ugandan constitution of 1995 with amendments through 2017.

790 United Nations Human Rights, Office of the High commissioner, Uganda: UN Expert Concerned about Proceedings against Supreme Court Justice Kisaakye,' <https://www.ohchr.org/en/news/2023/03/uganda-un-expert-concerned-about-proceedings-against-supreme-court-justice-Kisaakye> accessed on 15/05/2024.

BIBLIOGRAPHY

Books

Anders & Zenker, *Transition and justice: Negotiating the terms of new beginnings in Africa*

> Anders G and Zenker O, *Transition and justice: Negotiating the terms of new beginnings in Africa*, (Wiley-Blackwell 2015)

Andrews, *'The South African Judicial Appointments Process,'*

> Andrews P, *'The South African Judicial Appointments Process,'* (2006) VOL. 44(3) City University of New York, 565

Dicey, *Introduction to the study of law of the constitution*

> Dicey A V, *Introduction to the study of law of the constitution* (Macmillan 1967)

De Vos and others, *South African Constitutional Law in Context*

> De Vos P and others, *South African Constitutional Law in Context,* (4th edition, Oxford University press 2014)

De Vos and others, *South African Constitutional Law in Context*

> De Vos P and others, *South African Constitutional Law in Context* (4th edition Oxford University Press 2019)

Ginsburg, Rosen and Vanberg, *Constitutions in times of financial crisis,*

> Ginsburg T, Rosen MD, and Vanberg G, *Constitutions in Times of Financial Crisis* (Cambridge University Press 2019).

Hayek, *The Constitution of liberty*

> Hayek FA, *The Constitution of liberty*, (Vol XVII the Definitive Edition the University of Chicago Press, 2011)

Johnson, Militarism and the British Left, 1902–1914,

> Johnson M, *Militarism and the British Left, 1902–1914*,' (Palgrave Macmillan 2013)

McIlwain, *Constitutionalism*

> McIlwain C H, *Constitutionalism: Ancient and Modern* (Ithaca, NY: Great Seal Books, 1947)

Montesquieu, *Sprit of Laws*

> Montesquieu C and Nugent T, *The spirit of laws.* (G. Bell & Sons ltd London 1750)

Mwakikagile, *'Uganda: A Nation in transition: Post-colonial analysis'*

Mwakikagile G, *'Uganda: A Nation in transition: Post-colonial analysis'* (New African Press 2012)

Roznai, *Unconstitutional Constitutional Amendments*

Roznai Y, *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea (1st* edition, Oxford University Press 2017)

Smith, *Judges and democratization: Judicial independence in new democracies*

Smith BC, *Judges and democratization: Judicial independence in new democracies* (1st edition Routledge 2019)

Chapters in books

Klug, 'Transformative constitutionalism as a model for Africa?

Klug H, 'Transformative constitutionalism as a model for Africa?' in Philipp Dann, Michael Riegner, and Maxim Bönnemann(eds) *The Global South and Comparative Constitutional Law* (Oxford, 2020)

Ochieng, 'The Composition, Functions and Accountability of the Judicial Service commission from a comparative perspective'

Ochieng W K, 'The Composition, Functions and Accountability of the Judicial Service commission from a comparative perspective,' in Ghai JC *Judicial Accountability in the New Constitutional (eds)* (ICJ –Kenya 2019)

Ojambo, 'The 1995 Constitution as a Tool for Dictatorship in Uganda: An African Dilemma of Constitutionalism**,'**

Ojambo R, 'The 1995 Constitution as a Tool for Dictatorship in Uganda: An African Dilemma of Constitutionalism**,'** In the book:Muzee, Sunjo,Enaifoghe (eds) *Democracy and Africanness* (Springer 2023)

Cases

Kenyan cases

Consolidated Petition No petition 446 and 456 of 2016

David Ndii & others v Attorney General & others [2021] eKLR

Njenga v Judicial Service Commission & 9 others (Civil Appeal 234 of 2017) [2022] KECA1429 (KLR)

Okiya Omtata and others v Attorney General and others petition No. E181 of 2023

Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR

SC Petition No. E001 of 2023

The Speaker of the Senate & another [2013] eKLR, Advisory Opinion No. 2 of 2013

South African cases

Carmichele v Minister of *Safety* and *Security 2001 (10) BCLR 995 (CC)*

Dalindyebo v S (090/2015) [2015] ZASCA 144

De Lange v Smuts NO and Others (CCT26/97) [1998] ZACC 6; 1998 (3) SA 785; 1998 (7) BCLR 779

EFF v Speaker of the National Assembly and Others; DA v Speaker of the National Assembly and Others 2016 (CC) 11 (CC)

Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998)

Raduvha v Minister of safety and security and Another {2016} ZACC 24; 2016(10) BCLR 1326 (CC)

Southern African Litigation Centre v Minister of Justice and Constitutional Development 2015 5 SA 1

The Secretary of Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others 2021 (18) ZACC

Ugandan cases

Amon Byarugaba, and others v Attorney General,Constitutional petition 0044 of 2015[2022]UGCC 11(15/12/2022)

Hon. Sam Kuteesa V Attorney General [2012] UGCC 2

Masalu Musene & 3 Ors v. Attorney-General. Constitutional Petition No. 5 of 2004.

Krispus Ayena Odongo v Attorney general, Parliamentary commission (constitutional petition 30 of 2017) [2020] UGCA 31 (07 February 2020).

Kyagulanyi Sentamu and another v Attorney General and 2 others (Miscellaneous Cause 16 of 2021) [2021] UGHCCD 1
Uganda Law Society (ULS) v. Attorney General Constitution Petition No.52 of 2017

Other cases

British Columbia Government Employees' Union v British Columbia (AG), [1988] 2 S.C.R. 214

Dobbs, State Health Officer of The Mississippi Department of Health, et al. v Jackson Women's Health Organization et al.

Rex v Sussex Justices. R v Sussex Justices, ex parte McCarthy ([1924] 1 KB 256, [1923] All ER Rep 233).

The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09

Constitutions

Kenyan Constitution of 2010

South African Constitution of 1996

Ugandan constitution of 1995 with amendments through 2017

Dissertation and Theses

Kachale, 'Judicial (In)Activism in Malawi? A critical analysis of the Impact of Constitutional Jurisprudence on Constitutionalism and the Rule of Law'

Kachale CJ, 'Judicial (In)Activism in Malawi? A critical analysis of the Impact of Constitutional Jurisprudence on Constitutionalism and the Rule of Law,' (Ph.D. Thesis, School of oriental studies London 2012)

Makama, 'Constitutionalism and judicial appointment as a means of safeguarding judicial independence in selected African jurisdictions'

Makama SP, 'Constitutionalism and judicial appointment as a means of safeguarding judicial independence in selected African jurisdictions' (LLM dissertation, University of South Africa 2012)

Manyatera, 'A critique of the superior courts' judicial selection mechanisms in Africa: The case of Mozambique, South Africa and Zimbabwe'

Manyatera G, 'A critique of the superior courts judicial selection mechanisms in Africa: The case of Mozambique, South Africa and Zimbabwe,' (LLD Thesis, University of Pretoria 2015)

Mutakha, ‘An interpretation of the constitutional framework for devolution in Kenya: a comparative approach’

Mutakha K, ‘An interpretation of the constitutional framework for devolution in kenya: a comparative approach’ (LLD Thesis, University of the Western Cape, 2014)

Oduori, ‘Challenges to the Implementation of the Constitutional Provisions of the two-thirds Gender Rule in the National Assembly of Kenya,’

Oduori P N, ‘Challenges to the Implementation of the Constitutional Provisions of the two-thirds Gender Rule in the National Assembly of Kenya,’ (Masters Dissertation, University of Nairobi, 2016

Encyclopaedias

Britannica encyclopedia, Idi Amin

Britannica, ‘Idi Amin’ (*The Editors of Britannica encyclopedia)*, <https://www.britannica.com/biography/Idi-Amin> Accessed on 20/07/2024

Law DS, "Judicial Independence"

Law DS, "Judicial Independence" (*Encyclopaedia Britannica)* <https://www.britannica.com/topic/judicial-independence> accessed 10/10/2024.

Stanford Encyclopaedia of Philosophy, ‘Constitutionalism’

Stanford Encyclopaedia of Philosophy, ‘constitutionalism,’ *(substantive revision Jun 9, 2022)* < https://plato.stanford.edu/entries/constitutionalism/> Accessed on 07/08/2022.

The Editors of Encyclopaedia, ‘Separation of Powers’

The Editors of Encyclopaedia Britannica, ‘Separation of Powers’ (*The Editors of Encyclopaedia),* <https://www.britannica.com/topic/separation-of-powers> Accessed on 27/08/2024.

Waldrow, J The Rule of Law

Waldrow J, 'The Rule of Law' in Edward N Zalta and Uri Nodelman (eds), *The Stanford Encyclopedia of Philosophy* (Fall 2023 Edition) <https://plato.stanford.edu/entries/rule-of law/#:~:text=The%20idea%20is%20that%20the,used%20to%20control%20the%20state.> Accessed on 27/08/2024.

Waluchow, ‘Constitutionalism’

Waluchow Wil, ‘Constitutionalism’ *(Stanford Encyclopaedia of Philosophy 20 Dec 2017)* <https://plato.stanford.edu/archives/spr2018/entries/constitutionalism> accessed 04/09/2022.

International Instruments

Bangalore Principles of judicial Independence

Bangalore Principles of judicial Independence, adopted by the Judicial Group on Strengthening Judicial Integrity (2002)

Commonwealth Latimer House Principles

Commonwealth Latimer House Principles, 'Principles on the three Branches of Government,' First drafted in 1988/1989, the Commonwealth Latimer House Principles were officially published and agreed in 2003

December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

ICCPR

International Covenant on Civil and Political Rights (adopted 16

UNGA

United Nations General assembly, The rule of law at the national and international levels 18/12/2006

United Nations Human Rights Committee

United Nations Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007)

United Nations Human Rights Council, 27th Session

United Nations Human Rights Council, 27th Session, *Report of the Working Group on Arbitrary Detention*, 30 June 2014, A/HRC/27/48

UN Human Rights Office

United Nations Human Rights office, 'The basic principle on the independence of the judiciary.'

Journal Articles

Abul-Ethem, 'The role of the judiciary in the protection of human rights and development: A Middle Eastern perspective'

Abul-Ethem F, 'The role of the judiciary in the protection of human rights and development: A Middle Eastern perspective,' (2002) 26 issue 3, Fordham Int'l LJ 761.

Albertyn & Goldblatt, 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality'

Albertyn C & Goldblatt B, 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' 1998 14 SAJHR 248

Asiimwe, ‘Constitutionalism, Democratisation and Militarism in Uganda’

Asiimwe S M, ‘Constitutionalism, Democratisation and Militarism in Uganda,’ Nkumba, Bus J, Vol 15, (2016) 179

Asiimwe, ‘Of Fundamental Change and No Change: Pitfalls of Constitutionalism and Political Transformation in Uganda, 1995-2005,’

Asiimwe G, ‘Of Fundamental Change and No Change: Pitfalls of Constitutionalism and Political Transformation in Uganda, 1995-2005,’ (2014) Vol. XXXIX, No. 2 *CODESRIA*, 21

Barber, ‘The Principles of Constitutionalism’

Barber NW, ‘The Principles of Constitutionalism,’ OUP 1

Bezezew, ‘Constitutionalism’

Bezezew M, ‘Constitutionalism,’ (2009) Vol. 3 No.2, Mizan law review, 358.

Carolan, ‘The New Separation of Powers: A Theory of the Modern State’

Carolan E, The New Separation of Powers: A Theory of the Modern State (OUP 2009).

Davis and Klare, ‘Transformative Constitutionalism and the Common and Customary Law’

Davis DM and Klare K, ‘Transformative Constitutionalism and the Common and Customary Law’ (2010) Volume 26(3) SAJHR 403.

Fombad, ‘Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa,’

Fombad CM, “Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa”, (2007) 55 Am J Comp L 1.

Foran, ‘The constitutional foundations of reasonableness review: artificial reason and wrongful discrimination,’

Foran M, ‘The constitutional foundations of reasonableness review: artificial reason and wrongful discrimination,’ Edinb Law Rev 26.3 (2022): 295

Guzman, ‘Military Jurisdiction and International Law,’

Guzman F, ‘Military Jurisdiction and International Law,’ (Advanced edition) Vol II (Chapters 1

Hassan, ‘Continuity despite change: Kenya’s new constitution and executive power’

Hassan M, ‘Continuity despite change: Kenya’s new constitution and executive power,’ (2013) vol. 22, No. 4, Department of Government, Harvard University, Cambridge, 587

Hoexter, ‘The principle of legality, South Africa Administrative law’

Hoexter C, ‘The principle of legality, South Africa Administrative law’ (2004) Macquarie LJ 165

Klare KE, ‘Legal Culture and Transformative Constitutionalism’

Klare KE, ‘Legal Culture and Transformative Constitutionalism,’ [1998] SAJHR 146

Krotoszynski, ‘Transcending Formalism and Functionalism in Separation-of powers analysis’

Krotoszynski R Jr. ‘Transcending Formalism and Functionalism in Separation-of-Powers Analysis’ Duke LJ 2015 <http://scholarship.law.duke.edu/dlj/vol64/iss8/2/> accessed 12/11/2022

Lafargue & Katumanga, ‘Kenya in Turmoil: Post-Election Violence and precarious Pacification,’

Lafargue J & Katumanga M, ‘Kenya in Turmoil: Post-Election Violence and precarious Pacification,’ (2008) Vol 38 East Afr Rev

Langa, 'Transformative constitutionalism'

Langa P, 'Transformative constitutionalism' (2006) 17 Stell LR 351

Latham, ‘The Supreme Court as a Political Institution’

Latham E, ‘The Supreme Court as a Political Institution’ (1947) Vol 31, Minn L Rev 205

Matthews and Coogan, ‘Kenya and the Rule of Law: The Perspective of Two Volunteers,’

Matthews K & Coogan WH, ‘Kenya and the Rule of Law: The Perspective of Two Volunteers,’ (2008) 60 Me L Rev 561

Mutabazi, ‘Switching Roles in Pursuit of Democracy in Uganda: the performance of civil society and media in the absence of political opposition,’

Mutabazi S, ‘Switching Roles in Pursuit of Democracy in Uganda: the performance of civil society and media in the absence of political opposition,’ (2009) 41 Les Cahiers d’Afrique de l’Est- East Afr Rev <https://journals.openedition.org/eastafrica/584>

Mutua, ‘Justice under Siege: The Rule of Law and Judicial Subservience in Kenya’

Mutua M, ‘Justice under Siege: The Rule of Law and Judicial Subservience in Kenya,’ (2001) Vol 23 No.1 Makau Mutua, Justice under Siege: The Rule of Law and Judicial Subservience in Kenya, (Feb 2001) Vol 23 No.1 University at Buffalo School of Law, 96 96

Mutunga, ‘Kenya: a new constitution: Willy Mutunga on the culmination of almost five decades of struggles,’

Mutunga W, ‘Kenya: a new constitution: Willy Mutunga on the culmination of almost five decades of struggles,’ (2013) Vol 65, Pluto Journals, 20

Neo, ‘Autonomy, deference, and control: Judicial doctrine and facets of separation of powers in Singapore,’

Neo JL, ‘Autonomy, deference, and control: Judicial doctrine and facets of separation of powers in Singapore,’ (2018) 5, National University of Singapore, 461

O'Callaghan, ‘The Influence of Personal Values on Legal Judgments’

O'Callaghan RJC, ‘The Influence of Personal Values on Legal Judgments’ (2013) 40 J Law & Soc 596

Oxtoby, ‘The Appointment of Judges: Reflections on the Performance of the South African Judicial Service Commission,’

Oxtoby C, ‘The Appointment of Judges: Reflections on the Performance of the South African Judicial Service Commission,’ (2021) Vol. 56(1) J Asian Afr Stud 34

Plank, ‘The Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia,’

Plank E T, ‘The Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia,’ (1996) 5, Wm & Mary Bill Rts J 1

Roznai, ‘Unconstitutional Constitutional Amendments—the Migration and Success of a Constitutional Idea’

Roznai Y, ‘Unconstitutional Constitutional Amendments—the Migration and Success of a Constitutional Idea’ (2013) 61 Am J Comp L 657

Sayer, ‘Independence and After,’

Sayer G, ‘Independence and After,’ (2004) Oxfam Digital Repository, 2

Sellers and Tomaszewski, ‘Rule of Law in Comparative Perspective’

Sellers M and Tomaszewski T, ‘Rule of Law in Comparative Perspective,’ (3rd ed Springer 2010) 1

Sharma and Asarpota, Role of Judges in the Art of Interpretation of Statutes

Sharma M and Asarpota NB, Role of Judges in the Art of Interpretation of Statutes, 4 (4) IJLMH (2021) 826

Siyo L & Mubangizi JC, ‘The independence of South African judges: A constitutional and legislative perspective’

Siyo L & Mubangizi JC, ‘The independence of South African judges: A constitutional and legislative perspective’ (2015) Potchefstroom Electronic Law Journal (PELJ) 817 <https://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812015000400004#back_fn16>

Solange, ‘Transformative constitutionalism in a democratic developmental state,

Solange Rosa, ‘Transformative constitutionalism in a democratic developmental state’ (2011) 22(3) Stell LR 542

Stein R, ‘Rule of Law: What Does It Mean?’

Stein R, ‘Rule of Law: What Does It Mean?’ (2009) vol 18 MINN J INT'L L 293

Ten CL, ‘Constitutionalism and the Rule of Law,’

Ten CL, ‘Constitutionalism and the Rule of Law,’ in A Companions to Contemporary Philosophy, Vol 2, 2nd Edition, Robert E. Goodin Philip Pettit and Thomas Pogge (2nd edn, Blackwell Companions to Philosophy 2007

Tiwari, ‘Judicial Independence: Separation of Power,’

Tiwari RR, ‘Judicial Independence: Separation of Power,’ 4 (3) International Journal for Law Management and Humanities (IJLMH) 2448

Lectures

Dunstan Mlambo, ‘Transformative Social Change and the Role of the Judge in Post-Apartheid South Africa*,’* 16th Annual Human Rights Lecture, at Stellenbosch University, Delivered on 24/03/2022

Kennedy A, ‘Written Constitutions and the Common Law Tradition’, 20th Sultan Azlan Shah law Lecture, 2006

Mahomed CJ ‘The Role of the Judiciary in a Constitutional State - Address at the First Orientation Course for New Judges’ (1998)

Michael A. Wolf, Chief justice of the Supreme Court of Missouri, State of the Judiciary, during a joint session of the General Assembly in Jefferson City, Mo. Address Jan. 25, 2006

Pius Langa ‘Transformative constitutionalism' lecture delivered at Stellenbosch university 9th October 2006

The Hon J Spigelman AC Chief Justice of New South Wales: ‘Judicial Appointments and Judicial Independence,’ at The Rule of Law Conference, Brisbane, 31 August 2007

Statutes

Kenyan Statues

Financial Act No. 4 of 2023

Judiciary fund Act of 2016

The Judicial Service Act 1 of 2011

Ugandan Statutes

Uganda Peoples' Defense Forces Act of 2005

South African Statutes

Population Registration Act of 1950

The Insolvency Act 24 of 1936

Websites

Africa News, ‘Kenya's CJ Maraga Complains against Budget Cuts, 'Disrespect'”

Africa News, ‘Kenya's CJ Maraga Complains against Budget Cuts, 'Disrespect'” *(Africa News 4 November 2019)* <https://www.africanews.com/2019/11/04/kenya-s-cj-maraga-says-judiciary-under-attack//> accessed 28 February 2022

African legal information institute, ‘Judicial independence infringed when Uganda's Chief Justice has to 'plead' for funds’

African legal information institute, ‘Judicial independence infringed when Uganda's Chief Justice has to 'plead' for funds’ *(20/03/2020)* < https://africanlii.org/articles/2020-03-20/carmel-rickard/judicial-independence-infringed-when-ugandas-chief-justice-has-to-plead-for-funds-constitutional-court> accessed 10/11/2022

African Research Institute, ’Steady Progress? 30 Years of Museveni and the NRM in Uganda,’

African Research Institute, ’Steady Progress? 30 Years of Museveni and the NRM in Uganda,’(05/02/2016) <https://www.africaresearchinstitute.org/newsite/publications/steady-progress/> accessed on 20/06/2024

Aljazeera, ‘Bobi Wine recounts ‘torture by Ugandan soldiers’

Aljazeera, ‘Bobi Wine recounts ‘torture by Ugandan soldiers,’ (03/09/2018) <https://www.aljazeera.com/news/2018/9/3/bobi-wine-recounts-torture-by-ugandan-soldiers> accessed on 09/02/2023

Aljazeera, ‘Popular Ugandan opposition MP Bobi Wine charged with treason’

Aljazeera, ‘Popular Ugandan opposition MP Bobi Wine charged with treason,’ (23/08/2018) <https://www.aljazeera.com/news/2018/8/23/popular-ugandan-opposition-mp-bobi-wine-charged-with-treason > Accessed on 30/12/2023.

Aljazeera; ‘Uganda: Pop star-turned-politician charged in military court’

Aljazeera; ‘Uganda: Pop star-turned-politician charged in military court,’ 16/08/2018<https://www.aljazeera.com/news/2018/8/16/uganda-pop-star-turned-politician-charged-in-military-court> accessed on 25/08/2023

American Bar Association, ‘Rule of Law

American Bar Association, ‘Rule of Law,’ <https://www.americanbar.org/groups/public_education/resources/rule-of-

law/#:~:text=Many%20countries%20throughout%20the%20world,rights%20are%20guaranteed%20for%20all

Amnesty International, '2010 Constitution Restored Confidence in a Truly Independent

Amnesty International, '2010 Constitution Restored Confidence in a Truly Independent Judiciary,' (2022) < https://www.amnestykenya.org/2010-constitution-restored-confidence-in-a-truly-independent-judiciary/> Accessed on 15/05/2024

Armitage, 'The residuals of colonial rule and its impact on the process of racialisation in Uganda

Armitage C, 'The residuals of colonial rule and its impact on the process ofracialisation in Uganda,' <https://cers.leeds.ac.uk/wp-content/uploads/sites/97/2016/04/The-residuals-of- colonial-rule-and-its- impact-on-the-process-of-racialisation-in-Uganda-Colette-Armitage.pdf Accessed on 08/04/2024

Atuhaire, 'Uganda's Yoweri Museveni: How an ex-rebel has stayed in power for 35 years,'

Atuhaire P, 'Uganda's Yoweri Museveni: How an ex-rebel has stayed in power for 35 years,' BBC (10/05/2021) <https://www.bbc.com/news/world-africa-55550932> accessed on 26/10/2022

BBI Kenya, 'Building Bridges Initiative, Constitutional Amendment Bill 2020'

BBI Kenya, 'Building Bridges Initiative, Constitutional Amendment Bill 2020' *(BBI 2020)* <https://www.bbi.go.ke/> accessed 30 November 2022

Befeld, 'South African courts: Are they guilty of judicial overreach or merely Upholding the rule of law?'

Befeld A, 'South African courts: Are they guilty of judicial overreach or merely upholdingthe rule of law?' (07/09/2021) <https://www.iol.co.za/news/politics/opinion/south-african- courts-are-they-guilty-of-judicial-overreach-or-merely-upholding-the-rule-of-law-751c156c-cbf9-480c-bce5-1d71c7952ab4> Accessed on 14/02/2023

Ben-Hur, 'LSK Terms Uhuru's Failure to Appoint Judges as Gross Violation of the Constitution'

Ben-Hur J, 'LSK Terms Uhuru's Failure to Appoint Judges as Gross Violation of theConstitution' *(Standard media 2 September 2020)* <https://www.standardmedia.co.ke/nairobi/article/2001384913/lsk-terms-uhurus-failure-to-appoint-judges-as-gross-violation> accessed 28 February 2022

Bingham Centre for the Rule of Law, 'The Appointment, Tenure and Removal of Judges under Commonwealth Principles'

Bingham Centre for The Rule of Law, 'The Appointment, Tenure and Removal of Judges under Commonwealth Principles' <https://binghamcentre.biicl.org/documents/38_van_zyl_smit_2015_commonwealth_compendium.pdf> Accessed on 05/04/2024

Biographics, ‘Idi Amin: The butcher of Uganda,’

Biographics, ‘Idi Amin: The butcher of Uganda,’ (25/10/2018) <https://www.youtube.com/watch?v=GrxQYbk2LBI> accessed on 06/08/2022

Blakemore, ‘The harsh reality of life under Apartheid in South Africa’

Blakemore E, ‘The harsh reality of life under Apartheid in South Africa’ (10/09/2021) <https://www.history.com/news/apartheid-policies-photos-nelson-mandela

Bok, ‘Baron De Montesquieu, Charles-Louis De Secondat’

Bok H, ‘Baron De Montesquieu, Charles-Louis De Secondat’ (*Stanford Encyclopedia of Philosophy* 2 April 2014) <https://plato.stanford.edu/entries/montesquieu/> accessed 10/10/2022

Bonventre, ‘6 to 3: The Impact of the Supreme Court’s Conservative Super-Majority’

Bonventre VM, ‘6 to 3: The Impact of the Supreme Court’s Conservative Super-Majority,’ <https://nysba.org/6-to-3-the-impact-of-the-supreme-courts-conservative-super-majority/> accessed on 12/10/2024.

Bradner ‘Here is what Happened when Senate Republicans Refused to Vote on Merrick Garland’s Supreme Court Nomination’

Bradner E ‘Here is what Happened when Senate Republicans Refused to Vote on Merrick Garland’s Supreme Court Nomination,’ (19/09/2020) <https://edition.cnn.com/2020/09/18/politics/merrick-garland-senate-republicans-timeline/index.html> accessed on 25/01/2024

Brockway and Jones, ‘Partisan gap widens in views of the Supreme Court,’

Brockway C and Jones B, ‘Partisan gap widens in views of the Supreme Court,’ (07/08/2019)<https://www.pewresearch.org/short-reads/2019/08/07/partisan-gap-widens-in-views-of-the-supreme-court/> accessed on 15/06/2024

Brown, ‘Ugandan Asians 50 Years Since their Expulsion from Uganda’

Brown T, ‘Ugandan Asians 50 Years Since their Expulsion from Uganda’ <https://lordslibrary.parliament.uk/ugandan-asians-50-years-since-their- expulsion-from- Uganda/> Accessed on 20/12/2023

Bulmer, ‘Judicial Tenure, Removal, Immunity and Accountability,’

Bulmer E, ‘Judicial Tenure, Removal, Immunity and Accountability,’ (2017)2 International IDEA <https://www.idea.int/sites/default/files/publications/judicial-tenure-removal-immunity-and-accountability-primer.pdf > accessed on 16/05/2024

Burke, ‘Kenyan election annulled after result called before votes counted, says court’

Burke J, ‘Kenyan election annulled after result called before votes counted, says court’ (20/09/2017) <https://www.theguardian.com/world/2017/sep/20/kenyan-election-rerun-not-transparent-supreme-court > accessed on 03/08/2022

Canadian Judicial Council, ‘Ethical Principles for Judges’

Canadian Judicial Council, ‘Ethical Principles for Judges’ <https://cjc-ccm.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf> accessed 31 March 2022

Carbone, ‘Populism’ Visits Africa: The Case of Yoweri Museveni and No-Party Democracy in Uganda,’

Carbone G, ‘Populism’ Visits Africa: The Case of Yoweri Museveni and No-Party Democracy in Uganda,’ (2005) <https://www.lse.ac.uk/international-development/Assets/Documents/PDFs/csrc-working-papers-phase-one/wp73-museveni-and-no-party-democracy-in-uganda.pdf> Accessed on 06/12/2023

Centre for Public Interest Law, ‘Statement on the Appointment of Judicial Officers,’

Centre for Public Interest Law, ‘Statement on the Appointment of Judicial Officers,’<https://cepiluganda.org/news-blog/statement-on-the-appointment-of-judicial-officers/> accessed on 01/04/2024

Chabalala, ‘Judicial Service Commission should have limited or no political appointees, law professor argues

Chabalala J, ‘Judicial Service Commission should have limited or no political appointees, law professor argues,’ News24 (23/03/2023) <https://www.news24.com/news24/southafrica/news/judicial-service-commission-should-have-limited-or-no-political-appointees-law-professor-argues-20230323> accessed on 15/06/2024

Chonghaile & Smith, ‘Court order four Kenyans to stand trial over 2007 election violence’

Chonghaile CN and Smith D, ‘Court order four Kenyans to stand trial over 2007 election violence,’(23/01/2012)<https://www.theguardian.com/world/2012/jan/23/court-kenyans-trial-election-violence (accessed on 03/08/2022

Citizen TV Kenya, ‘BBI decision’

Citizen TV Kenya, ‘BBI decision’ *(Citizen TV 20 August 2021)* <(https://www.facebook.com/watch/?v=390589462458145> accessed 22 April 2022

Citizen TV, ‘CJ Koome defends Judiciary against claims of capture, says they are independent,’

Citizen TV, ‘CJ Koome defends Judiciary against claims of capture, says they are independent,’ (30/01/2024) <https://www.youtube.com/watch?v=i4hSfQmWQqY> accessed on 30/01/2024

Citizen Tv, ‘Ruto, allies attack Judiciary over housing levy ruling’

Citizen Tv, ‘Ruto, allies attack Judiciary over housing levy ruling,’ (27/01/2024) <https://www.youtube.com/watch?v=uYamXLWCFKU> Accessed on 06/01/2024

CNN, ‘Lindsey Graham erupts: Kavanaugh hearing an unethical sham,’

CNN, ‘Lindsey Graham erupts: Kavanaugh hearing an unethical sham,’ (27/09/2018) <https://www.youtube.com/watch?v=RTBxPPx62s4> Accessed on 31/12/2023

Comrie, ‘Gwede Mantashe singles out ‘problematic courts’

Comrie S, ‘Gwede Mantashe singles out ‘problematic courts’ (22/06/2015)https://www.news24.com/news24/gwede-mantashe-singles-out-problematic-courts- 20150622> Accessed on 26/01/2024

Cornell Law Institute, ‘Separation of Powers

Cornell Law School, ‘Separation of Powers,’<https://www.law.cornell.edu/wex/separation_of_powers_0 > accessed on 27/08/2024.

Crabtree & Tortora, ‘Lacking Faith in Judiciary, Kenyans lean towards the Hague,’

Crabtree Steve and Bob Tortora, ‘Lacking Faith in Judiciary, Kenyans lean towards the Hague,’ Gallup (05/08/2009) <https://news.gallup.com/poll/122051/lacking-faith-judiciary-kenyans-lean-toward-hague.aspx> accessed on 01/10/2022

De Vos, ‘Why Report of Nkandla Ad Hoc Committee is of No Legal Relevance,’

De Vos P, ‘Why Report of Nkandla Ad Hoc Committee is of No Legal Relevance,’ Constitutionally Speaking, (19/11/2014) <https://constitutionallyspeaking.co.za/why-report-of-Nkandla-ad-hoc-committee-is-of-no-legal-relevance/> Accessed on 25/11/2023

Department of Justice, ‘The Judicial Service Commission’

Department of Justice, ‘The Judicial Service Commission,’ <https://www.justice.gov.za/faq/faq-jsc.html#:~:text=The%20JSC%20was%20established%20in,to%20the%20administration%20 of%20justice.> Accessed on 27/08/2024.

DW News, ‘In Kenya, politics split on ethnic divide,’

DW News, ‘In Kenya, politics split on ethnic divide,’ (26/10/2017) <https://www.dw.com/en/in-kenya-politics-split-on-ethnic-divide/a-37442394> accessed on 29/07/2022

Eilperin & DeBonis, ‘President Obama Nominates Merrick Garland to the Supreme Court,’

Eilperin J & DeBonis M, ‘President Obama Nominates Merrick Garland to the Supreme Court,’ (16/03/2016) <https://www.washingtonpost.com/world/national-security/president-obama-to-nominate-merrick-garland-to-the-supreme-court-sources-say/2016/03/16/3bc90bc8-eb7c-11e5-a6f3-21ccdbc5f74e_story.html> Accessed on 25/01/2024.

Elimu, ‘Prominent Kenyan Leaders – Jaramogi Oginga Odinga,’

Elimu, ‘Prominent Kenyan Leaders – Jaramogi Oginga Odinga,’ https://learn.e-limu.org/topic/view/?c=45&t=830 accessed on 01/01/2022

ENCJ, ‘Funding of the Judiciary’

ENCJ, ‘Funding of the Judiciary,’ <https://www.encj.eu/articles/77#:~:text=Adequate%20funding%20of%20the%20judiciary,and %20judges%20perform%20their%20functions.> accessed on 25/12/2023

Fratta ‘post-electoral violence in Kenya: more than 1000 people killed and 300,000 displaced’

Fratta M, ‘post-electoral violence in Kenya: more than 1000 people killed and 300,000 displaced’ (28/02/2008) <https://reliefweb.int/report/kenya/post-electoral-violence-kenya-more-1000-people-killed-and-300000-displaced> accessed on 29/07/2022

Gettleman, ‘Disputed Vote Plunges Kenya into Bloodshed,’

Gettleman J, ‘Disputed vote plunges Kenya into bloodshed,’ (31/12/2007) <https://www.nytimes.com/2007/12/31/world/africa/31kenya.html> accessed on 29/07/2022

Global security ‘The military under Amin’

Global security.org ‘The military under Amin,’ <https://www.globalsecurity.org/military/world/uganda/amin-2.htm> accessed on 01/08/2022

Goldberg, ‘Kenya’s High Stakes Presidential Election,’

Goldberg ML, ‘Kenya’s High Stakes Presidential Election,’ (28/07/2022) <https://www.undispatch.com/kenyas-high-stakes-presidential-elections/> accessed on 01/01/2023

Hoexter, ‘The Principle of Legality in South African administrative law’

Hoexter C ‘The Principle of Legality in South African administrative law’ *(1 March 2004)* <http://classic.austlii.edu.au/au/journals/MqLawJl/2004/8.html> accessed 9/9/2022

Hong, ‘North Korea Laws since 2016: What they imply for the country’s future’

Hong DU, ‘North Korea Laws since 2016: What they imply for the country’s future’ (25/02/2021) <https://www.38north.org/2021/02/north-korean-laws-since- 2016-what-they-imply-for-the-countrys-future/> accessed on 27/7/2022

Human Rights Channel, ‘What is a constitution,’

Human Rights Channel, ‘What is a constitution,’ (10/09/2014) <https://human-rights-channel.coe.int/asset-what-is-a-constitution-en.html> accessed on 15/07/2022

Human Rights Watch, ‘Ballots to Bullets,’

Human Rights Watch, ‘Ballots to Bullets,’ <https://www.hrw.org/report/2008/03/16/ballots- bullets/organized-political-violence-and-kenyas-crisis-governance> accessed on 01/10/2022

Human Rights Watch, ‘North Korea: Abusive rule 10 years after Kim Jong IL’

Human Rights Watch, ‘North Korea: Abusive rule 10 years after Kim Jong IL’ (16/12/2021) <https://www.hrw.org/news/2021/12/16/north-korea-abusive-rule-10-years-after-kim-jong-il> accessed on 16/09/2022

Human Rights Watch, ‘Righting Military Injustice, Addressing unlawful Uganda’s Prosecution of civilians in military courts’

Human Rights Watch, ‘Righting Military Injustice, Addressing unlawful Uganda’s prosecution of civilians in military courts,’ (27/07/2011) https://www.hrw.org/report/2011/07/27/righting-military-injustice/addressing-ugandas-unlawful-prosecutions-civilians accessed on 02/08/2022

Human Rights Watch, ’Human Rights in North Korea,’

Human Rights Watch, ’Human Rights in North Korea,’ (05/06/2018) <https://www.hrw.org/news/2018/06/05/human-rights-north-korea> accessed on 16/09/2022.

International Crisis Group, ‘Kenya’s 2022 election: High stakes,’

International Crisis Group, ‘Kenya’s 2022 election: High stakes,’ (09/06/2022) <https://www.crisisgroup.org/africa/horn-africa/kenya/b182-kenyas-2022-election-high- stakes> accessed on 07/08/2022

Isozaki, ‘Understanding the North Korean Regime,’

Isozaki A, ‘Understanding the North Korean Regime,’ (April 2017) <https://www.wilsoncenter.org/sites/default/files/media/documents/publication/ap_understandingthenorthkoreanregime.pdf> Accessed on 01/01/2023

Judge Matters, ‘Judge Matters condemn Julius Malema’s comments Against Magistrate Twanet Olivier’

Judge Matters, ‘Judge Matters condemn Julius Malema’s comments Against MagistrateTwanet Olivier,’ (22/10/2023) <https://www.judgesmatter.co.za/opinions/media-statement-judges-matter-condemns-julius-malemas-comments-against-magistrate-twanet-olivier/> accessed on 25/12/2023

Judge Matters, 'Is there political influence at play in the selection of judges?’

Judge Matters, 'Is there political influence at play in the selection of judges?’ (13/08/2022) <https://www.judgesmatter.co.za/opinions/political-influence-selection-of-judges/> accessed on 20/08/2023

Judges Matters,’ JSC Judicial Criteria for appointment’

Judges Matters,' JSC Judicial Criteria for appointment,' <https://www.judgesmatter.co.za/jsc-judicial-criteria-for-appointment/> accessed on 05/04/2024

Judicial Service Commission, 'The Membership,'

Judicial Service Commission, 'The Membership,' <https://www.jsc.go.ke/index.php/jsc-overview/> accessed on 05/04/2024.

Kenyan Judiciary, 'Financial Year 2024/25 Judiciary Draft Budget Report'

Kenyan Judiciary, 'Financial Year 2024/25 Judiciary Draft Budget Report,'<https://www.judiciary.go.ke/wp-content/uploads/2023/10/FY-2024-25-Judiciary-Budget-Report-A-Guide-for-the-Citizen-1-1.pdf> Accessed on 25/12/2023

Kenyan Parliament, 'Dramatic face-off as MP Otiende Amollo lectures John Mbadi on matters BBI'

Kenyan Parliament, 'Dramatic face-off as MP Otiende Amollo lectures John Mbadi on matters BBI' *(Kenyan parliament 29 April 2021)* <https://www.youtube.com/watch?v=sviPTkGHvP0> accessed 20 March 2022

Kiyonga & Mukisa, 'Court Martial Ruling: A positive for criticized constitutional court'

Kiyonga D & Mukisa D, 'Court Martial Ruling: A positive for criticized constitutional court'<https://www-monitor-co-ug.webpkgcache.com/doc/-/s/www.monitor.co.ug/uganda/magazines/people-power/court-martial-ruling-a-positive-for-criticised-constitutional-court-3468104> accessed on 22/08/2023

Krotoszynski, 'Transcending Formalism and Functionalism in Separation-of powers analysis'

Krotoszynski Ronald Jr. 'Transcending Formalism and Functionalism in Separation-of-Powers Analysis' *(Duke Law Journal 2015)* <http://scholarship.law.duke.edu/dlj/vol64/iss8/2/> accessed 12/11/2022

LASPNET Research, 'The Poor, Vulnerable and marginalized fail to Access Justice in Uganda'

LASPNET Research, 'The Poor, Vulnerable and marginalized fail to Access Justice in Uganda,'(2016) <https://www.laspnet.org/blog/419-the-poor-vulnerable-and-marginalised-fail-to-a access-justice-in-uganda> Accessed on 23/01/2023

Legal Information Institute, 'Legal formalism,'

Legal Information Institute, 'Legal formalism,' Cornel Law School <https://www.law.cornell.edu/wex/legal_formalism#:~:text=As%20a%20descriptive%20theory%20of,public%20policy%20ramifications%20of%20rulings. > accessed on 28/09/2023

Legal Information Institute, 'Separation of powers'

Legal Information Institute, 'Separation of powers' <https://www.law.cornell.edu/wex/separation_of_powers> accessed 12/12/2022

Letoo, ‘President Ruto sustains attacks on Judiciary, claims it's being used to sabotage government

Letoo S, ‘President Ruto sustains attacks on Judiciary, claims it's being used to sabotage government,’ (02/01/2024) <https://www.citizen.digital/news/president-ruto-sustains-attacks-on-judiciary-claims-its-being-used-to-sabotage-govt-n334110> accessed on 04/02/2024.

Mail and Guardian, ‘Kenya President Falls Behind in Opinion Poll,’

Mail and Guardian, ‘Kenya President Falls Behind in Opinion Poll.’ *(Mail and Guardian 07/12/2007)* ‘Kenya President Falls Behind in Opinion Poll,’ <https://mg.co.za/article/2007-12-07-kenya-president-falls-behind-in-opinion-poll/> accessed on 15/01/2023.

Maphanga, ‘Malema condemned for attack on Judiciary officer’

Maphanga C, ‘Malema condemned for attack on Judiciary officer,’ (23/10/2023) <https://www.sabcnews.com/sabcnews/malema-condemned-for-attack-on-judiciary-officer/> accessed on 28/01/2024

Maraga Says Executive Frustrating Him and the Entire Judiciary

Maraga CJ, Says Executive Frustrating Him and the Entire Judiciary (04/11/2019) https://allafrica.com/stories/201911050049.html accessed on 10/05/2023

Margaritoff, ‘The Life of Idi Amin, the ‘Butcher of Africa’ Who Ruled 1970s Uganda’

Margaritoff, ‘The Life of Idi Amin, the ‘Butcher of Africa’ Who Ruled 1970s Uganda’ (27/11/2022) <https://allthatsinteresting.com/idi-amin-dada> accessed on 01/08/2022

Mbaku, ‘Is the BBI Ruling a Sign of Judicial Independence in Kenya?’

Mbaku JM, ‘Is the BBI Ruling a Sign of Judicial Independence in Kenya?’ *(9 March 2022)* <https://www.brookings.edu/blog/africa-in-focus/2021/08/19/is-the-bbi-ruling-a-sign-of-judicial-independence-in-kenya/> accessed 24 January 2022

Miriri and Malalo, ‘Kenya Starving Judiciary of Funds, Chief Justice Says’

Miriri D, Malalo H, ‘Kenya Starving Judiciary of Funds, Chief Justice Says’ *(Reuters 4 November 2019)* <https://www.reuters.com/article/ozatp-uk-kenya-politics-idAFKBN1XE1OY-OZATP> accessed 22 March 2022

Monitor, ‘How Mbarara Kampala Fell into Tanzanian Army,

Monitor, ‘How Mbarara Kampala Fell into Tanzanian Army, (27/04/2012)<https://www.monitor.co.ug/uganda/magazines/people-power/how-mbarara-kampala-fell-to-tanzanian-army-1570886> Accessed on 08/04/2024

Mugerwa, ‘Baganda, Banyankore, Basoga dorminant tribes,’

Mugerwa Y, ‘Baganda, Banyankore, Basoga dorminant tribes,’ 16/01/2021 <https://www.monitor.co.ug/uganda/news/national/baganda-banyankore-basoga-dominant-tribes-1644626> accessed on 24/12/2022

Mulera, ‘Ten Point Program of Uganda’s Nation Resistance Movement (NRM) -1984’

Mulera MK ‘Ten Point Program of Uganda’s Nation Resistance Movement (NRM) -1984,’<https://blog.mulerasfireplace.com/engage/ten-point-program-of-uganda-s-national-resistance-movement-nrm-1984-20426> Accessed on 16/06/2024

Muluka, ‘Jomo and Jaramogi: A tale of Kenya’s enduring political dynasties’

Muluka B, ‘Jomo and Jaramogi: A tale of Kenya’s enduring political dynasties’<https://www.standardmedia.co.ke/article/2000228496/jomo-and-jaramogi-a-tale-of-kenya-s-enduring-political-dynasties> accessed on 01/01/2023

Musau, ‘Judiciary fund operationalized with Inaugural Ksh 9 billion Allocation’

Musau D, ‘Judiciary fund operationalized with Inaugural Ksh 9 billion Allocation’ (12/08/2022) <https://www.citizen.digital/news/judiciary-fund-operationalised-with-inaugural-ksh9b-allocation-n303831> accessed on 25/12/2023

Musisi and Wandera, ‘Torture: we have learnt nothing from history’

Musisi F and Wandera D, ‘Torture: we have learnt nothing from history,’<https://www.monitor.co.ug/uganda/special-reports/torture-we-have-learnt-nothing-from-history-3723438> Accessed on 06/12/2023

Muvunyi, ‘Yoweri Museveni: 30 years in power’

Muvunyi F, ‘Yoweri Museveni: 30 years in power,’ DW (29/01/2016) <https://www.dw.com/en/ugandas-president-museveni-seeks-another-term-after-30-years-in-office/a-19011412> Accessed on 27/10/2022

Naluwairo, ‘Military courts and human rights: A critical analysis of the compliance of Uganda’s military justice with the right to an independent and impartial tribunal

Naluwairo R, ‘Military courts and human rights: A critical analysis of the compliance of Uganda’s military justice with the right to an independent and impartial tribunal,’ <http://www.scielo.org.za/pdf/ahrlj/v12n2/07.pdf Accessed on 30/01/2024

Nation TV Kenya, ‘CJ David Maraga Accuses Executive of Frustrating Judiciary's Work’

Nation TV Kenya, ‘CJ David Maraga Accuses Executive of Frustrating Judiciary's Work’ *(Nation media 4 November 2019)* <https://www.youtube.com/watch?v=_ABSW1dJQRY> accessed 22 February 2022

Nation TV, ‘Maraga blames Uhuru for delaying to appoint 41 Judges’

Nation TV, ‘Maraga blames Uhuru for delaying to appoint 41 Judges,’ (08/06/2020) <https://www.youtube.com/watch?v=S4bKYfqPq0U> accessed on 26/10/2022

National Conference of State Legislature, ‘Separation of powers--an Overview’

National Conference of State Legislature, ‘Separation of powers--an Overview’ < https://www.ncsl.org/about-state-legislatures/separation-of-powers-an-overview > accessed 22 March 2022

NBC News, ‘Trump Built Supreme Court Conservative Majority, loses’

NBC News, ‘Trump Built Supreme Court Conservative Majority, loses’ (2024) https://www.nbcnews.com/politics/donald-trump/trump-built-supreme-court-conservative-majority-loses-rcna131956 accessed 06/06/2024.

Nelson Mandela Foundation, ‘Historical Background the Judiciary,’

Nelson Mandela Foundation, ‘Historical Background the Judiciary,’<https://omalley.nelsonmandela.org/cis/omalley/OMalleyWeb/03lv00017/04lv01495/05lv01505.htm> Accessed on 15/04/2024

Nelsonmandela.org, ‘Speech by President Nelson Mandela at the inauguration

Nelsonmandela.org, ‘Speech by President Nelson Mandela at the inauguration of the Constitutional Court’ on 14 February 1995. Available at <http://db.nelsonmandela.org/speeches/pub_view.asp?pg=item&ItemID=NMS228&txtstr=constitutional%20court> accessed on 01/08/2022

New Vision, ‘UJOA deplores political interference in Courts’

New Vision, ‘UJOA deplores political interference in Courts’03/08/2017<https://www.newvision.co.ug/news/1459092/ujoa-deplores-political-interference-courts> accessed on 25/08/2023

News24, ‘DA: Reduce the number of political influences on JSC’

News24, ‘DA: Reduce the number of political influence on JSC,’ (30/06/2013) <https://www.news24.com/news24/da-reduce-political-influence-in-jsc-20130630> accessed on 20/08/2023

Nguyen, ‘News maker: Odinga in fight of his life over "stolen" poll’

Nguyen K, ‘News maker: Odinga in fight of his life over "stolen" poll’ (03/01/2008) <https://www.reuters.com/article/us-kenya-violence-odinga-idUSL0347095720080103> accessed on 29/12/2023

NTV Kenya, ‘CJ Maraga: I have no problem with President Uhuru’

NTV Kenya, ‘CJ Maraga: I have no problem with President Uhuru,’ *(Nation TV 23/08/2020)* <https://www.youtube.com/watch?v=xb0LoEBc6_o> accessed on 26/10/2022

Nyawa, ‘The Broken Promise: Kenyatta’s Love for Abusive Constitutionalism and Imperial Presidency

Nyawa JM, ‘The Broken Promise: Kenyatta’s Love for Abusive Constitutionalism and Imperial Presidency [2020] Available at SSRN: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3660631> accessed on 15/05/2024

Observer Uganda, ‘Museveni on why the government will continue to disobey court orders’

Observer Uganda, ‘Museveni on why the government will continue to disobey court orders,’ (21/09/2022) <https://observer.ug/news/headlines/75255-museveni-on-why-govt-will-continue-to-defy-court-orders> accessed on 27/10/2022

Odoki,’ The Challenges of Constitution-making and Implementation in Uganda’ of the Constitutional Court’

Odoki BJ,’ The Challenges of Constitution-making and Implementation in Uganda,’<https://constitutionnet.org/sites/default/files/Odoki,%20B.%20Challenges%20of%20Constitution-making%20in%20Uganda.pdf> Accessed on 23/01/2023

Office of the High Commissioner for Human Rights, ‘Independence and Impartiality of Judges’

Office of the High Commissioner for Human Rights, ‘Independence and Impartiality of Judges <https://www.ohchr.org/Documents/Publications/training9chapter4en.pdf> accessed 11 November 2021

Ogemba and Muthoni, ‘Judiciary on trial as cash crisis hits hard,’

Ogemba P and Muthoni K, ‘Judiciary on trial as cash crisis hits hard,’ (29/10/1019)<https://www.standardmedia.co.ke/amp/article/2001347258/judiciary-on-trial-as-cash-crisis-hits-hard> Accessed on 25/12/2023

Ogila, ‘CJ David Maraga Blames President Uhuru for the backlog of cases, decries disregard of Court orders’

Ogila J, ‘CJ David Maraga Blames President Uhuru for the backlog of cases, decries disregard of Court orders’ *(Standard Media 18 June 2020)* <https://www.standardmedia.co.ke/nairobi/article/2001374421/president-uhurus-uta-do-attitude-paralysing-courts-cj-maraga?fbclid=IwAR3UYyfG-nL8x-TnSiVHNVhMKe_i4j4DqVv5xKVyu9h3t8J56s2KkjwA4VE> accessed 28 April 2022

OHCHR- Uganda: UN Experts extremely concerned at serious rights violation linked to general elections

OHCHR- Uganda: UN Experts extremely concerned at serious rights violation linked to general elections (13/04/2021) <https://www.ohchr.org/en/press-releases/2021/04/uganda-un-experts-extremely-concerned-serious-rights-violations-linked> accessed on 25/08/2023

Ohchr, ‘Basic Principles on the Independence of the Judiciary’

Ohchr, ‘Basic Principles on the Independence of the Judiciary,’ (06/09/1985) <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary> accessed on 05/04/2024

Onyiego, ’The landmark Moment as New Kenyan Constitution Takes Effect’

Onyiego M, ’The landmark Moment as New Kenyan Constitution Takes Effect,’ (26/08/2010) < https://www.voanews.com/a/kenyas-new-constitution-signed-into-law--101632883/124592.html> accessed on 20/12/2023

Otieno, ‘Kenya: Bad blood between executive & judiciary worries Kenyans,’

Otieno J, ‘Kenya: Bad blood between executive & judiciary worries Kenyans,’ <https://www.theafricareport.com/142661/kenya-bad-blood-between-executive-judiciary-worries-kenyans/ accessed on 10/10/2024.

Otieno, ‘The problem with Kenya President Ruto Attacks on the Judiciary’

Otieno O, ‘The problem with Kenya President Ruto Attacks on the Judiciary,’ (08/01/2024) https://www.theeastafrican.co.ke/tea/news/east-africa/the-problem-with-kenya-president-ruto-attacks-on-judiciary-4485416> accessed on 30/01/2024

Owen, et al. ‘Supreme Court Justices Questioned’

Owen B, et al. ‘Supreme Court Justices Questioned’ - Video.’ *(The Guardian 25 October 2011)* <https://www.theguardian.com/law/video/2011/oct/25/supreme-court-deliver-justice-video> accessed 23/11/2022

Parliament of Uganda, ‘MPs approve increase of High Court judges 1

Parliament of Uganda, ‘MPs approve increase of High Court judges,’ (14/07/2023) <https://www.parliament.go.ug/news/6771/mps-approve-increase-high-court-judges-151> accessed on 28/08/2023

Paukwa, ’History of Tax in Kenya,’

Paukwa, ’History of Tax in Kenya,’ (21/08/2019) < https://paukwa.or.ke/kecurrency-taxes- taxes-taxes/

Platt, ‘The Qualities of a Good Judge’

Platt S, ‘The Qualities of a Good Judge,’ <https://www.apursuitofjustice.com/the-qualities-of-a-good-judge/> Accessed on 05/04/2024.

Queensland Parliament, ‘Role of the Judiciary’

Queensland Parliament, ‘Role of the Judiciary’ (July 2015) <https://documents.parliament.qld.gov.au/explore/education/factsheets/Factsheet_5.1_RoleOfTheJudiciary.pdf> accessed December 12, 2022

Reuters, ‘Kenyan court refuses to stay ruling invalidating housing levy,’

Reuters, ‘Kenyan court refuses to stay ruling invalidating housing levy,’ (26/01/2024) <https://www.reuters.com/world/africa/kenyan-court-refuses-stay-ruling-invalidating-housing-levy-2024-01-26/#:~:text=NAIROBI%2C%20Jan%2026%20(Reuters),having%20found%20the%20measure%20unconstitutional.> accessed on 15/06/2024

Reuters, ‘Kenyan court strikes down housing levy, stays ruling until Jan 10’

Reuters, ‘Kenyan court strikes down housing levy, stays ruling until Jan 10,’ (29/11/2023 <https://www.reuters.com/world/africa/kenyan-court-strikes-down-housing-levy-finance-law-2023-11-28/> accessed on 15/06/2024

Reuters, ‘Kenyan politicians struggle to break ethnic voting patterns,’

Reuters, ‘Kenyan politicians struggle to break ethnic voting patterns,’ (05/08/2017) <https://www.reuters.com/article/us-kenya-elections-ethnicity-idUSKBN1AL049> accessed on 07/08/2022

Reuters, ‘Protests erupt as Kenyan leader wins vote,’

Reuters, ‘Protests erupt as Kenyan leader wins vote,’<Protests erupt as Kenyan leader wins vote | Reuters> accessed on 30/09/2022

Reynolds, ‘Constitutionalism and the Rule of Law,’

Reynolds NB, ‘Constitutionalism and the Rule of Law,’ (1986) Brigham Young University, <https://scholarsarchive.byu.edu/cgi/viewcontent.cgi?article=2470&context=facpub> accessed on 30/01/2024.

Rickard, ‘Executive interference in Ugandan court decisions continues- this time by the justice Minister’

Rickard C, ‘Executive interference in Ugandan court decisions continues- this time by the justice Minister,’ African Legal Information, <https://africanlii.org/articles/2024-03-21/carmel-rickard/executive-interference-in-ugandan-court-decisions-continues-this-time-by- the-justice-minister> Accessed on 15/05/2024

Rickard, ‘New challenges to judicial independence in Uganda,’

Rickard C, ‘New challenges to judicial independence in Uganda,’ (11/01/2024) <https://africanlii.org/articles/2024-01-11/carmel-rickard/new-challenges-to-judicial-independence-in-uganda> accessed on 20/09/2024.

Rickard, ‘Uganda’s security forces wait 24 hours before obeying court order to end opposition leader’s house arrest

Rickard C, ‘Uganda’s security forces wait 24 hours before obeying court order to end opposition leader’s house arrest,’ (African Legal Information,29/01/2021) <https://africanlii.org/articles/2021-01-29/carmel-rickard/ugandas-security-forces-wait-24-hours-before-obeying-court-order-to-end-opposition-leaders-house-arrest> accessed on 25/08/2022

Roosevelt, ‘Judicial Activism’

Roosevelt K, ‘Judicial Activism’ (Encyclopedia Britannica. 16 October 2019) <https://www.britannica.com/topic/judicial-activism> accessed 10 October 2022

Rotech, ‘Kenya trails regional peers in women top leadership positions’

Rotech K, ‘Kenya trails regional peers in women top leadership positions,’ (02/08/2021) <https://www.businessdailyafrica.com/bd/data-hub/kenya-trails-peers-in-women-top- leadership-positions-3495782> accessed on 21/01/2023

SABC ‘Chief Justice Zondo calls for independent judiciary,’

SABC ‘Chief Justice Zondo calls for independent judiciary,’ (08/12/2023) <https://www.youtube.com/watch?v=BeBU8Df8Gsw> accessed on 25/12/2023

Sherman, ‘A look at the revived allegations against Justice Kavanaugh’

Sherman M, ‘A look at the revived allegations against Justice Kavanaugh’ (16/09/2019) <https://apnews.com/article/impeachments-brett-kavanaugh-christine-blasey-ford-supreme-court-of- the-united-states-deborah-ramirez-0ab183dbb4474c58b2baee739c7d92ae> accessed on 25/12/2023

Sibanda, ‘Jacob Zuma sentence a triumph for the rule of law, but dissenting judgment provide ammo for supporters’

Sibanda OS, ‘Jacob Zuma sentence a triumph for the rule of law, but dissenting judgment provide ammo for supporters’ (Daily Mavericks 29/06/2021) <https://www.dailymaverick.co.za/opinionista/2021-06-29-jacob-zuma-sentence-a-triumph-for-rule-of-law-but-dissenting-judgments-provide-ammo-for-supporters/> accessed on 30/07/2022

Smith-Spark and Sevenzo, ‘Kenya Supreme Court nullifies presidential election, orders new vote’

Smith-Spark L and Sevenzo F, ‘Kenya Supreme Court nullifies presidential election, orders new vote’, (02/09/2017) <https://edition.cnn.com/2017/09/01/africa/kenya-election/index.html> accessed on 03/08/2022

South Africa Government, ‘Judicial system’

South Africa Government, ‘Judicial system’ <https://www.gov.za/aboutgovernment/judicial-system> accessed 28 February 2022

South African Government, ‘Minister Ronald Lamola, Office of the Chief Justice Dept. Budget vote

South African Government, ‘Minister Ronald Lamola, Office of the Chief Justice Dept. Budgetvote 2023/2024,’ <https://www.gov.za/news/speeches/minister-ronald-lamola-office-chief- justice%C2%A0dept-budget-vote-202324-09-may-2023> Accessed on 15/03/2024.

South African Government, ‘National Legislature (Parliament)’

South African Government, ‘National Legislature (Parliament) <https://www.gov.za/about-government/government-system/national-legislature-parliament#:~:text=Parliament%20is%20the%20legislative%20authority,are%20open%20to%20the%20public.> accessed on 01/04//2022

Summary and Explanation of the criteria and guidelines used by the JSC when consideringcandidates for judicial appointment

Summary and Explanation of the criteria and guidelines used by the JSC when considering candidates for judicial appointment. Available at <https://www.lssa.org.za/wp- content/uploads/2023/05/20230417-Criteria-for-Judicial-Appointment-JSC-Approved.pdf> accessed on 04/02/2024

Sustainable governance indicators, Rule of law- ‘To what extent does the process of appointing (supreme or constitutional court) justices guarantee the independence of the judiciary?’

Sustainable governance indicators, Rule of law- 'To what extent does the process of appointing (supreme or constitutional court) justices guarantee the independence of the judiciary?'<https://www.sgi-network.org/2022/Robust_Democracy/Quality_of_Democracy/Rule_of_Law/Appointment_of_justices > Accessed on 30/11/2023.

Suzman Foundation, 'In the Interest of Justice: Reform of the Judicial Service Commission'

Suzman H Foundation, 'In the Interest of Justice: Reform of the Judicial Service Commission,'<https://hsf.org.za/publications/special-publications/hfs-report-reform-of-the- jsc.pdf> Accessed on 15/06/2024

Swart, 'Independence of the Judiciary'

Swart M, 'Independence of the Judiciary' (*Oxford Constitutions March 2019*) <https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e339#law-mpeccol-e339-div1-6> accessed 28/03/2022

Tanui, 'Proposed Judiciary Ombudsperson under BBI Will Entrench Executive Control: Maraga'

Tanui C, 'Proposed Judiciary Ombudsperson under BBI Will Entrench Executive Control: Maraga' (*Capital FM News 11/12/2020*) <https://www.capitalfm.co.ke/news/2020/12/proposed-judiciary-ombudsperson-under-bbi-will-entrench-executive-control-maraga/> accessed 28/02/2022

Taylor, 'How the Army is swallowing the Ugandan State'

Taylor L, 'How the Army is swallowing the Ugandan State,' (15/08/2022) <https://foreignpolicy.com/2022/08/15/uganda-museveni-military-army-state-power/> accessed on 05/02/2023

The Austrian Parliament, 'The separation of powers, why is it necessary?'

The Austrian Parliament 'The Separation of Powers – Why Is It Necessary?' <https://www.parlament.gv.at/ENGL/PERK/PARL/POL/ParluGewaltenteilung/index.shtml> accessed 12/12/2022

The East African, 'Kenyan Court of Appeal Stops President Ruto's housing Levy'

The East African, 'Kenyan Court of Appeal Stops President Ruto's housing Levy' (26/01/2024) <https://www.theeastafrican.co.ke/tea/news/east-africa/court-of-appeal-stops-ruto-from-collecting-housing-levy-4504162> accessed on 30/01/2024

The Editors of Encyclopaedia Britannica 'Jamhuri day',

The Editors of Encyclopaedia Britannica 'Jamhuri day', <https://www.britannica.com/topic/Jamhuri-Day> accessed on 24/09/2022

The Guardian, 'Supreme Court does it Deliver Justice?'

The Guardian 'Supreme Court does it Deliver Justice?' (25/11/2011) min 10:30 – 10:50, available at <https://www.theguardian.com/law/video/2011/oct/25/supreme-court-deliver-justice-video> accessed on 23/11/2022.

The Guardian, ‘South African court rules failure to detain Omar al-Bashir was ‘disgraceful''

The Guardian, South African court rules failure to detain Omar al-Bashir was ‘disgraceful',’(16/03/2016) <https://www.theguardian.com/world/2016/mar/16/south-african-court-rules-failure-to-detain-omar-al-bashir-was-disgraceful> Accessed on(27/10/2022)

The Guardian, ‘Supreme Court: does it Deliver Justice?’

The Guardian, ‘Supreme Court: does it Deliver Justice?’ (25/11/2011) <https://www.theguardian.com/law/video/2011/oct/25/supreme-court-deliver-justice-video> accessed on 23/11/2022

The Independent, ‘Army court has no power to try civilians – Constitutional court’

The Independent, ‘Army court has no power to try civilians – Constitutional court,’ (20/12/2022) <https://www.independent.co.ug/army-court-has-no-power-to-try-civilians-constitutional-court/> accessed on 10/02/2023

The Judicial Learning Center, ‘The constitution,’

The Judicial Learning Center, ‘The constitution,’<https://judiciallearningcenter.org/the-constitution/> Accessed on 30/11/2023

The Kenyan Judiciary, ‘Judiciary Fund Operationalised’

The Kenyan Judiciary, ‘Judiciary Fund Operationalised,’ (17/08/2022) <https://judiciary.go.ke/judiciary-fund-operationalised/> Accessed on 06/02/2024.

The law, ‘Transformative Constitutionalism,’

The law, ‘Transformative Constitutionalism,’ (17/06/2021) <https://thelawexpress.com/transformative-constitutionalism> accessed on 29/12/2023.

The Monitor Newspaper, ‘Election of Kabaka Muteesa as president of Uganda,’

The Monitor Newspaper, ‘Election of Kabaka Muteesa as president of Uganda,’ (01/08/2021) <https://www.monitor.co.ug/uganda/special-reports/uganda-50/election-of-kabaka-muteesa-as-president-of-uganda-in-1963-1522190> accessed on 01/08/2022

The Presidency Republic of South Africa, ‘President Ramaphosa Affirms Removal of Judges Hlophe and Motata,’

The Presidency Republic of South Africa, ‘President Ramaphosa Affirms Removal of JudgesHlophe and Motata,’ <https://www.thepresidency.gov.za/president-ramaphosa-affirms-removal-judges-hlophe-and-motata> accessed on 12/06/2024.

The Standard, ‘JSC Recommends Suspension of High Court Judge Said Chitembwe

The Standard, ‘JSC Recommends Suspension of High Court Judge Said Chitembwe, https://www.standardmedia.co.ke/national/article/2001444634/jsc-recommends-suspension-of-justice-said-chitembwe> accessed on 10/04/2024

Uganda Legal Information Institute, ‘Constitutional Petition’

Uganda Legal Information Institute, ‘Constitutional Petition’ (Ugandan Judiciary 07 February 2020) <https://ulii.org/ug/judgment/court-appeal-uganda/2020/31> accessed 22 March 2022

UK judiciary, ‘Independence from what and whom?’

UK judiciary, ‘Independence from what and whom?’<https://www.judiciary.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/independence/> accessed on 24/01/2022

UNHCR, ‘Uganda: UN Expert concerned about proceedings against Supreme Court Justice Kisaakye,’

UNHCR, ‘Uganda: UN Expert concerned about proceedings against Supreme Court Justice Kisaakye,’ 31/03/2023 <https://www.ohchr.org/en/news/2023/03/uganda-un-expert- concerned-about-proceedings-against-supreme-court-justice-kisaakye> accessed on 15/04/2024.

United Nations Human Rights office, ‘The basic principle on the independence of the judiciary.’

United Nations Human Rights office, ‘The basic principle on the independence of the judiciary.’ <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary> accessed on 11/11/2022

Voice of America, ‘Kibaki Wins 2nd Term in Kenya's Election; Riots and Protests Greet Announcement,’

Voice of America, ‘Kibaki Wins 2nd Term in Kenya's Election; Riots and Protests Greet Announcement,’ (27/10/2009) <https://www.voanews.com/a/a-13-2007-12-29-voa29-66813692/256123.html> accessed on 03/08/2022.

Wallis and Nguyen ‘Opposition leads Kenyan election count’

Wallis D and Nguyen K, ‘Opposition leads Kenyan election count’ (Reuters, 28/12/2007)<https://www.reuters.com/article/us-kenya-election-idUSL27107920071228>(accessed on 29/07/2017)

Wesaka, ‘Lack of respect for court orders worrying,’

Wesaka A, ‘Lack of respect for court orders worrying,’ (19/03/2021) <https://www.monitor.co.ug/uganda/oped/commentary/lack-of-respect-for-court-orders-worrying-3328724> Accessed on 06/01/2024

Wohl, ‘The Role of Courts in Our Society’

Wohl A, ‘The Role of Courts in Our Society’*(American Bar Association 01 June2017)* <https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2016-17-vol-42/vol-42-no-3/introduction-the-role-of-courts-in-our-society/> accessed on 10 October 2022

World Justice Project, ‘What Is the Rule of Law?’

World Justice Project, ‘What Is the Rule of Law?’ <https://worldjusticeproject.org/about-us/overview/what-rule-law> accessed 10/10/2022

Zeits, ‘Supreme Court has Never Been Apolitical’

Zeits J, ‘Supreme Court has Never Been Apolitical,’ (04/03/2022)<https://www.politico.com/news/magazine/2022/04/03/the-supreme-court-has-never-been-apolitical-00022482> accessed on 10/06/2023