IAA Journal of Arts and Humanities 11(2):31-37, 2024. www.iaajournals.org
©IAAJOURNALS ISSN: 2636-7297
https://doi.org/10.59298/IAAJAH/2024/11.3137.33 IAAJAH:11.23137

Assessment of the role of Judicial Activism in Human Rights Matters in Uganda

Akiteng Martha

School of Law, Kampala International University, Uganda

ABSTRACT

The judiciary plays a great role in preserving and promoting human rights through judicial activism. Globally, Judicial Activism has cut across all constitutional affairs in the present times, especially regarding the protection of fundamental human rights. This article assesses the role of judicial activism in human rights matters in Uganda. The article revealed that the courts have always taken cognizance of each case and laid down various judgments to protect the basic human rights and constitutional rights of every member of society. On this note, the article calls for the need to establish a balance between judicial and executive institutions. This will enable our honorable judges not to cross their limits in the name of judicial activism and not to try to take over the functions of other organs of administration. Judicial pronouncements must respect the boundaries that separate the legislature, executive, and judiciary. In other words, the judiciary should be independent and free to exercise its powers but should also respect the organs of the state and harmonize the relationship between the people and the state by upholding justice at all times in their judgments.

Keywords: Citizens, Courts, Human rights, Judicial activism, Organs of government.

INTRODUCTION

Judicial activism is a term that refers to courts making decisions partially or fully based on the judge's considerations besides existing laws. It refers to court rulings made by judges based on their political or personal views while presiding over cases. In constitutional matters, judicial activism can be seen where judges make decisions on cases of a constitutional nature[1]. The judicial system of Uganda is authorised by the Ugandan constitution of 1995 to administer justice by providing courts with the power and authority to do so within the boundaries of the law[2]. However, where the law tends to be ambiguous or lacking in specific directions as applied to a particular case, the court system is also responsible for interpreting the laws and making decisions as they think appropriate[3]. The judges as the exponents of a written law and as representatives of the royal found of Justice, were regarded in a peculiar sense as the "depositaries or living oracles of the law[4]." This is clearly explaining the power of judges in court proceedings in which they are allowed by law to make decisions as they deem fit in a particular case. This article assesses the role of judicial activism in dealing on constitutional matters in Uganda.

Meaning of Judicial Activism

It is easy to understand why there is no agreement regarding the meaning of judicial activism. First, because of individual perceptions, there is scarcely a concept with a consensus definition, and judicial activism is not exempted. Second, and more importantly, due to its often-political colorations, judicial activism evokes strong passions that threaten dispassionate intellectual scholarship. Such passions have led writers to describe the term from the perspective in which they view the particular judicial decision they criticize. This perhaps prompted Justice Scalia to observe that the term, in its current usage, is 'imprecise' and 'nothing but fluff[5]. The Black's Law Dictionary[6] defines judicial activism as a judicial philosophy which motivates judges to depart from strict adherence to judicial precedent in favour of progressive and new social policies which are not always consistent with

the restraint expected of appellate judges. It is commonly marked by decisions calling for social engineering and occasionally these decisions represent intrusions in the legislative and executive matters.

After analysing the usage of judicial activism in judicial opinions, books, and articles in law journals, Kmiec[7] reached five core meanings of judicial activism. These core meanings are explained with:

Invalidation of arguably constitutional actions of other branches. According to Kmiec[7], scholars often describe judicial activism as judicial invalidation of legislative enactment. This assertion was supported by Zarbiyev[8], who argues that judicial activism is any occasion where a court intervenes and strikes down a piece of duly enacted legislation. However, recognising the deficiency of the above definition in cases of unconstitutional pieces of legislation, Kmiec quickly turned to a refined definition offered by Professor Graglia who saw judicial activism as the practice by judges of disallowing policy · choices by other governmental officials or institutions that the Constitution does not prohibit[9]. Ignoring precedent: Judicial activism is also defined in terms of judges ignoring precedents. Kmiec shows two distinctions of judicial activism related to the source of judicial precedents. The first distinction depends on whether the particular precedent is vertical or horizontal, and the other depends on whether the precedent flows from constitutional, statutory, or common law[7].

Judicial legislation: Critics of judicial activism sometimes accuse judges of legislating from the Bench. Judicial legislation within the meaning of judicial activism therefore connotes statutory interpretation in a manner that expands or gives birth to new rules of law[7]. Departure from accepted interpretive methodology: Kmiec explains that wrong use or failure to use the tools of the trade can be branded judicial activism. This is akin to adherence to the principle of stare decisis. Thus, where a judge chooses to follow rules of interpretation different from established rules, she may be accused of judicial activism[7]. Kentridge AJ in S v Zuma[10] captured the difficulty of accepted rules of interpretation when he stated that it is not easy to avoid the influence of one's personal intellectual and moral preconceptions...the Constitution does not mean whatever we might wish it to mean...If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination. Result-oriented judging: The last category of Kmiec's core meanings of judicial activism is, unlike the previous four, endowed with reasonable precision. It involves judicial decisions aimed at achieving specific purposes or defy clear and concrete definition[7].

Fundament Human Rights and Judicial Activism in Uganda

Chapter Four of the 1995 Constitution of the Republic of Uganda contains fundamental human rights and freedoms that are inherent to all human beings. These are basic human rights that are universal, interconnected and are all equally important. Article 20(1) of the Constitution states that Fundamental rights and freedoms are inherent and not granted by the state**[11]**. This means that the State does not grant or take them away. Uganda's extremely unbalanced history regarding fundamental rights is something that the country has fought to shake off. Post-independence Uganda has been fraught with major abuses of fundamental rights and freedoms concerning life, expression, freedom, and property. The 1995 Constitution of the Republic of Uganda recognizes, protects, and guarantees under Chapter 4 the Fundamental Rights and Freedoms of the individual. Article 50 of the Constitution provides a right to seek legal redress in case of abuse of these fundamental rights and freedoms and to enforce them. It is important to note that to proceed under Article 50, the matter must relate directly to a fundamental human right in the Constitution[12].

Constitutional protection under Chapter Four includes the right to own and enjoy property under Article 26(1) and the right to claim compensation for deprivation of property. The Constitution of the Republic of Uganda guarantees the right to protection of property. There should be peaceful enjoyment of property and deprivation of property should be subject to certain conditions. In order to be compatible with the law any interference with ownership of property must strike a fair balance between the demands of the general interest of the community and the requirements of protection of the fundamental rights and freedoms. A taking of property without paying an amount reasonably related to its value will normally constitute a disproportionate interference that cannot be justified under the Constitution[2].

In case property such as land is taken away it must be done in accordance with the law and adequate compensation must be paid for it. To have a property interest protected by the state a person must have a legitimate claim of entitlement to it. Historically, in Uganda, as a result of the political instability, loss of property was rife, and redress from courts for recovery or to seek compensation was not guaranteed as the government rested mainly on the political leader at the time. Article 50 (1) of the Constitution provides a remedy by way of application to a competent court for redress including compensation for a person who claims that a fundament right or freedom under the Constitution has been abused. It also provides under Article 50(4) that the Rules Committee shall make procedural rules to provide for enforcement of fundamental rights and freedoms[11].

In the case of Bukenya Church Ambrose v. Attorney General[13], the court held that the Committee did not have the mandate to make rules, hence the rules were ultra vires. The court stated further that in the absence of rules made by the Parliament, Article 50(1) was not in abeyance as Article 274 of the Constitution saved all existing laws before the coming into force ofthe Constitution. Article 273 read with S. 48 of the Judicature Act (Cap. 13) allows the preservation and continued application of the Fundamental Rights (Enforcement Procedure) Rules S.I No. 26 of 1992 as the Relevant law for the procedure for enforcement of Fundamental rights and freedoms[14].

The Procedure for doing so is by Notice of Motion under Rule 3(1) of the Fundamental rights and freedoms (enforcement procedure) Rules 26 of 1992. Following the coming into force of the 1995 Constitution, these rules continue to have effect by virtue of Article 273 which preserves the existing law subject to modifications as to bring them into compliance with the 1995 Constitution. The 1992 Rules were further saved under Section 48(1) (d) of the Judicature Act (Cap. 13) and therefore continue to have full force and effect[11]. In National Association of Professional Environmentalists v. AES Nile Power LTD[15], the Court was quite clear that the correct procedure for the Plaintiffs to have followed in that case was by notice of motion as prescribed under the 1992 Rules. However, under Rule 4(1) of the 1992 rules there is a limitation period of 30 days for bringing an action. The High Court of Uganda in Francis Tumwekwasize & ors Vs. AG[16], the court held that Article 50 provides a relaxed procedure for the enforcement of fundamental rights and freedom. With the change in governments in 1986, a semblance of political stability was restored to Uganda with promises of order and freedom. The Expropriated Properties Act provided a remedy for all non-Asians who had been expelled in 1972 by the government of President Idi Amin Dada to recover their properties which were taken over by government[17].

Justice Okumu Wengi stated in the case of Chimanlala Bhailbhai Patel Vs. the Attorney General[18], that a right to a claim for compensation is a constitutional right to property and claim for compensation may be brought notwithstanding the statutory limitations of the Civil Procedure (Limitation) Miscellaneous Applications Act Cap 70 Laws of Uganda. The High Court of Kenya in the case of Weheire Vs. Attorney General[19], stated that there is no limitation period within which to bring actions to enforce fundamental rights and freedoms. In Rwanyarare vs. Attorney General[20], the Court found that the Civil Procedure & Limitation (Miscellaneous Provisions) Act (Cap. 71) did not apply to actions to enforce human rights. The Court found that the 1992 Rules create a specific procedure to be followed and they make only the Civil Procedure Act applicable. This position has been further affirmed by the court in in the case of Green watch Vs. Attorney General[21]. Article 50 prescribes the forum for enforcement of human rights actions as a "competent court". The expression is not defined but the 1992 Rules state that the application shall be filed in the High Court. In Ismael Serugo vs. KCC & A.G[22], the Supreme Court ruled that in the course of handling Article 137 matters, the Constitutional Court could deal with Article 50 matters. However, unless the action requires interpretation of the Constitution, the Court of First Instance should be the High Court. Therefore, as stated by the Court in the case· of Bukenya Church Ambrose Vs Attorney General[13], the

Constitution is not in abeyance and the 1992 Rules for enforcement of Fundamental rights and freedoms is still applicable. In the case of Charles Onyango Obbo & Another Vs. Attorney General[23], the issue on appeal was whether section 50 of the Penal Code Act, which makes publication of false news a criminal offence contravened the said 15 Article 29 of the Constitution. On page 10 of his lead judgment, Mulenga, J.S.C had this to say:

" *... it is evident that the right to freedom of expression extends to holding, receiving, and imparting all forms of opinions, ideas, and information. It is not confined to categories, such as correct opinions, sound ideas, or truthful information. Subject to limitation* 20 *under Article 43, a person's expression or statement is not precluded from constitutional protection simply because it is thought by another or others to be false, erroneous, controversial, or unpleasant. Everyone is free to express his or her views. Indeed, the protection is most relevant and required where a person's views are opposed or objected to by society or any part thereof as "false" or "wrong".*

Additionally, in light of *Article 43*, the right to freedom of expression is restricted by public interest. The decision of the Supreme Court in the case of *Zachary Olum* & *Another vs. the Attorney General*[24], gives an insight into the case at hand. In this particular case, the petitioners brought the petition under *Article 137* of the Constitution seeking declarations, *inter alia*, that *section 15* of the *National Assembly (Powers and Privileges) Act, Cap 249*, which prohibits members of Parliament from using evidence of proceedings in the Assembly having first to obtain permission is unconstitutional. The question before the court was whether that restriction or the condition rendered the provisions of *section 15* unconstitutional. Manyindo, D.C.J as he then was, held that the import of *Articles 41* and *43* of the Constitution is that fundamental rights and freedoms conferred on individuals in Chapter 4 of the Constitution have to be enjoyed subject to the law of Uganda, in so far as such law imposes reasonable restrictions. The Hon. Justice also held that individual rights are protected but they can never override the public interest, state security, and sovereignty[24]. Thus, it is generally accepted that laws may restrict actions that involve the exercise of constitutionally protected rights. The test 15 here is an objective one. The application of the proper test must be considered within the context of the subject matter or circumstances of each case. In this respect, courts should endeavour to apply not only the letter of the law but also the spirit.

The Universal Declaration of human rights, 1948[25] contains a provision to the effect that "*every individual and every organ of the society shall strive by teaching and education to promote respect for human rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance".*

As Ugandans, we always ought to remember that it was regrettable that a former Prime Minister of Uganda lost his life in the cause of human rights including many citizens and members of the legal profession. That is because fighting for human rights and defending the rights of the people sometimes tents to become costly, especially in instances where the independence of the judiciary is crossed by different organs of government that want the courts to side with them at the expense of the rights of the common person or people[26].

In *constitutional obligations in developing countries*, Mujuzi[27] wrote that in reality, the courts tended to uphold the government's stand in almost all the cases. In considering the actual suspension or abolition of the constitutions themselves, the courts came to be guided by new methods of changing legal norms. With all the guarantees prescribed by the constitution for the independence and power of the judiciary and the protection of judiciary and the protection of individual rights and freedoms, there is always the hope that the constitution and the tendency or punish the violators.

Additionally, the Courts of Uganda have been mindful of their duty to guard the Constitution from violation by agents of the state. In the case of Uganda v Kalawudio Wamala[28], the accused Kalawudio Wamala was taken into Police custody on 13th September 1994, long after 48 hours after his arrest. Egonda Ntende J had this to say,

"The Constitution has set a new threshold for all organs and agencies of government and persons, including men and women serving in those organs and agencies. It positively

commands all agencies and organs of government to respect uphold and promote the fundamental rights and freedoms set forth in the Constitution. This implies in my view that each officer is beholden, in carrying on his duties, to respect, or uphold and promote those rights and freedoms. Where an officer of an organ or agency of government fails to respect or uphold or promote the rights and freedoms set forth in the Bill of Rights (chapter 4) such officer and consequently the organ oropenly he/she belongs to is in breach of Article 20(2) of Constitution".

It is clear from the above quote that the High Court, was already very much in the forefront in guarding those human rights and freedoms enshrined and entrenched in our Constitution.

CONCLUSION AND RECOMMENDATION

The judiciary plays a great role in preserving and promoting human rights through judicial activism. Uganda being a country standing on constitutional and democratic governance has to practice and uphold the rule of law. Judicial Activism has cut across all constitutional affairs in the present times most especially in regard to protection of the fundamental human rights. Be it the case of bonded labour, illegal detentions, torture and maltreatment of women, the implementation of various provisions of the constitution, environmental problems, and health among others. The courts have always taken cognizance of each case and laid down various judgments to protect the basic human rights and constitutional rights of each and every member of society. It is on this note that the article calls for the need to establish a balance between judicial and executive institutions. This will enable our honorable judges not to cross their limits in the name of judicial activism and not to try to take over the functions of other organs of administration. Judicial pronouncements must respect the boundaries that separate the legislature, executive, and judiciary. In other words, the judiciary should be independent and left free to exercise its powers but should also respect the organs of the state and should harmonize the relationship between the people and the state by upholding justice at all times in their judgments.

REFERENCES

1. judicialactivism, https://www.law.cornell.edu/wex/judicial_activism
2. Rosenne, S.: 2 The Establishment and Constitution of the Court. In: The Law and Practice of the International Court, 1920-2005 (4 vols). pp. 43–96. Brill Nijhoff (2006)
3. Kischel, U.: The Context of Common Law. In: Kischel, U. and Hammel, A. (eds.) Comparative Law. p. 0. Oxford University Press (2019)
4. Blackstone: Introduction to the Laws of England | Online Library of Liberty, https://oll.libertyfund.org/pages/blackstone-introduction-to-the-laws-of-england
5. Judicial activism | Definition, Types, Examples, & Facts | Britannica, https://www.britannica.com/topic/judicial-activism
6. Black's Law Dictionary - Free Online Legal Dictionary, https://thelawdictionary.org/
7. Kmiec, K.: The Origin and Current Meanings of Judicial Activism. California Law Review. 92, (2004). https://doi.org/10.2307/3481421
8. Zarbiyev, F.: Judicial Activism in International Law—A Conceptual Framework for Analysis. Journal of International Dispute Settlement. 3, 247–278(2012). https://doi.org/10.1093/jnlids/ids005
9. 'Judicial Activism' in Europe: Not a Neat and Clean Fit by Nausica Palazzo :: SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3838727
10. S v Zuma and Others (CCT5/94) [1995] ZACC 1; 1995 (2) SA 642; 1995 (4) BCLR 401 (SA); 1995 (1) SACR 568; [1996] 2 CHRLD 244 (5 April 1995), https://www.saflii.org/za/cases/ZACC/1995/1.html
11. Constitutional history of Uganda, https://constitutionnet.org/country/uganda
12. Constitution & Government | Uganda National Web Portal, https://www.gou.go.ug/about-uganda/uganda-glance/constitution-government
13. Bukenya Church Ambrose v Attorney General (Constitutional Petition No. 26 of 2010) [2011] UGCC 5 (20 March 2011). (2011)

14. Judicature (Fundamental and Other Human Rights and Freedoms) (Enforcement Procedure) Rules, 2019. (2019)
15. NAPE VS AES Nile Power, https://greenwatch.or.ug/judicial-decisions/nape-vs-aes-nile-power
16. Francis Tumwekwasize & 2 Ors v Attorney General (HCT-00-CV-MC-0036-2009) [2010] UGHC 36 (22 March 2010). (2010)
17. Expelled Ugandan Asians fight for seized properties 50 years on | Reuters, https://www.reuters.com/article/markets/commodities/expelled-ugandan-asians-fight-for-seized-properties-50-years-on-idUSL8N32E1ZA/
18. Chimanlal Bhailalbhai Patel v Attorney General (Civil Suit No.105 of 2002) [2004] UGHC 7 (12 February 2004). (2004)
19. Wachira Weheire v. Attorney General | Global Health & Human Rights Database, https://www.globalhealthrights.org/wachira-weheire-v-attorney-general/
20. James Rwanyarale and Anor v Attorney General (Constitutional Petition No. 11 of 1997) [1997] UGCC 1 (18 December 1997). (1997)
21. Greenwatch Ltd v Attorney General of Uganda - Africa Freedom of Information Centre, https://www.africafoicentre.org/wpdmpro/greenwatch-ltd-v-attorney-general-of-uganda/
22. Serugo v Kampala City Council & Another (Constitutional Appeal No. 2 of 1998) [1999] UGSC 23 (11 June 1999). (1999)
23. Charles Onyango Obbo and Anor v Attorney General [2004] UGSC 1 (10 February 2004). (2004)
24. Zachary Olum & Anor v Attorney General (Civil Application No. 1/04) [2004] UGCA 12 (29 July 2004). (2004)
25. Universal Declaration of Human Rights | UnitedNations, https://www.un.org/en/about-us/universal-declaration-of-human-rights
26. Judiciary Holds 6th Benedicto Kiwanuka Memorial Lecture, https://judiciary.go.ug/data/news/1341/644/Judiciary%20Holds%206th%20Benedicto%20Kiwanuka%20Memorial%20Lecture.html
27. Mujuzi, J.D.: Reconciling customary law and cultural practices with human rights in Uganda. Obiter. 41, 239–256 (2020)
28. Uganda v Kalawudio Wamala (Criminal Session Case No. 442 of 1996) [1998] UGHC 5 (6 November 1998). (1998)

CITE AS: Akiteng Martha (2024). Assessment of the role of Judicial Activism in Human Rights Matters in Uganda. IAA Journal of Arts and Humanities 11(2):31-37.
https://doi.org/10.59298/IAAJAH/2024/11.3137.33