NIRJ
NKUMBA INTERNATIONAL RESEARCH JOURNAL
Nkumba International Research Journal (NIRJ)
Volume 2 Issue1,May 2022

An inquiry into the independence of the Director of Public Prosecutions in Uganda

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Abstract

This paper inquired into whether or not the incumbent Constitution of Uganda contains sufficient guardrails to stymie infringement upon the independence of the Director of Public Prosecutions (hereinafter "the DPP") in Uganda.

The paper employed a qualitative approach and relied upon the text analysis method of inquiry. It, therefore, reviewed the text of the incumbent Constitution as to the independence of the DPP. It also gleaned the literature regarding a constitutional climate that helps or hurts the independence of public prosecutors, to fortify the findings of the inquiry.

The paper determined that de jure, the Constitution provides for the independence of the DPP, but also ascertained that de facto, the DPP is not independent due to a flawed mechanism of the DPP's appointment, the absence of a life tenure or a single-term tenure for the DPP, and the fact that the DPP can be removed or re-appointed by the unilateral will of the president.

The paper offers proposals for constitutional reform to strengthen the independence of the Office of the DPP in Uganda including that the Parliament of Uganda should amend the Constitution to provide for the appointment of the DPP by a body of prosecutors or lawyers in lieu of politicians. Or the DPP, upon appointment by the President should serve a fixed term that is not renewable. The paper also recommends that the DPP should only take over the prosecution of a criminal case he or she did not institute, with the concurring will and consent of an individual or entity that initiated it, and only so to continue the case to its logical conclusion.

Keywords: *DPP Uganda, prosecutorial independence, separation of powers, unitary executive, Uganda constitutional commission, Odoki Commission.*

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Introduction

The value of public prosecution cannot be overemphasised, not least because public prosecution is an integral part of any country's justice system. In conjunction with the police and judges, prosecutors are vital bastions of the rule of law and justice (Voigt & Wulf, 2019). Prosecutors are situated in the middle of the ecosystem of justice; between detectives of crime (the police) on whom they rely to obtain inculpating evidence, and the leviers of sanction against criminal violations (the judges) who prosecutors feed such evidence to make a judgment to convict or acquit an accused individual. Their position confers on prosecutors the right to choose whether to prosecute a criminal violation or to abstain from doing so, (Luna & Wade, 2012c), depending on whether in their judgment a case merits prosecution or not. Because they render judgement as to which case to prosecute and which one not to, prosecutors have earned the moniker 'judge by another name'(Weigend, 2012).

Owing to the vital function they perform in a criminal justice system, the independence of prosecutors from interference, direction, and control is indispensable; otherwise, they risk getting condemned to being agents

of injustice. Yet, while it is not controversial that much scholarship has been accorded to the police and the judiciary and their relevance to the rule of law, public prosecution has somewhat been a scholarly outlier (Voigt & Wulf, 2019).

In Uganda, the independence of the chief public prosecutor viz. the DPP has not received the scholarly attention it deserves, as a literature survey on the subject returns no result on a systematic study respecting the independence of the DPP in the country.

To reference a sample of studies, Bakibinga offered an analysis of the role of prosecutors in preventing torture and ill-treatment of accused persons and therein discussed the mandate of the Office of the DPP in Uganda (Bakibinga, 2018). However, he fell short of examining the Office's independence, only mentioning *en passant* that the DPP is independent and is not subject to directions or control of any person or authority in the performance of his or her functions.

In another scholarly attempt, Bakibinga examined the constitutional provisions for the independence of the DPP. However, in that effort, he pivoted to the Bahamas and only made passing references to the Ugandan context (Bakibinga, 2018). Bakibinga, therefore, did not examine the independence of the DPP in Uganda thereby leaving a knowledge gap about the subject.

Tumwine also attempted an analysis of the DPP in Uganda. However, he focused his study on the role of the DPP in the administration of criminal justice in Uganda wherein he analysed the specific functions of the DPP to the end of justice, not the independence of the DPP (Tumwine, 2017). Hence, too, Tumwine left a knowledge lacuna.

This paper, therefore, aimed to fill this knowledge gap. The paper focused on examining the guardrails in the current constitutional order and whether they improve or impair the independence of Uganda's DPP. This is because, in the absence of independence and if under the supervision and control of political leaders, the DPP can be suffocated by undue influence to shield the allies and friends of individuals who exercise control and supervision over him or her from criminal prosecution and/or to persecute their foes and opponents (Weigend, 2012), and in effect render justice a pantomime.

Structure of the paper

The paper is organised as follows: It offers a review of the philosophy undergirding criminal justice; a review of the theory underpinning prosecutorial independence; a historical review of the development and need for public prosecutions; and a contextual review of the independence of the DPP in Uganda. It then offers a statement of the problem; describes the methods and materials used, and gives the findings and the attending discussion. Last but not least, it offers recommendations for reform.

Philosophical Review

The fact that public prosecution is sacrosanct in both nexus and praxis is not controversial. Nor does a proposition that public prosecution is foundational for constructing and continuing a just society lack grounding in good reason. Hobbes (1651) and Locke (1689), although each proposed a constitutional vision that was in diametrical opposition to the other's, regarding how a state that's neither anarchistic nor unjust ought to be constituted—nonetheless had a convergence of insight. They concurred that making and sustaining such a state behoves both the erection of a preponderant power, to wit: a government that is capacitated to stymie and even sanction individuals who act injuriously against others.

Experience has lent credence to the veracity of the theory that justice is of unquestionable necessity in a civil state and that there ought to be a superior agency that is empowered to act for the cause of justice on behalf and in lieu of persons who may suffer injury that may be visited upon them by others.

This is a true saying then, that the absence of justice is definitional of chaos, violence, and insecurity, in rampancy the likes of which Hobbes describes in his “state of nature”. For the benefit of the unfamiliar, Hobbes’ state of nature is a government-less and lawless dystopia in which every individual suffers a ruinous constancy of violence waged by all against all and in which all are bereft of the concept of justice.

Hence then, justice is a fundament of civility and is foundational to peace, order, and security. In their theories of a civil and just state, Hobbes and Locke had a *consensus ad idem* having to do with the idea that civil, secure, and tranquil living behoves the existence of a legislator to promulgate laws that regulate the behaviour of persons by way of prohibiting one from injuring or dispossessing another of his property and offering remedies to victims and sanctions against violators.

Moreover, the sages referenced above had a concurrence of thought on the idea that laws were useless if they were not enforceable; therefore, they concurred on the point that there was a need for an authority, to besides legislating, execute the laws, and dispense justice—except that they disagreed on whether the powers to legislate, execute and adjudicate ought to be distributed or united. While Hobbes opined that the powers are indivisible, incommunicable or not shared, and inseparable (Hobbes, 1951, pp.127-28) and that powers that are divided mutually destroy each other (ibid, 225); Locke, in contrast, favoured a division of the powers which he styled legislative, executive, and federative (Fairlie, 1923). Whatever their disagreements on whether the powers are divisible or not, Hobbes and Locke agreed that the existence of the law and its execution and adjudication is the cornerstone of a just society.

Since the rule of law is a reasonable and necessary aspect of the functioning of a state, so too public prosecution if uncorrupted moves forward the rule of law and establishes justice. Public prosecution is one element, that, working in tandem with the courts of law and penitentiary institutions, constitutes the justice system.

However, if care is not taken as to the structural alignment of public prosecution and the executive tributary of government, the purpose of public prosecution, namely to execute both impersonally and impartially a state’s penal law, can be defeated. Such a defeat of the purpose of public prosecution may occur if for instance, a public prosecutor is asked or forced by a president or any such authority as may be the head of the executive branch of government, to persecute his or her opponents. Accordingly, the idea that a department or the office of public prosecutions ought to be independent in its prosecutorial function is widely accepted.

Theoretical review

Public Prosecution only serves its intended end, namely, the service of justice, when and if a public prosecutor makes independent prosecutorial decisions uninfluenced and undirected; and conversely fails in that effort if prosecutorial decisions are directed or influenced. Thus, the theory of prosecutorial independence enjoins that a person or institution empowered and burdened by a constitution to contribute to the creation and maintenance of a just society must be liberated from legislative, judicial, and executive control and direction as regards prosecutorial decision making (Todd, 2020).

However, the theory of prosecutorial independence appears to be at variance with the theory of separation of powers, which places the power to execute all law in the hands of the executive and eviscerates the legislature and judiciary from the same. This is because, under the theory of separation of powers, the prosecution of criminal laws is part of the function of executing laws falling within the orbit of the executive branch of government. Thus, the prosecutorial independence theory presents an intellectual headache to resolve in the light of the theory of separation of powers.

Yet, this is not impossible to disambiguate. The theoretical tension is not actually between the theory of separation of powers and the theory of prosecutorial independence, but between the theory of unitary executive and that of prosecutorial independence. For the theory of separation of powers is a “parent” theory that anchors the theory of prosecutorial independence since there is no prosecution to talk about in the absence of the executive branch of government which is a creature of separation of powers.

It is, therefore, unconscionable to reason that a "parent" theory which is a predicate can be in tension with an off spring theory, as it were, which is a consequent. If there were such tension, it would self-resolve because a consequent owes its existence to a predicate and, therefore, the two can never be in tension in such a relationship.

Instead, the theory of unitary executive is one which truly is in conflict with the prosecutorial independence theory. Both are offspring (so to speak) theories of the theory of separation of powers. According to the unitary executive theory, the separation of the executive branch from the other branches by default also prevents any department that performs the functions of the executive branch from acting independently. All functions and institutions which have the duty of executing the law must be hierarchically ordered in a manner that places them under the care of the head of the executive branch (Calabresi, & Saikrishna, 1994).

The unitary executive theory, in the terms mounted by Calabresi and Prakash, relates to the idea that in a democratic structure of government, in which power is dispersed among three branches of government, it is the executive branch that is solely and exclusively vested with the duty to execute laws and in presidential constitutional systems such as the United States, the executive power is vested in the president who the US Constitution requires to take care that the laws are faithfully executed (Driesen, 2020).

Thus, the fact that, according to Calabresi and Saikrishna (1994), a constitution confers the legislative power on the legislature and vests the judicial power in the judiciary, also bestows the executive power upon the executive branch. Therefore, if executive power is vested in the president by the constitution, then by infection also, the executive branch is constitutionally under presidential control (Strauss, 1984). Public prosecution, according to the unitary executive theory, because it is part of the function of law execution, has to correspondingly be under the control of the president in presidential systems.

However, a president, if he or she were to control and direct public prosecution, would be shoved into a climate in which he or she, whenever it is beneficial to him or her whether personally or politically, is granted undue leave to direct the prosecution of political opponents or personal enemies, and in the same go, to abstain from prosecuting those in his or her favour. This would in effect subvert justice. This is a serious flaw in the theory of unitary executive vis-à-vis justice.

There is, therefore, a unique aura in granting leave to a public prosecutor to possess the discretionary power to choose which cases merit prosecution and which ones do not. The theory of prosecutorial independence is, therefore, valid in such circumstances. That a public prosecutor (although he or she may be under the executive branch) should make independent prosecutorial choices is beneficial for shielding the function of public prosecution from political abuse. Yet, that is an end that is impossible to pursue or achieve if and when politics is given an inch of territory in prosecutorial decision-making.

When such occurs, not only is the function of public prosecution politicised; it also becomes weaponised in that those who wield political power turn the noble function into a tool to use, not against criminals but political opponents—and also use it as an implement to protect the allies of a politician with prosecutorial power or the power to control prosecutorial decision making. For instance, a study by Nasiru affirmed that under the dictatorship of Yahya Jammeh of the Gambia, the Attorney General's control of the DPP's prosecutorial functions and the presidential control of both the Attorney General and the DPP through appointment and dismissal inspired rampant prosecution of individuals for political reasons (Nasiru, 2021).

Moreover, the danger with the unitary executive theory does not only consist in the political persecution of opponents but also politically-motivated prosecutorial favouritism whereby a political ally of the prosecutorial decision-makers is likely to be shielded from prosecution; hence jeopardising the rule of law and creating an unjust society.

For instance, in Kenya, before the 2010 constitutional order that took away prosecutorial functions from the Attorney General, who serves at the pleasure of the president, prosecutions were heavily influenced by

politics. Nasiru observes that the arrangement resulted in the protective intervention of the Attorney General in favour of government officials including the vice president and president at the time, who together with others, were implicated in a gold export corruption scandal (Goldenberg scandal) by taking over and discontinuing a corruption case instituted by the Kenya Law Society as a private prosecutor, and later only after external pressure reluctantly and with shenanigan, prosecuted the case resulting in delays and no single conviction.

Thus, the function of public prosecution ought to be independent of executive or other interferences and should be for justice, not politics. The theory of prosecutorial independence, then, is sounder than the theory of unitary executive to the extent that it guarantees public liberty, the rule of law, and justice, than the unitary executive theory.

Historical review

The idea that a State needs a public prosecutor has roots in the English and Welsh legal-judicial traditions of the nineteenth century during which the first office of the DPP was first established in 1879 by the Prosecution of Offences Act (Rozenberg, 1987). Prior, prosecutions for criminal offences were carried out initially by private prosecutors and later when the police system was developed, by the police as well as private lawyers (Kurland & Waters, 1959). However, the reliance on private prosecutors on the one hand and the police on the other was inimical to justice. Whereas private prosecutors could only be afforded by those who had the financial capacity to hire one and could due to avarice easily collude with wealthier defendants; police prosecutors were generally incompetent in matters of prosecution (ibid).

Accordingly, justice was elusive in many cases, leading to a concurrence of thought and will among jurists, lawyers, and lawmakers that there was in England a need for a system of public prosecutions supervised by a man (or woman) of higher intelligence who would ensure that persons employed to prosecute criminals do not exceed their duty (ibid) or fail in it; hence the creation of the Office of the DPP in England in 1879. Nonetheless, the DPP in England did not act independently, until the enactment of the Prosecution of Offences Act of 1908, by which the DPP was severed from the Treasury Solicitor (Nasiru, 2021). Thus, the idea that a State should have a public prosecutor as an independent public office has permeated republics that calibrated their legal-constitutional systems to the English system including Uganda.

Contextual review

The office of the public prosecutor in Uganda has existed for as long as Uganda has been an independent state. It was established by the 1962 constitution as “Director of Public Prosecutions”, and in the verbiage of the constitution, it was a public office whose function was to ensure that violations of the criminal laws of the country were punished.

The DPP had the power, if he considered it necessary, to coin and undertake criminal proceedings against any person and before any court in Uganda but the court-martial; take over and continue any prosecution commenced by another person or authority, and discontinue at any stage any criminal proceedings whether instituted by him or not (Constitution of Uganda, 1962-Art. 82 (2) (a); Art. 82(b); Art. 82 (c)).

The 1962 constitution espoused the theory of prosecutorial independence over the theory of unitary executive. The DPP under the 1962 constitutional architecture was independent, at least normatively. Although he would be appointed by the President on the recommendation of the Prime Minister, the DPP was in the execution of the prosecutorial duties burdened on him by the 1962 constitution, shielded from the direction or control of any other person or authority (Constitution of Uganda, 1962- Art. 82 (6)) including from the appointing authority.

Moreover, although the President appointed the DPP in a bipartite manner with the Prime Minister, neither the president nor the Prime Minister was constitutionally permitted to exercise disciplinary control over the DPP (Constitution of Uganda, 1962- Art. 111 (2) (b)). The DPP was also not removable from office by the President, Prime Minister, or any other authority (Constitution of Uganda, 1962- Art.131 (7) (a)). These constitutional

provisions created multi-layered and multi-dimensional protections of prosecutorial independence for the DPP in the 1962 constitutional architecture.

However, in a clawback, the 1967 constitutional architecture disembowelled the idea of prosecutorial independence when it rendered the office of the public prosecutor subservient to the Attorney General, who was a government minister appointed by the president (Constitution of Uganda, 1967). Unlike the 1962 constitutional architecture, the security of tenure of the public prosecutor was not fortified.

The President was invested both with the power to appoint public officers, remove them without asking leave of any person or authority, and exercise disciplinary control over them (Constitution of Uganda, 1967- Art. 104 (1)). Since the DPP was a public office, the chief public prosecutor was by that fact, also under the direct control of the president. Impliedly, the independence of the public prosecutor under the 1967 constitutional configuration was zero.

The rationale for the demise of independent public prosecution was informed by the political dynamics that led to the abrogation of the 1962 constitution and the promulgation of the 1967 architecture. Under the 1962 constitution, executive power was dispersed to different power centres. Prosecutorial power was vested in the DPP with a brick wall, as it were, of constitutional protections from executive encroachment. The power of the investiture of public officers was shared between the President and the Prime Minister. None could singly appoint a public officer, not least the DPP, and none, acting alone or in concert, wielded the power to remove him.

That architecture offered such a constraint on the executive branch that no president wielding executive power could stomach if he had an opportunity to flip the architecture, and such an opportunity presented itself with the 1966 constitutional crisis that resulted in the abrogation of the Constitution and a power grab by Prime Minister Milton Obote. With the newfound power, whatever Obote wanted, Obote obtained with the subsequent constitutions, viz., the 1966 (interim, so-called) Constitution and its successor, the 1967 (Republican, so-called) constitution. Obote, who became President under those constitutions enjoyed vast and the least checked executive power arguably since the colonial era, including the power to control and direct criminal prosecutions. In the circumstances, prosecutorial power was bound to be abused by the executive: possibly to persecute the president's opponents and enemies and/or to abstain from prosecuting his friends and allies.

In 1988, the National Resistance Council enacted Statute No.5, establishing a Constitutional Commission to commence the process of making a new constitution that would replace the 1967 Constitution (Odoki, 1993). The Report of the Commission reveals the public's concern, then, about the DPP subserving another person or authority as it had been the case in the 1967 constitutional architecture, listing the danger of abuse if he or she were made to bend the knee, as it were, to the superior in matters of prosecutorial decision-making. In lieu, the Report of the Commission revealed that Ugandans proposed that the independence of the DPP should be sacrosanct in the new constitutional architecture (ibid).

In 1995, a new architecture was erected with the promulgation of a new Constitution. The DPP was normatively made independent from the direction and control of anybody or authority in the discharge of his or her constitutional burdens (Constitution of Uganda, 1995). The appointment of Uganda's chief public prosecutor entails a tripartite procedure: by the president upon recommendation by the Public Service Commission and after confirmation by Parliament (Constitution of Uganda, 1995- Art.120 (1)).

Statement of the problem

Whereas the role of public prosecution is very critical in the gatekeeping of the rule of law and justice in the democratic universe in general, and Uganda in particular, and whereas the Constitution of Uganda provides for the independence of the DPP—little research or systematic analysis has focused on the DPP's independence in Uganda.

Accordingly, although the DPP in Uganda is independent *de jure* to the extent that the Constitution provides that the institution shall be independent in the execution of its duties from the direction and control of any person or institution; there, however, have been sobering statements and actions attributed to the president regarding prosecutorial decision making, which careen towards Presidential interference in or control of prosecutorial decision making.

For instance, in March of 2021, the *Nile Post* and the *Observer* carried stories, according to which the President promised to ask the DPP to review the cases of some detained youths and to recommend a soft landing for them (Kazibwe, 2021a).

Another red flag is the report by the *Nile Post* that the DPP in November 2021 dropped criminal charges against the President's private secretary, who had been charged with giving false information to the Electoral Commission in a bid to secure jobs for her three relatives in the Commission—and according to the newspaper, the individual gratefully attributed the DPP's act of dropping the charges against her to the President, (Kazibwe, K., 2021b) which gives a ground to suspect that the DPP in Uganda may have acted on the whims of the President.

Although the DPP can theoretically ignore the presidential requests/orders as regards prosecutorial decision making, it is difficult to see how such requests or orders can be ignored when the president has ultimate executive power and is *ipso facto* empowered to appoint and dismiss any member of the executive branch without asking leave. This appears to be a lacuna that may ensure the President's effective colonisation of the DPP and prosecutorial decision making.

Therefore, this inquiry was incentivised by the need to identify the constitutional lacunae and/or clawbacks that might compromise the DPP's *de facto* independence, and to make suggestions for closing them by legislative action.

Specifically, this paper examined the constitutional provisions for the independence of a public prosecutor under the 1995 Constitution. In that regard, the author inquired into the following questions: What guardrails in the Constitution exist to guarantee the independence of the DPP in Uganda? Are they robust?

Methods and Materials

The paper employed a qualitative approach of inquiry and, therefore, hinged upon the text analysis method. On that footing, the paper reviewed the Constitution of Uganda of 1995 and in particular the provisions that careen towards the independence of the DPP. By the same logic, the constitutional provisions that do not tie in with the independence of the DPP were excluded. Moreover, the literature that was related to conditions that help or hurt the independence of public prosecutors, to triangulate and fortify findings, was used; thus, the literature that did not address itself to the conditions that improve or impair the independence of the DPP was excluded

Findings and discussion

This paper sought to examine the normative independence of the DPP under the incumbent constitutional configuration including whether there are guardrails against political meddling and how robust they might be and found out the following.

Not under the direction and control of anybody or authority

The paper determined that under the Constitution, the DPP is normatively not under the direction or control of any person or authority, and thus independent to that extent. This is unlike in the antecedent constitutional architecture, to wit the 1967 constitutional architecture under which, as described earlier, the DPP was subservient and under the direction and control of the Attorney General, a minister and member of the cabinet who served at the pleasure of the president.

Implicitly, the DPP under the 1967 architecture was careened towards prosecutorial dependence on the Attorney General and indirectly on the president. Since the incumbent constitutional order extricates the DPP from the Attorney General and any other person or authority in the performance of its prosecutorial decision-making processes; therefore, to that extent, it may be said to be independent. As Aaken, Salzberger, and Voigt also observed, if no external instructions may be given, prosecutors will be called formally independent (Aaken, et al., , 2004).

Power to initiate or take over and continue criminal prosecution

The paper also determined that the DPP is empowered to exercise discretion in prosecutorial decision-making, which signifies prosecutorial independence. The DPP is constitutionally empowered to have effective control over criminal investigations. He or she can direct the police to investigate any information of a criminal nature and to report to him or her; (Constitution of Uganda, 1995-Art. 120 (3) (a)) can initiate criminal proceedings against any person or authority in any court with competent jurisdiction other than a court-martial (Constitution of Uganda, 1995- Art. 120 (3) (b)), and can take over and continue any criminal proceedings instituted by any other person or authority (Constitution of Uganda, 1995- Art 120 (3) (c)).

These discretionary powers of the DPP are also fortified by the provision that in the exercise of those discretionary powers, he or she is not to be guided or inspired by political consideration but should only have regard to the public interest, the interest of the administration of justice and the need to prevent abuse of legal process (Constitution of Uganda, 1995-Art. 120 (5)).

The discretionary power of the DPP provided for under the Constitution empowers him or her to obtain the evidence he or she may need, unfettered, and to make an independent judgment call on whether or not to prosecute. Thus, from that, it appears that the Constitution provides for decisional latitude and freedom of action to the DPP.

Power to enter a nolle prosequi

Nolle Prosequi or "unwilling to prosecute" is a written entry made on the court record when a Director of Public Prosecutions undertakes not to continue the action or prosecution (Bakibinga, 2019). The DPP in Uganda can, in addition to coining prosecution *proprio motu* and taking over one not initiated by him or her, discontinue at any stage any criminal case before verdict or judgment, the only limit to that power is that regarding cases he or she did not initiate, the DPP requires the concurring consent of the court having cognisance of the criminal case (Constitution of Uganda, 1995-Art. 120 (3) (d)). The requirement to have the concurrence of such a court is to prevent the DPP from discontinuing criminal cases he or she did not initiate without justifiable reasons. Nonetheless, the exception does not impair the independence of the DPP.

It is, therefore, correct to infer that the DPP has the unfettered discretion to bring charges against a person if he or she considers that any criminal laws have been infringed by that person. He also has the prerogative to terminate the charges even without assigning reasons, especially when the decision to prosecute was initiated by him or her. The framers of the Constitution were alive to the fact that criminal cases are affected by many extraneous circumstances. This discretion, therefore, enables the DPP to terminate and then reinstate charges as and when the circumstances of a given case have changed.

Yet, the paper also found out that whereas the Constitution provides for the independence of the DPP, it does not offer sufficient guardrails that can fortify the independence of the DPP from especially subtle executive interference, and direction, or control in any meaningful way. The Constitution is riddled with clawback articles that *de facto,* impair the independence of the DPP.

The DPP is exposed to the executive's impulses through the executive's power of investiture, as it were. Although the DPP is appointed by the President upon the recommendation of the Public Service Commission and with

the concurring approval of parliament (Constitution of Uganda, 199- Art. 120 (1)) the tripartite procedure of the DPP's investiture does not offer sufficient protection from the President's influences. This is because the tripartite procedure was contrived by the framers of the Constitution to address only one dimension of the two-dimensional problem, namely, to prevent the President, who's the appointing authority, from installing individuals amenable to him or her at the helm of an institution of a high public value such as the DPP.

By requiring the Public Service Commission to recommend an individual to the President to be appointed, therein is a tacit presupposition that the Public Service Commission initiates the process, and so the President does not control the process but participates in it midway. Implicit in that logic is the supposition that the appointing authority would not appoint individuals based on his personal or political preferences.

Yet, just in case there was a slim chance that the preceding bipartite procedure involving in the first instance the Public Service Commission and in the second the President, was flawed and the President appointed an individual he or she personally or politically favoured, another leg of the procedure requires Parliament or a subset of it to approve a Presidential appointment of the DPP and offers another layer of protection against especially the President's personal preferences, or so it seems.

However, as observed already, the three-legged procedure of the investiture of the DPP appears to have been designed to address one dimension of a two-dimensional challenge to the independence of the DPP in Uganda. Although there is no evidence to suggest that the tripodal procedure described above guarantees the independence of the DPP from undue presidential influence, interference, direction, or control, it does not even prevent the President from appointing a personal or political ally to the office. Some examples abound as follows:

Mike Chibita who was in 2013 appointed by the President as the DPP following the procedure laid down in the Constitution as discussed, had before served the appointing authority as his Private Secretary for legal affairs, and as MiniBane has opined, Mike Chibita had been in close association with the President before he was appointed the DPP by President Museveni (MiniBane, 2019). In the second instance, Richard Buteera was appointed on the 21st of September 1995, the penultimate day of the promulgation of the Constitution, which occurred on the 22nd of September 1995 (Besigye, 2014). This was done, according to Kizza Besigye, because Buteera, under the Constitution that would come into force just the next day, was not qualified to be DPP, the implication of it possibly being that the President couldn't wait for his preference to be blocked for being ineligible (ibid).

Nonetheless, Besigye's extrapolation of why the President couldn't wait one more day to appoint Buteera under the Constitution may be valid, it is also plausible that the President took the evasive manoeuvre because he was not sure that the tripartite procedure would land his man the job. Perhaps the President understood that Buteera was not going to be recommended by the Judicial Service Commission because he was unqualified, and perhaps, the Parliament also could have rejected his appointment had the President appointed him under the new Constitution (ibid). Whatever the incentive, one conclusion cogently suffices: the appointing authority, it doesn't matter who, will always and everywhere have personal preferences and political considerations when appointing the DPP, and in the absence of sufficient safeguards to protect his or her independence from the appointing authority, the DPP will be placed in a state of mind in which he or she kowtows to whoever has the power to appoint, discipline, or dismiss him or her.

The tripartite procedure provided for under the Constitution is not sufficient sentry against undue influence, direction, or control of the DPP by the appointing authority. First, if it was laid down as such to preclude the appointment of the DPP based on the personal or partisan preferences of the appointing authority, the tripartite procedure has so far failed to achieve that end in the obtaining environment. For it to be effective, the Public Service Commission has to be independent as well as the Parliament, from the executive; otherwise, the President can influence or compromise them to either recommend his preference in the case of the Public Service Commission or confirm him in the case of Parliament.

Unfortunately, the framers of the Constitution did not sufficiently provide for the independence of either the Public Service Commission or the Parliament. In the case of the Public Service Commission, the Constitution makes a skeletal and almost hollow statement that *"in the exercise of its functions, the Public Service Commission shall be independent and shall not be subject to the direction or control of any person or authority…" (Constitution of Uganda, 1995- Art. 166 (2))* but does not go far enough to ensure that the envisioned independence is actualised in practice.

It is impossible for the Public Service Commission to achieve independence from a person or authority that populates it and can remove the members, except to the extent that either his largesse or lethargy so permits, but not if the appointing authority has an eagerness for or interest in a matter before the Public Service Commission. Thus, the Public Service Commission's participation in the appointment of the DPP in Uganda does very little, if at all, to prevent the appointment of political or personal allies of the President or his or her stooges—and is not a sufficient guardrail against the possible fealty of the DPP so appointed to the President

This is why: since the President appoints individuals to the Public Service Commission, albeit with the approval of Parliament (Constitution of Uganda, 1995- Art. 165 (2)) and the President has constitutional license to remove individuals from the Public Service Commission without leave of any other person or authority if he or she can claim for instance incompetence or misconduct (Constitution of Uganda, 1995- Art.165 (8)), and can refuse to reappoint a member since nothing compels him to reappoint a member—with such power of the presidency over the Public Service Commission, members of the Commission have no security that would embolden them to defy or contradict recommending an individual who's preferred by the President if they have cognisance of such preference. In lieu, it is highly likely, based on a rational choice, that members could seek to enchant their appointing authority in order to enhance or cement their chances of either being reappointed or not being removed. Such is one way the President can have his way with the Public Service Commission.

In the case of Parliament, which has the constitutional authority to confirm the appointment of the DPP by the President, the story is similar to that of the Public Service Commission, except the variation that the President doesn't have the power of investiture over the Members of Parliament, in that he can neither appoint nor dismiss them. Nonetheless, the President can still wield immense influence over a parliament and have his way if he or she has a partisan majority that has a blind adulation of him or an unquestioning, even mindless fealty to him or her, confounded with an absence of constitutional checks on majority rule.

The obtaining constitutional architecture of Uganda undergirds majoritarian rule, and so long as the President has an overbearing influence on a partisan majority in parliament and on a committee of parliament that confirms presidential appointments, the President will always have his way regarding his preferred DPP when and if he has a compliant partisan majority in parliament and/or the committee of parliament that is empowered to confirm his appointments.

Thus, it is safe to infer that the three-pronged procedure of the investiture of the DPP as well as other presidential appointees, was contrived to preclude the DPP from a possible union with executive control such as had afflicted and infirmed the constitutional dispensation antecedental to the current one, wherein the DPP subserved politicians. Yet, the procedure leaks and puts justice and the rule of law in trouble, in that, the President does not have to ask leave of anybody or authority to dismiss the DPP.

Nor is there present in the Constitution a trace of insulation, or anything teetering on inoculating the DPP in any form or fashion, against eviscerating the DPP from office at the pleasure of the President. And, therefore, a president who is armed with a spear while the DPP has no shield, enjoys a climate in which he needs no license to call the tune and the DPP to play it; unless the DPP is saintly and is *ipso facto* removed from earthly cares. In other terms, the DPP who has to execute the prosecutorial function in those circumstances can only assert independence in matters the President has an interest in if he/she doesn't have to choose between his job and independence.

The finding of this paper that the DPP cannot be independent in the incumbent constitutional setup, despite the constitutional references to the independence of the DPP, is fortified by Aaken et al's (2004) contention that the performance of a public prosecutor in his prosecutorial function is contingent upon his personal independence vis-à-vis the government. They explicated that the personal independence of prosecutors is consequent upon whether and how they are nominated, elected, or appointed as well as whether and how are promoted and removed from office (Aaken et al., 2004).

Since the DPP in Uganda is not elected but appointed albeit upon recommendation by the Public Service Commission and the confirmation or approval by parliament, it is conscionable that I don't detain myself to a discussion involving the election of prosecutors vis-à-vis their independence. Aaken, Salzberger, and Voigt have concluded that public prosecutors who are appointed to a life tenure or a fixed non-renewable term, and those appointed by people who are not politicians, enjoy the most independence. Prosecutors who are appointed to life-long tenures have tended to absorb pressure from appointing authorities since they are insulated from repercussions related to the fear of losing their job. The same applies to prosecutors who are appointed to a single term since they are not tempted to please the appointing authority in anticipation of re-appointment.

However, the effect of a single-term appointment on the prosecutorial independence of public prosecutors is limited in that if the appointing authority has the authority to appoint a prosecutor who by law must serve a single term, to another position such as to be a minister or a judge, the single-term prosecutor may also be tempted to delight the appointing authority and thereby lend himself to the subservience of such appointing authority.

Aaken, Salzberger, and Voigt have reasoned that prosecutors who are appointed by the executive, as is common practice around the world are less independent, whereas those appointed by a body of prosecutors or a combined body of judges and prosecutors tend to lead to a high degree of independence from the executive.

In addition, they conclude that the behaviour of prosecutors towards members of the executive is influenced by the degree to which members of the executive determine a prosecutor's career including removal from office and transfer. If prosecutors may be removed at will by the executive, the incentive to resist political pressure will be reduced.

Impliedly, the nature of the appointment of the DPP in Uganda generates little or no independence since; the DPP is appointed by politicians (appointed by the President and confirmed by a subset of parliament); has no delineated tenure, and can be removed by the President at his discretion at any time.

Recommendations

The paper determined that *de jure*, the Constitution provides for the independence of the DPP, but also ascertained that *de facto*, the DPP is not independent due to a flawed mechanism of the DPP's appointment, the absence of a life tenure or a single-term tenure; and the fact that the DPP can be removed or re-appointed by the unilateral will of the President.

To ensure the de facto independence of the DPP in Uganda, this paper recommends that the Parliament of Uganda amends the Constitution to provide for the appointment of the DPP by a body of prosecutors or lawyers, not politicians; and should not be subject to removal by the President whether alone or in conjunction with Parliament. It further recommends that if the President should have the power to appoint the DPP, Parliament should amend the Constitution and provide that the DPP, in that case, should serve a life tenure or a fixed term that is not renewable and that in that case, the DPP upon expiry of the single term, should be ineligible for appointment to another public office.

Last but not least, to ensure that the DPP is not used by politicians to take over and discontinue cases initiated by private prosecutors, the article recommends that the Parliament of Uganda amends the Constitution to require the DPP to take over the prosecution of a criminal case with the concurring will and consent of an individual or entity that initiated it and only to continue it. As such, the amendment should also compel the DPP to revert the case to the private prosecutor who initiated should he or she lose interest in it and only the initiator should have the ultimate right to discontinue it.

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