

Critical Assessment of Article 28 of the Constitution of Uganda and Its Violation by Security Organs

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ABSTRACT

This article critically assessed article 28 of the Constitution of Uganda and its Violation by Security Organs, and the concept of a right to a fair trial in criminal proceedings, the major challenges facing Court in Uganda in interpreting the rights; and remedies thereto. The research focuses on the circumstances that give rise to violation of Article 28 by the security organs, the different challenges faced by the law in implementing the Article, and legislative taken into account while granting the law. In the view of these findings, the article calls for the parliament to consider defining the scope of this right as well as time frames in legislation in line with the generally accepted guidelines deduced from judicial precedents. This will provide an appropriate guideline and set legal parameters within which this right is to be interpreted and applied. This may be done through amendment of various legislation such as the criminal and other offences.

Keywords: Fair Hearing, Security Organs, Prisons, Matters, Administration of justice

INTRODUCTION

The Uganda Human Rights Commission (UHRC) was created by the 1995 Constitution and the Uganda Human Rights Commission Act to protect and promote human rights in the country[1, 2]. Its mandate involved among others, investigating complaints of human rights violations and ensuring an appropriate remedy for complainants. When the UHRC started work on 16 November 1996 it immediately began receiving complaints from the public[3]. In 1997, it received 349 complaints, which increased to 919 in 1998. Though the UHRC was disposing of approximately 50% of the complaints, it did not manage to dispose of the remaining 50%[4]. With an increasing number of complaints received without a proportionate number being disposed of, several matters were left pending for a considerably long period of time; in one case lasting up to nine years before final disposal[5]. The length of time taken before the final disposal of a matter filed with the Commission raises several questions pertaining to the right to a fair hearing, particularly the right to a speedy trial. If a matter is filed in 1997 and it is only disposed of in 2006, what are the implications to the right to a speedy trial? Is justice done to the person who lodged the complaint in 1997 and has had to wait until 2006 to have the matter finally concluded? Furthermore, what are the implications of the delay to the UHRC, an institution whose mandate extends to protecting and promoting all the human rights in Chapter Four of the Constitution, which includes the right to a speedy trial? What are the causes of such delays, and finally what are the remedies for those who may be thereby affected? The above questions are posed with in the context in which Article 28 of the 1995 Constitution on the one hand guarantees the right to a fair hearing and Article 44 states that that right is non derogable i.e. it cannot be violated under any circumstances whatsoever; and on the other hand, the institution mandated to protect and promote human rights is taking a considerably long period of time to dispose of matters, in some instances violating the non derogable right to a fair hearing and particularly the right to a speedy trial [6]. The right to fair trial is also protected under article 6 of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights (ECHR)[7]; article 8 of the American Convention on Human Rights (ACHR)[8]; and article 7 of the African Charter on Human and Peoples' Rights (ACHPR)[9]. Elements of right to fair trial are embodied as pre-trial rights, rights during trial and rights after trial[10]. The right to fair trial must be protected throughout the trial to ensure justice prevails. The right to a fair trial is considered as one of the most essential and fundamental human rights in all countries that respect the rule of law. Its applicability on a criminal charge does not start when charges are actually presented to court, but from the first contact between the suspect and State authorities that are involved in investigations[11]. It embodies aspects of both institutional and procedural fairness in the determination of criminal cases in order to ensure achievement of justice[12]. This right does not exist in isolation but is anchored on and acts as a

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safeguard for other important rights such as the right to life, liberty, freedom from torture, cruel and degrading treatment. The Right to a fair hearing is one of the rights that have been guaranteed by all of Uganda's Constitutions since 1962 [13]. Although the UHRC has played a central role in protecting and promoting human rights in the country, it has had many difficulties in ensuring that the right to a speedy trial is fully protected and realized. Although Article 28 (1) guarantees the right to a speedy trial [14], it does not elaborate any further on what this actually entails. This notwithstanding, if a matter is filed in 1997, and disposed of in January 2006, having taken a period of nine years, the issue of whether or not the right has been violated must be raised. Delayed justice is usually justice denied especially in a context where witnesses lose their memories; leave the jurisdiction of the court, evidence disappears etc. Furthermore, complainants also lose interest in the matter or they become frustrated by the delay. There is a long stretch of time between filing the complaint and the point at which it is finally disposed of. Such duration is a consequence of the several challenges faced by the UHRC, which ought to be addressed to ensure that persons complaining of human rights violations do not fall into the predicament of feeling that their rights are being violated by the very institution mandated to protect them.

The Right to Fair Trial in Criminal Proceedings

In *Baryaruha v Attorney General* [15], the court discusses that the concept of the right to a fair trial is inevitably bound up with the concept of justice. The court noted that there appears to be no definition of the right to fair trial either in the international instruments which recognise it or in the case law of the international bodies protecting these instruments. The court, in *Restivo v. Hessemann*, takes the view that it is possible to have a fair trial despite flaws in the procedure. The court further noted that there are circumstances where a conviction can be upheld even though some principles of the right to a fair trial have been violated. This view has created a gap since these principles are aimed at ensuring that no party is disadvantaged by having a right violated. Any violation is likely to give an advantage in favour of the violator. This will more often than not, affect the fairness of trial. Some courts have taken the view that any violation of the right to fair trial, even at the pretrial. This entitles an accused to be acquitted [16]. Justice Center [17] analyses co-relation between the seriousness of an offence with which an accused is charged vis a vis the right to a fair trial within a reasonable time. He argues that where there is an inordinate delay in trial, the court should be more willing to find a violation of the right to trial within a reasonable time in cases where an accused person is charged with a serious offence than where the charge is minor. Seriousness of the crime relates to the gravity of the alleged criminal wrongdoing and how heavy the possible penalties can be if one is found guilty. She bases the right to speedy trial on seriousness of offence. The right is enshrined in the constitutions and laws of many nations and is also found in numerous international instruments. It is no surprise, then, that the right to a trial within a reasonable time has been guaranteed in international law.

Ghana is a signatory to a number of these international treaties and covenants and therefore is legally bound to the provisions of international instruments such as the International Covenant on Civil and Political Rights (ICCPR) [18] and the African Charter on Human and Peoples' Rights (ACHPR) [9]. Clooney and Webb [19] explore the concept of right to have a fair trial without unreasonable delay. They observe that the reasonableness of the length of proceedings should be assessed in light of particular circumstances of a case, regard being had to three factors: the complexity of the case; the conduct of an applicant; and the conduct of state authorities. The period to be taken into account in determining the duration of a case, starts from the time a formal charge is brought against an accused until the charge is finally determined or when the sentenced imposed becomes final.

This may be the date of the last appeal or issuing of judgment. In cases where a challenge is brought in ongoing proceedings, the period which has already elapsed since the laying of the formal charge should be considered. This period should exclude any periods which an accused absconds during proceedings [20]. On the issue of complexity, they observe that factors which should be taken into account while analysing this concept include the subject matter of the case, the number of disputed facts, international elements in a trial, the number of witnesses or volume of evidence to be considered. This should, however, be balanced against the general principle of securing proper administration of justice by ensuring that trials are heard and determined expeditiously. With regard to the conduct of parties, she argues that only delays which are attributable to the State may justify a finding of failure to comply with the reasonable time rule. Namakula [21] discusses the right to a speedy trial by the Uganda Human Rights Commission (UHRC), a human rights institution in Uganda mandated to protect and promote human rights. The right to fair hearing is one of the key rights enshrined by the Constitution of the Republic of Uganda, 1995.

Challenges faced Court in interpreting Rights to have a Fair Trial

One of the areas that has been the focus of scholars and policy makers is the conditions under which prisoners as well as remand prisoners live, and the kind of treatment being meted out to them. In this light, several bodies (international and regional) have been set up to enforce the standards laid down by the United Nations (UN) and other regional bodies. These bodies include: The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment or shortly Committee for the Prevention of Torture (CPT), Inter

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American Commission on Human Rights, and African Commission on Human and Peoples' Rights (ACHPR). The fundamental reasons for remanding individuals in custody are to ensure that remandees will attend court as required to answer the charges made against them [20]. In addition, the need to protect the integrity of the justice system has resulted in the development of the practice of remanding accused persons in custody where it is deemed necessary to protect witnesses. Many jurisdictions also remand a person in custody on occasions when it is seen to be necessary to ensure the safety of the accused person. Apart from the above outlined factors justifying remand, there are other reasons which have been argued out. Ajah and Okpa [22] argues that remanding individuals serve to provide them with "a taste of imprisonment", yet presumed not to be part of the rationale for remands into custody. Another significant area that has been underscored in the literature is the issue of merging of remand prisoners and convicted prisoners. Ajah [23] found out that the rights of remand prisoners are violated. The facility intended to hold remand prisoners only, however, with the overflow of prisoners in the system, also houses some convicted prisoners. Likewise, "a medium security prison (Nsawam) that is not supposed to house remand prisoners does hold some". He added that what is most unfortunate is that most of the prisons in Ghana are composed of inmates who are awaiting trial (remand prisoners) and this has tended to compound the overcrowding situations in detention and prison centers.

A study by Justice for All Programme [24] and its impact on Ghana's Prisons System²⁹ concluded that the Justice for all programme has helped to decongest the prisons to some extent because some of the remand prisoners who accessed justice through the programme were acquitted and discharged. The programme has therefore impacted positively on the lives of remand prisoners in particular and the Ghanaian justice delivery system in general. This has brought some level of relief to the general prisons administration. Woolman [25] in discussing two important constitutional provisions (i.e. the right to freedom and security of a person and the right to have one's trial begin and conclude without unreasonable delay) relating to remand prisons in South Africa observed that the excessive use of remand has two central issues: overcrowding and the lengthy duration of detention which many remandees are compelled to endure. Almost all detention centres and prisons in Africa are overcrowded according to a report published by the African Commission on Human and Peoples' Rights (ACHPR) [26]. Issues of bail and remand in custody have attracted the attention of a wide range of observers in the criminal justice system. It is only in recent years that there has been a collective effort to study and to reform the law. Most of the available literature came about as a result of efforts by governments to reform the law on bail.

The Judicial remedies available upon violation of rights of trial

A complex legal situation has emerged as an outcome of the mix in common law and statutory provisions. USA and the United Kingdom began significant bail law reform in the 1960s, leading to legislative amendments with the Bail Reform Acts, 1966 and 1984 [27]. The backdrop to this article is provided by two contemporary criminal justice narratives. The first concerns victims' of crime and women's rights within the criminal justice system; the second emphasises the need to enhance the "fair trial" rights of defendants in criminal cases. The first narrative is the outcome of an uneasy conjunction of interests between the agendas of government, victim-support groups and long-term feminist campaigns around the rape trial and violence against women [28]. To date, it has generated multiple reform proposals, ranging from the officially approved emphasis on vulnerable witnesses³² and the new restrictions on cross-examination on previous. This first narrative also has increasing resonance on the international plane - amidst recognition of gender violence as a human rights issue²⁴

Procedure of arrest and detention

A person becomes a detainee when he or she is either lawfully arrested and is detained in custody or is summoned by Police while conducting investigations into a case. Formal or lawful arrest and detention follows the following procedure; Upon receiving a report that an offence has been committed, the Police opens a file and registers the case by giving it a Criminal Register Book number (CRB) [20]. In criminal case of *Uganda v Hussein Hassan Agade & 12 Ors* [29], the court held that the police starts investigating the case by taking the statement of the complainant, summoning witnesses to the commission of the offence and the accused person and records their statements. When the accused person did not answer to the summons, the Police forward the file to a Magistrate who issues a warrant of arrest. This is a document which instructed the Police to look for the person named therein and arrest him forthwith. The purpose of the warrant of arrest is to ensure that the accused person answers to the charges brought against him or her. Upon arrest, the accused person is interrogated or asked questions, produced in court for charging and trial. Police should do this within forty-eight (48) hours. If by the time of arresting the Police have not finalised their investigations and the offence with which the accused person is charged is a minor offence, the Police can release the accused person on Police Bond pending conclusion of the investigation process. The Police has a discretion to grant or deny an accused person bond if he or she is accused of committing a major offence, but nevertheless, they must produce that person in court within 48 hours of arrest. The Police sends the file to the State Attorney to sanction the charges against the accused person. Sanctioning is an administrative measure by which the Director of Public Prosecutions assesses whether evidence collected by

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Police is sufficient to sustain the charges brought against an accused person. If on perusal of the file it is established that evidence is insufficient, the Director of Public Prosecutions sends the file back to Police to gather more evidence.

The accused person is produced in Court, where the Magistrate reads out the offence which the accused person is alleged to have committed and asks him or her to plead. The accused person should tell court whether he/she pleads guilty or not guilty. On doing this the Magistrate remands him/her unless he/she applies for bail and sets a date for hearing the case. If the accused person pleads not guilty, the Magistrate informs him or her of his right to apply for bail. The accused person can apply for bail there and then or be remanded and instruct a lawyer or any other person knowledgeable about the procedure to apply for bail on his/her behalf. For offences which are only triable by the High Court, the accused is charged in a Magistrate's court, but he or she is not allowed to plead to the charges. The Magistrate informs him/her about the right to apply for bail in the High Court and remands him/her. The detainee can then file an application for bail at High Court where the Judge hears it and takes a decision on whether to grant or deny him/ her bail. When the prosecution finalises its investigations, the accused person is committed to the High Court for trial. For cases which are triable by the Magistrates court but are not bailable by them for example embezzlement, when the accused person is presented in Court, he/ she takes a plea and is remanded. The accused is informed of his/her right to apply for bail in the High Court which he/she can exercise any time before the trial process is completed.

CONCLUSION

The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms. One of the key ingredients of the right to a fair trial is the right to have trial begin and conclude without unreasonable delay. This article concludes that there are both physical and structural delays to access to justice in Ghana. The physical delays are the result of constant breakdown of vehicles as a result of extreme pressure and inadequate budget to provide fuel for official vehicles making it difficult to present suspects before the court when their court dates are due while the structural delay results from the cumbersome court procedures or rigid legal regimes and unnecessary bureaucratic bottlenecks. This article also concludes that the delay in accessing justice adversely affects the prison administration because it puts pressure on prison facilities such as clinics, infirmary, and vehicles. Such delays also increase the risk in the work of the prison officers. Overcrowding was found out to be one the negative effects of the delay on prison administration. It further puts undue strain on the budget of the prisons especially on items such as fuel bills, medical supplies, and waste management. This article further concludes that the right to a fair trial without unreasonable delay has been interpreted to apply in two sets of standards: during pre-trial detention and during the actual trial. Whether the right applies during pre-trial is a contentious issue. In cases where accused persons argued that delay to be prosecuted occasioned a violation of their right to a speedy trial, the courts have considered whether the pretrial delay occasioned prejudice to the accused leading to a fair trial. With regard to delays which occur during actual trial, what constitutes a reasonable time is judged according to the circumstances of the individual case. The court will consider several factors in determining whether a trial has been concluded within reasonable time, such as the nature of the crime, duration it has taken, societal interests and prejudice to the accused. The courts have a duty to consider all the circumstances of the case in determining whether the right to a trial without undue delay has been violated. This study also concludes that remedy for violation of the right to fair trial within reasonable time varies from jurisdiction to jurisdiction. Public interest is key when crafting an appropriate remedy where a violation of the right to have a trial within reasonable time has been violated. The courts would consider whether delay would be prejudicial to the accused. The remedy of stay of proceedings or acquittal can only be considered by court where it is Page I 18 determined that the breach is so severe that a fair trial cannot be held. It must be shown that despite other measures in place expediting the trial, the delay remains undue. In this wise, the article calls for the parliament to consider defining the scope of this right as well as time frames in legislation in line with the generally accepted guidelines deduced from judicial precedents. This will provide an appropriate guideline and set legal parameters within which this right is to be interpreted and applied. This may be done through amendment of various legislation such as the Criminal and Other Offences.

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