EMERGING JUDICIAL POWER IN TRANSITIONAL DEMOCRACIES: MALAWI, TANZANIA AND UGANDA

A dissertation presented

by

Rachel L. Ellett

to
The Department of Political Science

In partial fulfillment of the requirements for the degree of Doctor of Philosophy

In the field of

International Affairs and Public Policy

Northeastern University
Boston, Massachusetts
April 2008
EMERGING JUDICIAL POWER IN TRANSITIONAL DEMOCRACIES: MALAWI, TANZANIA AND UGANDA

by

Rachel L. Ellett

ABSTRACT OF DISSERTATION

Submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy in International Affairs and Public Policy in the Graduate School of Arts and Sciences of Northeastern University, April 2008
ABSTRACT

It is broadly accepted that an independent and empowered judiciary is central to the rule of law. This dissertation examines the construction of judicial power in emerging democracies through addressing the paradoxical presence of strong judicial power in weak and volatile democracies. I argue that we must unpack our assumptions about democracy and move beyond regime based theories of judicial behavior. I find that existing strategic decision-making theories do not adequately account for the emergence of judicial power in sub-Saharan Africa. Instead this study finds that variation in level of judicial institutionalization or viability accounts for the presence of strong judicial power in weak democracies. A judiciary with a high level of institutional viability is able to withstand the frequent exogenous shocks typically present in sub-Saharan Africa’s neopatrimonial regimes.
ACKNOWLEDGMENTS

This dissertation would not have been possible without the support and encouragement of many people in Tanzania, Malawi, Uganda, United Kingdom and here in Boston. First I would like to thank the members of my committee. Professor Michael Tolley has been an endless source of support and encouragement and I could not have asked for a better advisor and mentor. Professor Tolley’s intellectual imprint can be found throughout this dissertation. I would also like to thank my second reader Professor Bill Miles for his helpful advice and close editing of what turned into a very long dissertation manuscript. Finally, I would like to recognize the guidance I have received from Professor Peter VonDoepp at the University of Vermont. Peter expressed enthusiasm for this project in its very early stages and was generous in sharing his early case and newspaper article data from Malawi. When I was in Malawi I felt as though I were treading in Peter’s footsteps, as his name frequently came up - usually in reference to his ‘encyclopedic knowledge of Malawian case history’! Last but not least I must recognize the administrative support I’ve received from Janet-Louise Joseph and Barbara Chin while I was in Africa and back in Boston.

Fieldwork for this dissertation was made possible by grants from Northeastern University Department of Political Science, The Whiting Foundation, and from the National Science Foundation (Award No. 0617472).

While I was in Uganda I had the good fortune to spend time at the Centre for Basic Research. Their database of newspaper articles was invaluable, as was their hospitality and friendly welcome. The Makerere Institute of Social Research was professional and efficient in responding to my queries and assisting me in gaining research clearance with the Ugandan government. However, above all I must thank all
of my interviewees for giving me their time and providing candid and insightful responses to my many questions.

This was my second trip to Malawi and I could not have been more welcomed. In Lilongwe I had the good fortune to attend the Second Constitutional Redrafting Conference, thank you to those people that translated – both language and substance. In Zomba, thankyou to the staff at the National Archives. In Blantyre I spent several days working in the excellent archives at the Nation newspaper – thank you to the Nation librarian. I also conducted most of my interviews in Blantyre and would like to acknowledge the generosity and patience with which my interviewees responded to my numerous and challenging questions. Additionally, I would like to thank Professor Nandini Patel who offered important intellectual insights combined with practical support and friendship.

In Tanzania there are two individuals I must recognize above all: Professor Lutfried Mbunda and Professor Chris Maina Peter at the University of Dar es Salaam. Professor Mbunda was very helpful in orienting me when I first arrived and arranged access to the University library. Chris Peter was extraordinarily kind and supportive when he literally opened up the contact list in his cell phone and arranged interviews and appointments with individuals I would have never otherwise met. As in Malawi and Uganda I was constantly amazed by the candor and detail of the responses to my questions - thank you to all my Tanzanian interviewees.

While in East Africa I was fortunate to have a home base on the island of Zanzibar. To Annie, Dave and Josh, Mwanaheri, Suleiman, Stephen and Meena thank you for your friendship and support. In London thank you to Claire and Rob for a home when I was working in the SOAS library. My colleagues at Northeastern - Kaitlyn
Kenney, Kimberly Jones, Emily Neal, Mary Churchill and Milica Golubovic - have provided a great intellectual network combined with friendship over the last five years.

Finally, none of this would be possible without my family. My parents, Jean and Rob Ellett, and brother Tom Ellett cheered me along from start to end and my father was particularly supportive in spending hours reading through very early chapter drafts and aiding in the creation of the table of contents. Last but not least my husband Rod Wyrick, without whom I would have given up on this interminable project a long time ago. I thank you and recognize your many sacrifices, your love and support.

And to all those I have neglected to mention asanteni sana.

Northeastern University

Boston, USA.
# TABLE OF CONTENTS

Abstract ................................................................. 4

Acknowledgments ..................................................... 5

Table of Contents .................................................... 8

List of Tables .......................................................... 10

List of Cases and Statutes .......................................... 13

List of Abbreviations ................................................. 23

Chapter 1 Introduction ............................................. 24  
   I: Research Questions  
   II: Dissertation Outline

Chapter 2 Literature Review and Methodology .................. 32  
   I: Third Wave of democracy in sub-Saharan Africa  
   II: Competing Theoretical Explanations of Judicial Behavior  
   III: Methodology and Research Design  
   IV: Data

Chapter 3 Colonialism, Judicial Power and the Transition to Independence ............... 55  
   I: Colonialism, State Formation and Customary Law  
   II: New Courts Old Judges and Independence Constitutions

Chapter 4 The Judiciary under Authoritarianism ................ 97  
   I: Theoretical Explanations  
   II: A Brief Overview  
   III: Preventative Detention and Emergency Powers  
   IV: Judiciary and the Ideological Framework  
   V: Parallel Jurisdictions

Chapter 5 Internal and External Judicial Autonomy .......... 177  
   I. Differentiation from Political Environment  
   II. Durability  
   III. Legitimacy  
   IV. Formal External Autonomy  
   V. Informal External Autonomy

Chapter 6 Malawi 1994-2007 ..................................... 265  
   I: Political environment  
   II: Judicial decision-making
Chapter 7  Tanzania 1994-2007 ................................. 345

I: Overview of political environment
II: Judicial decision-making
   A. Judicial Review
   B. Election Petitions
   C. Separation of Powers
   D. Procedural issues and locus standi
   E. Significant rights cases

Chapter 8  Uganda 1995 – 2007 ................................. 407

I: Political Environment
II: Judicial decision-making
   A. Judicial Review
   B. Procedural issues and locus standi
   C. Election Disputes and Petitions
   D. Significant rights cases

Chapter 9  Conclusion ................................. 499

I: Emerging Judicial Power in Transitional Democracies
   A. Has the judiciary functioned as an insurance mechanism?
   B. Are judges strategically responding to changes in the political environment over time?
   C. Institutional Explanations
II: Implications beyond Eastern and Southern Africa
III: Future Research

Appendix A  Flow Charts of Court Systems ................................. 529
Appendix B  Summary of Law Reporting in Malawi, Uganda and Tanzania ................................. 535
Appendix C  Timeline of Judges Salary Dispute ................................. 536
Appendix D  Timeline of Events Concerning Referendum on Multipartyism ................................. 539
References ................................. 541
Vita ................................. 553
LIST OF TABLES

Table 2.0  World Bank Governance Indicators
Table 4.0  Data on Post-Colonial Cases in Malawi
Table 4.1  Uganda Timeline of Significant Events
Table 5.0  Independence of the Judiciary
Table 5.1  High Court at Blantyre Civil Case Data 1990-2006
Table 5.2  Supreme Court Case Data 1966-2006
Table 5.3  Recruitment and Promotion of Judges
Table 5.4  Judicial Appointments according to Region, December 31st 2006
Table 5.5  Percentage of Total Budget Allocated to Tanzania Judiciary
Table 6.0  Percentage of votes for the major party alternatives
Table 7.1  Percentage of votes for the major party alternatives
Table 7.2  Selected Politically Significant Cases
Table 9.0  Trends in the Emergence of Judicial Power in Transitional
            Democracies
LIST OF FIGURES

Figure 1.0  Colonial Era Timelines
Figure 2.0  Uganda Colonial Court Structure
Figure 9.0  Zones for the Construction of Judicial Power
LIST OF GRAPHS

Graph 5.0  Percentage of Total Budget Allocated to Tanzania Judiciary
Graph 5.1  How do you feel about dismissed judges who ruled against the government?
Graph 5.2  What would you do about dismissed judges who ruled against the government?
Graph 5.3  How much do you trust the courts of law?
LIST OF CASES AND STATUTES

Malawi Cases


Ally Juu va Watu v. Loserian Molley & Another (1970)

Anti-Corruption Bureau v Amos Chinkhadze and Joe Kantema (2003)

Apex Car Sales Ltd v. Anti-Corruption Bureau Civil Cause No. 3479 (2000)

Attorney General ex parte Mary Nagwale (2005)

Attorney General v Chipeta (1994)


Attorney General v Fred Nseula and Malawi Congress Party (1994)

Attorney General v Gwanda Chakuamba and Chakufwa Chihana (1999)


Bokhoboko and Jonathan v. The Republic (2000)


Chipeta J. Republic v. Idd Mtoge (1979)


Dr. Charles Kafumba & Others v. The Electoral Commission & Malawi Broadcasting Corporation (1999)
Dr. Peter Chiwona v. Hon. Gwanda Chakuamba (2000)

Du Chisiza v. Minister of Education (1993)


Ian Kanyuka (on behalf of all NDA members) v. Chiumia, Mtumodzi, Ndanga, (2003)

In the Matter of Presidential Reference of a Dispute of a Constitutional Nature under Section 89(1) (h) of the Constitution AND In the Matter of Section 65 of the Constitution AND In the Matter of the Question of Crossing the Floor by Members of Parliament (2005)

In the Matter of Presidential Reference of a Dispute of a Constitutional Nature under Section 89(1)(h) of the Constitution AND In the Matter of Section 86(2) of the Constitution AND In the matter of Impeachment Procedures Under Standing Order 84 adopted by the National Assembly on 20th October 2005 AND Malawi Congress Party (MCP), United Democratic Front (UDF) and Alliance for Democracy (AFORD) – Amicus Curiae (2005).

In the Matter of Section 65 of the Constitution and In the Matter of Question of Crossing the Floor by a Member of Parliament (2005).

John Tembo & others v. Director of Public Prosecutions (1983)


Kanyuka (on behalf of all NDA members) v. Chiumia, Mtumodzi, Ndanga (2003)


Limbe v. Minister of Justice (1993)

Malawi Law Society and Episcopal Conference of Malawi v. The State, the President of Malawi, the Minister of Home Affairs and its Army Commander (2002)


National Democratic Alliance (NDA) v Electoral Commission, MBC and TVM (2003)

The Ombudsman v. The MBC (1999)

In re Pindeni and Nyirenda v. Republic (1977)

Peter Chupa v. The Major of the City of Blantyre and Others (2001)

The President of Malawi and another v. Kachere and Others (1995)

Public Affairs Committee v Attorney General, Speaker of the National Assembly, (2003)


Re Nomination of J.J. Chidule (1995)


Sole v. Republic (1982)

The State and Malawi Communications Regulator Authority Ex-Parte Joy Radio Limited (2007)

The State and the National Assembly ex part Hon Silvester Kasambala and the Registered Trustees of the Public Affairs Committee (PAC) (2005)
The State v. Attorney General and the Speaker of Parliament; ex parte Brown Mpinganjira

The State v Attorney General and the Speaker of Parliament ex parte Gwanda Chakuamba

The State v. Registrar General et al ex parte CILIC (1999)

The State v. Speaker of the National Assembly and the Attorney General ex parte Mary Nagwale (2005)


Cases from other Jurisdictions

Ex Parte President of the Republic of South Africa In Re: Constitutionality of the Liquor Bill (1999).


Richards and Another v. Governor General and Attorney General (1990)

Sierra Club v. Morton (1922)

SP Gupta v Union of India (1982)


Tanzania Cases


Ally Lalakwa v. Regional Prisons Officer (1979)

Ally Juu Watu v. Loserian & Anor (1979)

Ami v Safari (2001)


Bi Hawa Mohamed v. Ally Sefu (1983)
Charles Charari Maitari v. Matiko Chacha Cheti and Four Others (1987)
Chumhua s/o Marwa v. Officer i/c of Musoma Prison and Another (1988)
Director of Public Prosecutions v. Daudi Pete (1990)
Daudi s/o Pete v. The United Republic (1989)
Edward Mlaki and Liston Matemba v. Regional Police Commander, Kilimanjaro Region and Secretary, Regional security Committee, Kilimanjaro Region
Hamisi Rajabu Dibagula v. Republic (2001)
Happy George Washington Maeda v. Regional Prisons Officer (1979)
Lohay Akonaay, Lekengere Faru Parutu Kamanu and 52 Others v. Minister for Tourism, Natural Resources, and Environment (1998)
Lujuna Shubi Ballonzi, Senior v. The Registered Trustees of CCM (1992)
Mbushuu @ Dominic Mnyaroje and Kalai Sangula v. Republic (1994).
Peter Ng’omango v. Gerson M.K. Mwangua and the Attorney General (1992)
The Registrar of Societies and 2 Others v. Baraza la Wanawake Tanzania (2000)
Re: An Application by Paul Massawe for an Order of Mandamus (1977)
Republic v. Mbushuu alias Dominic Mnyaroje and Another (1994)
Rev. Christopher Mtikila and 3 Others v. Republic (1992)
Seif Sharif Hamad v. S.M.Z. (1992)
SMZ v Ali (2000)
SMZ v. Machamo (1999)

Uganda Cases
Re Alcon International Ltd (Ex Parte) (1998)
Attorney General of Uganda v. The Kabaka’s Government (1963)
Attorney General v. Major General David Tinyefuza (1997)
Chitambala v. R (1957)
Col. Rtd Dr. Besigye vs. Uganda (2006)
Efalaimu Bunkenya v. The Attorney General (1972)
Federation of Uganda Women Lawyers, Oloka-Onyango & Others v. The Attorney General


Dr James Rwanyarare & Anor v. Attorney General & Anor. (2000)


Kayira and Semwogerere v. Rugomayo Omwony Ojok, Ssempebwa & Eight Others (1979)

The Kitariko of Buganda v. The Attorney General of Uganda (1954)

Kizza Besigye v. Yoweri Museveni (2001)


Lymoki and others v. Attorney General (2005)

Masiko Winifred Komuhangi vs. Babihuga Winnie (2002)

Mwenge v. Migadde (1933)

Olum and another v. Attorney-General (2) (2000)

Ontario Lt v. Crispus Kiyonga & Ors (1992)


Rex v. Yowasi K. Pailso & 2 Others (1922)

Rukundo v Attorney-General (1997)

Rwanyarare & Another v Attorney General (1997)


Serugo v KCC and Another (1997)
Ssempebwa vs the Attorney General (1986)
Tumukunde v Attorney General and Another (2005)
Uganda v. Commissioner of Prisons, ex parte Matovu (1966)

Cases from other jurisdictions
Republic v. Mbushuu and Another (1994) (Tanzania)

Malawi Statutes
Press Trust Act 1994
The Press Trust Reconstruction Act (5C of 1995)

Tanzania Statutes
Advocates Act 1997
13th Amendment of the 1977 Constitution of the United Republic of Tanzania
14th Amendment of the 1977 Constitution of the United Republic of Tanzania
Basic Rights and Duties Enforcement Act (Act No.33 of 1994)
Criminal Procedure Act 1985 (Section 148)
Deportation Ordinance Act 1921
Eleventh Constitutional Amendment Act No. 34 of 1994
Government Proceedings Act of 1967
National Elections Act 1985
National Elections (Amendment) Act (Act no. 4 2000)
Land Tenure Act 1992
Legal Aid Criminal Proceedings Act 1969
NGO Act 2002
Political Parties Act No. 5 of 1992
Preventative Detention (Amendment) Act (Act no. 2 1985)
Regulation of Land Tenure (Established Villages) Act 1992
Written Laws (Miscellaneous Amendments) Act No. 13 of 1994

**Uganda Statutes**

The Constitution Amendment Act No. 13, 2000
Constitutional (Amendment) Bill, 2005
Government Proceedings Act (Chapter 69)
National Assembly (Powers and Privileges) Act
Penal Code Act Section 154
The Police Act, 2007
The Political Parties and Organizations Act, 2002
Referendum (Political Systems) Act, 2000
The Trade Unions Act, 1976
Succession Act, Secs.27,43.
LIST OF ABBREVIATIONS

Malawi

AFORD Alliance for Democracy
CCM Chama Cha Mapinduzi
CILIC Civil Liberties Committee
DPP Democratic Progressive Party
HRCC Human Rights Consultative Committee
MBC Malawi Broadcast Corporation
MCP Malawi Congress Party
MLS Malawi Law Society
NDA National Democratic Alliance
TANU Tanganyikan African National Union
UDF United Democratic Front

Tanzania

BAWATA Baraza la Wanawake wa Tanzania (Women’s Organization)
CCM Chama Cha Mapinduzi (Revolutionary State Party, authoritarian, formed by merger of TANU and the Afro-Shirazi Party [ASP] of Zanzibar Feb 1977, only legal party 1977-1991);
CUF Civic United Front
ICO Islamic Conference Organisation
NCCR National Convention for Construction and Reform
TANU Tanganyika African National Union (from 1964, Tanzanian African National Union, only legal party in Tanganyika 1962-77; merges with ASP as CCM 1977)

Uganda

DDGG Donor Democracy and Governance Group
<table>
<thead>
<tr>
<th>Acronym</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>DP</td>
<td>Democratic Party</td>
</tr>
<tr>
<td>FDC</td>
<td>Forum for Democratic Change</td>
</tr>
<tr>
<td>JATT</td>
<td>Joint Anti-Terrorism Team</td>
</tr>
<tr>
<td>NRC</td>
<td>National Resistance Council</td>
</tr>
<tr>
<td>NRM</td>
<td>National Resistance Movement</td>
</tr>
<tr>
<td>PGB</td>
<td>Presidential Guard Brigade</td>
</tr>
<tr>
<td>PPU</td>
<td>Presidential Press Unit</td>
</tr>
<tr>
<td>PRA</td>
<td>People's Redemption Army</td>
</tr>
<tr>
<td>RC</td>
<td>Resistance Council</td>
</tr>
<tr>
<td>UPC</td>
<td>Uganda People's Congress</td>
</tr>
<tr>
<td>UPDF</td>
<td>Uganda People's Defence Forces</td>
</tr>
</tbody>
</table>
Chapter 1

Introduction
“As a non-hegemonic epistemic enterprise, comparative constitutionalism needs to transform itself into constitutional ethnography [. . .] We need to ask, following Emile Durkheim, how best can one trace the non-constitutional elements in a constitution? [. . .] Further, how does one related the operations of markets, national and global to constitutional development, and changing notions of constitutionalism underlying it, especially given the dominance/hegemony of a solitary superpower, promoting in the South both “good governance” as well as gross violations of human rights?” (Baxi:1209)

Writing in 1995 Neil Tate and Torbjörn Vallinder concluded that the expansion of judicial power would further advance around the world because “. . . the conditions that appear to favor the development of that expansion continue to be on the rise. Perhaps the most important of these conditions is the presence of liberal democracy” (Tate 1995:526). But as the 1990s progressed it became evident that transitional democracies were not consolidating. Moreover, despite optimistic prophecies, democratic transitions in Latin America, Eastern Europe and Africa have not automatically produced the rule of law, protected human rights or established independent judiciaries. In many cases, when elections were held before the rule of law was secured, the outcome was a weak, quasi-democratic state. In order to understand the development of the rule of law in transitional democracies we must first explain and highlight the conditions under which judicial independence and assertiveness are rendered possible. While the contributions of Tate and Vallinder’s 1995 book acknowledged the different forms and levels of judicial power, and the differing speeds at which it could evolve, the issue of contracting judicial power was not considered. In other words, the possibility that government will try to ‘unjudicialize’ politics after a period of intense ‘judicialization.’ By examining the emergence of judicial power in specific historical, social and political settings we are able to generate context specific, nuanced theory on the different paths contained within the global expansion of judicial power. This dissertation examines the emergence of judicial
power in three transitional democracies within sub-Saharan Africa: Malawi, Tanzania and Uganda.

The shared theme of recent literature on the power of courts is that comparative politics scholars need to bring judicial institutions into the mainstream of their analysis. Courts cannot be understood as only a restraint on power, but must be understood as part of existing political configurations of power. Courts have been given the power to declare legislative and executive acts unconstitutional and they are not being shy about using this power. Courts can no longer be seen as apolitical, neutral third-parties narrowly interpreting precedent. Judges, more than ever, are acting within and in response to the broader political environment. Georg Vanberg (2005:175) characterizes this well:

The power of constitutional courts is considerable but constrained. The judges who serve on these courts cannot afford to consider only the constitutional text, legal principles, or their own preferences. Because implementation of judicial decisions is potentially problematic, judges must take into account the likely reactions of other actors to decisions by the court.

Judicial behavior is endogenous to the broader political, social and economic environment. The concomitant emergence of judicial power with liberal democracy is not a coincidence, for scholars have widely noted that dispersed political and economic power is an important condition in the construction of judicial power across a variety of regions (see Chavez 2004, Ginsburg 2003, Ramseyer 1994 for example). However, as Tom Ginsburg (2003:13) has observed in Asia:

A set of strong, secular, autonomous legal institutions capable of checking legislative and executive authority took centuries to develop in Western Europe. With much less experience with the legal machinery of the modern nation state and with a legacy of strong concentrated political authority, similar institutional development would seem to be a difficult proposition in Asia. Despite increasing public scrutiny and pressure from foreign donors and international financial organizations, reciprocity and
personalism remain central to many descriptions of East and Southeast Asian politics and economies.”

We know surprisingly little then about the development of judicial institutions in non-Western settings, and nowhere is that more true than in sub-Saharan Africa. As H. Kwasi Prempeh (2006:593) notes “research on courts and judicial activity in Africa is scant.” Historically, research on the courts in Africa has tended to revolve around an anthropological analysis of legal pluralism and the integration of the customary into the imported colonial system of law (Mingst 1988). More recently a handful of political scientists have begun to examine the contemporary strategic environment for African judges (VonDoepp 2005), the challenges to building the rule of law (Widner 2001), and the pro-democracy enhancing role of the judiciary in eastern and southern Africa (Gloppen 2003, 2004 and 2006). This research proposes to expand the nascent literature on African courts.

I - Research Questions

It is the assumption of this study, that an independent and empowered judiciary is central to the development of the rule of law. An independent judiciary is central to the maintenance of horizontal accountability, without which democratic development is not possible (Schedler, et al. 1999). I will explain judicial independence in these three transitional democracies by addressing two key questions. First, do judges adjust their decision-making according to the perceived threat level of current and future political environments? Evidence collected to date suggests that judges do indeed engage in what Helmke has coined “strategic defection” (e.g. Helmke 2005, McNollgast 1995, Iaryczower, Spiller & Tommasi 2002, Stephenson 2003). Helmke (2005) revealed that in the case of Argentina, when the judiciary believes the government is going to lose
power, it will attempt to distance itself through anti-government rulings. On the contrary, if the government looks certain to remain in power then the incentives for the judiciary to defect are removed. The implication of these findings is that democracy (defined as regular, free and fair elections) does not necessarily guarantee judicial independence.

Secondly, is a competitive multiparty democracy a necessary, though not sufficient, condition for judicial independence? According to research conducted across a geographically diverse set of regions, the answer to this question is yes (e.g. Chavez 2004, Epstein & Knight 1996, Ginsburg 2003, Landes and Posner 1975, Magaelhaus 1999, Ramseyer 1997, Trochev 2004). By examining the rational preferences of political elites, the authors posit the following: No party wants to change the rules because when they are out of power they will require those same judicial protections, and they can use the judiciary to block the policies of the new government. Therefore we can conclude that judicial independence is threatened only when a party is fully entrenched and there is little likelihood of a turnover of power.

It is widely documented that despite the dissolution of long-term authoritarian regimes across much of Africa, African judiciaries today are still constrained under systems dominated by overly powerful executives. In spite of written guarantees of institutional protection, judicial tenure is frequently threatened and the judicial appointment process is fraught with partisanship and corruption. Moreover the legal system as a whole is overburdened and underfunded, and judicial oversight bodies are weak and partisan. However, a surprising paradox has emerged: In recent years both the Malawi and Ugandan High Courts have demonstrated assertiveness vis-à-vis their respective governments, despite apparently high-level political threat environments.

This study will explain the emergence of judicial review through combining two
theoretical approaches. The existing literature on comparative judicial politics has tended to focus on either regime-based explanations of judicial decision-making or internal institutional explanations. This study assesses the relative merits of both explanations with the context of sub-Saharan Africa. It is the contention of the comparative analysis of three sub-Saharan African states has significantly expanded the geographical and theoretical reach of comparative judicial politics studies.

This study presents a new conceptual configuration of judicial power. It proposes that we must divide our understanding of judicial power into two conceptual categories: External Institutional Autonomy and International Institutional Autonomy. External autonomy refers to the degree to which the judiciary is free from interference and internal autonomy refers to the enabling aspects of judicial power, in other words the degree to which the judicial is able to give positive meaning to judicial power and independence. This conceptual bifurcation of judicial independence therefore presents a possible solution to the apparent paradox of sporadically strong judicial power in weak democracies.

Despite low-levels of external autonomy the Ugandan judiciary has carved a significant ‘zone’ for the construction of judicial power due to the relatively high levels of institutional autonomy and viability. Consequently, as this dissertation has demonstrated, we see a higher level of assertive judicial decision-making. In the case of Tanzania we see a markedly higher level of external autonomy but lower levels of internal institutional autonomy. Therefore the corresponding zone for the construction of judicial power is diminished and we find a reduced level of assertive judicial decision-making.
II - Dissertation Outline

After the literature review and discussion of methodology in Chapter 2, the first substantive section of this dissertation deals with the historical-institutional legacy for each of the three cases. Chapter 3 provides an overview of the colonial era by examining the difficulties associated with legal pluralism, the nature and uses of judicial power during this era, and the most significant legacies. Chapter 4 moves on to the post-independence authoritarian era. This chapter examines the relevance of important theories regarding judicial behavior under authoritarianism, including Lisa Hilbink (2007); Mark Ossiel (1995) and Neil Tate (1993). The chapter provides a brief narrative overview of the major features and differences between the Banda, Nyerere and Obote/Amin regimes as it relates to the judicial institutions. The second part of Chapter 4 takes an in-depth comparative look at three important areas: Preventative Detention and Emergency Powers; Parallel Jurisdictions, and the Judiciary and Ideology.

Chapter 5 moves to the contemporary era and provides extensive data and analysis on the levels of both external and internal institutional judicial autonomy in Malawi, Uganda and Tanzania. Chapters 6, 7 and 8 cover Malawi from 1994-2007; Tanzania from 1994-2007 and Uganda from 1995-2007. Each of the country chapters begin with a brief analysis of the political environment over the last fifteen years. However, the majority of each of the country chapters will be used to analyze the judicial decision-making of the High Court and Courts of Appeal. The cases have been grouped according to judicial review, electoral petitions, significant rights cases, technical and procedural issues, the issue of standing, and public interest litigation. Within these subsections the analysis proceeds chronologically so as to examine the development of the decision-making as it relates to changes in the political environment. In addition, these
chapters examine the levels of popular institutional legitimacy and the defining internal norms and culture.

Finally, Chapter 9 concludes with a summary of the findings of this dissertation and will address where and how these findings have departed from the existing literature, and how this study has expanded the literature. A framework for understanding the emergence of judicial power in transitional democracies will be put forth and implications for this framework beyond sub-Saharan Africa will be discussed.
Chapter 2

Literature Review and Methodology
I - Third Wave² of Democracy in Africa

The third wave of democracy has not been manifested in a continent of fully entrenched liberal democracies. As Crawford Young (2004:141) writes:

Notwithstanding the disappointments and even disillusionments of the 1990s, the dream of a democratic future remains in the social imagination. The past is a library of negative lessons on state forms: neither the bureaucratic authoritarianism of the oppressive colonial state nor the predatory patrimonial autocracy of its post-colonial successor beckon retrieval. At issue is the quest for a form of governance that can weave together the universal values of a democratic order with elements of the African cultural heritage.

The transition appears to be stalled at the half-way point and Africa has now emerged into a continent of what Fareed Zakaria calls ‘illiberal democracies.’ The new leaders of the continent – Museveni of Uganda, Zenawi of Ethiopia – are systematically obstructing the liberalization of the political system in an effort to remain in power as long as possible. In other states, such as Tanzania, there is political stability but it comes at a cost to political party competition. Elections are held, but the outcomes of those elections are already known. In short democracy is subverted through the continued practice of neo-patrimonial forms of governance. The regular holding of elections and a superficial adherence to the rule of law, separation of powers and a liberal rights regime appears to be simply democratic window-dressing.

These new forms of illiberal democracy form the basis of this research. Although extensive research on comparative judicial studies has been carried out in the advance post-industrial democracies, and in the more consolidated democracies of Latin America and Eastern Europe, we have yet to fully understand the institutional dynamics of these new regimes that appear to be stuck in a permanent stage of transition. This research a

² This term borrows from Samuel Huntington (1991) The Third Wave.
significant contribution to our understanding of institutional development in these new regimes.

II - Competing Explanations of Judicial Behavior

A. Neo-Institutionalism: Rationalist explanations of judicial behavior

Judicial-Control as a Political Strategy In 1957 Robert Dahl produced his seminal piece “Decision-Making in a Democracy: The Supreme Court as a National Policymaker” (1957). Dahl was one of the first to recognize the Court as a ‘political’ and not just ‘legal’ institution; concluding that over time we can expect to see the Supreme Court legitimize government policy rather than challenge it. In the 1960’s Martin Shapiro adopted an approach to the study of the courts that took its cue from Dahl; he labeled it “political jurisprudence.” Shapiro’s argument was that the court is part of the institutional structure of American government and as such should be treated in the basically the same way we would treat any other agency (Shapiro 1964). This new conception of the courts as political institutions allowed Shapiro to move away from a jurisprudence-centered approach to a power-centered view (Gillman 2004).

William Landes and Richard Posner (1975) take up Dahl’s argument that the Supreme Court follows the dominant coalition, but adopt a different theoretical approach. Applying the interest-group theoretical approach they find that the Court enforces the "deals" made by effective interest groups with earlier legislatures. Building on this foundational work, Mark Ramseyer (1994) reformed Landes and Posner's framework into an electoral-market model in his 1994 study on Japan. Ramseyer finds that only when a ruling party has a low expectation of remaining in power might it
support a powerful and independent judiciary. Both Japan and the United States have constitutional protections in place to secure judicial independence, yet US judges are insulated from politicians and Japanese judges are not. Due to their absolute dominance of the electoral marketplace and their significantly favorable odds of retaining control Liberal Democratic Party leaders “having better odds, faced lower risk-adjusted costs to non-independent judiciaries. With lower costs they opted for non-independent judges and closely monitored their judicial agents” (Ramseyer 1994:747).

Also within the Asian context Tom Ginsburg’s (2003) more recent work highlights and extends Ramseyer’s thesis, by suggesting that constitutional designers set up courts as if they were an enforcement body. Courts form a type of “insurance policy,” a policy that will protect dominant elites as they maintain their position in government. In short, weak political parties, or weak coalitions will produce strong judiciaries. Ran Hirschl examines the same phenomena, but instead replaces ruling parties with what he refers to as “hegemonic elites.” The actions of these hegemonic elites are more than just the outcome of benign electoral politics. Hirschl asserts that to examine judicial empowerment based merely upon electoral politics is a “minimalist” position, an oversimplification. In ethnically and culturally divided states, the hegemony of elites is constantly challenged by marginalized minority groups. Elites empower courts, Hirschl reasons, in order to protect themselves and to “insulate” their policymaking from the pressure of minority groups. Hirschl applies this model to the cases of Canada, New Zealand, Israel and South Africa. “Judicial empowerment through constitutional fortification of rights may provide an efficient institutional way for hegemonic sociopolitical forces to preserve their hegemony and to secure their policy preferences even when majoritarian decision-making processes are not operating to their advantage” (Hirschl 2000:73). Hirschl describes this phenomenon as the judicialization of politics.
or the movement towards a “juristocracy.”

Adopting a neo-institutionalist approach Magaelhaes (1999) focuses his study of Eastern European constitutional courts on the intersection of decision making, institutional frameworks and choices. Pedro Magaelhaus finds that “new judicial institutions in emergent democracies are shaped primarily by the strategies of dominant political actors who attempt to maximize the congruence of the judiciary with their interests and its responsiveness to their priorities.” The outcome is that entrenched elites will attempt to consolidate their power by bounding the independence of the judiciary. Eric Herron and Mark Randazzo (2003) examine the impact of various exogenous factors on judicial decision making across eleven post-Communist countries. Some of the factors they tested were economic conditions, executive power, identity of the litigants and legal issues. In part, reaffirming Magalehaus’ conclusions, Herron and Randazzo found that the courts were less likely to invalidate statutes and governmental decrees as presidential power increased.

Using formal modeling techniques, Matthew Stephenson (2003:59) reaffirms earlier findings based on the electoral-competition model by discovering a strong correlation between stable, competitive party competition and judicial independence. Conversely, "when one party or ruling clique dominates the political system, we expect either a judiciary with preferences almost identical to the ruling party or no real independent judiciary at all" (Stephenson 2003). The outcome in terms of judicial decision-making is that the judiciary can be expected to modify their doctrine to maintain their independence. In Stephenson’s model the possibility of reverse or reciprocal causation is not ruled out. Stephenson acknowledges that the problem with this model is that political competition and democratic stability may be endogenous to judicial empowerment; judicial independence may foster democratic stability and stable
political competition.

All of the above theories deal with some form of democratic government. In short, research to date indicates that in democracies judiciaries help to take uncertainty of the political environment. The ability of the ruling regime to manipulate or shape the judiciary in a way that secures their policy preferences is dependent upon the distribution of power. If the opposition is weak and power is unevenly distributed in the ruling party then it becomes more likely that judicial preferences will mirror those of the ruling party. This dissertation examines the judiciary in non-democratic regimes. In an authoritarian regime the rules of the game are set by the ruling party, the only party, therefore the judiciary is not needed as an insurance policy. The ruling regime does not require the judiciary as an insurance policy so the question must then become: Why would an authoritarian regime keep the judiciary in the first place?

Like the ‘insurance model’ theorists, Neil Tate (1993) turns to regime related factors when seeking explanations for judicial independence and behavior under authoritarian regimes. Again, as in the insurance model theories, the authoritarian elites manipulate the judiciary to help maintain power. Tate finds that when crisis rulers take over they do not always dismantle or significantly alter their judiciaries in the same way they do the legislature or political party. Tate found that in the Philippines, India and Pakistan structurally the judiciary emerged from crisis regimes looking more or less the same. This is due to three major reasons. First, rulers assume little risk in leaving the courts unchanged. It is unlikely that the judges will challenge the regime in any serious way. Second, the judiciary is not likely to offer any serious setbacks to the regime. Finally, leaving the courts untouched increases the perceptions that the regime is acting constitutionally. The regime is able to do this through restricting the scope and depth of the courts decision-making. In chapter 4 I examine some of the strategies adopted to
restrict the judicial decision-making by the post-independence authoritarian regimes in Malawi, Uganda and Tanzania.

“Strategic” Judicial Decision-making A large body of literature on the strategic choices judges make in response to potential constraints by other institutional actors has emerged from the case of the United States, for example Frerejohn and Weingast (1992) and Epstein and Knight (1996). This literature concludes that judges act strategically, adapting to the current political environment. How they act will depend on whether the environment is hostile or not. US based models of strategic decision making have been applied and adapted in the vastly different Latin American context (see Helmke 2005; Iaryczower, Spiller & Tommasi 2002; Bill Chavez 2004, for example). Iaryczower, Spiller and Tommasi (2002) in their case study of the Argentine Supreme Court, found that the probability of a justice voting against the government decreases the stronger the control of the president over the legislature, but increases the less aligned the justice is with the president. The authors demonstrate that the Argentine Supreme Court was more independent than previously thought, and that the justices were merely behaving strategically. This reaffirms previous scholarship: politics and process matter to judicial decision-making. Rebecca Bill Chavez’s (2004) study of the judicial independence in Argentina complements the findings of Iaryczower, et al. by showing that when government was divided (for example under the Alfonsin presidency in the 1980s when one chamber of the legislature was held by the opposition) the courts exhibited relatively high levels of independence.

Helmke (2002) affirms these findings, but approaches the same question from a slightly different angle. Given the institutional insecurity of the Argentine judiciary we should assume that they will not be independent. How then do we account for the
occasions where the Argentine judiciary has asserted itself against the government in power? The answer is the judiciary is looking forward, to the possibility of the opposition gaining power. Once a weak government looks as if it is going to lose power, the judiciary will attempt to distance themselves through anti-government rulings. Helmke refers to this as “strategic defection.” Helmke’s thesis is especially relevant to transitional democracies, “precisely because such institutional protections are in short supply in many parts of the developing world, the separation-of-powers approach should prove particularly compelling for analyzing judicial behavior beyond the American context” (Helmke 2002:291). Helmke’s contribution to the development of theory on judicial politics, particularly within the context of transitional democracies, is significant. Within the context of democratization, however, Helmke sounds a cautionary note suggesting that given conditions of political uncertainty, judicial decision making may or may not advance the project of democratic consolidation through the rule of law.

In short, these studies affirm the following: “in a separation of powers system, the range of discretion and hence independence afforded the courts is a function of the differences between the elected branches. The narrower the range of policies between the branches, the lower judicial discretion” (Weingast 2002). This study will contribute to the literature by expanding the application of these theories in terms of regime type as well as geographic scope. Despite the formal constitutional separation of powers and the transition to multipartyism in most African states, the reality is that most states continue to operate as de facto single party states. The legislature exhibits very little independence vis-à-vis the executive, therefore more often than not both branches present a united front when it comes to policymaking. This presents a very narrow space along the policy equilibrium, and the courts must decide when they are willing and or able to step outside of that space to challenge the status quo. The broader lessons of this
research are significant for judicial studies outside of Africa and for democratization scholars within Africa.

B. Historical Institutional Explanations of Judicial Power: Legitimacy and Durability

Regime explanations alone do not account for judicial behavior or the construction of judicial power. It is particularly appropriate to adopt a broad historical institutional approach to the study of the judiciary because change in the courts is very slow. Courts are by nature inherently conservative institutions, it is would be erroneous to concentrate on only recent major changes in the overall political structure. Instead we have to examine the historical pathways for clues as to how, when and why change has occurred. We must not examine the judiciary in isolation, we have to examine it in relation to a) other institutions and macro-political processes (historical institutionalism), and b) dynamics of each particular regime by paying close attention to the behavior and strategic decision-making of key political elites (rational-institutionalism).

It is imperative that we build on the strengths of both approaches to significantly move our understanding of the creation and maintenance of judicial power in different settings. As Pierson and Skocpol (2002:720) opine: “Although historical institutionalists have directed our attention to persistent legacies from the past, new rules of the game can and do emerge from strategic bargains among elites, especially in a period of crisis or uncertainty.” Howard Gillman (1999:67) argues that we might not be able to understand the “narrow category of ‘strategic behavior’ without the contributions of historical and interpretive methods.” Accounts of judicial decision-making as mere instrumental politics are relevant but do not tell the whole story. Gillman posits that scholars of
judicial politics should examine institutional norms, social structures of power and jurisprudential traditions in addition to the political power structure.

Of all the political institutions it is the judiciary that is the least receptive to change and the most likely to maintain significant institutional attributes across major political changes. As Kathleen Thelen (2003:209-210) writes:

\[ \text{[F]requently particular institutional arrangements are incredibly resilient and resistant even in the face of huge historic breaks (revolutions, defeat in war); in other words, exogenous shocks of just the sort one would expect to disrupt previous patterns and give rise to institutional innovation . . .} \]

\[ \ldots \text{On the one hand major macro historical transformations result in institutions that still maintain distinctive historical characteristics across those transformations. On the other hand, institutions such as the US Supreme Court, have preserved many of its attributes but has still transformed itself with regards to the expansion of its judicial power.} \]

Thelen argues that in order to understand this phenomenon we need to establish the institutional feedback mechanisms at work and this in turn will provide insights into what aspects of institutions are renegotiable and under what conditions (Thelen 2003:222). Although the judiciary as an institution is slow to change this does not mean that change does not take place at all. Change is a dynamic and multilayered process – certain aspects of an institution may stay the same while others move on.

The recently published work of Lisa Hilbink (2007) is able to identify important aspects of the Chilean judiciary that stay the same despite profound regime change. Why would judges appointed under democratic regimes facilitate authoritarian policies? Hilbink proffers an institutional explanation, noting that the institutional characteristics of the judicial “grounded in the ideal of apoliticism, furnished judges with understandings and incentives that discouraged assertive behavior in defense of rights and rule of law principles” (Hilbink 2007:225). This ‘institutionalized apoliticism’ was fostered and maintained by the tremendous power of the Supreme Court which exercised
rigid control over the judicial hierarchy. Those who refused to fall into line were
dismissed or subject to disciplinary action. Although it is clear that apoliticism ending
up supporting the illegitimate regime, it was essential to maintaining the professional
integrity of the judiciary. “Challenging the decisions of the military junta [. . .] would
both violate judges’ professional duty to remain apolitical and imperil their chance of
professional advancement [. . .] Chilean judges were trained to be ‘slaves of the law’”
(Hilbink 2007:236). Hilbink’s argument does not displace regime related explanations
of judicial power but I would argue it precedes them. In other words judge’s decision-
making is fundamentally constrained by their institutional setting.

Hilbink’s notion of apoliticism has a strong resonance in the regional setting of
sub-Saharan Africa. But the question is – Is this apoliticism the result of historical
institutional factors as Hilbink finds in Chile, or are they more connected to external
regime-related factors? The work of Siri Gloppen (2003), Jennifer Widner (2001) and
Peter VonDoepp (2005) echo Hilbink’s findings as far as the concept of apoliticism is
concerned but posit slightly different explanations.

Siri Gloppen’s work on the accountability function of the judiciary in Tanzania
and Zambia (Gloppen 2003) highlights the weakness of both countries’ judiciary in the
face of executive dominance. In the case of Zambia, Gloppen finds that the court might
have taken on an ‘apolitical’ role due to the highly politicized nature of many of the cases
they receive. Gloppen calls the un-political judge a ‘norm of appropriateness’: Thus
pointing to important institutional factors.

The conception of an ‘apolitical’ court is a theme that Peter VonDoepp (2005)
built on in his comparative study of strategic judicial decision-making in Zambia and
Malawi. Based on two databases of (politically significant) high court decisions from
Malawi (1994-2003) and Zambia (1992-2003), VonDoepp tests several hypotheses
drawn from the public law literature on strategic judicial decision-making, finding that in both countries a large proportion of high court cases have been found against the government. However, VonDoepp suggests that this decision-making does not resemble ‘judicial independence’ so much as a lack of control over the judiciary by political elites. VonDoepp discusses the reasons behind this lack of control, most of which are rooted in the neo-patrimonial nature of African politics. VonDoepp asserts that neutrality is not so much an institutional norm as it is a strategy in itself. That to be overly partisan or political would be to invite sanctions, possibly removal from the court. Thus ‘strategic neutrality’ becomes a safeguard against retribution or removal.

Jennifer Widner (2003:43) argues that party competition in Africa may not be a necessary condition for an independent court system. At best it creates a “bulwark against the dismantling of such courts.” Indeed in her longitudinal study of the courts in Tanzania Widner (2001) is able to demonstrate that even in a political system dominated by the hegemonic Chama Cha Mapinduzi (CCM) assertive judicial elites are able to reach out to the political leadership and strategically build their power and influence over time. Widner documents the evolution of the court systems of eastern and southern Africa through a narrative centered on the life and work of Tanzania’s longest serving Chief Justice, Francis Nyalali.

As Widner demonstrates the courts of the 1970s and 80s were simultaneously disregarded and abused by the government, moreover the courts had very little support or trust from the public. This lack of support combined with a hostile environment set the stage for the introduction of a range of strategic initiatives on the part of the judicial leadership. This included reaching out to the international community (most notably aid donors), who offered both financial support and professional development assistance. But it was Chief Justice Nyalali’s strategic reaching-out to political elites that was most
interesting, and for some (Bukurura 1995) controversial. Nyalali was able to convince the CCM leadership that the separation of powers and rule of law should be reestablished and respected. This is in part due to his successful characterization that these values were the values of Africa’s liberation leaders.

Widner’s account challenges existing strategic theories of the development of judicial independence. Widner notes that in the west independent courts and multiparty democracy develop in tandem. However, due to weak public support, in part due to the absence of a powerful and dynamic capitalist class, and a lack of electoral incentives these models do not fit the African context. Nyalali’s extrajudicial activities paid-off; demonstrating that judicial elites are important strategic actors in their own right. Circumstances pushed Nyalali into, by Western standards, an unconventional role.

C. Combining Regime and Institutional Explanations

In this dissertation I have sought to combine and test insights from both approaches in the public law literature. I analyze the level of competitiveness in the political arena and assess the degree to which that has impacted the emergence of judicial power. In addition, in Chapter 5 I evaluate significant amounts of data on the institutional characteristics of the courts in Uganda, Malawi and Tanzania. While it is clear that political regime matters the application of existing regime related theories in sub-Saharan Africa is problematic because of the weak level of party competition and the continued existence of neopatrimonial traits across all three states. Therefore I will be analyzing the internal and external attributes of institutional autonomy as indicators of judicial power.
This study is a qualitative, in-depth longitudinal comparative analysis of Malawi, Tanzania and Uganda and adopts a ‘constitutional ethnographic’ approach. This is defined by Kim Lane Scheppele (2004:395) as: “The study of the central legal elements of polities using methods that are capable of recovering the lived detail of the politico-legal environment.” Using a Geertzian method (Geertz 1983) of employing ‘thick-description’ this study will seek to create generalizable theory through descriptive inference.

The shortcomings of this methodological approach lie in the difficulties of moving from ‘thick description’ to generalizable theory and elegant explanatory models. However, as Gillman (1999:87) argues we should be prepared to acknowledge that “the more we see decision-making as arising out of historically derived and institutionally embedded rationalities of action the more we may insist upon the contingent nature of our explanations.” I endeavor to move from thick-description to specifying causal relationships through a research design that carefully delineates and conceptualizes both independent and dependent variables.

A. Case Selection and Conceptualizing Independent Variables

Quality of Democracy Because this is a small-\(n\) in-depth comparative study the cases were deliberately selected on one of the explanatory variables – quality of democracy. This case selection was generated from the regime theory literature that correlates judicial independence with competitive liberal democracies. Important factors could be held constant across the three cases: they all share a British colonial history, have
endured periods of authoritarian rule and transitioned to some form of multipartyism. In addition the judicial institutions of each country are rooted in English Common law.

Although the three cases of Malawi, Tanzania and Uganda are all broadly classified as delegative democracies, there are important differences that should be noted. First and foremost, as Table 2.03 indicates, Uganda is by far the least stable of three countries. Surprisingly, however, the Ugandan government is ranked the highest in terms of “Government Effectiveness.”

Table 2.0 World Bank Governance Indicators

<table>
<thead>
<tr>
<th></th>
<th>Voice and Accountability</th>
<th>Political Stability</th>
<th>Rule of Law</th>
<th>Government Effectiveness</th>
<th>Control of Corruption</th>
</tr>
</thead>
<tbody>
<tr>
<td>MALAWI</td>
<td>-0.31</td>
<td>+0.02</td>
<td>-0.46</td>
<td>-0.85</td>
<td>-0.74</td>
</tr>
<tr>
<td>UGANDA</td>
<td>-0.54</td>
<td>-1.18</td>
<td>-0.50</td>
<td>-0.31</td>
<td>-0.71</td>
</tr>
<tr>
<td>TANZANIA</td>
<td>-0.26</td>
<td>-0.17</td>
<td>-0.47</td>
<td>-0.50</td>
<td>-0.37</td>
</tr>
</tbody>
</table>


Tanzania has made significantly further strides in combating corruption and yet has weaker levels of government effectiveness than Uganda. This table illustrates the difficulties associated with classifying these regimes, the seemingly contradictory trends across different variables. Overall Tanzania is doing slightly better in terms of governance than its neighbors.

Each case has a different level of political party competition. In the case of Malawi there was a turnover of power when the first democratic multiparty election was

---

3 Scale is from -2.5 to +2.5; higher values correspond to better governance. Indicators are aggregated based a large number of citizen and expert surveys by a variety of organizations.
held in 1994, and subsequent elections have been closely contested. In the case of Tanzania there was no turnover of power at the first multiparty election. Chama Cha Mapinduzi (CCM) has continued their dominance on mainland Tanzania from the post-independence period through to the most recent election of 2005. Uganda has no party competition. With the signing of the 1993 constitution, Museveni’s National Reform Movement (NRM) solidified their one-party system of governance. However, recently with approval from the constitutional court and by the people (through referendum this year) the government has released all restrictions on opposition parties. Recent evidence suggests that although opposition parties have been legalized Museveni is taking extreme measures to ensure that they will not form any kind of substantial opposition. In addition to domestic and international newspapers, NGO reports, and first-hand accounts, secondary academic texts will also be used.

*Internal and External Institutional Autonomy* The notion of external independence is borrowed from Peter Russell’s (Russell 2001) two dimensions of judicial independence. The first – external autonomy – refers to sources of dependency, and influence from the external environment. In other words the degree to which the judiciary is free from interference. I adjust Russell’s concept of internal individual judicial autonomy into an internal institutional conception of autonomy. This captures the positive, or enabling aspects of judicial independence. I conceptualize internal autonomy by borrowing from the Bumin, Randazzo and Walker’s (2007) framework on judicial viability. In contrast to Bellin, Randazzo & Walker’s (2004) quantitative study I am able to capture these historical-institutional elements through the use of in-depth descriptive methodology.
I take durability and differentiation from the political environment and characterize them as part of ‘internal institutional autonomy.’

**Differentiation** from the political environment (physical location, professional qualifications, voluntary association)

**Durability** with resistance and flexibility the court can withstand the challenges of a democratizing system. (length of formal insularity, adequate equipment and administrative support, court age)

In addition I add an important third measure to durability and differentiation – legitimacy. Legitimacy is a crucial component of institutional viability. A judiciary with a greater level of legitimacy will feel an internal sense of empowerment. Without legitimacy “courts find it difficult to serve as effective and consequential partners in governance” (Gibson 1998). Here I focus on public opinion: levels of support from civil society, and the levels of internal corruption and control. In the sub-Saharan context in particular it is important to also consider the level of support from elites. Here I focus on the national law societies or bar associations. As Gibson, Caldeira and Baird (1998), Vanberg (2005) and others note, public opinion feeds back into the court (both directly and indirectly through the electoral marketplace) and this consequently affects the performance of that court. Gibson, Caldeira and Baird (1998) find that support for High Court’s increases as the courts gain more exposure. Thus, exposure is ultimately good for the court. However, they also note that support for the court evolves slowly over time. They find that in young courts court output and institutional legitimacy are weakly connected in comparison to older courts. Concluding that perhaps “young courts can only acquire legitimacy by making their decision known to the mass public and waiting” (Gibson 1998:356). The most salient question in regards to sub-Saharan Africa is: Do the courts have enough popular support to prevent interference from the executive even when decisions are made against the executive? For most individuals the higher courts
of the judiciary are irrelevant and they will never come into contact with those courts in their lifetime. Therefore an understanding of the courts requires a fairly sophisticated assessment of their role within the political system, particularly in regard to their accountability function through the separation of powers.

In addition to examining attitudes of the public and elites towards the judiciary I will examine the degree to which internal norms and internal corruption effect the construction of institutional legitimacy. This is by far the most difficult variable on which to collect data. It will examine the level of control the judicial hierarchy submits over its members and will attempt to characterize the norms and frameworks of reference utilized by the judiciary. This is ascertained through examining the language in judgments, external statements by judges and through interview data. As Siri Gloppen (2003) notes although there is broad agreement on the importance of judicial independence, what is the prevailing attitude with regard to the judges relationship with the other arms of the government. In short, what is the prevailing institutional culture with regard to the political role of the court?

I characterize Russell’s (2001) notion of external autonomy along two dimensions: formal and informal. Formal external autonomy refers to the constitutional powers conferred upon the institution; this includes power of judicial review and judicial appointment mechanisms. Informal external autonomy refers to the ways in which the judiciary has suffered negative interference. This encompasses manipulation of the appointment process, verbal attacks and disregard of judicial decisions by the military.
B. Conceptualizing Judicial Power

Central to my conceptualization of judicial power is that the courts are not simply neutral third-party arbiters but that they are wielders of political power; a power that can affect, and be affected by politics and the distribution of power. Recent trends indicate that the widespread establishment of constitutional provisions on judicial review ushered in a new global expansion of judicial power (Tate 1995). However, as Tom Ginsburg (2003) notes, there are important differences that need to be observed in terms of the type of judicial review set up. Judicial review provides an insurance policy in a competitive democratic arena. Ginsburg argues that “the design of the system will reflect in part the configuration at the time of constitutional drafting, with the availability and power of judicial review increasing with political diffusion” (Ginsburg 2003:64). Ways in which judicial review can be minimalized or maximized can include the size of the courts, the appointment of judges and access to the courts. This will alter the number and types of cases coming to the court; ultimately however, it is up to the judiciary to give substantive meaning to these powers. Moreover, it will depend on how the government reacts to the assertion of power over time.

When conceptualizing judicial power scholars have a tendency to focus on the degree to which judicial decisions are abided by and enforced. This is not necessarily a good measure in transitional democracies for a variety of reasons. Of course, total disregard of all decisions indicates a weak judiciary. But what is more typical is a strategic adherence or strategic default on judicial review decisions based on political expediency. In fact I make the argument that a greater intensity and number of attacks on the judiciary is an important indicator of judicial power. It is a sign that the government feels threatened and that the judiciary needs to be kept on a shorter leash. High numbers of cases filed, particularly those concerned with highly contested political
issues, will naturally attract more significant attention. Overall this attention is expected to increase diffuse support for the judiciary (Gibson 1998).

In this dissertation my base measure of judicial power is court judgments. Chapters 6, 7 and 8 examine the decision-making of the judiciary in judicial review cases, election petitions and significant rights cases. However, it is not enough to examine these cases in a vacuum. It is here that I acknowledge the endogeneity of judicial power as a concept. First and foremost judicial decisions are important mechanisms that feed back into the judicial institutions. The decisions feed back indirectly in terms of institutional legitimacy and constituent support for the judiciary, but also directly. The decisions send signals to other elites regarding what kinds of cases they are receptive too and offer an indication of the likelihood of success for future cases. Furthermore, those same signals can also trigger direct attacks or interference in the independence of the judiciary.

In sum, judicial power is a complex variable with composite, endogenous parts. In this dissertation I separate out the conditions or inputs in the judicial decision-making process and the outputs - the decisions themselves. However, in the case of new courts in transitional states we have to look beyond case outcomes when we are measuring judicial power.

IV – Data

A. Documents

The first step in this project has been to construct timelines of i) significant cases and ii) significant political events. Certain of these cases and events are selected as in-depth illustrative case studies. In addition to the use of secondary historical material, two
major primary sources are used for this initial stage of research: newspapers and law reports. Despite the availability of major English language newspapers on-line, the archival capacity of these websites is limited. Field work was conducted over the course of ten months in Malawi, Uganda and Tanzania.

Unfortunately the countries of sub-Saharan Africa have not been very successful at disseminating their statutes or case law beyond the national court libraries, or law schools. Before entering the field I found some post-1993 hard copies of the Malawi, Tanzania and Uganda law reports in the libraries of Harvard University, School of Oriental and African Studies (University of London) and the British Library. In addition the electronic Africalaw (©2005 Lexis Nexis) database covers Tanzania and Uganda from 1999 to present. However, these resources do not completely cover the time period covered by this research.

In the field collecting case data turned out to be difficult out best, impossible at worst. None of the three national courts have electronic databases of cases. The only official record is the hand-written court registry. This is obviously maintained chronologically and is of little use at the High Court level given the large volume of cases. Malawi’s most recent set of law reports extends through to the year 1993. There is very little of use in those reports. The vast majority of cases are unreported. I retrieved cases through secondary sources, through the High Court on-line database and through requesting copies be made of the original judgments from the High Court registry (this turned out to be problematic given that there was not one single functioning copy machine on the court premises in Blantyre). Tanzania has the most recent set of national Law Reports through to 1997. However, I was reluctant to rely on this database as a complete universe of cases because the editorial board was alleged to have been highly politicized. It became clear that indeed many important judgments had been left out.
The editorial board still meets annually to select cases for inclusion; however the reports have not been printed for over ten years. Finally Uganda has not had a national law report since 1957. There are some private reports that have been published in the 1990s – for example the Kampala Law Reports (published by the Law and Development Centre). In addition Kituo Cha Katiba has recently published a Constitutional Cases Digest for East Africa.

Given these difficulties my original goals of collecting a complete database of: 1) all cases that name the government and/or opposition as a party; 2) cases that address the constitutional protection of civil and political liberties, 3) cases in which the government has a significant interest – was problematic. To the best of my ability and limited resources I was able to obtain a close to complete universe of what I term ‘significant cases.’ This, I believe has given me ample resources with which to answer my research questions.

I utilize the cases to provide a chronological narrative of emerging judicial power in the three cases. I engage with the actual text of the cases and not simply whether the outcome was pro or anti-government. Engaging on a deeper level with the text of the judgments has allowed me to descriptively infer important internal cultural norms, behaviors and attitudes. This is the case in both jurisprudential terms and in political, social terms.

B. In-Depth Interviews

This study conducted a series of strategic, in-depth interviews in each of the three countries. The interviews were semi-structured so as to allow for comparison between the respondents, but not to shut off the possibility of gleaning information not previously considered by myself. Because the methodology of this study is qualitative, the number
of interviews obtained was not as important as the quality and depth of the information I was able to glean from each interviewee. The goal of the fieldwork was not to interview every past and present high court justice, but to garner enough information to identify both behavioral and attitudinal patterns.

Through the use of snowball techniques I was able to interview over 60 informants in the field. One of the problems with using the snowball technique is that I was often referred to individuals that people believed would tell me what I wanted to hear. This often included the more outspoken and assertive judges for example. So in addition to the snowball technique I would approach many individuals without referrals based on prior research that indicated they were important stakeholders. The interviews were conducted anonymously and ranged in length from 30 minutes to 160 minutes.

The interviews were conducted with 3 main groups of individuals:

1) Past and present high and appeals court justices
2) NGO activists; organizers of national law societies; constitutional lawyers
3) Local academics; media observers

Because of the confidentiality agreements I entered into my interviewees are identified by their occupation and their nationality only. Specific titles, for example “Chief Justice”, have necessarily been eliminated to avoid implicit identification.

C. Contextual Understanding and Insight

As King, Keohane and Verba (1994:40) remind us, we are often called upon to interpret the meaning of an act within a given context. In order to do this successfully we must be familiar with the cultural norms and the history of particular actors. Spending 10 months in the field helped increase my understanding of the political, social, economic and cultural context of the three countries in which this study will take place.
Chapter 3

Colonialism, Judicial Power and the Transition to Independence
In 1961, prominent lawyers and jurists from across sub-Saharan Africa would meet (under the aegis of the International Commission of Jurists (ICJ)) in Lagos to discuss building the rule of law in Africa. A Nigerian, Chief Arthur Prest, declared that the ICJ “must inspire lawyers in the four corners of the globe to fight against every violation of the rule of law, not only in the law courts, but on political platforms, in educational institutions, in trade unions and in all fields in which they participate because it is only by dedicated struggle that the survival of the rule of law can be assured” (International Commission of Jurists 1961). Indeed the use of the word ‘struggle’ would turn out to be prescient, as democracy and its’ central component, the rule of law, have struggled to take root across the African continent. However, despite the enormity of the challenge faced by these leading jurists and lawyers of newly, or soon to be, newly independent states, there was reason for optimism. The Chief Justice of Nigeria, Sir Adetokunbo A. Ademola declared,

That this conference is being held in Africa at this time, when so many important decisions have to be taken, when so many problems have to be solved, when there are signs of major conflicts, when the rule of force is being substituted for the rule of law, when all these various ailments have afflicted us in Africa, is not only significant but is also proper that a body dedicated to human dignity and justice should exchange ideas and reaffirm their belief in such practical problems pertaining to the rule of law. (ICJ 1961)

The major issues of concern at this conference are issues Africa continues to grapple with today, from restricting the scope of executive power, to the protection of rights under declarations of a “state of emergency.” Moreover, the representatives at the ICJ conference saw the rule of law and democracy as two intertwined concepts.

Judicial power is path dependent. The decisions made and actions taken fifty or even one hundred years ago affect both the actions of and attitudes towards the judiciary (Malinowski 1959) often bound by decisions made decades ago. Judicial decision making
is not only affected by legal precedent, but also by changing political and historical trends. How were the courts as institutions shaped by the political environment over time? Key factors that have shaped judicial behavior are: changing domestic political regimes, changing global power structures (political/economic and legal), societal conflict and divisions, and indeed institutional changes within the internal judicial structure. This chapter will examine the judiciary under colonial rule and the transition to independence. Taking cues from Joel Migdal’s state in society thesis, I will show how the first encounters between the indigenous people of Africa and the formal colonial state shaped one another. We cannot separate our study of the state, or in this case the judicial arm of the state, from the evolving and constantly conflicting realm of society. Furthermore, as I shall go on to explain, the essential characteristics of the colonial state carried over to the post-independence state. These characteristics were generally quite undemocratic, indeed it is not really surprising to see how the overly powerful colonial executive branch (versus weak legislature and judiciary) transformed the omnipotent colonial governorship, to the authoritarian, nationalist, indigenous independence leaders. Moreover, many of the institutional characteristics of the colonial judiciary could be argued to be present in the contemporary African judiciary. These characteristics include a conservative, formalist approach to the law, being overly deference to precedence, and a culture of moderate incrementalism.

I shall argue that both the law and judges themselves were used as instruments of control and repression. Law (in combination with the actual or threatened use of force) was crucial to colonial control and domination. Secondly, the courts were weak in terms of their ability to check the power of the government (no judicial review), and in terms of their ability to protect the rights of citizens. Thus the inherited court system at independence was weak and marginalized. Thirdly, the weak institutionalization of the
courts, unprofessional judges, few lawyers created a very weak base upon which to build a powerful judiciary at independence. Fourthly, efforts to both construct and bring customary law into a single common law system created innumerable practical problems well after the transition to independence. At a more general political level, the British use of “ethnicity” as a mode of organization and administration would have devastating consequences for citizens under future governments.

With varying degrees of difficulty each country transitioned to independence. I examine the process of drafting the independence constitution, which were constructed as a matter of political expediency rather than within a “rights discourse” setting. This (pragmatic) emphasis on power relations over rights, the lack of consultation or consensus building around the documents, in part explains the short lives of each of the three independence constitutions. Finally, I begin to sketch out parallels between the African legal experiences under colonialism versus under globalization today. I introduce this argument here in Chapter 3, but develop it further in the second half of this study.

I - Colonialism, State Formation, Customary Law.

“Law ought to be defined by function and not by form” (Malinowski 1959)

A. Law as an Instrument of Control

The three geographically contiguous countries of Uganda, Malawi and Tanzania were all once part of the British Empire. Uganda became a British protectorate in 1902 after the signing of the 1900 Buganda Agreement.4 Malawi became a British protectorate in 1902.

---

4 The country that is Uganda today is the result of a colonial experiment by the British: to integrate distinct multiple tribes into an aggregated, viable state. The colonial entity of Uganda was clearly divided between two major linguistic groups the Bantu in the South (kingdoms of Buganda, Busoga, Bunyoro, Toro, and
Tanzania (the Tanganyika) was initially a German colony until the end of WWI, at which time it came under the control of the British. All three countries share similar legal structures. Indeed, up until the 1970s the Ugandans and the Tanzanians shared an actual court: The East Africa Court of Appeal.

Figure 1: Colonial Era Timelines

It is perhaps misleading to begin this study with an examination of the Ankole) and the Luo in the north (chiefdoms of Acholis and Langis and the Karamojong and Itesots clans) (Berg-Scholsser 1990:23). Buganda was by far the most powerful kingdom in East Africa, and prospered as it was given preferential power, independence and status under the British system of indirect rule as established first by Lord Lugard in Nigeria in 1900. It was sophisticated, well organized and wealthy. In a sense, the British entered into a direct partnership with the Bugandan people. However, ultimately there was no doubt that the colonial power held ultimate authority which was usurped from the Kabaka (King). The institutional framework established for Uganda was contained in the Buganda Agreement of 1900 and the 1902 Order in Council (Tusiime Kirya 2006:3).

Unlike Malawi and Uganda, Tanganyika started life as a German colony. Between 1885 and 1890 the colonial administration of Tanganyika was carried out under the auspices of the German East African Company. In 1891 the German government took over the full-administration of the colony. As in the British colonies legal power was vested in the District Officers. The District Officer was responsible for daily administrative duties; but he was also the judge and executor of punishments. As Wambali notes (1996:113), the constitutional order was autocratic: “German colonizers seriously believed that they could successfully affect their lofty development plans using the iron hand.” The Tanganyikan people responded through a series of revolts and uprisings, most significantly the Maji Maji war of liberation from 1905-1907. In short, 20 years of German rule over Tanzania was marked series of native uprisings, and presented little opportunity for law making. When the British arrived developed a new style of administration was developed that was a significant departure from German rule.
development of law under colonialism. This suggests that there was no such thing as pre-colonial law. Many anthropologists have written rich studies of pre-colonial legal structures in Africa. Despite British efforts to homogenize the ‘customary’ into a single system of law, we cannot talk of a “single” system of “African” customary law. Regional and local differences were both significant and profound. The more developed kingdoms, such as Buganda, administered justice on the basis of standardized or accepted principles. In contrast, kinship structures without a distinct leadership structure would administer justice in a more ad hoc manner. The nature of law was process, rather than rule oriented. Rulers often handed down punishment or retribution after consultation with the people. At the outset, it is important to note that the pre-colonial customary law was quite different to the colonial “institutionalized” customary law. Under colonialism the ‘constructed’ customary law was established in a particular way to protect and enhance the power of the local elites and the colonial powers (Chanock 1998).

It is not an exaggeration to suggest that the onset of colonial rule set the social structures, conditions and politics for the remainder of the twentieth century – both in institutional terms and with regards to political culture. The import of particular notions of governance and law became distorted, but remained for decades to come. The fundamental goal of colonialism was the exploitation of natural and human resources for economic gain. Given the skeleton administrative and bureaucratic structures developed by the British, why then was it so important to develop a comprehensive system of law? First, we cannot separate the evolution of law from the evolution of capitalism and the marketplace. As the colonizers penetrated (literally and figuratively) further into Africa, the market became more developed. This meant the critical introductions of private land, private goods and private property. In addition to the selective use of force, the best way
to protect these goods was through the law; in particular the law of written contracts. As Chanock, (1998:235) writes, “the development of the market was pushing people towards contractual relationships, the struggle for the control of things, rather than of people.” It is Yash Ghai (1970:34) that perhaps best summarizes the “function of law” in colonial Africa:

Lawyers were constantly adjusting the law to the needs of the politicians and administrators who were carrying out the forward policy in Africa. Sometimes these persons adjusted the law themselves and left the lawyers to catch up as best they could. In so far as law operated as a check on their activities it did so because there was an inevitable time-lag between the request for reconsideration of basic principles, and the legislative implementation of the new basic principles. Thus neither the lawyers nor the politicians saw the function of the law as standing impartially between two sides, or even leading in favour of the weaker side, but as making the way smooth for the stronger. Was it impolitic to annex African protectorates? This did not matter; the law was sufficiently flexible to ensure full governmental powers in a protectorate. Was it politic to break agreements with African rulers? It did not matter; the law would permit an Act of State to be pleaded which would avoid the embarrassment of having to justify one’s action in court.

The relationship between capitalism and the development of the judiciary has seen a renewed significance in Africa since 1990 in our globalized world, and is a theme I shall be picking up on later. International institutions, particularly the World Bank, see the importance of the rule of law in developing an effective economy and an efficient marketplace. The judiciary is seen as central to the rule of law. This is typified by funding for special commercial courts, many of which now seem to have newer, superior buildings, more personnel and better funding than the traditional civil and criminal law courts. The interaction between indigenous law and colonial legal structures shares

---

6 Note case of new commercial court in Kampala, project funding by World Bank (and EU?). Both Court of Appeal and Supreme Court are in temporary buildings. Court of Appeal building owned by private individual(s) (interview with Court of Appeal Justice), government hasn’t paid the rent and they have been threatened by eviction.
several parallels with contemporary interactions between globalized legal, economic and political forces, and domestic courts.

The British were less interested in modernization and more interested in the maintenance of law and order. Law and order was enforced through a range of tactics, from patronizing paternalist rhetoric to brute military force. Despite the questionable methods, at the end of the day the colonizers truly believed they were on a mission to bring ‘civilization’ to Africa. Perhaps even greater than the quest to protect private property was the fear of anarchy. For an ordered, well-structured society was naturally most conducive to resource extraction. The primary concern of judges was not to protect the rights of individuals (for forced labor naturally had no rights). Oloka-Onyango (1993:12) bluntly summarizes this connection between the evolution of judicial power and the colonial system of production: “issues such as forced labour and taxation were not to be the subject of judicial scrutiny and were dealt with administratively. Moreover, individuals that had been subject to mistreatment had no rights and were not protected by the courts.”

The goals of colonialism were not to develop Africa for Africans. Development took place (i.e. infrastructure – roads, rail) only to the extent necessary to provide for the expeditious and efficient exportation of goods back to the motherland. Perhaps one of the most harmful manifestations of the evolving colonial state was the huge gap between the educated, urban elite and the poor, uneducated rural masses. The urban-rural divide worked to the benefit of the British. It was in their interests to maintain the primitive nature of rural society. In economic terms this meant less competition for goods and services, and a steady stream of cheap or forced labor. The legal structure that both enabled and protected this relationship was an imported one. "... The accepted law was made in the metropolitan countries and exported to the colonies in different
administrative and legal forms to service the interests of those it was designed to protect, namely, to expand capitalist production to the disadvantage of the colonized” (Oloka-Onyango 1993:47).

B. Customary – Common Law

“Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed but it needs careful tending. So with the common law. It has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour all the world over: but it has also many refinements, subtleties and technicalities which are not suited to other folk. These offshoots must be cut away. In these far off lands the people must have a law which they understand and which they will respect. The common law cannot fulfill this role except with considerable qualifications. The task of making these qualifications is entrusted to the judges of these lands. It is a great task. I trust that they will not fail therein” (Denning LJ commenting on power conferred on the High Court of East Africa in 1902, in Nyali Ltd v Attorney-General at 653)

The glue that helped bind this imported system to the indigenous population was customary law.7 The colonial court system was essentially the same across Uganda, Tanganyika and Malawi (although in Malawi appeals would go straight from the High Court to the House of Lords.) Customary law was tacked onto the bottom of the judicial hierarchy, and this where most Africans’ experience with colonial law would begin and end.

---

7 Chanock adds an important dimension to this picture, and that is that law was not just imposed from above, it was adopted by the African’s themselves. Local leadership, in particular used customary law to meet their individual ends. Chanock (1998) notes that: “Africans were active users, not passive recipients, of the new form.”
Figure 2: Uganda Colonial Court Structure

This chart gives the impression that there was a ‘single’ version of justice. This was not the case, however. As Fullerton-Joireman (2006:195) notes “Colonisation not only preserved multiple and distinct bodies of law, but promoted their application to different populations within the same country. A British citizen in any colony of the British Empire could expect to be subject to British law with a reliance on British legal precedents as defined by British case law. Such was not the case for indigenous or so-called ‘native’ populations. They were subject to customary law in conflicts with other Africans or to British law if involved in a conflict with a British citizen. British or common law recognised individual rights, yet customary law focused only on group rights, so much so that individual property rights in land, for example, were not recognised for indigenous people in British African colonies.”
This legal system was established very early on in colonial rule, and in the case of Uganda the dispersal of power was established under the 1900 Buganda Agreement.\(^9\)

The essential point of the Agreement was that any exercise of judicial power by the recognized "Native" authority, was undertaken via the overall supervision of the colonial administrative super structure. This dominance was confirmed by the 1902 Order in Council which established a system of Courts of Justice that mapped those in existence in the metropolitan state, with a system of appeals extending to the Privy Council of the English House of Lords. (Oloka-Onyango 1993:7)\(^10\)

Customary law was the foundation upon which English common law was placed – albeit an invented foundation. The dual system (one for whites and one for blacks) maintained the social, economic and political status quo. Or to put it another way, “the white man’s machinery of law enforcement was set up to enforce the black man’s substantive law” (Sack 1973). This focus on customary law became a significant part of the restructuring of African society. The system of indirect rule\(^11\) imposed by the British provided the

---

\(^9\) The agreement quickly morphed to take on a religious and an economic element. The Kabaka chose mostly Anglican chiefs, and those chiefs were given significant portions of land under the 'mailo system.' Anglican missionaries dominated the court of Buganda, whereas the Catholic White Fathers dominated the Baganda population as a whole (Berg-Schlosser and Siegler 1990:97). Thus membership in a particular religion now took on the significance of an economically and politically relevant factor (Chanock 1998). This legacy of an emphasis on religion is still felt in contemporary Uganda; religion is one of the factors taken into consideration during the judicial appointment process.

\(^10\) In *Mukwaba v. Mukubira* (Civil Case No.50 of 1954, in 7 ULR 74) and *The Kitariko of Buganda v. The Attorney General of Uganda*, court validated colonial control of the Buganda. "In essence, the Judiciary was confirming -in a highly positivist fashion - the fact that state power in the colonial context could not be the subject of judicial scrutiny. This confirmed the supremacy of the Executive over the Judiciary and in many respects set the stage for the judicial attitude towards executive power in the post-colonial period. Not only had there been a triumph of executive over judicial power, which, despite the urgings of the Bush Report continued to be fused in the lower native courts and in the chiefs and district officers, but even the higher judiciary merely reinforced the domination of state power over all other forms of expression or organization." (Oloka-Onyango 1993:18)

\(^11\) The British style of colonial rule - indirect rule - was developed by Lord Lugard in Nigeria in 1902.
means for the dominant ethnic group to remain dominant. Furthermore, the onset of
capitalistic, cash based economy created more social tension and pressure. The
important point here is that colonial power in the form of British indirect rule did not
satiate all local, regional and ethnic conflict. It created and inflamed these conflicts.

The passing of the conquest states, the establishment of the *pax Britannica* and the provision of stronger judicial machinery did not put
an end to evil, jealousy and the desire to harm others. Indeed as conflicts
were sharpened by the pressures of colonial capitalism and the growth of
the economic warfare of man against man. This was the greatest
disturber of the villages’ social peace (Mamdani 1996).

What is so fascinating about the British encounter with customary law is that the
encounter itself came to define and reshape customary law into a static entity. The
integration of customary law was a mechanism by which the state could legitimize itself.

As Joel Migdal (2001:154-155) notes:

> [S]ocial changes in elements of the public and the generation of new non-
state forms of law among these publics can transform the make-up of the
state (here in legal terms), the very way the state is constituted. And the
state, in turn, can transform society through its application of new law as
well as by synthesizing different sets of societal law that may be at odds
with one another. Where such a double transformation takes place, state
come to be associated among those publics with what is right, gaining key
legitimacy from that shared sense of meaning

Common law was grafted onto customary law. Yet customary law remained a distinctly
separate, parallel system of law; a system which was not always to the benefit of those

result are achieved by his patient and loyal application of these principles, with as little
interference as possible with native customs and modes of thought. (Lord Lugard, 1926)
who had experienced injustice. Moreover, the idea of integration is a little misleading. The goals of the British were always to, where possible, resolve disputes in the customary or informal tribunals, this being cheaper and more efficient for the colonial government. As noted by Yash Ghai (1987), the goals of the colonizers were to keep native tribunals as separate as possible from the rest of the legal system. This then served the function of keeping rural society separate from the urban areas. In other words, customary tribunals were a system of containment. The dualistic system of common law and customary law was replete with practical problems, and indeed customary law was never treated as either morally, or legally equal to British common law. This is epitomized in the following comment by Judge Somerhough in Chitambala v. R (1957) (cited in Mamdani 1996:112): “Native customary law, in my view, is more or less in the same position as foreign law and it must be established by an expert before courts other than native courts.” Furthermore, the adoption of customary or traditional law into a single system ossified the traditional law. In short, “It did not have the flexibility and sensitivity of the traditional system because the former was received in such a way that it was "fixed" in time (Kakwenzire 1992:43).

If a case could not be settled in a Native Court of Appeal, it was brought before a superior (Magistrates' or Supreme) Court. British officials in these courts were instructed to apply native or customary law to colonial subjects, provided that this law met the

---

12 Oloka-Onyango (1993:8) discusses an illustrative case of the friction between informal and formal law, and how it didn’t always serve justice: “This was made clear in the case of REX v. YOWASI K. PAILO & 2 OTHERS Criminal Revision No.43 of 1922, in which the applicants sought a revision of a judgment by the Lukiko Court, where they had been accused and convicted of making seditious statements against the persons of the Kabaka. In the Lukiko court trial, no prosecutor had appeared, the procedure being that the complainant himself would prosecute the case. However, because the complainant was the Kabaka for whom it was beneath his status to appear in his own court, the case was accordingly prosecuted by the court itself, by putting questions to the accused. The High Court found nothing lacking in this procedure and simply held that in a prosecution for exciting hatred and contempt against the native government, it is no justification for the accused to claim they were actuated by feelings of patriotism and only sought to improve the condition of the country.”

13 6.N.R.L.R.29
requirements of the ‘Repugnancy Clause’\textsuperscript{14}, which excluded practices that were anathema to justice, equity, and good conscience (Reichman 2004: 256). Unsurprisingly, this repressive measure was not just used to maintain the social and ‘moral’ order (as its name suggests), but it was also used as a means to achieve specific political and economic goals. Oloka-Onyango (1993:11) cites an interesting example of this in the 1933 case of \textit{Mwenge v. Migadde} (1933).\textsuperscript{15} In an attempt to secure small-holder coffee production, the Ugandan colonial courts wiped away Bugandan native land tenure law in a single ruling. They were able to do so by invoking repugnancy clause. Whenever there was a conflict between ‘the law’ and custom – the law would always prevail. The important thing to note here is that the maintenance of local or customary law was not a benevolent act meant to preserve local customs or heritage. It was explicitly a form of oppressive control. The repugnancy clause enabled imported judges to pick and choose which customs were in their interests to maintain, and which should be abolished. This practice was ultimately destructive to the very social threads of society. As Peter Fitzpatrick posits (1992:10):

\begin{quote}
The potent implication of the repugnancy clause is that the native does not have a distinct and integral project since, with the repugnancy clause, a part of the resident culture can be denied here and a part there without any harm to a significant fabric of existence. Such an ultimate negation by imperialism was profoundly identified by Fanon as the fragmentation of a life once lived and the consequent rigidification of the fragments, the dynamic of which is now external to them.
\end{quote}

One of the major difficulties the British experienced in the interpretation of customary law was the fact that it was an oral tradition. This did not fit within the common law concept of \textit{stare decisis}, or written precedent. Thus, British administrators had local

\textsuperscript{14} The repugnancy clause was a standard in all instruments that applied the basic principles of common law and equity and statues of general application to colonial territories. Any customs or traditions found offensive, were declared “repugnant” and abolished (Morris 1966) p.11.

\textsuperscript{15} High Court Miscellaneous Case No.19 of 1933 ULR 97
experts testify to the existence of their laws, which were then converted into writing and incorporated into common law precedent (Reichman 2004:257). These local experts, as in all areas of colonial political administration, were not always neutral arbiters of justice. They were, of course, naturally inclined to further the interests of their own tribe or ethnic group. By recording decisions in this way, British legal administrators established "a body of precedent, turning local law into something akin to English case law. Precedents were invoked and debated not only in British courts, but also in indigenous ones, where actors sometimes framed their arguments against the backdrop of their understanding of how matters would be handled in colonial courts" (Mann and Roberts 14, cited in Reichman 2004:257).

There was also an important symbolic, or perhaps ideological, component to the incorporation of customary law into British Common Law. It created what Reichman (2004:92) refers to a “seamless narrative.” Turning oral legal traditions into written precedent created a new historical narrative for the African people. However, as Reichman (2004:92) argues that “this narrative was often a mechanism by which the British could belittle or turn customary law into simply “stories.” The incorporation of certain aspects of customary law into English Common Law precedence was the natural

16 First, it is important to note that a precise definition of indirect rule does not exist. It was more of a guiding principle. However, it is useful to refer to Perhams’ definition here: “... a system by which the tutelary power recognizes existing African societies and assists them to adapt themselves to the functions of local government” Margery Perham, Native Administration in Nigeria [London, 1937] cited in Morris and Read [1972:257]. One of the difficulties of indirect rule was that it complicated the relationship between the native courts and the high court. As Morris wrote in 1926, “It must be evidence to anyone who has devoted any attention at all to the subject of indirect rule that it is not possible to preserve the authority of a chief and rule through him, instead of ruling directly, if he is deprived of his traditional and customary functions as judicial, as well as executive, head of the community. If his judicial chiefship, whether exercised by him alone or, as is more usual, with the advice of his councilors, is taken away from him and invested in British officers, his authority must inevitably decay and disappear eventually. ... In native tribes such as those in Tanganyika, judicial and executive powers are combined in the chiefs and the native courts which we have are a vital part of the machinery of native administration. They are no part of the ordinary judiciary system based on European ideas and, this being so, the native courts should be under the supervision of the administrative officers and not under that of the high Court. ... Moreover, there is always a tendency for the stronger superior court to overshadow and dominate the weaker inferior court and, if for any of these reasons the faith of the chiefs and people in their courts became impaired, a fatal blow would be dealt to the system of indirect administration to which we attach such importance. (pp.145-146)
next stage of development: development as defined by the British.” It is wrong to see the gradual incorporation of customary law into common law precedent as something static.

The changes in customary law reflected the evolution of society at that time. One of the purported benefits of common law over civil law is its flexibility to adapt to the changing social, political and economic circumstances. These benefits were eliminated by the British. It must be noted that the gradual evolution of common law in England is a far cry from the repressive colonial, and later, authoritarian regimes of Africa. As Fullerton-Joireman (2006:194) notes, “this process was developed in the relatively homogeneous context of England where the oral tradition and the elevated, respected role of the judiciary were important elements of the political culture.”

However, the notion of what was ‘customary’ became part of the ‘invented’ colonial narrative. It is worthwhile to pause here and consider Mahmood Mamdani’s important arguments that the concept of ‘customary’ was a political and economic device of central importance to colonial powers. Mamdani (1996:50) writes,

European rule in Africa came to be defined by a single-minded and overriding emphasis on the customary ... although the notion of the customary was not unique to the African encounter with Western colonialism, distinctive about that encounter was the scope of the customary. Not only did customary law in Africa guide personal relations but it also guided access to productive resources, i.e. land. The bearer of custom was the tribe; the tribe now became the organizing unit of society in a way that was quite different to what had come before. Yes, hierarchical authority was a characteristic of pre-colonial African society; but the key difference in the colonial era was that the Chief’s power was backed up by the economic, military and political might of the colonial state.

As Sally Falk Moore argues, the chiefs moved from the social field (the place of the conflict) to the formal assembly (Mamdani 1996:119). Thus the use of law in development created a greater ethnic identification and awareness:

In the development of ethnicity during the colonial period, as well as in the development of the colonial and post-colonial states, the customary law served
most usefully, not as a system of rules, but as a method of legitimation. The new ‘tribes’ had recourse to an ideology of traditionalism of which the customary law was a part. It defined practices that were special to groups and also carried along practices, which helped people both to make identifications and to legitimate new demands (Chanock 1998:238).

Even as the colonial chapter came to an end, the belief in the successful institutionalization and positive legacy of British common law was great. As Roberts Wray pronounced in 1960, "British administration in overseas countries has conferred no greater benefit than English law and justice" and “the ideal of justice and good government is the guiding star of British administration."17 The British regarded the incorporation of customary or traditional law, into what they believed to be a single system of law, as an unmitigated success. In retrospect, taking historical lessons into account, scholars today agree that the forced implantation of a foreign system of law is unlikely to be successful. The transplantation and implementation of foreign legal systems represented a substantial challenge, given that these systems were not rooted in local norms and values (Fullerton Joireman 2006:128).

C. Judicial Power, Culture and Institutionalization

If the adoption of aspects of customary law was imperative to the legitimization of the colonial regime, then the judges that both interpreted and created the law were political agents of the colonial state. Thus, at the heart of the colonial political regime was the colonial judge. As Chanock (1998:27) elucidates, “The important thing seemed to be not to get the law right but to get the politics of court creation right. The proper development of the law and the arresting of social dissolution appeared to depend on the creation of judicial institutions properly founded in the traditional community, which would themselves develop the law.” In addition executive privilege operated above the

---

17 Cited in (Reichman 2004)
law. Governors were given extremely broad swathes of power that allowed them to consistently rule through executive fiat. However,

> Very occasionally, a court might set aside a specific rule made by a governor as *ultra vires*. For example, in *Mbui v. Rex* (1951) the enabling ordinance gave the governor the power to limit coffee crowing by areas. The regulation made under the ordinance limited it by ethnic classifications. It was held *ultra vires* . . . These invocations of the received English law to curb the power of the governor were the exception not the rule. In most areas, the governor’s decision-making powers were beyond the reach of judicial process, justified by a variety of technical grounds. Administrative decisions with respect to chieftaincy, land and deportation, and the detention of Africans were all insulated from challenge Seidman (1970:178).

Thus it was under the initial colonial regimes that the concept of ‘emergency powers’ was established; a concept that has gone on to be abused by power hungry executives through today.¹⁸ These emergency powers gave governors the right to detain citizens without trial, to deport aliens, to deprive a naturalized British subject of his citizenship and to anything else necessary to secure law and order in the colonies. The British colonial administrators argued that these severe restrictions on the rights and liberties of the indigenous population were simply a necessity when only a very small number of individuals were ruling a very large and spread out population. The most important thing to be reiterated about British colonial rule is that courts and judges were not independent. They swore allegiance to the British crown, not to the people of Tanganyika, or Malawi or Uganda. They were explicitly political in their decision making. Judges were representatives of the government and not the people. However, many were under the illusion that they were independent and were carrying out justice. The judges believed they were carrying out the same law in the same way as they had

¹⁸ For example, the rather elderly English common law precedent of *Liversidge v. Anderson* (which defines the legal relations between personal liberty of the subject and the security needs of the government) would continue to be cited by African courts long after it has been overruled in England itself. Perhaps most famously in the Ugandan case *Ex Parte Matovu* (1964).
back home, but simply in a different environment. The English law that colonial Africa inherited lost the crucial cultural/historical control mechanisms that were in place in England. In England the same laws In *Terrell v. Secretary of State for the Colonies* (1953) Chief Justice Goddard outlined the colonial concept of independence of the judiciary as follows:

> The provisions of Section 3 of the Act of Settlement relating to the tenure of judges of the Supreme Court of England did not apply to the Straits Settlements or to any other Colony. It is for the Crown by prerogative, or for Parliament by statute to set up Courts in a colony, and the conditions upon which judges there hold office are determined by the terms of the Statues - made by parliament – or under prerogative

Unlike their English counterparts, all colonial judges held their office at Her Majesty’s pleasure. This lack of democratic control led to an oppressive and restrictive set of laws. Justice Wilson, in *Re: Herman Mild* (1937)¹⁹, admitted the absence of the separation of powers in Tanganyika, although his ruling still maintained that the absence per se would not hinder due course of justice or a fair trial (Nabudere 2001). From the practical view of the British, it did not make sense to imbue the Chiefs with political power and not give them the means by which to enforce this power and domination. Thus as Mamdani (1996) notes all power was fused in a single person.

That judicial structures existed merely to protect the interests of the white colonizers provided the white population with an illusion of justice. Moreover, “the illusion of democratic government – for whites – was bolstered by the judicial system” (Simbakalia 1994). Moreover, the notion of indigenous justice was antithetical to the colonial raison d’être (Chanock 1998). In Malawi “the administration felt that ‘there existed no legal system’ applicable to ‘members of civilized communities’, though there was a ‘definite though varying body of native law and custom which was known and

---

¹⁹ 1 T.L.R. 29
understood by all and which had grown up in the course of an unknown period to regulate, more or less successfully, the conditions of ‘native life’” (Chanock 1998:71). Native Authorities in colonial Malawi had a great deal of power. They regulated “villages’ cleanliness and sanitation, control of infectious diseases, control of fire, road making, tree felling, limitations, tax registration, reporting of deaths, grass-burning, the killing of game and other administrative matters” (Chanock 1998:71). As Chanock reports, the number of convictions in colonial Malawi rose from 1,665 in 1906, to 2,2821 in 1911, to 3,511 in 1918.

In Tanganyika, the importation of English law meant a whole new rule book of restrictions. Wambali (1996) lists some of these: Deportation Ordinance 1921, the Expulsion of Undesirables Ordinance of 1930, the Emergency Power Orders in Council 1939-1961, the Witchcraft Ordinance 1928 and the Collective Punishment Ordinance. These provided for the extensive powers of the state to deny freedom of movement. Freedom of association was curtailed through the Societies Ordinance of 1954 (the same year the first official political party was established).

It was clear to many Africans that colonial justice was not there to serve the interests of the colonized, but the interests of the colonizer:

The tribal law which God gave us is being destroyed completely . . . those who have been chosen and salaried are happy, thus they despise their unfortunate friends in the same rank. In the old days when there was no money, there was no killing each other, no jealousy or falsehoods; while in the present days all these have happened simply because the new customs have upset the old ones in nothing save in money alone (Nyakyusa 1937)20

Furthermore, the sense of dislocation of law and the courts from everyday life was also quite profound. Judges were required to wear full British regalia, wigs, robes and all. What was the relevance of this to the African peasant? This legacy of British law remains

today. Judges in all three countries wear full gowns and wigs, and indeed so do the lawyers who appear in the upper level courts. 21 An observer visiting Nigeria in 1937 noted this incongruous juxtaposition:

The newcomer to Africa visiting the Courts of Law in different parts of the country for the first time views with astonishment the scene before him. The presiding magistrate or Judge, on special occasions in his official robes of scarlet, seated with native assessors--counsel in their robes and the prisoner in the dock--the crowd of spectators kept back by native police in uniform. A repetition of an English scene in African surroundings, often of a primitive nature. The whole atmosphere is obviously unsuited to the African mentality. As he listens to the proceedings he realises that no primitive or even partly educated native can hope to understand the workings of British justice. The Court procedure is not understood by the prisoner. If he is guilty and wished to admit it, he is often told to plead not guilty. If he desires to explain he is told he must remain silent. (Roberts 1960) 22

Today legal regalia remains a symbolic legacy of British common law. A more significant and substantive legacy, according to many contemporary, liberal scholars (Oloka-Onyango, Peter, Ng’ong’ola) is the conservative nature of common law. This conservatism can be characterized as the strict binding of legal interpretation to precedent. Many scholars equate the positivist stance of contemporary judges with a pro-state attitude. As Justice Mwalusanya (of Tanzania) writes,

Our courts must be courts of justice, not merely courts of law. It is at this period, more than any other period, that judges and lawyers in the new states of Africa must do a re-thinking as to what their basic attitude to positivism should be. Judges’ conservatism and pro-State attitudes in post independence Tanzania have been a subject of many criticisms by scholars who have viewed them as ‘uninspiring’. (Mwalusanya 2006:viii)

The picture painted is one of a clash between imported rules and norms on the one hand, and a specific African political, economic and social context on the other. The colonial judges argued that they were merely doing what they had been trained to do. As

21 Based on author interviews, overall judges appeared to support the continued use of British legal regalia. Despite the fact that the gowns and wigs are incredibly expensive.

22 Cited in (Reichman 2004:86)
Seidman observes, by sticking so rigidly to English precedent, they ended up creating new law for the colonies,

The deeply-embedded tradition of the colonial judges during the colonial period . . . was that the judges do not create the law; they merely “find” it. Judges trained from their professional infancy that courts not only do not, but ought not to make policy judgments . . . will snatch at any pre-existing rule available in preference to violating their most deeply-held professional commitment. It was but to be expected that judges so trained would find refuge in the current English decisions, which could safely follow upon the ground that they were binding upon them. They tended to create new law for the colonies by following English decisions, even when they were not called upon to do so. (Seidman, 1969:62)23

Yash Ghai (1970) notes how in Kenya, the rigid adherence to English precedent became more pronounced as the colonial period went on. Until the 1930’s the Supreme Court of Kenya recognized that law applied in Kenya need not necessarily be exactly the same as law applied in England. Ghai (1970:171) posits that the early judges had served for a much longer period in Kenya than in the latter half of the colonial era, and therefore had more opportunity to think in Kenyan terms. In addition, after 1930 the Supreme Court was completely cut off from African civil litigation and customary law. Furthermore, the Privy Council and the Supreme Court of Appeal were strong influences in shaping Kenyan jurisprudence at this time.

Although it appears to be a normative debate, I believe it is important to address the issue of legal positivism in African common law courts. The debate is not a historical debate, but is very much contemporary. I will address this in later chapters. Of particular relevance to this study is the following question: Are judges using legal positivism as a tool of feigned neutrality to protect themselves and their position? Ugandan scholar Oloka-Onyango (1993:5) asserts the following:

The positivist mode of analysis has found its way into both legal academic discourse and judicial opinion, and is especially manifest in Commonwealth Africa. Its major emphasis is the analytic distinction and

23 Cited in (Oloka-Onyango 1993), p.15.
independence of law and morality and the assertion of the specific legal forms. Its main concern is not the "ought" but the "is"; positivism asserts that law is a closed and independent entity and correct decisions about conflicts in society can be arrived at from an examination of predetermined rules. Consequently the analysis of the meaning of legal concepts must be isolated from historical or sociological enquires, as well as uncritical appraisal of law in terms of morals, social aims and functions.

In Chapter 4, I will examine in greater depth potential explanations for judicial subservience under authoritarian regimes, and will return to this institutional/cultural legacy in more depth.

Under the Buganda Agreement, leadership at both the national and local levels was imbued with both executive and judicial power. As Tusiime Kirya (2006:4) writes, “this fusion of powers was compounded by the fact that state power could not be subject to judicial scrutiny. In many ways, this set the stage for the judicial attitude towards executive power in the post-colonial period.” The extent to which these early structures remained intact is quite remarkable. Unfortunately, the omnipotent colonial authority was simply replaced by the mighty machinery of the one-party authoritarian state.

It is misleading to ignore the level of disharmony that existed within the colonial service in terms of attitudes towards the implementation and development of colonial law. Morris and Read (1972:73) classify two distinct groups of colonial officials when they discuss attitudes towards the suitability of wholesale adoption of English law: the “administrative” point of view versus the “judicial” point of view:

Broadly speaking, there were two clear-cut and opposing points of view, most members of the administrative service adhering to the one, and most members of the judiciary adhering to the other. According to the administrative point of view, the imported legal system needed very considerable modification if injustices were to be avoided, or, indeed if it were to bring any real benefit to the largely illiterate African populations, whose conditions of life different completely from those in England, where the system had evolved. The adherents of the opposing judicial point of view maintained, on the other hand, that there should, and could be no serious watering down of English rules to meet what the
administration claimed to be African needs; what might appear to be complexities and technicalities were, in fact, an integral part of the English legal system, and, in themselves, helped to ensure that high degree of justice which the system professed to provide: without them the standard of justice must be lower, and that a lower standard of justice should be provided for the African population could not be contemplated.

Like Chiefs, the District Commissioners of colonial Africa were not only the rulers, but also the judges. Thus any judicial check on administrative power was eliminated. As Morris and Read (1972:289) note,

lawyers nurtured on Dicey’s concept of the rule of law might predictably react with suspicion to a judicial system in which administrative officers with only a modest measure of legal training participated so extensively (and which in some respects they dominated, event to the extent of maintaining the native courts as an exclusive preserve from which lawyers were barred completely . . . ) Not merely was the presence of the administrative officer all-pervading in the judicial structure, but the powers he enjoyed were very wide.24

They existed as another form of bureaucratic supervision over the native administrators; but also had the power to interpret the law and sentence at will. As Seidman (1970:78) recalls in his memoirs as a District Commissioner in colonial Tanganyika, the commissioners had “powers to imprison for up to two years and to impose a 2000 shilling-fine (plus 24 strikes of the cane for certain offences such as rape and cattle theft). More serious cases were referred for trial by the High Court circuit.” Commissioners’ legal decisions were overseen though the revision of criminal cases and through directives from the chief magistrate (Morris 1972). It is also important to emphasize the role of the individual here. The lack of uniformity across districts and cases was dramatic, both in terms of the individuals involved and the local response to these individuals. Chanock (1998:136) illustrates this point: “The experience of and response to the coming of colonial courts and legal forms was by no means uniform.

24 Administrative officers in Uganda had wider jurisdiction (could pass any non-capital sentence) than in Tanganyika.
Variations in the average length of a district officer’s stay in a particular district and, more importantly, the relative wealth of the community; the strength of its indigenous organization; and its degree of tribal homogeneity; appeared to have influenced local response to the new courts.” Most cases coming to the native courts and to the District Commissioners were of a criminal nature. The District Commissioners passionately defended their legal power and indeed even pushed for more. The following extract is from the report of a Tanganyika district officer in 1932:25

I consider that the present system of professional magistrates and judges should be abandoned. The conception that, because a man has passed Bar examinations and has eaten a number of dinners in one of the Inns of Court, he is fit to be a magistrate is, in my opinion, fallacious. It is a relic of the old English guild system, the modern relic of which in more humble occupations is the trade union. Much more than the elementary knowledge of English law required by bar examinations is necessary to administer justice in native territories. Knowledge of the language, customs and psychology of the people is necessary and this can never be acquired by sitting in a court. A knowledge of the law which he is called on to administer should certainly be possessed by every government official, and administrative officers, whose sole functions are based on the laws, probably possess a more comprehensive familiarity with them than any other official. I submit that the class of official most qualified to exercise judicial functions is the administrative official and I would base a reorganization of the judiciary on this fact... Where I have attacked the legal profession it is because I feel it has a stranglehold on the country which should be loosened; the territory is rapidly becoming a lawyer’s udder to the enrichment of the advocate and the impoverishment of the people.

Of course the judiciary fundamentally disagreed with this stance. According to Morris and Read (1972), they vociferously defended their position. Writing in 1926, Alison Russell, the then Chief Justice of Tanganyika wrote:26

There are no doubt some administrative officers who look back regretfully to the days of Livingstone under his tree or James Martin marching up from the coast: days when, unencumbered by stationary, undistressed by the labour of keeping a record and untroubled by the thought that


somebody might want to read it, decisions were given off hand and out of the head; and so on to the next shauri. This method of disposing of cases is no doubt extremely prompt and agreeable. But everyone who has tried cases knows how often a quiet perusal of a well kept record influences a judgment.

The lack of training and general inadequacies at the lowest levels of the legal system was later highlighted by the Commission of Inquiry into the Administration of Justice in Kenya, Uganda and Tanganyika Territory in Criminal Matters, May 1933 (Colonial No.96) (see Oloka-Onyango 1993 for more on the work of the commission). Most of the detailed recommendations of the committee were accepted by the East African governments, but the broader recommendations met with resistance. For example, the Governors were unable to accept the Commission’s contention that the dispensing of justice by lay magistrates was undesirable and should be taken over by professional magistrates (Seidman 1970:101).

In partial defense of the colonial judges, it should be noted that they were often ignorant about local customs and culture. British judges were equipped with the tools of British common law, but they were applying them in a foreign and alien environment. Thus, they selectively rejected and applied certain aspects of customary law in a discretionary manner. Very often these individuals did not even have a solid legal training. In his “Handbook for Magistrates in Nyasaland” (1940) C.C. Ross (1940:5) states that, "The great majority of district officers who are called upon to undertake magisterial work have, however, had no experience and are not as a rule professionally qualified. In many cases natural aptitude and ability makes up to a large extent for this lack of experience but it can never do so entirely and, especially during his early years as a magistrate, the administrative officer is beset by many pitfalls into which, for want of this experience, he almost inevitably tumbles from time to time."  Ross goes on to suggest that the best training an African judge could get was to go and observe the
magistrates courts in England, in order to acquire the "atmosphere" of a court. This comment underscores the misguided emphasis on order, procedure, English legal regalia and custom. It was as if they had imported the skeleton (structure) and the clothes to dress the skeleton in, but the vital organs of the body, the heart, lungs, liver, etc. were missing: procedure and style.

II - New Courts, Old Judges and Independence Constitutions

While the constitutional order under colonialism was never really important (given the concentration of power in the Governor), at independence it became the most important aspect of the transition and emerged as the locus for political disputes and negotiation (Ghai 1972). At independence African countries were faced with a new dilemma. What configuration of laws and courts should the newly independent state adopt? In each country new constitutional arrangements were negotiated closely with the British government and consensus on the constitution became a precondition for securing independence (Ghai 1972). This was the first time that the British had paid significant, close attention to constitutional matters. Perhaps the most important issue to be noted

27 A corollary of this question is - Why did the newly independent states adopt any kind of written constitution at all? The written constitutions were part of the negotiation process between the British and her colonies. This document ensured a sense of continuity and hopefully peace. In the words of Issa Shivji, their importance lies more in the constitutional moment, or the transfer of power, than in terms of the new regimes they set out. As Shivji (1998) writes:

While we have great use, if not reverence, for the documents called constitutions there has been little regard for constitutional principles or constitutionalism. Constitutional documents have neither been an outcome of a clash of principles nor are they seen as embodying a political commitment to a global societal vision. Their utility lies in serving the 'constitutional moment' (i.e. transfer of power). They do not even have much of a 'constitutional function', (i.e. ordering of the state apparatus, division and allocation of power etc.) and much less ideological legitimacy. . . If constitutions then serve only the incidence of transferece of power without even having the function of legitimating it, the question that arises immediately is why constitutions at all? It seems to me therefore that the only rationale for the constitutions is international legitimacy or respectability – to constitute the sovereignty of the state in the international arena.
is that there was no significant change in mode of governance. As Ekeh (2004-33) summarizes, most of the independence constitutions

. . . were silently premised on the received notion of colonialism that the state belonged to its rulers. African nationalists were pressing for a change of personnel, not for a change in the system of rulership. In effect, decolonization became a process of transferring ownership of the state from the alien European rulers to native nationalists.

Therefore, the independence constitutions did not reflect a domestic (negotiated) consensus. Instead they were the result of a compromise between the colonial rulers and the nationalist leaders (Shivji 1998). Most Commonwealth African independence constitutions were constructed on the basic liberal principles of the Westminster model – with the exception of a written bill of rights. Furthermore, the independence constitutions provided for “a governor general representing the Queen as head of state; an executive prime minister from the majority party in parliament, a cabinet of ministers . . . and an independent judiciary” (Shivji 1998:24). As was true of the general constitutional order, a modified version of the existing colonial court system was adopted. Shivji (1998) describes this phenomenon as the superimposition of a liberal constitution on a despotic colonial legal order. The most significant change to the legal system was the incorporation of customary courts into a single system of justice.

In Kenya, India and every other former colony there was a choice to follow the Western legal system that had been used by the colonisers. This can be understood as a result of the training of indigenous lawyers in the law of the metropole during the colonial era. Countries chose to follow the law of the metropole because it was familiar and there were at least some trained and practicing legal professionals in the country with experience in that form of law (Fullerton Joireman 2006)

A. Filling Courts with New Personnel

Some scholars have pointed out the incongruity of the shells of colonial institutions. They were refilled with a new set of individuals (some qualified, some not), but all
coming from a different culture – different to the formal, rational-legal bureaucracy of British colonial Africa. British colonial culture was reliant upon an informal culture developed by the upper-class British civil servants. As Seidman (1970:199) writes,

If the ‘British ideal’ so carefully inculcated in the aristocratic family, the public school, and the university means anything, it must include the notion of the rule of law, the unceasing effort to govern by law, not by man alone. What the colonial service bequeathed to Africa was its precise opposite: a tradition that good government was made by good men, and a set of authoritarian institutions which were designed to give the widest possible scope to individual discretion, rather than an instrumental system with easy communication with the governed, narrowly defined roles, institutions for rational decision-making and sanctioning devices to enforce the rule.

Once the informal structure (based largely on colonial recruitment practices) was removed the democratic institutional shells foundered. Seidman (1970:201) adopts the position that law is not transferable and should be adapted to specific, local circumstances. “The invocation of the same rules of law and their sanctions in different times and places, with different sanctioning institutions and a different complex of social, political, economic, and other forces affecting the role-occupant, cannot be expected to induce the same sort of role-performance as it did in the place of the origin of the norms.” A unified court system is nothing without a cadre of professional, trained jurists. However, we must also be cognizant of the practical and financial difficulties facing independence governments. The colonial authorities struggled to fill the judiciary in the years immediately following independence, and continue to struggle today.28

Although these issues arose at the general bureaucratic level, the High Court and Appellate Court expatriate judges stayed in power, in some cases until long after independence. In the early years this was a pragmatic decision. At independence all senior positions in Malawi’s judicial system (excluding, naturally the local courts) were

---

28 This is compounded by severe budget restrictions.
held by expatriates. “Resident magistrates were all British or Nigerian, and all the judges were British” (Forster 2001:280). This colonial personnel-hangover proved to be an important dynamic in the institutional restructuring of the post-colonial state.

The main tendency of post-independence legal reform was not toward the democratization of the legal system inherited from colonialism, but toward its deracialization. Racial barriers were dismantled and a formal equality was observed. Often chiefs’ and commissioners’ courts were abolished, and their functions were transferred to magistrate’s courts. All litigants were formally given a status of equality before the courts, and the debate on legal reform was restructured – around the question of access to justice. (Mamdani 1996:136)

Deracialization in the higher levels of the judiciary began to take place, albeit at different speeds in different settings. Why did white colonial judges stay on long after most of their counterparts had returned to their homeland? As Oloka-Onyango (1993:20) asserts, "[I]n the first instance, both the higher courts and to a lesser extent, the lower courts remained overwhelmingly foreign in composition. Many were a holdover from the colonial era, awaiting the termination of their contracts, or attracted to the tropical life, where their emoluments and status were considerably in excess of what could be expected if they returned home." It is important to consider the impact of having white judges remain on the bench after independence. I suggest they represented both a symbolic and intellectual continuity across dramatic regime change. They aided in the entrenchment of English common law practices. These organizational, normative and jurisprudential practices became so institutionally entrenched that they exist (to differing degrees) today.

29 Uganda had a white British Chief Justice appointed (Justice Peter Allen) as late as 1986. Whereas in Tanzania the “Africanization” of the judiciary was quite rapid under Nyerere. In Malawi the ex-patriate Judges suddenly left of their own volition in 1966, after Banda began to openly defy the decisions of the court (see Forster 2001)
B. Uganda, Tanzania and Malawi

The independence constitutions of British Africa would be shaped around some form of the Westminster model. Unlike Tanzania, discussions over the independence constitution of Uganda were protracted. This later came to be symbolic of the discord and disharmony that was present in the Ugandan polity. It is interesting to note Young’s (1976:247) comparative analysis,

The decolonization strategy nurtured by the British was strikingly different in the two instances; the blueprint for Tanzania was a multiracial partnership, while Uganda was to be a united African state. Paradoxically, the promotion of multiracialism facilitated the consolidation of integrated African nationalism, while the moral engagement for African unity in Uganda inadvertently fostered disunity.

In Tanzania, TANU was so dominant that 71 of the seats in the first election were not contested. National identity coalesced around TANU identity and away from ethnicity, whereas in Uganda cultural divisions became institutionalized at the political level even before independence was achieved. The Democratic Party, the Buganda Kingdom and the Uganda People’s Congress (UPC) were forced to confront one another and attempt to build alliances. One of the major points of contention was the regional distribution of power. The independence constitution created a strange kind of quasi-federalism, in which the Buganda (full federal powers) had far more local powers than the other semi-federal states, who were under much more restricted, closer control from the central government. In short, this inequality led to resentment: the 1962 Ugandan Constitution was an unworkable set of compromises.

The semi-autonomy arrangement negotiated by the Baganda involved the establishment of their own Lukiko (parliament), a percent of seats in government, and their own court. Given the faulty political arrangements and tenuous promises made by the British, it appears that the independence constitution was doomed to failure, or in Oloka-Onyango’s (1993:19) words, it is “unsurprising that legal historians have viewed
the Independence Constitution as a mere ‘elastoplast’ over a system that had been held together largely by a mixture of force and occasional, expeditious compromise.”

Furthermore, by 1966 the 1962 constitution was abrogated by the interim “pigeon-hole” constitution.

As with Malawi and Tanzania, one of the most significant steps taken to restructure the legal system in Uganda was bringing the customary courts into the main system by converting them into magistrate’s courts.30 After independence, in the period up until 1966, the courts were forced to decide on several significant issues. Unfortunately, the courts did not have a significant body of case law upon which to draw. These cases will be discussed in-depth in Chapter 4. This was also true of Malawi and Tanzania. Courts previously reserved for ‘whites’ only, were now dealing with complex disputes between Ugandans. As Morris and Read (1966) noted Uganda was able to develop something of a tradition of judicial exposition because of the effect of the Agreements many important constitutional cases came to the courts. The authors further note that this is in part related to the traditions of litigiousness in Uganda.

In 1961 Tanganyika gained its independence from British colonial rule. Unlike Uganda and Malawi, who held their constitutional conferences in London, a Constitutional Conference was held in Dar es Salaam in 1961.31 As Yongolo (2000:29) writes,

The success of this conference, unlike those in Kenya and Uganda, was attributed to the fact that many issues had already been sorted out in

---

30 “The division of jurisdiction involved in the dual system of courts, perpetuating the duality of the laws and the separate treatment of litigants to some extent on a basis of racial distinction, had been accepted in recent years as no more than a transitional arrangement. As early as 1957 a major step towards the future integration of the courts was taken with the enactment of the African Courts Act. A further important step in 1962 provided for the constitution of certain African courts, by declaration of the Chief Justice, as subordinate courts, thus enabling additional bridges to be built between the two systems. In 1964 the Magistrates Courts Act provided for the final states of integration of the courts although this statute has not yet been applied throughout the country”

31 This was in contrast to most British colonies where constitutional conferences were held at Lancaster House in London, hence the “Lancaster House Constitutions.”
several negotiations between the then Secretary of State, Ian Mcleod, and Nyerere in London. . . . [We] feel that the ease at which Tanganyika sailed to independence, was largely because Britain did not have much economic interest as it had in Kenya. . . But more importantly, Tanganyikans had fought for independence single-mindedly reflecting the level of mobilization of the masses TANU had achieved.

The dual system of local courts and high courts remained until three years after independence when the High Court and Local Courts systems were officially separated through the enactment of the Magistrates’ Courts Act, 1963. Thus the High Court became the superior court of record, and appeals continued to the East African Court of Appeal until it was disbanded in 1977 (Mamdani 1996:9).

Finally, the incorporation of Zanzibar into a joint republic with Tanganyika on 23rd April 1964 must be addressed. Nyerere successfully integrated the island archipelago with the mainland with little resulting instability or fuss – in part through a commitment to a shared Swahili culture. Nyerere remained President and Abeid Karume (President of Zanzibar) became First Vice President. The legal complexities of the federation sometimes serve to mask the underlying tensions that still exist today. It was a masterful piece of diplomacy on Nyerere’s part:

Nyerere was able to accord Zanzibar one quarter of the parliamentary seats, far in excess of its demographic entitlement, and distribute several key ministerial portfolios without compromising TANU’s effectiveness – despite the fact that the Zanzibaris were insistent on preserving the separate identity of their own political movement, the Afro-Shirazi party, and an extraordinary degree and internal autonomy on the islands. Had the structure of national politics in mainland Tanzania been founded upon culturally based factions and coalitions, the infusion of a substantial block of Zanzibaris into the interplay of cultural segments would almost certainly have been profoundly destabilizing and difficult to absorb. (Oloka-Onyango 1993:257)

There was very little conflict between the outgoing colonialists and the Tanzanian nationalists. However, this did not mean that the new nationalists were inheriting or even had the intent of creating a progressive, democratic state. As in Malawi and
Uganda, on assuming power Nyerere’s TANU\(^{32}\) party sought to solidify their power through excluding competition. The constitutional order at Tanganyikan independence did not allow for a powerful executive or for supremacy of the President and party. There was no bill of rights (unlike the Malawi and Ugandan constitutions), but merely aspirations in the preamble to the constitution. These clauses in the preamble later were tested in the courts, and ultimately failed.\(^{33}\) The rights provisions remained even after the courts had declared them to be “devoid of any legal force” (Mbunda 1999).

Further, judicial review was only seen as an obstacle to the development of the Tanzanian state. As the Report of the Presidential Commission on the Establishment of a Democratic One-Party State (Paragraph 31) suggested: “By requiring the courts to stand in judgment of the legislature, the judiciary would be drawn into the arena of political controversy. Decisions concerning the extent to which the individual rights must give way to the wider considerations of social progress are not properly judicial decisions. They are political decisions best taken by political leaders responsible to the electorate” (Report of the Presidential Commission on the Establishment of a Democratic One Party State, para 31).

Naturally, in a unified country there was no minority that needed rights protections. This pattern played out across the African continent. As Wambali (1996:4) writes:

> Political practice in Africa has shown that the common objective of the ruling regimes was to assume absolute control of the newly independent state. The aim was to inspire “loyalty of the people” . . . This they did by doing away with a

---

\(^{32}\) TANU was the transformation of the Tanganyika African Association – a social welfare association of a few elites and urban people. TANU transformed the organization into a mass based movement. The movement became so successful that it is co-opted other organizations. For example, leaders of the Tanganyika federation of Labour, from 1958, sat on the Executive Committee of TANU (Wambali 1996:142).

\(^{33}\) These rights were contained in preambles to the TANU Constitution, the Republican Constitution (1962), the interim Constitution (1965) and its’ 1975 amendment, and the Constitution of the United Republic of Tanzania 1977 before the 1984 amendment (Mbunda 1999:30).
constitutional order, which allegedly posed a handicap to their program of action, in two ways. First was by removing the constitutional symbolism of the British sovereign over their heads, lest it be undesirable impediment in the future. . . Secondly, was by throwing overboard the liberal-democratic principles of limited government, embodied in the independence constitutions, and thereby arresting the further development of constitutionalism in the new states. . . They had nothing to learn on democracy from the colonial past.

Additionally, the TANU constitution became an ancillary to the state constitution. As Mvungi (1991:80) writes:

Section 3 (4) provided for the inclusion of the constitution of TANU as a schedule to the Interim Constitution and that this schedule could be amended from time to time by the party according to the rules of amendment of the party constitution. This provision was significant in two ways. By making the Party constitution a schedule to the constitution of the Republic, the former became part and parcel of the latter hence an enforceable part of the constitution of the state. The general rule of law involved here states clearly that a schedule to a legal instrument is a justiciable part of that instrument. This general rule was applied positively in the case of *Thabit Ngaka v. The Regional Fisheries Officer* 1973 LRT no.24 where claims based on rights set out in the TANU constitution were said to have a good legal basis because the TANU constitution was a schedule to the Interim Constitution. So unintendedly, a Bill of Rights in the form of rights contained in the party constitution had become part of the law of the land.

This essentially turned the constitution into a constitution of a private organization. Or to look at it the other way around, the party itself became a constitutional organ in both Uganda and Malawi, both removing the monarch as head of state and creating exceedingly powerful executives topped with all-powerful Presidents (in Uganda the Head of State was the *Kabaka*, in Malawi it was the Queen).

Malawi’s transition to independence was perhaps more dramatic than in Tanzania and Uganda. After the 1953 Federation of Nyasaland, Northern Rhodesia and Southern Rhodesian, opposition to colonial rule in Malawi intensified, leading to violence and chaos. In 1958 Dr. Banda returned to Malawi and began to establish a grassroots mass movement to campaign for Malawian independence. On the 3rd of
March 1959 a State of Emergency was declared and Banda was arrested. Although the British weakly attempted to stem the rising tide of African nationalism across Southern Africa, ultimately they gave in and released Dr. Banda from prison in 1960. Later that same year constitutional talks were held at Lancaster House in London. The British responded by declaring a state of emergency. It is against this backdrop that the Malawians conducted their peaceful independence negotiations in Lancaster House. As with Tanzania and Uganda, this process was dominated by British elites, with some inclusion of a handful of Malawians (most prominently, Dr Banda). Kanyongolo (1998) argues that the negotiation process surrounding the Malawian constitution was a matter of political expediency rather than the application of neutral notions of what constituted “good governance.” There was no process of public consultation, as only a small group of elite Malawians were brought into the negotiations. Indeed, the absence of consultation and consensus is present across all three cases.

Elections were held in August 1961, and unsurprisingly the Malawi Congress Party (MCP) won a convincing victory. For Banda, this landslide electoral victory was what he needed to further legitimize consolidation of his power. The MCP claimed that the opposition parties were wiped out by the elections themselves. In other words, they did not win any seats and so were financially bankrupt. However, the MCP was eager to ensure that the opposition did not reemerge. In the words of the government, “while we can learn from the older and developed countries how to run parliamentary institutions we would not be wise to be their carbon copy by embracing the whole of their parliamentary system in our developing societies” (Malawi Government 1974:6). On July 6th 1964 the State of Malawi finally came into being. The first step for Prime Minister Banda was to convert the monarchical constitution into a Republican
Constitution in 1965. The new Republic of Malawi came into being on 6th July 1966 with Dr. Kamuzu Banda as its first President.

Heretofore, as I have demonstrated, at independence there was no real democratic constitutional order upon which the new independent state and judiciary could build. This chapter posits that, under colonialism it was beyond the scope and power of the judges to develop a sense of constitutionalism. As Oloka-Onyango writes, (1993:16) “... no notion of constitutionalism could arise, not only on account of a lack of a Constitution but also because to apply such a notion could have ultimately led to supporting a challenge to the colonial status quo - a job no colonial judge was prepared to undertake.” Thus new independence constitutions were imposed on states and societies that were lacking in a sense of constitutionalism. Okoth-Ogendo has emphasized that a commitment to constitutions without constitutionalism is meaningless. “... all law, and constitutional law in particular, is concerned, not with abstract norms, but with the creation, distribution, exercise, legitimation, effects, and reproduction of power; it matters not whether that power lies with the state or in some other organized entity ” (Okoth-Ogendo 1992:67).

III - Conclusions

The colonial era established six important trends. First, the law and judges themselves were used as instruments of control and repression. The British judges were there to maintain law and order, to ensure that private property was protected, and that contracts were honored. Law helped to create a rational system of order through which the colonizers ruled their protectorates. Economic extraction was made easy through a received system of British common law that unevenly protected the colonizers at the expense of indigenous workers. The mass population had little contact with the higher levels of the judiciary. Criminal cases were tried by a High Court Judges sitting with
local assessors; almost no civil action was commenced (Morris and Read 1972). As Yash Ghai (1970) surmises that the judiciary was less human and impartial than they thought. The courts existed to prop up and propel forward the colonial administration. They did not exist to further the needs of the African population.

Secondly, the courts had no ability to check the power of the colonial government. Despite the establishment of constitutional organs, power remained vested in the executive branch where the Governor had power of veto and could rule through decree. The courts were weak in terms of their ability to check the power of the government (no judicial review), and in terms of their ability to protect the rights of citizens. Thus their ‘accountability role’ within the colonial political order was minimal at best. As Yash Ghai notes, the Governor was not accountable to anyone within the colony itself, he was only accountable to the Colonial Office back at Westminster (Ghai 1972).

Montesquieu’s celebrated doctrine of the ‘separation of powers’, only partially applicable to the constitutional structure of England, was precisely contradicted in colonial East Africa. Not merely were administrative officers in control of the bureaucratic organization but they also pre-empted to a great extent the areas of legislation and the administration of justice. The colonial territories might be termed administrative states: the structure of the administrative hierarchy was, in effect, the Constitution. (Morris and Read 1972:288)

Therefore, the inherited court system at independence was weak and marginalized. Despite some restructuring, and an attempt to Africanize the higher levels of the judiciary, the courts would remain this way for the next thirty years. Indirect rule implies that Africans were allowed to rule themselves. Indirect rule though, was simply a colonial administrative system. As Morris and Read (1972:262) write: “the colonial ‘states’ existed only in administrative terms, and constitutional law applied mainly as defining the relationship between the imperial government and its local officers, within the structure of imperial law.”
Thirdly, the weak institutionalization of the courts, unprofessional judges, and few lawyers created a very weak base upon which to build a powerful judiciary at independence. Judicial power was a reflection of the distribution of political power under colonial rule, it was not about justice. Although the courts, did not build up any kind of substantial political power during the colonial era, they did establish an institutional identity and culture that was distinctly English and conservative. This cultural legacy can be seen in the continued use of traditional English legal regalia, including wigs for both judges and lawyers. The jurisprudential legacy is one of legal conservatism and caution. As Bukukura (1995:5) notes:

What emerges from the history of English law and legality in general, and the imposition of the British legal system and its inheritance at independence in particular . . . is that there are forces within the judiciary in Tanzania and elsewhere contended with the maintenance of the status quo (inclined towards judicial restraint).

This distinct identity proved to serve an important symbolic purpose as the judiciary came under threat during the post-colonial authoritarian era.

Fourthly, efforts to both construct and bring customary law into a single common law system created innumerable practical problems well after the transition to independence. Furthermore, the emphasis on ‘customary’ naturally sowed the seeds of a politics based on ethnicity. The process of ‘restatement’ was the transformation of customary law into written law (although not codified). Mamdani (1996:131) notes that in Malawi even “where two or more ethnic groups inhabited the same district, an attempt was made to present significant differences between their laws and to re-present their material by ethnic groups. Customary law continued to be used as a management tool and as a political tool.” This strategic use of the “customary” continued to be used by independent states,
Not surprisingly, the managers of independent states soon discovered the advantages of customary courts in terms of their non-professionalism and accessibility... the modern court was considered the desirable goal, but so long as resources were beyond reach and peasants remained “backward”, the customary was accepted as compromise, inevitable but hopefully temporary (Mamdani 1996:131)

Malawi presents a more extreme case of utilization of customary law for violent political ends. In the case of Malawi, Banda mimicked the actions of the British by setting up traditional courts as a parallel system of justice. The traditional Chewa courts were imbued with powers almost equal to those of the common law courts, including the death penalty. The only difference from the colonial era is that individuals were placed into one system or the other depending on the political nature of their case (as opposed to their race). Two parallel systems of justice were created and manipulated to achieve concrete political ends.

Fifth, the transition to independence in each of the three states was easiest in Tanzania, and perhaps most difficult in Uganda. Many observers of Ugandan politics note that the independence constitution contained the seeds of self-destruction. In all three states, deftly negotiated ‘democratic’ independence constitutions were replaced with single-party authoritarian versions in just a year or two. The most important function of the independence constitutions was to serve as a document around which independence negotiations could take place. However, these documents of ‘compromise’ were weakened because of this – the case of Uganda in particular. Yash Ghai argues that all these constitutions “show an amazing distrust of power; while the whole colonial edifice was built on power, the nationalist leaders are expected to carry on government on the basis of new and fragile institutions” (Ghai 1972:413). Their significance as political blueprints for the new regimes turned out to be short-lived. The lack of transparency and of real consensus building among groups, and only passing concern
with human rights agenda, resulted in a document imbued with very little legitimacy. This weak legitimacy combined with a dispersal of power across weak institutions was a recipe for failure. As I will demonstrate in the following chapter, the imposition of a democratic constitution on three states with no history of constitutionalism was, with the power of hindsight, an exercise in futility. The power of formal institutions was quickly usurped by the undemocratic practices of new leadership and traditional informal institutions. In the case of Uganda, when the constitutional order became a set of unbearable restraints for the government, the entire constitutional order may be destroyed.

Finally, as this study progresses I will highlight and analyze the parallels between law under a system of colonialism, and law within a system of globalization. I posit that there are important lessons to learn today by examining accounts of law and colonialism. In both cases unequal massive political, economic and cultural forces are pushing towards the homogenization of law. Moreover, the inequalities that drove this dynamic under colonialism are not only present today, but (as many have argued) are also just as pervasive. Chanock (2004:viii) argues that the new processes of globalization are more benign than colonialism. Indeed, direct political control is no longer present. However, as we did under colonialism, we now see the rapid movement of legal and judicial ideas and concepts across borders.

Generally this dynamic is unidirectional, moving from the developed to the developing world. It is a phenomenon that takes place within a new discourse of democracy and rule of law, rather than control and repression. Despite this important difference, today the focus on that which is ‘legal’ is usually motivated by that which is ‘economic.’ In other words, rule of law reform is intimately connected to economic
globalization and the dynamics of economic globalization play out unevenly across regions and state borders.
Chapter 4

The Judiciary under Authoritarianism
“Perhaps we must conclude that these governments do not consider that legitimacy, though requiring some visible elements of legality, is in the end crucially dependent on it. . .”
  - (Ghai 1993:259)

“The past is always there, it doesn’t go away. Whenever something goes wrong or seems to be going wrong people look to the past. This affects the judiciary. People are more determined to fight for the independence. For us we are so conscious of what we’ve gained now, we don’t want it taken away. . .”
  - (Author Interview with Ugandan Judge, January 2007)

The success of the independent nationalist movements was measured by the speed with which the last constitutional settlement was scrapped (Ghai 1972). Notions of a permanent constitutional order in the mold of the advanced democracies of the world emerged to be premature. Instead constitutions became a “weapon in the political struggle itself” (Ghai 1972), and the entire system of administration and justice continued to be used as an instrument of oppression, rather than liberation. Neopatrimonial leaders, following the lead of their patrimonial forbearers – mediaeval kings, etc. turned the personal into the political. They ruled with absolute authority and their decrees were not subject to question or review. They captured state resources, and distributed them as a means towards their continued maintenance of power, and not towards the development of their nation. As Kwasi Prempeh (2007:481) notes, the process of “reconfiguring legitimacy within the postcolonial state and society had but one beneficiary, the president.”

The leadership of Nyerere of Tanzania (1960 – 198634), Banda of Malawi (1964-1993) and both Obote (1962-66 and 1980-85) and Amin (1971-1979) in Uganda followed

---

34 Although Nyerere would step down as President of Tanzania in 1986, he would remain Chairman of the CCM party until 1993.
patterns of neopatrimonial rule. Each leader relied on the politics of individual personality and charisma. However, Nyerere moved beyond simply the politics of personality to shrewdly build and entrench a very strong political party - Chama Cha Mapinduzi (CCM), a party that remains in power today. These leaders monopolized both economic power and political power, and in the case of Malawi and Tanzania, a monopoly on military power. Leaders maintained a strong grip on state power through the nationalization of economic resources, as we see in Malawi and Tanzania, or indigenization of state resources, as we see in Uganda under Amin (see also Hyden 2006). In addition, through constitutional means they maintained a façade of legitimate power. Under the three respective Republican constitutions total control was embodied in the hands of one individual. The 1962 Tanzanian Republican Constitution allowed Nyerere to exercise his enormous powers “in his own discretion and shall not be obliged to follow advice tendered by any other person” (Sec. 3 (3)).

One reason independence leaders were able to move so easily from elected democrat to autocrat, is that they were riding on waves of popularity and nationalist sentiment from the struggle for independence. This was certainly the case in Tanzania.

35 There are important distinctions to be made between the three. It is useful to consider Jackson and Rosberg’s (Jackson & Rosberg 1982) typology of personal rule: (a) princes, (b) autocrats, (c) prophets and (d) tyrants. According to Goran Hyden, President Banda of Malawi was an autocrat; President Nyerere of Tanzania was a prophet and Idi Amin of Uganda was a tyrant. Of course these are simplified, ‘ideal types’ and I broadly agree with Hyden, certainly Banda was an autocrat (country is the ruler’s estate, party and government are essentially his servants and agents), Amin was a tyrant (rule through fear and brutality) however, it might be misleading to suggest that Nyerere was only a benevolent prophet. Hyden describes prophets as visionaries wanting to reshape Africa societies, and I would agree that Nyerere was indeed a prophet, but a prophet who frequently relied on autocratic means of achieving his ideological goals. Indeed, Hyden acknowledges that, “There is much overlap between the four categories and it is clear that some presidents would fit more than one category. . . .[Moreover] There is no empirical evidence that one category of leaders, on the aggregate, produced better development performance records than others.”

36 In Tanzania, for example, after the army mutiny in 1964, Nyerere disbanded the military and created instead a military wing of TANU. Today the military remains part of both the state structure and party structure. This means that an army officer can be called to administrative duty as a District Commissioner for example (Author interview with Ugandan political scientist, January 2007).

37 Malawi 1966, Uganda 1967, Tanzania 1967
and Malawi. Leaders across Africa defended their undemocratic forms of governance in a reactionary, nationalistic manner. Often this was a paternalistic-type argument that Africans were not ready for democracy; democracy was a Western invention and thus not suited to Africans.\textsuperscript{38} There was also a very practical notion that the nation was fragile and needed to be kept intact through a powerful, autocratic state and that a ‘strong-state’ was best suited to developing the state. In 1962, writing in the London Observer\textsuperscript{39}, Nyerere stated that “Our constitution differs from the American system in that it . . . enables the executive to function without being checked at every turn. . . . Our need is not to apply brakes to social change. . We need accelerators powerful enough to overcome the inertia bred of poverty.” This point is driven home by Crawford Young (2004:145), who posits:

> The imperative of national unity thus became a mantra for ruling parties at the moment of independence. The necessity of \textit{umoja}, or oneness, made the single party system the indispensable political armature for the new state, a dogma which swept the continent. The urgency of containing cultural pluralism was not the only argument marshaled, but it was nonetheless a leading plank in the single party platform.

In addition to maintenance of unity, the continued use of undemocratic apparatus was couched in the language of necessity of development. Strong, centralized government was indeed necessary to the development of the people. As Prempeh (2007:479) writes:

> In the end, the imperatives of postcolonial development would supply the justificatory and legitimating rhetoric for retaining and enforcing the most authoritarian aspects of the colonial legal order. Thus, what would change about the colonial state was not its structure or machinery of

\textsuperscript{38} Banda used this tactic most dramatically. He believed that Malawi was culturally distinct, and therefore a more relevant, more appropriate form of democracy was required. As Banda famously declared to his parliament, the chief was political leader, military commander and chief justice Hansard (Malawi), 8\textsuperscript{th} Session, 7\textsuperscript{th} December 1971, p.586, cited in (Widner 2001) On the 22\textsuperscript{nd} February, 1963 Banda was quoted as saying: "Is not this paper, this Bill of Rights, just a piece of paper? The real Bill of Rights for Europeans, or for anyone who is not an African, is the goodwill of the people of this country. Any European who does not realise that and depends upon a piece of paper guarantee is simply living in a fool's paradise", cited in (Widner 2001)

\textsuperscript{39} Cited in Jwani Mwaikusa, 1995 dissertation – get cite, p.105.
control, but its assigned mission and ideological underpinnings. Africa's postcolonial rulers believed that by changing its orientation and purpose and Africanizing its personnel, in short by re legitimizing it, that it was possible to use the selfsame colonial state to accomplish the purposes of the postcolonial project. The postcolonial project would thus be executed by a “colonial state in African guise.”

Debates around the suitability and applicability of Western notions of governance, couldn't be more vividly illustrated than by looking at the legal system, particularly the courts themselves and the development of the rule of law. Despite the widespread human rights abuses, in the face of total executive dominance the courts were able to do little. By the 1970s, as Jennifer Widner (2001:114) writes,

In Tanzania, Uganda and Malawi, the institutional status of the courts declined still further . . . The rule of law collapsed as governments began to engage extensively in preventive detention, often with little regard even for the weak limits statutes imposed on the practice. Frustration with the courts grew

A general pattern emerged across the region that the courts were either marginalized (Malawi), ignored (Uganda) or became an important mechanism of control in maintenance of one-party state (Tanzania). This theme of maintaining a system of law and order, but for anti-human rights, anti-democratic means, is taken up by Issa Shivji. Shivji (1994), who provides a succinct description of the characteristics of law under the Tanzanian authoritarian state. Or as he refers to it: the “extra-legal state.” The extra-legal state rules through law, but not within it. Thus state force is disguised in an ideology of rights or the rule of law ideology (Shivji 1994). The following characteristics were written in reference to Tanzania, but equally apply to post-colonial Malawi and Uganda.

1. Structurally the organs of resolution of disputes tend to be a part of, or heavily influenced and/or controlled, by the executive organs of state. . . Broadly speaking, processes of adjudication are overshadowed by administrative fiat and decision-making rather than judicial resolution of disputes.

2. Much of the law on the statute book is of the enabling kind, i.e. empowering, in very wide and unrestricted terms, the executive organs
of the state to effect a wide variety of “functions” i.e. exercise arbitrary/discretionary power. . . In short, laws are characterized by exceptionalism/particularism as opposed to universalism.

3. Absence of contract (Shivji 1994:81-82)

In all three states the extra-legal state not only affected political relations, but also economic relations. In the case of Tanzania, this was through the state socialization policies build around the *ujamama* policy. In Uganda, Amin expelled Uganda’s business-owner economic class with a single stroke of the pen. In short, the extra-legal state was central to both politics and production. Where possible patrimonial rulers used the courts to enforce these extra-legal regimes; to this extent they were clearly accomplices. However, when the courts could not be relied upon, then other tactics were be used. These ranged from the establishment of parallel judicial structures, to persuasion and private influence, to the brutal removal and murder of the chief justice.

This chapter will first give a brief overview of political and judicial evolution power from independence to the late 1980s. Then I will focus on the use of preventive detention laws and emergency powers, and the responses of the judiciary as demonstrated in key cases. I will also examine the relationship between the judiciary and the ideological political framework, with special emphasis on Nyerere’s socialist ideology. Did both individual judges, and the court as an institution tow, the ideological line of the times? Additionally, I will examine the establishment, and significance of, parallel jurisdictions and extra-judicial institutions with a significant emphasis on Banda’s use of traditional courts in Malawi.

Throughout I will highlight the continuities from the colonial era, particularly emphasizing the restricted powers of the judiciary under conditions of executive dominance. In my conclusion I will summarize the extent to which these cases affirm, or reject, existing theoretical assumptions on the behavior of judges under authoritarian rule. By addressing two key questions:
1. Was an adherence to legal positivism a “strategy” to help protect the institutional integrity of the courts?
2. Are the three parts of the Tate thesis both relevant and applicable in the context of Malawi, Tanzania and Uganda.

Finally, I will outline a theoretical framework that will aide in our understanding of the construction of judicial power during the authoritarian period in sub-Saharan Africa.

I - Theoretical Explanations

Neopatrimonial regimes are characterized by the ‘informal,’ rather than strict adherence, to ‘formal’ rules and institutions. It is easy to dismiss this period as one in which the rule of law was simply not present at all. A period in which informal rules and illegal institutions dominated, and ‘national development’ was always placed above individual rights. However, it is also interesting to consider the degree to which leaders either legitimately abided by the rule of law, or attempted to disguise their illegal actions in a cloak of legality. In a general sense, it is no longer accepted amongst political scientists that authoritarian regimes reject the use of law in its totality. As Barros (2002:324) concludes in his study of constitutionalism and dictatorship in Chile, “[i]nstitutional constraints upon supreme power are not necessarily incompatible with authoritarianism. If structured upon non-monocratic foundations, a dictatorship can institute legal limits on its own exercise of political power.”

When considering the institutional legacy of the colonial era it is important to consider the culture of judicial conservatism. Colonial judges were trained to interpret the law in a very rigid, positivistic sense. Judges in the authoritarian era were trained in the colonial era (indeed many expatriate judges remained in power long after independence). Moreover, many of the new indigenous judges were trained in London.
Judges were taught that they must apply the law exactly as they find it, and that no consideration to moral validity should take place. Thus laws are to be judged only on the basis of their sources, not on their content – these sources may be inherently illiberal (Ossiel 1995). This argument suggests that the judges applied the anti-democratic policies of the authoritarian regimes while maintaining a façade of neutrality, because they were concerned with the written legality, rather than substantive meaning or moral legitimacy behind the laws. Lisa Hilbink (2007:38) adopts a modified view of this argument, finding that in authoritarian Chile the judges were not simply administrative automatons, instead

[J]udges were willing and able to appeal to principles beyond the letter of the law, so long as the outcome favored or restored the (conservative) status quo. In other words, although there did seem to be a general tendency among judges to avoid evaluating the legitimacy of government policy some did deem it appropriate to review and even challenge the actions of the sitting government when those actions somehow threatened the social order. . My claim then, is that there was an “antipolitics” ideology at work in the Chilean judiciary, but one that cannot be understood as simply a function of legal positivism. Unlike “plain fact” positivists, judges could and sometimes did publicly assess the legitimacy of executive and legislative acts.

In short Hilbink is suggesting that judges under authoritarian regimes are motivated by a sense of political conservatism rather than an abstract legal conservatism. Hilbink (2007) places more emphasis on institutional factors over regime factors (partly through demonstrating the continuity of judicial behavior over both authoritarian and democratic regimes in Chile). There are clearly parallels between Hilbink’s Chile and sub-Saharan Africa in the post-colonial era. A fear of disorder certainly motivated judges to assess the legitimacy of government acts, but more often that not this resulted in propping-up rather than overruling the government.

The formalist approach to judicial decision making in post-colonial commonwealth Africa could be deemed a strategic approach – one of “strategic
neutrality.” This term was coined by Peter Vondoepp (2005), who found that neutrality could be a strategy in itself. That to be overly partisan or political would be to invite retribution and possible removal from the court. Ossiel (1995) offers a similar argument framing his strategic theory as a choice between the languages of legal positivism versus that of natural law:40

The positivist critique allows the scope of the regimes’ misconduct to be made to appear much narrower than the natural law critique permits. In political circumstances where public critique carries serious risks for the critic, there has been a powerful impulse to minimize these personal dangers by couching judicial resistance in positivist terms, even when motivated by moral concerns. . . 

However, Ossiel finds in his comparative study of Argentina and Brazil, that in Argentina the judiciary used a strategic “realist approach” to judicial decision-making. Where judges have been largely sympathetic to the authoritarian regime, as in Argentina, they have sought to express their criticism of its most oppressive policies in the same jurisprudential form as that adopted by the regime’s rulers. Given this desire to couch judicial criticism in a friendly form, positivism offers the most congenial idiom for resistance where authoritarian rulers seek legitimacy for themselves and their policies through the appearance of continuity with the preceding constitutional regime, an appearance they seek to maintain by affirming the continuing validity of its positive law. (Ossiel 1995:227)

In contrast, Ossiel finds that Brazilian judges were more likely to adopt a “natural law” language/argument that appealed more to the nation as a whole because direct dialogue with the government was not productive. Where judges, as in Brazil, are largely unsympathetic to the authoritarian regime, by contrast, natural law provides the most congenial form for resistance to its directives . . . The chief reason that natural law argument has been employed is not that it has most effectively sensitized its judicial adherents to the moral repercussions of oppressive law but that it has offered them the most effective idiom for addressing a larger public

40 Ossiel defines natural law as the view that there is an inherent connection between law and morality. Thus it is socially desirable for judges to look beyond the mere words of the rules and laws to more general principles embodied in legal doctrine.
beyond the ruling circles of the regime and for suggesting to this public the scope and severity of official misconduct. (Ossiel 1995:229)

The application of Ossiel’s theory in sub-Saharan Africa is problematic because none of the independence leaders wanted to publicly acknowledge that their policies were a continuation of previous regimes. However, it is widely acknowledged that their style of governance and the authoritarian legal framework did indeed owe a great debt to the colonial era. Moreover, judges frequently resorted to judicial positivism as a strategy of neutrality rather than critiquing the government as a method of protection. In this chapter I will demonstrate that both VonDoepp’s suggestion of ‘strategic neutrality’ and Hilbink’s ‘antipolitics ideology’ theory are at work in post-colonial era. In addition, they are also important theoretical threads that tie the colonial, post-colonial and multiparty eras of judicial behavior together.

Hilbink (2007:36) finds that the strong, independent bureaucratic structure of the court system (with a conservative Supreme Court at the top) provided incentives for individual judges to tow the institutional, ideological line. The ideological role of judges became the subject of a huge intellectual debate in East Africa. This debate assumes that judges have a free will and shall follow whatever path they deem fit. However, the evidence of judicial behavior from the region during this time suggests that judges towed the ideological line and this is particularly evident in Tanzania.41 Of the three countries, the Tanzanian judiciary was the most entrenched in the regime. As I note in Chapter 7, the judiciary remained within the bureaucratic structure of the Ministry of Justice until the year 2000. As I will demonstrate judges attempted to remain neutral, but under the leadership of a sycophantic Chief Justice, certainly had to tow the party line to advance through the system. The case of Tanzania is most interesting here. All judges were

---

41 Hilbink acknowledges that under the civil law system the judiciary is part of a more extensive, formalized bureaucratic structure than common law systems. But my research indicates that many of her insights are relevant in sub-Saharan Africa.
required to be party members, and support the goals of *ujamaa*. The judges did sympathize with Nyerere’s regime but still maintained they were only supporting the goals of *ujamaa* to the extent in which they were contained in the statutes and laws of the time. This ideological and political party coherence did not exist in Uganda and Malawi.

Neil Tate (1993) turns to regime related factors when seeking explanations for judicial independence and behavior under crisis regimes. Tate finds that when crisis rulers take over they do not always dismantle or significantly alter their judiciaries in the same way they do the legislature or political party. This certainly reflects the behavior of post-colonial leaders in Tanzania, Malawi and Uganda. In comparison to the legislature, the independence of the judiciary was severely curtailed, but still managed to maintain its’ institutional and structural integrity. Although there was a complete breakdown of the rule of law in Uganda, it became apparent after conducting extensive interviews in Tanzania and Malawi, that assessments of the Banda and Nyerere eras are not necessarily as black and white as perhaps the literature suggests. In other words, it was not all bad.

Tate (1993) presents this argument through a study of three Asian crisis regimes: Philippines, India and Pakistan. Tate is not arguing that the judiciary was unaffected, but that structurally the judiciary emerged looking more or less the same. The courts continued to do their job as impartially and independently as possible. They didn’t change, but the constitutions they were enforcing did, i.e. bills of rights were removed, or rendered irrelevant by Preventive Detention Laws and Emergency Powers

---

42 Following this, a legitimate question to offer is the degree to which this sense of continuity affects the judiciary under the next regime. For example, in 1994 in Malawi were all Banda era judges replaced? Does the lack of change in the judiciary threaten their independence over time?

43 Of course, it would be incorrect to classify Banda’s Malawi and Nyerere’s Tanzania as ‘crisis regimes’, however, the logic of rule under the military crisis regimes and the post-colonial authoritarian regimes is close enough to allow analytic parity here.
giving leaders the power to rule through decree. The following three points form a summary of Tate’s thesis:

1. **Rulers assume little risk** Crisis rulers do not assume a very serious risk when they leave the courts structurally unchanged and, at least officially, independent. The odds the courts will seriously challenge the crisis ruler appears to be small. This might be because the judges, or relevant majorities of them, agree with the crisis ruler’s assessment of the political situation, and his or her policy objectives.

2. **No major setbacks from judiciary** Had the crisis rulers suffered further setbacks in the chambers of their Supreme Courts; they might well have had second thoughts about their decisions to leave their judiciaries intact. But such setbacks were not forthcoming.

3. **Restrict scope and depth of decision making** The Asian case studies also suggest that the crisis ruler’s initial strategy to use the courts to increase the perception that they were acting constitutionally and legitimately soon requires revision. This strategy involves leaving the courts independent while seeking to restrict the scope and depth of their decision making to prevent them from posing a threat to the regime. (Tate 1993)

1. **Rulers assume little risk:** Part of Tate’s argument is that by leaving the judiciary alone the regime is able to maintain at least some semblance of respectability. Plus, if one has a judiciary that is strongly on one’s side they are an important enforcement mechanism. While we should note that it was General Amin who abducted and murdered his Chief Justice, we should also note the following extract from Justice Peter Allen’s diary (2000:390-391):

   **Wednesday January 15th, 1975**

   This evening my contact dropped in to see me⁴⁴... He’d been asked by Amin and the Defence Council to obtain my unofficial reaction to a suggestion that they were considering for implementation. Their proposed scheme is to appoint one air force and two army officers, all captains, to be High Court judges and thus ensure, so they hoped, that they had an effective say in the running of the courts to the satisfaction of the military. I asked if the officers selected were legally qualified and the

---

⁴⁴ It is interesting to note the use of the term “my contact”; this implies that regular, informal contact between the judiciary and government was in place. Even if the government contact wasn’t at the highest levels of government, he would certainly have access to those levels.
answer, of course was no. They had chosen three officers who had
attended, but not completed secondary schools and spoke some English;
which they considered to be a sufficient qualification. . . I pointed out that
we still had a good working judiciary and it was pointless to destroy it in
this way. I certainly would not want to be part of such a set-up and no
doubt many of my colleagues would feel the same way. I mentioned that
such a move would not be received at all favourably by the outside world
and it would certainly result in bad publicity for Amin.

Thursday January 16th, 1975

My contact called in this evening and brought me the news that Amin had
dropped the plan to infiltrate the Judiciary with his military officers.

2. **Restrict scope and depth of decision making:** Parallel judicial structures present a
severe restriction on judicial power, but in the long-term it was positive with regards to
the judiciary (particularly in Malawi). These parallel court structures became heavily
politicized and ridiculed, and the conventional court structures were marginalized, but
left alone. These suggested findings reflect the findings of Toharia (1975). Toharia found
that even in authoritarian Spain, there was a surprising level of ideological diversity
among members of the judiciary. Toharia’s explanation for this apparent paradox is the
existence of a parallel set of special courts closely supervised by the regime. “The *de facto*
existence of two parallel systems of justice: the ordinary and the extraordinary (the
second being in charge of all cases with an actual or potential political reference” in fact
protected the ordinary courts (Toharia 1975:476). As Tate (1993:318-319) describes, in
crisis-regime courts the government is likely to restrict the scope and depth of the courts
decision-making by:

- **reserving the important and threatening litigation for decision by more
  controllable agencies, e.g. military courts. Crisis regimes may try to**
- **restrict the scope and depth of their courts’ decision making by
  proclaiming the non-challengeability of decrees essential to establishing
  and maintaining their rule. The scope of the courts’ decision making may
  also be restricted by setting up parallel judicial structures to hear and
  decide those cases that the regime does not want decided by the regular
courts.**
3. No major setbacks from judiciary: In *Uganda v. Commissioner of Prisons, ex parte ojok* (1966), the Ugandan High Court gave legitimacy to the extra-constitutional seizure of power by an illegal government. It was important that the judiciary continue to hear non-threatening, non-political cases – the more threatening cases could instead be dealt with through extra-judicial structures. As Tate suggests, crisis regime leadership will look to act within the law, which usually means changing the law itself or creating parallel jurisdictions, but act “legally” none the less. As one judge in Malawi commented, “If you look back at the Banda government, Dr. Banda was a stickler for legality. Whatever he did he had some law for it.” Given that in the thirty years proceeding independence aid was primarily based on ideological criteria rather than “good governance” or the rule of law, that Banda was a “stickler of legality” might appear to be counterintuitive.

As Hyden (2006:107) states, “The means by which development was achieved mattered less than the fact that there was a rhetorical commitment to the objectives of development, capitalist or socialist.” Indeed, even at his worse Amin was being heavily financed by the Saudi government. When we talk of adhering to the law to give a sense of ‘legitimacy’, it was perhaps less important to maintain this legitimacy for Western, donor eyes, than for domestic perceptions. The mantra, justice must not just be done, but seen to be done is pertinent. People must at least perceive that the system is acting in the interests of justice. Indeed, the traditional courts in Malawi were extra-legal, extra-constitutional bodies, but despite this were incredibly popular amongst the rural peasants.

---

45 E.A. 514

46 Author interview with Malawi judge, May 2007.

47 Author interview, Malawi Supreme Court judge, May 2007.
II- A Brief Overview

Malawi

"One of the most important things in a country which is about to become independent, and to be fully responsible under its own political government for conducting its own affairs, is to ensure that there is a system of Courts established where everyone knows that, if he has a complaint against another person involving a breach of the law, he can go to a Court which will give a fair and balanced judgment in the case concerned. It is therefore most important both from the point of view of promoting the happiness of all the people living in the country, from whatever race, and from the point of view of the reputation of the country and its Government in the outside world, that the new Courts are regarded as being completely fair and impartial, and lacking in all forms of victimization on grounds of race, religion or other differences."

- Nyasaland Minister of Justice Correspondence

In Malawi, as in most of the African continent, in the years proceeding independence the constitution became just another law that existed to enable the leadership. On the back of a very successful election, Banda decided not to take anything to chance and to instead eliminate all the opposition. In his own inimitable style, Banda declared that:

The fact is that the African people have indicated, through the ballot box, an overwhelming support for my party in preference to any other . . . I do not myself propose to take the initiative in building up an effective opposition to my party. . . Africans find it difficult not to discern an element of hypocrisy in expatriate criticism of one-party, or predominantly one-party, government. Basically the territory had a one party system of government operated by Governors ranging from the autocratic to the benevolently despotic throughout the Colonial regime. Where opposition by Africans was permitted it was tolerated so long as it remained virtually ineffective. When frustrated at their seeming total ineffectiveness the Africa opposition resorted to strong measures, a "state of emergency" was declared-people were killed and hundreds were imprisoned without trial . . . The basic fact is that should the people as a whole tire of me and my party, then they will remove and replace us. Until that time comes we propose to govern (Banda circular letter dated 25th February, 1963)

48 Correspondence from the Nyasaland Minister of Justice to every Court President in the country, cited in (Nyasaland 1963)

49 Cited in (Nyasaland 1963)
Banda was democratically elected in 1961 and constitutional guarantees of human rights, judicial independence, and regular elections were contained in the independence constitution (Chirwa 2002). Chapter II of the 1964 Constitution delineated a comprehensive Bill of Rights. As Banda constructed what was effectively a one party state, so these rights were undermined. The were first undermined in the name of public security, and then deleted entirely and replaced with the “Fundamental Principles of Government.” Under this new constitutional clause, rights as defined by the United Nations Declaration on Human Rights were acknowledged, but they could be superseded in the “interest of defense, public safety, public order and the national economy” (Ng’ong’ola 2001:63). In 1966 Malawi became a Republic, and in 1971 Dr. Banda declared himself ‘President for Life.’ The judiciary publicly supported this constitutional amendment. The day after the inauguration of Dr. Banda as ‘President for Life’ the state-owned newspaper reported the following: “The simple but moving swearing-in ceremony was in the cool afternoon, conducted by Malawi’s Chief Justice James Skinner, who was accompanied by the Judges of the High Court, Judges of the National Traditional Court and the Registrar of the High Court.”

The 1966 constitution abolished the right of appeal to the Privy Council and provided for a Supreme Court of Appeal for Malawi. Furthermore, the 1966 constitution only legally recognized one party – the MCP (Section 4) and all power was essentially vested in the Presidency. The post-colonial state was in essence the same as the colonial state. It was the undemocratic imposition of elite rule over the masses, rather than the integration of the masses into the state. Banda would go on to sustain his ‘personal’ rule for the next thirty years. “Nothing is not my business in this country:

50 As did Kenneth Kaunda in neighboring Zambia and Bokassa in the Central African Republic, for example. In all three cases the state came to be identified with the deified individual at the top.

51 In addition to declaring himself ‘life president’ Banda could nominate any number of members of Parliament and could dissolve parliament at any time (Sections 20, 25 and 45(2)).
everything is my business, everything. The state of education, the state of our economy, the state of our agriculture, the state of our transport, everything is my business” (Cross 2001). Despite this, Banda remained quite popular. Forster (2001) describes Banda’s pursuit of political legitimacy as the emergence of a populist authoritarianism. Banda would frequently appeal to the traditional, particularly in reference to values and morality. In short, Banda was appealing to the masses by focusing on “fulfilling basic needs, and maintaining peace and calm: with ideals relating to civil liberties and human rights taking much lower priority” (Forster 2001:278).

The state under Banda was repressive. Banda stifled development by keeping much of the smallholder agricultural class in relative poverty. Civil society was non-existent, and minority rights were frequently abused. As in all authoritarian regimes, order and control were maintained through severely restricting freedom of speech and association. This meant both banning publications out of existence and also monopolizing those that still existed. For example:

*Press Holdings*, the company that eventually made him [Banda] rich, was started as the parent company of the Malawi News, the party’s mouthpiece. By 1968 the Malawi Censorship Board was established. In its first seven and a half years of existence it banned over 840 books, 100 periodicals and 16 films” (Lwanda 1993:148).

Over the years many journalists were sacked and detained. Banda’s paralyzing shadow ultimately retired in the very last refuge of justice, the judiciary itself.

The courts were under the direct control of the Malawi Congress Party (MCP) and Banda. The Attorney General was either a government minister or a public officer. The Malawi Supreme Court of Appeal, the High Court and the Magistrate Courts fell under the Judicial Department of the Ministry of Justice headed by the Registrar of the High Court who acted under the discretion and supervision of the Chief Justice (Lwanda 1993:76). The Chief Justice was naturally appointed by the President. What sets Malawi
apart from Uganda and Tanzania was the establishment of a powerful, parallel system of justice. The traditional court system had no independence, and was used as a means to quash any opposition. The traditional courts usurped the power of the conventional High Courts. These traditional courts will be examined at length later. At this time the vast majority of cases being heard at the High Court level and above were straightforward criminal cases. The following tables taken from the Judicial Department Annual Report for 1968 illustrates this point:52

Table 4.0: Data on Post-Colonial Cases in Malawi

Table II: Number of Criminal Matters heard in the High Court in the Year 1968 compared with the three Preceding Years

<table>
<thead>
<tr>
<th>Years</th>
<th>1965</th>
<th>1966</th>
<th>1967</th>
<th>1968</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cases committed for trial to the High Court</td>
<td>130</td>
<td>110</td>
<td>173</td>
<td>146</td>
</tr>
<tr>
<td>Appeals head by the High Court</td>
<td>362</td>
<td>291</td>
<td>571</td>
<td>580</td>
</tr>
<tr>
<td>Cases submitted for confirmation by the High Court</td>
<td>623</td>
<td>970</td>
<td>1,288</td>
<td>998</td>
</tr>
<tr>
<td>Cases heard on revision</td>
<td>86</td>
<td>78</td>
<td>105</td>
<td>192</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>1,110</td>
<td>1,449</td>
<td>2,137</td>
<td>1,916</td>
</tr>
</tbody>
</table>

[52] Based on my research in the government archives at Zomba, this was the last available formal report kept by the Judicial Department. It is probably not a coincidence that this was the final year that the High Court had “normal” jurisdiction. Banda introduced his parallel traditional court system in 1969.
Table IV: Number of Civil Proceedings Heard in the High Court in the Year 1968 compared with the three Preceding Years

<table>
<thead>
<tr>
<th></th>
<th>1965</th>
<th>1966</th>
<th>1967</th>
<th>1968</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appeals from Subordinate Courts</td>
<td>3</td>
<td>3</td>
<td>2</td>
<td>8</td>
</tr>
<tr>
<td>Appeals from Traditional Courts</td>
<td>23</td>
<td>15</td>
<td>27</td>
<td>20</td>
</tr>
<tr>
<td>Civil Actions</td>
<td>150</td>
<td>193</td>
<td>292</td>
<td>270</td>
</tr>
<tr>
<td>Applications Probate of Letters of Administration and re-sealing Letters of Administration</td>
<td>43</td>
<td>50</td>
<td>50</td>
<td>87</td>
</tr>
<tr>
<td>Petitions for Divorce, Judicial Separation or restitution of conjugal rights</td>
<td>11</td>
<td>11</td>
<td>6</td>
<td>13</td>
</tr>
<tr>
<td>Petitions in Bankruptcy</td>
<td>4</td>
<td>1</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>Miscellaneous applications</td>
<td>18</td>
<td>14</td>
<td>8</td>
<td>5</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>252</strong></td>
<td><strong>287</strong></td>
<td><strong>389</strong></td>
<td><strong>408</strong></td>
</tr>
</tbody>
</table>

Table VII Number of Persons Tried in the Subordinate Courts in the year 1968 and their offences compared with three preceding years

<table>
<thead>
<tr>
<th></th>
<th>1965</th>
<th>1966</th>
<th>1967</th>
<th>1968</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Total</strong></td>
<td>9,117</td>
<td>12,593</td>
<td>13,803</td>
<td>10,089</td>
</tr>
</tbody>
</table>

At independence all senior positions in the Western-type judicial system were expatriates - British or Nigerian magistrates, and all British judges (Forster 2001:280). Banda encouraged their continued participation in the judiciary to the extent that they cooperated with the regime. An early case of interest was that of Republic v. Silombela (1963)\(^{53}\), in which Silombera, a political dissident and a Yao from the South, was tried under charges of treason. Before the trial even began, while in attendance at a Lonrho dinner party in 1963 Banda was cited as saying: "I know he is going to be found guilty. What kind of a judge can acquit Silombela? No. . . . He will be found guilty. And after

\(^{53}\) 3 M.L.R. 438
that, you can come and watch him swing. That's all" (cited in Lwanda 1993:76).

Silombela was found guilty and hanged in front of the party officials and relatives of those he had killed during his guerilla campaign. In 1969, after Justice Bolt, a British expatriate had acquitted five men who had been accused of murder in a trial with political overtones; Dr Banda announced that he was overruling the judge's verdict:

No. . . . They are not going to be let loose, I can tell you that. . . No matter what anyone in Blantyre or Zomba say, those people will never come out of there - never, never, never - no matter what anyone says or does. . . Those people are not going to be let loose. Not let loose. I am in charge, and I am not from England either (cited in Lwanda 1993:73).

The very next day, November 18th, 1969 Malawi's four High Court judges, then still British, resigned with the telling statement: "Without wishing to question the sincerity of those who hold the opposite view, we cannot believe that justice will be adequately safeguarded in these circumstances" (Lwanda 1993:76). There had also been consternation in Parliament over the acquittals, and similar examples of actions of expatriate judges were seen as unsatisfactory and were quoted (Forster 2001:282). The resignation of the expatriate judges, the succession of prejudiced statements by Banda against the judiciary, and the creation of a parallel system of traditional courts shifted public perception that there was a fair or just legal system in place.

In 1966 a Commission on the judiciary proposed that there was a need to move towards a more pragmatic form of legal system (Forster 2001:281). As Forster (2001) posits, government perceived that Western legal technicalities and rules of procedure were getting in the way of convictions. For it was generally accepted that people did not

---

54 Banda often justified his freedom of comment on cases while they were still being heard by utilizing that familiar call to tradition. "He argued that his own practice accorded with tradition: in the past the court was not above the law and the law was not above public feeling, so there was no question of the case being free from comment. He accused lawyers of having a sense of technicality rather than justice" (Forster 2001: 282-283).

55 Silombera was a Yao from the South, and had been marginalized by a Banda Chewa majority. Silombera had led low-intensity insurgency war against Banda.
make false accusations for no reason – the “no smoke without fire” argument. Informal culture was seen to clash with formal legal rules. Forster further notes, (2001:281) the three chiefs who were part of the commission wanted to go even further,

They saw a defendant’s demeanour and previous character as relevant factors in assessing guilt or innocence: and they wished to give greater weight to circumstantial evidence. They wanted confessions to be used as evidence, and they were even willing to accept torture (such as putting an arm in boiling water) as a way of “helping” a confession, but this was rejected.

This later led to the establishment of parallel traditional courts.

In 1965 Banda solidified his power through the Preservation of Public Security Regulations. Estimates of detention in Malawi run into the hundreds of thousands. It was a slow and gradual campaign to undermine the judiciary. On the 24th March, 1970 in a speech to parliament Banda was recorded as saying: "Tell the police not to release those people, no matter what the judges are saying I am in charge here, not the judges" (cited in Lwanda, 1993 #218:148). The feelings of judges towards the system at this time suggest that the judges were aware of the restrictions on their ability to make independent, impartial decisions. This is echoed in the following reflections of the then Chief Justice, Richard Banda, as recorded by the Joint Delegation of the Scottish Faculty of Advocates (1992:54):

The Chief Justice did not accept that the courts were not independent of the state. He insisted that in his career as Attorney General and Chief Justice there had been no single incidents where the government had interfered with the courts. The President himself had ordered that no Minister should interfere with the courts. He said that when he had been appointed Director of Public Prosecution the president said to him personally that no ministerial colleagues were permitted to interfere. Asked about the case of Stanford Munyenyembe, a Chief Resident Magistrate who had been dismissed following a verdict of acquittal he had delivered, the Chief Justice said it was sad that he should have lost his job. It was not right and eroded judicial independence. As to the legal protection of judicial independence, the Chief Justice told us that he regretted the 1985 change in the constitution which, he said, had removed
the necessity for parliamentary approval of a judge's removal. Judges could not be removed by the President. He would have preferred the old rule to continue. He insisted that in fact no judges had been removed.

The Chief Justice went on to describe the profound difficulties the courts experienced with enforcement. This indicates that the lack of respect Banda had expressed for the courts somehow trickled down to the police and others. Furthermore, the actual independence of the judiciary was frequently threatened due to the lack of security of tenure. This was a characteristic of all three regimes in Tanzania, Malawi and Uganda. Judges were seen as mere civil servants, as they were not drawn from private practice. As civil servants they were liable to dismissal by the government at any time. As the delegation later went on to note, “the Minister of Justice, Mr Makuta had been Attorney General, Director of Public Prosecutions, Secretary of the Cabinet and Chief Justice before his appointment as Minister in 1992 (Joint Delegation of the Scottish Faculty of Advocates 1992:54). By 1985 what weak protections already existed for the judiciary were weakened further when there was a change in the constitution that allowed the President to remove judges without approval of Parliament (Constitutional Amendment 1985). Protections for Magistrates and Traditional court judges were even weaker.

---

56 It should be noted that although the judges interviewed by the delegation denied any direct interference by Banda, it did occur. Here, in the words of the delegation, is an example of one such incident: “From time to time, the Government of Malawi had interfered directly with the due process of law. Appendix 4 to this Report is a copy of a letter dated February 28th 1989 from the Registrar of the High Court of Malawi to practicing Lawyers. Legal proceedings had been brought to challenge dismissals and suspensions from Blantyre and Lilongwe City Councils in 1987 and 1988. The letter shows that President Banda, by Proclamation issued through the Chief Justice, order that where such dismissals or suspensions have been “carried out in the public interest upon the specific instructions” of the President himself, then all suits relating to them were to be “deemed closed, and if contemplated shall not commence” (Joint Delegation of Scottish Advocates, et al. 1992:64).
Tanzania

As I understand the constitutional position in our country, the Judiciary is supposed to be an independent institution in the sense that those who are entrusted by the Constitution to decide the rights and liabilities or the guilt or innocence of people must be free from all kinds of pressures regardless of the corners from which those pressures come. The Judiciary must be free from political, executive or emotional pressures if it is going to work with the smoothness and integrity expected of it under the supreme Law of the Land-the Constitution. It must not be subjected nor succumb to intimidation of any kind.

- Justice Kisanga in Chipeta J. Republic v. Idd Mtegule, 1979

The strength of the single political party (then TANU) combined with the strong, charismatic leadership of Julius Nyerere were two positive attributes that sets Tanzania apart from Malawi and Uganda. Indeed, the single key word that describes post-colonial politics in Tanzania is continuity. Today, in 2008 Chama Cha Mapinduzi (CCM) is still in power. CCM has maintained their grip on power for fifty years. Indeed, while I was conducting fieldwork, CCM were celebrating fifty years in power. Perhaps the most significant turning point in the post-colonial history is the Arusha Declaration in 1967. This committed Nyerere’s regime to a rural oriented version of socialism. What is strikingly different about Tanzania (in comparison to Uganda and Malawi) under Nyerere and the CCM is that they largely had the support of the people, and continued to maintain that support through the 1980s and 1990s. Despite the clear dissatisfaction with Nyerere’s socialist policies, somehow the party managed to reform the system and maintain its position in power. Nyerere did not step down until 1986, many years after the apparent failures of his socialist experiment.

In 1993 the people voted in a referendum against the introduction of multipartyism. Thus, we must question had this regime/party maintained its legitimacy. From a purely political perspective Tanzania’s independence leaders have to be applauded for what Young (1976:271) refers to as

57 High Court of Tanzania at Dodoma, (P.C. Crim. Rev. No.1 of 1979)
the extraordinary skill used in developing TANU as an instrument of national integration and cultural engineering through promotion of Swahili as an agency of national culture. . . The exceptional personal qualities of Tanzania’s first president, Nyerere, leave open nagging questions as to whether the integrative accomplishments are institutionalized reigning achievements or the individual legacy of a talented leader.58

Within the first few years of his rule Nyerere eliminated opposition and constructed a strong one-party state. The 1965 constitution maintains the separation between the National Executive Committee of the party and the National Assembly. However, this was inspired by “the desire to retain the internal autonomy of the party and the confidential nature of its deliberations” (Ghai 1972:420). In short, this constitutional order optimized both TANU and Presidential power. In the absence of any kind of opposition it is unclear why or if members of the legislature would support or try to defend the independence of the judiciary. As Widner (2001:100) writes, “without competition politician’s individual attitudes toward the courts mattered much more. Whether the head of state accepted the principle of judicial independence and ensured that his ministers and officers in the field followed suit was key.” When conducting interviews in Tanzania I found that people either strongly believed that Nyerere undermined the rule of law or they strongly believed that Nyerere supported the rule of law. One legal scholar said the following59:

Nyerere never believed in courts; in law as the arbiter of conflicts of interests. He believed in policies. In 1983 in establishing the parallel

58 As with Dr Banda in Malawi convincing victories in early elections led Nyerere and his TANU party to believe that they held the complete mandate of the people. This mandate gave them the right to eliminate opposition parties. In the first general election TANU won 70 out of 71 contested legislative council seats. Both Banda and Nyerere were important figureheads in the anti-colonial struggle, and used this popularity to pursue their own agendas after successful elections. Their parties were the “national” parties that organically grew from the independence movements. As Mbunda writes (1999:35), “opposition to TANU before independence amounted to betrayal of the cause of nationalism, whereas opposition to TANU after independence was similarly regarded as treachery or treason, again because of TANU’s role in achieving independence.”

courts, he told judges “sorry I won’t bring these people before you.” Not in a negative way. He just didn’t believe in it. That is the history. It has a bearing on the development of the court system. He never believed in that. In a way he didn’t believe in private practice. Lawyers are crooks, they can turn black to white, blue to red. That has a bearing on the court system. Nyerere, believed in going slowly. Once done it is hard to take a sharp turn away from that - to create an active judiciary.

However, an interview with a senior Judge in the Tanzania Court of Appeal presented another viewpoint:

I think Nyerere believed in the rule of law and exercised it. The posture of Nyerere and his charisma, the respect he had and the powers he had under the constitution at that time. He could have just done away with the courts and nobody would have dared raised an objection. It was because of Nyerere himself that the courts were able to operate as freely as they did. Otherwise, at that time the constitution gave Nyerere so much power, as he himself said, “if I wanted to be a dictator I could have been.” If the courts were free it is because he wanted them to be.

It is true admittedly, like any human being, any powerful person there were some occasions that he made decisions that were not proper. For instance there was some sort of political case somewhere in Tabora. A person who was one of his best friends and colleagues, they rose together in the party. Kosela Bantu, it was alleged that he instigated people into some killings. He was arrested pending prosecution. They went to the District Commissioner and the District Magistrate gave Bantu bail. Nyerere said detain him [to the magistrate]. The judiciary told the CJ, your DM has been detained by Nyerere because of this case. Chief Justice Georges went to Nyerere and said “what are you doing” if you are aggrieved, go to the High Court and appeal the decision. He was released immediately. There was another case somebody called Mogonja. There was an election, electoral petition that he lost. The law at that time, even now says he was not to contest an election for the next five years. For some reason Nyerere appointed him Regional Commissioner, ex officio, he was also a member of parliament. So the CJ went to Nyerere and told him you are going against a court decision. Although Nyerere publicly announced that he was Regional Commissioner, Nyerere never swore him in. Nyerere backpedaled.

These two positions may not necessarily be as contradictory as they first might appear.

Perhaps at times his actions reflected both positions. A couple of features appear to distinguish the Tanzanian judiciary from its Malawian and Ugandan counterparts. The first is that there was very little turnover in the judiciary, particularly in the position of

121
Chief Justice (only three from independence to 1997). Secondly, the evidence suggests that Nyerere at least maintained a dialogue with the judiciary, even if he at times sought to marginalize or ignore them. Widner (2001) documents former Chief Justice Nyalali’s relationship with Nyerere, in which Nyerere claims that he always felt that the space existed to challenge and debate the President. This was a luxury that did not exist in Uganda, and didn’t appear (at least from available evidence) to have appeared in Malawi.

Nyerere did have his own personal frustrations with the judiciary. In Freedom and Socialism (1968:104) Nyerere argued that:

> There is a separate hierarchy and system of command for the judiciary, and once a man is appointed it is extremely difficult to displace him. These things are intended to help secure impartiality. But they must not do more. They must not lead to the belief that a judge can be, or should be ‘neutral’ on the basic issues of our society. . . . Otherwise their interpretations may appear ridiculous to that society, and may lead to the whole concept of law being held in contempt by the people.

The Republican Constitution of 1962\(^6\) marked a new beginning for Tanganyika. It marked a decisive shift away from a parliamentary system towards a presidential system. The shift to a republic (in particular the creation of a strong executive) was seen as essential to the implementation of TANU’s development plans. The 1964 union between Zanzibar and Tanganyika formed new federal republic of Tanzania.\(^6\) The interim constitution established by the new government in 1965 was supposed to be replaced within one year. However, it was to last for twelve years until the permanent constitution was eventually adopted in 1977 (Yongolo 2000:42).

---

\(^6\) Constituent Assembly Act No.1 of 1962, Cap.499 of the Revised Laws of Tanzania. This constitution broke links with the British Crown and established the beginnings of a framework through which the regime could solidify power.

\(^6\) The union is a complicated legal matter, and indeed it is quite difficult to classify. There have been no significant cases to come before the courts on this matter. Increasingly over time, the federation has become a matter of tension between the people and the governments. Historically Zanzibari politics did not closely follow an elaborate constitutional order, but instead were based on the few post-1964 revolution laws.
The 1965 interim constitution effectively put in place a one-party state and eliminated all forms of party competition. Article 3 provided for the one-party state. The same had also provided for partial party supremacy (Article 3 (3)). Prior to this, however, Nyerere started to dismantle the opposition through the 1962 Preventive Detention Act. This Act would enable the President to detain any person in the Republic for security reasons, without being questioned in a court of law.\footnote{62}{Morris and Read (1972:106-107) point out that one of the first Acts to significantly deviate from English law was the Tanganyika Minimum Sentences Act of 1963, where in the face of increasing crime the government felt existing imprisonment and corporal punishment laws were inadequate. In addition to the draconian approach to crime, TANU stifled civil society. Trade unions were suppressed and traditional authority institutions were eliminated.\footnote{63}{\textit{African Chiefs Ordinance (Repeal) Act 1963, Cap.517 of RLT}}}

In addition to the draconian approach to crime, TANU stifled civil society. Trade unions were suppressed and traditional authority institutions were eliminated.\footnote{63}{\textit{African Chiefs Ordinance (Repeal) Act 1963, Cap.517 of RLT}}

The ambiguous separation of powers and a powerful single party working outside the legal framework resulted in a series of clashes between state organs. This inevitably weakened the actual and perceived power of the judiciary, and emasculated the judiciary to the point that they were not prepared to confront the executive (Kibwana 2001). The 1967 Government Proceedings Act abolished judicial review.\footnote{64}{\textquotedblleft}It completely insulated the government from all claims in a feudalistic manner. According to this law, anybody who wanted to sue the government had first to seek the permission from the same government through the Attorney-General or the minister responsible for justice to sue it. In some cases it took years to get the holy permit. This was not an accident, it has its meaning. The time factor was intended to wear out the claimant and force him to settle the matter out of court with the government. It he insisted on proceeding with the case, then the time would have taken its toll and it was likely that some of the key witnesses would have died, been transferred or simply forgotten what transpired in relation to the issue being litigated\textquotedblright{} (Peter 1997b).\footnote{64}{\textit{“It completely insulated the government from all claims in a feudalistic manner. According to this law, anybody who wanted to sue the government had first to seek the permission from the same government through the Attorney-General or the minister responsible for justice to sue it. In some cases it took years to get the holy permit. This was not an accident, it has its meaning. The time factor was intended to wear out the claimant and force him to settle the matter out of court with the government. If he insisted on proceeding with the case, then the time would have taken its toll and it was likely that some of the key witnesses would have died, been transferred or simply forgotten what transpired in relation to the issue being litigated” (Peter 1997b).}}
This power of decree allowed Nyerere to ignore the courts decisions and “save” whomever he wanted. In addition, the Presidency was imbued with the power to declare a state of emergency and the definition of a state of emergency at that time was expansive. The judiciary also lost power of review over the Electoral Commission. Similarly, the legislature lost its teeth. They no longer had powers of impeachment against the president. But on the flip side, the President did have the power to dissolve parliament, and approve all Bills before they became law.

Shivji (1994:83) argues that the authoritarian state in Tanzania was “legitimized through the ideology of ُujamaa for at least over a decade before the crisis set in.” Nyerere justified the application of anti-democratic measures through an appeal to a special kind of African, socialist ideology. Nyerere turned ُujamaa into an economic philosophy through appealing to traditional African concerns such as the notion of family and community. In Freedom and Unity, Nyerere wrote (1966:103), “In the traditional African society everybody was a worker . . . The organization of traditional African society . . . was such that there was hardly any room for parasitism.” As I will examine later, this wholesale policy change created a lot of work for the courts. Widner (2001:43) notes “. . . the ambitiousness of the task he had set for the government was destined to create difficulties for the fledgling national courts. Dramatic changes in the law . . . inevitably created bigger caseloads for the courts, as people tried to determine what the changes really meant.” As far as handling cases related to ُujamaa the courts were strict and only heard cases in which there was a clear legal action. People became frustrated with this because they felt that it was slowing down the revolution (Widner 2001:106). This is reflected in Nyerere’s rhetoric at the time. Contained in the document ‘Presidential Commission on the Establishment of a Democratic One Party State’ is the following reference to the U.S. Supreme Court under Roosevelt,
[Tanzania] has dynamic plans for economic development. These cannot be implemented without revolutionary changes in the social structure. In considering a Bill of Rights in this context we have in mind the bitter conflict which arose in the United States between the President and the Supreme Court as a result of the radical measures enacted by the Roosevelt Administration to deal with the economic depression in the 1930’s. Decisions containing the extent to which individual rights must give way to the wider considerations of social progress are not properly judicial decisions. They are political decisions best taken by political leaders responsible to the electorate.65

There was a sense of frustration, and the party tried to respond to the perceived obstacle of the conventional court through creating greater levels of oversight and through the creation of parallel court structures outside the existing system. For the Tanzanian judiciary the threat then was to come from below, as opposed to Uganda where the greatest pressures and threats were coming from elites(Peter 1997a:219-220).

With the elimination of traditional courts, the Western court system and party structure had to deal with rising crime rates. As Forster (2001), observes this led to the reemergence of neo-traditional organizations such as sungusungu vigilante groups. There was a certain level of both suspicion and misunderstanding with regards to the functioning of the legal system inherited form the British. TANU argued that a Bill of Rights would be a hindrance to economic development. Moreover, they believed that the Bill:

Might be used by predominantly expatriate judicial officers to frustrate the efforts of the new government through the mechanism of judicial review . . . to embody a bill of rights in the Constitution would only invite a conflict between the executive and the judiciary and hence what was important was to guarantee an independent and impartial judiciary dispensing justice free from political influence or pressure . . . judicial review. . . was weakened, in the pretext of avoiding a conflict. . . In other words, accountability to the people was no longer a matter sanctioned in courts (Widner 2001`:104).

65 Cited in (Prempeh 2007:469).
This justification against the bill of rights has strong echoes of the struggle between President Banda and the expatriate judges of Malawi. The Chief Justice of that era, Chief Justice Georges, makes the argument that the lack of a legally enforceable Bill of Rights was helpful in an era of one-partyism. The courts could use the general principles in the constitution to educate the public, whereas a justiciable bill of rights might have engaged the courts in confrontation with the government which “at that stage would have been impolitic.”

From the late 1960s onwards the magistrates were deprofessionalised. Indeed, as was the case in Uganda and Malawi the lower courts suffered greater interference than the higher levels of the judiciary. Judges were selected by local TANU (later CCM) branches, and over time these magistrates judges would find their way into the upper echelons of the judiciary. While a High Court land dispute case was still pending, *Ally Juu Watu v. Loserian & Anor* (1979)\(^{67}\), a Ward Secretary sought to evict the plaintiff from the disputed land while the District Party Secretary wanted to transfer the case to himself but the office of the Attorney General advised him not to. In relative terms, the High Court managed to maintain some professional integrity (Shivji 1998:23). It was common at this time to settle disputes through informal mechanisms.

In the *ujamaa* villages, much local law was made and adjudicated by the management committees of the village... such tendencies have led to unprecedented conflicts between the judiciary and political and executive officers. They also have led to the functions of the judiciary being (p.134) usurped and have in several cases led to untold abuses of human rights abuses in Tanzania. But, as Mwaikusa asserts, the Judiciary did not compromise legality with party supremacy. In the issue of *sungusungu*, a kind of peoples militia, for instance, the High Court in several cases declared it unconstitutional” (Wambali 1996:200-2001)

\(^{66}\) Georges, “Traditionalism and Professionalism,” p.49, cited in (Widner 2001)

\(^{67}\) LRT No.6
In 1977 the two existing parties in Tanzania, the Tanganyika African National Union (TANU) and the Afro Shirazi Party (ASP) from Zanzibar merged to form Chama Cha Mapinduzi (CCM). The same committee which had been appointed to draft the party constitution was assigned to draft the new constitution for the Republic of Tanzania. As with Obote’s “pigeon-hole” constitution and Malawi’s 1967 republican constitution, the entire process lacked transparency and was absent any kind of consultation. The party was the state and therefore there was no one to consult!

According to Shivji (1999), “the Commission had started working on the Constitution even before it was formally appointed as the Constitution Commission. It submitted its proposals to the National Executive Committee which adopted them in camera in a one day meeting.” The 1977 Constitution also introduced Article 10 to provide for full-scale party supremacy. The revised constitution gave senior judicial officers slightly more protection. “New provisions said that the executive of legislature could not abolish the office of a judge of the High Court or a justice of appeal”, the 1977 constitution further stipulated “that judges were to be paid out of the Consolidated Fund” (Widner 2001:137).

From 1971 to 1977 the judiciary was under the leadership of Chief Justice Saidi, who did not have a close relationship with Nyerere and turned out to be quite weak at solving the courts problems (Widner 2001). One of the most anti-democratic trends of this era was the comprehensive preventive detention laws. The courts took the position that a valid detention order from the secretary of state was enough, and could not enquire further. Justice and the rule of law had collapsed and a special Judicial System Review Commission (Msekwa Report) 1977 found that people were dissatisfied with the courts and with the police.

1977 was the year of the political party merger, the year of the promulgation of the permanent constitution, and the year Chief Justice Nyalali was appointed. As
Widner (2001) suggests this became a watershed point, “along with counterparts throughout the region, the Tanzanian courts entered a period in which the relationship between the branches of government would undergo renegotiation.” The 1977 constitution was not revisited until 1983, at which time, a quite vigorous debate had begun focusing on the powers of the president; vis-à-vis the powers of the National Assembly, and most significantly, the adoption of a Bill of Rights. Leading the fight against the more restrictive aspects of one-party rule was the Tanganyika Law Society (TLS). One case in particular form the early 1980s remains of seminal importance and that is Bi Hawa Mohamed v. Ally Sefu (1983). In his judgment Chief Justice Nyalali concluded that a wife’s domestic services were a contribution to marital assets and so the wife should be eligible for her share of matrimonial property. Nyalali construed the words ‘their joint efforts’ and ‘work towards acquiring assets’ to incorporate domestic work of either husband or wife. This was a progressive and far reaching judgment, seemingly years ahead of its time.

Pressure for the adoption of a bill of rights on the mainland also came from Zanzibar. Zanzibar had a short-lived bill of rights in its independence constitution. After the revolution Zanzibaris were agitating for the reincorporation of a bill of rights back into the constitution. It would have looked bad if Zanzibar had incorporated a bill of rights into their new constitution and Tanzania did not yet have one. While the debate surrounding the introduction of the bill of rights was going on, the state introduced the Economic Sabotage Act in 1983 (which had retrospective effect). In the face of increased

---

68 Most NGO’s, as part of Tanzanian civil society, kept a very low profile during the years of demobilization of civil society with the notable exceptions of Tanganyika Law Society, the University of Dar es Salaam Academic Staff Assembly (UDASA) and CHAKIWATA. From 1983 the Tanganyika Law Society became very vocal on issues concerning the Constitution and actually led the debate on democracy in the late 1980s and early 1990s.

69 Court of Appeal of Tanzania, Civil Appeal No. 9 of 1983 (Unreported)
crime and lawlessness, this new statute authorized vigilante searches and seizure of property. The creation of these special economic crimes created a parallel system of justice. Nyerere openly declared his intention to bypass the judiciary, “I hope the judges and lawyers will forgive me, this time I am going to deal with these people outside the courts”\(^\text{70}\). Ultimately, the inclusion of a bill of rights in 1984 was (in the short term) ineffectual because it was enacted within a one-party authoritarian state. The bill of rights remained non-justiciable for the next five or so years.

A discussion of judicial independence in Tanzania at this time cannot be complete without examination of Hamisi Masisi. In the case of Hamisi Masisi & Six Others v. Republic (1984)\(^\text{71}\) a Musoma Resident Magistrate succumbed to the pressure of the Regional Commissioner. The applicants had applied for bail in the Resident Magistrates Court which was granted. However, the Regional Commissioner for Mara Region ordered their rearrest and detention. The Resident Magistrate canceled his previous orders for bail in order to avoid a conflict between the Executive and the Judiciary. As if out of desperation the Magistrate forwarded the records to the High Court for revision where Justice Mfalila once again stated:

> The Resident Magistrate was wrong. He is not supposed to make judicial decisions on expediency. He is a judicial officer in which case he is supposed to act only in accordance with the law despite any irrelevant pressure that might be applied on him. I note with regret the helplessness which the Resident Magistrate exhibited in the face of these pressures from the Executive. He should expect such conflict and pressures and his duty is not to succumb as he did, but to stand firm in defense not only of the people brought to his Court but also the Constitution and practices of the United Republic as by law establish.

As Widner and others tell the tale of the Tanzanian judiciary in the immediate post-independence era it appears to be a story of maintaining a delicate balancing act: trying

\(^{70}\) Nyalali paraphrasing Nyerere, cited in (Widner 2001:145).

\(^{71}\) TLR 751 (HC), Mwanza
to measure when to speak out, and when to keep quiet. They abided by a strict sense of legality, hearing only those cases that had a legal point to be heard. Perhaps the Tanzanian judiciary did not compromise itself in a legal sense, but the entrenchment of the one-party state resulted in its marginalization. Mbunda (1999:62) argues that:

[The] one party state led to a marginalization of the judiciary making it cease to be seen as an essential organ of the government. . . There followed what appeared to be an alliance of the legislature and the executive which literally pushed the judiciary into a corner and dramatically demonstrated loss of confidence in the judiciary at the state level.\textsuperscript{72}

The lowest point for the Tanzanian judiciary appeared to be the late 1970s and early 1980s. Preventive detentions were running into the thousands, judicial power was further eroded through the Economic Sabotage Act, and a justiciable bill of rights did not yet exist. Part of the story was also one of leadership. Certainly the leadership of Chief Justice Saidi from 1971 to 1977 was seen to be weak and inadequate. Saidi was an ideologue, who placed \textit{ujamaa} before the law. According Widner’s account (2001) Nyalali was beginning to find his feet (and assertiveness) just as the party was weakening in the face of complete economic collapse. This opened the way for a renegotiation of the separation of powers.

\textbf{Uganda}

Unlike Tanzania and Malawi, Uganda did not enter a period of one-party, authoritarian stability at independence. On the positive side, at independence there were two political parties, attempting to duel it out with one another. Moreover, the judiciary played an important role in resolving political disputes in the four years immediately preceeding

\textsuperscript{72} Note in particular the Economic Sabotage (Special Provisions) Act (1983)
independence (Ghai 1972). However, they were never able to do this in a sustainable or democratic manner as the country lurched from one crisis to another and spent large portions of the post-independence era under military rule. Indeed the first notable point of comparison is that the first indigenous leader, Ben Kiwanuka, led the country in the year before independence under the Democratic Party, yet lost the first election to Milton Obote’s Uganda People’s Congress (UPC). Obote coming to power signaled Uganda’s entry into a period of rule through violence and instability. It was also a sign of the profound unworkability of the federal regime bequeathed by the British. In the years to come the judiciary would be a victim of that constitutional arrangement. In the twenty-four years following independence, six out of eight heads of state came to power through overthrowing the previous regime. The last coup occurred in 1986 when the National Resistance Army overthrew the military council and brought Yoweri Museveni to power where he remains through today (Oloka-Onyango 1995).

Table 4.1 Uganda Post-Independence Timeline

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>1962</td>
<td>Milton Apollo Obote becomes Prime Minister of Uganda</td>
</tr>
<tr>
<td>1964</td>
<td>Suspension of the 1962 Constitution</td>
</tr>
<tr>
<td>1964</td>
<td>The Uganda Magistrates’ Courts Act of 1964 – Subordinate courts and African (and Buganda) courts have been replaced by magistrates’ court of four grades.</td>
</tr>
<tr>
<td>20th May</td>
<td>Crisis- Buganda announced motion ordering Central government to leave the Kingdom by the end of the month.</td>
</tr>
<tr>
<td>1967</td>
<td>New Constitution, Uganda declared a Republic with an Executive President, Kingdoms are abolished</td>
</tr>
</tbody>
</table>

Note for example, Attorney General of Uganda v. Kabaka’s Government [1965] E.A. 393, in which the central government and the Buganda resolved a dispute over their financial relationship through the High Court, which eventually went on to the Privy Council. Both courts ruled in favor of the Central Government and the matter was resolved. Other important cases involved Buganda’s right to levy taxation, transfer of police services – to name but a few. As Ghai notes, however, all these cases ultimately went in favor of the central government (Ghai 1972:428-429).
1967  Uganda Judicature Act provides that the High court may exercise jurisdiction in conformity with “any established and current custom or usage” – thus elevating customary law to a higher standing than previously had been the case. Appeal from East African Court of Appeal to Privy Council is abolished.

1969  Attempt on Obote’s life, all opposition political parties banned

25th January  Amin successfully staged a coup

1971  Asians sent into exile

1972  By 1973 the police had collected over 15,000 bodies in and around Kampala, excluding soldiers

1974  Abduction of Chief Justice Kiwanuka from his courtroom. Later murdered.

1979  Amin’s government fell to Tanzanian backed exiled fighting groups

20th June, 1979  After 68 days in office, Professor Yusuf Lule was overthrown by the Ugandan National Liberation Front (UNLA) and replaced by Godfrey Binaisa.

11th May, 1980  Binaisa overthrown by a group of UNLA soldiers.  A Military Commission was formed, they promised a quick return to democracy and the rule of law

27th May, 1980  Obote returns at head of state

December, 1980  Elections are held, but are rigged. Head of military declares himself to be the final judge in election results, and dismisses 10 returning officers including Chief Justice Wambuzi and two other judges. This marked the beginning of a shocking five year civil war

July 27th, 1985  Under the leadership of Tito Okello, the army disposed of Obote for a second time. Okello was sworn in as Head of State

26th January, 1986  Despite attempts at peace talks, fighting continued between the military council and the National Resistance Army (NRA). In early 1986 the UNLA lost Kampala to the NRA.

January 26th, 1986  Museveni sworn in as President. Remains President today.
Yash Ghai claims that of all the independence constitutions in the regions it is not surprising that Uganda was the first to abandon constitutional rule. The constitution “abounded in unworkable compromises and institutionalized inequalities . . . It embodied the conflict between progressive and nationalistic aspirations on the one hand and feudal and tribal politics on the other” (Ghai 1972:429). The regime of Uganda’s first Prime Minister, Apollo Milton Obote, was one of disorder and great mistrust. The transition to independence was a rapid one for Uganda, and did not successfully generate a strong nationalist movement or party. Although the opposition Democratic Party was a national party, it was perceived as a vehicle for Catholic interests (Ibingira 1990). Furthermore, ethnic groups were suspicious of one another, and in the case of the Buganda and Bunyoro, this conflict escalated as the two groups fought over lost land (Oloka-Onyango 1996:142).

Obote’s political goals became the retention of power at all costs, including institutional legitimacy and individual human rights. In the early years, Obote worked within the constitutional order, taking advantage of opportunities to consolidate power where possible. However, when Obote chose to rewrite the independence constitutional order, the opposition were gradually eliminated. By the time of Amin’s coup in 1971 over 50 percent of the independence cabinet was in jail, having been detained under the emergency powers (Oloka-Onyango 1993:25).

It was the shaky foundations of independence constitution that almost guaranteed a conflict. The superior constitutional status of the Buganda within the strangely drafted semi-federal arrangement, combined with the Kabaka Mukesa as Head of State, and Obote as Head of government set the scene for deterioration of relations.
between the Obote government and the Buganda kingdom (Uganda Commission of Inquiry into the Violation of Human Rights 1994:40-41). The general crisis was precipitated in 1966 when the Buganda Lukiko (parliament) met and declared their independence. The military, led by General Idi Amin, ordered an invasion of the Kingdom forcing the Kabaka into exile. In 1967 Uganda was declared a Republic, and the Kingdoms were abolished.

During this time, perhaps the greatest challenge to Obote’s power came from the military. As Obote lost the loyalty of the army, so Amin gained it. On January 25th, 1971 Amin staged a coup and ousted Obote. The militarization of the Ugandan state distinguishes it from Malawi and Tanzania. In the early years of Obote’s regime the military were co-opted. As each successive regime came in, they scrapped the military and created a new one. The military always posed a threat, and as such, was to be feared. One way of controlling the threat was to continue to recruit on the basis of physical attributes, rather than intellectual attributes.74

Obote consolidated and legitimized his rule through both the 1966 interim (“pigeon hole”) constitution and the 1967 republican constitution. Executive power was moved beyond the remit of the court. The Attorney General was appointed to cabinet rank by the President and directly oversaw the Director of Public Prosecution. This politicized what was supposed to be an independent position. 1967 marked the beginning of the court’s demise in power. As Oloka-Onyango (1993:30) contends, the country,

---

74 In 1963 there were simultaneous army mutinies in Uganda, Tanzania and Kenya. A Ugandan political scientist described this as a watershed moment in Ugandan history that explains the continued dominance/significance of the military in Ugandan political life today. “The approach to the mutinies in the various countries was different. That affected how the military were absorbed. In Kenya after the mutiny the army was disbanded. They remain very independent from politics. In Tanzania they disbanded the army and created a party army, the CCM party. It is like that today. In Tanzania they can even get a General from the Army and make him a District Commissioner, or state attorney, or foreign minister. . . The still serving officer can give any other assignment. In Uganda we stayed with the same army and promoted it. That is why many people said we made a mistake staying with the army that mutinied. That’s why we allowed Amin to develop.” (Interview with author, January 2007).
including the courts, had come full circle, reverting back to the early phases of colonialism; a time when the courts were weakly enforcing a narrow sphere of rights, namely property rights.

The now infamous detention case, *Uganda v. Commissioner of Prisons, ex parte Matovu* (1966), has been widely discussed and reported in East Africa law reviews. To set the scene, I will first turn to the words of noted Ugandan legal scholar Joe Oloka-Onyango (1996:141) who claims that the *Matovu* case is:

> [t]he single most debilitating decision passed by the Uganda Judiciary. Like a ghost, *Ex Parte Matovu* continues to haunt the effective operation of the judicial arm of government. This is because the underlying premise of that decision continues to find both direct and indirect manifestation in judgments passed by our courts. . . it gives pride of place to the maxim: *inter armes leges silent* (in the midst of arms the law is silent) -- a maxim that promotes rather than curtails the extra-constitutional usurpation and abuse of governmental power.

In the *Matovu* case the court was asked to address, amongst several issues, whether they had the power to address the validity of the 1966 Constitution (the ‘pigeon-hole constitution’), and whether the Emergency Powers Regulations conferred broad discretionary powers on the President and his ministers. In short, the question was: Did the High Court have the jurisdiction to rule on the exercise of power by a minister?

Although the court decided it did have jurisdiction to hear the case, it lacked authority to:

> [R]ule on the validity of the Constitution, basically because, ‘. . . .Courts, legislatures and the law derive their origins from the Constitution, and therefore the Constitution cannot derive its origin from them, because there can be no state without a Constitution.’ It is obvious that the reluctance of the Court to deal with the substance of the case was only in part related to the legal questions that were involved. They were furthermore responding to the objective reality of their existence within the particular political conditions prevailing at the time. To rule that the Constitution was invalid, would also have meant that the source of power

---

75 EA 514
and legitimacy upon which the Court itself was constituted, was indelibly tainted (Oloka-Onyango 1993).

Oloka-Onyango (1993:25) claims that through the decisions, the Udoma Court abdicated its responsibility to protect fundamental rights and freedoms. It made the illegal acts of an illegal government legal. *Matovu* is a reflection of weak judicial power during the 1960s and 1970s. There is one important exception to this rule, however, and that was the saga of Mr. Shah, who attempted to recover money owed to him by the government (*Shah v. Attorney General* (1969)). Shah claimed that the central government was liable for the unfulfilled contract he had with the Buganda government. The High Court agreed and the plaintiff obtained a court order for payment, but the Attorney General refused to pay. Meanwhile the government enacted a new bill that purported to render the judgment void. Shah went back to the court, and the case now addressed the fundamental rights issues related to protection of individual property, and individual protection, before the law. The High Court ruled that the amendment was unconstitutional and were critical of the government’s actions (*Shah v. Attorney General* (No 2) [1970]) (Ghai 1972:431).

On January 25th, 1971 Amin came to power through a military coup. This didn’t necessarily mark a watershed moment for the courts, but more of a continued decline towards total marginalization. In his diary entry for Tuesday 26th January, Justice Allen remarks:

> At the court today we all carried on with our normal duties just as if nothing special had happened yesterday. Court staff, advocates, the parties in cases and witnesses turned up as usual and work went on. Presidents fall and rise, governments change, but here in the Mbarara court two old men, Butirima and Kataraiha, are before me concerned only

---

76 E.A. 261 [1969]

77 E.A. 523
with continuing their many years of litigation and disputing over the boundary between their *bibanja* (cultivated plots). (Allen 2000)

Amin quickly consolidated his power through a regime of terror, violence and the abrogation of the constitution. Legal Notice No.1 of 1971 suspended Articles 1, 3 and 63 of the 1967 Constitution. This gave Amin the power to overrule the constitution and rule through decree.

The hallmark of his brutal regime was the militarization of the Ugandan state which included the judiciary and the executive. The Army took over the work of courts. Where the courts still ran, they were subjected to the presence of the armed Public Safety Unit (PSU) or State Research Bureau (SRB). Judges became nervous, particularly in any cases concerning military personnel, and regularly went into hiding or fled the bench completely. After the “abduction and murder of the Chief Justice Benedicto Kiwanuka in 1972 and arrests of Magistrates by Army personnel, some magistrates . . . went into exile. Some magistrates and supporting staff in courts were also made to disappear. The power of the judiciary was broken” (Widner 2001:116).

After Kiwanuka’s death, Amin proceeded to attempt to fill the Ugandan judiciary with personnel from Pakistan. By the time of the coup in 1971 the courts had not moved far from the colonial framework they had inherited. As far as rights are concerned, the courts were interpreting a very narrow set of rights concerned mostly with property (Oloka-Onyango 1993:29). The government was seen to be above the law, as was the military. The following widely cited comment from Justice Russell (*Efalaimu Bunkenya v. The Attorney General* (1972))78, sums up the climate judges were working in when Amin came to power in 1971:

> There appears to be a widespread but mistaken belief not only among the general public and apparently even in legal circles that the police, soldiers

78 EAL 329
and private persons lawful entitled to arrest without warrant, persons whom they reasonably suspect of having committed or about to commit designated offences, may shoot them in cold blood, should they fail to acquiesce in their arrest.

Appointments to the judiciary were highly politicized. Different heads of state removed subsequent Chief Justices – Udoma, Sheridan, Wambuzi and Masika. Shortly after taking power, Amin removed Dermot Sheridan as Chief Justice and replaced him with former Prime Minister Kiwanuka. Peter Allen (2000) reflects on this,

Amin, in his dictatorial way, has recently issued a Decree appointing Kiwanuka as acting Chief Justice. The Decree does not reveal what is supposed to happen to Dermot Sheridan, the actual Chief Justice. I gather he has no choice but to accept this and leave Uganda on ‘retirement’. I suppose Amin was persuaded that a former VIP like Kiwanuka ought to be given a high post now that he is free of Obote’s efforts against him; but he has never held any judicial position before.

Later Amin made a failed attempt to pack the court, which had not completely succumbed to his pressure, with appointees from the air force and military (Allen 2000:383-384). In 1981 the man who would later go on to be the Principal Judge in the 1990s, Jeremiah Herbert Ntagoba went into exile. After deciding a defamation case against the Vice-President, soldiers were sent to the judge’s house and Judge Ntagoba fled to Kenya (Oloka-Onyango 1993:35). Pressure was placed on any judge who was perceived to be sympathetic to whomever was in opposition at the time. Sometimes this pressure was actually violent, and sometimes it threatened violence.

As with the 1966 law in Tanzania that stopped individuals from suing the government, in Uganda the *Proceedings Against the Government (Protection) Decree* No. 8 of 1972 banned action against the government for measures taken to maintain ‘public order.’ As Hatchard, et al. (1993:5) note, “the terminology used was so broad. . .[that] it virtually sealed the Executive from any form of external scrutiny or sanction.” In November 1974 the *Voice of Uganda* reported that Amin had been receiving complaints
from soldiers and the public that judges and magistrates were receiving bribes to release criminals. Amin warned that “no judge magistrate should behave as a God and think he is indispensable because the military Government could not kneel down before anyone and would dismiss anyone who was corrupt and against Government policy. . . the Government has a big file on judges and magistrates who have imposed improper fines or sentences on offenders.” After Amin’s speech the Minister of Justice spoke and said the Judiciary wanted more help from members of the security forces to track down judges and magistrates who were corrupt. Next, the Chief Justice spoke, saying that if judges were corrupt they couldn’t command respect (Widner 2001:118). The judges could not expect any kind of support from anyone in the Ministry of Justice, including the Minister and Chief Justice himself.

That the judiciary was rendered impotent is demonstrated by the fact that a constitutional case was not even reported from 1972 onwards, as Oloka-Onyango notes (1993:32):

The Amin regime attained the high-point of its fascist ideology and thereby secured the almost complete emasculation of judicial power and any remaining notions of constitutionalism. Unsurprisingly, the case reports contain no cases on Constitutional law after 1972, not only on account of the Executive response to judicial challenges, but also because the public had been sufficiently traumatized as to seek recourse from the courts for anything other than the enforcement of their fundamental rights.

The case of Kayira and Semwogerere v. Rugomayo Omwony Ojok, Ssempebwa & Eight Others (1979) tested the constitutionality of President Lule’s removal from power, and sought to declare that the National Consultative Council had acted unconstitutionally in passing a ‘vote of no confidence’ in the President. Although it was “illegal,” the court failed to declare this. In way it was a mute point, as events had continued to unfold and

---

a new regime was already installed by this point. The court demonstrated a high level of discomfort with this case. They came up with a weak decision in which the NCC could not remove the President but could remove the Chairman of the National Executive Committee of the UNLF – thus the Presidency was declared vacant. The courts discomfort with openly declaring the removal of the President unconstitutional can be seen in the following:

In deciding whether or not the National Consultative Council acted legally in removing the President of the Republic it must be noted that the issue calls into question the legitimacy or otherwise of the incumbent government. The consequences of issuing such a declaration are very serious. Court should be reluctant to inquire into questions of a Political nature bearing in mind the gravity of the consequences that could result from such a declaration.

Oloka-Onyango (1993) uses this case as evidence of the court’s weakness at this time, further believing that the court missed an opportunity to undo the damage of Matovu and declare the extra constitutional assumption of power as being illegal. To make things even worse, “the court compounded the injury by replying Matovu's case as authority for its proposition and thereby compounded the ills that Matovu had bequeathed to the people of Uganda” (Oloka-Onyango 1993:33-34). Ironically, the Pakistani case, upon which Matovu was based, had been overturned by this time.

Chief Justice Wambuzi returned to Uganda after Amin’s defeat and was installed as Chief Justice for a second time (just in time to preside over President Lule’s case). Wambuzi was then replaced with another new Chief Justice in the Obote II regime. The position of the Chief Justice will always be political. As a spokesperson, the Chief Justice is responsible for representing and furthering the interests of the judiciary. Perhaps out of fear, fear that ambivalence or neutrality towards the current regime will be interpreted as support for the opposition, the Chief Justice chose not to assume a neutral position. Similar to the actions of Chief Justice Saidi in Tanzania, Chief Justice
Wambuzi supported the ruling regime under his tenure. Allen (2000:553) records the following:

April 16th, 1981

This afternoon I attended the graduation ceremony for the latest magistrate’s course at the Law Development Centre. The Chief Justice was there and in his speech advised that magistrates must not be involved in politics at all nor make public political statements. This is from a judge who does both of those things openly and blatantly. Realising this, he then added that, of course, it is different for him as Chief Justice. He didn’t explain how or why it is different, but it is no secret that he’s an ardent UPC supporter. He attends their rallies and makes speeches at them. He can’t seem to realize that he’s supposed to be, and appear to be, impartial and apolitical.

Under the Obote II regime Oloka-Onyango (1993:35) claims that the judiciary was somewhat resuscitated relative to the completely impotent period prior. In addition to Re: Sevumbi (1980)80, in which the court stated that Matovu’s case was distinguishable and could not necessarily be relied upon, “[s]everal other cases decided under the Obote II regime reflected a Judiciary that was struggling with laws that were patently outrageous, but was too constrained by the force of history and their own positivist leanings to come completely out of the cocoon.” In the case of John F. Kityo v. Attorney General (1983)81, Justice Allen pronounced the Legal Notice No. 1 of 1979 to be illegal, because the act had not been conducted in “good faith” and was not intended to be permanent.

These were small stands, taken against a government that had absolutely no regard for the rule of law and believed themselves to be accountable to no one. Oloka-Onyango (1993:37) again,

[T]he Judiciary never directly challenged the political basis of power at the time - a legacy that it inherited from its predecessors, and goes back, once again, to the continuing dominance of MATOVU’s ghost. . . In a

80 HCB 36
81 HCB 56
nutshell, by the time of the demise of the Obote II regime and the period of anarchy and interregnum which followed, (July 1985 to January 1986), the Executive operated as if it was the sole arm of the government.

Uganda in the early post-colonial period demonstrates that when there was a need for discipline, order, and an adherence to the rule of law – under the watchful eye of the courts – it was absent. The government was not able to adhere to the rule of law and the courts were unable and unwilling to do anything about it.

III - Preventive Detention and Emergency Powers

The citizens of Uganda, Tanzania and Malawi have the British to thank for some of the most draconian and harmful laws to be administered in the post-colonial state. Harding and Hatchard (1993) explain that, “the modern statutory version of preventive-detention law may be said to have its origin about 200 years ago in the attempts by British authorities to preserve order and restrict political subversion or criticism in England.” Preventive detention laws allowed governments to arrest individuals before they had actually done anything wrong. These particular laws across Malawi, Tanzania and Uganda were responsible for the derogation and irrelevance of individual human rights in the one-party authoritarian era. Governments that did not feel secure in their position and developed legal mechanisms through which to silence, and in some cases, eliminate potential opposition.

In addition to being used against political opposition, Preventive Detention laws were used as a supplement to criminal law (note case of Malawi). These laws were part
of the package of laws inherited from independence. As Widner (2001:118) notes, most African countries had some form of preventative detention already on their books:

Most countries in eastern and southern Africa had detention laws on the books. In Malawi, Zimbabwe, Uganda, and Kenya they were enshrined in the constitution, which spelled out in limited detail the ways in which detention could be employed. In South Africa, Zambia, Swaziland, and Tanzania the legislation had no specific constitutional authorization. Detention provisions often appeared under several different laws and under emergency powers acts.

The principle fact that the preventative detention laws were not subject to judicial review was also established under colonialism. In the Matter of Railal Bhikhabhai Patel and In the Matter of an Application for a Writ of Habeas Corpus ad Subjiciendum (1956) Justice Lowe held that the High Court had no power to vary or revoke a deportation order made by the governor (Uganda Commission of Inquiry into the Violation of Human Rights 1994:37). In short, executive will and power was beyond revoke in the courts. After independence, courts depended on English legal precedent which was used to support detention laws all across Commonwealth Africa.

The judicial response to preventive detention is determined first by the scope of the constitution and laws, then secondly, by the willingness of the judiciary to confront the executive. In all three cases here the judiciary shied away from confrontation with the government. A fear of disorder still permeated both the judiciary and society at this time. Indeed, this fear of returning to disorder is a theme prevalent in the present-day judiciaries of Tanzania, Malawi and especially Uganda. Perhaps, sometimes, individual rights have to be suppressed for the greater good of society as a whole.

---

82 Note, 1897 Native Court Regulation of the East Africa Protectorate, Sec. 77; Tanganyika Deportation Ordinance 1921; Tanganyika Expulsion of Undesirable Persons Ordinance, 1930; Townships (Removal of Undesirable Persons) Ordinance, 1944 and the Criminal Procedure Code, 1945 (cited in (Nabudere 2001))

83 High Court of Tanganyika at Dar es Salaam, (1956) 2 T.L.R. R 227.

84 Liversridge v. Anderson, 1942 A.C. 206, decided that as long as there was a valid detention order from the secretary of state that said there was reasonable grounds, the courts could not inquire further, cited in (Morris 1972), p.118.
Uganda

In Uganda both Obote and Amin used unlawful arrest and detention as a key part of their official security policy. “The Government relied on provisions in the Emergency Powers Act. 1963; Emergency Power (Detention) Regulations, 1966 and the Public Order and Security Act, 1967 to effect endless arrests which were fruitlessly challenged in the courts” (Uganda Commission of Inquiry into Violations of Human Rights 1995: 879-882). The 1964 Deportation Ordinance gave the Ugandan government carte blanche to arrest whomever they wanted. Their actions were not subject to review by the courts. Oloka-Onyango (1993:23) describes one attempt by the courts to challenge the Obote government in *Ibingira & Others v. Uganda* (1966)\textsuperscript{85}. After hearing of potential action against him by his cabinet, Obote arrested five ministers and detained them under the Deportation Ordinance. The Ministers challenged the validity of the ordinance in relation to the fundamental rights contained in the 1962 Constitution. Their case was first upheld in the High Court. However, on appeal Justice Spry of the Court of Appeal concluded that the Deportation Ordinance had been abrogated by the coming into force of the 1962 Constitution. The government responded by

\[\ldots\text{[s]erving them with detention orders under the Emergency Powers} \\
\text{(Detention) Regulations. These applied only in Buganda, where a state of} \\
\text{emergency had been declared, indemnifying the government against the} \\
\text{action it had taken against the detainees under the Deportation Ordnance.} \\
\text{On subsequent appeal to the Court of Appeal against the detention orders,} \\
\text{the Court refrained from ordering their release. It made no reference to the} \\
\text{Constitution; accepted the validity of the Emergency Power} \\
\text{Regulations and refused to accept the imputation of ill motive on the part} \\
\text{of the Minister who had ordered the subsequent detention. (Oloka-Onyango 1993:24).}\]

\textsuperscript{85} EA 306 and 445
This, according to Oloka-Onyango, was a high point for the Ugandan judiciary, especially with regards to human rights. As if possessing a premonition, Morris and Read (1966:330) conclude:

This endeavour to ‘Africanize’ criminal law and procedure, and the courts, in Uganda has no direct parallel in East Africa, yet there are signs there that the judicial ideal derived from the traditions of English law may not enjoy the final victory. Such signs may be detected in the refinement of powers of preventive detention without trial (established in the laws of each East African state), in the vogue for severe and even mandatory sentences involving corporal or capital punishment, and in startling new procedures in Karamoja.

Unlawful arrests were made and individuals detained without proper authority.

The ability of the courts to try those charged before them and to enforce their judgments was initially strong at independence, but weakened to the point that under Amin’s regime they virtually came to a standstill. The issue of Preventive Detention Act carried through from Obote I to Amin to Obote II. It is worth considering the testimony of a Chief Magistrate operating under Obote II. During the hearings of the Uganda Commission of Inquiry into Human Rights Violations, Blaze Babigumira (a Magistrate, who moved to Chief Magistrate and then High Court Registrar) gave testimony about interference in his job. The following testimony vividly illustrates the level of interference experienced by the judiciary under the Obote II regime. In the case of Haji Kateregga 86 the defendant was not granted bail (Uganda Commission of Inquiry into Violations of Human Rights 1995:886).

BABIGUMIRA: [O]n the 10th May, 1982, the police rushed in my chambers with the then Inspector General of Police, Mr. Okoth-Ogola that the Vice-President had directed the release of Haji Katerega. I told them that I could not do so and I advised them to contact the DPP who would either withdraw charges or otherwise order the withdrawal of the bail. I

86 Criminal Case No.MMA206
immediately wrote to the Hon. the Chief Justice submitting the file to him.

MR. NAGENDA: What was the name of the Chief Justice, please?

BABIGUMIRA: George Masika. The then Chief Justice wrote back as follows: “I acknowledge the receipt of your letter reference MSK/5 of 12th May, 1982, regarding the above matter. That was the release of Kateregga. I agree with your decisions and the advice you gave to officers who visited your Chambers in connection with this case. I have already communicated the matter to higher authorities and accordingly the case file is returned herewith.”

BABIGUMIRA: He did write to His Excellency the President at that time. I have it here also I have a photocopy.

COUNSEL: Would you like to read it please?

BABIGUMIRA: “His Excellency the President, Hon. Dr. Milton Obote, MP, P.P. Box 7168, Kampala. Your Excellency, Re: MASAK CRIMINAL CASE NO. MMA 206 of 1982. Uganda Versus Haji Sulaiti Kateregga. I have received a report from the Chief Magistrate Masaka regarding the above case whose copy I attach herewith. It is embarrassing enough to have a serious conflict emanating from your Excellency’s office and that of His Excellency the Vice-President, but it is more for the Court of law to be directed by anyone other that the Director of Public Prosecutions to release a person charged with a criminal offence. I am aware of many complaints which have been levied against the court for having released persons charged with the possession of firearms having regard to the prevailing circumstances in Uganda. This point was fully stated and the meeting held in my Chambers late last year attended by the Attorney General, The Minister of Internal Affairs and the Minister of State for Defence among others. As a result of their views expressed at the meeting all Magistrates were cautioned and advised not to release persons charged with possession of firearms although the offence is bailable. As the Chief Magistrate correctly puts it, the conflict would not arise if the Director of Public Prosecutions is fully apprised of the rare difficult cases instead of issuing directives to the police or anyone else. Once again the need for centralizing intelligence cannot be over emphasized. As the case stands, the Chief Magistrate had acted correctly and it is up to the Director of Public Prosecutions to be satisfied otherwise and thereafter take whatever action he deems necessary.” He was referring to my report to him which I did not read because you have the copy.

BABIGUMIRA: About two days later, the D.P.C., Masaka rang me to say that Haji Kateregga had been arrested, molested and taken away under terrible circumstances . . .
BABIGUMIRA: A few days later, Kateregga came to arrest me as well at the court premises; but he found me in court. He stood in the middle of the court for about half an hour and left shaking his head. As he got out, he was heard saying that he wanted me to say anything so that he shoots me in court. But, as he stood there, I continued doing my business as if I did not see him.

COUNSEL: You are saying you were going on with our court proceedings, and then he just stood in court!

BABIGUMIRA: He came in heavily armed and he stood in the middle of the court; so I ignored him. He stood there, I ignored him almost for half an hour; and then he had to go.

COUNSEL: Did you not have some powers to deal with him?

BABIGUMIRA: Not the Kateregga I knew at that time! The powers I had but I was cautious about using them: The man who was armed and if I had made a mistake and said anything he would have shot.

COUNSEL: Did it not interrupt your proceedings? Were you able to do your work properly as you would have done, when he was standing there armed?

BABIGUMIRA: It was better to keep in court other than going to chambers where maybe he would follow me. I was not interrupted. I just continued and ignored him as if I had not seen him.

Babigumira goes on to describe a second incident in which the Vice-President, Paul Muwanga, again ordered the release of a defendant. Babigumira states that upon seeking advice from the Chief Justice and Chief Registrar, he was advised to allow the District Commissioner (DC) to give the Release Order. Their reasoning for this was that the Chief Justice could then contact the President with the evidence that the Magistrate was being interfered with. The DC was nervous about writing the release order. He went to see the Vice-President who got very angry and demanded to see Magistrate Babigumira. The DC, Isaac Muwanga, thereafter advised Babigumira to either release the prisoner or run away! This is Babigumira’s response (Uganda Commission of Inquiry into Violations of Human Rights 1995:888):
BABIGUMIRA: I told Isaac Muwanga that I was neither going to release Musoolooza nor run away. He closed his eyes for quite a time, wondering what to tell me next. And he said, “Are you prepared to die?” I told him that I would not be the first one; Kiwanuka had died for justice, then I would be the second one; and I told him to take me to Nile Mansion; but he refused because he knew what was going to happen!

Tanzania

As in many African countries, collective rights (grounded in notions of African traditionalism) superseded individual rights; therefore, if collective rights were threatened it was perfectly legitimate to abrogate individual rights. Nowhere does this maxim hold truer than in the application of Preventative Detention laws in Tanzania. Despite the introduction of a Bill of Rights in 1984, today, in 2008 Tanzania still holds Preventive Detention laws on its books. By the late 1970s CCM reached the pinnacle of their power, and the resort to Preventive Detention measures was frequent. In addition, the Preventive Detention Act of 1962 and the Regional Commissioners Act of 1962 allowed a regional commissioner to detain people, provided he brought the person before a magistrate within forty eight hours (Widner 2001). Even as late as the early 1980s, the Human Resources Deployment Act permitted the arrest and detention of unemployed people before repatriation to the rural areas. By the early 1980s there were some calls for change, including from the legal community, because these laws were not subject to review in the courts.

Nyerere supported the policy, stating “[T]he Government was prepared to take the risk of locking up innocent people in order to prevent harm to the state.” In regards to the preventive detention act it has been asserted by several scholars that the court had several missed opportunities to assert itself. Like many other Preventive detention cases

87 Cited in (Ng’ong’ola 1996)
in Tanzania, *Attorney-General v. Lesinoi Ndeanai & Others* (1980)\(^8^8\), dealt with technicalities around the execution of the detention rather than the decision to detain itself (*Wanda* 1993:125).\(^8^9\) In *Lesinoi* Justice Kisanga noted:

> [t]here is no doubt that the Preventive Detention Act confers vast powers of curtailing the liberty of an individual. It empowers the President to detain a person if he is satisfied that certain circumstances specified under it do exist. The issue as to whether those circumstances do exist is entirely subjective ... and his decision to detain a person in pursuance thereof cannot be tested or questioned in any court

Adhering to these technicalities was a mechanism through which the court could, in part, protect individuals from wanton behavior on behalf of the state. The courts could not legally challenge the mechanism of preventive detention until after 1985. However, there were times when some of the bolder judges attempted to release individuals only to have them immediately rearrested outside the court. *Peter* (1997:125) cites the classic case of *Happy George Washington Maeda v. Regional Prisons Officer* (1979).\(^9^0\)

In *Ally Lalakwa v. Regional Prisons Officer* (1979)\(^9^1\) the applicant was arrested and detained by the police. While Lalakwa’s application for habeas corpus was still pending in court in Arusha, the police decided to transfer the applicant to Dodoma allegedly on instructions from the police and Prison’s Headquarters in Dar es Salaam

---

\(^8^8\) 1980 T.L.R. 214

\(^8^9\) In the case of *Lesinoi* the Vice President had ordered the detention of the applicants under section 2 of the Preventive detention Act, 1962. According to that section, a detention order has to be duly signed and sealed with the Public Seal in order to be effective. The President’s Order was however not sealed with the Public Seal. The issue before the High Court was whether the Vice-President had properly exercised presidential powers in issuing the detention order. It was held that since there was no proof that the President had delegated such powers to the Vice-President, the order was invalidly made. However, on appeal to the Court of Appeal, two more issues arose, namely a) whether the absence of the public seal invalidated the order, and b) whether the court had jurisdiction to question a detention order when such jurisdiction was ousted under section 2 of the said Act. As *Peter* (1997:123) notes, the courts took the issue of public seals very seriously. It was a question of substance as well as form.

\(^9^0\) High Court of Tanzania at Arusha, Miscellaneous Criminal Cause No. 36 of 1979 (unreported).

\(^9^1\) High Court of Tanzania at Arusha, (Unreported).
under a new order of deportation. This technically defeated the application which was pending in court.\textsuperscript{92} In case of Edward Mlaki & Another v. Regional Police Commander Kilimanjaro & Another (1979)\textsuperscript{93} the presiding Judge quoted the following:

This defiance to the court process by two highly placed government officials though prima facie directed at this court is in fact directed at the laws of this land. It will be definitely cheating oneself that by doing it is the Court which is being flouted but in reality it is tantamount to watering down the whole legal system of the country. (Mbunda 1999:73)

Tanzania is still struggling to eliminate all of these draconian laws from her statute books. For example, although the 1962 Preventive Detention Act was amended in 1985, it still has still not been repealed (Peter 1997b:134).

Chumcha s/o Marwa v. Officer in charge of Musoma Prision and the Attorney General was a case in the High Court in Mwanza just a year after the Preventative Detention Act had become justiciable. Mwalusanya declared the deportation ordinance of 1921 void under the new bill of rights. The government appealed, but withdrew while the case was still pending. Next, the government prepared a bill to amend the Deportation Ordinance. One critic asked: What was the motive behind the amendment of the law already declared null and void? Why such impatience now that the Court of Appeal was yet to give its position and judicial processes were still underway? Was it an act of faith on the judiciary? Did it help in creating stability in law? Was it a way of avoiding conflict among state organs or of enhancing it? (Yongolo 2000:170). The post-1985 treatment of Tanzanian detention laws will be dealt with in-depth in Chapter 7.

\textsuperscript{92} The problem of non-enforcement by the police authorities is echoed in this statement from the Joint Delegation of Scottish Advocates, et al (1992:54), “A number of Judges and lawyers we met seemed determined to uphold and enforce the rule of law. Judges have been making orders that persons be released from detention, and seen those orders flouted by the Malawian security services. The Chief justice, Mr. Richard Banda, frankly accepted that he had on occasion found it practically impossible to ensure that his own orders were enforced. His expressed concern was that if he proceeded to attempt to commit a police or security services officer or authority for contempt of court that would bring the Court as well as the judge in for ridicule.”

\textsuperscript{93} Miscellaneous Civil Application No.38 of 1979 (HC) Arusha (unreported)
Public detentions in Malawi were widespread with estimates going into the hundreds of thousands. Government officers made a practice of detaining people so they could conduct criminal investigations (Ng’ong’ola 1996). Banda used the Preservation of Public Security Regulations (1965) as a way to control potential opposition forces and muzzle the judiciary. The Act originated under British Colonial rule in 1960, but was revamped in 1965. The Preservation of Public Security Regulations is an important piece of legislation because it essentially nullified the bill of rights. It provided exceptions to the rule. The concept of Preventive Detention as providing the exception to the rule is echoed in this statement from the Minister of Justice in 199294 “that the Universal Declaration of Human Rights (UDHR) enshrined in Article 2 of the Malawi Constitution was binding, but subject to the broad exception that laws could be made to protect public security; for example the Preservation of Public Security Act, and the offence of sedition.”

On a few occasions the court stepped in to ensure the correct application of the Public Security Regulations, but they have never substantively stepped in on a case. In the cases of In re Pindeni95 and Nyirenda v.Republic (1977)96 the High Court held that the period of detention prescribed by Public Security Regulations 1965, res. 3(7) and 4(8) could not be extended. In Nyirenda the courts did not define the term ‘preventative detention’, but Justice Chatsika stated:

Although the powers under this section are wide, it is the view of the court that they can only be exercised in accordance with the accepted form of what is usually considered to be activities subversive to the public security

94 Cited in,
95 5 M.L.R. 207, 211
96 8 M.L.R. 273
of the country. The appellant at the time had been charged with serious
criminal offences. He was in custody and bail had been objected to by the
prosecution. There was no change of the accused doing anything
subversive while he was in custody awaiting trial. In these circumstances
I fail to see the justification for issuing a detention order when the
appellant was – using the word loosely – in detention.

Furthermore, in Sole v. Republic (1982)97 the court stated that detention under
Preservation of Public Security Regulations is to be no longer than reasonably necessary
to obtain a decision as to whether to make a detention order. Soloman Soles v. The
Republic (1981) is the paramount Preventive Detention Case in Malawi. As a result of
this case, new legal provisions were enacted to establish a detention review board, and
the chairman of this board was a High Court Judge. The board was advisory only, but the
Minister was required to take its’ recommendations into account. There had been no
applications for judicial review of permanent detention orders. Additionally, there was
no case in which the High Court ordered the release of a detainee on the grounds that the
minister acted ultra vires, or on the grounds that he acted on facts which did not
constitute a threat to order. In fact, during this era a ministerial order was never
challenged in the court on either procedural or substantive grounds.

The courts implicitly assumed that their jurisdiction was circumvented on the
issue of Preventative Detention. As Wanda (1988:168) summarizes:

The courts have accepted the legality of the action without ever inquiring
into whether the decision to detain was based on facts which showed the
detainee posed a threat to public security or order. This has occurred
because of an implicit assumption that the Act and regulations ousts the
jurisdiction of the courts. Thus the courts have avoided a direct
confrontation with the executive and have, instead, preferred to take the
easy option of accepting the legality of the detention order or control
order on its face value.

97 10 M.L.R.
Towards the end of the Banda era, the courts did become a little bolder in striking down preventive detention cases. As the Delegation of Scottish Faculty of Advocates, et al. reported (1992:48), recently increasing numbers of detainees have been applying for habeas corpus. 85% of applications in 1980’s and 95% in 1991 resulted in unconditional release orders. Unfortunately, despite the success of the courts the release orders were largely ignored. Mr Mhango concluded that "their orders have usually either been ignored or disobeyed by the police."

We cannot end a discussion of Malawi’s Preventive Detention Laws without mentioning the case of Chakufwa Tom Chihana. This case was of huge symbolic and political importance to Malawi. Chihana was a prominent Malawian trade unionist living in exile in Zambia. Upon hearing of the popular reception of the Catholic Bishops March 8th, 1992 letter calling for the abandonment of the culture of fear and political intolerance, Chihana decided to return to Malawi to call for a referendum on the issue of multipartyism. Upon arrival at the airport, with documents containing pro-democracy speeches in his hands, Chihana was arrested. Ng’ong’ola (Lukoyogo 1988:169) suggests that he was lucky that the eyes of the international donor world were on Malawi at this time, for it allowed him to be tried in the conventional courts rather than the traditional courts. The case of *The Republic v. Chakufwa* (1992), the subsequent appeal in *Chakufwa Chihana v. Republic* (1992), and their broader implications will be discussed in Chapter 5.

---

98 High Court, Criminal Case No. 1 of 1992

IV - Judiciary and the Ideological Framework

“As citizens and TANU members, the courts are bound to further ujamaa”

- Chief Justice Saidi, Tanzania 1972

The ideological and intellectual climate can have a significant effect on the courts. In Tanzania (less so in Malawi and Uganda) the courts’ performance was evaluated in academic and journalistic spheres at the time. The climate in Tanzania, and Uganda to a lesser extent, was one of Marxist-Socialism. The “socialist legality” movement intellectually shaped attitudes towards the judiciary in Eastern Africa. The countries where Western legal assistance was greatest, was where these ideological currents were strongest (Widner 2001).

At the law faculty in the University of Dar es Salaam, an academic planning committee instructed the lawyers that “[l]aw should be taught in accordance with our socialist policies.” This meant teaching law in context, but it also meant occasionally ignoring the rule of law. As Widner (2001:128) notes, “the particular brand of radicalism that swept Africa devalued the rule of law and crippled the fledgling governments in their dealing with outsiders.” The Dar es Salaam law faculty, under the guidance of Professor Nabudere, developed a curriculum that was grounded in radical Marxist theory. Lukoyogo and Tenga (1988) note that the Marxist critique gained a hegemonic position in the faculty’s curriculum. This would, at times be restrictive, for “students cannot comprehend the necessity of understanding law as it is if its understanding the hegemonic function of the law to see it at the level of legal ideology as an arena of the class struggle” (Ali 1968:47).


101 Mahalu 1986, cited in
These developments were preceded by hot debate. The most famous of these debates occurred in the Makerere University magazine *Transition*. This debate is significant enough to be considered in-depth; therefore I replicate large portions of the debate below.

In the aftermath of Obote sending the Kabaka into exile and the promulgation of the 1967 Republican constitution Obote embarked on his “movement to the left” strategy. This occurred simultaneously with the move to a single-power authoritarian state. As Nabudere (2001:53) notes, the judiciary was a vital part of pushing this “new order” forward. Indeed they had successfully done that through ruling against *Matovu* in 1969. Picho Ali was a Soviet trained lawyer and a man on the staff of President Obote’s office. In his article, "Ideological Commitment and the Judiciary", Ali advocated that the normative school of jurisprudence was wrong in insisting on the application of legal norms in isolation of the apolitical rims. This was wrong because as we have seen, the judges in the *Matovu* case, using the normative theory of *Grundnorm*, had ruled in favor of the changes that occurred and which had ushered in the new order (2001:57). As Picho (2001:60) wrote:

> The principle of ideological parity is an attempt, with specific reference to Uganda, to show the need to maintain and develop the harmonious inter-relations between law and political order after the achievement of independence. Uganda has embarked upon the problem of re-examination of all the institutions inherited from the colonial regime. Law is one such important element of our society, which requires exhaustive re-examination.

Ali later went on to reflect on two other important cases from this time. The first was the trial of two mercenaries from Congo (in which an ex-pat Judge overturned the original conviction and sent him back to his country of origin), and the second was the trial of twenty Ugandans under treason charges following the 1966 revolution (Judge advised that separate charges be brought against the individuals and the state withdrew its case).
"Picho Ali in both of these cases argued that the expatriate judges had been influenced by the normative judicial doctrine according to which the law should be interpreted exactly the way it is written without being guided by the aims and objective for which such a law is supposed to serve" (Nabudere 2001:60).

In response to Ali's article, Nabudere argued that Ali had not correctly appraised the judiciary. Further,

I challenged his understanding of Kelsen's "Pure Theory of Law" and the interest it served as "a science of law." He could therefore not have shown how his theory of ideological parity would have injected a new and positive content to the doctrine of independence of the judiciary. My contribution challenged the whole notion that a judiciary could be independent of the ideology that constituted the state and the interests behind the state. I also argued that his contribution had in fact raised more questions that it had sought to answer. Although I agreed with the main thrust that law must reflect the ideology of a given society, my main interest was to define what kind of society existed in independent Uganda. After everything is said, I think we ought to agree-and I here agree with Picho-that there is no such things as the independence of the judiciary anywhere. The judiciary has always been created by the politics of the economic based and not vice-versa. So it is always pointless to talk about the judiciary sitting in judgment of the economic base and its politics and hence its ideology. To say the judiciary (should) be at par with the ideology of an independent Uganda is therefore to beg these questions: What is the ideology of an independent Uganda? Who has state and propounded it? What is its economic base? Why is the judiciary still colonial-oriented in spite of such ideology (if any)?"(55)

Here Nabudere (2001:57) spells out the difference between their positions:

To me the ideological commitment I was expounding here was of a different kind. It was a social and political commitment to the struggles of the peasantry and the working class in Uganda. Picho Ali was calling for an ideological commitment of the judiciary to a "political order" which was obscure, but which was in reality the political order of the property-owning classes on a world class, which included the Ugandan property-owning petty bourgeoisie. In his analysis, he had confused the interests of these two blocks of classes under the general idea of the "Ugandan people". For this reasons, I was challenging the "revolution" which in my view perpetuated the myth of an independent judiciary except that it demanded that the judges be committed to the "Revolution" and the "Political Order" which was nonetheless, the political order of the bourgeoisie in Uganda.
Later the debate was joined by two mainstream lawyers who argued the case for an independent judiciary (again citing Kelsenian theory) against the ideological view of Picho Ali. The first extract is from Kazzora 1968:102

> While a good case could be made that a modest attempt should be made to Ugandanise the High Court Bench, I reject Mr. Picho Ali’s contention that the judiciary should be a ‘revolutionary institution and not a body interpreting laws in the exact manner as of the colonial regime is. . . in full power in Uganda’. The Courts are in duty bound to interpret the law of the land without fear or favour: in so doing they are guided and are bound by rules of the constitution which I hope Mr. Picho Ali knows something about. . . The principle of ideological parity may be valid in the context of Soviet jurisprudence but it would be undesirable to introduce it in Uganda where English common law still reigns.

Abu Manyanja joined in the portion of the debate concerning Africanization of the judiciary and further, questioning the commitment of the government to any real ideological agenda. Manyanja pointed to rumors that the appointment of Ugandan Africans to the High Court had been delayed mostly because of tribal considerations. As Nabudere (Uganda Commission of Inquiry into the Violation of Human Rights 1994:42) writes, "These pointed remarks on the issue of tribal considerations influencing the retention of expatriate judges and attacks on lack of ideology of the ruling party and their retention of colonial laws landed Abu Mayanja in trouble. The following year, he was arrested under the State of Emergency and detained without trial under one of the colonial laws, which had been retained by independent Uganda." The Editor of the magazine was also arrested under sedition charges.

Nabudere surmises that it was beneficial for the judiciary to remain independent because they retained the colonial laws and these laws protected the interests of the property owning classes. To defend the oppressed classes would entail “a confrontation with the law because of the fact that the laws of independent Uganda were neo-colonial

---

102 Cited in
and not tailored to defend the interests of the people of Uganda” (2000:392). Unlike Uganda and Tanzania, there was no socialist ideological debate taking place in Malawi. In the case of Malawi, ideology was concentrated in the personality cult of one man: Dr. Kamuzu Banda. In contrast to her neighbors, Malawi was aligned with the white minority South African regime and pursued an unashamedly capitalist path of development. In comparison, Tanzania also had an important cult of personality around a single individual, Mwalimu Julius Nyerere. However, Nyerere had developed a distinctive and highly evolved national identity and ideology contained within the idea of *ujamaa*. Although the individual was at the centre of *ujamaa*, Nyerere managed to imbue the socialist cause with a certain moral weightiness, or legitimacy, to it.

The twin pillars of Nyerere’s ideology were developmentalism¹⁰³ and socialism. Nyerere had a vision of totally transforming the Tanzanian state and Tanzanian society. Even before the Arusha declaration in 1967, Nyerere articulated the important role judges would play in supporting this transition:

> All aspects of our national life are changing very rapidly, and it is important that all responsible servants of the people should be clear about their duties and opportunities for service in the developing situation. . . . It is impossible for the judiciary to continue to operate in the colonial tradition when everything else in the society is changing. What is necessary, instead, is for the basic purposes of our judicial system to be understood so that the implementation processes of those basic purposes can be adapted to the new society, and the fundamental principles thus preserved (Nyerere Speech to Judges and Magistrates in 1965 cited in (Bukurura 1995)).

In order to enact these policies the party had to be supreme, monolithic and efficient. Where the government is the political party and the party was the state, the courts were making decisions within a delimited ideological framework. In Justice Kawawa’s

---

¹⁰³ The ideology of developmentalism is defined by Shivji, I.G. in the following way:: “the central element in the dominant ideological formation in post independent Africa has been, what we call, the ideology of developmentalism: The argument of this ideology is very simple: ‘We are economically backward and we need to develop very fast. . . (Shivji, I.G, 1985:1).
opening address to a conference judges and magistrates in Dar es Salaam on November 27th, 1967, he said, “This country is fully committed to a policy of socialism and self reliance. Steps have been taken on various fronts towards the implementation of this policy. . . the judiciary is as much involved in these things as any organ of state. . .”

In his seminal text on *ujamaa* “Freedom and Socialism” (pp.110 and 112) Nyerere opines:

> . . . [W]e do in practice assist the judges by making them ‘independent’ of power politics. There is a separate hierarchy and system of command for the judiciary, and once a man is appointed it is extremely difficult to displace him. There things are intended to help secure impartiality . . . [judicial independence] . . . must not lead to the belief that a judge can be, or should be, ‘neutral’ on the basic issues of our society.

The role of the courts was to play “a more meaningful role in the country,” which was a role of supporting party policies. In short it was not only legitimate, but also pro-nationalist and pro-development, to support the party platform through pro-CCM rulings. As Yongolo (2000:41) writes,

> this fact was admitted by the then CJ of Tanzania in 1972 as he was discussing the problems of compensation for land taken from the people for the purpose of establishing *ujamaa* villages. He said in conclusion: “The judiciary could not be used as a tool to opposed *ujamaa*. As citizens and TANU members, the courts are duty-bound to further *ujamaa*.” Yet, by this time *ujamaa* policies had not yet been promulgated into law. So the judiciary was enjoined to enforce a political and illegal matter.

Widner (2001:115) reaffirms this point as she discusses the discord within the judiciary following the appointment of Chief Justice Saidi in 1972:

> Some of his colleagues thought he was ‘more of a politician than the politicians.’ He made no secret of his own policy preferences and remarked to the press that the interests of the greatest number should prevail. He announced that he would personally handle all cases involving *ujamaa* villages. At least one justice of appeal dissented from this edict and refused to comply. The vice president had to be called in to help mediate a solution
How to deal with the role of the judiciary in promoting *ujamaa* became a point of serious division within the Tanzania judiciary. During this time of intense political pressure, the judiciary was divided between those who wanted to play it safe and cooperate with the government, and those who wanted to maintain their autonomy. In response to a circular issued by the Chief Justice, the late Justice Biron asserted that, “the Chief Justice cannot issue circulars ordering members of the judiciary to abide by political or executive whims” (Kijo-Bisimba & Maina Peter 2006:11).

Socialist doctrine across the Soviet Union, China and Southeast Asia saw the courts as an obstacle to policy implementation. Thus they ignored the concept of separation of powers. This was not the case in Tanzania, but nevertheless the courts did not present much of an obstacle to the evolution of Nyerere’s socialist doctrine. Whether it was through the tacit acceptance of preventive detention, or by accepting that individuals would not be offered compensation for the land taken under the land redistribution program, the courts supported the *ujamaa* project. Bukurura (1995:11) posits that the debates within the judiciary over it’s own role in the construction of *ujamaa* were never resolved. The position of Chief Justice Georges and others, which was that the role of the judiciary was to not only identify with, but to actively support and uphold government policy, was not universally accepted within the ranks of the Tanzanian judiciary.

In the post-Arusha Declaration era there were large scale nationalizations, but party functionaries were also actively confiscating property. By example Peter (1997:253) cites *Patrick Maziku v. G.A. Sebabili and 8 Others*:

[A] Regional Commissioner ordered the takeover of flour milling machines belonging to the plaintiff and gave them to a village. The plaintiff knew that it would not be easy to sue the Regional Commissioner in his official capacity due to the requirement of Ministerial consent to sue the Government as required under the Government Proceedings Act No. 16 of 1967. He opted to pursue the
Regional Commissioner in his personal capacity. The Government applied to be joined in this suit and the moment that was allowed by the court – it insisted that consent should be obtained. Of course it knew that it was not going to issue any consent!

Sometimes the courts were not even allowed to handle land related cases without interference. Mbunda (1999:65) cites the case of Ally Juu va Watu v. Loserian Mollel & Another (1970) L.R.T. No.6 in which Senior Judicial officers were subject to interference. In a dispute over land, the plaintiff sought an order for eviction and damages. While the case was still pending the defendant brought the case to the attention of the Regional Commissioner who also doubled as the Regional Party Secretary. The Regional Party Secretary, with assistance from the State Attorney, sought to withdraw the case from the Court and take it to the Regional Security Committee which he was chairing.

In interviews with judges it appeared that most believed they were simply doing their jobs. One senior Tanzania Court of Appeal judge reminded me that in fact judges were simply applying the law, and that law supported the ideological movement of that time. The judge also claims that they were creative with the law when they were faced with difficulties – for example, not having a bill of rights:

Judges were not required to tow the line of ideology, only if that ideology was codified into law. We were applying the law. If that ideology had not found its way into law, then we were not dealing with it.

Soon after independence, we had the bill of rights, immediately after it was knocked out from our constitution. There was no bill of rights until 1984 that is when it was reinstated. From ‘62-’84, without the bill of rights the courts still enforced the bill of rights. We used the preamble of the constitution. Then even the constitution of the party at that time,

104 Author interview, Tanzania Supreme Court Judge, June 2007.
105 It should be noted that this was not always a successful strategy. Attorney General v. Lesinoi Ndeanai and Two Others (1980) T.L.R. counsel for the respondents invoked the Preamble of the Constitution to challenge the constitutionalist of the Preventive Detention Act (1962) under which the respondents were detained. Submitting that the Act contravenes the country’s Constitution. Court of Appeal Justice Kisanga held:

It is true that a number of rights have been enumerated in the Preamble to the Constitution. There include right of freedom of the individual but this amounts only to a declaration of belief in those rights. It is no more than just that. The rights themselves do not become enacted thereby such as
TANU then CCM. There was a time when it was a schedule to the national constitution. So courts used that schedule, even in the party constitution, they talked about human rights and all people being equal. Because of that we made a lot of decisions on land rights . . . it is not true that we were required to tow the line of the ideology. That part that became part of law, we enforced law. Even where it wasn’t part of law, we did enforce rights through the bill of rights.

The major point that needs to be considered in Tanzania is that ideology somehow justified any attempt to stifle or interfere with the judiciary. Ideology legitimated power and warped the rule of law and judicial independence. Yongolo (2000:106) states that in comparison to some of its neighbors, such as Zambia or Uganda, the Tanzanian judiciary was better off. However, this did not mean interference did not exist. Instead Yongolo characterizes interference in the Tanzanian judiciary as one that took the form of “ideological persuasion.” This was a kind of moral or emotional pressure, in which a ruling against the government was a betrayal of the nation. This is symptomatic of the merger of state and party, and apparently, nationhood.

In contemporary Tanzania this presents an important legacy. Undemocratic activities towards the judiciary, or in general for that matter, are often couched in a language of developmentalism and nationalism. Although the rhetoric has change in terms of substance -Tanzania has long ago left socialist economic principles behind and has fully embraced an open markets ideology – the style of the rhetoric still remains today. This includes the belief that to criticize the government is to be unpatriotic or disloyal.

---

they could be enforced under the Constitution. In other words one cannot bring a complaint under the Constitution in respect of violation of any of these rights as enumerated in the Preamble.

Furthermore, this strategy was cut-off to the judiciary in 1977 with the promulgation of the permanent constitution; the party constitution was not appended to the new permanent constitution.
Banda’s form of authoritarianism can be described as a form of “populist authoritarianism” or “democratic dictatorship” (Forster 2001). Banda emphasized the importance of moving away from an “alien culture” and moving towards placing, in the rhetorical sense, more power in the hands of the people. As Forster, (2001:278) writes,

The reiteration of the need for pragmatism implies that the aim is to do the best possible under the circumstances. The key priority was presented by Banda as one of fulfilling basic needs, and maintaining peace and calm: with ideal relating to civil liberties and human rights taking much lower priority. Banda’s policies with respect to the legal system were of a piece with his populism.

This involved the use of extensive propaganda. For example, in 1974 the government released a report entitled: “The Success of a One Party State in Malawi.” Similar to Nyerere in Tanzania, Banda built an ideology around a call to “tradition,” or to “Africa.” As I have already documented, Banda justified the establishment of the traditional courts through a call to a kind of “Chewa traditional ideology.” However, punishment under the laws of “tradition” relied upon a common understanding of what tradition meant. As Forster (2001) notes, tradition was whatever Banda wanted it to be.

V - Parallel Jurisdictions

Uganda

As the Ugandan state was militarized, public detentions were made easy. Judicial powers were transferred to non-judicial branches of government. Power to incarcerate, and even execute civilians, was given to the Military Tribunal the Economic Crimes Tribunal, the State Research Bureau, the military police, and the Armed Forces (Oloka-Onyango 1993:30). There was little the judiciary could do to reign in these excesses of power. As Oloka-Onyango (1993:30-31) writes:

[T]he function of the traditional judiciary became seriously marginalized. Even for the otherwise intimidated Ugandan judiciary, this was a little too excessive. The initial reaction was shock and sanctimony. Justice Russell, for example commenting on the effect of the Military Police (Powers of Arrest) Decree,
The Economic Crimes and Trials Decree was established in 1975. It was set up as a special tribunal to try certain crimes. As with the establishment of parallel tribunals elsewhere, the governments were dissatisfied with the work of the mainstream courts and sought an alternative. In the Economic Crimes Tribunal crimes related to the economy could be tried; for example, hoarding, over charging, smuggling, embezzlement, corruption, etc. Guilt was presumed and illegal sentences, not provided for under the Decree, were commonplace (Uganda Commission of Inquiry into the Violation of Human Rights 1994:42). This removal of jurisdiction from the conventional courts had a profound effect. As Justice Allen (2000:392) writes:

> All these have been removed from the jurisdiction of our courts, which now cannot even remand such accused person’s nor release them on bail. People are just slung into prison and left to await the arrival of a tribunal in that area. It could be quite a long wait as they don’t sit very often. . . There is a provision for a Military Appeals Tribunal for appeals against their arbitrary decisions, but it has not yet been set up. It’s just a paper court.

In 1973 Amin established military tribunals under the Trial by Military Tribunals Decree No. 12/1973. These tribunals were staffed by the military, and people were tried and arbitrarily sentenced to death by firing squad. Amin’s Military Tribunals were a complete violation of any sense of the rule of law or justice. As Amnesty International reported in 1978, the regular rules of the court were completely suspended. Normal rules of evidence did not apply and individuals rarely had access to a legal advisor.

---

106 Ironically there was no accountability in the army, despite the military tribunals no one was court martialed during the Amin era. (Rights 1994: 58)
Furthermore, cases were known of trials which had been conducted in secret or even without the defendant’s knowledge. There was no appeal from these tribunals to a non-military legal authority, only to the Defence Council, namely, President Amin. The following case was cited in the Human Rights Commission Report (Uganda Commission of Inquiry into Violations of Human Rights 1995):

In September 1977 sixteen male Ugandans were tried by a Military Tribunal chaired by Colonel Juma Ali. Twelve of the accused were sentenced to death, two were acquitted and two were imprisoned. . . The trial was a travesty of justice, a ‘show’, since the conventions and pleas of guilt were obtained by force from the accused. In the case of the 16, the Tribunal picked and chose whom to acquit or convict and whom to spare or sentence to death. The Military Tribunal which carried out the trial was deemed by the Human Rights Commission as illegal since it was not established in accordance with the 1967 Constitution and the Judicature Act. The military Tribunals Decree did not guarantee fair trials . . . The members of the Tribunals were military men who were apparently hand-picked to serve the purposes of the regime. They had no legal knowledge of or experience in handling cases similarly to those before them.

The legacy of the military believing and acting as though it is above the law continues today. Recent incidences range from military police storming the High Court to re-arrest suspects that had been granted bail to civilians being tried in military courts.

Malawi

It was in Malawi that the most radical changes to the legal system took place. Banda openly indicated his government’s dissatisfaction with the inherited colonial system early on in the independence era. In 1967 Banda established a Commission of Inquiry into the criminal justice system. The main thrust of the report was that convictions should be meted out without undue regard to technicality. As a result,

[A] number of significant changes made by the revised code of criminal procedure and evidence run counter to the principles of English law formerly applicable in Malawi. Further amendments of 1969 gave jurisdiction to the Traditional Courts (which stand in the direct line of succession from the native courts of the colonial period) to try capital cases and the appellate powers of the High Court may be excluded in such cases. In his arguments commending the changes of 1969 President
Banda presented some forceful comments upon the inappropriateness of certain English rules of criminal procedure in his country and the need to return to traditional principles of African legal procedure” (‘Morris & Read 1972:329).107

In 1969 the government passed a law upgrading certain traditional courts to allow them to try all types of criminal cases and to pass the death sentence. This further allowed Banda to direct that no appeal from these courts could go to the High Court. What he set up was a parallel system of Chewa Traditions Courts which functioned alongside the "Western" judiciary. Which system a defendant entered depended on the political nature of the case, or the politically desired outcome. Banda personally had a hand in deciding which cases went through which system. In an interview with the British Law Society delegation in September 1992, Chief Justice Richard Banda elucidated:

The High Court enjoys concurrent jurisdiction, but as a matter of government policy certain cases, in particular capital crimes are dealt with the traditional courts. This was seen as a matter of fairness to the community, the other courts being "too technical." Cases were transferred to the traditional courts at the election of the prosecution. All homicide cases were heard in the Traditional Court. The rules of evidence were not strictly enforced in the Traditional Courts. This did not mean that there were miscarriages of justice. . . As to the Status of the Universal Declaration of Human Rights, the Chief justice said that this was referred to in the constitution. But the judges did not often have to regard it; however, counsels were beginning to raise it in applications to the court.

The British Law society delegation’s conclusions about the Traditional courts system were as follows:

a. The (justice) Minister had unrestricted power to appoint members
b. The lack of legal representation contravenes Article 7 (1) (c) of the African Charter on human and Peoples rights
c. Capital cases went to the death penalty after such an absence of legal representation.

107 . . . We had in this country before the British came and set up an administration in 1891, a judicial system that was far superior [to the British system]. . . . Justice in this country must not only be done, but must be seen to be done . . . not only by 8,000 Europeans . . . but by the four million Africans. . . .” (Hansard, Malawi: Official verbatim Report of the Debates of . . . Parliament (Government Printer, Zomba), 21 Nov. 1969, 220-2) cited in
However, it is important to distinguish between the very small traditional courts that were very popular with the people, and the bigger regional traditional courts that became politicized. The following extracts are from an interview conducted with a current Malawian Supreme Court Justice.108 In this interview the judge further explicates this division between the ‘real’ traditional courts and Banda’s introduced traditional courts. I went on to ask him to reflect on his personal experiences during this time:

Would you agree that one of the effects of the parallel system of justice set up in Malawi was that the conventional (Western) court system was largely left untouched?

Yes, I would agree. Maybe what I could add… We had the real traditional courts. The small, small, what you would call the primary courts, they were in the villages, remote areas. Technically they had problems due to training and knowledge, but they were popular because of the easy access. The right of access to the courts it was there, and the people were very happy about them. They developed a system where obvious errors, miscarriages of justice could be corrected through the system… even by administrative structures. They had commissioners from the traditional courts who were not judicial officers but they had knowledge about basic law. So they would correct the obvious errors by those people. So those were popular. The people (actually I must confess now) they still want them. They feel frustrated that they got removed and replaced by our Magistrates Courts who are not performing the same function, who are not as open, as accessible, they are not everywhere.109 And even where they exist they still seem to be a bit aloof… It is when Dr. Banda created the bigger courts at the regional level and then national level to run parallel at the high level. That is where the problem was.

But those other ones that he created in 1970-71 I suppose those are the ones you are concerned with most. Because he started by giving them restricted jurisdiction, customary law. When he created them it was to deal with murder and manslaughter cases involving Malawians… but over the years he started abusing the other courts, taking jurisdiction

---

108 Author interview with Malawi Supreme Court Justice, April 2007.

109 This point was reiterated in interview with a Catholic priest who said that when he was out in the community he was constantly asked to resolve household, village, disputes. After the traditional courts were disbanded people didn’t know where to turn and were turned off by the formality (and probably corrupt nature) of the Magistrates Courts.
away from the regular courts. So that was a bit unpleasant. But again the
population they were happy, even to the extent they were dealing with
murder/manslaughter cases, the general population, especially the rural
community, the traditional leaders they were happy. It was only the elite
and the judiciary itself - because surely it compromised the independence
of the judiciary, since its functions were taken over by these courts.

Could you discuss Dr. Banda’s use of rhetoric concerning the Africanization of
the judiciary and the notion of ‘Chewan justice’?

I doubt whether he was very sincere about that. He wanted a forum where
he could push his dissidents and they would have a ‘kangaroo’ type of
justice. Because apart from that he was legalistic, he wanted to do things
strictly according to the law. It looks like he took an opportunity where,
because there was some kind of serial murders, when a suspect is
suspected of a serial murderer, he was brought before the High Court and
he was acquitted at no case to answer level – not a prima facie case. I
suppose he may have seized upon the unpopularity of that decision. Then
he created those with a motive to whenever he wanted to punish the
dissidents, over the years he increased their jurisdiction. For treason, for
some economic crimes, he would push his dissidents there- there was no
legal representation.

I was with those courts. He would not interfere directly. I was a
regional/professional magistrate. They put a professional magistrate at
every region. The interference was not direct; to that extent he was smart.
He would not send a minister or party functionary to tell you what to do.
Surprisingly, the interference was from the members themselves. There
were three chiefs, most of them illiterates, and there was a court chairman
who was from the little traditional courts, but maybe someone that has
received a number of promotions and maybe some education up to
primary or secondary school level. But they were political appointees
because the presiding officers of the small traditional courts were political
appointments. It was those members who exerted some pressure on the
rest of the members. You would be hearing a case and you wanted to deal
with it according to the way you feel. But then they would say “no the
President must be thinking . . . if we decide that way, the President will be
unhappy, we should decide it this way.” It was among ourselves, the time
I was a magistrate no one from the outside came and said this is the way
you should handle it, no. What we did not know some of us was whether
those were saying that were approached by somebody.

---

110 Between 1968 and 1969 there was a spate of “axe” murders in the townships surrounding Blantyre.
When the suspects were eventually brought to the High court, the British judge was compelled to acquit for
lack of sufficient evidence. Politicians were incensed at the elevation of technicalities and procedures over
substance.
Did you ever want to leave the judiciary during this time because of this pressure?

I would say no. Why I would say no is that in the majority of cases I was not disappointed with the decisions. I was not disappointed. I think where there was a lot of abuse in those traditional courts was when they put a political dissident there; it was a ‘kangaroo court.’ I think if I did that there were very few such cases, fortunately I was involved in ordinary cases. So in ordinary cases, ok, the regional courts and the one at the national level, the majority of cases they were dealing with were homicide cases... We did some appeals. We did reduce murder to manslaughter. Sometimes we came up with certain acquittals that we maybe would not have come up with in the regular courts.

These responses raise a number of interesting points. The first is the subtle distinctions the judge makes regarding the nature of interference. It demonstrates how effectively Banda used local operatives to control the opposition and pursue his policy goals. In addition, the level of ambivalence, or of both ‘good’ and ‘bad,’ is something to reflect on as a researcher. Indeed, in 1994 when the constitutional drafting commission decided to eliminate all traditional courts, they may have thrown the baby out with the bathwater. For they did, as the judge stated, have important popular appeal and served an important role in terms of alleviating the conventional court system.

Tanzania

The intent behind the establishment of parallel courts, tribunals, or commissions is to protect the government from the legal process. In the case of Tanzania, the courts could not be trusted; therefore it would only seem natural to establish parallel tribunals through which cases could be tried without normal laws of evidence of procedure to get in the way of business. The Economic Crimes Court was one such body. Established under the Economic Sabotage Act of 1984, the tribunal was established without supervision from the judiciary. It’s punishments were widely described as draconian. As Mbunda writes, (1999:63)
It was constituted by a judge and two lay members, the latter being selected by the Regional Judicial Boards which are or were dominated by ruling party functionaries. Until 1987 all questions including the guilt and innocence of the accused persons under this Act had to be decided by the agreement of the majority of the members. The legal expertise of the presiding judge was therefore irrelevant for all purposes. The accused could not be represented by advocates, nor did they have the right to bail. The decisions of this Court were final as there was no provision for appeal. Rules of evidence were set aside and even rigors of the criminal procedure Code on arrest and detention meant to safeguard the rights of accused persons did not apply to suspects under this Act. In short, all cardinal principles of criminal jurisprudence were abrogated to ensure conviction of the suspects.

The special tribunal was established to “avoid extended use of preventive detention on a large scale against economic threats.” However, as Widner (2001:144) notes, in 1981-1982 preventive detention laws were used to incarcerate over a hundred people. The international human rights community was up in arms against these parallel tribunals and the judiciary itself felt that the time had come to take a stand (Widner 2001:145). In an interview with Widner (2001:145), Nyalali paraphrased the President, “I hope the judges and lawyers will forgive me; this time I am going to deal with these people outside the courts.”

Nyalali went on to say, “The legislation came as a shock. We had admired President Nyerere’s intellect and courage. . . How could I continue to preside over the courts when it was declared a matter of policy to bypass the judiciary?”

The following events are narrated in detail by Widner. They involve the Chief Justice going to the Central Committee in Dodoma to address the complaints of the courts. From there Nyalali went on to the National Executive Commission (this time taking all the judges of the Court of Appeal and the Chief Justice of Zanzibar with him). In a dramatic turn of events, the members of the Executive Committee turned to the president stating that it was inconceivable that the Chief Justice would state that the

111 Nyalali’s shift to confront the CCM executive in person, outside of the court, would set a precedent. His behavior has been followed by his successors (Author interviews in Tanzania, June 2007).
President was not above the law, and that the members of the Court of Appeal were “stooges of imperialism.” Nyerere simply replied by saying “he would never dream of living in a country where a person was above the law.” Ultimately the Economic Crimes bill was revised and the jurisdiction of the new Economic Crimes Court was within the High Court. Although not perfect, it was a vast improvement on the prior situation, and by the mid-1990s the Economic Crimes Court had fallen into disuse (Widner 2001:149-151).

VI - Conclusion

The period between independence and the dramatic events of the early 1990s did not positively contribute to the institutionalization of the judiciary. At independence the judiciary and the rule of law were perceived to be an obstacle to development. Instead of removing this obstacle, the governments of Eastern and Southern Africa chose to by-pass the obstacle altogether. This legacy remains, and as I will show in the coming chapters, legitimacy was not automatically conferred upon the judicial institutions of Eastern and Southern Africa simply by the provision of formal powers and protections in new constitutions. In each country the struggle for legitimacy and respect from the executive and legislature is ongoing.

This chapter began with an overview of the political and judicial development of each judiciary. Both the Malawian and Tanzanian judiciary were placed in very difficult positions under the leadership of popular, nationalist leaders: Individuals who had led their country to independence and who had created a sense of nationhood and identity that was intrinsically related to their political party and regime. The courts had no choice other than to operate within the boundaries of that regime, even when that meant applying draconian and oppressive legislation. This is demonstrated in my discussion of
the broad preventative detention laws that were common across the continent. In short, under the personalized, neo-patrimonial style of leadership, the presidents (more than any other factor) of Tanzania and Malawi shaped the institutional development of the judiciary, and restricted the expansion and entrenchment of judicial power during the authoritarian era.

In what appears to be a paradox Yash Ghai (1972) makes the argument that the personalization of power under charismatic leadership led to the partially successful entrenchment of political institutions in Tanzania but not Uganda:

Paradoxically, institutionalization may in the short run require “personalization” of power at the top. It was clear that the most significant assets in East Africa as independence were the “charismatic” leaders. One obvious strategy for national consolidation and political development was that the political system be defined under the umbrella of the leader, and then the charisma of the leader transferred to the institution was established and regulated by the Constitution. Only in Tanzania has such a strategy been pursued, even though the transfer of charisma is far from complete. In Kenya, the leader, by his political partisanship, seriously undermined his potential for such a role, while the leader in Uganda, never having quite enjoyed the pre-eminence of the other two, had first to create the “charisma.” Apart from the personal factors, the situation in Tanzania was the least complex and most malleable. In Tanzania it was possible to define the political system with deliberation and purpose, and no particular strain was placed on the Constitution. The situation in the other two countries was too complex to allow of an orderly political development, and hence tremendous strains were placed on the Constitution. There was either no opportunity or no desire to institutionalize the location and exercise of power (Ghai 1972:432-433).

Despite having greater success in the creation of institutions, Nyerere was skeptical and mistrusting of the judiciary and his rhetoric reflected this. The judiciary was seen as an obstacle to the implementation of Nyerere’s *ujamaa* goals, and the bill of rights was perceived as a potential source of instability and conflict between the branches of government. The Tanzanian judiciary was therefore brought under the control of the CCM state and would not begin to extricate itself until the beginning of the 1980s. In
Malawi, President Banda’s leadership style was significantly more despotic and his rhetoric towards the judiciary more threatening and harsh. Whereas in Tanzania Nyerere sought to bring the judiciary into the TANU/CCM fold, Banda sought to ostracize and exclude the conventional judiciary from any meaningful role in the day to day governance of Malawi.

For the judicial institutions, the positive aspect of Nyerere and Banda’s longevity was the lack of turnover of leadership. Although facing potential insecurity, judges were not removed as frequently as in Uganda. This is perhaps best illustrated by contrasting the high turnover of Chief Justices in Uganda with the relatively small number of Chief Justices in Tanzania and Malawi. In Uganda, each change of regime brought with it a change of Chief Justice. This in part accounts for the high level of internal institutional turmoil in Uganda vis-à-vis Tanzania and Malawi. I theorize that greater continuity in judicial personnel in Tanzania and Malawi helped to create a stronger structural framework of institutional norms and identity, which better served the judiciary in the multiparty years from 1994 onwards.

Through a discussion on the role of ideology and the courts, I demonstrate how the judiciary was used as a tool to promote ideology and specific policies. In the case of Tanzania this was the furtherance of *ujamaa*. This led to conflict within the judiciary, and to heated debate and discussion within the academy as law professors debated the ideological role of judiciary in the newly independent regimes of sub-Saharan Africa.

*Legal Positivism and Strategic Neutrality: Hilbink and Ossiel* Lisa Hilbink’s (2007) thesis that judges selectively applied an antipolitics strategy has strong resonance in the post-independence period in Africa. Each time a politically sensitive case came before the judiciary, the judiciary chose to retreat into a position of either political neutrality, or a pro-regime position through the clever application of legal principles.
There were very few occasions when judges were engaged in criticism of the regime through the use of what Mark Ossiel (1995) refers to as ‘natural law’ arguments.

However, there is strong evidence to suggest that the judges used ‘positivist law’ in tacit support of the government, and that this legally conservative approach served to construct a façade of judicial neutrality. Ossiel’s thesis becomes more relevant in the multiparty era, where there are a small number of judges that have openly expressed their opposition to the conduct of the government through arguments that move far beyond legal positivism.

During this period the judiciary had to strike a balance between supporting the regime and their long-term institutional identity and viability, which was dependent on at least keeping a façade of legal integrity. Hilbink’s thesis that the courts were sticking to a path of legal positivism due to a pragmatic antipolitics, rather than an ideological adherence to legal conservative principles, is compelling. The British educated judges had a set of tools at their disposal and they had to adapt and apply them to the new political climate of independence Africa. In short, they were a means to an end rather than an ideological end in itself.

*Tate thesis* Neil Tate (1993) sketches out three reasons why authoritarian rulers chose to leave judicial institutions intact, at least minimally. First, rulers assume little risk by doing so. It is unlikely that the judiciary is going to seriously threaten their position in power. Secondly, as time progressed it became less likely that the government would experience any major setbacks. This chapter demonstrated that there were very few anti-government decisions in post-colonial Malawi, Uganda and Tanzania.\footnote{One notable exception in Uganda is the case of *Shah v. Attorney-General* (1969) and then the subsequent appeal in *Shah v. Attorney-General* (1970). However, *Shah* is bracketed on either side by two very pro-regime decisions. First, the infamous *Ex-Parte Matovu* (1966) in which the Court effectively gave}
with the whole scale removal of all expatriate judges, followed by the removal of powers of judicial review, and finally the removal and then transplantation of judicial power into the traditional forum. The judiciary made a few attempts to chip away at the broad Preventative Detention laws over time, but this never posed a threat to the Banda regime.

Central to Banda’s strategy was the establishment of a parallel system of traditional courts in 1969. This refers to what Tate terms “restricting the scope and depth of decision-making.” The Malawian traditional courts usurped all significant power from the conventional judicial institutions – trying and convicting individuals on charges of treason, sedition and murder without representation. The traditional tribunals represented the complete emasculation of the legal system, and from that point on they were subsumed under Banda’s personal political rule. The traditional tribunals in Malawi were established quite early on, whereas in Tanzania the use of parallel jurisdictions came a little later with the establishment of the special Economic Crimes Court. Powers of judicial review were in effect removed with the passage of wide derogation clauses protecting government policy and behavior. Presidential decrees in all three countries became the desired method of policymaking, and these decrees were beyond the scope of judicial inquiry.

At the point of transition in the 1990s the judicial institutions of Malawi, Uganda and Tanzania were not beginning at the same point. I present the argument that the Malawian judiciary survived the authoritarian era to the point at which they started the multiparty era at point zero rather than in negative territory. Whereas the Ugandan judiciary had been marginalized and violently attacked, the Malawian judiciary, although constitutional legitimacy to the extra-constitutional seizure of power through military means. Second, *Kayira Semowogerere v. Ojok, et al.* (1979), in which the court failed to declare the removal of Professor Lule from power ‘unconstitutional’.

175
verbally chastised in the early years, did not suffer the same kind of military interference. Moreover, years of conflict in Uganda led to the economic neglect of the courts so resources were barely adequate for the courts to just function. In addition, the Ugandan judiciary of the 1960s established some highly problematic precedents for themselves (more so than in Malawi). The keystone of these precedents is *Ex-Parte Matovu* (1966). *Ex-Parte Matovu* (1966) legitimized the unlawful replacement of one legal order thereby giving legal authority to the illegal usurpation of power. *Matovu* continue to be relied upon for decades after its passage (Oloka-Onyango 1996). In short, the Ugandan judicial institutions had bigger hurdles to overcome. The Tanzanian judiciary did not experience a radical shift in the political environment; thus it is not really possible to talk about a ‘before’ and ‘after.’

Symbolically etched onto the minds of every Ugandan is the murder of Chief Justice Kiwanuka. The weight accorded to the abduction, and murder of, the former Chief Justice has been woven into a tale that valorizes the victim status of the judiciary. As I will demonstrate in Chapter 8, this particular event forms the foundation of what I call a ‘narrative of victimization’ perpetuated by the Ugandan judiciary. This narrative serves to obscure the implicit cooperation between the judiciary and the government over the years, and has propped up the legitimacy of the Ugandan judiciary.
Chapter 5

Internal and External Judicial Autonomy
The typical sub-Saharan judiciary is a ‘court under constraint.’ Before assessing the performance and politics of judicial decision-making in Chapters 6, 7 and 8, this chapter will describe and analyze the extent to which the judiciaries of each country are institutionally viable and autonomous. The chapter, referencing the period beginning in the early-1990’s through to 2007, will also address the level of external autonomy experienced in each case.

The notion of external independence is borrowed from Peter Russell’s (Russell 2001) two dimensions of judicial independence. The first – external autonomy – refers to sources of dependency and influence from the external environment. In other words, the degree to which the judiciary is free from interference. Russell’s (2001:11) concept of institutional autonomy refers to “sources of influence and control within the judiciary itself.” Here Russell is referring to the sense of the judge as individual rather than the judge as an institution. I characterize this internal ‘institutional autonomy’ as positive freedom to render decisions independently. In order to capture this notion of positive independence, or the ‘enabling’ aspects of judicial power, I borrow from the Bumin, Randazzo and Walker (2007) framework on judicial viability. I take durability and differentiation from the political environment and place them on the internal side of the equation. I take autonomy and place it on the external side of the equation. As stated in Chapter 2, I am able to move beyond the restrictions of dichotomous or ordinal variables through adopting an in-depth narrative technique. This allows me to add an important third measure to durability and differentiation – legitimacy. Clearly, a judiciary with a greater level of legitimacy will feel an internal sense of empowerment. Here I focus on public opinion: levels of support from civil society, and the levels of internal corruption and

113 Here I borrow from Gretchen Helmke 2005 “Courts Under Constraint: Judges, Generals and Presidents in Argentina.”
control. As Gibson, Caldeira and Baird (1998), Vanberg (2005) and others note, public opinion feeds back into the court (both directly and through the electoral marketplace) and consequently affects the performance of that court.

I therefore divide this chapter into two parts. Part 1 reviews the level of internal institutional autonomy through an exposition of: I – Differentiation from the Political Environment; II – Durability, and III – Legitimacy. Part 2 examines the degree to which each judiciary enjoys external autonomy, or negative independence. I divide this section into two parts: IV – Formal External Autonomy examines the varying levels of formal powers constitutionally conferred on each of the judiciaries; V – Informal External Autonomy reviews the informal methods through which the judiciary has been interfered. This final section examines the actual reality, as far as manipulation of judicial appointments is concerned, as well as the level and frequency of public verbal and physical attacks on the judiciary.

Russell posits that we cannot create a complete theory of judicial independence, but we should instead focus on “the key points of interaction at which undue influence may occur” (p.13). In this chapter I have created a framework in which to understand the generic and specific challenges facing the judiciaries of each country.

I - Differentiation from the Political Environment

Of the three cases, the Tanzanian judiciary has had the most difficult task differentiating from the political environment since the early 1990s. This is because the judiciary was fully incorporated into the CCM party structure for the 30 years post-independence. To separate the judiciary from the party structure would obviously take years, not months. A
Court of Appeal judge commented\textsuperscript{114} that the judiciary has been independent since 1994 because they went from forced CCM membership, to not being allowed membership to any party. Despite the integration of the judiciary into the CCM party, it is widely felt (based on author interviews) that Nyerere appointed on merit and qualifications, and not just political affiliation.

A. Physical location

All three countries suffer from inadequate facilities. Of the three, Uganda is in the worst situation with the highest level of demand. The High Court building dates back to the colonial period and only has a handful of courtrooms. The Court of Appeal is located in an office building the government leases from a private individual. This is supposed to be temporary but there is no sign of any progress. One justice of the Court of Appeal told me that the government was several months behind on rent payments for their facilities, and that the owner had filed legal papers threatening eviction. The Supreme Court is located some distance outside of downtown Kampala in Mengo district. They are located on the upper floors of the Mengo Magistrates court. The exception is the commercial court – the court building is currently under construction in Kampala. The lack of a distinct building certainly has impact the ability of the Ugandan judiciary to ‘differentiate’ themselves, but it has also served as a significant restriction on the expansion of the courts. For if there is nowhere to house the judges then why bother with new appointments:

Chief Justice said government had increased the number of Judges of the Supreme Court from five to nine without catering for accommodation of the Court. The High Court judges had been increased from 15 to 25 yet they are operating in a building which was meant for 6 judges. “Already the Supreme Court is un-housed, the High court has inadequate space where are you going to put the Court of Appeal? The Supreme Court is not

\textsuperscript{114} Author interview with Court of Appeal Justice, June 2007.
fully-staffed. The High Court is still looking for Judges, now we have to look for Judges for the Court of Appeal too.115

Similar problems exist in Tanzania and Malawi. The Tanzanian Court of Appeal is currently housed in temporary accommodations on the waterfront in Dar es Salaam until enough money can be raised to build a separate and independent court structure. The High Court is inadequate for the current number of judges. In Malawi the major court in Blantyre does have its own separate building, but an expansion of this building has been delayed. The builders recently stopped working because they claimed the government was behind on payments.

B. Professional qualifications of Judges

In Tanzania there are minimum educational qualifications for both High Court and Court of Appeal judges. The candidate must hold a recognized University law degree and must pass examinations set by the Council of Legal Education. In Uganda qualifications are presented as number of years of service as either a judge or an advocate. In the case of the Chief Justice this is a period of twenty years, and in the case of the Deputy Chief Justice and Supreme Court of Appeal Justice it is fifteen years. In the case of the Court of Appeal it is ten years, and so on (Sec 143). There is an important clause added onto this however: “Any period during which a person has practiced as a public officer holding an office for which qualification as an advocate is required shall be counted in the calculation of any period of practice required under clause (1) of this article even though that person does not have a practicing certificate” (Sec 143 (2)). This strikes me as problematic, and opens the door even wider to the possibility of political appointees. In Malawi, to qualify for appointment to the High Court or Supreme Court of Appeal one

115 “Chief Justice Makes Rare Attack on CA” Monitor July 3rd, 1995
must already be a “judge of a court having unlimited jurisdiction in criminal or civil proceedings; or entitled to practice as a legal practitioner or an advocate or a solicitor in such a court and has been entitled so to practice for not less than ten years” (Sec 112 (1) (a) (b)).

Traditionally, all three countries have had problems enticing lawyers out of private practice into the judiciary. Presidents in all three countries have commented on this. The primary reason given is that private practice lawyers make significantly more money than judges. However, recent interest in recruiting more judges from private practice could be the executive branch signaling an intention to promote more pro-regime judges.

C. Voluntary Association of Judges

The national judge’s associations of sub-Saharan Africa have on the whole been ineffective in promoting judicial independence. Their main function has been to serve as a forum for judges to come together to discuss issues and concerns. In extreme cases of interference with the judiciary, the associations have been known to speak out. An example of this is the Malawi Judge’s Association in 2001. Based on author interviews, judge’s were far more likely to cite the Commonwealth Judge’s and Magistrate’s Association (CJMA) as a forum for networking, education and exchange of ideas. Former Chief Justice Richard Banda of Malawi served as President of CJMA in 2003.

The East Africa Judge’s and Magistrates Association (EJMA) has become more active in recent years. A regional association appears able to maintain independence and to speak more assertively on behalf of the judge’s of East Africa more so than the national associations. This is an important point to consider. Regional associations then provide the more significant civil society function that appears to be lacking in the case of national judge’s associations. In addition, it should be mentioned that both Tanzania
and Uganda have flourishing Women Judge’s Associations. The Women Judge’s Associations provide an important forum and support network for the minority women judges on the bench.

The Tanganyikan Judges and Magistrates Association was founded in 1984. The Association does not have a permanent office or secretariat (there is a secretary that conducts administrative duties resident in Dodoma). The association is not a union, but instead acts as an organizational body for the dissemination of information and educational materials. In addition, the association has been an important lobbying body for improvements in judicial service contracts. The Chair of the association is voted in by his or her peers. However, the role of the chair appears to be ill-defined, and the judges have not used this organization as a platform to publicly air their grievances. Despite the weakly defined role of the Judges Association in Tanzania, there is a potential base upon which to build. The Judge’s Association suffers from the same problem as the Tanganyika Law Association, and that problem being it was part of government for so long.

The Uganda Judicial Officers Association has played a vocal role in decrying the recent attacks by President Museveni. Uganda has developed a strong domestic continuing education program for judges at the Judicial Services Institute (JSI). The JSI is strongly affiliated with the Judge’s Association.

The Magistrates and Judges Association of Malawi (MAJAM) appears to have played a more active role in shaping policy decisions on the judicial institutions. The Association meets annually and has been central to the development of the Malawi Judiciary Strategic Plan 2003-2008. The association’s most assertive moment came in 2001 as President Muluzi attempted to impeach three High Court Judges. On November 13th, 2001 the then President of MAJAM sent a memo to “All International Organizations Concerned with the Welfare of Judges in the World”; the subject line read “Actions
II - Durability

Durability characterizes the degree to which the court can withstand external challenges.\textsuperscript{116} As Bumin, Randazzo and Walker (2007:5) note “resilience and flexibility are marks of a stable policy maker. If the judiciary can maintain its role in the ebb and flow of democratization, this serves as a measure of its integration into the political system.” Increasing the durability of the courts has been a challenge for sub-Saharan judiciaries. As I demonstrate below they are highly vulnerable to exogenous shocks.

A. Length of formal insularity

None of the three cases have life tenure for judges. Author interviews revealed that the early retirement ages were the most problematic in Tanzania, where it is de rigueur for judges to negotiate directly with the executive for extensions on their contract.

In the case of Uganda, a judicial officer may retire at any time after attaining the age of sixty years, and shall vacate his or her office- (a) in the case of the Chief Justice, the Deputy Chief Justice, a Justice of the Supreme Court and a Justice of Appeal, on attaining the age of seventy years; and (b) in the case of the Principal Judge and a Judge of the High Court, on attaining the age of sixty five years (Sec 144 (1)). Unlike Tanzania and Malawi, the door is not open to negotiating a contract beyond retirement age.

In Malawi the general retirement age for all judges is 65. However, the President

\textsuperscript{116} Bumin, Randazzo and Walker (2007) include Court Age in this measure. For the purposes of this study it is not necessary to include court age because all the courts are of more or less the same age. There are two caveats to this. The first is that up until 1977 the East Africa Court of Appeal served as the final appellate court for Uganda and Tanzania; after the dissolution of the East Africa Court of Appeal both Uganda and Tanzania established their own national Court of Appeal. The second is the establishment of a constitutional court in the 1995 Ugandan Constitution. This Court of Appeal would serve as an appellate court for cases from the High Court and as court of first instance for all constitutional cases. Constitutional cases could then be appealed to the Supreme Court of Appeal. The Supreme Court of Appeal also serves as the court of first instance for any Presidential election disputes.
may allow a judge who has reached such an age to remain in office for a long as
predetermined by the President in consultation with the judicial services committee.
Former Chief Justice Richard Banda first went into private practice and is now an ex-
patriate judge in Swaziland.

Tanzanian judges currently face a great deal of insecurity when they reach
retirement age – 60 in the High Court, 65 in the Court of Appeal. In the beginning the
law was silent on the entitlements of judicial officers, instead retirement “packages” were
left to the discretion of officers at the Treasury (Peter 2007a:257). A 1996 by-law
established an expansive and uniform package. However, as Peter notes, this was merely
a by-law and could be removed or superseded by another law. It was finally the passage
of the 2007 Judges (Remuneration and Terminal Benefits) Act that secured
remuneration, and terminal and survivor’s benefits to the Higher Court judges. This Act
was passed after a significant amount of work on the part of the Tanganyika Judges and
Magistrates Association. An executive member of the Association told me that the
Association had worked on the Judges Act for a long time. This is the first Act to
establish judges’ remuneration and retirement benefits since independence. Formerly,
Judges were reliant on the President to sign an order. The Judge concluded: “Now we
have this act it empowers us to claim our rights.” An additional point of interest is that
the Act draws heavily on similar law from Uganda – underscoring the relevance of intra-
regional cooperation within East Africa. The executive member of the Judge’s
Association indicated that the most problematic aspect of the act was the provisions
regarding retirement packages.

The full-scope and impact of this issue was revealed to me in an interview
with a Court of Appeal Justice:117

What is the greatest threat to judicial independence today?

117 Author interview with Tanzania Court of Appeal Judge, June 2007.
Remuneration and condition of service of the judges: Steps have been taken and we hope matters will be improved. That will be a real stumbling block to judicial independence otherwise. In the Court of Appeal compulsory retirement is 65, I have x years to go. In the High Court it is 60. The trend has been that they reach these years and then they go on contract, typically two years. In fact even our Chief Justice now is on contract, for two years – he will leave this year July 20. But he was supposed to go before . . . I didn’t mince my words; my intention for us was for us to all meet. I think it is wrong for judges to get contracts, and it is was even more wrong for the Chief Justice to get a contract . . . this compromised the independence of the judiciary. I have to bargain with the government. The moment you start bargaining your independence is at stake. This is against the independence of the judiciary. But I understand that the problem is when it comes to 65 I will still be active and energetic. But the salary I get is not sufficient to prepare for retirement. Retirement age comes and I am not ready. Way out – I will take a contract; forget about the independence of the judiciary it is now about personal survival. Some [judges] have had three contracts.

Based on the response above I was expecting the Judge to recommend life-tenure for judges. He did not, however, instead suggesting the answer was a more generous retirement package:

Is the judges association lobbying for higher retirement age?

Problem is a few of us died, and then you don’t have a full retirement. We said increasing the tenure is not to our advantage, in case you die. Then you only get 1 year death annuity. Solution is not increasing age limit. If at 65 you are alive, then what will the government do for the remainder of your life. Conditions are bad, if conditions are bad in office, the conditions will be worse outside of office, so you will try to keep getting contracts. Law has been changed and things appear to be moving to the better. Getting provided for money and whatnot is one thing, but keeping yourself busy is another thing. Our faculty is another question. We should find ways judges could be used elsewhere usefully.

Do you have specific ideas about how retired judges could be used outside of the judiciary?

At 65 I would like to go and teach. I have always been giving lectures. This is what I intend to do. Some of them come back to the courts... “Your honor this, Your honor that” . . . that is bad...I could agree to be a
consultant in chambers and younger lawyers would come to me.....so that is the main threat to judicial independence. For instance at the moment the Chief Justice is on contract, xxx is on contract, xxx is on contract ....we have about 4 judges in the Court of Appeal on contract. We should have people with security of tenure.

The ambiguous extension of judges’ contracts weakens the insularity of the Tanzanian judiciary. The judiciary is unhappy with the situation as it now stands, but to address it head-on with the government would be a threat to personal tenure situations. There are also instances of this occurring in Malawi. For example, Justice Hanjahanja is now beyond retirement age.

B. Adequate Equipment and Administrative Support

Scholars of third world development in general and Africa specifically, will be familiar with the difficulties facing the judicial institutions of eastern and southern Africa. In all three countries both administrative staff and judges expressed a high level of dissatisfaction and frustration with the working conditions, administrative support and resources available. Some of these problems are related to petty corruption and incompetence, but most boil down to a lack of adequate funding.

In Malawi, across the board staff expressed a continual frustration over the lack of resources. Computers that didn’t work, and missing files were common complaints just to name just a few.\textsuperscript{118} In 2003 USAID donated computers and stationary. However, in both the High Court and Supreme Court registries in Blantyre, the computers are used as either extensions of the bookshelves or as entertainment by playing solitaire throughout the day. Computers are used by secretaries as typewriters, and there is no

\textsuperscript{118} For example, the following incident was reported in The Nation in 2001: “Bandas’ nieces have sued their uncles’ financial advisor, Farook Sacranie, for misuse of money in Banda’s foreign accounts. The case file had gone missing at the High Court Principal Registry in Blantyre. Judge Anclet Chipeta said he could not hear the case yesterday because the file could not be found within the court.”
centralized database of documents and cases. The library in Blantyre is out of date and
missing important resources. The librarian is attempting to create indices of Malawian
cases (in the absence of such indices being created by someone in the registry); however,
his first effort was lost when his dilapidated computer crashed. The court librarian is
now trying to create his index, this time the old-fashioned way with paper and pencil.
There is not a standardized procedure for distributing judgments; the court librarian
receives some judgments from some of the judges, but not from all the judges, all of the
time.

There is clearly understaffing, and this combined with poor resources leads to
record management that is so poor it sometimes paralyzes court proceedings. Poor
records management also increases the likelihood of intentional “misplacement” of case
files – for indeed it is a lot easier to bribe a court clerk than a judge. In short, the failures
of the administrative staff are due to a combination of poor resources, a lack of training
and (in my opinion the most important) poor management. In 2002 the administrative
staff went on strike, and the registrar of the High Court was unable to intervene as the
dispute between the staff and the treasury dragged out over five weeks. Inevitably work
at the court came to a complete halt for the duration of the strike.

The High Court building in Kampala is plastered with anti-corruption posters.
Again, ‘missing files’ are apparently a significant problem. As in Malawi, record-keeping
and case file management in particular, presents a significant obstacle to the expeditious
and transparent disposal of cases. A Court of Appeal Judge in Kampala explained to me
that there are no law clerks available. When she has to write her opinion she must go to
the library herself, conduct her own research and write her own opinion. Some judges
type their opinions, but many continue to write in long-hand and then go through
numerous versions with their secretary. Generally speaking the secretaries are not
skilled in the area of law and instead are simply used as human typewriters. Judges in
both Tanzania and Malawi noted that they did not control the hiring and training of administrative staff, but that this is done by a separate human resources office within the ministry of justice.\textsuperscript{119}

Finally, one of the biggest obstacles to the rapid and accurate disposal of cases is court reporting. It is still typical (across all three countries) for judges to record the proceedings of a trial in long-hand. This is rendered even more problematic when language and translation is introduced into the equation because it is commonplace for witnesses to give testimony in Kiswahili in Tanzania. As one High Court judge in Tanzania\textsuperscript{120} explained to me, not only am I recording in long-hand, but I am simultaneously translating from Kiswahili to English.

In addition, issues of delay, accuracy and public accessibility to the record come into question. Based on research in the 1990’s, Jennifer Widner reported in 2001 that these issues had not been resolved in Tanzania, and indeed there was no consensus as to the appropriate remedy for court reporting. Based on my experiences ten years later nothing has changed – judges are still writing in long-hand. In short, the judiciary has yet to modernize. Placing computers into the hands of poorly trained administrative staff working in old buildings with no air conditioning is not the answer.

C. Access to Law Reports and Statutes

Law reporting in Malawi is woefully inadequate. For example, The \textit{Malawi Law Reports Series} is out of date and the last published volume was in 1993. Unfortunately, Malawi is not benefitting from the \textit{Law Africa} series in the same way that Tanzania and Uganda are

\textsuperscript{119} During time spent in at the human resources office in Blantyre, I was able to ascertain through informal conversations that the office found it difficult to hire and keep administrative staff at the courts. The informant indicated that this was because judges were notoriously difficult to work for and of course the pay was low.

\textsuperscript{120} Author interview, High Court Judge Dodoma, May 2007.
through the reemergence of the East Africa Law Reports.\textsuperscript{121} Cases are available to the public as ‘unreported’ cases. However, issues of printing and distribution prevent the effective dissemination of case law both within the court system itself and outside to the wide legal community. Kanyongolo (2006) observed that easy access to even the most basic materials, such as the \textit{Laws of Malawi}, is only readily available to judges in the higher echelons of the judiciary. Furthermore, there is very little expert commentary on the law in Malawi. The only source is the \textit{Chancellor College Students Law Journal}, a journal published by the University of Malawi Student’s Law Society Kanyongolo (2006).

The internet has the potential for improving access to information for judges and lawyers. However, access to on-line legal database can be restricted through expensive subscriptions and the quality of the internet in Malawi is often patchy and unreliable.

Tanzania is the only country of the three to have a national reporter after 1993. However, Chris Maina Peter (2007:253) posits:

\begin{quote}
[T]he \textit{Tanzania Law Reports of 1983 to 1997} is a good example of poor and almost useless law reporting if not digesting. Firstly, looking at these “Reports” one is not sure whether they are Law Reports or Law Digests. Secondly, the choice of the cases “reported” is not explained or justified. Some completely useless cases (in terms of their contribution to the science of law) are “reported” and some very important cases are left out. Strangely enough, some cases which are not “reported” locally in our “Law Reports” are highly regarded and are reported in other more prestigious Law Reports abroad such as the Commonwealth Law Reports and other channels.
\end{quote}

One judge interviewed informed me that the Law Reporting committee still existed and was meeting once a year to decide which cases would be selected for the law reports. This is despite the fact that national law reports have not been published for more than ten years. I assume that now the Law Reporting committee is either directly supplying the East Africa Law Reports with cases or at least is consulting with Lexis Nexis.

\begin{quote}
Beyond mere lack of and quality of law reporting, many lawyers do not even have
\end{quote}

\textsuperscript{121} The East Africa Law Reports are published by Lexis Nexis, both electronically (on-line) and in hard format.
access to the reports. Jennifer Widner reports that in 1995-1996 Law Society surveys in Tanzania 64 percent of lawyers surveyed said that they lacked easy access to the country’s statutes. While 44 percent said the same in Uganda, only about a third of the lawyers in the two countries said they had access to judges’ decisions – both informally or through law reports (Widner 2001:219). The situation in Uganda is similar; there have been a few private law reports available for example, the Kampala Law Reports series. Kituo cha Katiba has also recently produced a constitutional cases digest. The library at the High Court of Uganda is outdated and incomplete.122 However, the judiciary in Uganda does have a website up and running, and they have started to disseminate certain decisions and other important documents on that website.

III- Legitimacy

Public acceptance of the courts is critical to the establishment and maintenance of institutional legitimacy. Former Chief Justice Nyalali was the first in the region to really understand the importance of speaking and reaching out beyond the bench. As Widner (2001:311) comments, “Nyalali’s concern to cultivate public acceptance of the courts as protection against overly zealous officials caught outsiders by surprise.” It is not clear that post-Nyalali Chief Justice’s have followed this example.

A. Legitimacy and Popular Opinion

While international civil society activists, international donors and other elites spoke out against the 2002 Malawi impeachment scandal, the population perhaps wasn’t as vociferous as they might have been. In the first Afrobarometer Malawi Survey, people indicated a high level of support in favor of dismissing anti-government judges.

122 Author interview with High Court librarian, January 2007.
Graph 5.1: 1999 How do you feel about dismissed judges who ruled against the government?

How do you feel about dismissed judges who ruled against the government?

1= Strongly support government; 2=Support government; 3=Neither support nor oppose; 4=Oppose; 5= Strongly oppose government; 6= Don't know

Source: Afrobarometer Malawi Survey Round 1 1999, Q.96.

Graph 5.2: 1999 What would you do about dismissed judges who ruled against the government?

What would you do about dismissed judges who ruled against the government?

1=Do Nothing; 2=Speak to Others About it; 3= Write Newspaper; 4=Phone Radio or TV; 5=Contact govt. rep; 6=Join march or demonstration; 7=Don't know

Source: Afrobarometer Malawi Survey Round 1 1999, Q.97.

This level of popular mobilization against the judiciary by the government in power is very similar to the tactics employed by Museveni in Uganda, and to a lesser degree by the
CCM periodically over history. As documented in Chapter 8, Museveni’s populist mobilization against the judiciary has an ideological spin to it; focusing on the anti-majoritarian aspect of the judiciary. In Malawi dissatisfaction with the judiciary is often based on the public perception that they are paid well, but are always complaining they are not paid well enough. In short, there is a lack of appreciation of the need for a well paid judiciary to protect judicial independence.

It is in Uganda where the judiciary has been at the forefront of popular debate and mobilization. This was seen most vividly in the aftermath of the Ssemogerere case. Thousands of the people were mobilized and sent out on to the street to decry the usurpation of constitutional power – away from the hands of the people into the hands of the judiciary. Justice Twinomujuni of the Constitutional Court felt compelled to respond to these public demonstrations by writing in the New Vision newspaper. Indeed, one measure of the degree of independence of the judiciary is to examine the apparent freedom of judges to speak their mind off the bench. A brief review of the Ugandan media coverage of the judiciary will lead the reader to two names: Justice George Kanyeihamba of the Supreme Court of Appeal and Judge James Ogoola, Principal Judge of the High Court. Both figures are popular public speakers, and frequent attendees at the multitude workshops and conferences. Many of these meetings only loosely tie in with the theme – rule of law – and are often overtly political. However, the comments of these judges are more often directed at other political and economic elites rather than populist attacks of the kind made by Museveni.

At a debate with the theme ‘Strengthening Multiparty Democracy in Uganda’, both judges were present and openly condemned the practice of MPs crossing the floor from one political party to another. Justice Ogoola was quoted as describing the practice as a “phenomenon of cheap political harlotry.” Both suggested that politicians usually

---

123 “Justice Twinomujuni the Whipping boy” The Sunday Vision, August 20th, 2000
cross with the aim of gaining material wealth or wrestling power from the ruling party. They also spoke out against the bloated cabinet, which went against earlier recommendations favoring a small cabinet. Justice Kanyeihamba said he disagreed with the President on defining an MP’s priorities, and that he would “continue advising the President without fear or favour.”

Kanyeihamba spoke out again in September of 2007 expressing frustration with President Museveni’s refusal, failure or delay in appointing judges at different levels.

At the “Domestication of International Human Rights Instruments and Access to Justice in Uganda”, Kanyeihamba suggested the President should be given a time limit in which to fill empty seats on the bench. The Supreme Court is currently short of two members after the death of Justice Arthur Oder and the retirement of Justice Alfred Karokora last year. In August 2007 the African Peer Review Mechanism (APRM) Commission met with 50 judges in Kampala. They told members of the Commission that they were not to blame for the under-performance of the judiciary. Instead they blamed Parliament and the executive for underfunding and delays in appointment of judicial officers. They also blamed government for making vague and insensitive laws.

The judiciary is lauded for maintaining some semblance of judicial autonomy, but at the same time increased responsibility comes with this independence and frequently this increased responsibility is highly political. The Referendum related cases between 2000 and 2004 were particularly challenging for the judiciary. Former principal judge, Justice Ntagoba, highlights the perils of being the only “independent” institution in the movement system of government:

. . . [the judiciary] is the last public institution which has a semblance of non-partisanship, and still has some respect even in the eyes of the people who are not dyed-in the wool ‘Movementists.’ That is why Judges are

124 “Floor-Crossing MPs lambasted” The Daily Monitor, October, 9, 2006.

being asked even to frame questions for the controversial referendum. This trend toward deploying judges to resolve political issues has the danger of undermining the credibility of the Judiciary. The best thing is to keep the Judiciary out of political feuds, and to amend laws which drag them into administering political affairs.\textsuperscript{126}

Politicization of the judiciary is also a significant problem in Malawi, and to a lesser extent in Tanzania. The graph below indicates that overall the courts of law have had medium to high trust levels in each respective country.

Graph 5.3: How much do you trust the courts of law?

![Graph 5.3: How much do you trust the courts of law?](image)


Of course “courts of law” encompasses magistrates to the Supreme Court, and because of this it is erroneous to read too much into the changes between 2 and 3 on the graph. However, the graph demonstrates that the judiciary as an institution is generally viewed favorably. But how much can we trust this kind of data? The Malawian judiciary feels that they are generally misunderstood and mistrusted. The 2003-2008 Malawi Judiciary Development Programme noted that, “The lack of understanding of the role of a democratic government amongst members of the public, especially politicians has

\textsuperscript{126} Just Keep Judges out of Politics” The Monitor. 12, December, 1999.
contributed to the creation of a poor perception of the Judiciary by the public.”

Overall the perception amongst elites in Malawi is that the judiciary is fairly independent. An expert survey conducted by the Centre for Social Research at Malawi (2002) revealed the following:

Table 6.2: Independence of the Judiciary

<table>
<thead>
<tr>
<th>The Judiciary is:</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Independent of other branches of government in its</td>
<td>16.0%</td>
</tr>
<tr>
<td>operations</td>
<td></td>
</tr>
<tr>
<td>Largely independent of other branches of government in</td>
<td>25.9%</td>
</tr>
<tr>
<td>its operations</td>
<td></td>
</tr>
<tr>
<td>Somewhat independent of other branches of government in</td>
<td>38.3%</td>
</tr>
<tr>
<td>its operations</td>
<td></td>
</tr>
<tr>
<td>Hardly independent of other branches of government in its</td>
<td>14.8%</td>
</tr>
<tr>
<td>operations</td>
<td></td>
</tr>
<tr>
<td>Fully dependent on other branches of government in its</td>
<td>2.5%</td>
</tr>
<tr>
<td>operations</td>
<td></td>
</tr>
</tbody>
</table>


These figures, in comparison to similar questions asked about the legislature and executive branch, demonstrate a much stronger faith in the democratic attributes of the judiciary as compared with the legislature and executive branch (see Centre for Social Research Report 2002). The overall impressions of the mass populace are mixed. In the 2004 National Crimes Victim Survey:

- 87.1% Know where their nearest magistrates court is.
- 87.7% Believes the courts were performing duties satisfactorily
- 55.6% Courts make fair decisions
- 24% Courts are impartial
- 12.3% Courts are hard on criminals
- 12.3% Felt courts perform inadequately because: - They are biased in favour of people that they know (39.9%)
  They take too long to complete a case (20%)
  They are too lenient on criminals (19.8%)
  They are inconsistent in handling cases (13.8%)
They are corrupt (8.1%)
They lack resources 5.7%

Overall there was a strong regional difference, as the authors found that respondents are more likely to be satisfied in the south than the north. "In summary, the vast majority of Malawians appear to be satisfied with the manner in which the courts operate, are confident that they administer justice impartially and trust that they deal with offenders appropriately" (Pelser 2004:79). In actuality, very few individuals deal with the highest courts of the land. Instead their contact is with the lower level magistrates courts. However, perceptions regarding leniency of judges towards criminals almost certainly shapes judicial decision-making at the very highest levels.127

B. Legitimacy and Civil Society

In Malawi the Law Commission has been an important and highly visible body. The Law Commission was established by the 1994 constitution and has been an active body as far as addressing and debating reforms in the legal and justice sectors. However, as Kanyongolo (2006) argues, despite the productivity of the Commission, proposed changes and legislation have regularly been ignored by the executive and legislative.128 The visibility of the Law Commission rose exponentially in 2006 and 2007 as they organized a review of the Constitution. In the days and weeks following the April 2007 convention the newspapers (both the Nation and the Daily Times) either explicitly or implicitly pursued allegations of bias and corruption within the commission.129

Malawi’s civil society blossomed in the multiparty era and many of these

---

127 Author interview with Malawi Supreme Court Judge (May 2007).

128 Kanyongolo (2006) also suggests that because the Commission is almost entirely funded by international donors, then it would be reasonable to assume that the agenda pursued by the Commission is reflective of the agenda(s) of international donors.

emerging groups have developed around issues related to governance and the law. Given the weakness of political parties as accountability mechanisms, civil society has served an important function in protecting democracy in Malawi. Perhaps the most powerful and well organized civil society organization is the church. Churches (particularly the Catholic Church and the Church of Central Africa Presbyterian (CCAP)) led a very vocal presence in opposing Muluzi’s third term bid. Several civil society groups have turned to the courts to protect their rights and space and have, in turn, been vocal defenders of judicial independence when the judiciary has been threatened. One area where civil society has yet to really engage the courts is in the area of public interest litigation. Public interest litigation is still in its nascent stages in comparison to the more significant developments in Uganda. This is due in large part to two major factors. Firstly, civil society actors in Malawi are less well-funded and organized than in Uganda. Secondly, as I discuss in chapters 6 and 8, the constitutional provisions on locus standi are significantly different. In Uganda standing is interpreted far more expansively thus allowing those not directly affected to bring cases to court.

Ugandan civil society had successfully used the courts to challenge the government, particularly in the area of public interest litigation. But as one observer told me, civil society in Uganda is characterized by competition (for resources) rather than cooperation. This has limited their efficacy and impact. The relationship between the media and civil society is a two way street. Naturally newspapers and journalists have found themselves in court defending their writing against defamation suits. On other occasions the judiciary itself might file defamation suits against the media. For example, Justice Hanjahanja’s case brought against a radio station, who made comments about Hanjahanja’s impartiality alleged by lawyers for the Forum for Democratic Change (FDC).

Perhaps with the exception of salary increases, overall the media has been quite
supportive of the judiciary. Accurate and fair media coverage is essential to the promotion of judicial legitimacy. Judges frequently express frustrations over inaccuracies in the coverage of cases – this reflects a lack of technical knowledge with regards to the workings of the legal system. The Ugandan media is the most sophisticated and the most critical of the three countries. This has worked both against and for the judiciary.

Civil society organizations have also pursued cases on behalf of the ‘people’ as a whole. The biggest obstacle they have faced in this regard (see Civil Liberties Commission (CILIC) cases and Political Action Committee (PAC) cases) is the issue of standing. Do these public interest bodies have standing to bring cases on behalf of the people of Malawi as a whole? Most recently PAC filed a case seeking the court to reinstate Section 64 into the constitution – the recall provision for MPs, which gives constituents the power to remove MP from parliament when they are not happy with their performance. In March of 2007 it was reported by the Nation newspaper that attorney Ralph Kasambara had accused Attorney General Jane Ansah and Chief State Advocate David Nyamirandu of trying to influence members of the PAC to withdraw the case.\textsuperscript{130} The record of the court with regards to these cases is mixed, but generally the courts have been quite narrow and conservative in their interpretation of \textit{locus standi}.

A similar story can be told in Tanzania. The vast majority of civil society actors in Tanzania are apolitical bodies concerned with development related issues. The small number of political NGO’s that do exist have been systematically suppressed by the government. This includes \textit{Hakielimu, Baraza wa wanawake}, and LEAT (Lawyers Environmental Action Team). In chapter 7 I discuss the barriers the women’s organization faced in just registering with the government. \textit{Hakielimu} (an organization focused on education – but demonstrating the political malfeasance in failing the

\textsuperscript{130} (Annus 2004)
education sector) is constantly being gagged by the government. It is LEAT, however, that has suffered the most. LEAT has investigated government and World Bank sponsored environmental and human rights issues in Tanzania. Their investigations have uncovered many sensitive issues beginning with small-scale miners facing eviction from Bulyanhulu. In 2002 the Tanzanian government arrested LEAT leadership – Tundu Lissu and Rugemeleza Nshala – on charges of sedition. The cases are still pending. The Legal and Human Rights Centre based in Dar es Salaam has been a vocal critic on matters related to the legal sector and took the lead on the recent Takrima case. In short, when it comes to matters of governance, democracy and human rights, the environment for civil society is hostile across all three cases. In turn, civil society actors have not been strong defenders of judicial independence and have failed to fully utilize the courts to further their policy goals.

Law Societies as Legitimating Actors The most important actors relative to the development of judicial power in Eastern and Southern Africa have been the law societies. A close examination of the differences (both historical and contemporary) across Malawi, Uganda and Tanzania reveals some important findings. To varying degrees, historically the Law Societies lacked independence and leadership. However, in all three countries there has been broad agreement that “bar associations were more likely to follow than to lead when it came to pressure for improvement in the laws, respect for rights, and administration of justice” (Widner 2001:316). The Tanganyikan Law Society was part of the state apparatus until the economic reforms of the late 1980s. Private practice was non-existent and the bar was one of the smallest in the region (Widner 2001:317). However, in the last five years, all three the Law Societies have expanded, improved their financial base, attracted strong and dynamic leadership, and

---

131 Widner (2001:317) notes that in 1993 there were no more than 179 practicing lawyers and of those 30 worked for the Tanzania Legal Corporation.
become an important critic and supporter of their respective judiciaries.\footnote{132}{It should be noted that within the East African community there is strong cooperation. The East African Law Society is an active watchdog body. Individual members often have greater courage speaking out against abuses in their neighbors country than they do their own.}

The Malawi Law Society (MLS) has become more of an active player in the Malawian legal and political scene in recent years. The MLS was established in 1965 under Section 25 of the Legal Education and Legal Practitioners Act.\footnote{133}{Cap.3:04 (the Act) of the Laws of Malawi} The Society is not technically an independent bar association (for example the head of the Malawi Law Society is the Attorney General). However, the MLS has started to establish a sense of independence and assert itself as a watchdog authority of the government, in addition to its’ role as a regulatory/disciplinary body within the legal profession. The objectives of MLS are to represent, protect and assist legal practitioners as regards conditions of practice, and to protect and assist the public on all matters related to the law. The MLS also serves a regulating function, disciplining members where necessary. Nevertheless, the disciplinary committee suffers from poor organizational infrastructure and funding. Moreover the committee does not have the power to sanction lawyers, but merely to put forward recommendations regarding the alleged infraction (see Kanyongolo 2006:97).

As of 2007, the society had 197 members.\footnote{134}{Malawi has a very small number of lawyers for the size of its population. Most lawyers are graduates of the University of Malawi, but Malawi doesn’t necessarily get to keep all these graduates. In 2005 the University graduated 215 law graduates, but only 175 lawyers were licensed in that same year (Munthali March 19th, 2003 2003). Kanyongolo suggests that this is due to death, people forgetting to renew their licenses, or some lawyers may have moved abroad.} This small number demonstrates the differences of scale between Malawi and Uganda, as in Uganda there are now around 1000 members in the Ugandan Law Society.

The Malawi Law Society has benefited from international support from the International Bar Association (funded by Open Society Initiative for Southern Africa). The IBA sent an officer to Blantyre to work on capacity building for the Law Society –
including launching the website, developing CLE programs, encouraging further training for the executive board. The MLS has also sought to file more test cases with the goal of developing Malawian jurisprudence in key procedural and substantive areas. These have ranged from a brief on judges salary increases, to Section 65, to the right to trial within a reasonable period of time (Section 42) to the constitutionality of the death penalty. Further, the MLS has increased its visibility through making public statements (often critical) on important issues - such as the recent arrest and release of 10 suspects in relation to treason charges, the draft Money Laundering and Proceeds of Serious Crime and Terrorism Bill (Kanyongolo 2006).

The Malawi Law Society (MLS) and the Civil Liberties Commission (CILIC) have filed cases related to judicial independence. In regards to the impeachment matter, CILIC successfully filed for an injunction against the legislature preventing them from debating the proposed impeachment motions. CILIC filed a case in 2003 seeking to stop the swearing in of four new judges until a public review of their appointments were made. The defendant in this case was the Judicial Service Commission.

In contrast to Malawi, the Ugandan Law Society (ULS) is strong and assertive. This is a function of the stronger economy and greater number of private practice lawyers. In fact, the Law Society has become a vocal mouthpiece of the judiciary in the last 3 years. Events in the High Court in November 2005 led the Ugandan Law Society to call a one-day strike and arrive outside the Courts in full legal regalia to protest what Justice Ogoola has coined “the rape of the temple of justice.” Similarly, the second time the PRA suspects were released on bail the ULS worked closely with the leadership of the judiciary to condemn the actions of the NRM regime.

The organization is not perfect and still suffers from organizational and

---

135 Author interview with IBA representative at Malawi Law Society, April 2007.
136 (Theu March 1st, 2007)
leadership problems. It is hard to get lawyers to give their time to the Society in an area of such as test litigation, because they will not be reimbursed for it. The Society has filed memorandum with the Judicial Commission of Inquiry and has released numerous public statements on their concerns about interference with the independence of the judiciary. Given the propensity of President Museveni to confront and attack the judiciary through inflammatory statements in the media, it has been important for the ULS to respond in the media, for historically, the judiciary has refrained from speaking out. A review of newspaper archives at the Centre for Basic Research in Kampala revealed that the ULS had consistently released condemnatory statements in the press each time Museveni publicly attacked the judiciary or showed blatant disregard to judicial decisions. Below is an example of the kind of statement issued by the ULS:

A strongly worded statement issued last week by the ULS takes issue with remarks made by the president last year that the industrial court supports worker’s demands for a pay rise without due regard to the employers ability to pay. The statement term the President’s remarks as "very unfortunate, amounting to intimidation and a direct interference by the executive in the independence of the judiciary, which is contrary to the provisions of the Uganda Constitution 1995" [...]The law society concluded by advising the president and all other arms of the government to desist from "arm-twisting" judicial officers into biased decisions calculated to give undue advantage to certain groups or classes of persons or organizations as against the others. 137

During my research in Uganda I found strong evidence that the ULS leadership is meeting and cooperating with the judiciary. Workshops organized by the ULS frequently engage the judiciary, and it appears that this is a forum where certain members of the judiciary feel free to speak their mind. It was reported in 2000, for example, that the Attorney General Bart Katureebe ordered Justice Twinomujuni not to present his paper - "Implications of the Amended Article 97 of the Constitution" - at a workshop organized by the Uganda Law Society. The paper further alleged that the Chief Justice was also

137 “Lawyers Irked by Presidents Words” Monitor, 15, January, 1996.
against the presentation of the paper. On January 29th, 2007 the Uganda Law Society met in Kampala to participate in a workshop on enhancing the role of lawyers and the media in promoting the rule of law in Uganda. Present at the workshop were Justice Kanyeihamba and Principal Judge Justice Ogoola. They both gave speeches on the importance of maintaining the rule of law in Uganda.

During the question and answer session a member of the Law Society stood up to express serious concerns about the executive reaction to the PRA prisoners. The questioner then went to ask why would civil society go out and protest, when inevitably that protest will turn into a suicide mission? Kanyeihamba responded by noting the current impasse between the judiciary and the executive. In other countries, he noted, this impasse could be resolved through the parliament. In Uganda however, parliament is not capable of policing the rule of law. Therefore, Ugandans must rely on civil society to engage in civil disobedience as a way to oversee the rule of law. Kanyeihamba went on to argue that there used to be a culture of obedience to the courts, and that the NRM believed in this in the beginning. He cited the example of the 2001 Referendum cases where the Prime Minister, Speaker of Parliament and Attorney General all showed up in court. At that time, the judiciary had the rule of law, and the executive obeyed judicial decisions. Justice Ogoola said that there was nothing the judiciary could do. Instead they, like the nation, had to reply to the people. The power of the judiciary should not be measured by its’ ability to enforce judgments. Justice Ogoola went on to state that, technically judges can use “contempt of court”, but if they put the Solicitor General in jail does this help? In other words, judges cannot put the entire executive in jail.

In Tanzania there is a weaker record of engagement by the Tanganyikan Law Society as a defender of the judiciary. As stated at the beginning of this section, judges wanted the Law Society to take on a more aggressive role, believing that they could play

---

an important role as spokesperson and defender of the judiciary. The words of a Court of Appeal Judge on the controversial Basic Rights and Duties Act of 1994 illustrate this:

The Tanzanian bar, law society, is not that strong. For instance, in human rights, after a couple of human rights cases had been handled. The government went to amend the constitution, whereby it said now human rights cases will be handled by 3 judges, this is the position, and then they will give time to whatever authority to make amendments. If the TLS was aggressive enough they would have come to challenge that.

An interview with a past President of the Tanganyika Law Society revealed why the Law Society was weak for so many years:

For a while we were a command economy, for three decades. Everything was state controlled. Private practice was in the hands of the Tanzania Legal Corporation, the government and that killed private practice. We had ten lawyers doing ‘private practice.’ They didn’t associate as a Bar association. The law demanded that they just met. For many years there was no President, no leadership. With the transition in the economy, private practice started to come back again.

But the dormancy stayed on for quite a while. The society really had died. Meanwhile other civil society groups became active and lawyers became active in those groups instead. We didn’t have money because subscriptions were low. The society was just one person, a secretary, really doing nothing.

*How were you able to turn the society back into a dynamic and relevant organization?*

In the two years before I took over we became active. We must have a strategic plan. Raise subscriptions. Be visible, be active and be seen. Not just be like a trade union. We want to play our role as lawyers. When I took over we already had increased subscriptions so we had a good financial base. We had a network with the law reform commission and human rights commission.

We published, started a news bulletin and weekly news flash. We refurbished our office. Now we have a good secretariat. Right now we are well plugged into various law reform programs. In mid-June we are hosting the SADC lawyers association.

We are members of the East Africa Law Society, we are doing rule of law and human rights work. We have the strategic litigation in the East Africa Court of Justice.
Are you filing strategic litigation at the national level?

TLS have encouraged strategic litigation, but not filed. The legalized bribery law – takrima case. A team of lawyers went there and challenged it. The government hasn’t appealed. In the Independent candidates for the President the TLS was indirectly involved.

Is there a dialogue between the TLS and judiciary?

There is a love-hate relationship. You respect them. Openly you participate in judges’ forum. There is mistrust and complaints. Judges delay delivery of justice. There is corruption here and there. But the society traditionally, we would raise it indirectly, organize meetings. During my time we established a mechanism of direct meetings. We raised our complaints with the Chief Justice. We never found it necessary to go public and criticize the judiciary. Some problems were solved, some remain. Fortunately now there is a smart partnership between the bar and the judiciary. We have open dialogue daily - our daily news flashes they are sent to the judiciary. We have networked well with the Ministry of Justice. We established good avenues for criticizing them. We are part of the same set up, whatever problems there are we are discussing internally. We are working on a common program for legal aid. We want the TLS to be the coordinator of good programmatic legal aid and advocacy. We have bought premises. Turn it into a Human Rights, Legal Aid and Advocacy Centre. Legal Aid clinics. Secretariat will also be housed there.

So far we haven’t found any reason to go public against the judiciary.

Are you monitoring performance of the Judiciary?

Yes – we have a representative on the case management committee. We have a desk manned by a person who is supposed to receive complaints from advocates on how judges are behaving. There are judges who can really be rough and shallow too. They write judgments that are very bad. We want to pick out judgments that are terribly bad, and to put them in the newsletter. That was written in bad English, beyond the ordinary level. There is an increase in bad judgments. Yesterday one of the judges gave a ruling in our favor. But you don’t even like it because it is very bad precedent.

It is only now we are beginning to come out. The TLS was dormant and passive. I used to joke. We have so many civil society groups doing advocacy work, but we should be ashamed. This belongs to us – we are the ‘advocates’. We should be the high priests of the rule of law and independent judiciary. The society has failed to tap the excellent resources we have in terms of individuals.
The TLS has reached a turning point. The changes are too recent to assess whether or not they will impact the evolution of judicial power in Tanzania. There are three important roles for the TLS to play. The first role being to speak out against any abrogation of judicial independence. The second role being to challenge the judiciary to become more active and assertive. The third, to bring important test cases to court in order to challenge many of the outdated statutes and laws.

To go back to the question of why bar associations are important to judicial behavior, I turn to the comments of an executive member of the East African Law Society:

Something else might partly explain judicial assertiveness. It is about the size of the Bar. In a sense it is the Bar that drives the judiciary. If you have bold lawyers that file bold cases you put the judiciary in a corner. If you have meek lawyers that don’t file any cases then even if the judiciary is very activist . . . the bar itself must reach a critical mass, when you are few you are quite vulnerable. I trace when Kenya really changed. It was around 1989 and 1990 when for the first time membership of the legal organization crossed the 1000 threshold. There is safety in numbers; a few bold people can get on with it. When you have small bars with only one hundred or two hundred lawyers, there is precious little you can do. Even in Uganda you can see you are close to the thousand-mark. That gives a bit of impact, even the law society from its own subscriptions; with income it can do different things. Tanzania has one of the most conservative bars in sub-Saharan Africa. It’s partly from the socialist history. In socialism professions like law are frowned upon people study agriculture, engineering and so on. In Zanzibar, Amani Abeid Karume, the first thing he did after the 1964 revolution was to abolish the private bar association. There was no private bar association, it started again in the 1990s.

Dar es Salaam has the smallest bar, and the meekest bar. Kenya now has about 6,000, Uganda hit 1,000 last year. Tanzania is now hitting it . . . Without a strong professional sector you can’t have a vibrant economy. Entrepreneurs need lawyers. In Kenya, British colonial enterprise they would go to a region and settle [. . .] Industry far advanced in Kenya. Under ujamaa professional development was stopped.

*Are there differences in the procedures for admittance to the bar?*
In Kenya and Uganda we went the British way, you go to post-graduate law school. You get a practice diploma; once you graduate admission to the bar is pretty automatic. There is an objective test, if you make the mark you are in. If you fail you re-sit the unit. The age of admission kept dropping. Average age of admission is 23 in Kenya and Uganda. The younger they are the more courageous you are you will file cases against the government.

In Tanzania you get a law degree, do pupillage, then you go and intern or into government. Then after 10 years you go and do your bar exam. The Council of Legal Education is actually the examining board. Even after you have gathered enough guts and you apply to go before the Council, it is chaired by the Chief Justice, twice a year. You go there and you find a group of old men and they fire questions against you. You don’t pass, you just satisfy them. Up until five years ago in Tanzania the average age of admittance was 32. It is such a harrowing experience, it kills your spirit. You don’t find Tanzanian lawyers being innovative enough to go to court. If you don’t go to government you go to a private firm. By the time you have finally been admitted to the bar you are so desperate to make money you are not going to ruffle any feathers. In Kenya and Uganda it was after 6 to 8 years they started to slowly admit cases instead of throwing them out on legal technicalities.

Here in this country there are no more than 10 real activist lawyers in full time practice. Just how much can they do? Since all the real business is government business once you are identified as an activist lawyer you aren’t going to make any money. In these other countries there is so much business you can actually get some clients because they like your political stance.

One controversial statement and you get a call. They say, “Hey, what’s up? Why are you fighting us nowadays? Are you sure you want to take us on?” The idea of regional cooperation tends to equalize those things a bit more. I get a lot of pressure from my colleagues in Dar because they don’t want to make them.

Regional legal bodies are important in this respect. At the recent meeting with Museveni there were 350 Ugandan lawyers in the room. Museveni lost his temper... he was like a raving lunatic. The Ugandan lawyers in the room were sitting straight and stiff. The Kenyan and Tanzanian lawyers were laughing at him. There was nothing he could do. For the Kenyan and Tanzanian lawyers, come Sunday I’m going to jump in the plane and go home. Part of the magic of these things, you can get together regionally and make a statement it has more weight. In addition, it insulates you.

In 2005 we held our AGM in Dar a couple of days after the Black Mamba’s had attacked the court. We formulated a memorandum and delivered it to the Ugandan High Commissioner in Dar. Our Chief Guest was Chief Justice Barnabas Samatta. The man made some pretty strong statements
on the role of the lawyer in a democracy. It was as if he was saying it is up to you to do something about it.

Tanzanian lawyers would say something about Kenya or Uganda but never about their own country.

C. Legitimacy, Corruption and Internal Institutional Control

There are strong hierarchical patterns of control within the judiciary of each country. However, beneath this veneer of control and congeniality there are varying degrees of animosity between the levels of courts and individuals. In Uganda some of these disputes have been publicized in the media. The veracity of these reports cannot be confirmed as this is a topic that no judge was willing to address in interviews – at least not in a candid manner.

Allegations of corruption in the judiciary in Uganda are more prominent than in Tanzania and Malawi. On December 19th, 2004 daily newspapers in Kampala reported that a judge had been named in a bribery scandal (one the papers revealed the judges’ name, the other did not). The allegations were brought by the litigant in a case over which the judge was presiding. As Tusiime (2006:22) reports, “The judge was pushed into a corner and forced to petition the President for protection against harassment by the complainants. However, it must be observed that the debacle could have been avoided if there was a clear procedure for presenting complaints. Such procedure must be provided by Parliament.”

In August 2006 there were calls from some corners of the establishment for a probe into alleged misconduct and corruption within the judiciary. Outspoken Supreme Court Justice Kanyeihamba was quoted as saying the judiciary itself needs to act on persistent claims by the media and the public that some judges were either corrupt or handed down dubious judgments. In response, the Chief Justice noted that “the

independence of the judiciary must start . . . by appointing people of integrity, who will uphold and exemplify the independence of the judiciary.” Although there are strong allegations of corruption in the judiciary, unlike the lower levels, in the higher levels it is hard to uncover.

In 2003 Justice Ogoola revealed an attempted bribery in the courtroom offering an insight into the form corruption could take. At his mother-in-law’s funeral, the justice had been offered an envelope with cash for ‘soda.’. The individual that offered this cash condolence happened to be Mr. Muhammad Majyambere, Djibouti’s Consular General to Uganda. What occurred afterward was reported in the newspaper, as the judge publicly returned the envelope back to Majyambere in the courtroom:

Majyambere seemed extremely uneasy as the judge made the stunning revelations. He stood and raised his hands several times - as if to say something. If the judge saw Majyambere’s hands, he ignored him and went on to tell the whole story uninterrupted. Justice Ogoola said that there was a smaller envelope inside the big one with the words 'contribution for a soda' written on top. “I could not accept the small envelope, because I thought it was against my conscience and code of conduct. I accepted the condolence message. I called you [Majyambere] here to tell you that I did not accept the envelope,” Ogoola said - looking straight into the embarrassed businessman’s eyes.

The judge was suspicious that the offer could be linked to the three cases he has been handling against Majyambere. The judge has now pulled out of all three cases to avoid any risk of bias in his judgements. The cases against Majyambere were filed by Trust Bank and involve about Shs 200 million.140

More recently, a judge was removed from the bench under allegations of corruption. In September 2006 President Museveni, on recommendation of the Judicial Service Commission, directed the judiciary to immediately stop High Court Judge Richard Wengi from hearing any cases until a tribunal investigating the judge on ‘various

offences related to improper conduct' had finished its' work. Back in 2004 Judge Wengi was publicly accused of demanding a US$500,000 bribe after issuing an award of more than US$8.2 million to UK registered Transroad Ltd. Judge Wengi fought these accusations on two fronts by appealing directly to President Museveni and simultaneously appealing the process in the Constitutional Court. The Judicial Service Commission issued a reported recommending his removal from the bench, citing “gross misconduct, corruption, forgery of court documents, impropriety and bias.” High Court Judge Musoke had declared the case moot because Wengi had already submitted a resignation letter at the time of his dismissal. As of December 30th, 2007 Justice Wengi had appealed to the Court of Appeal.

Malawi The performance of judicial officers is evaluated by their superiors in the hierarchy. The mechanisms for such evaluation are not made public. Similarly, it is unclear how promotions are determined or how the Chief Justice allocates cases. The Constitution does not state the basis on which the President may promote judicial officers from the magistracy to the High Court and from the High Court to the Supreme Court. There are also no publicly available criteria for the elevation of a judicial officer to the position of Chief Justice. In an interview with a senior member of the Malawian Supreme Court, a certain level of dissatisfaction with the internal affairs of the court was expressed:

Chief Justice will be leaving in June. I think the Chief Justice thing is a bit tricky, because it is the President that appoints them and then it goes to the parliament. When it came to the current one, he was lucky, it was unanimous. It is a bit tricky. He can choose anybody that he wants. We don’t seem to have some rules. At that level it might be politicized. I think we have a problem in the judiciary we don’t even have a position of the

143 “Judge Wengi takes his case to Court of Appeal”
Deputy [Chief Justice]. It is not in the Constitution, it has always been like that. The Constitution just reflected the situation on the ground in 1994. I think what was happening it was something we could have corrected within the judiciary. When we were in meetings, no one was frank enough to raise the issue. The Chief Justice didn’t want to have someone recognized as Deputy. In the Constitution the most senior judge will take over functions of the Chief Justice when he is away.

Because if that was done, it is probably that the next Chief Justice would be the Deputy. If he is overlooked, then people should know why. Or least . . . Chimasula, is ‘Judge in Charge’ of the High Court – we have just started. There is some talk, even at the constitutional conference. If that goes through the succession problem will go away, sometimes

Okay we do have precedence among ourselves, Judge Mteya, is second, I am xxx. Then it shouldn’t be difficult.

This internally defined precedence was broken this year with the appointment of Lovemore Munlo. Clearly the judiciary has a strong vertical hierarchical structure. This began under the colonial system and has remained intact since then. The Chief Justice has an important disciplinary role to play in this dynamic, besides his role of allocating judges to cases. In a series of antagonistic correspondence between the Malawi Law Society and the Chief Justice in 1956 (in which the Law Society is making complaints about the speed with which cases are dispensed and the general conduct of the judges of the High Court), the Chief Justice tersely reminded the Law Society secretary of his position of absolute power:

I can hardly refuse to comply with the request made in the final paragraph of the letter from the Honorary Secretary of the Nyasaland Law Society at Folio 138, but as a preamble I might say I take the strongest exception to receiving from such source suggestion as to how I am to run my Registry. In so far as I am aware, for all such purposes I am head of the Department, July 8th, 1956.144

An executive member of the Malawi Law Society suggested that the internal disciplining structure of the judiciary is important to its efficient running:

144 Chief Justice of Malawi (Chapalata March 31st, 2004).
In terms of administration, I would say we have gone backwards – in the past two years – I think we have gone backwards. Things are not really moving. I don’t want to point fingers at anyone. I believe there is no discipline amongst the judicial officers. Maybe I’ll come out openly now, I don’t think the Chief Justice has much authority among the judicial officers.

The other Chief Justice’s . . . the former Banda was able to control because they were afraid of him as a person. Towards the very end, when he knew he was going, he started to compromise. The new Chief Justice is good, but he is not as tough, he is soft spoken, such that he . . . you hear some Judges they’ll say, the Chief Justice . . . nothing is going to happen to me, I can’t get fired. I believe the issue is not whether you are getting dismissed or not, it is about whether you are doing your job – accountability to someone who is above. My view is that the general discipline has disintegrated. Even last week when we went to see the Chief Justice, we said that we think there is a lack of discipline amongst the judiciary now. Of course, they will point fingers at members of the Bar – we accept yes, we contribute. But to a large extent discipline has been lacking. In my view it has to do with whether one is doing right or not. As far as our participation with the judiciary is concerned, we think we have gone backwards. There is no proper discipline. even if you appear before the judges sometimes it takes ages for the decisions. Except for the sensitive political cases, where they make quick judgments. The normal ones, it might take two years before you get a judgment. That is deplorable in my view. Maybe I’ll be the only one to come out and attack the judiciary in this way. We tend to spare the judiciary.145

It is interesting that the interviewee spoke in favorable terms about the former Chief Justice Richard Banda. Banda was viewed by many to be heavily partial towards the government (see Vondoepp (2005:294). Presumably, this ‘most preferred’ status with the President and his government gave him considerable clout within the judiciary itself. If he was immune from criticism from the President, then who was he answerable to?

After retirement Chief Justice Banda dabbled in private practice. Representing clients in cases before his former colleagues! As one newspaper rhetorically asked, “Would he be prepared to address the judges as “your honor” in the courtroom?” In 2007, Banda was appointed Chief Justice of Swaziland.

It is difficult to get a true evaluation of the internal culture of the judiciary. Given the small pool of qualified individuals to staff the judiciary, it appears that as long as one doesn’t antagonize the government or one’s peers, then the journey up through the judicial hierarchy is pretty much guaranteed. Perhaps with the exception of the top job of Chief Justice. In August 2007 the President did choose to exercise his prerogative to select a Chief Justice from outside of the present judicial structure. Lovemore Munlo was, until April of 2007, Registrar of the United Nations’ Special Court for Sierra Leone. At only 57 years of age he was younger than the other Justices of the Supreme Court. Munlo, who has also served as Registrar of the UN Criminal Tribunal for Rwanda, rose through the ranks in the Malawian Ministry of Justice before Banda appointed him Attorney General in the early 1990s.

**IV - Formal External Autonomy**

Formal external autonomy measures the degree to which the judiciary is formally insulated from interference from the executive and legislature. I will examine the degree of formal autonomy in each judiciary through three key measures: A. Formal Judicial Powers; B. Budget Control and, C. Judicial Appointments Process. Before doing so I believe it is important to give a general overview of the Constitutions of each country, the preeminent values of each constitution, and the degree to which the separation of powers is entrenched.

The fundamental principles of the Constitution in Malawi are contained in Sec. 12, they are as follows:

i) All legal and political authority of the State derives from the people of Malawi and shall be exercised in accordance with this Constitution solely to serve and protect their interests.
ii) all persons responsible for the exercise of powers of State do so on trust and shall only exercise such power to the extent of their lawful authority and in accordance with their responsibilities to the people of Malawi;

iii) the authority to exercise power of State is conditional upon the sustained trust of the people of Malawi and that trust can only be maintained through open, accountable and transparent Government and informed democratic choice

In essence, Malawi is lying out its' vision of a new democratic, liberal state and society.

This is one of the fundamental values of the Constitution: that the individual is supreme and all members of Malawian society should be protected, including minorities. Chapter IV of the constitution lists a Bill of Rights\textsuperscript{146}. These human rights were enshrined in the Bill of Rights thus deeming them sovereign, and removing them from possible interference from the will of the majority. The judiciary has the responsibility of interpreting, protecting and enforcing the Constitution, and all laws in accordance with the Constitution “in an independent and impartial manner with regard only to relevant facts and prescriptions of law” (Article 9). Perhaps most important is Article 11(2)(c) which expressly states that the Constitution be interpreted through the values of an open and democratic society, and the applicable norms of ‘public international law and comparable foreign case law’.

The Office of Ombudsman, the Human Rights Commission, the Law Commission, and the National Compensation Tribunal all provided forum through which the people of Malawi could hold the government accountable. One issue that is not adequately addressed in the Malawian Constitution is that of ethnic/regional divisions. The question of whether a federal constitution would have been more appropriate for a country with strong regional divisions has been raised as an issue since

\textsuperscript{146} Not everyone in Malawi is happy about the constitutional emphasis on human rights and the individual. The Constitution’s guarantee of human rights has been blamed for encouraging a culture of defiance of responsibility and neglect of social responsibility (Chirwa 2002)
1994. The question of whether or not the regional issue should have been addressed in the constitution is a controversial one. Under the provisions of the constitution all individuals are equal. However, in reality, regional inequalities pervade daily life in Malawi. If the Senate had been established, this would have gone some way addressing this deficiency. Chirwa, et al. (2002) point out that the appointment of Second Vice President Chakufwa Chihana went some way towards diffusing regional tensions.\footnote{The appointed Second-vice President Chakufwa Chihana hailed from the AFORD party, dominant in the north of the country. The UDF is of course dominant in the South; hence the symbolic bridging of regions.}

As far as the horizontal distribution of power was concerned, the main issue was the prevention of a power monopoly in the executive. The new system envisioned by the framers was one where “the Presidency performs the job of executing the laws granted to it by the legislature, and where the Judiciary is free to uphold, apply, and interpret the laws of the land without executive or legislative interference” (Banda 1998:323). Despite the wishes of the minority party, AFORD (Alliance for Democracy), a single legislative body was formed called the National Assembly.\footnote{The National Assembly originally had 177 seats; this was later expanded to 193 seats. The most prominent concern was to prevent the President from operating outside of the rule of law. A second chamber of parliament (the Senate) was, according to the constitution, supposed to be established two months after the local elections. However, parliament decided not to proceed with this, ostensibly on the grounds of cost. This transformed the Malawian system from a bicameral to a unicameral legislature.}

At over 100 pages, Uganda’s Constitution is by far the longest and most comprehensive. As Oloka-Onyango (1995:165) writes, “it is intended to cover virtually every conceivable issue and there lies both its strength and weakness as an instrument designed to establish the framework for the future exercise and control of political power in Uganda.” There are progressive provisions that create the possibility of an emerging liberal, democratic order. However, all these provisions, including the recognition of women’s rights, socioeconomic rights, and a Human Rights Commission,\footnote{Powers of the Commission are as follows:} were...
overshadowed by the continuation of strong executive powers, and of course the Movement system of one-party democracy. As in the United States, the President is Head of State, Head of Government, and Commander in Chief. What limitations there are on the power of the President – in light of a recent constitutional amendment to allow Museveni to run for a third term – it seems, irrelevant, for they can be altered at any time.

The preamble to the Ugandan Constitution sets out several important objectives and directives, including national unity and stability, gender balance, education objectives, and cultural objectives. Unfortunately, the Constitution does not explicitly guide as to how these goals are going to be realized. Uganda is speaking to past episodes, when the Constitution was arbitrarily amended to suit whomever was in power at the time, in its’ extensive section on the ‘Supremacy of the Constitution’ (Sec. 2 (1)). In this expansive section, the Constitution is deemed supreme, and further:

Sec. 2
(3) This Constitution shall not lose its force and effect even where its observance is interrupted by a government established by the force of arms; and in any case, as soon as the people recover their liberty, its observance shall be re-established and all persons who have taken part in any rebellion or other activities which resulted in the interruption of the observance, shall be tried in accordance with this Constitution and other laws consistent with it.
(4) All citizens of Uganda shall have the right and duty at all times-
(a) to defend this Constitution, and in particular, to resist any person or group of persons seeking to overthrow the established constitutional order; and
(b) to do all in their power to restore this Constitution after

53. (1) In the performance of its functions, the Commission shall have the powers of a court-including issuing summons, questioning any person or to require any person to disclose any information within his or her knowledge relevant to any investigation by the Commission. In addition, they can commit persons for contempt of its orders and may if satisfied that there has been an infringement of a human right or freedom. Order- (a) the release of a detained or restricted person; (b) payment of compensation; or (c) any other legal remedy or redress. Individuals do have the right to appeal.
(c) a matter relating to the exercise to the prerogative of mercy
Tanzania is still stuck with an amended version of the 1977 Constitution despite the recommendations of the Nyalali report. The 1977 Constitution of Tanzania establishes its’ founding principles within the theme of *ujamma*. The goals being the establishment of a “society fraternity on the principles of freedom and justice,” and that these values are best furthered in a system that respects the horizontal separation of powers, under a government that promotes both socialism and democracy (Preamble). Article 3(1) also presents the legacy of *ujamaa* by stipulating that Tanzania is still a democratic, socialist state. Although the use of the term ‘socialism’ does not have any practical relevance for modern day Tanzania, it is left within the Constitution for historic purposes (Makaramba 1997:10).

A second major issue in the Tanzanian Constitution is that of the union. There are two constitutions in the union: the United Republic of Tanzania and the Zanzibar Constitution. There are several legal and technical issues with the articles of the union. But to date, it remains intact, and the courts have not addressed this issue. The 1977 Constitution can be amended by a two-thirds vote of the Parliament (including the Bill of Rights). Furthermore, as I have already addressed, the Bill of Rights is limited through the retention of legislation such as the 1962 Preventative Detention Act\textsuperscript{150} and the 1977 Newspapers Act.\textsuperscript{151}

\textbf{A. Formal Judicial Powers}

The power of the judiciary in Uganda is “derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people” (Sec. 126)

\textsuperscript{150} An act allowing the President to detain individuals without trial.

\textsuperscript{151} An act allowing Ministers the right to ban a newspaper if, in his or her opinion, it is in the public interest.
(1). This provision is unusual, but generally speaking, has been positive. The judiciary has made use of this provision in defending itself, and in deciding certain cases. Article 126 2 (e)\textsuperscript{152} has had a profound affect on judicial power in Uganda. There is a strong tendency for the Ugandan government to resort to technical and procedural issues when defending themselves in a court of law. If these are not serious, particularly in constitutional cases, then the petitioner will usually be heard.\textsuperscript{153} However, the Ugandan judiciary was slow to embrace this provision in its literal sense. The evolution of jurisprudence related to Article 128 2(e) is described in more detail in Chapter 9.

The Tanzanian provisions on judicial power are weak. The provisions give the government the power to set up parallel jurisdictions: “If this Constitution or any other law does not expressly provide that any specified matter shall first be heard by a court specified for that purpose, then the High Court shall have jurisdiction to hear every matter of such type” (Sec. 108(2)). Nevertheless, in the Economic Crimes Court in the early 1980s, the power of the judiciary was completely usurped. Moreover, the power of the High Court of Tanzania is circumscribed through the limitations upon, and enforcement and preservation of, basic rights, freedoms, and duties. Act No. 15 of 1984 s.6 and Act No.34 of 1994 s.6. Section 31 (5) which allows the government to retroactively comply with judicial recommendations, reads as follows:

\begin{quote}
(5) Where in any proceedings it is alleged that any law enacted or any action taken by the Government or any other authority abrogates or abridges any of the basic rights, freedoms and duties set out in Articles 12 to 29 of this Constitution, and the High Court is satisfied that the law or action concerned, to the extent that it conflicts with this Constitution, is void, or is inconsistent with this Constitution, then the High Court, if it deems fit, or if the circumstances or public interest so requires, instead of declaring that such law or action is void, shall have
\end{quote}

\textsuperscript{152} Article 126 stipulates that substantive justice should be administered without undue regard to technicalities.

\textsuperscript{153} As I will discuss in Chapter 9, the 1995 Ugandan Constitution did away with \textit{locus standi} requirements. This has enabled the judiciary to hear and rule on far more cases than their counterparts in Malawi and Tanzania.
power to decide to afford the Government or other authority concerned an opportunity to rectify the defect found in the law or action concerned within such a period and in such manner as the High Court shall determine, and such law or action shall be deemed to be valid until such time the defect is rectified or the period determined by the High Court lapses, whichever is the earlier (emphasis mine)

I shall discuss the implications of this provision in-depth in Chapter 7. It has received critical attention from activists and scholars alike, because the provision curtails and undermines power of judicial review in Tanzania by diminishing and narrowing the separation of powers.

In Malawi judicial power is stated as follows: “The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue is within its competence” (Sec 103 (2)). This is similar to the South African Constitution of 1996 which simply states that the “judicial authority of the Republic is vested in the courts.” Article 9 of the Malawian Constitution states that, “The judiciary shall have the responsibility of interpreting, protecting and enforcing this Constitution and all laws in accordance with this Constitution in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law.” This is far more explicit than Article 4 of the Tanzanian Constitution which imbues the judiciary with “judicial powers.”

Judicial independence is rendered meaningless as a concept if the possibility of transferring power in other bodies exists. To this end, Tanzania is the most problematic of the three constitutions. Perhaps because of Malawi’s history with the parallel traditional courts under President Banda, they have added the following provision just to be safe: “There shall be no courts established of superior or concurrent jurisdiction with the Supreme Court of Appeal or High Court” (Sec 103 (3)). The Malawian court does have concrete power of judicial review, and the courts are the supreme arbiter in all legal
disputes and political disputes (Section 10(1)). However, this power is narrowed by Malawian Civil Procedure. Section 10 (I) (Suits by or Against Government or Public Officers Act) prohibits the courts from granting an injunction against the government. Section 10(2) prohibits courts from granting any person who sues an individual public servant a remedy that would not have been granted had the government been sued directly. Lastly, an individual wishing to sue the government must give the government two months notice (Kanyongolo 2006:55). The Courts have both upheld and ignored this statute - upheld in *Mhango v. Attorney General* (1998)\(^ {154}\) and ignored in *Administrator of Estate of Hastings Kamuzu Banda v. Attorney General* (1997)\(^ {155}\) (cited in Kanyongolo 2006:56).

**B. Budget Control**

The Malawian judiciary has very little control over its’ budget. The budget for the courts comes out of the consolidated fund. The Registrar submits an annual budget, but rarely are the needs of that budget met. There is no constitutional provision on budgetary support for the Malawian judiciary. In contrast, the Ugandan constitution explicitly lays out the following in Section 128 on judicial independence:

\[(6)\] The Judiciary shall be self-accounting and may deal directly with the Ministry responsible for finance in relation to its finances.

\[(7)\] The salary, allowances, privileges and retirement benefits and other conditions of service of a judicial officer or other person exercising judicial power, shall not be varied to his or her disadvantage.

\(^{154}\) Civil Cause No. 338 of 1998 (unreported)

\(^{155}\) Civil Cause No. 1839 (A) of 1997 (unreported)
As I demonstrate later in this chapter these ‘judicial independence’ provisions have not provided any real budget control for the Ugandan judiciary. Similarly, the Tanzanian judiciary is paid out of the consolidated funds, and although it can request a budget, it is rarely met. The Tanzanian judiciary faced severe budget shortages in the late 1990’s, but then was rewarded with funding for expanded appointments in 2006. In an interview with a senior High Court Judge I asked if the government was strategically withholding funding as a method of control. The judge responded that, “last year the President appointed 20 judges, prior to that it had been 9 [appointees] maximum. [In addition] we were allowed to employ 85 resident magistrates and 100 primary court magistrates. Then you cannot say that the government has disregarded the judiciary because of their judgments.” However, a very different viewpoint was expressed by a former President of the Tanganyikan Law Society:

The judiciary is subdued. The independence is now being misinterpreted, let’s be passive instead of independent. They ask for funds and are not given funds. Budgetary controls can be very effective. You underpay them they take bribery. “Why should I write a good judgment when I’m not paid?” Tanzanian judges still take pen and paper and scribble everything down from morning to evening. You look at the workload of a Tanzanian Judge it takes a miracle to expect them to perform well. It is a combination of indirect political pressure. You put them in a situation where they have to look up to you. Recently they have got better benefits. You can imagine the collective psychology of the judiciary. There are those that are openly political appointees. When you take them there you know they will be rewarded better. In that situation it is not easy to see judges coming out and standing firm against executive wrongs. Most of them came from the executive side of life – the executive cabinet, the secretariat, state attorneys, and parliamentary office. Collectively you have a judiciary that potentially, progressively will feel indebted to the executive.

C. Judicial Appointments

156 Author interview with High Court Judge, Dar es Salaam Tanzania, June 2007.

157 Author interview with former Tanganyikan Law Society President, June 2007.
The principles of judicial independence have been enshrined on multiple occasions by international bodies.\textsuperscript{158} I do not have specific evidence on the degree to which these documents were consulted in the drafting of the Uganda and Malawian Constitution, but I do know that international academics were brought in to review drafts of constitutions (see for example University of Virginia Law Schools’ Howard, Bates, et al. (1995) \textit{Commentary on the Constitution of Malawi}). Some of the issues I will highlight in this section on formal judicial appointment provisions include the strong executive influence on judicial appointments (particularly in Tanzania); an unclear role for the legislature in terms of ratifying those appointments (Malawi and Uganda); weak protection for judges from removal (Malawi and Uganda); and the ease by which terms of appointment can be extended beyond retirement in both Tanzania and Malawi.

In addition to a statement on the powers and jurisdiction of the judiciary, it is essential to state the protection of the independence of the judiciary. As Madhuku (2002:233) notes, “in legal terms it allows redress to be sought in the courts in the event of a law or action undermining the independence of the judiciary. In political terms, it enables members of the public to criticize any tendencies by the executive to interfere with the work of the judiciary.”

\textit{Judicial Independence} In Malawi the Constitution states that “All courts and all persons presiding over those courts shall exercise their functions, powers and duties independent of the influence and direction of any other person or authority” (Sec 103 (1)). In Uganda, Section 128 starts out by simply stating that: 128. (1) In the exercise of judicial power, the courts shall be independent and shall not be subject to the control or

direction of person or authority. It then goes on to list the provisions that protect that independence. However, in the 1977 Tanzanian Constitution there is no provision on the protection of judicial independence.

**Judicial Appointments** In Uganda judges of the High Court and justices of the Court of Appeal and Supreme Court are “appointed by the President acting on the advice of the Judicial Service Commission and with the approval of Parliament” (Sec 42 (1)). Thus judicial appointments are crucially overseen by an institution that is directly accountable to the public. Moreover, “acting on the advice” of the Judicial Service Committee is quite a strong provision, and is preferable to the Tanzanian version that only required the President to “consult with” the Judicial Service Commission. As one Tanzanian observer told me, it is not unknown in Tanzania for the President to select a judge that is not on the short-list provided by the Judicial Service Commission. The list is not made public anyway, thus denoting a significant lack of transparency.

In Malawi, “The Chief Justice shall be appointed by the President and confirmed by the National Assembly by a majority of two thirds of the members present and voting. All other judges shall be appointed by the President on the recommendation of the Judicial Service Commission” (Sec 111 (1) (2)). This is an improvement on the Ugandan clause because it specifies the method through which judges shall be approved (a two-

---

159 (2) No person or authority shall interfere with the courts or judicial officers in accord the courts such assistance as may be required to ensure the effectiveness of the judicial courts.
(4) A person exercising power shall not be liable to any action or suit for any act or omission by that person in the exercise of judicial power.
(5) The administrative expenses of the Judiciary including all salaries, allowances, gratuities and pensions payable to a in respect of persons serving in the Judiciary, shall be charged to the Consolidated Fund.
(6) The Judiciary shall be self-accounting and may deal directly with the Ministry responsible for finance in relation to its finances.
(7) The salary, allowances, privileges and retirement benefits and other conditions of service of a judicial officer or other person exercising judicial power, shall not be varied to his or her disadvantage.
(8) The office of the Chief Justice, Deputy Chief Justice, Principal Judge, a Justice of the Supreme Court, a Justice of Appeal or a Judge of the High Court shall not be abolished when there is a substantive holder of that office.

thirds majority); although the two thirds majority doesn’t place the appointment process beyond the reach of partisan politics. Ultimately, it does leave one wondering why it is only the Chief Justice that is subject to confirmation by the National Assembly. As Howard, et al. (1995:184) remark about Malawi’s Chapter IV on the Judicature:

Separation of powers part is most striking. The executive branch has authority to exert strong checks, not only on the judiciary itself, but also on the legislature’s regulation of the judiciary. At several points in this chapter, the influence of the legislature on judicial proceedings is minimized in favor of an executive branch that reaches to control substantive aspects of the rule of the judicature. Evidence of the legislature’s constructed influence may be noted in the fact that Parliament is entitled to confirm only the appointment of the Chief Justice of the Supreme Court of Appeal, thereby permitting the other judges of this highest court to be appointed exclusively by the President, without review by the legislature. An example of the executive’s increasingly broad reach is the President’s ability, with the consent of the person involved, to reassign persons holding the office of Judge to any other office for as long as the President sees fit.

As I discuss later the President has reassigned judges to other offices, most recently Judge Jane Ansah to the post of Attorney General. Historically, the Attorney-General in Malawi has been a highly politicized and it is difficult to believe that Judge Ansah could come to the bench with her impartiality and neutrality in tact.

Under the 1977 Constitution of the Republic of Tanzania, the Chief Justice is appointed directly by the President, and other judges are appointed by the President in consultation with the Judicial Service Commission\textsuperscript{161} and with the Chief Justice.\textsuperscript{162} The Chief Justice has no security of tenure, and he or she can be removed from office at the President’s pleasure but will remain a judge. As Yongolo (2000:229) posits, “[t]his is not a healthy position if democracy is to be broadened in the country because the rationale

\textsuperscript{161} In the appointment of High Court Judges

\textsuperscript{162} In the appointment of Court of Appeal Judges
behind it is to weaken the autonomy of the judiciary as a method of “checks” employed by the executive.”

_**Judicial Service Commission**_ The concept of the Judicial Service Commission was established in the independence constitutions, where it was believed a more democratic and open method of appointment was required than had been employed in the past. Colonial methods of judicial appointment were through executive fiat: the Governor (Hatchard, et al. 2004:152). Given the power of the Judicial Service Commission with regards to both the appointment and removal of judges, it becomes essential to the preservation of judicial independence that the commission itself is independent. In all three states the Judicial Service Commission is responsible for overseeing appointments; however, the make-up of each Commission is drastically different from the other.

Perhaps most notable is Uganda, which is the only state in eastern and southern Africa where the Chief Justice is not chair of the Commission.\(^{163}\) In Uganda, the make-up of the commission is far more extensive and more detailed in its’ layout. The Chairperson must be any justice of the Supreme Court, except the Chief Justice, Deputy Chief Justice or Principal Judge. Besides the Chairperson, the Ugandan Judicial Service Commission will be comprised of one member of the court that shall be nominated by the Public Service Commission. Two more members will be advocates of not less than fifteen years’ standing, and nominated by the Uganda Law Society. A further member must be another Judge of the Supreme Court nominated by the President, in consultation with the Judges of the Supreme Court, the Justices of Appeal, and Judges of

---

\(^{163}\) Hatchard, et al. (2004:152) suggest that this is because in the past there were concerns that previous incumbent has apparently improperly influenced judicial appointments led to the Constitution specifically excluding the Chief Justice.
the High Court. The final two members are of the public, who shall not be lawyers, and are once again nominated by the President\textsuperscript{164} The Ugandan Commission also specifies that, “A person is not qualified to be appointed a member of the Judicial Service Commission unless the person is of high moral character and proven integrity” (Sec 146 (5)). Unlike Malawi, there are limits on the appointment to terms of four years.

Under the 1977 Constitution of the Republic of Tanzania, the Tanzanian Judicial Commission shall be made up on the following members: Chief Justice (who shall be chairman); the Attorney-General; a Justice of the Court of Appeal, who shall be appointed by the President after consultation with the Chief Justice; the Principal Judge of the High Court; and two members who shall be appointed by the President (excluding MP’s) (Sec. 112).

What is striking about the make-up of Judicial Service Commissions in all three countries, is that they are dominated by Presidential appointments. In Uganda’s case, only two out of the nine appointments are not direct or indirect presidential appointees. The these two advocates are the ones appointed by the Uganda Law Society. This is in stark contrast to the South African Constitution where membership is allowed for up to 25 members, including opposition politicians, a university law lecturer, etc. (see Sec. 178 of South Africa Constitution).

Under the \textit{Latimer House Guidelines}\textsuperscript{165} it was advised that a majority of the membership of Judicial Service Commissions be comprised of senior judges. However, Hatchard, et al. (2004) claim that this standpoint is outdated, and this provision has been dropped from the guidelines. It seems that the Judicial Service Commissions that are larger in size are able to encompass a broader range of membership, and thus be more likely to protect their independence. Hatchard, et al. (2004:152) claim that it is

\textsuperscript{164} The Attorney General is an \textit{ex officio} member of the Commission.

\textsuperscript{165} The drafters of these guidelines were primarily senior Commonwealth judicial figures.
preferable “to leave the selection to the judges themselves or to specify particular office-holders *ex officio* to serve as members.”

**IV - Informal External Autonomy**

**A. Politicization and Manipulation of Judicial Appointment Processes**

I experienced difficulty in collecting adequate data on the length of appointments. Record keeping was sporadic and incomplete, or I was not allowed to access to the records. The limited data I gathered from Malawi indicated that President Mutharika had only made three new appointments. The data also indicated that historically there had been a low-turnover of judges. As I document in Chapter 8 there have been some cases of ‘forced’ retirement in Uganda; most recently with Justice Richard Wengi. But again, the data indicated that judges were staying on the bench through the end of their formal tenure. The biggest change to come to the Tanzanian judiciary has been the appointment of 25 new judges in 2005. Otherwise there has been very little turnover of personnel.

It has been reported that in Uganda, as in Malawi, the Judicial Service Commission had not been properly constituted for long periods during 2005 and 2006 (IBA 2007:42). Only 33 of the High Court judges are currently at their posts, and 5 of those have been seconded to other appointments. (IBA 2007:32). All three Constitutions explicitly list a minimum number of judges to sit on the High Courts and Courts of Appeal. This is another institutional weakness. Despite the urgent need with regards to filling top-level appointments in the Uganda judiciary, including two Supreme Court Justices, newspapers have reported that names have been put forward but faced Presidential veto. The Judicature Amendment Bill 2006 allowed the Ugandan government to increase the number of judges at the Supreme Court from seven to eleven
and in the Court of Appeal form eight to twelve (IBA 2007:33). Yet some of the positions remain unfilled.

In their 2007 investigative report on judicial independence in Uganda the IBA found that several informants believed that the appointment process had been heavily politicized in Uganda. The Uganda Judicial Officers Association (UJOA) in October 2006 claimed that:

[T]here was a trend of rewarding politicians: especially those who have lost elections’, while career judicial officers were being overlooked. According to the UJOA, 98 percent of judges’ appointments since 1997 have been political. The Chairperson of the UJOA further stated that because of the judges’ political affiliations, the public could sometimes predict the judgment of each judge on a panel before the actual ruling was made.

One of the most direct accusations to be made in recent history came from former Principal Judge Justice Ntabgoba:

‘Since the courts do not have enough funds, it makes the Judiciary susceptible to demands from some quarters.’ The judge said the culture of appointing judges on tribal, gender and religious lines also undermined the Judiciary.166

A review of press coverage on the judiciary in Uganda indicates that the process has been more transparent than in Tanzania and Malawi. Several of the recent high-level appointees have a long political history and were thus perceived to be Museveni cronies. One newspaper editor expressed the following:

The on-going furor about the likely appointment of Joseph Mulenga and George Kanyeihamba to Supreme Court is uncalled for . . . with democratisation and transparency one could not imagine how either Mulenga or Kanyeihamba will with impunity flout the regulations of the judiciary merely to satisfy their political egos.167

166 “Judges Decry State Meddling,” The Monitor, September 4th, 2001

Concerns now lie with the new crop of judges that will be appointed to the courts. Commenting after the Ssemogerere case, Museveni argued that, “these judges shall also be shaken. Now that the Movement stayed longer in power, it has now got its cadres go through schools and some have mastered; we shall shake these lawyers.” One article from the Monitor discusses the appointments and performance of present Supreme Court Justices. It is unusual for the African press to have examined voting patterns of the Supreme Court and to adopt an American style analysis of those patterns:

. . . The Supreme Court appears to have benefited from a rare crop of statesmen who have given it much needed independence in articulating complex political and constitutional issues. Joseph Mulenga and George Kanyeihamba are respected jurists from the opposite sides of the political divide. Justice Tsekokoo is a former MP while Justice Karokora a career judicial officer was highly respected during his long stay at the High Court. Justice Oder is the most senior and is strong on criminal justice and human rights issues, while Tsekooko and the departing Chief Justice took lead in civil appeals. Wambuzi and Kikonyogo have been key swing votes at the Supreme Court. Mulenga usually votes with Oder, while Karokora and Tsekooko are a solid block. The last swing vote remains Kanyeihamba. Since that article was written Justice Wambuzi has retired, Justice Oder has passed away and Justice Kikonyogo was moved to the head the Constitutional Court as Deputy Chief Justice. The appointment process for Kikonyogo was fraught with controversy. Members of the judiciary itself actively campaigned against her appointment.

**Malawi** After the 1995 Constitution there was good cause to expand the number of judges appointed to the higher levels of the Malawian judiciary, because the jurisdiction previously circumscribed by the parallel traditional court system was now reinstated. Thus the courts would automatically be dealing with a vastly expanded docket. Below is data collected from the High Court Registry at Blantyre:

---


169 “One Area where President Museveni Doesn’t Abuse his Power” Monitor, December 2, 2000
Despite the gaps in data, a general trend can be observed in the increase of cases – particularly in the last five years. Of specific interest to this study is the substantial increase in cases of judicial review since 2003. A High Court judge suggested that this was, in part because the Courts struck down very few applications for judicial review, and that the courts were hearing almost everything. In essence, the judge was accusing the court of being too activist:

From my view there are two ways of look at judicial review. There are proper judicial reviews and there are others that are borderline cases. But the approach the court has taken so far, it strikes down very few applications. When filing a motion to move for judicial review, if you have both parties available to hear it, it will go forward. Very few are thrown out. So many things that have been happening - on the face of it - they don’t look proper. (Author interview, High Court Judge, April 2007)
Another indicator of the state of the High Court is the number and type of appeals going to the Supreme Court. Again the same High Court judge suggested that there was reason to be concerned:

When your appellate system goes into overdrive you know something is wrong with your High Court. So that is what has happened with the executive decisions. There have been so many errors, maladministration, almost everything can be challenged. So the High Court, instead of throwing it out, they will hear them and sort it out. You give that chance to have it dismissed and so on; at least there was some justice in the case. It goes back to the selective way of doing things; some people have been dismissed [from the courts] for what others have been promoted for. So I think that is why we are going into overdrive. We seem to be having history repeating itself too fast in such cases. That is my view; it is just like seeking a second opinion all the time. (Author interview, High Court Judge, April 2007)

Has the appellate system gone into overdrive? In the 1970s an average of 4.3 civil appeals were filed, in the 1980s an average of 18.6 civil appeals were filed, in the 1990s an average of 32.9 civil appeals were filed, and in the 2000’s an average of 37.6 civil appeals were filed. The following data is taken from the Supreme Court Registry:\(^{172}\)

\(^{172}\) The Supreme Court register is handwritten in a large, dusty book. The original Civil Case book (started in 1966) still has not been filled. Criminal data was only available from 1984 onwards.
### Table 5.2 Supreme Court Case Data 1966-2006

<table>
<thead>
<tr>
<th>Year</th>
<th>Civil</th>
<th>Criminal</th>
<th>Year</th>
<th>Civil</th>
<th>Criminal</th>
</tr>
</thead>
<tbody>
<tr>
<td>1966</td>
<td>1</td>
<td></td>
<td>1986</td>
<td>14</td>
<td>41</td>
</tr>
<tr>
<td>1967</td>
<td>1</td>
<td></td>
<td>1987</td>
<td>32</td>
<td>36</td>
</tr>
<tr>
<td>1968</td>
<td>4</td>
<td></td>
<td>1988</td>
<td>31</td>
<td>24</td>
</tr>
<tr>
<td>1969</td>
<td>0</td>
<td></td>
<td>1989</td>
<td>21</td>
<td>18</td>
</tr>
<tr>
<td>1970</td>
<td>1</td>
<td></td>
<td>1990</td>
<td>17</td>
<td>20</td>
</tr>
<tr>
<td>1971</td>
<td>1</td>
<td></td>
<td>1991</td>
<td>29</td>
<td>18</td>
</tr>
<tr>
<td>1972</td>
<td>1</td>
<td></td>
<td>1992</td>
<td>19</td>
<td>1</td>
</tr>
<tr>
<td>1973</td>
<td>4</td>
<td></td>
<td>1993</td>
<td>15</td>
<td>2</td>
</tr>
<tr>
<td>1974</td>
<td>3</td>
<td></td>
<td>1994</td>
<td>45</td>
<td>7</td>
</tr>
<tr>
<td>1975</td>
<td>4</td>
<td></td>
<td>1995</td>
<td>49</td>
<td>21</td>
</tr>
<tr>
<td>1976</td>
<td>3</td>
<td></td>
<td>1996</td>
<td>39</td>
<td>8</td>
</tr>
<tr>
<td>1977</td>
<td>7</td>
<td></td>
<td>1997</td>
<td>45</td>
<td>12</td>
</tr>
<tr>
<td>1978</td>
<td>10</td>
<td></td>
<td>1998</td>
<td>42</td>
<td>11</td>
</tr>
<tr>
<td>1979</td>
<td>9</td>
<td></td>
<td>1999</td>
<td>29</td>
<td>21</td>
</tr>
<tr>
<td>1980</td>
<td>19</td>
<td></td>
<td>2000</td>
<td>50</td>
<td>16</td>
</tr>
<tr>
<td>1981</td>
<td>16</td>
<td></td>
<td>2001</td>
<td>43</td>
<td>71</td>
</tr>
<tr>
<td>1982</td>
<td>14</td>
<td></td>
<td>2002</td>
<td>34</td>
<td>51</td>
</tr>
<tr>
<td>1983</td>
<td>14</td>
<td></td>
<td>2003</td>
<td>38</td>
<td>39</td>
</tr>
<tr>
<td>1984</td>
<td>15</td>
<td>27</td>
<td>2004</td>
<td>19</td>
<td>17</td>
</tr>
<tr>
<td>1985</td>
<td>10</td>
<td>41</td>
<td>2005</td>
<td>33</td>
<td>35</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>2006</td>
<td>46</td>
<td>35</td>
</tr>
</tbody>
</table>

Source: Supreme Court of Appeal Register, Blantyre Malawi.

In their 2002 report on indicators for monitoring good governance in Malawi, the Centre for Social Research found the following upon review of their expert panel:

### Table 5.3 Recruitment and Promotion of Judges

<table>
<thead>
<tr>
<th>Judges are</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Always appointed and promoted on their own merits and qualifications</td>
<td>18.5%</td>
</tr>
<tr>
<td>Usually appointed and promoted on their own merits and qualifications</td>
<td>30.9%</td>
</tr>
<tr>
<td>Sometimes appointed and promoted on their own merits and qualifications</td>
<td>30.9%</td>
</tr>
<tr>
<td>Rarely appointed and promoted on their own merits and qualifications</td>
<td>8.6%</td>
</tr>
<tr>
<td>Appointed and promoted without merit principles</td>
<td>7.4%</td>
</tr>
</tbody>
</table>

Source: Centre for Social Research, University of Malawi. (2002) Report on Indicators
for Monitoring Good Governance in Malawi

The first major shift in the makeup of the judiciary under the new Malawian Constitution was the expansion in size of the judiciary. As of December 21st, 2006 there were 28 members of the High Courts and Supreme Court of Appeal. In 2002 there were 22 members of the High Court and Supreme Court of Appeal. Going back to 1992 there were only 9 judges in the High Court and Supreme Court of Appeal. Of those 9 judges from 1992 appointed by Banda, 6 are still active members of judiciary sitting on the Supreme Court of Appeal – Chief Justice Unyolo, Justice Tambala, Justice Msosa, Justice Kailaile, Justice Mtegha, and Justice Mtambo.

As described in the previous chapter, the President appoints judges in ‘consultation’ with the Judicial Service Commission (with the exception of the Chief Justice who is subject to a two-thirds approval vote by the National Assembly). The Judicial Service Commission is appointed by the President. It is interesting that after coming to office, President Muluzi did not attempt to wipe out all of Banda’s appointments. Instead Muluzi filled the judiciary with his appointments through a rapid expansion program. The continued longevity of judges appointed during the Banda era points to the lack of severe bias within the judiciary. Peter VonDoepp’s data (2005:291) on the pro-government versus anti-government decisions of judges appointed before, during, and after 1994, indicate there is not a strong pattern of bias in judicial decision-making in any of the three cohorts of appointees.

173 Author data collected from Human Resources Office for Judiciary in Blantyre. Since 2002 the Human Resources Office has kept quite detailed data on the judges sitting in office – this includes their home region, dates of service and present court appointment. However, the Director informed me that records prior to 2002 don’t seem to exist.
174 Data gathered from published Malawi Law Reports.
175 Annus and Tavits (2004) conclude that working experience in the previous regime did not significantly alter judicial behavior. Given the difficulties of finding qualified judicial personnel in transitioning states, one has to consider the practical utility of establishing a brand new court under a new regime. “Our study indicates that in order to establish a qualitatively different judicial system under a new regime, it is not necessary to dismiss most of the old judges. Replacing the existing judiciary into appears much less relevant than, for example, investing in the education and training of judges as well as in the resources of courts.” (IBA 2002)
Although it is perceived that the process of appointments is more or less fair, most Malawians agree that there is a lack of transparency. There have been complaints that the President does not always consult with the Judicial Service Commission in the making of appointments. However, there is no way of confirming this. An interview with an executive member of the Malawi Law Society revealed that the Law Society is not being properly included in the appointment process:

We met with the Chief Justice last week . . . We raised a number of issues. We said according to the law, there is a representative of the Malawi Law Society on the Judicial Service Commission. There is one, but he has never reported to the Law Society and we don’t know what he does there, we are not represented, because he was appointed by the President some time ago. Maybe next time we need to send our own representation. Because we want to be checking what is happening, we want to closely monitor how the judges are being appointed now. We don’t want to compromise on standards, it is in our interests to see that proper people are put on the bench and we want to be involved. (Author interview MLS executive member, April 2007)

Regional Bias in Judicial Appointments Unlike South Africa’s Constitution which codifies that considerations of race and gender be included in the judicial appointments process, it is not a requirement that the Malawian Judicial Service Commission consider demographic diversity (Kanyongolo 2000:31). As previously outlined, the most salient socioeconomic division in Malawian politics is that of region, and indeed this does spill over to the courts as well. It is fascinating to ponder whether or not bias based on region is a reality in judicial decision making or whether it is just perception. At a very basic level, Malawi, like many sub-Saharan African countries, also has a problem recruiting and keeping members of the judiciary. Indeed, this is perhaps a factor that limits the impact of non-legal interference in the process. The judiciary has a problem luring lawyers away from private practice, because it results in a significant pay drop. Kanyongolo (2006) notes that as salaries improved slightly in 2001 members of the

\[\text{176 See (Mchulu February 28th, 2003)}\]
\[\text{177 Section 174(2)}\]
private sector were attracted into the judiciary.\textsuperscript{178} In fact, this is a complaint of the current Chief Justice of the United States Supreme Court, who has been a forceful voice for increasing judge’s salaries.

Even more so than Uganda and Tanzania, the Malawian professional pool of potential appointees is quite small. As outlined in Chapter 4, the development of the mainstream legal sector during the Banda era was exceedingly limited, and this has meant the post-1994 period has been about playing catch-up. Because the number of law graduates and practicing lawyers is already small, coupled with the requirement that lawyers have ten years experience before being appointed to the bench, this is significantly limiting to Malawian government in terms of options selecting appointees.

It appears that every effort has been made in Malawi to balance appointments to the judiciary on the basis of region. The outcome of this numeric balance means that judges from the sparsely populated North are over-represented in the judiciary. The following data demonstrates this effect as there are currently 9 judges from the North, 10 judges from the Central Region, and 8 judges from the South. The current make-up of the Supreme Court is: 2 South, 2 Central and 3 North.

\textsuperscript{178} In March 2001 11 candidates short-listed by the Judicial Service Commission, 6 came from the private sector (Kanyongolo 2006:86).
Table 5.4 Judicial Appointments according to Region, December 31st 2006

<table>
<thead>
<tr>
<th>Title of Post</th>
<th>Name</th>
<th>Date of Birth</th>
<th>Date of Birth</th>
<th>Date of 1st Appoint</th>
<th>Date of Appoint to Present Grade</th>
<th>Home Address</th>
<th>Region</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chief Justice</td>
<td>Unyolo</td>
<td>04.04.43</td>
<td>31.05.79</td>
<td>26.10.94</td>
<td>26.10.94</td>
<td>Dedza</td>
<td>C</td>
</tr>
<tr>
<td>Supreme Court J</td>
<td>A.K. Tembo</td>
<td>15.05.50</td>
<td>01.07.76</td>
<td>26.10.94</td>
<td>26.10.94</td>
<td>Kasungu</td>
<td>C</td>
</tr>
<tr>
<td>High Court J</td>
<td>G. Chimasula Phiri</td>
<td>16.09.58</td>
<td>01.04.82</td>
<td>18.06.94</td>
<td>18.06.94</td>
<td>Lilongwe</td>
<td>C</td>
</tr>
<tr>
<td>High Court J</td>
<td>R.R. Mzikamanda</td>
<td>30.11.58</td>
<td>04.07.83</td>
<td>15.11.97</td>
<td>15.11.97</td>
<td>Lilongwe</td>
<td>C</td>
</tr>
<tr>
<td>High Court J</td>
<td>J.M. Ansah (F)</td>
<td>11.10.55</td>
<td>25.07.78</td>
<td>15.11.97</td>
<td>15.11.97</td>
<td>Lilongwe</td>
<td>C</td>
</tr>
<tr>
<td>High Court J</td>
<td>R.S.A. Chiudza Banda</td>
<td>11.11.41</td>
<td></td>
<td>23.04.96</td>
<td>23.04.96</td>
<td>Lilongwe</td>
<td>C</td>
</tr>
<tr>
<td>High Court J</td>
<td>F.E.M. Kapanda</td>
<td>24.06.62</td>
<td>01.04.97</td>
<td>23.08.00</td>
<td>23.08.00</td>
<td>Salima</td>
<td>C</td>
</tr>
<tr>
<td>High Court J</td>
<td>L.P. Chikopa</td>
<td>09.08.65</td>
<td>01.04.97</td>
<td>23.08.00</td>
<td>23.08.00</td>
<td>Balaka</td>
<td>C</td>
</tr>
<tr>
<td>Supreme Court J</td>
<td>I.J. Mtambo</td>
<td>04.08.46</td>
<td>15.08.74</td>
<td>23.03.92</td>
<td>23.03.92</td>
<td>Chitipa</td>
<td>N</td>
</tr>
<tr>
<td>Supreme Court J</td>
<td>H.E. Mtegha</td>
<td>17.07.42</td>
<td>14.04.70</td>
<td>26.10.94</td>
<td>26.10.94</td>
<td>Mzimba</td>
<td>N</td>
</tr>
<tr>
<td>Supreme Court J</td>
<td>J. Kalaile</td>
<td>12.07.43</td>
<td>21.07.70</td>
<td>26.10.95</td>
<td>26.10.95</td>
<td>Likoma</td>
<td>N</td>
</tr>
<tr>
<td>Supreme Court J</td>
<td>M.P. Mkandawire</td>
<td>14.10.42</td>
<td>01.01.62</td>
<td>11.11.89</td>
<td>11.11.89</td>
<td>Mzuzu</td>
<td>N</td>
</tr>
<tr>
<td>Supreme Court J</td>
<td>D.F. Mwaungulu</td>
<td>11.06.56</td>
<td>15.08.74</td>
<td>26.10.94</td>
<td>26.10.94</td>
<td>Karonga</td>
<td>N</td>
</tr>
<tr>
<td>Supreme Court J</td>
<td>A.K. Nyirenda</td>
<td>26.12.56</td>
<td>04.04.80</td>
<td>18.06.94</td>
<td>18.06.94</td>
<td>Nkhatabaya</td>
<td>N</td>
</tr>
<tr>
<td>Supreme Court J</td>
<td>E.B. Twea</td>
<td>09.04.56</td>
<td>31.07.78</td>
<td>15.11.97</td>
<td>15.11.97</td>
<td>Mzimba</td>
<td>N</td>
</tr>
<tr>
<td>Supreme Court J</td>
<td>A.C. Chipeta</td>
<td>26.07.56</td>
<td>23.08.00</td>
<td>23.08.00</td>
<td>23.08.00</td>
<td>Mzimba</td>
<td>N</td>
</tr>
<tr>
<td>Supreme Court J</td>
<td>M.C.C. Mkandawire</td>
<td>01.01.61</td>
<td>11.10.86</td>
<td>10.12.01</td>
<td>10.12.01</td>
<td>Mzimba</td>
<td>N</td>
</tr>
<tr>
<td>Supreme Court J</td>
<td>M.L. Kamwambe</td>
<td>12.11.54</td>
<td>01.09.79</td>
<td>01.09.04</td>
<td>01.09.04</td>
<td>Karonga</td>
<td>N</td>
</tr>
<tr>
<td>Supreme Court J</td>
<td>A.S.E. Msosha (F)</td>
<td>08.02.50</td>
<td>05.08.75</td>
<td>15.11.97</td>
<td>15.11.97</td>
<td>Thyolo</td>
<td>S</td>
</tr>
<tr>
<td>Supreme Court J</td>
<td>H.S.B. Potani</td>
<td>30.07.64</td>
<td>03.07.89</td>
<td>24.03.03</td>
<td>24.03.03</td>
<td>Zomba</td>
<td>S</td>
</tr>
<tr>
<td>Supreme Court J</td>
<td>W.M. Hanjahanja</td>
<td>20.07.37</td>
<td>20.07.37</td>
<td>24.10.96</td>
<td>24.10.96</td>
<td>Zomba</td>
<td>S</td>
</tr>
<tr>
<td>Supreme Court J</td>
<td>R.R. Chinangwa</td>
<td>11.07.52</td>
<td>02.12.79</td>
<td>15.11.97</td>
<td>15.11.97</td>
<td>Mulanje</td>
<td>S</td>
</tr>
<tr>
<td>Supreme Court J</td>
<td>D.S.L. Kumange</td>
<td>23.05.39</td>
<td>18.06.94</td>
<td>16.10.94</td>
<td>16.10.94</td>
<td>Zomba</td>
<td>S</td>
</tr>
<tr>
<td>Supreme Court J</td>
<td>J. Katsala</td>
<td>14.11.64</td>
<td>28.04.03</td>
<td>28.04.03</td>
<td>28.04.03</td>
<td>Chikwawa</td>
<td>S</td>
</tr>
<tr>
<td>Supreme Court J</td>
<td>E. Chombo (F)</td>
<td>23.12.53</td>
<td>24.03.03</td>
<td>24.03.03</td>
<td>24.03.03</td>
<td>Blantyre</td>
<td>S</td>
</tr>
<tr>
<td>Supreme Court J</td>
<td>C.I. Kamanga</td>
<td>16.10.68</td>
<td>15.09.92</td>
<td>21.06.03</td>
<td>21.06.03</td>
<td>Blantyre</td>
<td>S</td>
</tr>
<tr>
<td>Supreme Court J</td>
<td>A. Manyungwa</td>
<td>14.04.67</td>
<td>28.08.93</td>
<td>24.12.03</td>
<td>24.12.03</td>
<td>Thyolo</td>
<td>S</td>
</tr>
<tr>
<td>Supreme Court J</td>
<td>D.G. Tambala</td>
<td>20.07.46</td>
<td>01.08.72</td>
<td>15.11.97</td>
<td>15.11.97</td>
<td>Chiradzulu</td>
<td>S</td>
</tr>
</tbody>
</table>

Data was collected by the author from the Human Resources office for judiciary in Blantyre, April 2007. F indicates female. There are current three female judges in Malawi. However, only two are sitting on the bench. Justice Jane Ansah became Attorney General in 2006.
The appointment process attempted to address perceptions of regional bias. However, these perceptions do still exist. Kanyongolo (2006) argues that for Malawians there is an “irresistible temptation” to rationalize particular judgments with reference to the judges’ regional identity. This has often been the case in the Malawian media. In an interview with an executive member of the Malawi Law Society I was told that the process of judicial appointments was incredibly politicized – largely attributed to the issue of region. Nonetheless, the interviewee also expressed some hope that things were changing for the better, and that regional divisions were gradually eroding with new generations.

Is the issue of region still prevalent in the judicial appointments process?

I come from the north. I might be constrained to talk about that, but I will still say it! If you look at the older generation of lawyers, the majority are from the north that is the reality on the ground. If you look at middle aged lawyers, the majority are from the north as well. The younger generation is combined. When you talk about appointments you talk about the middle age or older group somehow the people from the north (the majority) would qualify. But we know that in the past regime the president would bypass the names recommended him. There was a lot of politics involved in the appointment of judges. It all had to do with whether you sing to his song or not. I know a judge, who openly said at a Law Society meeting (at that time he was a Law Society member), that he was a paid up member of the political party in power. The same year he was appointed a judge. The appointment was very questionable. I think a group of those appointed had those traits. Unfortunately, the people from the north at that time were not singing the government tune; they were more for the opposition. The mere fact that you are from that region you are perceived as being pro-opposition. Others were being left on those grounds, but we hope that trend is soon changing. I think with the new regime, it has its own weaknesses, but somehow it has managed to get some people who have the credentials required. I am not very keen to talk about this issue, but that is the reality. But I’m saying things are changing, changing for the better.

Recently the executive appointed new judges to the bench without review by the Judicial Service Committee. The Judicial Service Commission also found that some members of
the judiciary expressed strong concern that “some judges are perceived by the public to be pro or anti the ruling of the UDF party.” On February 19th, 2003 President Muluzi approved appointments of two High Court Judges - Isaac Mtambo and Atanazio Tembo - as judges of the Supreme Court of Appeal. They filled vacancies left by Unyolo, who became the new Chief Justice, and Michael Mtegha. Shortly after this announcement the Civil Liberties Committee (CILIC) filed an application for an injunction to halt the swearing in of the new judges until their appointments were reviewed in a transparent way by the Judicial Services Commission. CILIC stated that:

One of the applicants will swear in an affidavit in which he is saying that he was told by a member of the Judicial Service Commission that he would not be appointed because he comes from the Northern region . . . The advertisement said there were five positions to be filled. Only four people have been appointed. Now, are they saying the fifth position cannot be filled because the remaining applicants are Northerners . . . At least in the past the Law Society was consulted, but not in the instant case. This is a blatant lack of transparency.

However, not all individuals give credence to the regionalism argument. One senior member of the judiciary argued that the emphasis on region is perhaps misplaced:

On balance, it is there. Except that probably even the perception, the smallest region in the north, fortunately they are highly educated; it is easy to find a good number of them to fill the judiciary. In the end, proportionally they are having a larger share. I remember the other appointments to the judiciary, previously, one or two gentleman from the north complained. It was their conduct. One of them . . . now he is being overlooked even in other areas. I don’t think there is a deliberate policy. In the judicial service commission, the judge who is there is from the North, Judge Nyirenda . . .

The Open Society Initiative for Southern Africa (OSISA) (2005:290) held meetings in relation to their research assessment on the rule of law in Malawi. At that meeting, in which Judges of the High Court, the Attorney General, and the President of the Malawi Law Society were in attendance, it was agreed that regional composition of the judiciary

---

180 (Munthali March 20th, 2003)

181 (Banda March 3rd, 2006)
is inconsequential to the functioning of the judiciary. However, Kanyongolo argues that further survey research needs to be done to assess the scope and breadth of public perceptions of the judiciary.

On the one hand, you have actual numeric parity in judges sitting in the High Court and Supreme Court on the basis of region, and on the other hand, you have perceptions by both the public and insiders that the appointments process is both political and biased. In the absence of a complete database of judgments it is difficult to assess the merit of these claims of regional bias. However, this will be examined in-depth later on through the analysis of cases. Ultimately, the care taken to ensure that each region is equally represented appears to suggest that region is a salient issue in Malawian judicial appointments.

Interviews in Uganda and Tanzania revealed that gender, region and tribe are considerations in the judicial appointment process – more so in Uganda than Tanzania, which does not have a small number of strong regional identities. The process appears less politicized than in Malawi. I was unable to gather accurate data on appointments in Uganda and Tanzania to ascertain whether there are clear patterns of regionalism in appointments.

B. Manipulation of Salaries

Salaries Members of the current Ugandan judiciary are some of the best paid civil servants not only within Uganda, but within the region in general. Members of the judiciary had to struggle to get to this point and still struggle today. In 1994 the pro-government New Vision newspaper commented on the following:

It was heartwarming over the weekend to see President Museveni and the High Court judges on TV chatting in a very relaxed atmosphere. One cannot help to recall that the judges just secured their pay-off the other day. They are probably the only public servants, besides URA and UIA
staff, who do not have to steal to survive. . .

Unfortunately, just six months later the New Vision reports that, “judges of the High Court and the Supreme Court have not been paid for the last three months.” However, a recent victory for the Ugandan judiciary was the decision rendered by the Constitutional Court that found the imposition of income tax on salaries of judicial officers to be inconsistent with the constitution (*Wilson and Others v. Attorney General* (2004)).

In Malawi the judiciary has been involved in lengthy salary dispute with the government. Appendix C lays out a detailed timeline of salary disputes between the judiciary and the government. Judges should not have to negotiate salaries directly with the government. This is a direct threat to judicial independence. Most recently, the Malawi Law Society intervened on behalf of the judges filing a case against the government on the basis of the government’s failure to implement salary increases. Another significant salary/benefits related dispute was the brief January 2005 judges strike over the government’s failure to provide new official vehicles. Unfortunately, while most legal experts and civil society activists recognize the importance of a sufficiently well-paid judiciary to safeguard their independence, the public are not very supportive of the judiciary’s demands for better salary and benefits. When a Supreme Court Justice asked about the level of support from the media noted:

The only time I found [the media] very unhelpful. Was when we wanted salary increases, they were against us. I have a feeling that they were just

---


183 Judges Miss Salaries February 16, 1995 New Vision.

184 Constitutional Petition No. 5 of 2002 (unreported)

185 Unfortunately the High Court case file only contained a rough draft of the judgment. This draft did not indicate the case name, number or the name of the Judge hearing the case.

186 Author interviews with judges and journalists, April 2007.
expressing the view of the public. The public thought we were making unnecessary demands. Malawians are jealous people by nature, and the press . . . on that one . . . I can assure you, they were unhappy and unsupportive. They don’t think we deserved more than we are getting. Maybe the public has not been educated about the rights of the judiciary, its value in terms of remuneration in terms of perks, etc. There is a tendency to say, “Why should a judicial officer receive more than a doctor and a teacher?” . . . the bottom line is we become unpopular when we demand something else. (Author interview, Supreme Court Justice, April 2007)

The perception that the judiciary is “negotiating” their salary and benefits is institutionally damaging for the judiciary. As a High Court judge stated in the recent judicial salary dispute case, “Negotiations involve compromises. . . Questions will always arise as to what the judiciary gave or took in order to get any suggested improvements to their Terms and Conditions of Service approved.” The judge concluded that deciding judicial salaries and benefits in the National Assembly was more in-line with established principles of judicial independence. One way in which the judges defend themselves is through citing regional and international standards of judicial pay and benefits.187 It is a double-edged sword for the judiciary. It is important that they are paid sufficiently, to eliminate the possibility of bribes and corruption, but constant struggles with the government over pay (without broad public support) can significantly decrease institutional legitimacy. Retirement benefits in Malawi have historically been weak, thus leading retired judges to go into private practice.

In Tanzania the judiciary has historically suffered some of the lowest salaries in the region.188 One of the weakest areas was the retirement benefits. However, the judiciary recently scored a victory with the passage of the Judges Remuneration and

187 An interview with a senior judge in Malawi revealed that salary matters were discussed at Commonwealth judges meetings. The judge noted that, “in other countries, when a judge retires he gets his salary so he is not forced to come back and practice. In Zambia, they take 80% of salary of serving judges. We asked for that and the MPs refused, laughed it off, and said that they couldn’t give us that one. Now, you talk to anyone about that. Judges no ‘ahhh, why should you be treated like that.’ But just across the borders they are doing it.”

188 Author interview Law Professor, Dar es Salaam, Tanzania May 2007.
Terminal Benefits and Termination Act of 2007; this complemented and clarified the passage of improvement previously made in the Public Service Retirement Benefits Act of 1999. This was hard fought by the Tanganyikan Judges Association and is a significant improvement on past retirement packages. Past retirement packages were left to the discretion of the relevant officer at the Treasury. As Chris Maina Peter (2007a:257) comments, “one is not sure what a holder of one of these offices could decide when confronted by a suit against the government a few months before retirement.” Tanzanian judges today retire on 80 percent of their existing salary.

C. Manipulation of General Budget Support

Leadership in the courts cite lack of funding as one of the most serious obstacles to the effective running of the judiciary. Justice Ogoola, Principal Judge in Uganda, has gone as far as to declare that the lack of financial independence:

[W]hittles down the independence of the judiciary as an institution. The financial position of the Judiciary had reduced it to a position akin to that of a beggar going cup in hand to the Executive and the Legislative arms of the State in order to be able to perform its constitutional duty.189

As is typical across the region, the Ugandan government spends less than 1 percent of its annual budget on the judiciary. The government, with strong donor support, spends money on infrastructure and salaries, but resources are still seriously lacking. The Magistrates suffer the most and it is no surprise that the lower levels of the judiciary are the ones most likely to succumb to corrupt practices. Donor support for the upper-levels of the judiciary tends to focus on the separation of powers and protecting judicial independence, whereas reforms targeted at the lower levels of the judiciary tend to focus

---

on “access to justice” issues. I argue that access to justice is equally important across all levels of the court system.

DANIDA has focused significant resources on the Ugandan judiciary. DANIDA funding of infrastructure development, training and education has had mixed results. An executive officer at DANIDA explained with frustration the difficulties they had encountered. For example, even the attempt to create an electronic database was problematic. DANIDA provided the computers, but many of the High Courts outside of Kampala frequently suffer from severe power cuts and surges. The power surges would kill a computer in seconds. Secondly, training administrative staff to properly use the computers and institute case file tracking and organization mechanisms has met with very little success.

All three countries suffer from serious backlogs of cases, but it is certainly most acute in Uganda. The backlog of cases continues to grow by about 8% a year. In recent years the number of High Court circuits has been increased from seven to twelve, yet resident Judges were only employed at 9 of the 12 circuits. In addition there has been an increase in specialized divisions, with the addition of Land and Family divisions to the existing Civil, Commercial and Criminal divisions (Ogoola 2006). Data for 2004 demonstrates how serious the situation is with regards to disposal of cases at the High Court level:

190 The World Bank agreed to assist the judiciary in Uganda by restocking its’ libraries. The Ministry of Justice received US $1 million from the World Bank for consultancy services to reform laws impeding private sector development. Will overhaul laws, such as bankruptcy, sale of goods, etc. make Uganda more attractive for private investors?
Table 5.4 Total number of Civil Suits

<table>
<thead>
<tr>
<th>Category</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brought Forward</td>
<td>4600</td>
</tr>
<tr>
<td>Filed</td>
<td>2364</td>
</tr>
<tr>
<td>Disposed of</td>
<td>1386</td>
</tr>
<tr>
<td>Pending</td>
<td>5578</td>
</tr>
<tr>
<td>Total Number of Cases</td>
<td>6964</td>
</tr>
</tbody>
</table>


Table 5.4 Total number of Civil Suits

<table>
<thead>
<tr>
<th>Category</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brought Forward</td>
<td>66%</td>
</tr>
<tr>
<td>Filed</td>
<td>34%</td>
</tr>
<tr>
<td>Pending</td>
<td>80%</td>
</tr>
<tr>
<td>Disposed of</td>
<td>20%</td>
</tr>
<tr>
<td>% Disposal Rate for One Year Cases</td>
<td>59%</td>
</tr>
<tr>
<td>% Disposal Rate for Total No. of Cases</td>
<td>20%</td>
</tr>
<tr>
<td>% Backlog Clearance Rate</td>
<td>-21%</td>
</tr>
</tbody>
</table>


As indicated in the second table, the expected backlog clearance rate is negative, and this of course means that the backlog will continue to grow rather than diminish. In the words of the report – the backlog will never be cleared. As of 2007 the judiciary reported to parliament that there were a total of 84,379 cases pending (of these 39,622 were
pending before the Chief Magistrates’ Courts). These statistics are cited because they demonstrate that the only way to change the current course of the courts is to perform major structural changes. The courts allude to a number of reasons for the problems around the expeditious disposal of cases. The biggest problem, and the most obvious, is poor funding:

Courts are not sufficiently financed. As a result service cannot be promptly affected, witnesses cannot be summoned, and criminal sessions cannot be held frequently. Civil sessions are not held at all, while judges are unable to return to stations to dispose of part heard cases. From the beginning of the Financial Year 2005/2006 there were drastic cuts in the Judiciary’s budget. As a result session funds became inadequate to support both civil and criminal sessions in the country. A number of sessions earlier planned, had to be indefinitely postponed; while others have had to be terminated before the expected period; and cases referred to the next convenient session. Needless to state, this has reduced the output and frustrated all stakeholders within the system (Ogoola 2006:12).

Cutting judicial budgets is another form of attacking and undermining the judiciary. Perhaps it would have been a more prudent strategy for the NRM regime to increase the budget in the all-important electoral year. The events of November 2005 pushed the judiciary into the spotlight for both domestic and international actors. In September 2006, opposition MP’s took on the cause of judicial under-funding and urged Parliament to address problems of understaffing and inadequate remuneration of judges. The Shadow Minister for Justice and Constitutional Affairs was reported to have suggested a 50% pay increase, the appointment of 21 judges, 48 Chief Magistrates and 44 Grade One Magistrates.192

*Tanzania* Justice Nyalali recognized that true institutional reform at the

---


beginning of the 1990s would require funding. For the first time this involved making direct overtures to bilateral donors (Widner 2001:198). Procuring funds directly from donors raised a few eyebrows in government. In addition, as Widner notes, prominence in the new global legal networks of judges and lawyers would provide an extra degree of legitimation, and perhaps more importantly protection.

Foreign donor support for the judiciary appears to have been targeted in recent years at the Commercial Court rather than the judiciary as a whole. Indeed, the majority of budgetary support has come from foreign sources rather than domestic. The judiciary receives a very tiny percentage of the total annual budget and this number has recent dropped. Given that the judiciary is one of the primary mechanisms of democratic accountability, its tiny portion of the total budget allocation is surprising.

Graph 5.0 Percentage of Total Budget Allocated to Tanzania Judiciary

![Graph showing percentage of total budget allocated to Tanzania judiciary]


By way of contrast in 2004-05 the Prime Minister’s office received 1.6 per cent of the
annual budget – around six times the size of the budget for the entire judiciary. These figures are similar to Uganda and Malawi. Financial support for institutions of accountability has taken second place to poverty reduction, education, health and other projects.

*Malawi* As is the case in Tanzania and Uganda, the Malawian court system is chronically underfunded. Whilst there are no shortage of plans on how to improve the functioning (implicitly the independence) of the judiciary, there is a lack of will and funding to implement these plans. Kanyongolo (2006) suggests that this lack of political will stems from an unwillingness by politicians and civil servants to limit their power. The judiciary complains that government budgets are far below the projected needs of the judiciary for each fiscal year. Furthermore, money is not always released on time, or in the amount previously agreed to. The *Malawi Judiciary Development Programme* reports that this is a significant problem. In the 2005/6 budget the judiciary received only 0.7% of the total national budget (Kanyongolo 2006). However, the judiciary does receive support in the form of direct aid from international donors. For example, DIFID has been active in the area of criminal law.

In 2001, High Court Registrar Healey Potani declared that donors had shown interest in using computers for court registries to check against the loss of cases filed and to make information more accessible. "The fact is that registries will soon be computerized but I can't say how soon," said Potani. In 2003 USAID donated computers and stationary valued at $211,000. This was declared to be part of USAID's

---

193 The *Malawi Strategic Judicial Development Programme* was launched in 2003, attempting to map out ways of preserving judicial independence in Malawi. (Reporter July 31st, 2002 2002)

194 For example, in 2002 the Nation reported that “High Court Registrar Healy Potani has said that trials for homicide cases will resume on August 26 when the British Department for International Development (DFID) will release close to K18 million for 150 cases. Potani also said the K17,39,100 given by the EU's rule of law programme for murder cases in the country had run out. Money was used to pay salaries, jurors, court officials.” (Semu March 10th, 2001 2001)

195 (Reporter September 11, 2003 2003)
ongoing support aimed at the Malawian judiciary since 1995. As of 2008 it is not clear what happened to the donated computers, and the registries are not online.

In 2000 the judiciary was given some administrative autonomy through the Judicial Administration Act (Act 11 of 2000). However, as Kanyongolo (2006) notes, this only goes part way to solving the problem because of the financial dependence on the executive and legislature. This lack of financial autonomy is a direct threat to judicial independence. The judiciary is so overstretched that budget issues are not simply a matter of increasing the efficiency of the courts; it is a matter of survival for the courts. If the money does not arrive then the courts cannot function.

D. Direct Attacks on the Judiciary

The battle between Museveni and the Ugandan courts has been a battle for popular support. Whenever the judges make a ruling that Museveni does not agree with, he characterizes it as “anti-majoritarian”, or as going against the will of the people. I document Museveni’s verbal attacks and threats against the judiciary at length in Chapter 8. As an example, the IBA (2007) report noted one particularly egregious threat in 2005. Uganda continues to struggle with land reform issues. Land is an easy issue around which to stir up popular ferment. In fall 2005 (just before the storming of the High Court) Museveni threatened landowners intent on evicting tenants, and followed up with a warning to the judiciary saying that he ‘will suspend a judge who colludes in illegal evictions and institute an inquiry’ (IBA 2007:75). Under the Ugandan Constitution the President has no powers to take disciplinary action or remove judges from the bench. This power lies with the Judicial Service Commission. The Uganda

---

196 (Semu February 21st, 2001 2001)

197 A limited selection of civil and criminal cases are available through the courts website at www.judiciary.gov.mw This does not constitute anything close to a complete online database or index, however.
Judicial Officers Association (UJOA) made the following statement, ‘[w]e specifically condemn threats of firing judicial officers when handling in land matters, for the state should be the last to call for mob justice when there are avenues of due process for one who is dissatisfied with a decision of court’.

There are also reports of Museveni’s attempt to control which judge sits on certain cases. In 2001 the Chief Justice was quoted as saying he was “grateful that the Uganda Law Society has picked interest in the recent interference with the independence of the Judiciary.” This statement was made following allegations that Principal Judge Ntabgoba received telephone calls from State House demanding him to withdraw justice Musoke-Kibuuka from the Ngime Byanyima Case.198

Another highlight of Museveni verbal threats was in 1998 when at the Third Annual Conference of Chief Magistrates members lamented recent threats by President Museveni to import foreign judges to check corruption in the judiciary.199 In interviews with judges, the IBA delegation repeatedly found that the Executives public criticisms created a climate of fear within the judiciary.200 One positive effect of the verbal attacks on the judiciary is that it helped the Ugandan judiciary to win crucial support from elites. Many members of the elite political and economic class have strongly supported the judiciary over Museveni over the last few years. It is easy for the judiciary to capture this zeitgeist of victimization given the specific history of attacks on the judiciary. A commentator recently wrote an editorial for the Daily Monitor newspaper entitled “Just who will speak for the Judges?”

In Uganda, hardly a month passes by without our judges and judicial officers

200 An example of this fear is the withdrawal of both Judges Lugayizi and Katutsi from the Besigye trials.
being subjected to unwarranted and most undignified criticisms, condemnations, blackmail, verbal and literary abuses and provocations by the executive, the latest being the attacks on Justice George Kanyeihamba. The president’s aides have since learnt from him the art of anti-judges verbal and literary gymnastics. They even call some judges by telephone to talk to the judges about cases still pending before courts of law. The judges are highly commended for letting Ugandans know about such inappropriate calls from “State House”, in protest. We commend our judges and judicial officers for so far remaining calm and keeping to the judicial etiquette of remaining tight-lipped with dignity. Sometime last year, 2003, a meeting took place between the Judges and the President at State Lodge Nakasero, in Kampala. Some of us hoped that after that meeting, State House would declare and maintain anti-judges ceasefire. It has not happened. It would seem that a General must keep attacking even a dead enemy in order to justify going to war.201

The author of this editorial described himself as a “concerned Movement cadre,” reflecting the strength of dissent within the party as well as from outside the party. Justice Kanyeihamba has been the most outspoken and he also was at one time an NRM ‘insider.’ Kanyeihamba has encouraged more judges to speak out against Museveni, but few seem to be following. Mostly recently Kanyeihamba was quoted urging judges to gather the courage to challenge the government: “The NRM government has not developed a culture of killing vocal judges so judges should use this opportunity to resist anything that smells like dictatorship and abuse of human rights.”202 The timing of this comment appears to be aimed at the Chief Justice who was derided for doing little to fight for the judiciary. Instead the Chief Justice acted more like a messenger scuttling

201 “Just Who Will Speak for the Judges?” Daily Monitor, September 14, 2007

to and fro between the judiciary and the President. It was reported (though I was unable to confirm this) that at a meeting of judges in the middle of the March 2007 strike, after being criticized by a fellow judge, Chief Justice Odoki rhetorically asked: "Do you want me to die? You want me to lay my life and die?"203

"Bingu Invites Judges to Luncheon."204 The Malawian judiciary has also suffered substantial political interference. Shortly after coming to power in 2004, President Mutharika made a public statement declaring that his administration would not interfere with the judiciary to ensure that professionalism and total independence in justice are delivered. Mutharika said he would like to see the judiciary completely free from influence of the executive branch:

This means political interference in the judiciary should be zero. Let the lawyers interpret and administer justice free from pressure. Four new judges bring to 25 the total number of judges in both HC and SC. If we had the resources we would like to have a separate constitutional court205

Despite these claims Mutharika went on to use the judiciary as a key tool in his fight against former President Muluzi and the UDF. 2007 turned out to be a trying year in this regard. One case in particular, the Presidential Referral on Section 65 of the Constitution, was high stakes enough to warrant the President to begin meddling with judicial independence.206 Prior to this judgment the President was seen publicly feting judges. For example, on March 3rd, 2007 the Nation reported that the President had invited judges to a luncheon at the State House the following week. Further, the article reported that the invitation has been received with mixed feelings by senior members of

---


204 (Ntonya 2004)

205 (Banda March 3rd, 2006)

206 Section 65 referral tested the ‘crossing the floor’ constitutional provisions. This threatened Mutharika’s party in the legislature and indirectly threatened Mutharika’s presidency.
the bench. One senior judge was quoted as saying the following, "Some judges feel there is something fishy about the invitation. . . They feel having lunch with the President would compromise them especially on the Chilumpha case currently being handled in the court."

This was the second time in one year that the President had invited judges to dine at his residence. The last dinner took place around the time the judiciary was handling the controversial 2004 election case, and soon after that dinner the judges were driving brand new 4x4 Toyota Prado’s. Following the decision upholding Section 65, the courts have been verbally attacked by the President who has been quoted as accusing some members of the judiciary of supporting the opposition. In fact, Mutharika accused them of being “mercenary judges.” Perhaps most striking were the events of August 2007. Just hours after High Court Judge Joseph Mwanyungwe ruled against President Bingu Wa Mutharika’s attempted acquisition of a court order forcing parliament to debate and pass the national budget, Justice Mwanyungwe’s home was raided by the anti-corruption bureau.

During November of 2007 another surprising development occurred. It was reported, November 3rd, 2007 in the Nation that Muthrika intended to increase the size of the judiciary by adding 30 new judges. 22 would go to the High Court and 8 to the Supreme Court. A source within the judiciary was quoted as saying that, “there was a directive from Office of the President and Cabinet (OPC) to increase the establishment by 22 in the High Court and eight in the Supreme Court but we are surprised with the number and the fact that some procedures were not followed. It’s a worrisome development because we don’t know who they want to employ.” The source also feared the government was trying to counter the “mercenary judges” the President complained

207 (Clottey 8th August, 2007)
208 (Reporter November 3, 2007)
Although this development has yet to play out fully, it seems that it is a highly strategic move on the part of President Mutharika. The Malawian judiciary has been complaining for a long time that they are understaffed, and they blame the slow processing of cases on the small number of judges currently sitting on the bench. The President can couch this development as a response to the needs of the judiciary. How the government is going to pay for these judges and where they are going to find them are issues of critical importance.

**Attempted Judicial Impeachment** In a move that undermined judicial independence at the highest levels, parliamentarians voted in November (2002) to impeach three Malawian High Court Judges (Chimasulu Phiri, Anaclet Phiri and Dunstain Mwangulu) for "incompetence" or "misbehavior" after each of them made rulings in separate cases perceived to be politically biased or which challenged the government. This has been the most direct attack against the judiciary of Malawi and Uganda and Tanzania. The parliamentary motion flouted an earlier High Court ruling by Justice Bathiel Chiudza Banda, who had ordered that the impeachment proceedings be halted until a constitutionally mandated investigation had concluded. The application for an injunction against Parliament was filed by CILIC. Under Section 199(3) of the Constitution of Malawi a judge can only be removed for misbehavior and incompetence. In addressing the charges against Chimasula Phiri and Anaclet Chipeta), Lead Counsel Ralph Kasambara argued the following:

Surely, My Lord, no sane person can say a judge who starts hearing a matter at 4:00 and finishes at after 7:00pm is incompetent and has misconducted himself . . . No reasonable person can argue that the exercise of one's academic freedom and indeed freedom of expression in commenting upon matters before the public domain is guilty of misconduct.

---

209 (Fullerton Joireman 2006)

210 An Amnesty International Country Report from 2002
This was a clear violation of the Malawian Constitution. The parliament had no authority to ‘try’ and ‘convict’ the three judges; this authority lay with the Judicial Services Commission.\(^{211}\) On May 8th, 2002 the charges against the three judges were dropped by the President. There was much concern from the international community regarding this development.\(^{212}\) The British threatened to withhold aid, citing interference in the operations of the judiciary as one reason. Denmark announced that it was cutting aid to Malawi because of the governments "attempts to limit judicial independence; politically motivated violence; and systematic intimidation of the opposition."\(^{213}\)

The judiciary also had the support of the AFORD party in parliament. AFORD walked out of parliament in protest, and MP Chihana was quoted as saying, "we will go back into the law of the jungle and we can't be party to that. That is a refined version of what happened in 1960s, they are the same people."\(^{214}\) I am hesitant to suggest that AFORD was supporting the judges because the judiciary was perceived as being pro-

---

\(^{211}\) The following report appeared on the “Human Rights Internet” website at the time of the judicial impeachment: **Independence of judges and lawyers,** The Special Rapporteur (SR) sent an urgent appeal to the government concerning the initiation of Impeachment proceedings against three judges. The information received indicated the following, *inter alia:* motions for their removal were circulated in Parliament in November 2001; the three obtained an injunction from the High Court restraining Parliament from proceeding with these motions, for want of jurisdiction; the Judicial Service Commission (JSC), which under the Constitution is responsible for disciplinary matters regarding judicial officers, commenced proceedings against the three judges and a hearing was scheduled to take place the second week of November; the charges against the three judges were motivated by political interests, after they had issued rulings against the United Democratic Front, the majority party in Parliament; following the initiation of the impeachment proceedings, one of the judges resigned from a high-profile treason trial over which he was presiding; Parliament accepted the motions for the judges' removal and requested the president to have them dismissed; the president decided to drop the charges against one judge and referred the charges against the other two to the JSC, which adjourned the hearing to January 2002. The SR noted that fears had been expressed that the JSC would just rubber-stamp a pre-determined decision of the executive to dismiss the judges. [http://www.hri.ca/fortherecord2002/vol2/malawitr.htm](http://www.hri.ca/fortherecord2002/vol2/malawitr.htm)

\(^{212}\) In response to the serious accusations against the two judges, the International Commission of Jurists sent a fact-finding mission to Malawi from 16-22 December 2001 to investigate attacks on the independence of judges and the rule of law.

\(^{213}\) (Munthali November 15th, 2001)

\(^{214}\) (Nyasaland July 8th, 1956)
North. Instead this was an extension of the pre-existing political conflicts in the country. Most agree that this was not about judicial misconduct, but was a reflection of the “deep political wrangling in the country” (Khembo 2001:7). Indeed all the MP’s that called for the impeachment of the judges were from the ruling UDF party. Ultimately all this appeared to be the UDF attempting to set up the vote on the third term for Muluzi. As the BBC reported, “there are suspicions that the government is trying to install new judges more likely to allow the constitution to be changed, enabling Mr. Muluzi to run for a third term of office in 2004” (BBC News Africa November 2001). In August 2002 the International Bar Association released a report detailing the conclusions of their fact finding mission earlier that year. Part of their findings were that despite efforts by most judges to remain independent, there nevertheless existed pressure from the executive and “active political subversion of judicial independence” (IBA 2002:41).

The effect of the impeachment proceedings on the judiciary had a cautionary effect, but did not scare the judiciary into being totally submissive. I discuss the reasons behind this in Chapter 7.

VI - Analysis and Conclusions

Overall the judiciaries of Malawi, Uganda and Tanzania have successfully differentiated themselves from the political environment. Judges are appointed on the basis of clear educational and experiential qualifications, and all three countries have voluntary judges associations. However, as I note, these associations serve as little more than annual forums to air the grievances of the judges and to date have not played a strong political or advocacy role. Although inadequate and in disrepair, the judiciaries also have their own buildings that are separate from the government. There are not substantial differences between the three cases. Uganda, simply by force of numbers and due to a more independent history than in Tanzania, has a stronger level of differentiation.
The successful differentiation of the Malawi, Uganda and Tanzanian judiciaries is in large part due to the institutional history of the courts. As I have previously noted the continued use of English legal regalia is one of the ways in which the judiciary symbolically separates itself from the political environment. This is important because the ability of the courts to distinguish themselves from the political environment was seriously challenged under authoritarian rule. Additionally, I note the ways in which the courts struggled to distance themselves from the respective autocratic regimes in Malawi, Uganda and Tanzania.

Historically, the durability of the courts in Eastern and Southern Africa has been weak. First, I found that formal insularity of judges is weak because judges do not have life tenure. This is a problem because judges have a tendency to go into consultancy positions within private practice. Second and more seriously is, as highlighted in reference to Tanzania that judges are negotiating with the executive for extensions on their contracts.

With respect to adequate equipment, administrative support, and access to law reports and statutes the courts have suffered. Judges typically operate under arduous and inadequate conditions. The further down the hierarchy one goes, the worse the situation is. At certain points inadequate resources have actually forced the court to stop working, as was the case in Tanzania in the late 1990s when the judiciary ran out of paper. Small improvements have added up to little progress and durability of the judicial institutions remains shaky.

Public opinion matters, but as a social scientist it is sometimes difficult to capture the ways in which public opinion affects judicial decision-making. Clearly in a state where public opinion towards the courts is positive the courts will be endowed with a greater institutional legitimacy. Former Chief Justice Nyalali (Widner 2001:312)
claimed that public opinion accounted for his own long tenure. Nyalali declared that three times under three separate Presidents, the question of his removal had arisen and in each case, “the prospect of unfavorable public opinion saved him.” I repeated this claim to a current member of the Tanzanian judiciary and asked if he believed this was the case. Does public opinion really protect judicial independence in Tanzania? The Judge suggested that Nyalali’s case was different because of his ethnicity:

There is a feeling of tribalism, coming from the north where Nyalali had come from, but he was not removed because of the constitution. The public would up rise for a day or two, but then forget. It was the constitution that left Nyalali untouched.

The judge therefore diminished the role of the public. The public became more attentive and involved throughout the 1990s and through today. The public opinion remains in the sense that it can stop the government from going too far, thus acting as a buffer. The public does have a certain sense of antipathy towards the judiciary as a whole because they appear remote and elitist and are widely believed to be corrupt.

In Uganda the judiciary has not mobilized populist support. Following the 2004 Referendum case, the public, mobilized by the NRM, came out onto the streets and protested. But when an armed group of NRM security men stormed the High Court in Kampala in 2005, the people did not go to the street in protest. The Uganda Law Society did protest however, and this is an important point. The judiciary has reached out to political and economic elites – particularly those in the legal community. This has been a very effective tool in Uganda, and I have not seen it used to the same extent in Tanzania and Malawi.

Civil society and media have contributed to the establishment of judicial legitimacy. Uganda again has the most active civil society and media. The judiciary has benefited from a higher profile through coverage of public interest litigation. They have
also benefited from extensive coverage in the media. This coverage has not always been positive but nevertheless has raised the institutional profile of the judiciary and has thus indirectly promoted the legitimacy of the institution. It is in these aspects that Uganda stands apart from Malawi and Tanzania.

Georg Vanberg (2005) identifies that courts are dealing with two constituencies; moreover courts are constrained by the need to generate compliance. Vanberg finds in Germany that the principle inducement for governing majorities to comply with court decisions is the threat of a loss of public support. However, the threat of public backlash can also act as either a liberating forced or a constraining force on judicial decision-making. Public backlash is in the minds of judges in sub-Saharan Africa. One area in which the judiciary endures a great deal of direct public pressure is in the area of criminal law. People frequently complain that judges have been too lenient in their imposition of punishments. Public tolerance with regard to some of the more political cases often comes down to whether or not the judges are aiding or preventing legislators from doing their job.

The translation of Vanberg’s arguments to sub-Saharan Africa is problematic. Firstly, legislators concerned with reelection are not necessarily concerned with short-term policy decisions. That is because the conventional rules of the electoral marketplace have been replaced by a logic rooted in anti-democratic, neo-patrimonial practices. Secondly, given the low levels of development, it is difficult to spread the decisions and analysis of the decisions far beyond urban elites. In short, there is a lack of transparency in all three countries. Judges decision-making is not subject to the same kind of scrutiny as in Europe or North America. However, the lack of transparency does vary across the three states – Uganda has the most vibrant and intellectually compelling media of the three cases. The opposition newspaper, The Monitor, in particular has played an
important role in decrying to the recent attacks on the judiciary, but is also not afraid to criticize decisions it perceives to be unfairly pro-Museveni.

The formal protections available to each judiciary are enshrined in their respective Constitutions. It is the case of Tanzania that is noteworthy for they are still operating from a modified version of the 1977 Constitution. Provisions for judicial power are significantly weaker than in Uganda and Malawi, as judicial review is non-binding. Furthermore, the Tanzanian Constitution can be amended only by a two-thirds majority in parliament. Currently the CCM controls over two-thirds of the parliament. I argue that the evolution of the Tanzanian legal system and the expansion of judicial power was a function of the transition to a free market economy more than a commitment to a genuine multiparty system and liberal rights protection regime. Rights are marginalized by broad derogation clauses and ancient statutes such as the Preventative Detention Act. Ultimately, the unwillingness of the CCM to allow a new constitution to be drafted is symbolic of their strong grip on power.

Malawi and Uganda both wrote new constitutions in the early 1990s. The intention in both cases was to move away from the powerful, executive-centered constitutions of the past, and to ensure that these were truly constitutions of ‘the people.’ As demonstrated in this chapter, despite the admirable goals and objectives laid out in the extensive preambles, the Constitutions (alone) have failed to deliver – power is still concentrated in the hands of the few. This is a combination of some weakness in the written documents, but more importantly a weak adherence to the rule of law and the principles of constitutionalism by political elites. Local scholars in both countries have mixed/contradictory feelings about the process of drafting the constitutions in their respective countries. On balance, it appears that the majority of opinions take a cynical view of the process (particularly in the case of Uganda), and do not believe that they
represented a full commitment to constitutional, liberal democracy by the political elites. In Uganda the more positive aspects of the constitution were overshadowed by the provisions on the establishment of a multiparty political system. Joe Oloka-Onyango represents this position (1995:171):

However, despite attempts to decentralize power and control the executive, the draft Constitution still manifests the executive-centred and autocratic philosophy that underpinned earlier constitutional enactments. Such conceptual loopholes paved the way for dictatorship and the eventual complete abandonment of the notion of constitutionalism in Uganda.

In the case of Uganda as long as the NRM were able to secure their ‘movement’ system of politics, they did not have to be threatened by an independent judiciary. In a single-party system, the judiciary becomes an arm of that single party. Museveni does not need to maintain an independent judiciary to protect him once out of power, because he doesn’t intend to leave power. Nevertheless, he needs to maintain at least the appearance of an independent judiciary to help give the regime legitimacy, and secondly to help resolve conflicts in a peaceful way. Finally, we have to consider the impact of foreign donors. The Constitutional Commission was almost entirely funded by foreign donors. Some observers suggested that this financial dependence would create a political dependence (Mugwanya 2001). However, on perhaps the most important provision – single vs. multipartyism – the opinions of foreign donors were rejected. From the perspective of economic development judicial independence was seen as a cornerstone to be protected at all costs and was an important factor in persuading Museveni to both fund and protect the independence of the courts. Ultimately the 1995 Constitution set the scene for the emergence of a far more powerful judiciary than had ever been seen before in Uganda. The establishment of a permanent Constitutional Court within the Court of Appeal has been significant. As I will show in subsequent chapters, obstacles to achieving the full
bench required for the hearing of constitutional cases in Tanzania and Malawi slows down the judicial process considerably. In Tanzania this has reached the point where people don’t even bother to file the cases in the first place.

In the case of Malawi there is a more genuine commitment to the principles of multipartyism (at least in the beginning, this eroded very rapidly under Muluzi, culminating in his attempt to amend the constitution to run for a third term). The courts played an important role in the transition to democracy in the early 1990s. As (Donges 1995:232) notes, “the courts played a role, but not a formative on influencing the outcome. Their decisions sometimes obviously supported the government, notably in the continued detention of Chihana, but on the other hand the courts allowed reinstatement of students who had demonstrated and unbanned exile press.” Support for an independent judiciary seems to have increased and solidified over the years since the promulgation of the 1995 Constitution. At the Second Constitutional Drafting Conference I witnessed members of both the opposition party and the party in power praise the judiciary. They apparently believe that the judiciary is the only branch of government to have maintained its independence, and as such did not need to be tampered with in terms of constitutional amendments.

The judiciary has little formal control over their own budget and this substantially weakens their institutional viability. I cover at length the problems with the composition of the Judicial Service Commissions and the lack of transparency as far as judicial appointments are concerned.

As will be made clear in the following three country chapters, the judiciaries of all three countries have suffered informal interference and manipulation. This section began with an overview of the politicization of judicial appointments, and described how the appointment process is flawed due to a lack of transparency. Additionally, the media
and the respective national law societies are becoming more vigilant as time goes one and people realize how high the stakes are. In the case of Malawi I focused on the strong equal division of judges in terms of region of origin. Close attention has been paid to maintaining a regional balance in the Malawian judiciary, although evidence on regional voting patterns was weak.

External autonomy has been weakened by the failure of national legislatures to pass and implement fair salary increases and retirement packages. This has been most problematic in Tanzania and Malawi. Uganda has historically paid their judiciary quite well in regional terms. In the case of Malawi the judiciary became so exasperated with the failure of government to live up to its promised salary increases that it was forced to take the government to court. The question of budget support is a more difficult one in terms of identifying cause and effect. The Tanzanian judiciary was significantly under-funded in the late 1990s, but so were the other ministries. As one judge commented, “It was when the government had no money. All ministries were struggling. We don’t feel that it is an indirect challenge. The executive know that the peace and good governance hinges on the judiciary. They know that the respect the country gets from the outside, the donors will not come without the rule of law.” The judiciary has experienced significant hardship with regards to resources that, in turn, has weakened its durability. Although speculative, I believe that at a minimum deprioritizing the judicial budget is a form of indirect threat to the judiciary. The role of international organizations and the donor community is critical to this issue. International organizations have put a lot of pressure on governments to adequately fund the judicial sector and at times step in to improve the budget shortfall.

Finally, each judiciary has suffered varying degrees of direct attacks. The Ugandan judiciary has suffered the most in this regard and as a result has the lowest
level of external autonomy. Consistent verbal attacks on the authority and integrity of the judiciary since the early-1990s have created an unbearable environment for the judiciary. Furthermore, the recent failure of government to abide by and implement judicial rulings has struck at the very heart of the rule of law. In fact recent occurrences led one interviewee in the IBA 2007 visit to conclude that “judgements against the government are not executable.”

Despite pledging an adherence to the rule of law upon entering office, Bingu wa Mutharika has recently chastised the Malawian judiciary as being full of “mercenary judges.” While the environment has not matched Uganda in terms of threat and negativity it is clearly a time of high anxiety for the judiciary. The attempted impeachment was not so long ago that it wouldn’t be fresh in the minds of the judges.

Attacks on the judiciary in Tanzania have been few and far between. The only significant public attack was by the speaker of the parliament in response to the Ndyanabo ruling. However, the external autonomy of the Tanzanian judiciary has been undermined in more subtle ways. In Chapter 7 I examine some of Mkapa’s speeches that have undermined judicial integrity in Tanzania.
Chapter 6

In 2005 newly elected President Bingu wa Mutharika left the United Democratic Front party and established his own party - the Democratic Progressive Party (DPP) - several MP’s followed right behind crossing the floor in the process. Under Section 65 of the Malawi Constitution, however the practice of “crossing of the floor” of Parliament from one party to another is prohibited. Previous individuals had fallen afoul of this provision before and had sought guidance from the High Court demonstrating a high level of faith in the integrity and independence of the judiciary. President Mutharika chose to bring this issue back to the courts through a Presidential Referral. In 2005 Speaker of Parliament, Louis Chimango, tried to remove MP’s that had switched from the UDF to the DPP parties, but the court issued an injunction preventing this until the constitutionality of the section had been determined in the courts again.

On November 7th, 2006 the High Court issued its ruling. They did not agree with the President that Section 65 was an abrogation of the fundamental freedoms and rights also contained in Malawi’s Constitution (Sections 32, 33, 35 and 40). This was not the outcome that President Mutharika hoped for, so wasting no time the Attorney-General chose to appeal to the Supreme Court. There were two problems with this. The first is that the appeal was filed before the High Court judgment had been delivered. Secondly, how can one appeal from a Presidential Referral if one isn’t the “loser” so to speak? Expressing extreme irritation Justice Twea noted that “The impression created is that the President has a predetermined position and, that he has no confidence in the opinion of this Court until he hears from the Supreme Court.”

The Supreme Court disagreed with Justice Twea’s ruling instead declaring that any person has the right to exhaust his or her legal remedies by way of eventually appealing to the Court of Appeal. After significant delays (suggested by some observers

\[215\] In the Matter of Presidential Reference of a Dispute of a Constitutional Nature under Section 89(1) (h) of the Constitution AND In the Matter of Section 65 of the Constitution AND In the Matter of the Question of Crossing the Floor by Members of Parliament (2005).
to be an intentional tactic) the Supreme Court finally ruled on the Presidential Referral in July 2007, agreeing with the High Court and upholding Section 65 of the Constitution. In the months following this particular chain of events the executive exhibited significant hostility towards the judiciary – ranging from harassment of individual judges to threats to double the size of the judiciary with a swathe of new judges.

The story of Section 65 and the Malawian judiciary is reflective of the broader picture. The onset of multipartyism marked the beginning of a new era for the judiciary, an era in which the courts were under more scrutiny and criticism than ever before as they walked the tightrope of political neutrality. More so than the Tanzanian and Ugandan judiciary, the Malawian courts have been forced to rule on highly politicized cases, many of which barely contained a thread of law. This has brought them widespread admiration as one of the most independent and democratic branches of government, but over time have garnered negative consequences including a diminution of judicial power.

In this chapter, I shall shed light on just how intimately judicial power in Malawi is linked to the various configurations of political power, to the institutional history of the judiciary, to the strategic behavior of both political and private elites, and finally to the significant role of the international community (both in regards to the political elites and the judiciary themselves). I begin with an overview of the political environment between 1994 and 2007, before moving on to an overview of judicial decision-making during this same period. The chapter concludes with an analysis of the patterns of decision-making as it relates to the changes in the political environment over time.

I - Political Environment

In contrast to Tanzania’s managed, elite-led democratic transition and the belated
emergence of a weak multipartyism in Uganda, Malawi experienced a strong break with the past and transitioned to what I classify as a competitive yet dysfunctional emergent democratic order. In comparative terms Malawi’s transitional democracy is more competitive than many other sub-Saharan states; however the nature of that competition is dysfunctional at best and destabilizing at worst. Jan Kees van Donges (1995), argues that there are three distinct democratization patterns in Malawi which also hold true generally across Africa. The three patterns are regional fragmentation, a search for a maximum coalition combining all regional forces, and a prominent role for personality politics focused on a handful of individuals. In Malawi (one of the poorest countries in the world) the path to personal enrichment leads directly into the political realm.

However, despite fundamental problems with democratization in Malawi the political elites have for the most part played by the rules of the game. This reflects a broader trend across sub-Saharan Africa recently identified by Daniel Posner and Daniel Young (2007). Frequently when political elites in Malawi have chosen to deviate from the democratic rules of the game, they have faced sanction from the High Court (VonDoepp 2001). As I will outline, the judiciary has emerged as a key guardian of Malawi’s democracy.

Malawi successfully held three presidential and parliamentary elections since independence, and has been led by two Presidents: Bakilli Muluzi of the United Democratic Front (UDF) and Bingu wa Mutharika, originally of the UDF but later split to form his own party called the Democratic Progressive Party (DPP). I have divided my brief analysis of Malawian politics into the three eras as defined by the Presidential and

---

216 Two broad trends with regards to political party systems in sub-Saharan Africa can be identified: 1) most parties are weakly institutionalized. They are organized on a rigid hierarchical basis and lack internal democracy. Party loyalty breaks down within a system corrupted by bribes and a concentration of economic resources. 2) Is the resilience and strength of incumbent parties. Upon victory they essentially “capture the state” in both economic and political terms, obtaining the ability to offer patronage jobs, to reward loyal voters and districts with financial benefits. These two trends hold true in the Malawian case.

A. 1994-1999

The 1995 election results broke down almost entirely along regional lines. Given that over half of Malawi’s population resides in the South, Muluzi’s UDF had to consolidate its base there to ensure victory (2002a). That Malawian politics is dominated by regional divisions is unexceptional in African politics. But what is exceptional is that (unlike Kenya or Togo for example) it has not torn the country apart, and democracy in a somewhat diminished form is still in existence fifteen years after its introduction.

Soon after winning the first multiparty election in 1995 the United Democratic Front (UDF) entered into an alliance with the AFORD (Alliance for Democracy) party from the north. This was not the beginning of a stable two-party system; AFORD left the UDF alliance and by 1999 had entered into an alliance with MCP in preparation for the second presidential and parliamentary election. Despite the failure of Malawi to develop

217 AFORD 36 seats (North), MCP 56 seats (Central) and UDF 79 seats (South).

218 The salience of ethnicity in Malawian politics owes its roots to the missionary and colonial era. A time in which Tumbuka (North), Chewa (Centre) and Yao (South) identities acquired both political and ideological coherence. Vail and White, cited in (Kaspin 1995:601) identify several factors that made these groups ‘tribal’ – these included the creation of written forms of Chitumbuka and Chichewa, the training of Tumbuka and Yao intelligentsia by missionary schools, indirect rule created along ethnic lines and the structural relations of communities and regions to the colonial economy. The political and economic features of the colonial era stayed in place under Banda. What changed was the elevation of the Chewa and the central region (in political, economic, infrastructure terms) in exchange for a body of docile, political support. In the Banda era the capital was moved from the south to the central region, and Chichewa was adopted as the national language. The dominance of these three ethnic groups has continued in the multiparty era and has been conflated with region, despite the ethnic pluralism within each region, particularly in the South. As Kaspin (1995) concludes identity in Malawi is dynamic, not static. The implication that enemies become allies in opposition to a more external aggressor assumes a structural logic, sometimes called ‘nesting’, in which each identity category is elicited in relation to its opposite, and each pair of opposites are conjoined elements within a larger category that subsumes them both. The declared identity of some Ngoni and Tumbuka friends is illustrative: 12 years ago, as young professionals, they differentiated themselves from each other as Ngoni or Tumbuka, but in 1994 they self-identified as ‘northerners’ who voted as a consolidated unit against the Banda regime. Regional identity with regards to the judicial appointments process and in regards to judicial decision making will be addressed in-depth in the next section.
a “U.K style” stable two party system, three parties have survived and run (in various configurations) in the three consecutive elections. However, as Rakner & Svasand (2005) note Malawian voters find it difficult to intelligently assess the record of each party as far as their policymaking is concerned. This is exacerbated by party leaders switching parties, a phenomenon that serves to decrease voter satisfaction and increase levels of cynicism toward politics in general. The political parties are not engaged in policy or ideological dialogue with civil society or with the population in general. The parties are financial and organizational vehicles through which individuals are elected. What distinguishes the political parties from one another is not ideological, but instead they are distinguished by their respective regional bases of support (Englund (2002b), Kaspin (1995), Posner (2001), Vondoep (2001)).

Since 1995 overall there has been a broad commitment to the principles of multiparty democracy, to the 1995 Constitution219 and to a liberal, free market economy. The institutions of democracy have been established and these institutions define what Harri Englund (Article Article 19 2000) refers to as the “procedural essence of neo-

---

219 It should be noted that there has been some quite significant tinkering with the constitution post-1995. The following are some of the major amendments to the 1995 constitution: Constitutional Amendments. There have been a number of amendments to the 1994 constitution. For the most part these amendments have eroded democracy and constitutionalism in Malawi and not enhanced it. The following are some of the more significant amendments.
1995 – Section 80 (6) (c) Limits past criminal record of Presidential candidates to only seven years. At the time President Bakili Muluzi was concerned about his 1968 conviction of stealing from government.
1995 – Section 64 Recall provision repealed.
1995- Appointment of Second Vice President Section 80 (5) (b) Parliament passed this amendment allowing the President, where he desires to appoint a Second Vice President. However, the President must not choose the Second Vice President from his own party and the President has the power to remove the Second Vice President at his whim. This clearly erodes the democratic accountability function of the opposition party, making them beholden to the executive.
2001 – Section 68 Parliament removed this provision that allows for a Senate (upper chamber of parliament). Major arguments surrounding this upper-chamber related to cost.
2001 - Section 65 Crossing the Floor Broadened the definition of who has crossed the floor.
2001 – Section 50 Quorum - reduced from two-thirds to 50% +1. MPs claimed difficult to get a two thirds vote in the Parliament. Opposition had a tendency to march out of parliament over bills they did not like. Passing of this act enabled the UDF (who held over half the seats in the National Assembly) to pursue their own party policy agenda.
liberal democracy.” As far as the horizontal distribution of power is concerned, the legislature and also the court, continue to be subservient to the executive. However, without a super-dominant majority in the legislature both Muluzi and Mutharika have not had carte blanche to pursue their own agendas.

Muluzi’s second term began under the dark cloud of a flawed election. One of the major flaws in the 1999 election was interference in the press. Despite guaranteed press freedoms under the 1995 Constitution, journalists printing anything critical of the government have been harassed (at best) or beaten or put in jail (at worst). Moreover, media ownership in Malawi has always been concentrated in the hands of the few. Despite the proliferation of papers in the 1990s (over 50 newspapers came and went), few have survived (Article 19 2000). Today the major newspapers continue to be The Nation, which is owned by UDF politician Aleke Banda, and the Daily Times, which is owned by Blantyre Print and Publishing a company linked to John Tembo and the MCP. Editorial policies have been questionable, including decisions about what stories to run and not to run.

The important elements of political control as it relates to the media are reflected generally in the economy. As the Muluzi administration matured they adopted the

---

220 As Englund goes on to argue the long shadow cast by both the colonial era and by Banda is one that valorizes elitism over true, participatory democracy. Englund (Article Article 19 2000) finds that this elitism extends beyond politicians, to include NGO’s – “Their penchant for titles and professional markets, their reverence for the English language, their habit of regarding the poor as “the grassroots”, all were instances of a mode of rule that showed no sign of abating in Malawi.” Englund moves beyond simply a political account of elite dominated policymaking and politics, to the concept of ‘elitism.’ Non-elite attempt to mimic the elite and thus helps to maintain and support Malawi’s entrenched historical inequalities. These inequalities are clearly one of the biggest obstacles to democratization in Malawi today.

221 The lead up to the 1999 elections and the elections themselves were characterized by serious abuses of freedom of expression by the incumbent UDF (Article 19 2000). The following incidents were observed by the Article 19 group:
1. Attempt to close down opposition’s National Agenda
2. Arrest of a Daily Times editor and journalist
3. Unequal coverage of Muluzi and the UDF particularly by the MBC.
4. Disinformation campaigns: For example, Government invented polls, through government media stating that Muluzi will be re-elected almost without challenge.
international language of human rights (distinguishing themselves from the previous Banda administration) while simultaneously “consolidating its economic patronage base” (Lwanda 2004). Instead of control through violence and force, the Muluzi regime adopted a policy of control through money. This had an unintended consequence that was stifling for Malawian democracy:

By buying key village, community, area and district players, political order of a reasonable sort, often extending well beyond the limits of party affairs, could be ensured. This ‘money factor’ was manifested by the many political party defections and realignments, including the UDF/AFORD and AFORD/MCP coalitions, as well as the subsequent UDF/MCP and UDF/AFORD rapprochements. The money factor would arguably . . . prove to be more critical than considerations of social structures, ethnicity, religion, and the role of donors and other aspects of the political process in retarding the development of participatory democracy.(Lwanda 2004:55)

There is perhaps some circularity in Lwanda’s argument in that he fails to point out that political elites used rhetoric of human rights to ensure international approval and avoid donor sanction. Donors are essential to the functioning of the Malawian economy. Vondoepp (2005) goes as far as to suggest that the possibility of external sanctions in the form of donor withdrawal were greater than those posed by the system of competition within. What is clear however is that concentration of wealth has gone hand in hand with concentration of political power, and because of this mechanisms of popular accountability are not in place. As Harri Englund (2002b) concludes “control of the modern state apparatus, from its resources for ‘development’ to its mean of coercion, enables the political elite to disentangle itself from a moral partnership with the populace.”

The 1999 election saw a continuation of the three-party system established in the

---

222 Muluzi built up his personal business empire in the 1980s through his sugar production and distribution company. Clearly the World Bank and IMF privatization prescriptions have been to the benefit of Muluzi and his associates. His empire now includes coal and granite mining, fuel distribution, transport, real estate in Malawi, South Africa and Europe, retail, broadcasting, and aspects of the service and agro-industries. Africa Confidential, cited in (Munthali January 9th, 2003)
1994 election. Muluzi’s victory was a narrow one. Half the country did not vote for him, and his party, the UDF, could not control the legislature alone. In addition to meddling in press freedoms, the election was considered to have been illegitimate given the many irregularities that plagued every stage. The High Court played an important “refereeing” role throughout the elections, and afterward in challenges filed by opposition leader Gwanda Chakuamba. They were able to assist in leveling the political playing field, although ultimately they endorsed the election results. The cases related to the 1999 elections will be more closely examined later in this chapter.

B. 2000-2004

Retrospectively, this period in Malawi’s democratic development will come to be known as the time President Muluzi attempted to circumvent the 1994 Constitution and run for a third term of office. In addition, as Lwanda (2004:55) notes, there were strong holdovers from the Muluzi I regime. This ‘political baggage’ included aggressive elite accumulation, a weak parliament, a weakened and divided opposition, and NGOs concentrating more on human rights than economic ones. However, one noticeable difference was the significant change in the restructuring of the opposition. This change can be attributed to the fact that the 2004 Presidential election was now open to challenge again for the first time in 10 years. Individuals posturing for Presidential candidacy strategically sought alliances, defected, and even created new parties. Changing party configurations and changing alliances included defections by powerful UDF individuals like Aleke Banda, Harry Thompson and Justin Malewezi. Moreover, several new parties emerged during this era presenting a challenge to UDF/AFORD/MCP hegemony. In the run up to the 2004 elections the number of political parties increased to 29, four times the number registered at the beginning of the multiparty era (Rakner & Svasand 2005)
The trend of off-shoot political parties started with Brown Mpinganjira, an MP openly opposed Muluzi’s third term plans, who broke away from the UDF in 2000 to form the National Democratic Alliance (NDA). Originally the NDA described itself as a pressure group, but later registered as a political party. It was the government this time that used the courts as a strategy to shut down the NDA. After a poor showing in the 2004 elections the NDA went back and merged with the UDF. After the MCP’s top leadership fell out (Gwanda Chakuamba and John Tembo), Chakuamba formed a new party, the Republican Party (RP). Again, the High Court was forced to rule on these internal party conflicts within the MCP. In addition, MCP Publicity Secretary, veteran politician Heatherwick Ntaba, split from the MCP and established the New Congress for Democracy (NCD). The RP became part of the Mgwirizano (‘unity’) Coalition that formed in the lead up to the 2004 election, and Gwanda Chakuamba became their Presidential candidate. Aleke Banda of the PPM was his running mate.

There are several reasons for this break-away party phenomenon in Malawi. Nixon Khembo (2004:128) posits that:

Most of these political adjustments result from low electoral thresholds, low cost of party formation and the liberal legal framework within which political parties are formed and operate, centralization of power and party structures, lack of systemness and resources, regionalism, weak intra-party democracy, displaced party rules and lack of ideology. In general, the liberal political system makes it less costly to fragment the party system.

While key figures split away from the UDF and MCP, AFORD entered back into a coalition with the UDF. This led to a split amongst AFORD membership. Ultimately, “of the 29 registered parties in 2004, 11 had not existed in the previous election, and five of the ten were directly linked to the struggle for leadership position in the parties, and by

---

223 Although Ntaba would be brought back into the UDF government shortly before the 2004 election.

224 Mgwirizano coalition was made up the RP, PPM, MAFUNDE, PETRA and MAGODE.
implication the candidacy for the presidency” (Rakner & Svasand 2005:8). The parliamentary election results from 1994 to 2004 are indicated in the table below. The table demonstrates the fragmenting of political power between 1999 and 2004:

Table 6.0 Percentage of votes for the major party alternatives

<table>
<thead>
<tr>
<th>Election</th>
<th>MCP</th>
<th>UDF</th>
<th>AFORD</th>
<th>Ind.</th>
<th>RP</th>
<th>PPM</th>
<th>NDA</th>
<th>M gode</th>
<th>Petra</th>
<th>CONU</th>
</tr>
</thead>
<tbody>
<tr>
<td>1994</td>
<td>33.7</td>
<td>46.4</td>
<td>19.0</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1999</td>
<td>34.8</td>
<td>47.3</td>
<td>10.6</td>
<td>7.1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2004</td>
<td>24.9</td>
<td>25.2</td>
<td>3.6</td>
<td>24.2</td>
<td>7.3</td>
<td>3.1</td>
<td>8.2</td>
<td>1.7</td>
<td>0.7</td>
<td>0.2</td>
</tr>
</tbody>
</table>


All the parties continued to be dominated by a small number of individual personalities. Often these personalities dominate the parties through means of financial control. It has been reported that Muluzi is the sole financier of the UDF, and without him the UDF would be a poor party (Khembo 2004).

Can the proliferation of parties in the 2004 Malawi election be seen as a further democratization of the political system? Is it preferable to have two institutionalized and internally democratic political parties, or instead to have eight weakly institutionalized, and internally autocratic political parties? Yes, the voters had a significantly higher number of choices come poll day. However, did these different choices indicate a pluralization or was it a continuation of the politics of personality? Arguments concerning the affects of regime on judicial power are premised on the concept of dispersed political and economic power. In the case of Malawi on one level the fragmentation of parties did diffuse power, however I argue that it is possible to simultaneously have multiple parties with a high concentration of political power. This is the case in the developing world. Third or fourth parties have a difficult time mustering adequate resources in the developed world; this is magnified in the developing world. Khembo (2004:134) states that “the central problem for party development and institutionalization is that the state is the major and almost only source of gaining
wealth, power and influence and, therefore, provides enormous incentives for party formation, splits, disbands, mergers, alliances and coalitions.” What we see in Malawi is a circulation of a small number of elites across and between a fragmented, weakly institutionalized political party system. The costs of starting a political party are low and often the parties exist in name only and are not “genuine.”

Third Term Debate and the Restrictions on Rights in lead up to vote Muluzi started the process of an attempted third term as early as 1999.225 Given the extended patronage network in place, Muluzi not only had the support of his UDF organization (and AFORD), but his party actively encouraged him to run (Patel and Tostensen 2006). The Attorney General at that time, Peter Fachi, was quoted as saying, “Muluzi will remain president of the country until another candidate is sworn in after holding fresh elections. Muluzi may even become ‘life President’ regardless of what the court rules” (cited in Makandawire 2002). The UDF tabled a bill proposing an amendment to Section 83(3) of the constitution which limits the tenure of the President to two terms consecutive terms. The constitutional implications of this move were potentially disastrous for Malawi. One of the defining elements of the transition away from the Banda years were the restraints placed on executive power. This proposal effectively did away with those restraints.

Why did the campaign for the third term garner so much support within the party? The UDF did not have a clear successor, so those within the UDF camp wanted to hold onto power, and they perceived the only way to do this was through a constitutionally mandated third term for Muluzi. As they campaigned on this issue, the dynamics of the UDF revealed how the party was ruled by a select few; that in fact the

225 Muluzi is one of several sub-Saharan leaders that have attempted to subvert the constitutional order and run for a third term. These include Conte (Guinea); Eyadema (Togo); Museveni (Uganda); Chiluba (Zambia); Nujoma (Namibia). As with so many aspects of political development in sub-Saharan Africa, this trend is not unique to Malawi and can unfortunately be seen playing out elsewhere across the continent. While Nujoma and Museveni were successful, Muluzi, Chiluba and others were not.
The oligarchic nature of the state was a reflection of the internal machinations of the ruling party. The key leadership systematically removed dissenters from within the party (Brown Mpinganjira, widely believed to have held Presidential ambitions, went on to form the National Democratic Alliance).

On the positive side, the dynamic nature of Malawian civil society was demonstrated by the vocal opposition of NGOs - particularly the churches. In general Malawian people opposed the third term. Those that supported it were in the minority and could be identified as those benefiting from the status quo. Despite the close nature of the contest, on July 4, 2002, the campaign by the UDF appeared to come to an end when it failed to attract the two-thirds majority in the National Assembly for a constitutional amendment. The opposition to the third term bill outside of parliament was vociferous and cut across many different groups. This, at least, was a sign of a healthy Malawian democracy. The High Court played an important part in protecting the opposition movement, as it had done in 1992 and 1993, by declaring Muluzi’s ban on third term demonstrations as unconstitutional (Malawi Law Society and Episcopal Conference of Malawi v. The State, the President of Malawi, the Minister of Home Affairs and its Army Commander (2002)). In addition, the third-term event can be seen as the partial assertion of the legislature over the executive. However, the ‘debate’ was ultimately characterized by coercion, bribery, and in certain instances violence reminiscent of years gone by (Patel and Tostensen 2006).

In the aftermath of the third-term defeat Muluzi proceeded to hand-pick a successor, whilst designating himself party chairman. Bingu wa Mutharika had been marginalized from the UDF since his dismal attempt contesting the 1999 Presidential elections under his own United Party (UP). Mutharika successfully fought and won the

226 The vote was incredibly close; Muluzi was only three votes short.

227 Civil Cause No. 38 of 2002 (unreported)
Presidential election in 2004. The 2004 election did see a slight break-up in regional bloc voting. The northern region saw its vote distribution spread across eight parties.\(^{228}\) The MCP continued its dominance in the central region while the south remained dominated by the UDF.

C. 2005-2007

Given the splintering of the political party system in the period leading up to the 2004 election it is not surprising that the UDF captured only 30\% of the seats in the legislature. As was the case in the 1999 election, the losers (Unity coalition, MCP, NDA and independent Justin Malewezi) petitioned the courts with claims of election rigging by the UDF. Ultimately several of these opposition groups, such as the NDA, RP and MGODE, were brought back into the UDF fold by Mutharika (Pelser 2004). Post-2004 UDF soon evolved into a divided party – one side loyal to Muluzi (party Chairman) and one side loyal to new president Mutharika. On February 28\(^{\text{th}}\), 2005 Mutharika announced his split from the UDF and launched a new party the Democratic Progressive Party (DPP). Gwanda Chakuamba, leader of the RP, became party chairman of the DPP, however a court injunction sought by disgruntled RP members stopped Chakuamba dissolving the party altogether. RP and MGODE withdrew from the court case they had filed disputing the 2004 election results, leaving the MCP to fight alone. There appears to be no sanctions for individuals who defect and then later rejoin the party, because they are bringing more votes back into the party.

This dramatic turn of events has led to perhaps some of the most volatile political years in Malawi since 1994. Each of the political conflicts has been pursued through the courts. The first big conflict after Mutharika left the UDF was between the President and Vice-President Justin Malewezi. Malewezi did not switch parties and remained a

\(^{228}\) AFORD, MGODE, NDA, PETRA, PPM, RP UDF, and Independents.
member of the UDF. Malewezi allegedly stopped carrying out his official duties as vice-president, including failing to attend cabinet meetings. Mutharika dismissed Malewezi arguing he had ‘constructively resigned’ anyway through not carrying out his official duties. Malewezi fought this dismissal in the courts, and Mutharika fought back by arresting Malewezi on treason charges. This case is still pending in the High Court. Meanwhile, some members of the legislature sought to impeach the President for ‘switching parties.’ The procedures drawn up in the legislature to begin impeachment proceedings came under the scrutiny of the High Court.

President Mutharika sought a solution to the ‘switching parties’ constitutional dilemma (Section 65) by submitting a “Presidential Referral” case to the High Court. When they definitively upheld precedent and ruled against the President he decided to seek a definitive answer from the Supreme Court. The Supreme Court upheld the High Court decision. By the end of 2007 Mutharika’s government was in limbo, effectively relying on the mercy of the Speaker of the House, who, under Section 65 of the constitution can dismiss all those MP’s that defected to the President’s DPP party. The ensuing tensions related to these events threatened to derail budget discussions earlier this year, much to the chagrin of students and other civil society activists who protested outside the parliament building. At the last hour (under significant international pressure), the budget was passed.

While it is evident that the basic political institutions are in place to secure democracy in Malawi, the degree to which these formal institutions act as restraints on political actors is questionable. What differentiates the post-1994 era from the post-independence era is that (for the most part) political actors are no longer by-passing the rules. Instead they are manipulating the rules to try and achieve their own goals. The aforementioned examples since 2004 are testament to this. Patel and Tosenen (2006) capture this political culture well:
departures from established rules and regulations appear to have been so frequent that they themselves are perceived to have displaced the formalities and acquired status as more or less accepted informal norms that are not reflected anywhere in written documents. They constitute a tacit understanding among actors about how matters are actually dealt with. It can be argued that we are, in fact, dealing with two institutions. In a sociological sense an institution comprises a set or a pattern of relatively stable social relations. Within this pattern interaction is iterative over time and governed by formalised, written rules and agreements as well as informal, tacit understandings about acceptable behaviour. When the formal and informal rules reinforce each other, they contribute to consolidating and solidifying the institution. Conversely, if formality and informality pull in different directions in terms of the normative institutional foundation, scope is created for instability and unpredictability to arise. (Patel and Tosenen 2006:16) (emphasis mine)

The last point above is particularly salient in respect to the use of the judiciary by both the government and opposition parties. The use of the ultimate formal institution – the judiciary – is part of a general strategic behavior and decision-making on the part of political elites. However, the path to get to the judiciary is often one characterized by an informal political culture. The regular and frequent use of the courts by political elites in Malawi is indicative of strategic behavior rather than a sign of a deep commitment to democracy and the rule of law. It’s strategic in the sense that their informal goals (capture or maintenance of power) are best served through formal institutions. Although, as many have discovered, including both Presidents, the Malawian High Court and Supreme Court of Appeal have not guaranteed favorable decisions one way or the other.

Assessments of the Mutharika era versus the Muluzi era tend to focus on the economy. The average Malawian is better off today under Mutharika’s regime than he or she ever was under Muluzi. This is relevant to politics as a whole, and as one Malawian political scientist advised, to understand politics in Malawi one must understand the
history of food security – for politics in Malawi is the politics of food security.\textsuperscript{229} In the last couple of years Malawi has done so well that they have managed to generate maize surplus which they are exporting to other countries, including (ironically) Zimbabwe.

As far as the political scene is concerned Mutharika is struggling to maintain control, and this has stifled his ability to ‘get things done.’ This was indicated in the 2007 delay in passing the budget. It is difficult to tell whether the post 2004 elections events could have been predicted or not. As one Malawian scholar suggested, “we may never know the deal made between Muluzi and Mutharika behind closed doors.”\textsuperscript{230} What is clear is that the deal did not involved Muluzi publicly coming back into politics and running against Mutharika in the 2009 elections.

D. Summary

Since 1994, three free, but not fair, presidential elections have been held. Large scale violence and disorder has been averted through the use of the judiciary as a safety valve mechanism. Second, since 1999 Malawi has seen a fragmentation and proliferation of political parties. It also saw the defeat of Muluzi’s third-term bill – a major victory for democracy. Third, 2004 did not see a change in political party, but did see a successful change in leadership. Fourth, post-2004 has been characterized by a political push and pull between Muluzi’s UDF and Mutharika’s DPP. It is not a democratic dispersal of power, but it is a dispersal of power nonetheless. Fifth, it is not certain that Mutharika will hold on to power through the 2009 elections. Finally, political culture is significant and as Patel and Tosenen (2006) remind us Malawian political culture is strongly hierarchical and this weakens institutions (particularly the legislature). The hierarchical

\textsuperscript{229} Author interview with Chancellor College Political Scientist, April 2007.

\textsuperscript{230} Interview with Chancellor College Political Scientist, April 2007.
mode of thinking that seems to pervade Malawian society leaves too wide a scope for abuse. It permeates parliamentary business and leads to rubberstamping. The singularly strong position of the presidency is an expression of this hierarchical thinking and bears particularly strong on parliament’s ability to hold the executive to account. (Patel and Tosenen 2006:17)


The decision making record of the Malawian judiciary between 1994 and 2007 is mixed. There have been individual judges that have stood out (for both their independence and perceived lack of independence), and a clear pattern of conservative Supreme Court decision making has been established in which many of the more major decisions of the High Court have been overturned. The evolution of judicial decision making since the transition to multipartyism, and the introduction of a liberal democratic constitution has not been linear or unidirectional. The court has not sought to incrementally increase their power over time, but instead appear to be playing “defense.” They have struggled to maintain their ‘actual independence’ in the face of executive interference and their ‘perceived independence’ in the face of highly politicized, high-stakes cases. Despite these challenges, as an institution, the High Court and Supreme Court of Appeal have asserted themselves, vis-à-vis the legislature and executive, and have avoided significant clashes and accusations of partiality. Explanations for the maintenance of judicial power in this weakly democratic state will draw on theoretical insights on the dispersal of political power and level of political uncertainty, on the willingness of elites and civil society to utilize the courts to resolve their political disputes, and the historical and normative characteristics of the court as an institution.

It is of critical significance that the use of parallel “super traditional” courts left
the institutional legitimacy and coherence of the conventional High Courts and Court of Appeal intact. Thus, when Muluzi came to power in 1994 he did not have to dismantle these courts and start over. The existing personnel remained. In short, the institutional capital of Malawi’s judiciary in 1994 was significantly higher than in Tanzania and Uganda – they did not suffer from a tainted reputation. Therefore during the early 1990s the judiciary was able to assert itself. This is in contrast to the institutional legitimacy of the legislature and executive branch that were, in comparison, weaker. Gloppen & Kanyongolo (2004) pick up on this theme:

The period between 1993 and 1996 should be seen as the time when the judiciary established itself as the primary custodian of the values of democracy. During this period, the political authority of the judiciary was consolidated by default because unlike the executive and parliament which were undergoing radical transformation, the judiciary survived the transition intact, with the same personnel and largely the same institutional framework. In the lacuna created by the transitional state of the executive and parliament, therefore, the judiciary was able to assert and expand its authority and power, with little or no resistance from the other branches.

As I demonstrate in the analysis below, some of these early rights decisions were not only an important part of the political openings that were taking place at this time, but also marked a new beginning for the Malawian judiciary. It is important to note that this happened before the new constitution was promulgated.

A. Prelude to a New Constitution

Between 1992 and 1994 Malawi transitioned from a single-party authoritarian state to one of multi-party democracy. The impetus for change emerged rapidly and came both from within and externally. In May of 1992 at a Paris meeting of foreign donors, in the face of repeated pleas of the exceptionality of the Malawian case with regards to one-
party governance,\textsuperscript{231} donor aid was withheld until Malawi could demonstrate progress towards good governance and human rights. Internally a significant catalyst for change was the release of the Lent Pastoral letter of the Catholic Bishops on March 8\textsuperscript{th}, 1992. The bishops called for “the abandonment of the culture of fear and political intolerance in Malawi, and for open discussion and debate of the country’s pressing problems including issues pertaining to political pluralism, endemic poverty, health and education” (Ng’ong’ola:625). Throughout this period of popular upheaval the High Court played a pivotal role in creating an environment that allowed for dissention. Banda strategically allowed the courts more power when in August 1992 the laws on forfeiture and preventative detention were amended to provide for reviews of ministerial orders by a High Court judge and a Detention Review Tribunal respectively\textsuperscript{232} (Ng’ong’ola).

To acknowledge that some form of judicial review of ministerial orders in these areas of the law was a significant improvement is a good indication of the odious nature of the forfeiture and detention laws before these reforms. But critics of the government, including church leaders and their associates, were entitled to be disappointed and dissatisfied. The government was unwilling to countenance the possibility of doing away with the concept of preventative detention or a “political detainee”. The Review Tribunal to be chaired by a judge was expressly constituted to review ministerial orders “in the opinion of the minister it would be prejudicial in the interests of national security to bring the case of a (detainee) for trial in a court. . .” As for the Forfeiture Act, it had always been unacceptable and unnecessary, especially when the country was not at war and there was no need to seize the property of “enemy aliens.”

\textsuperscript{231} Banda repeatedly claimed that ‘the people’ had chosen this system of government and that they were happy with the performance of the MCP.

The courts were able to create a space in which the voices of democratization could be voiced and heard. The courts protected political protestors, readmitted students and legalized the press in exile. In March 1993 the government, feeling threatened, invoked their powers under Section 46 of the penal code in order to place a ban on two recently launched newspapers (the UDF News and the Malawi Democrat). Applications were made to the High Court by the newspapers; the applications were successful and the bans were lifted. This event was indicative of, on the one hand, the arbitrary and oppressive nature of governmental decisions at this time, (Nzunda 1995:11) and on the other, the critical role of the Malawian court system in providing an outlet through which the government could be challenged.

The events surrounding the arrest and subsequent trial of Chakufwa Tom Chihana became an important part of the political narrative through the course of this transition period. Both the High Court case and the Court of Appeal case also serve as commentary on the continued deference of the courts to the government. It was generally agreed by civil society and the international community that there was nothing particularly “seditious” in the documents Chihana brought into Malawi. Upon delivery of their report (1992:15), the Joint Delegation of Scottish Advocates, et al. concluded the following:

Mr. Chihana faces two separate indictments containing five charges of sedition and two charges of acting so as to undermine confidence in the Government, contrary to Regulation 5(1) (b) of the Preservation of Public Security Act. Each charge carries a maximum penalty of 5 years, so that if convicted, Mr. Chihana could face up to 35 years in prison. We have carefully considered all the documents which the prosecution alleges show a "seditious intent" . . . We can state with complete confidence that no reasonable person could construe them as an incitement to violence. They contained reasonable criticisms of the existing Government, and politely call for progress towards restoration of basic human rights and the reintroduction of multi-party democracy.

Two British lawyers were hired by the state to prosecute this case, thou neither had
experience in criminal law. But both had been retained in the recent past by Lonrho, a corporation with considerable investment and influence in Malawi, and when this was pointed out, both the Minister of Justice and the Solicitor General accepted that this might have been the reason for their nomination. Further, in an interview with the Minister of Justice Wadson Deleza, the delegation was told the following:

Mr Deleza told us that as a sovereign state Malawians have the MCP which formulates policy. It goes without saying that once laws are passed, anyone who interferes must be tried according to the law. People can preach, he said, about multi-party ideology, but after 28 years, people know the benefits of the MCP. As to Mr. Chihana, Mr. Deleza said he knew that he was guilty. For Malawians he had committed a crime, that of using abusive language towards the government, outside the meaning of freedom of speech, For Malawians the Life President was the symbol of Unity (Joint Delegation of the Scottish Faculty of Advocates 1992:35)

The arrest and subsequent detention of Chihana was a key moment in the transition. It sparked large-scale protests in which over 40 protestors lost their lives (Ng'ong'ola 1996). In the case of The Republic v. Chakufwa (1992)233 the trial judge found that there was seditious intent in Chihana's documents, calculated to “bring into hatred or contempt or to excite disaffection against the Person of the President or Government.”234 On appeal, Chakufwa Chihana v. Republic (1992)235, Justice Kalaile reduced Chihana's sentence to nine months. The Chihana case also established an important point of constitutional law; that the Universal Declaration on Human Rights was to be incorporated as part of Malawian law. Technically the courts had little room for maneuver in terms of releasing Chihana, but as Ng'ong'ola (2001) claims:

The judges were not inclined to infuse their legal analyses with a sense of

233 High Court, Criminal Case No. 1 of 1992
234 Sec. 50(1) (a) of Penal Code
political realism. The trial judge, for example, shunned all attempts to be drawn into taking cognizance of the fact that what Chihana essentially called for in the “seditious speeches” was a referendum which the government had now conceded. . . As far as he saw it, his constitutional duty was to interpret and apply the law as it existed, not to change it. To all other concerned citizens not well versed in the niceties of law, justice could not be done or seen to be done if by this approach Chihana was condemned for making statements and demands which now appeared tepid in comparison to some of the “strong stuff” coming out of the referendum campaign.

Ultimately the government got what it wanted, and that was to keep Chihana out of the referendum campaign. Many, at least perceived, that the courts had actively colluded with the government. In the Malawi Democrat a prominent article claimed that ‘Malawi still colonial, claims Chief Justice’, in reference to the fact that sedition laws were inherited from the colonial era. In the same paper the AFORD Vice Chairman called for the resignation of the Chief Justice (Ng’ong’ola 1996:95). The courts later helped to protect some of the newly won rights that formed part of the campaign dispensation. Ng’ong’ola (1996:95) goes as far as to say that the courts during this period “revealed remarkable boldness and flair for judicial activism.” In particular, the Courts unbanned the UDF News and the Malawi Democrat (see Minister of Justice v. James Limbe, (1993) and Minister of Justice v. James Limbe, (1993)). Even though the campaign dispensations on freedom of press were subject to the discretion and approval of the Minister of Justice, in this case the court believed that the Minister’s discretion was subject to judicial review.

The events of the transition period must be considered within the context of thirty years of oppressive and corrupt rule. Banda concentrated all the powers of the state in himself, his two cohorts (John Tembo and Cecilia Kadzamira) and his party. They all considered themselves to be above the rule of law. In effect they ‘owned’ the

236 No.24, 19th March-1st April 1993

237 Civil Appeal No.2 of 1993

238 High Court, Miscellaneous Civil Application No. 63 of 1993
Therefore, when making the transition to multi-party democracy both the politicians and the people of Malawi had two central concerns: First, to establish a system of constitutional government that prevented the concentration of power in one individual or party, effectively dismantling the structures of the authoritarian state; and, second, to secure both rights and freedoms for the citizens of Malawi; thus putting in place a “Western style” liberal democratic government that would ensure the socioeconomic well being and protection of all. A significant move as far as the court system was concerned, was to completely abolish the parallel traditional court system. As the Joint Delegation of the Scottish Faculty of Advocates urged:

We conclude that it is imperative that Malawi's law and constitution should be brought into conformity with the Universal Declaration of Human Rights and the African Charter. We urge Malawi to abolish the death penalty; abolish the jurisdiction of the Traditional courts for serious crimes; abolish access to justice on the basis of race; extend the rights of defendants to be represented by a lawyer of their choice to all cases; outlaw detention without trial; reform the detention provisions to go towards internationally expected standards of freedom of association and expression; introduce open effective and independence checks on prisons and police officers; institute effective human rights training and introduce measure to protect the independence of the judiciary. (Joint Delegation of the Scottish Faculty of Advocates 1992:65)

B. Early Political Cases

The Transition Period 1992-1994 As discussed in Chapter 5, the judiciary played an important role in Malawi's transition to democracy by opening up and protecting the space in which civil society could operate and protest. This was a significant development in Malawian judicial history, as 1992 marks the first time judicial review had been used in Malawi. Some examples include: Du Chisiza v. Minister of Education (1993),239 challenging the Minister of Education’s ban on all forms of non-government sponsored entertainment in schools. Justice Duncan Tambala concluded that, “the

239 Miscellaneous Civil Case No. 10 of 1993 (unreported)
purported exercise of such power by the Minister was *ultra vires* and unlawful.” In *National Consultative Council v. Attorney General* (1994)\textsuperscript{240} Justice Tambala declared the use of road blocks by the police unconstitutional. In, *In re Motto Publication* (1994)\textsuperscript{241} Justice Unyolo declared that the police were negligent in holding property (computers belonging to “The Mirror” newspaper) that had been removed from the newspaper offices by a Reverend incensed about an article written about him. The Reverend took the computers down to the police station and then walked away with them. In *Limbe v. Minister of Justice* (1993)\textsuperscript{242} the Minister of Justice banned the importation of the Malawi Democrat (an AFORD newspaper). Justice Mackson Mkandawire agreed with the application stating that, “you cannot have a free and fair referendum when the campaign process is being strangled by taking away the freedom of expression and information . . . I am satisfied that the Minister was motivated by political considerations.” In *Aaron Longwe v. Attorney General* (1993)\textsuperscript{243} certain people were ‘unbanned’ from making speeches at political rallies.

In short, the court was again beginning to play its role of arbiter in political disputes, thus improving the level of democratic accountability at a crucial time in Malawi’s history. Despite the fact that these cases were coming to a court that still worked under the Banda regime, a court without a bill of rights, the creative use (by both lawyers and judges) of procedural law allowed the judges to circumvent undemocratic legal roadblocks (Gloppen 2004:4).

It is also important to reiterate the failures of the court during this era.

\textsuperscript{240} Civil Case No. 958 of 1994 (unreported)

\textsuperscript{241} Civil Application No. 29 of 1994 (unreported)

\textsuperscript{242} Miscellaneous Case No. 63 of 1993 (unreported)

\textsuperscript{243} Miscellaneous Civil Application No. 11 of 1993 (unreported)
Chakufwa Chihana v. The Attorney General (1992)\textsuperscript{244} was an example of the court restricting rights and not leveling the political playing field. Gloppen & Kanyongolo (2004:5) suggest that the success of the courts in other referendum related cases, such as Chihana, and Muluzi and Thomson v. The Attorney General (1993)\textsuperscript{245} are examples of the failure of the courts to “overcome the technical limitations in favour of broad principles of democracy was, therefore probably attributable to political choice rather than conceptual inevitability.” In addition to the political dimensions of these cases, I would add that they were seen as more high-stakes. Specifically, the case of Chihana which involved a political individual who (in the eyes of many) held the potential to turn Malawian politics into chaos. Perhaps the possibility of a chaotic transition rather than a ‘managed’ transition was enough to scare the judges into deferring to legal technicalities in the Chihana case.

\textit{1994-1999} There were two significant tests for the Malawian judiciary shortly after the transition to multipartyism: John Tembo & others v. Director of Public Prosecutions (1995)\textsuperscript{246} and The Attorney General \textit{v.} The Malawi Congress Party, Louis Chimango and Heatherwick Ntaba (1996).\textsuperscript{247} The latter case is popularly known as the “Press Trust Case” and refers to the UDF government taking of control of Banda’s Press Trust. The Press Trust was a conglomerate of enterprises (controlling much of the Malawian economy) that had been held in Banda’s name in the interests of the nation.\textsuperscript{248}

\textsuperscript{244} Criminal Appeal No. 9 of 1992

\textsuperscript{245} Civil Cause No. 66 of 1993 (unreported)

\textsuperscript{246} M.S.C.A. Criminal Appeal No. 16 of 1995 (unreported)

\textsuperscript{247} M.S.C.A. Civil Appeal No. 22 of 1996 (unreported)

\textsuperscript{248} MCP created the Press Trust in 1960 aimed at printing and publishing news in a newspaper called the 'Malawi News.' Capital was raised from MCP members, but Banda held 99%. The Press Trust was incorporated in 1982, but shares were not transferred until 1993 (Article 19 2000)
Naturally, it was a major source of financing for the MCP. In order to place the Press Trust into the hands of the government they had to declare Banda not to be in control of his faculties. So the DPP prosecuted Banda for the murder of former colleagues at Mwanza in 1983 (John Tembo & Others v. Director of Public Prosecutions). The case failed as medical experts claimed that Banda was of sound mind. Ultimately, both the Press Trust and Mwanza murder cases failed on appeal.

The Mwanza murder case was important symbolically for Malawi. After taking office the UDF government established a Commission of Inquiry into the Mwanza murders which was chaired by Justice Mtegha. The Commission found that the government officials did not die in a car accident, but that their death was the result of premeditated murder. After the report was released, former President Kamuzu Banda and his right-hand man, John Tembo, were arrested and charged with murder (Ross 1998). In lieu of a Truth and Reconciliation Commission (in the vein of South Africa’s TRC) this criminal case could have been an important part of Malawi collectively coming to terms with the wrongdoing of the Banda era. However, the failure of the state to successfully prosecute former President Banda and John Tembo no doubt closed the door to other potential claims through the courts.

Politically the Press Trust case is significant in two ways. The first way being that the MCP took their grievances to the court and secondly, that courts were able to rule impartially against the MCP despite the fact that the courts at this time were still

---

249 In 1983 four high-level politicians “disappeared” as they were trying to flee the country, Banda had alleged identified them as a threat to his rule.

250 There have continued to be quite vociferous calls for the establishment of a Reconciliation Commission in Malawi. A National Compensation Tribunal was established by the UDF government and has given out financial compensation to victims of the Banda era. One of the reasons why it is believed that Malawi did not establish a Truth Commission is that the UDF government was filled with individuals who played a variety of roles at some point in time under the Banda government. This is in contrast to South Africa where the ANC government replaced the old apartheid regime with individuals in no way related to the Nationalist Party (Ross 1998). Thus a Truth Commission could potentially be a severe embarrassment to the government, including former President Muluzi.
dominated by MCP appointments. The Press Trust Reconstruction Act (5C of 1995) sought to remove the current trustees and replace them with trustees appointed according to the Act. In addition, Press Trust tested two important constitutional issues: the first concerned the period of notification required for the passing of a bill and the second addressed the issue of quorum in parliament. Thus Press Trust became an important early, separation of powers test case.

Technical arguments regarding quorum during a regular sitting of parliament were ignored by Justice Dunstain Mwaungulu in the High Court case (Malawi Congress Party v. Attorney General (1995)\textsuperscript{251}). Mwaungulu stated that, “It could not have been in the mind of the framers of the constitutions that any number of parliamentarians could bind the nation.” To pass a bill without quorum (two-thirds must be present)\textsuperscript{252} was unconstitutional, and under the 1995 constitution, the constitution takes precedence over any decision made by the parliament. Further, Mwaungulu asserted that the Press Trust is a private trust, and thus the trustees had been deprived of their private property rights. The judiciary had successfully asserted itself, and followed through on their decision by ordering the government to return Press Trust property. This case remains significant in Malawian jurisprudential history, for it is the only time that the Court has declared an entire statute unconstitutional.

Signaling the start of a coming trend the Supreme Court went on to overrule Mwaungulu’s decision. The Supreme Court adopted a more literal, positivist interpretation of the constitution agreeing with the government position that quorum at the beginning of each parliamentary session is sufficient. In the Supreme Court’s view, the parliament was the supreme law-making body and as such their internal rules were not subject to judicial review. They also challenged the defendants “interest” in the case,

\textsuperscript{251} Civil Cause 2074 of 1995

\textsuperscript{252} This section was amended in 2001. Quorum is now one half plus one.
arguing that they did not have *locus standi* to bring the case (regarding the substantive issues surrounding the Trust restructuring)\(^{253}\) to court:

There is no evidence that any of the Respondents were trustees of the Press Trust at the commencement of these proceedings . . . They were in this Court as Members of Parliament and representatives of the Malawi Congress Party. The Press Trust itself is not a party. Nor are the respondents representing Press Holdings Ltd, nor is there any evidence that they are directors of these companies. The fact that the Malawi Congress Party had a significant role historically in the creation of the Press Group gives them no “sufficient interest.”

However, by far the most interesting part of the judgment was the Supreme Court’s use of the *doctrine of necessity*. It is argued that under the doctrine of necessity, otherwise *illegal* governmental action can be justified in peacetime conditions. Citing a number of cases emanating from the aftermath of the American Civil War (when the question of the validity of laws passed by the Confederacy was examined), the Supreme Court goes on to argue that to allow unconstitutional enactments is preferable to chaos and disorder under certain conditions. The Supreme Court does acknowledge that the majority of the cases they cite deal with insurrectionary governments; however, the differing circumstances still point to the same conclusion:

> that the courts will recognize unconstitutional enactments as valid where a failure to do so would lead to legal chaos and thus violate the constitutional requirement of the rule of law . . . The doctrine of necessity is not used in these cases to support some law which is above the Constitution; it is, instead used to ensure the unwritten but inherent principle of rule of law which must provide the foundation of any constitution. . . In every case in which the doctrine of state necessity has been applied it has been either the executive or the legislative branch of government which has responded to the necessitous circumstances, later to have its actions tested in the courts. This fact does not, however, detract from the general relevance of these cases in demonstrating that the courts will not allow the Constitution to be used to create chaos and disorder.

\(^{253}\) They did have standing as far as the issue of quorum in the National Assembly was concerned, by virtue of their position as Members of Parliament.
The question then must be: How does the Court argue that the doctrine of necessity was applicable in Malawi at this particular time? This relates to the post-Press Trust Reconstruction events. After the passage of the bill the opposition boycotted the national assembly, therefore making the passage of legislation under current quorum requirements impossible. The court thus states:

> In the case before us we do not believe that it was necessary to invoke the doctrine of necessity with regard to the passing or enactment of the Press Trust (Reconstruction Act, 1995) . . . However, with regard to any other legislation which was passed thereafter, we would validate such legislation on the grounds of the doctrine of necessity until the boycott by members of the opposition is called off . . . In our view, an imperative and inevitable necessity of exceptional circumstances now exist in Malawi. It is clear to us that Parliament will not be able to pass and approve the March budgets, with the result that no public funds will be available to support essential services . . . In addition there is no other remedy to redress the situation since the next General Elections are due to be held in 1999.

To sum up, on the one hand, the Supreme Court took a very narrow view of the constitutional provisions regarding quorum in the National Assembly. But on the other hand, through the seeking out and applying this *doctrine of necessity* they gave the government carte blanche to overrule the constitution and pass legislation without a majority – an extremely bold move on the part of the Supreme Court. The parliamentary boycott ended in April 1996; therefore the executive was never able to utilize this freedom bequeathed by the Supreme Court. I assert that the Courts move on the doctrine of necessity appears to be pandering to the government in power, but could equally be interpreted as a populist move. The opposition boycott of parliament was unpopular, and the people felt that the MP’s were failing to do the job for which they had been elected. Moreover, the fear of a resort to chaos and disorder is echoed across all three of these cases. Whilst being cautious and conservative, the Judges will not hesitate to make an assertive or more activist ruling if there is a fear that the status quo is being threatened. No judiciary wants to be responsible for the collapse of society into anarchy.
Dulani and Van Donge (2005:207) argue that “it was not a surprise that they found in favor of the government since Muluzi had appointed a number of new judges.” This argument is slightly misleading because the three judge panel on the Press Trust case – Unyolo, Mtegha and Kalaile- were promoted by Muluzi to the Supreme Court of Appeal, but were originally appointed to the High Court under Banda’s MCP regime. Two of the Judges were from the north, a region in support of the government as AFORD was in a coalition with the UDF.

Two other important constitutional tests came before the court in the early years of UDF rule. In *Mponda Mkandawire v. Attorney General* (1996)254 AFORD sought declarations and orders that President Muluzi had violated the constitution by retaining and appointing Ministers from AFORD (without consulting the party) after the dissolution of the Coalition agreement between UDF and AFORD. The court erred in favor of the executive, concluding that the President had the power to appoint whomever he wanted without consulting the political party to which they belong. Mponda Mkandawire lost this case again on appeal, the Supreme Court upheld the lower courts decision in its entirety.

In another case, MP’s from the opposition parties objected to the participation of cabinet ministers who were not MPs in assembly debates. The matter came before the High Court who ruled that the ministers were indeed ‘strangers in the house’ and should not be allowed to enter and remain unless invited. However, the Supreme Court of Appeal ruled that the courts have no jurisdiction in this matter. Arguing that, “the National Assembly, as a collective body, has decided, in its wisdom as manifested in the standing orders, that persons who are not members of parliament but are ministers are not strangers” (Patel & Tostenson 2006:7-8).255

---

254 Miscellaneous Civil Cause No. 49 of 1996, Unreported; M.S.C.A. Civil Appeal No.2 of 1997

255 M.C.S.A. Civil Appeal No. 33 of 1994 (unreported)
C. Election Petitions

In almost all of the elections held across Southern Africa in recent years the courts were forced to intervene. In every case the rules for free and fair elections, as laid out in the constitutions, are clear but when they are not adhered to “the process becomes controversial and a source of conflict rather than a mechanism for resolving strife” (Hatchard 2004:107). Thus, the courts play an important mechanism for ensuring that conflict does not turn into violence, and that the playing field is somehow kept level. Gloppen & Kanyongolo (2004) characterize this judicial function as a “safety valve” for the political system. The courts have progressively had to hear a greater number of cases generally, and a greater number of high-stakes political cases as each election has progressed.

1994 Elections Malawi’s first multiparty election was held in 1994 and there were no petitions disputing the results of the Presidential election. An important case was heard by the High Court addressing the right of an individual to contest a parliamentary seat in any district even if it is different to the district he or she is registered in. In Re Nomination of J.J. Chidule (1995) established that individuals could contest in any constituency regardless of where they had originally registered (cited in Gloppen & Kanyongolo 2004:5). Four High Court cases were filed related to the results of the parliamentary elections, of which two were not consequential. (see Ng’ong’ola 2001:69).

In 1996 a dispute over registration of voters for a parliamentary by-election was taken all the way to the Supreme Court of Appeal by the Electoral Commission (Electoral Commission v Richard Piriminta, Charles Fodya, Alex Rhodes Nkhope, Malawi Congress Party and United Democratic Front (1996). The court ordered that the

---

256 Civil Cause No. 5 1995 (unreported)
registration period be extended by one day in order to allow those who did not previously register to do so. The court considered allegations that certain people were being removed from the queues by UDF party people before they reach the registration point.

1999 Elections Several cases were filed in relation to the 1999 Presidential and Parliamentary elections; several before (selection/nomination of candidates\textsuperscript{258}), during (campaigning and conduct of poll) and afterwards (dispute of results). The Courts do have a mandate to intervene in the event of an electoral dispute. Whilst it is not desirable for them to do so, it provides an outlet for the resolution of conflict that might otherwise threaten the stability of the country itself. In *Attorney General v Gwanda Chakuamba and Chakufwa Chihana* (1999) the court ruled on the issue of MCP’s Gwanda Chakuamba and AFORD’s Chafukwa Chihana running for President and Vice-President on one ticket. Having two parties on the same ticket, the Electoral Commission asserted, contradicted Malawi’s election statutes.\textsuperscript{259} The plaintiffs appealed and the High Court ruled in their favor. Justice Hanjahanja, Chairman of the Electoral Commission, disagreed, but the appeal was finally withdrawn after Justice Kalaile replaced Justice Hanjahanja who was forced to resign from the Electoral Commission on May 13\textsuperscript{th}.\textsuperscript{260}

\textsuperscript{257} High Court Civil Cause No. 15 of 1996 and Malawi Supreme Court of Appeal Civil Appeal No. 23 of 1996 (both unreported).

\textsuperscript{258} See *Attorney General v Gwanda Chakuamba and Chakufwa Chihana*, MSCA, Civil Appeal No. 7 of 1999

\textsuperscript{259} The Electoral Commission has been a lightening rod as far as allegations of independence and impartiality of elections are concerned. This has strained the judiciary because chairmanship of the commission goes to a High Court judge. Justice Hanjahanja was perceived to be exceedingly pro-UDF in his leadership of the Electoral Commission (resulting in his forced retirement). These trends have led the Special Law Commission to recommend allowing any public figure to serve as head of the Commission, barring judges unless they are retired. Part of the problem is that appeals from the MEC go directly to the judiciary, this defeats logic. Current Chairperson Justice Anastasia Msosa supports the status quo, and recommends that further research should be conducted into the provisions of other SADC states.

\textsuperscript{260} The 1999 election caused a split in the Electoral Commission based on party affiliation. Two commissioners were suspended by Chairman Justice Kalaile. Countering these accusations one of the suspended Commissioners accused the Chairman of being a “dictator”, being influenced by the UDF and being involved in the dubious printing of ballot papers ((Mchulu June 5th, 2001))
Khembo v. Electoral Commission (1999)\textsuperscript{261} (cited in Gloppen & Kanyongolo 2004:6) the court ruled that the Electoral Commission must ensure that the elections are conducted in a manner that is both free and fair. In Mungomo v. Electoral Commission (1999)\textsuperscript{262} the Commission was ordered to set the date of the election in accordance with the constitution regardless of a contrary statute in the Parliamentary and Presidential Elections Act (cited in Gloppen & Kanyongolo 2004:6).

The 1999 election results were contested on two grounds: First, questions arose over whether or not the President had really secured a simple majority of votes. Given that Muluzi won 51\% of the vote, but less than 100\% of the electorate voted, suggested he received only 48\% of the vote. Secondly, it was contested as to whether the election process itself had been fair.\textsuperscript{263} In 2000, after much delay, the High Court finally ruled that only a majority of actual votes counted (Gwanda Chakuamba, Kamlepo Kalua and Bishop Mnkhumbwe v. The Attorney General, the Malawi Electoral Commission and the United Democratic Front (1999)\textsuperscript{264}. This case is also of constitutional importance because the High Court upheld the Electoral Commission’s pre-eminence in conducting elections (Gloppen & Kanyongolo 2004:6). The election results stood.

The Court was concerned that the chances of any party obtaining the fifty plus one majority were low, and that the prospect of endless reruns could not be discounted. Moreover, “the incumbent, in the meantime would have had to have remained in office without a mandate. As the Court noted, the ‘outcome of all this would be to subvert the democratic purposes of the constitution’ (Ng’ong’ola 2001:76). Indeed, the court made an important point regarding the interpretation of the constitution:

\textsuperscript{261} Civil Cause No.70 (1999) (unreported)

\textsuperscript{262} Civil Application No.23 (1999) (unreported)

\textsuperscript{263} Allegations included instances of local printing of ballot papers and possession of ballot materials by some district authorities.

\textsuperscript{264} Civil Cause 1B (1999) (unreported)
The Malawi Constitution is the Supreme law of the country. We believe that the principles of interpretation that we develop must reinforce this fundamental character of the Constitution and promote the values of an open and democratic society which underpin the whole constitutional framework of Malawi. It is clear to us therefore that it is to the whole Constitution that we must look for guidance to discover how the framers of the Constitution intended to effectuate the general purposes of the Constitution.

The question of whether this was a case of the judiciary just acting as a rubber stamping institution for Muluzi’s reelection is a controversial one. The judiciary appears to act as if it is supporting the UDF regime, however, as Ng’ong’ola’ (2001:77) notes, “the problem for the MCP is that the judicial reasoning in this case is technically sound and legally defensible, in light of the language employed in the haplessly constructed constitutional provisions.” Ng’ong’ola’s comments also seem to be indicative of the Malawian judiciary since 1999. When faced with controversial decisions of a political nature they have chosen carefully constructed legal paths to make their decisions.

1999-2007 Intra-party Disputes

The first question that must be asked is: Why would the court become involved in intra-party leadership disputes in the first place? Why would they choose to consider the legitimacy of leadership in light of ‘party constitutions’ as opposed to the national constitutions? Following interviews with key political actors, Gloppen & Kanyongolo (2004:14) argue that in addition to the weak dispute mechanisms available within the parties:

The broad constitutional mandate of courts facilitated the tendency towards taking intra-party disputes to the courts for resolution, because it made the judiciary receptive to political disputes, including those involving internal matters of political parties. Even if parties had internal dispute resolution mechanisms, the judiciary was more attractive than the internal mechanisms because it commands considerable public trust and confidence.

In *Re Constitution of Malawi Congress Party and Re a Convention and Part 4 Article*
40 of the Constitution of the Malawi Congress Party (2001)\textsuperscript{265} and appeal Chiwona v Chakuamba (2000).\textsuperscript{266} In 2000, shortly after the 1999 election the Courts got involved in two highly political, related cases. After the 1999 election there was a major split in the MCP party between Gwanda Chakuamba and John Tembo. The split became so serious that the two factions held separate conventions. Justice Mwaungulu of the High Court declared that both conventions were null and void, and that the leadership of the party should sort itself out. The vice-president of the MCP filed an appeal (\textit{Dr. Peter Chiwona v. Hon. Gwanda Chakuamba} (2000)\textsuperscript{267}, and the Supreme Court of Appeal ended up upholding Justice Mwaungulu’s original ruling. Chief Justice Banda noted the following: "The issue of who is the legitimate leader of the MCP is a political question which must be resolved by the generality of the membership of the MCP. This court can’t be the proper forum for it, nor can this court be the proper forum to resolve the deep divisions that exist in the MCP."\textsuperscript{268}

The Speaker of the House, following this court ruling, was required to continue to recognize Gwanda Chakuamba as the Leader of the Opposition, instead of recognizing John Tembo. Prior to this the Speaker had also unconstitutionally dismissed Chakuamba from parliament, for failing to follow established procedures. Following the Courts ruling that Chakuamba’s suspension from Parliament be cancelled (\textit{Gwanda Chakuamba v. Attorney General} (2000)\textsuperscript{269}) Speaker of the House Sam Mpasu stirred up a conflict with the court. Mpasu was quoted in The Nation newspaper as describing the ruling as creating a constitutional crisis:

\begin{itemize}
\item \textsuperscript{265} High Court Civil Cause No. 645 of 2001 (unreported)
\item \textsuperscript{266} Civil Appeal No. 40 of 2000
\item \textsuperscript{267} M.S.C.A. Civil Appeal No. 40 of 2000 (unreported)
\item \textsuperscript{268} (Reporter September 26th, 2000)
\item \textsuperscript{269} High Court Miscellaneous Civil Cause No. 68 of 2000 (unreported)
\end{itemize}
My first impression is that this is the first time I have heard of a court
bothering . . . cancellation of a legislative matter. This does not happen
anywhere. It is unusual to summon a Speaker of a National Assembly to
court. It is a question of whether the Speaker should obey the National
Assembly or a judge, this is a constitutional crisis. The Judge has put the
Judiciary and the legislature on a collision course.\(^\text{270}\)

Mpasu’s comments stirred up an even bigger firestorm. Observers were quoted as saying
that Mpasu was the one creating a constitutional crisis, not the judges. They also said his
comments undermined the independence of the judiciary, and that interference with the
judiciary by the legislature was counterproductive. The Speaker has been widely
criticized for being political in a position that is supposed to be neutral (based loosely on
the British model, with the important exception that he remains a member of the party
after appointment).\(^\text{271}\)

In 2002 and 2003 the intra-party dispute took another turn when Tembo and his
faction ignored an injunction issued by Justice Mkandawire to stop their separate
convention. Justice Chikopa (\textit{Attorney General v. Hon J.Z.U. Tembo and Hon. Kate
Kainja} (2003))\(^\text{272}\) found Tembo and his associates guilty of contempt of court and fined
them. After this conviction the Speaker of the National Assembly proceeded to gazette
the seats of the two appellants as vacant because they were convicted by the High Court
of contempt, which was a crime involving both dishonesty and moral turpitude. On
appeal (\textit{Hon J.Z.U. Tembo and Hon. Kate Kainja v. The Attorney General} (2003))\(^\text{273}\) the

\(^\text{270}\) (Munthali August 19th, 2003)

\(^\text{271}\) According to Patel & Tostesen (2006) “The overwhelming view among interviewed parliamentarians is
that the Speaker does not always act impartially. It was felt that it can hardly be otherwise as long as he
remains a politician. Many MPs favour the appointment of the Speaker on professional merit without party
affiliation, yet thoroughly conversant with the procedures of the House. This not being the case, however,
this office has been compromised; party allegiance has tended to take precedence over disinterested
professionalism. Some respondents even alleged that the Speaker has on occasion attended Cabinet
meetings.”

\(^\text{272}\) High Court at Mzuzu Civil Cause No. 50 of 2003 (unreported)

\(^\text{273}\) Malawi Supreme Court of Appeal No. 27 of 2003 (unreported)
Supreme Court concluded that the contempt of Court was of a civil and not criminal nature and therefore allowed the appeal. Tembo and Kainja were allowed to retake their seats in the National Assembly.

The Courts became embroiled in another intra-party conflict when divisions within AFORD caused a party split. The Supreme Court of Appeal overruled the High Court and granted AFORD trustees an injunction stopping members of a splinter pressure group, calling themselves Genuine AFORD, from using the Party's slogans, emblems, etc. Green Mamwonde did not push the matter in the courts any further, but decided instead to change its name to Genuine Alliance for Democratic Change (GAFORD). Judge Ansah, in her ruling on May 28th, 2003, concluded that the GAFORD and AFORD names were not identical as to cause any confusion among members of the two political organizations, their donors and supporters, adding that the pressure group has in fact different symbols from those of the party.

In 2005 AFORD sought an application for interlocutory injunction against Chakufwa Chihana (*Alliance for Democracy and Wallance Chiume v. Chakufwa Chihana (2005)) to declare that Chihana was removed from the office of the President of AFORD. Although Justice Mzikamanda did not rule on whether Chihana had officially been removed, he did grant the application ordering Chihana to vacate AFORD property. On appeal, *Chakufwa Chihana v. Alliance for Democracy and Wallace Chiume (2005)*, Chihana prevailed. The Supreme Court asserted that the AFORD National Executive Council (NEC) did not competently effect the removal of the appellant from office and that the NEC had violated the party constitution.

With regards to intra-party disputes, it was as though the court opened the floodgates. In the lead-up to the 2004 election the courts heard many candidate

---

274 High Court Civil Cause No. 12 of 2005 (unreported)

275 Miscellaneous Civil Appeal No. 49 of 2005 (unreported)
selection dispute related cases (see Gloppen & Kanyongolo 2004:14 for complete list). Although these cases may appear, on the surface, to be less political and high-stakes than the inter-party disputes, given the nature of Malawian politics in which one day someone may be a party colleague and then next they maybe a member of the opposition, the cases are significant. These cases also garner a great deal of attention in the media, with more scrutiny than perhaps some judges would like.

2004 Elections In the lead up to the 2004 elections an important case was filed regarding the legitimacy of the Electoral Commission. Sabwera and People’s Progressive Movement v. Attorney General (2004) challenged the legitimacy of having a judge sit as Chair to the Electoral Commission. The plaintiff, a contesting party in the election, complained that the Chairman was biased in favor of the UDF. There were problems with the judge sitting as the chair of the Commission, and also sitting on the body that oversaw the Commission. Ultimately the plaintiff lost his case, but as Kanyongolo & Gloppen (2004:11) note the case created important public debate around the problem of having a ‘judge’ serve as chair of the Commission. This issue arose again in the recent (April 2007) constitutional redrafting convention. Similar objections were raised, and it was asserted that the chairmanship be opened up to another public figure of similar status, but outside of the judiciary. In the end, the Law Reform Commission rejected this in favor of maintaining the status quo.

The Presidential and Parliamentary elections of 2004 were, in short, something of a mess. The seven party Mgwirizano coalition took the Electoral Commission to court (Mgwirizano Coalition v. Malawi Electoral Commission, Attorney General and United Democratic Front (2004)) asking for an extension of the May 18th election date, on the

276 High Court Constitutional Case No.1 of 2004 (unreported)
277 Author observations, April 2007.
278 High Court Constitutional Case No.5 and M.S.C.A. Civil Appeal No. 14 of 2004 (unreported)
grounds of miscounted ballots and excessive printing of the ballot papers. Over seven
million ballot papers were printed, but less than six million people were registered to
vote. Adding to the general confusion, the High Court delayed the election by two days
and then took possession of the excess ballot papers. That decision was later overturned
by the Supreme Court of Appeal. The Supreme Court took possession of the ballot
papers from the Electoral Commission which was simply not believed to be independent
and impartial. The Chairman of the Public Affairs Committee was quoted as saying, “Our
Electoral Commission is not independent . . . The Electoral Commission is in the hands
of the ruling party – that’s the problem” (IRIN News, May 2004).

After the election another case was filed by the *Mgwirizano* (Unity) coalition279
against the Electoral Commission and the Attorney General asking the Court to declare
the result null and void on the basis that the election was not free and fair. However, this
case was withdrawn after key opposition leaders signed a post-election agreement with
the UDF. This “Memorandum of Understanding” provided the opposition leaders with
cabinet posts in President Mutharika’s government.

In *Mgwirizano Coalition v. Malawi Electoral Commission, Attorney General
and United Democratic Front* (2004) 280 filed against the Electoral Commission there
were eight issues at stake. These included the deployment of “public resources” for UDF
campaigning, whether the number of registered voters is truly accurate, whether the four
day period of verification was adequate to confirm voter rolls, and in sum whether the
election could be free and fair given the aforementioned irregularities.

First, the proposal that the High Court take custody of the ballot papers was quite
bizarre. They didn’t begin to address the practical issues of such a mandate, especially

---

279 The opposition coalition was made up of seven parties, most notably the MCP and the People’s
Progressive Movement (PPM).

280 High Court Constitutional Case No.5; Civil Appeal No. 14 of 2004 (unreported)
given the short amount of time. The ruling was issued on May 14th; the election was due
to go ahead on May 18th. Justice Tambala wrote:

[W]e are unable to join in the view taken by the lower Court that the
storage of the ballot papers is a judicial issue for the Court. In our view,
the Court has no legal mandate to keep the ballot papers. Further, we
doubt the propriety of such an order without considering the interests of
the other many stakeholders and interested persons or bodies involved in
the electoral process.

The (up to) seven day delay of the elections, however, created an important release of
pressure. It was, to use Gloppen & Kanyongolo’s term, an important ‘safety valve’
through which the plaintiffs could vent their frustrations and the Electoral Commission
could attempt to right the wrongs of its botched voter registration efforts. The second
issue the Appeal Court spoke to was a specific complaint against the Malawi Electoral
Commission regarding UDF misuse of public funds. After receiving the complaint the
Commission referred the complaint directly to the President’s office. As Justice Phiri
wrote in the May 14th High Court judgment:

It goes against the grain of common sense to seek a third party to respond
to a matter which oneself does not comprehend. However, I found
earlier, that this was not a referral, for purposes an enquiry, but
abrogation of Constitutional and statutory duty, which clearly provide
that democracy is not about winning an election, but winning in an open,
free and fair democratic manner. The first defendant therefore should
fulfill its duty to determine complaints one way or the other and remedy
irregularities, even if it means ruling against the Government. This is the
only way to achieve free and fair elections. From the facts of this case the
first defendant clearly avoided making some vital decisions. The
argument that the complaints lacked clarity therefore cannot hold.

The Electoral Commission was against the postponement of the elections, and instead of
allowing the full 7 day postponement as allowed by the courts, they chose to postpone for
only 2 days. This is an example of the judiciary recognizing the power and authority of
the Electoral Commission, but it could be argued that judicial restraint in this case
contributed to various abuses related to the electoral process (Gloppen & Kanyongolo
2004:13). Ultimately the Electoral Commission failed to perform its mandated task
Prior to the 2004 election the National Democratic Alliance filed a case against the Electoral Commission and the MBC, *National Democratic Alliance (NDA) v Electoral Commission, MBC and TVM (2003)*. In this case the High Court departed from their previous position, as stated in the *Kafumba* case, regarding the preeminence of the Electoral Commission; that to force complainants to first file a written complaint with the Electoral Commission was tantamount to blocking access to justice. The plaintiffs lost their case because of improper presentation of evidence. There was plenty of it, but it wasn’t properly presented because the case was lodged late, and it resulted in a rushed presentation of the evidence (Gloppen & Kanyongolo 2004:17). After interviewing key informants, Gloppen & Kanyongolo (2004:18) discovered that there wasn’t much faith in the judiciary’s ability to oversee the work of the Electoral Commission after the disappointing *Kafumba* case.

D. Separation of Powers Cases

Many of the recent significant cases to come before the High Court and Court of Appeal either directly or indirectly concern the separation of powers in Malawi – that is the ability of the judiciary to oversee the internal workings of the National Assembly and to check the power of the Presidency. One of the earliest cases was of course the *Press Trust* case, in which the court upheld parliamentary sovereignty by asserting that the Press Trust Act had been passed constitutionally. However, the Supreme Court of

---

281 The use of quasi-judicial oversight committees has been widely criticized as a failure in the case of Malawi and many other African countries. They are chronically underfunded and are just as vulnerable to corruption (if not more vulnerable) than other political or judicial institutions.

282 A case had been filed prior to this by the Public Action Committee (PAC) but they withdrew their case after the NDA filed against the Electoral Commission and the MBC.

283 Constitutional Cause No. 3 of 2003
Appeal in their *obiter dictum* preempted the possibility of further litigation on the issue of parliamentary quorum while the opposition was on strike by asserting the *doctrine of necessity*. *Attorney General v Fred Nseula and Malawi Congress Party* (1994); *Attorney General vs. D Mapopoa Chipeta* (1996) and *the State v. Speaker of the National Assembly and the Attorney General ex parte Mary Nagwale* (2005) and the *The State and the National Assembly ex part Hon Silvester Kasambala and the Registered Trustees of the Public Affairs Committee (PAC)* 2005 are just a few of the recent cases concerned with the internal affairs of the National Assembly.

Early on in *Attorney General v. Fred Nseula and Malawi Congress Party* (1994)\(^\text{284}\) the Supreme Court concluded that:

> The correct legal position is that the National Assembly is not subject to the control of Courts in relation to matter which is governed by the Parliamentary Standing Order and which relates to the internal proceedings of the National Assembly. . . Courts have no right to inquire into the propriety of a resolution of the National Assembly.

In *Attorney General v Chipeta* (1994)\(^\text{285}\) the Attorney General sought an appeal against the decision of the High Court in which Justice Chimasula Phiri found that a person who is not a member of parliament does not become a member only by virtue of his or her appointment as a minister. The High Court further ruled that someone appointed as a minister is a ‘stranger’ in the chamber of the National Assembly. The Attorney General succeeded in appeal, and also in the appeal that the lower court had been too restrictive in their interpretation of Section 96 (1) (e).

The cases of *The State v. Attorney General and the Speaker of Parliament; ex parte Brown Mpinganjira; the State v Attorney General and the Speaker of Parliament ex parte Gwanda Chakuamba* are instances where the courts intervened because the

---

\(^{284}\) MSCA, Civil Appeal No. 33 of 1994 (unreported)

\(^{285}\) M.S.C.A. Civil Appeal No. 33 of 1994 (unreported)
matter went beyond the internal procedures cited. In 2006 the MLS filed a case requesting judicial review about the failure of government to implement agreed salary increases for the judiciary. In their written judgment the judges spent a long time mooting whether they could impartially hear a case in which they had an interest. They concluded the following:

This case is about parliamentary privilege i.e. whether proceedings of the National Assembly are subject to review by the courts and if yes under what circumstances and to what extent . . . Indeed, it is about judicial independence, the rule of law, separation of powers, checks and balances and the relationship between the three branches of government in a modern and functioning democracy. It appears to us that this is as good a time/change for the law relating to them to be laid down by the Courts. It would be a sad day for democracy, we think if just because the Judiciary has an interest, one way or another, in the outcome of the present action the Courts were to abdicate their function as given in Section 9

In *The State and Malawi Communications Regulator Authority Ex-Parte Joy Radio Limited* (2007)286 Justice Kapanda addresses the issue of separation of powers. In this case Joy Radio asserted that the government illegally constituted the Malawi Communications Regulatory Authority (MACRA) Board – including a failure to gazette the appointments. Justice Kapanda argued that the executive is not above the law (in this case the Communications Act) and that:

The appointments were *ultra vires*. The executive should not be allowed to pick and choose which laws they will observe. We must always remember that the Constitution enjoins every person not to be above the law . . . failure to comply with the explicit provisions of the Communications Act regarding the need to public the names of the Board Members in the gazette renders the appointment of Board Members inoperative.

In an act of desperation, the defendants claimed that to disband the MACRA board was “detrimental to good administration.” In addition to citing numerous legal reasons why this was not applicable in the MACRA case, Justice Kapanda stated:

---

286 Miscellaneous Civil Cause No.198 of 2006(unreported)
It is clear that the respondents cannot hide under the shadow of “detriment to good administration” as the public interest is to see to it that laws of the land are obeyed and not sacrificed at the alter of political convenience, expediency or appeasement. In addition public convenience and interest requires that the MACRA Board is manned by persons with requisite qualifications, expertise and experience and not some people masquerading as suitable persons merely because they are close to the corridors of power or happen to be known by some politicians.

Kapanda thus gave Joy Radio leave to appeal for judicial review as to whether the Board members were appointed correctly and as to whether they were politically biased.

The State v. The President, The Office of the Secretary and Cabinet, The Chief Secretary for the President and Cabinet, The Chief Secretary for Public Affairs and Attorney General Ex Parte Cassim Chilumpha (2006). The conflict between the President and Vice-President began in 2005 when Mutharika split from the UDF party. Vice-President Cassim Chilumpha remained with the UDF and ceased to perform his vice-presidential duties, including attending cabinet meetings. Subsequently, in September 2005 the Attorney General filed a case with the High Court alleging ‘constructive resignation’ – the vice-president had resigned through his conduct. The Attorney General filed two separate cases against Malewezi (Civil Case No. 10 of 2004 and later Civil Cause No. 370 of 2004). On both occasions the cases were classified as constitutional and referred to a three judge constitutional panel. In Attorney General v. Hon. Justin Malewezi (2004) the court declared that the Attorney General had acted ultra vires in bringing a constitutional matter to the court, and that only the President (under Section 89(1) (h)) can bring a dispute of a constitutional nature to the High Court. The use of Presidential Referrals is not unique to the Malawi case. It is has also been adopted as part of the South African Constitution; see for example Ex Parte President of the Republic of South Africa In Re: Constitutionality of the Liquor Bill

---

287 High Court Miscellaneous Cause No. 22 of 2006 (unreported).
288 High Court Civil Cause No. 370 of 2004 (unreported)
In their ruling the court (Ansah, Chiudza Banda, Katsala) stressed that this was an important matter of national interest “in our young multiparty democracy.” The Attorney General later withdrew the case, and Mutharika followed-up with a letter (made public) to the Vice-President in February of 2006 saying he accepted Chilumpha’s “constructive resignation.” The government then froze Chilumpha’s salary, benefits and car.

Chilumpha responded by applying for an injunction against the government. The Court granted an injunction and ordered the government to reinstate his benefits and privileges. The government did not challenge the injunction in court, but instead chose to ignore the courts orders regarding the reinstatement of Chilumpha’s financial benefits and security privileges. Chilumpha’s lawyers went back to court filing for contempt of court charges against Mutharika and members of his government. Chilumpha withdrew the case on the basis that the government had restored some benefits and privileges back to the vice-president. Two months after Chilumpha withdrew the case he was arrested on charges of treason. As of November 2007 the treason case is still pending in the High Court. Based on interviews conducted in April 2007 the government has purposely been delaying the progression of this case. As the case is pending the former Vice-President is detained under house arrest.

President Referral on Matter of Impeachment On October 20th, 2005 the National Assembly implemented impeachment procedures against President Bingu we Mutharika. This was in response to his defection from the UDF (the party under whom he was elected) and the subsequent creation of a new party under his headship – the Democratic Progressive Party (DPP). The National Assembly launched a full-scale legal assault in response. The President submitted the question of the constitutionality to the

---

289 Case CCT12/99
court for their opinion.

In the Matter of Presidential Reference of a Dispute of a Constitutional Nature under Section 89(1)(h) of the Constitution AND In the Matter of Section 86(2) of the Constitution AND In the matter of Impeachment Procedures Under Standing Order 84 adopted by the National Assembly on 20th October 2005 AND Malawi Congress Party (MCP), United Democratic Front (UDF) and Alliance for Democracy (AFORD) – Amicus Curiae (2005). In addition, the Attorney General took out an ex parte summons for an injunction restraining the National Assembly from proceeding to employ the adopted impeachment procedures pending the decision on the Presidential Referral. The injunction was granted while the court mooted the constitutionality of the impeachment process. However, in a quite fascinating turn of events, the same day the injunction was granted by the constitutional panel.

Justice Mwaungulu in The State and the National Assembly ex part Hon Silvester Kasambala and the Registered Trustees of the Public Affairs Committee (PAC) (2005) ruled against making an order of stay against the impeachment proceedings and declined to issue an injunction against the National Assembly. Thus there was an interesting clash between a High Court judge sitting alone and a panel of three High Court judges sitting on the Constitutional Court (Justices Nyirenda, Chimasula Phiri, Mzikamanda).

On October 6th, 2006 the Court issued their ruling. Three narrow issues were addressed: 1) the constitutionality of the impeachment procedures adopted by the National Assembly, 2) whether the impeachment procedures were in conformity with the

---

290 Section 89 (1) (h) of the Constitution states that the President shall have the powers and the duty to refer any dispute of a constitutional nature to the High Court. This power is slightly unusual, also found in South Africa.

291 High Court Constitutional Cause No. 13 of 2005 (unreported)

292 High Court Miscellaneous Civil Cause No. 287 of 2005 (unreported)
rules of natural justice and, 3) the jurisdiction of the High Court. On the issue of jurisdiction the court stated that, “All we can say . . . is that it has long been established by the High Court and the Malawi Supreme Court of Appeal that courts will be slow to tread on procedures regulating the internal affairs of the National Assembly” (p.9). In short, the principle of parliamentary sovereignty has been maintained with few exceptions. However, given that this matter was an issue related to the interpretation of the constitution (to what extent were the procedures adopted by the National Assembly constitutional) then the court has jurisdiction.

On the second issue - the principles of natural justice – the court highlighted the fundamental problem before them: that Section 86(2) was drawn up at the same time as the provision regarding the upper house of the legislature (the Senate). The Senate has since been scrapped, thus this potentially renders Section 86(2) problematic in relation to laws of natural justice. It is customary in countries with bi-cameral legislatures for one house to instigate the proceedings and the other to try the president. This avoids violating the principle that no one should be a judge of their own cause. In countries with unicameral legislature there are independent bodies to conduct the impeachment trial and their recommendations are then forwarded back to the legislature for the final vote. 293 This is the approach the court favored. They argued that bringing in the Chief Justice as an “overseer” whilst admirable was little more than symbolic ceremony. Instead an independent body should be empowered as part of the impeachment process.

The doctrine of necessity was raised again in the applications to the court. The court responded by arguing that there is no place for the doctrine of necessity with regards to Section 86(2):

We make a further observation that the argument that the impeachment

293 A “Special Committee of Inquiry” in Tanzania and a “Investigative Tribunal or Supreme Court Judges” in Uganda and Zambia.
procedure rules under discussion be allowed to pass even if they are not in full accord with the principles of natural justice on the basis of common law doctrine of necessity is untenable. Having noted in this opinion that Section 86(2) of the Constitution would have been fully complied with had the Senate been in place, we do not think that the National Assembly should be allowed to create a situation of necessity and thereafter rely on that necessity as an exception to the general rule.

Ultimately the court denounced the procedures adopted by the National Assembly as being in violation of the rules of natural justice. Preceding this ruling they were critical of the messy, ad hoc nature of the process drawn up by the Assembly concluding that they demonstrated how difficult it is to tell what really would be happening in the August House. It is interesting to note here the emergence of a dialogue between the judiciary and the legislature. This kind of dialogue is indicative of a more mature and established democracy.

In addition, this is one of the most potentially far reaching cases to ever have come before the court. The court recognized this by acknowledging the political and economic consequences for this young democracy. The potential for chaos and disorder was real, when in October the Standing Order was first passed riots and violence engulfed the state house. The ruling was slow to come, and one wonders whether this could have been a strategy for the President in order to delay the on-set of the impeachment process while he got his political ducks in order.

Section 65 – Crossing the Floor Of all the separation of powers disputes to come before the judiciary the longest lasting, and perhaps most politically significant, has been the ill-conceived Section 65 of the Malawian Constitution. Section 65 has been invoked on numerous occasions restricting the rights of MPs to leave and join other parties, as well their ability to form new parties. For the most part this has been applied for partisan political motives. Although the judiciary has issued many injunctions stopping the speaker of the National Assembly from declaring seats vacant, they have ultimately declared this section of the Constitution to be constitutional. Below I sketch the
The history of Section 65 – “crossing the floor” – in Malawi’s courts is long and turgid, going back to 1995. In 1995 Fred Nseula, a UDF Member of Parliament, was alleged to have joined the opposition MCP after he was relieved of his position as Deputy Minister of Finance (Fred Nseula v Attorney General and the Malawi Congress Party, (1994)294). The National Assembly voted to declare that Nseula had “crossed the floor” and was in violation of Section 65 of the Constitution. The Court ruled that the case was irrelevant anyway because Nseula’s seat had fallen vacant when he was appointed to the Cabinet. Nseula also established an important constitutional point early on. The point being that one section of the Constitution could not be read in isolation from the others:

The language of a Constitution must be construed not in narrow legalistic and pedantic way but broadly and purposively. The interpretation should be aimed at fulfilling the intention of Parliament. It is an elementary rule of constitutional interpretation that one provision of the Constitution cannot be isolated from all others. All the provisions bearing upon a particular subject must be brought to bear and to be so interpreted as to effectuate the great purpose of the Constitution.

This principle of broad constitutional interpretation was adopted by judges in future Section 65 cases.295 In Attorney General v. Masauli (1998),296 the Attorney General filed a case against Masauli (MP) and others for crossing the floor. The ministers had left the MCP, the party they were elected under, and declared themselves independent. After a motion was tabled and voted on in the National Assembly, the MPs were deemed to be in violation of Section 65 of the Constitution and their salaries were suspended and their seats declared vacant. The thorny question for the Court was whether or not these Members of Parliament had breached Section 65 of the Constitution. The High Court

---

294 MSCA, Civil Appeal No. 33 of 1994 (unreported)

295 In both Chipeta’s ruling in 2003 and Kapanda’s ruling in 2006, although both came to quite different decisions.

296 MSCA Civil Appeal No. 28 of 1998 (unreported)
found in favor of the MPs and this was subsequently affirmed by the Supreme Court on appeal.

In 2001 Section 65 of the Constitution was amended and the new Section 65(1) stated that members of the National Assembly were barred from joining any association or organization whose objectives or activities are ‘political’ in nature. Thus the provision was significantly broadened in scope. Controversy continued to swirl around the issue, and in August 2003 the Chairman of the Malawi Human Rights Commission was reported (*The Nation*, August 23, 2003) to have said the following:

The interpretation of the amended provision in Section 65 by the Speaker has frequently been viewed as inconsistent and partisan . . . to the extent that people can prejudge the outcome of his decision depending on the political allegiance of the particular Member of Parliament whose issue forms the subject matter of debate and interpretation.

Since assuming the position of Speaker in early 2003, Katsonga had dismissed a total of nine MPs (eight from the opposition) under an interpretation of Section 65 of the Constitution. The first MPs to be removed were MCP heavyweights Gwanda Chakuamba and Heatherwick Ntaba. The Speaker accused the two MPs of holding dual membership in both the MCP and the MCP/AFORD alliance in 2001. Next were the seven accused of belonging to the NDA pressure group (these seven were captured under the new expanded version of Section 65). The High Court issued an injunction, pressing the pause button until judicial review could be commenced. Then two more MPs lost their seats – members of Forum for Defence of the Constitution (FDC), a body that fought against the third term campaign. The Nation newspaper reported the following:

CCAP General Assembly yesterday said it is disappointed with the way the judiciary has failed to come out with an authoritative interpretation of Section 65 of the Constitution. A statement signed by the Assembly’s moderator Right Reverend Felix Chingota and Secretary General Yeremia Chienda said the church is aware that the judiciary has lately suffered political interference. "But we have the utmost faith that the judiciary has the ability to defy the odds and restore the rule of law then the legislative
and the executive arms of government are intoxicated by the quest for power and survival."

In June 2003 the Public Affairs Committee took this issue to the High Court on behalf of the wronged MPs. On October 5, 2003, Hon. Justice A.C. Chipeta found in favor of the plaintiffs. The following is excerpted from Justice Chipeta’s original ruling (Public Affairs Committee v Attorney General, Speaker of the National Assembly (2003).297

While it is true as claimed by the defendants that Tanzania, Ghana, Uganda, Zambia and India have provisions covering this concept in their constitutions . . . upon doing a comparative analysis of these Constitutions and our own I do find that while it would be true that our original S65 (1) was either just like these other provisions or milder than them I honestly cannot say the same about our amended S65 (1) . . . The amendment to Section 65(1), however, has been so radical and revolutionary that in effect it has completely uprooted our Constitution from the mild position it occupied to where is now stands quite alone on the new concept it now holds on crossing the floor . . . we have made ourselves unique and lonesome by making it possible, out of Assembly, to have a floor awaiting to be crossed wherever a member of Parliament belonging to a Party represented in Parliament attempts to join an organization or association believed to have objective or activities that are political in nature. . .

After establishing this unusual position that Malawi’s Section 65 holds in comparative terms, the judge went on to argue that the provision is a violation of constitutionally mandated rights:

Stretching the floor, in my view, amounts to a gross interference with the enjoyment of the freedom of association and of the exercise of political rights. . . In a free country like this I cannot call such a piece of law reasonable [. . .] I certainly cannot say that our current provision on crossing the floor is recognized by international human rights standards. I equally therefore cannot say that policing the movements and activities of a Member of Parliament. . . through keeping him under constant threat of losing his seat if he becomes daring and active, is a necessary species of surveillance in an open and democratic society298

After President Bingu wa Mutharika left the UDF party in 2005 to start his own party (DPP), several MPs followed. This automatically placed both the President and his new

297 High Court Civil Cause No. 1861 of 2003 (unreported)
298 (Munthali March 4th, 2006)
party in a compromised position with regards to Section 65 of the Constitution. In 2005 Speaker Louis Chimango tried to remove MP’s that had switched from the UDF to the DPP parties, but the court issued an injunction preventing this until the constitutionality of the section had been determined in the courts again. Mutharika filed a Presidential Referral asking for the court to definitively state whether or not Section 65, as it now stood, was in violation of the constitution ([In the Matter of Presidential Reference of a Dispute of a Constitutional Nature under Section 89(1) (h) of the Constitution AND In the Matter of Section 65 of the Constitution AND In the Matter of the Question of Crossing the Floor by Members of Parliament (2005)]299). The three judges sitting on the constitutional panel were Justices Twea, Kapanda and Potani; all experienced judges. Unusually, all three Judges wrote separate opinions – none were dissenting, but they did represent slightly different positions.

As with the impeachment case this brought the Malawian court under more scrutiny than they could have ever managed. The people of Malawi understood that the liability and legitimacy of the new regime was at stake, and again the court held this issue in their hands. After the Presidential Referral was filed matters progressed slowly. At one point the Human Rights Consultative Committee (HRCC) wrote to Chief Justice Unyolo in complaint, asserting that the judiciary was unnecessarily delaying the progression of the Section 65 case:

HRCC Chairman said the letter was written to make the Judiciary aware that it was delaying a highly emotional issue which may cause the House to boil should the courts fail to conclude it before the next sitting of Parliament which begins on April 4, 2005. "The Judiciary, as another arm of government, can only help the situation if it deals with this matter as quickly as possible so that the country can then chart its way forward" Newa also said, "The judiciary makes mistakes and should not be immune to criticism. "It is strange in this country that people are free to criticize the President and the National Assembly but fear to attack the Judiciary. All the three arms of government must be put in check," said Newa. MCP spokesman Nicholas Dausi shared the HRCC concerns, saying it is always

299 High Court Presidential Referral No. 2 of 2005 (unreported)
important the conduct of the Judiciary should not raise questions. "It is our learned friends who have taught us lay people that justice delayed is justice denied. It is therefore the expectation of MCP that justice should be seen to be done in an expeditious manner. When the President does something wrong, he is attacked. The same happens with Parliament. But somehow people develop cold feet when the Judiciary oversteps the mark. This tradition is wrong." "We do not want to be seen to be interfering with the work of the Judiciary. Any comments that we make on the issue will amount to some kind of interference with the courts. So we will just wait." said Sam Mpasu. Court argues that it is the parties that are not standing by the technicalities [and therefore causing delay].

As these events played out the scrutiny did not diminish, as people wanted to know why the case had not yet been resolved. Some people determined that the executive was purposefully stringing the case out. In July 2006 the Nation quoted MCP spokesperson Nicholas Dausi as stating that the executive was responsible for the delays:

Opposition parties say they foresee a long delay in passing the final verdict on the controversial Section 65 of the Constitution. MCP spokesperson Nicholas Dausi claimed the Judiciary is receiving enormous pressure and interferences from the Executive branch of government to delay the final verdict on the matter because they want to rule by default "since they are surviving by court orders." But Dausi could not give evidence of pressure and interferences. “We hope the Judiciary will conform to and comply with their constitutional mandate to interpret the laws of Malawi and we pray that they expedite the matter. I don’t think the Judiciary will dance to the tune of the Executive.”

On November 7th, 2006 the High Court issued its ruling. They did not agree with the President that Section 65 was an abrogation of the fundamental freedoms and rights also contained in Malawi’s Constitution (Sections 32, 33, 35 and 40). Justice Kapanda took a broad, sweeping approach to the interpretation of Section 65 of the constitution noting,

We should not be blind to the obvious fact that, when competing, political party candidates use party symbols. Further, this Court is aware that

---

300 (Langa July 28th, 2006)

301 (Theu November 21st, 2006)
most candidates who go into the National Assembly go there because of party colours and party sponsorship. It is for these reasons that the founders and framers of our Constitutions, with a view to provisions definitely had a purpose. It was to discourage the disappearance of party politics . . . Therefore, Section 65 becomes handy in that it discourages crossing of the floor s that respective political parties continue to represent particular constituencies which voted those particular candidates into the National Assembly.

Justice Twea’s opinion went further to delineate the difference between those elected as independents and those elected as independents:

Section as it now stands, only applies to members of the National Assembly who were members of a political party represented in the National Assembly who voluntarily cease to be a member of that party or join another political party represented in the National Assembly. Further, I endorse the view that the section as it stands does not apply to a member of the National Assembly who was elected as an independent or is a sole representative of a political party in the National Assembly. . I call the Attorney General and the Law Commission to amend it accordingly.

Justice Potani, whilst broadly agreeing with Kapanda and Twea, took a more nuanced approach identifying circumstances under which it might be permissible to cross the floor. First, Potani suggested that most independent candidates were at one point a member of a political party, but failed to win nomination through such party in the primaries. Secondly, Section 65(1) only prohibits crossing the floor to a party that already exists in the National Assembly. Thirdly, Potani went back to Mponda Mkandawire and Others v. Attorney General, in which the court erred in favor of the executive, stating that the executive could appoint whomever he or she wanted. However, Potani (in agreement with the Malawi Law Society) contended that if the individual appointed does not have the support of her party then the ministerial appointment would constitute crossing the floor. However, if the appointment comes with the support of the appointees’ party then it would not constitute crossing the floor.
An interesting twist in this case was the filing of an application by the Attorney General appealing the case before the decisions had even been read. On the day that the Presidential Referral was heard Justice Twa had to address the application for leave to appeal *In the Matter of Section 65 of the Constitution and In the Matter of Question of Crossing the Floor by a Member of Parliament* (2005).302 This was the first serious signal from Mutharika that he didn’t believe that the court would rule in his favor. Why did he file before the ruling even came? I would assume that he had insider information before the ruling was made public. In his judgment, Justice Twa expressed serious irritation at the actions of the Attorney General. In the first instance, how could the President appeal on a referral, because this indicates that he had a predetermined stance on the issue!

The impression created is that the President has a predetermined position and, unfortunately, that he has no confidence in the opinion of this Court until he hears from the Supreme Court. To make matters worse, this application was prepared before the opinion was delivered and it has been made without even advising the President of the outcome or how it would affect the affairs of the State should he choose to act on it. It is of great concern that this Court should be informed that the consequences of its opinion would be detrimental. This however, can only mean that the President did not anticipate such an opinion that he never made any necessary arrangements for what should happen. It should not be lost that the underlying cause of the controversy is based on politics. It should not be seen that the Court is involved in political maneuvers by allowing the application that would affect other parties positively or negatively as is anticipated . . . we wish to discourage in the strongest terms what has happened this morning. The Attorney General’s office should be the last to reject a Court decisions in anticipation. It sets a very wrong signal example to the bar and is capable of undermining the public confidence in the Judiciary.

The application for appeal was adjourned until November, 16, 2007. Because there are no “winners” or “losers” in a Presidential Referral case, the Constitutional Court denied the President’s leave to appeal. According to Justice Twa’s, the argument that the

---

302 High Court Constitutional Case No. 15 of 2005 (unreported)
application for the appeal would help avoid unnecessary costs lacked merit and served to show that the President lacked confidence in the court.303

In January 2007 the President sought leave to appeal again In the Matter of Presidential reference of a Dispute of a Constitutional Nature under Section 89(1)(h) of the Constitution AND In the Matter of Section 65 of the Constitution AND In the Matter of the Question of Crossing the Floor by Members of Parliament (2006).304 The Supreme Court disagreed with the ruling of the High Court that any person has the right to exhaust his or her legal remedies by way of eventually appealing to the Court of Appeal. One wonders why the Supreme Court chose to hear the case when they had an easy option not to. A case could be made that they were experiencing pressure from the executive branch. Or possibly they believed in the principle that anyone should have the ability to exhaust his or her legal remedies through to the Supreme Court. Or perhaps they already had a clear sense of where they stood on this issue and wanted to bolster the opinion of the High Court, thus finally putting this matter to bed.

In addition to granting the right to appeal, the Supreme Court also issued an injunction against the Speaker preventing him from acting on Section 65. The Supreme Court stipulated that the case should be heard within 45 days to expedite the matter. However, the government missed the 45 day deadline, making it appear that they were “buying time.” The next date was set for April 26th, but this time the court had to delay because of a shortage of judges.305 The Supreme Court finally ruled on the Presidential Referral in July, upholding Section 65 of the Constitution.

This case is probably the most difficult faced by the courts to date. Their ruling has put the existence of the present government at stake. If Mutharika does not have any

303 (Theu April 25th, 2007)
304 M.S.C.A. Presidential Appeal No. 44 of 2006 (unreported)
305 (Thau April 30th, 2007)
representation in the Assembly until the next elections are held, he may be forced into a policymaking stalemate.

E. Significant Rights Cases

Few rights cases have been brought to the Malawian courts and these cases have generally dealt with the right to fair trial, personal liberty, employment and property (Hansen 2001). International human rights standards are rarely referred to, and when cited by the Supreme Court they are usually done to back up conclusions already reached with reference to national law.306

Freedom of Expression/Access to Broadcast Media Although freedom of expression is fully guaranteed in the Malawian Constitution, these rights are frequently undermined by the application of selective restrictive laws, particularly the registration of newspapers and defamation laws. Many of the high profile cases regarding freedom of expression have dealt with political parties, but media organizations, trade unions and others often grapple with underhanded attempts at restricting their civil and political rights.

After the transition to democracy the media in Malawi flourished, particularly if compared to other African nations. The print media in particular was relatively objective, despite the fact that two out of the three main newspapers are owned by the

---

306 In interviews with lawyers Thomas Triers Hansen (2001:22) found that the lawyers perceived that judges were more receptive to foreign case-law than international human rights law. Further, they believed that difference between applications of international human right standards in Malawi versus South Africa could be due to the Roman/Dutch law orientation of lawyers and judges in South Africa. Malawi, in contrast is bound by rules of precedent. Finally, lawyers recognized that their own knowledge about international human rights was insufficient. Although the judges agreed that the constitution requires the broad interpretation and application of international human rights law, they rarely have cause to use or apply it. The judges expressed a preference towards use of foreign case law over international human rights law, and some felt that if lawyers would submit international law in their briefs they would appreciate it. The judges had participated in numerous international human rights seminars. However, it appears that Malawian judges and lawyers are not particularly active at the international level (in international workshops for example). Finally, both judges and lawyers expressed the profound difficulties associated with restricted access to legal materials. The Legal Aid Department, for example, did not have a copy of any of the major human rights conventions.
ruling UDF. However, the broadcast media was state owned (Malawi Broadcasting Corporation) and in the 1999 elections, there were allegations that the UDF was controlling access to the Malawi Broadcast Corporation (MBC). This was critical in a country that relies upon the radio to receive its news and information. The MBC rarely air views that are critical of the government or the UDF.

In the 1999 election the UDF was dominating the broadcast media with their campaign message. The opposition accused the MBC of biased reporting and unequal broadcast time. Muluzi was able to run his speeches live and repeat them; this facility was not extended to other candidates. The Court ordered the Electoral Commission to ensure that fair coverage was provided to all, but it was too late by this stage (Dr. Charles Kafumba & Others vs. The Electoral Commission & Malawi Broadcasting Corporation (1999))307. Judge Mkandawire ruled as follows:

I am satisfied that the Commission has done all that it can do to ensure that all political parties have free and equal access to the Malawi Broadcasting Corporation. The Commission is not in breach of any of the provisions listed by the plaintiffs. As for the holding of Free and Fair elections I find that the Electoral Commission is on the right track towards achieving that goal in so far as arrangements for free and equal access to Malawi Broadcasting Corporation is concerned. I have added this because I am fully aware that free and equal access to the radio is not the only component of free and fair elections. Indeed there are several others

To all intents and purposes the Electoral Commission was failing to live up to its mandate,308 yet the High Court was failing to enforce this mandate. Instead the Court

307 High Court Misc. Case No. 35 of 1999. The problem of fair election coverage is across the continent. It has been reported that broadcast coverage in recent Kenyan, Mozambican and Zimbabwean elections was characterized by highly biased public broadcasts (Source: Fair Elections International).

308 The power of the court to oversee quasi-judicial bodies and hold them to account has been tested. In Apex Car Sales Ltd v. Anti-Corruption Bureau Civil Cause No. 3479 of 2000 Justice Kapanda states that any individual aggrieved by the actions of the Anti-corruption bureau can bring action against them through the Attorney General, or against the Director of the ACB. In Anti-Corruption Bureau v Amos Chinkhadze and Joe Kantema (MSCA Civil Appeal No. 1Aof 2003) the Supreme Court concurred, stating that “the ACB as presently established under the section is not a juristic or legal person. It has no capacity to sure or be sued.” The jurisdiction of the Ombudsmans office was challenged in The Ombudsman v. The MBC
ended up finding fault with the Malawi Broadcasting Corporation (although the MBC’s conduct was never under legal dispute to begin with). Apparently the Electoral Commission had put together a proposed radio schedule giving equal time to all participants, but the MBC had not followed through with this recommendation. This case demonstrates the toothlessness of the Electoral Commission, and its inability to hold the MBC accountable to the democratic standards set out in the Constitution. It was not a winning moment for the High Court, who was not willing to come down on the Electoral Commission for failing to provide fair coverage. Further, Justice Mkandawire’s ruling that the MBC provide fair and balanced coverage was not adhered to by the MBC. As reported by various sources (note Article 19 report on media in Malawi, and Clement Ng’ong’ola 2001), the MBC did nothing to give equal broadcasting time to the MCP and AFORD. It was one of the weaker moments for the Court.

In 1998 the police prevented the Malawi Congress of Trade Unions from holding its meeting in Lilongwe and Mzuzu on the grounds that after looking at the agenda of the meetings, it was likely that there would be disturbances and the breakdown of law and order (*Ken Williams Mhango et al v The Attorney General et al* (1998)309). The High Court found that there were important restrictions on the right to assembly and that the police must approve public gatherings. Further, the police and Lilongwe City Council were public bodies and an injunction could not be issued against them310 (Nkhata 2003). Another area of weakness in terms of the protection of freedom of expression is that several laws and statutes give the government the right to oppress or intimidate the opposition. Furthermore, as Chirwa, et al. (2002:40) elucidate, “there has also been no

M.S.C.A. Civil Appeal No. 23 of 1999, in which the Supreme Court concluded that the Ombudsman’s decisions to inquire into a certain matter are subject to judicial review. As an administrative body the Ombudsman’s office is subject to judicial review in the same way that any other administrative body is.

309 Civil Cause No. 338 of 1998 High Court (Unreported).

310 Section 10 Civil Procedure (Suits by or Against Government).
change in the law which grants the police powers over assemblies and demonstrations which are so broad that they can be used to justify the selective banning of demonstrations involving perceived opponents of the government.”

In 2001 Peter Chupa brought proceedings against the Mayor of Blantyre - *Peter Chupa v The Major of the City of Blantyre and Others* (2001). Chupa successfully obtained an order of injunction that stipulated that the defendants, their servants or agents be restrained from disrupting or interfering with the plaintiff from holding a public meeting.

In 2002 President Muluzi sought to extend his tenure in office by amending the constitution in order to allow him to run for a third term. This created a national firestorm of debate on both sides the argument. During the third term debate, the President attempted to ban all political demonstrations and rallies that protested a possible third term. The first attempt at overturning the ban came from a consortium of church and civil society groups. They were successful in the High Court where Justice Mwaungulu (June 2nd, 2002) ruled that the ban was unconstitutional because Muluzi’s directive had been passed unconstitutionally. However, in the Supreme Court of Appeal Justice Tembo overturned Justice Maungulu’s order after the lawyers representing the church and civil society leaders failed to turn up. Accusations were flying between both sides accusing one another of ‘judge shopping’ – that is abusing court procedure to ensure that a certain judge hears their application (’Centre For Research 2002:78). Ultimately, Justice Twea would have the final word. The Malawi Law Society brought the case back to the High Court seeking to overturn the presidential directive (The

---

311 High Court Civil Cause No. 133 of 2001 (unreported)

312 As did Chiluba in Zambia (also unsuccessfully), Eyadema of Togo, Museveni of Uganda and Nujoma of Namibia.
Malawi Law Society, et al. vs. The State and The President of Malawi (2002).

Judge Twea ruled in the favor of the plaintiffs:

I find that the directive of the president at a political rally to limit such rights does not amount to law . . . it is my judgment that the two directives made by the President were unconstitutional, further banning “all form of demonstrations” was unreasonable as such a ban is too wide and not capable of enforcement as events have shown even at the President’s own rallies. . . Every Malawian who is mature enough will remember that for 30 years, eight years ago, this country “enjoyed” peace and quiet, law and order that was devoid of rights and freedoms and the social justice now enshrined in our constitution. Taking judicial notice of the cases brought before this Court and the events in our National Assembly, very few Malawians want that kind of peace and quiet, law and order.

This case marked the beginning of the rebirth of Malawian civil society. It also improved the social legitimacy and the standing of the Courts vis-à-vis society. This case was reported extensively in the national media; furthermore it had the backing of the powerful Catholic churches. What greater popular support could the court have behind them?

Moreover, the Malawi Law Society was of critical importance to the upcoming 2004 Presidential and Parliamentary elections. As Gloppen and Kanyongolo (2004:9) note:

This decision, among other things, created the space within which the constitutional framework governing elections could gain legitimacy through free debate in all forms, including assemblies and demonstrations. The action of the court in this case had a positive effect on the participatory quality of the political process leading up to the 2004 elections, and arguably contributed to democratic consolidation. The case was probably one of the most significant of the 2004 elections for the additional reason that it was one of the exceptional cases in which the courts articulated explicitly the broad democratic principles that underlay the framework of rules for the elections.

Rights under Criminal Law and the 2007 Death Penalty Case It has been much lamented by scholars, policymakers and activists alike that those charged and

---

313 High Court Misc. Civil Cause No. 78 of 2002 (unreported)
imprisoned under Malawian criminal law frequently have their constitutional rights
abrogated. The most fundamental of these rights is the right to a fair trial. Kanyongolo
(2006:99) asserts that most criminal defendants are denied their right to legal advice
because most cannot afford a private practice lawyer and government legal aid has
limited availability. Of the criminal cases that go to trial 87 per cent result in a
conviction (Kanyongolo 2006:101). Most likely this is not the result of hyperefficiency on
the part of the prosecution service, but more likely weakness on the side of the defence.
Further, police brutality against suspects has long reported to be a problem. In
Bokhobokho and Jonathan v. The Republic (2000)314 the Supreme Court dealt with the
issue of forced confessions. The Court held that confessions, even if made under duress,
were to be admissible as evidence in court.

The shortage of qualified lawyers is acute and this results in horrendous delays
for prisoners. Some homicide suspects have spent eight years languishing in jail
awaiting their day in court (Kanyongolo 2006:116). Suspects are routinely deprived of
their habeas corpus rights in addition to their right to be charge or released within 48
hours (Section 42(2)). The High Court regularly has to intervene to guarantee these
rights. In The Matter of Section 42(2) of the Constitution and in the Matter of Charles
Khasu and Louis Khasu (2003)315 Justice Mwaungulu admonished the police for
violating Section 42 (2). The suspect had been held for 14 days but not charged. The
Courts have a tricky tightrope to walk with regards to criminal matters – between
balancing the rights of the defendants under the constitution on the one hand, with
popular sentiment and appeals to keep criminals off the street on the other.

Despite consistent campaigning by human rights activists to abolish the death
penalty, it is still part of Malawi law. However, statistics show that there is a de facto

314 M.S.C.A. Criminal Appeal No. 10 of 2000 (unreported)
315 High Court Miscellaneous Criminal Application No. 61 of 2003 (unreported)
moratorium on the death penalty. No person sentenced to death since 1992 has been executed, and as of the year 2000 there were 53 people sitting on death row (Kanyongolo 2006:120). The issue of the death penalty was a heated one at the Second Constitutional Redrafting Conference in April 2007. The Special Law Commission concluded that, on balance, the majority of opinions lay in favor of maintaining the death penalty.

Concurrently, the High Court was considering its ruling in *Kafantayeni and Others v Attorney General* (2007).316 The Court (special constitutional panel consisting of Justice Frank Kapanda, Justice Elton Singini and Justice Maclean Kamwambe) pronounced the mandatory death sentence as unconstitutional, inhumane and a degradation to human dignity. The case wasn’t to decide on the constitutionality of the death penalty per se, but on the ‘mandatory’ aspect of the penalty.

The court was ruling in a case where murder convict Francis Kafantayeni and five others were challenging the constitutionality of the death penalty. The court declared, "We hold and declare that Section 210 of the Penal Code is invalid to the extent of mandatory death penalty. . . The declaration does not outlaw the death penalty but the mandatory death sentence following a murder offence." The effect of this decision thus brings judicial discretion into sentencing for the offence of murder, so that the offender shall be liable for sentences to death only as the maximum punishment. One of the lawyers for the plaintiffs, Noel Chalamanda, was quoted as saying that the ruling was a great judgment that would see a change in the way murder cases are handled in the country.317

*Right to Form a Political Party* In 2003 a political “pressure group”, the National Democratic Alliance (NDA), attempted to register as a political party and was denied this right by the government (UDF). This flouted Section 32 (freedom of association) and

316 High Court Constitutional Case No. 12 of 2005 (unreported)

317 (Kombo November 27th, 2001)
Section 40 (right to form a political party) of the Malawian Constitution, and as a result a case was filed by members of the NDA, *Ian Kanyuka (on behalf of all NDA members) v. Chiumia, Mtumodzi, Ndanga*, (2003). Under the leadership of well known politician Brown Mpinganjira, the NDA announced its intention to become a newly formed political party in January 2001. At this time, the organization was operating as a pressure group under the name National Democratic Alliance (NDA). It intended to register as a political party after holding its convention, then scheduled for the 2nd to the 5th January, 2003. The party was registered on January 3rd, 2003; however, under dispute was the use of “National” in their party name. The High Court found in favor of the NDA stating, “it would be against the principles of equity to deny a bona fide applicant political party from being registered on account only of the fraudster’s earlier futile registration, then, cancelled.” Again the Court was seen as protecting the constitutional right of members of the opposition to form national parties; parties that ultimately ran against the UDF in the upcoming 2004 election.

**Right to Private Property** In *the Administrator of the Estate of Dr. H. Kamuzu Banda v. The Attorney General* (1997) the estate of the deceased former President sought an injunction restraining the government from interfering in the deceased’s private property rights. The former President had been given the land by village chief’s in the 1970s. Under customary law once land is given away it cannot be taken back unless the recipient is guilty of certain crimes. The Court concluded that Banda had not done anything that would have made him liable to forfeit his land. Under the 1994 Constitution all customary land rights automatically became conventional, legal land rights. The Court determined that the government had taken away Banda’s land without complying with various statutes related to notice and compensation. Thus Banda’s

---

318 High Court Civil Cause No.58 of 2003
319 High Court Civil Cause No. 1839 (A) of 1997
constitutionally and statutorily guaranteed rights had been abrogated. Further, the judge considered the environmental impact of allowing the ranch to be opened up to surrounding villagers. In 1996 Section C of the ranch was surrendered. That section is now barren due to excessive deforestation. The remainder of the ranch is something of a nature sanctuary; it has been untouched by deforestation. Justice Chimasula Phiri concluded that, “The action contemplated by the Government to evict Dr. Kamuzu Banda from the Ranch will open up the ranch to environmental degradation and unsustainable utilization of the resources therein. Such action will constitute an undisguised dereliction from the important duty imposed by the Constitution and underlined by the Environmental Management Act.”

F. Standing and Public Interest Law

Although it may be easy to dismiss the issue of standing as technical procedural concern, a close examination of Malawian rights jurisprudence since 1994 will tell you that a generous interpretation of locus standi is essential to the practical application of constitutional rights provisions, and more specifically to the emergence of public interest jurisprudence. Section 15 of the Constitution entitles any “individual or groups of persons with sufficient interest” in the protection and enforcement of rights to seek redress through the courts. The position of the Malawi Supreme Court can be summarized as the following: that “a person who has no sufficient interest in the matter has no right to ask a court of law to give to him a declaratory judgment. He must have a legal right or substantial interest in the matter in which he seeks a declaration” (The President of Malawi and another v. Kachere and Others (1995)).

The Malawian interpretation has focused on the term ‘sufficient interest’ and any application that does not meet the stringent ‘sufficient interest’ test will be thrown out.

---

320 M.S.C.A. Civil Appeal No. 20 of 1995
'Sufficient interest' has been interpreted to mean a personal interest over and above that of every other citizen. This narrow interpretation of locus in Malawi has restricted the development of public interest law. Kanyongolo (2006:140) suggests that a constitutional amendment should be made to allow public interest litigation on constitutional matters with subjecting it to the stringent ‘sufficient interest’ test.

In the developed countries of the Commonwealth the interpretation of *locus* has evolved and expanded gradually over time. However, in the less-developed countries of the Commonwealth there is a case to be made that “sufficient interest” be interpreted as generously as possible given problems of development, literacy, resources and information networks. India presents an extreme case in that the judiciary has almost waived all standing requirements as far as public interest litigation is concerned. Ex-Chief Justice PN Bhagwati held in *SP Gupta v Union of India* (1982):321

Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons and such a person or determinate class of persons is, by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for appropriate direction

As Hodson (2003:169-170) notes, an obvious objection to the Indian position is that it gives the courts too much power, immediately putting them in the position of challenger to government. This is something the Tanzania, Malawian and Ugandan judiciaries are not comfortable with. The Indian judiciary has shown a willingness to “adapt rules of procedure where necessary to ensure compliance with human rights standards. This has progressed to the extent that actions may now be commenced by way of letter addressed to the court or a judge who may choose to treat it as writ petition” (Hodson 2003:169-170).

---

In *Kachere, et al v. The Attorney General* (1994)\(^{322}\), the plaintiffs petitioned the High Court to declare that the President had acted unconstitutionally by, among other things, appointing a second Vice-President. The Attorney General fought this case on the basis of *locus* contending that the plaintiff had not been directly affected by the alleged constitutional conduct. Justice Mkandawire upheld this right by stating that:

> It is clear that the constitution is supreme and that all arms or agencies of the government must act within the constitution. Both the Executive and Legislature must act within the constitution. It is therefore, the fundamental right of every person guaranteed by the constitutions that the Executive and Legislature should conduct their affairs within the constitution . . . In the instant case the plaintiffs are questioning the constitutionality of certain acts of the President and the Speaker. My funding on the matter is that plaintiffs have got a *locus standi* and I will hear them.

As is so often the case in Malawi, the Supreme Court reversed the decision of the High Court. As noted by Ngwira and Kaukonde (2003:7), the Supreme Court cited “authorities purportedly from England that have since been abandoned as wrong . . . the court restricted the constitutionality of the exercise of state power through the process of judicial review.” By taking on this narrow legal definition of who had standing, it denied that citizens have a significant interest in issues of constitutionality to be able to challenge the government through judicial review mechanisms.

I have previously discussed the *Mwanza* case in which standing was an issue for the UDF; the court argued that they did not have ‘sufficient interest’ in the matter. Further, in *Press Trust* the Supreme Court declared that the MCP MP’s did not have standing with regards to Section 15(2) of the Constitution that “unless an individual stands in a sufficiently close relation to it so as to give him a right that requires protection or on infringement of which he brings the action.”

---

\(^{322}\) Civil Case No. 2187 of 1994 High Court (unreported)
In *The Sate v. Registrar General et al ex parte CILIC* (1999)\(^{323}\) the Civil Liberties Committee challenged the decision of the government in banning the publication of the National Agenda (opposition) newspaper. The government ordered that the paper be closed because the real owners were not registered with the Registrar General’s Office and had not presented themselves as requested. Despite the enormous constitutional implications, the High Court dismissed CILIC’s injunction arguing they did not have sufficient interest. As Ngwira and Kaukonde (2007:284) conclude that:

> in declaring that the applicants in *Kachere* and *CILIC* cases have no *locus standi* to challenge the constitutionality of the acts of the government, not only did the Malawian courts deny or curtail Malawians the right to sue under the trust constituted in section 12 of the Constitution, but also unnecessarily imposed on itself a limitation on the scope of their power to enforce the government’s duty to be accountable to citizens.

In the case of *Civil Liberties Commission (CILIC) vs. The Minister of Justice and the Registrar General*, MSCA Civil Appeal No. 12 of 1999\(^{324}\) the Supreme Court of Appeals upheld the lower courts ruling that the appellant (Malawi Law Society) lacked sufficient direct interest in the matter and was therefore unable to establish locus standi. In examining how far English Common Law has come in addressing the sufficient conditions for locus standi the court first examined a number of cases outside of Malawi (*Regina v. Secretary of State for Foreign and Commonwealth Affairs Ex-parte World Development Movement Limited.* (1995));\(^{325}\) *Sierra Club v. Morton* (1922);\(^ {326}\) *Richards*

---

\(^{323}\) Misc. Civil Cause No.1 of 1999, High Court (unreported)

\(^{324}\) The Civil Liberties Commission is a human rights NGO. It originally requested judicial review of the Attorney General’s office over three specific issues: 1. Cancelled the registration certificate of an organization called Chikonzero Communications; 2. Banned the publication, printing and distribution of a newspaper known as the National Agenda; 3. Ordered that the printing, publication or distribution of the National Agenda would be a criminal offence.

\(^{325}\) 1 W.L.R. 386

\(^{326}\) 405 U.S. 727
and Another v. Governor General and Attorney (1990)\textsuperscript{327}). Judge Tambala stated the following in his ruling:

It is the view of this court that the appellant is unable to establish \textit{locus standi} even upon a liberal interpretation of the term sufficient interest recommended in the World Development Movement case. . . There are other organizations which could, in our view, successfully show that they possess the required sufficient interest in the subject matter or outcome of the present action. The proper organizations would include the Media Council of Malawi, the National Media Institute of Southern Africa (Namisa) and the Journalists Association of Malawi (Jama). These organisations, unlike the appellant, are specifically concerned with the rights and freedoms relating to the press, and we are of the view that such organizations could successfully claim sufficient interest in terms of section 15(2) of the Constitution.

More recently in Registered Trustees of PAC v. Attorney General and Others (2003)\textsuperscript{328} the court adopted a more generous interpretation of locus and heard the PAC's complaint concerning the unconstitutionality of the amended Section 65 of the Constitution. Justice Chipeta stated the following:

On a plain, liberal and purposive interpretation of the constitutional provisions touching on this subject and also on an acknowledgment of the fact that even the common law has shifted from its original rigid stance on the subject towards a more liberal way of viewing standing, I am convinced on balance that the plaintiff herein is, by direct authority of the Malawi Constitution itself mandated to come to the Courts as it has done to protect and enforce rights generally, even if its own may not be currently infringed or threatened.

Justice Chipeta, upon review of the various authorities submitted by the plaintiffs, was convinced that the Supreme Court in both the \textit{Kachere} and \textit{Press Trust} cases would have come to a different decision if they had access to the common law authorities he had been presented with. Hatchard, et al. (2004:177) claim that “it is likely that the [court] will refuse to

\textsuperscript{327} General Commonwealth Law Bulletin, vol. 16 No. 2, April, 1990

\textsuperscript{328} High Court Civil Cause No. 1861 of 2003 (unreported)
grant [locus standi] in cases when activist seek to raise purely political issues for judicial determination.” However, Judge Chipeta’s ruling in the PAC case indicates that this might not always be the case. As Gloppen & Kanyongolo (2006:195) argue, “this restrictive position on legal standing makes the courts unresponsive toward public interest litigation and class actions, thus discouraging the types of legal claims with the greatest potential for social transformation.” In addition to the negative social consequences, I believe that a continued conservative application of locus has been a useful strategic tool for the judiciary. Indeed, one of the Supreme Court justices in the CILIC case indicated during an interview that this was the case.

III - Analysis and Conclusions

Between 1994 and 2007 there is no clear consistent pattern of judicial assertiveness against the government. However, there is some evidence to suggest that the judiciary has become more assertive since it became evident that Muluzi would not run for a third term, and since Muthrika has come to power. Where electoral disputes have occurred, despite evidence of widespread abuse, the judiciary has chosen the pragmatic path of endorsing the winner in both 1999 and 2004. This is the same path chosen by the Ugandan Supreme Court in the two Presidential Election disputes (2001 and 2006).

In comparison to Uganda the Malawian government has – on the whole – complied with court decisions, but there are a small number of “significant instances in which government disobedience was not due to excusable lapses but premeditated actions” (Kanyongolo 2006:52). For example, following the High Court ruling in Malawi Law Society and Espiscopal Conference of Malawi v. The State, The President of Malawi, the Minister of Home Affairs and its Army Commander (2002)\textsuperscript{329} when

\textsuperscript{329} Civil Cause No. 78 of 2002.
police broke up anti-third demonstrations despite the courts ruling that lifted the demonstration ban. More recently in 2006 the government defied a High Court order in the case of three Malawian citizens who were arrested on suspected terrorism charges. The suspects obtained an injunction to block their deportation and ordered the government to either charge the men with an offence within 48 hours or release them on bail. In a Press Statement, the International Commission of Jurists stated: "The detention and deportation of these individuals without due process of law is shocking. The Executive completely disregarded the separation of powers and the rule of law by ignoring the legal proceedings that were taking place" (Malawi Judiciary 2003:10). It was later reported that the three al-Qaeda suspects deported from Malawi turned up in Sudan where they were released.330

As Kanyongolo (2004) posits, the only explanation for the failures of the Malawian government to abide by the law is political expediency. What this means for the judiciary is that while most of their cases will be abided by most of the time, this is not guaranteed. Even the smallest amount of doubt could have an effect on judicial decision making. There have been problems with the government consistently respecting the decisions of the judiciary. A report by the Malawi Law Commission suggested that a constitutional amendment be introduced making clear that the government was constitutionally obligated to abide by and respect the decisions of the judiciary (cited in Kanyongolo 2006:40). Kanyongolo (2006:40) notes that both the parliament and the government have failed to follow up on the non-binding recommendations of the Law Commission.

Unlike Uganda, the Malawian judiciary has been reluctant to assert its judicial review authority over the legislature. There have been a number of important separation

---

330 (Semu February 1, 2002)
of powers cases in Malawi, and on numerous occasions the Malawian judiciary has reaffirmed parliamentary sovereignty. I think this is in part due to the perception that the Malawian parliament has some independence vis-à-vis the executive. But it is also a misconception of the new separation of powers contained in the 1994 Constitution and a reliance on English cases and statutes that are no longer relevant.

As I have described the worst incident of interference in the judiciary was the attempted impeachments in 2002. A strong case could be made that the opposite of the intended effect was achieved with the attempted impeachment of three members of the High Court. The judiciary was able to see how much support they had from both civil society and from the international community. Ultimately the threat of aid withdrawal (the Danish development agency did withdraw in the months following the impeachment scandal) was enough to force Muluzi to step away from the impeachment and tow the line. This illustrates how the judiciary is calculating not only the degree of support and implications at the domestic level, but also at the international level. Decision-making after 2002 indicates an equally, if not more, assertive judiciary than pre-impeachment. In other words, the attacks on the judiciary buttressed rather than diminished the legitimacy of the institution.

Another paradoxical effect of the impeachment scandal was that it did expose an internal vulnerability within the judiciary. The judge allocation system was revealed to be problematic and it forced institutional change. In the middle of the impeachment scandal, Justice Edward Twea was quoted as saying the judiciary would not allow “judge-shopping” in allocating cases.\footnote{331 (Munthali July 11th, 2002)} This highlights the lack of transparency in assigning judges as cases come in. An interview with a Supreme Court Justice of Malawi, gives further insight into this internal debate within the judiciary on the issue of case allocation and the subsequent effects:
Ultimately did the impeachment affair strengthen or weaken the judiciary?

There seemed to be some kind of scare, certain judicial officers felt scared. We were not prepared for it. It came as a big surprise, especially when there was that collaboration between the party in government and elements in the opposition. It was a surprise. I think there are some who are scared. Because during certain meetings we have read that the judge in charge of the registrar of the High Court (especially here in Blantyre), he complained that certain political cases, when he assigns them to certain judges they refuse. Someone will say, I’ve done several of this kind, I don’t want to now . . . sometimes he has problems. He complained during that meeting. We tried to see how we could go about it. This scare is real. There were three judges impeached. It seems that all three, they took it differently.

There was one who was very depressed about it. He was very, very depressed. There was Judge X who was a bit worried, but maybe not too much, Judge Y who didn’t care about it . . . I think that is the way he would have taken it. He is the kind of judge who makes his decision and he believes he is right about it. You may not like it, you may criticize him, and he will criticize you back. He will tell you his decision is right. He was almost enjoying it, he laughed about it.

The Judge then goes on to implicitly suggest that the judiciary as an institution needs to proceed with more caution. This means being more aware of potential perceptions, particularly with regard to political matters.

Did we come out strongly? Maybe it made us aware - because the politicians might have exaggerated one or two things. Maybe there are certain things we in the judiciary, we are not sensitive to politicians. Not that we should decide in their favor. But maybe there are certain things we could do better [. . .] Personally I don’t think it would be wrong for the Chief Justice to say to an experienced judge “you should handle this.” But I know elsewhere, in the Commonwealth Judges Conferences, they say you should handle cases anonymously. I don’t believe that in all cases we should assign anonymously. So long as the Chief Justice is not saying this is the case please, would you think about this? You know trying to influence. But where you take into account maybe specialization - Judge x is very good at commercial matters, Judge y is good at administrative law matters, or he is senior enough. I have no problem.

The impeachment scandal forced the judiciary to become more transparent, to seek to
amend the law insisting on a three judge panel sitting on constitutional cases.\textsuperscript{332}

One of the outstanding features of Malawi is the high-level of judicial involvement in electoral disputes and even more unusual - intra-party disputes. Gloppen & Kanyongolo (2004:42) found that there was a degree of ambivalence expressed by the judiciary in their role as arbiter in internal disputes. On the positive side the high number of cases demonstrates a high level of trust in the courts. In addition it probably prevented many of these conflicts from disintegrating into violence. However, it could also jeopardize the legitimacy of the courts given the highly political nature of these conflicts and the sometimes ambiguous legal framework of reference for the judges.

As scholars of the U.S. Supreme Court know when a court is asked to engage in an election dispute their credibility and legitimacy are at stake – even in an institution that has built up substantial institutional capital over time. The Malawian judiciary, in contrast, does not have a long history of building institutional capital and legitimacy. There has always been a risk that the court would discredit itself by hearing these election petitions. However, perhaps because they have never really rocked the status quo, they have emerged with their institutional legitimacy more or less intact. The greatest challenge to the status quo handed down by both the High Court and Supreme Court of Appeal is the Presidential Referral case on Section 65. This has jeopardized the stability of the legislature, and consequently the ability of the President to get anything done.

\textsuperscript{332} As a footnote to the impeachment scandal, in July 2002, the government reportedly offered Justice Mwaungulu Chancellorship of Malawi University School of Law. Under Malawi law if a judge is seconded to another position (for example, Justice Elton Singani and James Kalaile who are Law Commissioner and Electoral Commission Chair respectively, later Justice Ansah would become Attorney General), a judge retains all the benefits and perks of their judicial office. Moving High Court or Supreme Court judges to other positions could be used as a perk, or in the case of the Chancellorship of the Law School, as a way to get a meddlesome judge off the bench into a less politically significant position. Generally it appears that the movement of judges to parallel or higher positions within government is seen as a reward.
As Barry Weingast (2002:690) notes in order to survive “institutions must be self-enforcing in the sense that relevant actors have incentives to abide by them.” The rate at which the decisions of the Malawi courts have been abided by is impressive. There are a few exceptions to this rule, but generally both sides have abided by court decisions. As Ginsburg points out this is an important feedback mechanism back into the court.

Ginsburg (2003:73-74) posits:

Occasional victories before the court encourage further filings and enhance the court’s role. I call this configuration, when a court is active, obeyed, and political salient, the “high equilibrium” of judicial review. If a court is unable to convince parties that other parties will comply with its decisions, there is little incentive to bring disputes to court. Furthermore, there is little reason for a losing party to comply if it believes others will not comply. The perception of noncompliance becomes self-fulfilling. I call this the “low equilibrium” of judicial review. In the low equilibrium courts do not often challenge politically powerful plaintiffs, with the result that they are rarely called upon to adjudicate truly important disputes . . . A successful constitutional court in a new democracy will seek to shift from low-equilibrium judicial review to high equilibrium, through careful use of strategy. A court effectively able to exercise the power of judicial review will not only enhance its own power, but will also benefit the constitutional order as a whole.

Malawi is making the progression from low-equilibrium judicial to high-equilibrium judicial review. However, I think Ginsburg perhaps underestimates the risks a judiciary faces when operating in this high-equilibrium judicial review phase. Although the President has not yet officially defied the Section 65 rulings, he has expressed his displeasure towards the rulings with verbal attacks against the judiciary, with physical intimidation (search and raid of judges home), through appointing an outsider to the position of Chief Justice and through doubling the size of the judiciary. In short, can a court operating in a “high-equilibrium” of judicial review within a politically unstable and undemocratic society survive? I would suggest that the linear, unidirectional nature of Ginsburg’s theory may not be applicable in the Malawian context. That until the political environment stabilizes the judiciary is prone to major setbacks.

The Courts have been successful at finding legal solutions to what are
frequently just political disputes. This is where we should look back to the colonial era and the roots in English jurisprudence and the common law tradition of precedent. Overall the language of the judges of the Malawian High Courts and Court of Appeal is cautious. They rarely use appeals to a higher national morality or sense of justice. The courts have not built up their legitimacy through dramatic populist appeals. Nor have they charted a course of path-breaking pro-rights decisions. Instead they have built their legitimacy on the basis of being a steady and dependable arbiter of high-stakes disputes. The Court has been most prominent as a referee in significant political disputes. It does not serve the interests of the Court to take the moral high-road on one side or the other. To resolve the dispute through legal technicalities is preferable to all concerned. In the Section 65 case, the real test is about to emerge, when we will see whether or not the government will abide by the final decision of the Supreme Court.

Furthermore the court has demonstrated the ability to find middle-ground and compromise. The 2007 death penalty decision was an excellent example of this. The ability of the court to continue to make these small decisions, together add up to a more significant development of judicial power. Currently the few strong voices on the High Court are quashed by the more conservative majority. The question we should now ask is whether younger judges will gradually transform the court; or whether once on the bench they too will settle in to a pattern of more conservative decision-making. In comparison to Uganda, Malawi has experienced strong top-down hierarchical control. Based upon evidence collected from newspaper reports and interviews there are fewer internal disputes within the judiciary. If you do your job and don’t antagonize either judicial leadership or the government you are assured of smooth movement up the career ladder. We cannot underestimate the importance of “keeping your job.” For the older career judges this is critical, however I suspect that in years to come the newer judges will have continued opportunities off the bench, either internationally or
domestically in the private sector. This could lead to patterns of bolder and more assertive decision making.

The courts in Malawi have been aware of how delicate their institutional position is within their emerging and volatile young democracy. At the beginning of the transition to democracy in the early 1990s the judiciary was presented with the opportunity to radicalize the judiciary as an institution, to build up a powerful pro-rights pro-democracy justice system. Some of the most populist pro-rights/democracy language is contained in the early judgments of the courts. By the late 1990s it had become apparent to the court, to the nation and to the international community that Malawi’s transition to democracy was going to be fraught and prone to relapse. The judiciary must read signals from the political elites, but also signals from the populace as a whole. They did not want to upset the status quo to the point that violence might break out (1999 election decisions), but they could not be seen to be pro-status quo, pro-government by the people (the 2003 overturning of government ban on third term demonstrations).

Whereas personal political ideology is thought to explain the decision making of judges in the United States, casual observers of the Malawian judiciary frequently put individual decision making down to regional origin. As I have demonstrated region has been at the forefront of the decision making process with regards to appointments. For the current make-up of the judiciary is almost perfectly balanced. The case has been made, that particularly judges from the North, have displayed a strong anti-government decision making record (VonDoepp 2005). This account of judicial decision making is incomplete and the evidence is not compelling. In interviews I found that judges were uncomfortable talking about issues of regional bias, and they were also careful to be even handed in their treatment of the government and opposition party. On the other hand, there are certain judges who have been loyal to the government and have been rewarded
for this. Justice Jane Ansah is one example; she was promoted to Attorney General from
the High Court bench. The judiciary has been forced to handle cases of enormous
political magnitude, from the treason case against the vice-President, to the Section 65
dispute, to the attempted impeachment of the current President. They appear to have
emerged in tact, but have in 2007 incurred the wrath of the sitting President who have
used intimidating words and aggressive action to attempt to subdue the judiciary.

As I outlined in Chapter 5 the durability of the Malawian judiciary is
weak. We should not underestimate the practical difficulties the judges face on a day to
day basis. The judiciary is chronically under funded, they do not have adequate access to
legal sources and documents, they have been forced into conflict with the government
over salaries (which resulted in direct negotiation) and they operate within a weak
administrative structure that suffers from poor management. At a minimum this slows
the speed of justice down, however these practical obstacles also stand in the way of
implementing justice.

Overall the institutional strength of the Malawian judiciary lies in its strong
legitimacy. It is viewed favorably by the population as whole and, more importantly, is
favorably viewed and respected by political and economic elites. At the recent 2007
Constitutional Convention the performance and integrity of the judiciary were one of the
few points of agreement between the UDF and DPP. People seem to recognize how
crucial the judiciary has been to the development of democracy in Malawi. Judges are
traveling now more than ever and are able to use this international experience in hearing
and deciding cases and in management of the court and negotiation of judges salaries.

To conclude, evidence from Malawi suggests that “strategic decision-making”
models of judicial power do not accurately account for the behavior of the Malawian
judiciary between 1994 and 2007. Furthermore, democracy is not a prerequisite for the

333 Author observations, Lilongwe, Malawi, April, 2007.
establishment of a powerful judiciary. The tumultuous political environment has pushed the judiciary into a more cautious stance. But this cautious stance cannot be identified as consistently pro or anti-government over time. Evidence suggests that having survived the attempted impeachment, and secure in the knowledge that Muluzi would not be President after 2004 the judiciary showed signs of increased confidence and assertiveness. This recent upward trend in assertiveness sets Malawian judiciary apart from its Ugandan and Tanzanian counterparts.
Chapter 7

Tanzania 1994-2007
In 1985 Professor Issa Shivji identified what he saw as the major reasons why the executive was not being challenged in the court, most prominent was the “timidity and mediocrity on the part of judges accompanied by loyalty born out of pressures and expectations of favour from the executive” (Shivji 1985:7). Ten years later *The East African Standard* ran a story suggesting that the Tanzanian judiciary was favoring the opposition, the accompanying cartoon showed a team wearing ruling party shirts playing volleyball against a team wearing an opposition party shirt. The judiciary was also playing – on the side of the opposition. This cartoon came in the wake the groundbreaking early 1990’s judgments of Justices Mwalusanya and Lugakingira. Jwani Mwaikusa (1996:245) argues that a heightened perception that the judiciary was or could becoming an ally of the emerging opposition during this time may have been sharpened by the Attorney-General’s request to remove the vocal government critic and activist Judge Mwalusanya from hearing a petition filed by opposition activist Reverend Christopher Mtikila. The request was granted and the case proceeded with an alternate judge. The question then is which account most accurately reflects the decision-making of the Tanzanian judiciary since 1994?

The judiciary in Tanzania has long been distrusted by both the legislature and executive. The people have perceived the judiciary as being distant and aloof from their own everyday realities and the law of the land was often ignored. Some individuals have even suggested that the judiciary was hated by the executive. The history of the Tanzania judiciary is one of subjugation, marginalization and deference to the executive. One symbol of this marginalization is that for years the judiciary was described as a “department” within the Ministry of Justice and Constitutional Affairs. The judiciary

---

334 *The East African* 17th April, 1995 cited in (Bukurura 1995:1)
335 Justices Mwalusanya and Lugakingira are widely cited as the most progressive, significant judges of the post-1984 era. Author interviews with legal scholars May-June 2007. See also (Kijo-Bisimba 2006)
336 Author interviews, Tanzania lawyer and retired judge, May/June 2007.
was not elevated to its true position as the third branch of government until the year 2000 with the passage of the 13th Amendment of the 1977 Constitution of the United Republic of Tanzania – the judiciary is now just the judiciary (Peter 2007a). Therefore on the one hand, it is not entirely surprising that the political community and society at large would be taken aback by this new role played by the judiciary on the verge of multipartyism, on the other hand it is quite surprising that a judiciary - so long an extension of the ruling CCM party - would at least *appear* to be asserting its new found power and independence. As Ben Lobulu337 wrote at the time of transition: “The dawn of the movement for democracy finds a judiciary nurtured under a repressive system of a government less liberal, less enlightened, and more autocratic than it is today.” Lobulu goes on to ask the obvious question: “Can such a judiciary come out for the woods and play its rightful role in a society yearning for democracy?”

As I will demonstrate in this Chapter with few exceptions the Tanzanian judiciary has trod a conservative path. It is obvious to most observers338 that the judiciary has not established its independence, and that this has been in large part due to the failure of government to abide by significant rulings of the High Court and Court of Appeal. Indeed this year the President of the Bar of Association of Tanzania, Joaquine De Mello, speaking at the East African Judges and Magistrates Association annual meeting, challenged both African leaders and the judiciary itself to give up “telephone law.” Arguing that telephone law – the use of phone calls to dictate to judges how to handle court cases – has become part of the legal framework of many African countries.339 The judiciary has continued to tread a timid and cautious path and since the loss of Justices


338 Conclusions based on author interviews with Tanzanian lawyers, academics, civil society members and judges, May/June 2007.

Mwalusanya and Lugakingira from there have been very few cases of significance since 1995. Two recent cases stand out, the Ndyanabo and the Takrima cases, that may perhaps indicate a moderate resurrection of judicial independence.

In this Chapter I will examine the reasons why the evolution of judicial power in 1990s Tanzania has been neither linear nor expansive. I shall begin with an overview of the political scene since 1994. I shall then move on to a chronological analysis of the major cases handled by the High Court and Court of Appeal, focusing on judicial review but also addressing significant rights cases and the treatment of procedural and technical issues by the court. I shall conclude this Chapter with an analysis of the political environment as it relates the evolution of judicial decision-making.

I - Political Environment

A. TANU Hegemony Since 1961

As in Uganda and Malawi it was generally believed that the transition to multipartyism would dramatically impact all political institutions. As Jennifer Widner (2001:291) writes, in addition to the uncertainty multipartyism would bring to the table – for a politician could never know for certain what an opposition party might do to its critics if it came to power – Chief Justice Nyalali felt that courage among judicial officers would be easier to nurture and develop in a multiparty democracy.340

President Nyerere stepped down as President of Tanzania in 1985 and Ali Hassan Mwinyi took over, although Nyerere would remain party Chairman until May 29th 1990. Mwinyi would rule for the next 14 years, until the first change of power through a

340 As I describe in Chapter 5, Chief Justice Nyalali would go on to have a very important role to play in the transition to multipartyism as Chair of the Commission formed to consider the advisability of a multiparty system in Tanzania.
popular election. The severe economic reforms coupled with a sharp economic downturn meant that Mwinyi’s time in office was exceedingly difficult. Mwinyi inherited a country in which people’s standards of living were tangibly worse than they had been in the 1970s. The ideologues within the CCM party, led by Nyerere resisted IMF led liberalization programs, this weakened the party significantly. But by the end of the 1990’s Mwinyi and the more pragmatic members of CCM had won, and the dismantling of the socialist state apparatus had begun. Mwesiga Baregu (1994) argues that this economic watershed also became an important political watershed. Baregu traces the beginnings of political dissent to the fact that opponents of the economic liberalization program quickly realized there was little they could do to dissuade the government from adopting liberal economic policies, therefore they “turned their attention to the logical inconsistency in the government’s espousal of economic liberalization and its rejection of political liberalization” (ibid at p.168). In short, economic transformation was spilling over into the political arena. This culminated in the restoration of multiparty democracy in 1992, with the first multiparty election held three years later in 1995. With regard to the early incorporation of the bill of rights it is perhaps more appropriate to state that the CCM leadership were dragged along rather than skipping ahead. Issa Shivji makes note of how the 1984 bill of rights was intimately connected to developments in Zanzibar and to the weak level of commitment from the CCM:

Just before the democracy tremors in Eastern Europe, there were reliable rumours making the rounds of bureaucracy that the party was seriously considering whittling down the Bill of Rights in the Constitution. It seems to have been particularly angered because apparently it was told that the President’s hands were tied in regard to the so-called “dissidents” in Zanzibar who could not be detained. In the event they were detained in any case. However, the democracy tremors seem to have sober up party stalwarts in their opposition to the bill of rights. Habits die hard though, and as has been documented, threats of detention and other forms of pressures in the on-going debate on multi-partyism are not totally absent. (Shivji 1991:126)
The transition to democracy in Tanzania has been managed, restrained and to a certain degree superficial. There is little evidence of a commitment towards democratic consolidation beyond holding regular multiparty elections (Wang 2005 :185). Moreover the CCM has consistently endeavored to control and marginalize the opposition to ensure their continued dominance of the parliament and executive branch. Rapid and profound transformation through popular agitation for change, as we saw in Malawi and Zambia, simply did not happen in Tanzania. This form of ‘top-down democratization’ (Hyden 1999), has been very slow and incremental. This is frustrating to observers hoping for more rapid change, but (putting aside Zanzibar) the limited transition had been stable and peaceful. A USAID Report on Democracy and Governance in Tanzania released in 2003 explains why CCM has been so successful in maintaining control:

The CCM’s ability to manage political change is a function both of the breadth of its organizational reach throughout society, and of a Tanzanian populace that is at once highly politicized, and accustomed to political competition within the confines of a one-party state. Compounded by the lack of sufficient movement on institutional change, the absence of a broad-based infrastructure of dissent within the larger society has also served to attenuate pressure for rapid or significant political reforms. Incremental reforms have generally been a double-edged sword: providing relief for accumulating pressures for change while at the same time ensuring that the content and parameters of change remain under CCM’s tight leash.

The democratization process is stalling because both institutional and informal restraints on executive power are limited at best. As in Malawi and Uganda, the judiciary has recently demonstrated a certain willingness to exercise its powers of judicial review and keep the CCM in check. But as I will demonstrate this willingness has been tempered by a legislature that is not willing to cede control.

The return of parliamentary sovereignty is perhaps less significant than it might appear at first glance given the overwhelming dominance of CCM. In 1995 CCM held 78.1 percent of the seats, in 2000 87.73 percent, and this would increase to 88.4 percent in
However, in the 1990 to 1995 period – despite being a de jure one party body – the parliament went through significant institutional changes and reconfigurations, this set the scene for a more dynamic role in Tanzanian politics. Overcoming the many challenges of the one-party legacy, the Bunge (parliament) has had some successes since 1995. Wang (2005:186-187) points to the number of Ministerial resignations in the 1990s as a result of parliamentary pressure, in some cases this involved the formation of an investigative select committee.

There are in other words, signs of the post-1992 Bunge being able to impose accountability in a few controversial cases, which has led to ministerial resignations and involved the formation of a selected committee. These must be seen as politically significant cases where parliamentary undertakings have been unpopular with the government, and where the pressure exerted by parliament to a certain extent has resulted in outcomes that have been adverse to government interests. In such cases, it looks as if the Bunge has been able to impose both answerability and enforceability. (Wang 2005:187)

As is the case in Uganda and Malawi the speaker of the parliament exerts a considerable degree of influence. In the case of Tanzania the current speaker is the controversial figure Pius Msekwa, who is a CCM ex-officio and a member of the party’s National Executive Committee (NEC). He is therefore subject to considerable scrutiny and oversight from the party leadership. There is some discussion and dissent at the committee level in parliament, but overall the crucial debates take place within the CCM party caucus. The implications of this, as Wang (2005:190) notes are that “there has been a shift away from plenary towards committees.” There are strong arguments to suggest that this is not particularly favorable to democratization. Although it could also be argued that the degree of specialization, combined with an overall improvement in the skills (education level) of MP’s has resulted in an enhanced accountability function

341 In interviews with Tanzanian MP’s Wang (2005:194) found that the number one difference in the bunge between the one-party era and the multi-party era was the vigorous debate in the former and the lack of debate in the latter. This is a function of strong party discipline and of the debate function now being served through committees.
for the *Bunge*. Wang (2005:192) concludes that “the one-party MP’s represented the government in their constituencies rather than their constituencies in the *Bunge*. . . . in really important cases the government prevails.” 342 This paradox - the multipartyism has strengthened one-party control and stifled debate – is summed up by a Senior CCM MP:

> Today, you have a multiparty system and now we are strictly under the guidance of the party. We are now bounded together to protect ourselves against the other political parties. There is the fear that if we do not work together the party will be forced to collapse or the government will be forced to collapse. So the debates are not as strong as they used to be in the past, and the voting also, you have to vote for the party all the time. (Senior CCM MP, interviewed by Vibeke Wang (2005:94-195).

In short, there was a marked shift to a political culture that valorized the preservation of power; whereas under the single party system individuals had an incentive to compete for maximum policy influence and to develop maximum institutional autonomy. In the 1995-2005 multiparty period majority MP’s had incentives to design institutional arrangements and follow policy recommendations that would benefit the party first (Killian 2004`:186). Tanzanian politicians are, like all other rational politicians, interested in staying in power. The party leadership structure remains vertically stratified in a top-down fashion, and like a sword of Damocles hangs over the heads of MP’s, the President has the power to decide who will and will not stand for reelection.

Mwinyi’s leadership was often criticized particularly in regard to upholding the sanctity of the constitution. Mwapachu (2005`:240-241) cites three cases cited as bringing about this criticism: First Mwinyi’s failure to censure the unilateral decision of the Zanzibar government to join the Organisation of Islamic Conference (OIC). Second, the inconsistent treatment of the Union question, particularly the move by the Union

---

342 Party discipline is enforced in a number of ways, perhaps two of the most visible are the use of a British style “whip” and the outright ban on “crossing the floor.”
National Assembly to have a separate Tanganyikan (mainland) Assembly established. Third, giving the Home Affairs Minister too much leeway in dealing with law and order issues, at the expense of the rule of law.

B. Mkapa I: 1995-1999

Mwinyi’s victory in 1995 was not as convincing as the CCM may have hoped for. The mainland election resulted in the opposition party candidates walking away with 40% of the vote. This promising start for the opposition appeared to evaporate in the years immediately following the first multiparty election. As USAID reports in 2003:

[T]he opposition was increasingly consumed with intramural strife, and proved incapable of forming a stable coalition or translating its electoral mandate into a broad-based social movement to sustain momentum for democratization. Indeed, this bickering contributed to popular discontent and a loss of opposition credibility, providing CCM with organizational latitude to set the terms for democratic reforms. In terms of legitimacy and mobilization criteria, opposition political parties declined precipitously after 1996. In the absence of strong social and institutional bases, opposition parties became no more than collections of individuals prone to internecine personality splits.

In additional to the organizational and financial challenges the opposition, as Tim Kesall (2003) notes, do not have a ready-made social base upon which to build support. In addition there is no significant trade union movement (as in Zambia) to build on, the trade unions were formally absorbed into the TANU party structure shortly after independence. In addition, Kelsall makes the important point that both religion and ethnicity are potential powder kegs in Tanzania. Nyerere’s intellectual nationalist legacy has made the possibility of organizing around a single ethnic group an impossibility.343

The failures of the opposition parties to form strategic alliances and a broad grassroots base were concurrent with a deliberate deliberalization strategy by the CCM.

343 Not only are political parties based on ethnicity and religion outlawed in legal terms, there is a great stigma attached to this type of political activity. It is also important to note that Tanzania is not dominated by a single large ethnic group, such as the Kikuyu in Kenya.
This shift was conceptualized around a broad reassertion of executive power over both the legislature and the judiciary. One of the mechanisms for asserting this control was the continued use of the old 1977 constitution. The opposition and members of the intellectual class recognized the profound problems inherent in a constitution promulgated at the height of authoritarian politics in 1977, combined with a slew of draconian laws some from the 1960s and 70s, others dating back to the colonial era. The hodgepodge amendment of the constitution has resulted in several contradictory clauses in addition to a bill of rights weakened by broad derogation clauses. The government’s response to these constitutional ‘tensions’ was to release a White paper in 1998. The White Paper and the Kisanga Commission led to a series of constitutional amendments in 2000. These amendments reaffirmed the separation of powers, yet continued to disproportionately empower the executive - the president would now be elected by a simple majority of valid votes cast and that he would be able toappoint up to 10 members of Parliament (MPs). One of the more controversial amendments in 2000 is discussed in detail later in this chapter: the official recognition or legalization of “hospitality” given by candidates in election campaigns.

C. Mkapa II : 2000 – 2005

In the 2000 elections the opposition lost more ground. The National Convention for Construction and Reform (NCCR-Maguezi) only won 1 parliamentary seat and failed to field a Presidential candidate. The Tanzania Labour Party won 4 seats as did Chama Cha Demokrasia n Maendeleo (Chadema). The opposition struggled to obtain adequate funding; it was harassed by police at their rallies and were not well-organized.
One of the ubiquitous features of hegemonic parties, in de facto one party state’s is that they almost inevitably become factionalized – the CCM is no exception.

Mwapachu (2005:252) writes

there is a special concern [that] as the country gears itself for the 2005 General Elections, that such politics of patronage and factionalism, two key sources of national disunity, are taking root. Within the ruling party there are already different factions, driven by all types of factionalisms, from religion, places of origin and even tribe.344

Tim Kelsall (2003) observes that the divisions within CCM itself are “broadly reflective of the country at large and manifests many of the same cleavages.” These are notably, ethnicity, religion, regional and generational divisions. To date these divisions have failed to manifest in terms of significant political change or restructuring.

Mkapa’s attitude to the judiciary was negative at best, hostile at worse. It was under Mkapa’s watch that many decisions were nullified through promulgation of new statutes. Mkapa still believed in the principles Nyerere had articulated decades earlier – that the role of the judiciary was to support the development of the country, implicitly this meant to support the government not to challenge the government. In his speech at the 25th anniversary of the Court of Appeal Mkapa partially revealed this position;

I have defended and will continue to defend, the cardinal principle of the institutional and individual independence of the Judiciary. But there is a difference between an independent Judiciary and one that is so elevated and detached from the world around it, and so out of sync with it, that for all intents and purposes could be considered blind and deaf to the realities of the society it seeks to serve. Tanzania needs a Tanzanian Judiciary, not one from Mars. For, as I said before, a Judiciary that wants to stand on only one leg - the philosophical and academic leg - will not be stable enough to be a pillar of peace and the pursuit of the socioeconomic goals of the society. Our Judiciary needs a second leg: the practical application and interpretation of laws in a real life situation, taking into account the social, political, economic and cultural vision and aspirations of the society it has been established to serve. (Mkapa 2007:36)

344 Mwapachu (2005:253) further notes that the issue of factionalism became particularly apparent in the run up to the 2000 Zanzibari Presidential election. Where factions threatened to break up the party over the nomination process for the CCM candidate.
President Mkapa then goes on to cite President Nyerere’s address at the 1965 Judges and Resident Magistrates Conference, in which Nyerere called on the judges to make decisions “in light of the assumptions and aspirations of the society in which they live.” Mkapa’s single pronouncement on the separation of powers was flaccid and inaccurate at best: “Tanzania has been a firm believer and upholder of the concept of separation of powers.” This was followed up by a warning, however, “The independence of the judiciary must be balanced with responsible professional conduct, competence and integrity on the part of the judicial officers, who must exercise their individual and institutional independence with case, and render honest and unbiased opinions based only on the law and the evidence” (Mkapa 2007:35).

D. Kikwete Era: 2006 – 2007

At the end of 2005 Jakaya Kikwete, the CCM candidate won the presidency of the Union with 80.2 percent of the vote. Observers declared that this election was more free and fair than previous elections. In the National Assembly elections CCM won 206 out of 233 elected seats. Elections on the islands of Zanzibar were once again marred by violence. Amani Karume, the incumbent President won with only 53 percent of the votes.

Corruption in Tanzania has increased since the transition to multipartyism. It is clear that corruption is pervasive from the lowest to the highest levels. USAID (2003:23) characterizes corruption in Tanzania in the following way: “[G]rand corruption in Tanzania appears primarily a question of private sector profits made at the expense of state revenue (i.e., through tax exemptions/avoidance) or through the alienation of property (i.e., land), which is then exploited in the private domain rather than through the classic siphoning off of revenue.” It is largely believed that Mwinyi set the scene for
corruption to flourish; despite good rhetoric Mkapa did not appear to substantially alter the trajectory the government was taking. To date, Jakaya Kikwete appears to be making more of a concerted effort. Recently culminating in the (February 2008) dissolution of his cabinet (including the forced resignation of Prime Minister Edward Lowassa) over a major corruption scandal. The implications for the judiciary specifically and for multiparty democracy overall and negative at best, debilitating at worse. Very few corruption cases have come to the judiciary and those involving top elites almost always end in acquittal. In a recent newspaper editorial it was noted that “corrupt individuals in the public and private sectors plunder public resources with impunity well aware of the weaknesses in the law if attempts are made to arraign them in court.”

Furthermore, it has been suggested that the government bureau charged with investigating corruption acts as if its purpose is to clear the names of those involved in corruption rather than to build evidence and a case against them.

Since coming to power in 2005 Kikwete has not faced any major show down with the judiciary. This is perhaps in response to the loyal cadre of 25 new judges appointed in 2005. As with the previous President’s Kikwete has professed an adherence to good governance and the rule of law and as with all Presidents’ it appears (despite Kikwete’s popularity) as though it is business as usual.

345 “This is how to do it”, Editor, The Guardian, December 6th, 2006.
347 Judicial appointments are discussed in more detail in Chapter 5. General comments suggest that the most recent round of appointments were highly politicized and compromised of people who had had successful political careers within the CCM ranks rather than promotions from the lower levels of the judiciary. Author interviews in Tanzania, May/June 2007.
E. Importance of Zanzibar

In contrast to the mainland, Zanzibar’s post-independence history is one of turbulence and instability. Shortly after independence in 1963 Zanzibar experienced a bloody revolution on January 10th 1964 in which the Afro-Shirazi Party overthrew the Zanzibar Nationalist Party (ZNP) and Zanzibar and Pemba People’s Party (ZPPP) government and the Sultan on his throne.348 The revolutionary government has ruled since. In 1977 the Afro Shirazi Party (ASP) merged with TANU to form Chama Cha Mapinduzi (CCM). It is the union of two formerly independent countries under a single Tanzanian Constitution that presents Tanzania with a whole set of potential problems. The 1964 union was based on a set of Articles that remain the subject of political, legal and academic debate today. The quasi-federalist union has left a question mark over whether or not Zanzibar is a state. The union issue has not been pursued through the courts to the degree that one might expect. In the treason trial of SMZ v. Machamo (1999) the Court of Appeal concluded that Zanzibar was not a sovereign state, thus an individual could not be charged with treason against the Zanzibar government. The failure of the legal community to engage in strategic litigation to push the process forward has been the source of some disappointment. As the Vice-Chancellor of Zanzibar University College, Mohamed Harith Khalfan recently noted: “Zanzibar lawyers had let down the public by not taking action against the union. He said lawyers had left all matters concerning the union to politicians, who often were not transparent.”349

In contrast to the mainland, there is a strong opposition party in the form of the Civic United Front (CUF) on Zanzibar. The CCM has been losing support and have sought to portray the opposition CUF as troublemakers and ‘people of violence’

348 There were strong racial and class elements to the formation of political parties at independence. ZNP and ZPPP were made up from the minority, landowning Arabs and Pemban’s, whereas the ASP represented the majority, landless peasant class of black Africans.

349 “Group files Case Challenging Union” IRIN, 24th April 2006.
In the 1995 election the CCM Presidential candidate won with only 50.2% of the vote. CUF won 24 constituency seats, versus 26 for the CCM. Elections observers declared the polls to be seriously flawed. In the wake of a political impasse, CUF decided to boycott the legislature. This led to the first initiative by the Commonwealth Secretariat to broker an accord between the two parties (Commonwealth Brokered Peace Accord Muafaka I). The Muafaka I accords took a long time to be agreed upon and were only signed about a year before the next election was to take place. Unfortunately CCM revolutionary government did not implement the accords before the next election.

The 2000 election was considered even more flawed than the first. CUF demanded a fresh round of elections and planed a demonstration in January of 2001. Despite warnings, and subsequently vicious beatings by the police the January demonstrations took place. In the face of this violence and instability the Union was under international pressure to find a solution to the crisis. The second peace accord, Muafaka II was negotiated and signed. This accord, amongst other things, established an independent Zanzibar electoral commission. As Ben Rawlence (2005:518) notes, “the Muafaka reforms would contribute significantly to a level playing field but to date implementation has been patchy . . . the judiciary remains unreformed, the police and security organs are still heavily politicized and compensation to the victims of the January shootings has not been paid.”

In the 2005 election violence occurred again, but not to the degree of the previous 2000 election. The CCM is not willing to yield any room to the opposition CUF on Zanzibar. However, their past illegal strategies of control and manipulation are not sustainable in the long run. To have Zanzibar controlled by the opposition party is unthinkable; yet the CCM does not appear to be strengthening its base of support. The
question is can the current nebulous status quo hold within a genuine multiparty framework? The answer to that is probably no, the articles of the union will have to be revisited and a clearer federation with well-delineated areas of autonomy for Zanzibar needs to be established.

Summary of Analysis: Nature of Regime and Nature of Transition

The separation of powers in Tanzania is weak. The executive continues to dominate. Recent constitutional amendments (allocation of power to President to appoint 10 MP’s; allowing a non-MP Speaker350) demonstrate that Tanzania is drifting away from a democratic model of separation of powers rather than towards it. As I will demonstrate in the remainder of this Chapter the few attempts by the judiciary to assert their powers of judicial review have frequently been disregarded through the subsequent passage of Acts of parliament that intentionally nullify the judicial ruling.

Despite almost total CCM dominance of the multiparty system there has been a successful and peaceful transition of power between Presidents over three consecutive decades. This peaceful transition of leadership has enhanced Tanzania’s democratic reputation perhaps more than is warranted. It should be noted that individuals singled out to take over have been identified early on and are ‘known quantities.’ Whilst they may each adopt distinct styles the substance of their stance of the major issues does not stray from the party line. The current President Kikwete is the most popular President since Nyerere and has appeared to be both competent and likeable. However, he has yet to address many of the major concerns facing Tanzania today, most pressingly perhaps

350 This amendment was widely believed to have been for the benefit of the long-serving Pius Msekwa, who decided he did not want to rerun for his parliamentary seat in 2005.
the Zanzibar question. Civil society and the media continue to be oppressed. Directly through police harassment\(^{351}\) and indirectly through legislation (NGO Act of 2002). Opposition parties lack adequate funding, organizational capacity and strong leadership. Leadership of the opposition parties have failed to form strong and enduring coalitions. Their support base is concentrated in urban areas and they have yet to successfully outreach to rural areas where the majority of Tanzania’s population still resides. They have lost ground in both the parliamentary and presidential elections since 1995. This is in contrast to Malawi and Uganda where there has been a more positive move towards greater competition. The CCM continues to dominate. As I have demonstrated there is some evidence of parliament acting as a watchdog body in their vetting of proposed legislation. But for the most part CCM MP’s remain loyal to the party and are strictly controlled through the party whip system.\(^{352}\) The party has yet to fully separate from the state.

Tanzania’s transition to democracy is stable, slow and incremental. It appears that many elites still are not fully committed to full liberal multiparty democracy. The question now is whether reform will continue at this incremental pace or whether the process will stagnate, or even move backwards.

What makes Tanzania interesting is that the President and CCM have not demonstrated any open hostility towards multiparty democracy in the way we have seen in Uganda under President Museveni. Yet, somewhat paradoxically Tanzania is in many ways “less-free” than Uganda – in terms of space for dissent (measured through civil society and media), in terms of the success of opposition parties and in terms of the separation of powers. The Ugandan judiciary and legislature certainly face strong

\(^{351}\) Note the arrest of Lawyers Environmental Action Team (LEAT) leaders on sedition charges and police harassment and searches of their offices.

\(^{352}\) Author interview with Tanzanian Political Scientist, May 2007.
attacks from the executive, but also appear to have more space in which to exercise dissent. In short, CCM has far greater control over the political system than Museveni’s NRM, this means that they do not have to engage in openly hostile, anti-democracy acts to keep control in the same way that Museveni does. As one observer told me the government does not need to attack the judiciary because the judiciary already knows what to do!\textsuperscript{353}

\textbf{II - Judicial Decision Making}

\textbf{A. Judicial Review}

Once the bill of rights had belatedly come into effect it didn’t take long before Justice Mwalusanya\textsuperscript{354} attacked the incompatibility of Tanzania’s preventative detention laws.

\textsuperscript{353} Author interview with UNDP official in Tanzania, June 2007

\textsuperscript{354} Retired Justice James Mwalusanya is revered as being one of Tanzania’s greatest promoters of human rights and justice. The legal community would label him a “judicial activist”, a label Mwalusanya chose to embrace. Mwalusanya was appointed to the bench in 1984, the year the Tanzanian constitution would be amended to include a bill of rights. In 2005 the Legal and Human Rights Centre published a book of selected judgments and writings of justice from Justice Mwalusanya to coincide with the presentation of the Tanzania Human Rights Award. Kijo-Bisima and Maina Peter (2006) give an overview and context to the rise of Mwalusanya in one-party Tanzania. As I have discussed at length in Chapter 4, Tanzania’s judiciary suffered both heavy pressure and extensive interference in the 1960s, 70s and into the 1980s. It was within this politically disagreeable situation that few “bold stars” emerged within the judiciary. According to Kijo-Bisimba and Maina Peter (2006:12) these included Justice Edward Mwesiumo, who had not fear speaking out against executive malfaisance. In his judgment in \textit{Edward Mlaki and Liston Matemba v. Regional Police Commander, Kilimanjaro Region and Secretary, Regional security Committee, Kilimanjaro Region}, Justice Mwesiumo pointedly asserted: “this defiance to the court process by the two highly place government officials though prima facie directed at this court is in fact directed to the laws of this country and therefore to the Constitution . . . it is tantamount to watering down the whole legal system of the country” (cited in Kijo-Bisimba & Maina Peter 2006:15). Secondly, Kijo-Bisimba & Maina Peter (2006) turn to the judgments of Justice Massoro Mnzavas. In 1977, at the height of the pressure on the judiciary Justice Mnzavas was faced with a case of a Regional Commissioner brazenly flouting the orders of a lower court. In his judgment (\textit{Re: An Application by Paul Massawe for An Order of Mandamus (1977)}) Justice Mnzavas reminded the Regional Commissioner that “one of the things that distinguishes Tanzania from other one party states is the independence of its judiciary” (cited in Kijo-Bisimba & Maina Peter 2006:18). Finally, Justice Lugakingira who will perhaps be best remembered, in addition to his tireless campaign for human rights, for the case of \textit{Christopher Mitikila v. Attorney General} (1993). This case is extensively analyzed elsewhere in this chapter. Justice Mwalusanya was in a separate category all his own. His work is
and its concurrent restrictions on freedom of movement. As noted in Chapter 4 Tanzania’s preventative detention laws usurped the powers of the judiciary enabling the executive branch to take matters directly into their own hands. In 1985 the Preventative Detention (Amendment) Act (Act no. 2 of 1985) reinstated the jurisdiction of the courts. Another outdated, but troublesome colonial law was the Deportation Ordinance of 1921. This allowed the President to sign a deportation order then the police, instead of deporting the individual decide to detain them indefinitely. In *Chumhua s/o Marwa v. Officer i/c of Musoma Prison and Another* (1988)355 the President of Tanzania ordered the deportation of Marwa Wambura and 155 others from the Mara Region to Lindi Region. The grounds for their deportation were that Marwa, et al.’s continued residence in the Mara region was dangerous to peace and good order. While awaiting their deportation they were detained in prison because of “non-availability of suitable transport.” The son of Marwa filed a write of habeas corpus. Mwalusanya declared the Deportation Ordinance of 1921 to be unconstitutional. The state attempted to restrict Mwalusanya by arguing that the case had been filed before the Bill of Rights had come into effect. Mwalusanya dismissed this objection. The Deportation Ordinance violated the equal protection clause under Article 13; the right to be heard is part of just procedure and “Parliament may no deprive a person of a right to a fair hearing in accordance with the principle of fundamental justice for the determination of his rights and obligations.” In *Chumcha Marwa* it seems as though Justice Mwalusanya is able to celebrate finally apply the principles of judicial review:

---

355 High Court of Tanzania at Mwanza, Miscellaneous Criminal Cause No. 2 of 1998

widely celebrated by law students and scholars because of his direct and easy to read judgments. Individuals observed how his chambers were filled with all kinds of materials, many on human rights that other judges had never seen before (Bukukura 1995:38). However, he was regularly attacked by State Attorneys and other Judges on the bench, particularly by those in the Court of Appeal. This provides important insight into the internal dynamics of the judiciary. Notice to High Court Judges being – proceed with caution lest you be chastised by the leadership of the judiciary.
Judicial review is a weapon which has to be used with great care and circumspection, such that the Judiciary has to be extremely careful to see that under the guise of redressing a citizen’s grievance, it does not encroach upon the sphere reserved by the Constitution to the Executive and the Legislature. It is tempting to seek escape from the burden of the decision, taking refuge in such expressions as “it is a political question” or that I have to decide “in public interest”, but those rationalizations can hardly take one far [. . . ] For sure if the judiciary cannot come to the aid of a poor citizen when oppressed, then its existence is questionable. We can do without it and perhaps create other institutions for that noble purpose.

Detention and Deportation Orders are widely known to have been used and abused by the colonial government and the independence government. Thus the judiciary has tended to treat them with a great deal of care and scrutiny. In the past the judiciary has declared many such orders defective and invalid (Peter 1997a:634). So in many ways Chumcha was an ideal case for the judiciary to begin flexing its new power without causing too much controversy.

Despite the transition to electoral democracy, political opponents are frequently arrested on trumped-up charges of sedition or treason. As I demonstrated in the case of Uganda, the debate over the right to bail has turned violent with the seizure of suspects released on bail by the High Court. Bail is generally considered a right, and not a privilege. If a court is to refuse bail then it should give significant reason. Daudi s/o Pete v. The United Republic (1989) has been established as a foundational case for the newly empowered Tanzanian judiciary. It was the first constitutional case dealing with the new bill of rights and therefore received significant attention from the legal community and human rights activists. Daudi Pete concerned an individual charged

---

356 Outdated statutes have given state prosecutors carte blanche to hold suspects without bail. The Criminal Procedure Act 1985 contains provisions that allow the state to hold individuals without bail without breaking the law. The Director of Public Prosecutions will argue that granting bail to the accused would be prejudicial to the interests of the State. That allows the State to delay while the prisoner languishes in jail (see (Kijo-Bisimba 2006:280)).

357 High Court of Tanzania at Mwanza, Miscellaneous Criminal Cause No.80 of 1989 (unreported)
with robbery with violence – he had seized some cows that had trampled his *shamba* (farmcrops). Under the infamous section of the Criminal Procedure Act that denies bail to persons accused of certain offences, Daudi Pete was denied bail on the grounds that the offense involved the threat of violence. On appeal to the High Court the lawyers for the accused argued that bail was a right under the Tanzanian Constitution. Justice Mwalusanya concluded that Section 148 of the Criminal Procedure Act of 1985 was unconstitutional as it contravenes the doctrine of presumption of innocence and offends the doctrine of separation of powers for it removes the discretion of courts in matters of bail. Justice Mwalusanya cited the arguments of the Counsel for the Republic in a 1988 case concerning bail:

> [T]he role of the Parliament is to make law. They are representatives of the people in their respective constituencies whose duty is to express the will of the people in the laws they enact. They are thus bound to enact any law irrespective of whether or not the same appears to be tyrannical or dictatorial in nature. In short, the powers of the Parliament in marking law are unlimited and can’t be questioned by anybody let alone the judiciary. Parliament can pass any law irrespective of whether or not the same appears to contravene the provisions of the Bill of Rights.

Mwalusanya responds by stating that “objective analysis of our social order is essential for any judge, an analysis that is unencumbered by a dense ideological fog but one that permits critical insight into the social order’s contradictions.” Justice Mwaluanya’s commentary on the role of the judiciary is worth citing verbatim here:

> [W]ith the advent of the Bill of Rights in 1984, the Judiciary in Tanzania and particularly the High Court is blinking under the glare of sustained appraisal of its role in society. The judiciary had indeed reached a watershed. Decisions taken now on the rights of the citizens prescribed in the Bill of Rights will have a critical effect on the continuing relevance of this institution in the future.

Interestingly Mwalusanya goes on to recognize the importance of image, legitimacy and the diffuse public support. This reflects the position of the then Chief Justice Nyalali as described by Widner (2001).
[. . .] The judiciary of late may have been receiving a bad image of a shady villain and never the fearless champion of truth and justice. That image ought to be corrected now [. . .] For the judges to be able to capture confidence from the community, a whole new package of legal outlook should be cultivated which does not abandon standards but emphasizes judicial creativity with a social objective in mind.

With regard to the issue of removing judicial discretion in cases of bail, Mwalusanya states that this is a subversion of the principle of separation of powers. In doing so Mwalusanya launches into an extensive academic discussion on constitutionalism and the separation of powers. However, only certain parts of the statute are unconstitutional. Mwalusanya concludes: “We should never mislead ourselves into believing that the strength of law lies in authoritarianism; rather it lies in reasonableness which commands respect.”

On appeal Director of Public Prosecutions v. Daudi Pete (1990)\(^{358}\) the Court of Appeal first upheld the jurisdiction of the High Court. The Court of Appeal concurred with the High Court and upheld that bail is a right and not a privilege. But it overruled the holding on the constitutionality of Section 148. It was held that the only provision which ought to have been so declared was Section 148 (5) (e) for it was unnecessarily wide. In addition they moderated Mwalusanya’s declaration on separation of powers. Noting the following:

The doctrine of separation of powers is fringed when either the Executive or the Legislature takes over the function of the Judicature involving the interpretation of laws and adjudication of right and duties in disputes with between individual persons or between the state and individual persons. Legislation prohibiting the grant of bail to persons charged with specified offences does not amount to a take over of judicial functions by the Legislature.

To many the narrow interpretation of this statute and the acceptance of the exceedingly broad derogation clause of the constitution (Article 30) by the Court of Appeal were disappointing. However, despite the moderating actions of the Court of Appeal, *Daudi Pete* is nonetheless a foundational case for the Tanzanian judiciary. As I discussed in Chapter 4 abuse of preventative detention laws and the withholding of bail were part of the politicians’ ‘bag of tricks’ for maintaining CCM hegemony and stability. This ruling constituted a strong statement on the part of the judiciary - we were in a new era where human rights were to be protected, even if this inconvenienced the government. Moreover, never before had a High Court judge so openly and directly criticized the government. It sent an important signal to the government to take the initiative and bring other sections of the Criminal Procedure Act into line with the bill of rights (Widner 2001:246). But it is the reaction of the government to both *Daudi* and *Mtikila* – discussed below - that demonstrates how the early 1990s was a seminal moment for the Tanzanian judiciary. The government also recognized that the early 90s was a critical juncture and the passage of the 1994 Basic Human Rights and Duties Act is widely believed (by both the academic community and the judiciary itself) to be a reaction to the *Daudi* and *Mtikila* cases. In the words of Kijo-Bisimba and Peter (2006:34) after *Chumha, Daudi* and *Mtikila* the judiciary “had to be tamed.”

In *W.K. Butambala v. Attorney-General* (1990) Justice Mwalusanya attacked another draconian piece of legislation – the Legal Aid Criminal Proceedings Act of 1969. Under the 1969 Act the amount of money paid by the State as remuneration for Advocates taking dock-briefs to assist poor accused person with major offences was

---

359 See for example, (Kijo-Bisimba 2006) and (Shivji 2006).

360 Author interviews with High Court and Court of Appeal judges, May/June 2007.

361 High Court of Tanzania at Mwanza, Miscellaneous Criminal Cause No. 50 of 1990. (Unreported)
minuscule. Mwalusanya declared that this was a violation of the Constitutional right to fair remuneration. “The paltry sums mentioned in Section 4 of Act No. 21 of 1969 are void, and modified to read that an advocate in legal aid cases shall be entitled to be remunerated according to quantity and quality of the work done as assessed by the certified authority.” The Attorney General was dissatisfied with this decision and appealed to the Court of Appeal. In *Attorney General v. W.K. Butambala* (1991)\(^{362}\) the Court granted the appeal on grounds of procedural (related to jurisdiction) irregularities. Further, the Court concluded that Justice Mwalusanya had raised the issue of constitutionality when there was no legitimately permissible occasion for him to do so. Interestingly Mwalusanya was severely reprimanded by the Court of Appeal for behaving like, as the Court coined, “ambulance Courts” – that is judges who go around looking for statutes to invalidate.\(^{363}\) An interview with a Court of Appeal judge suggested that

\(^{362}\) Court of Appeal of Tanzania Criminal Appeal No. 37 of 1991. Reported in Kituo Cha Katiba Constitutional Cases Digest, p.57.

\(^{363}\) In *Attorney-General v. W.K. Butambala* (1991), the Court of Appeal direct attacked Mwalusanya in their written judgment:

> “... If we may be permitted to borrow and extend the term “Ambulance Lawyers” in currency in certain jurisdictions, it is not desirable to reach a situation where we have “ambulance Courts” which go round looking for situations where we can invalidate statutes. We say this deliberately and by design and we do not think this is conservative in the negative same... But there must be occasion for that. That is a judicial power reserved for judicial situations. When we are moved we move into judicial action and fulfill our responsibilities. Not Otherwise. We are not knight errants.”

On another occasion the Court of Appeal criticized the style of Mwalusanya’s judgment writing, which was a style “more suited for a thesis than for a judgment.” One cannot help but be reminded of Mark Ossiel’s theory that judges openly hostile to the regime are more likely to couch their judgments in ‘natural law’ terms, appealing to general principles of what is ‘right’ and ‘wrong.’ These types of judgments are more populist in nature and are clearly designed to generate popular support. As Ossiel writes: “Judicial resort to natural law rhetoric is not only a common consequence of political crisis... It is also an effective tactical means to that end. In other words, it can help stir up political turmoil rather than merely reflect it, when judges seek to publicize the questionable character of executive policies that may partly have escaped public attention.” (Ossiel 1995:229). I believe that Mwalusanya was in part trying to stir up political turmoil, but in a positive way, to push the democratization process along. In hindsight however, it is clear that Mwalusanya perhaps overestimated the degree to which Tanzania had liberalized and would be receptive to international human rights norms, and underestimated the degree to which the government would be willing to interfere with a court that was not always being cooperative.
contempt within the judiciary for Mwalusanya was based on his propensity to go looking for “trouble”, trying to create conflict with the government and, to destabilize the situation. In the words of one senior Court of Appeal Justice, “Mwalusanya created an opportunity to have that case [Butambala] before him and to deal with it.”

*James F. Gwagila v. Attorney-General (1994)* once again pitted Justice Mwalusanya against the government. The plaintiff was a Regional Development Director for the Tabora Region until 1990 when he received a letter informing him that the President (under the Civil Service Act of 1989) had directed Mr. Gwagilo’s retirement from public service. No reasons were disclosed as to why this retirement was considered in the interests of the public. The Attorney-General claimed the court did not have jurisdiction to question the actions of the President and that a civil servant serves at the please of the President. Justice Mwalusanya held that the President is under obligation to give reasons for the dismissal by virtue of the Constitution which guarantees the right of appeal and right of judicial review from any decision affecting citizen’s rights and the right to know have access to information. Furthermore, it was declared a violation of the principles of natural justice not to give reasons to the party that has lost. For it is implicit, that if you don’t know the reasons for your loss then you are unable to appeal.

The notion of subjective or unfettered discretion is contrary to the Rule of Law. All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power. If discretion is not subject to review by a court of law, then in our judgment, that discretion would be in actual fact as arbitrary as if the provisions themselves do not restrict the discretion to any purpose and to suggest otherwise would in our view be naïve.

Once again Justice Mwalusanya was not shy to come out and directly confront the undemocratic behavior of the government. But this radical posturing would come with a

---

364 Author interview with Tanzania Court of Appeal Judge June 2007.

365 High Court of Tanzania at Dodoma, Civil Case No. 23 of 1993. Reported in [1994] TLR 73 (HC)
price. The next big constitutional case to come to Mwalusanya was too high-stakes for the government to risk allowing him to hear it: Christopher Mtikila’s fight for independent Presidential candidates would be transferred to Justice Lugakingira instead.

Rev. Christopher Mtikila and 3 Others v. Republic (1994)\textsuperscript{366} (Mtikila II) rocked both the political and legal world by testing the real commitment of the CCM regime to liberalization and their adherence to liberal democratic constitutional principles. The case involved opposition activist and human rights campaigner Christopher Mtikila and came dripping with controversy and potential embarrassment for the Mwinyi government. It was not entirely surprising then that after being assigned to Justice Mwalusanya, on the basis of government complaints the case was transferred to Justice Lugakingira.\textsuperscript{367}

The constitutional case came hot on the heels of a victory in the Dodoma High Court for Mtikila and three others who were jointly charged with three criminal offences (Rev. Christopher Mtikila and 3 Others v. Republic (1992)\textsuperscript{368} Mtikila I. Mtikila and his followers were charged with 1) Refusal to desist from convening a meeting or assembly after being warned not to by the police. 2) Holding an unlawful assembly, and 3) Use of abusive and insulting languages in such a manner that was likely to cause a breach of the peace. The issue on appeal was whether a person can be convicted on an offence not

\textsuperscript{366} High Court of Tanzania Civil Case No. 5 of 1993. Reported in [1995] TLR 31 [HC]

\textsuperscript{367} As Mwalusanya gained recognition, particularly for human rights, it was widely suspected by many that “forum shopping” was taking place; where complainants would strategically file in Mwalusanya’s district. Finally, there was a complete failure (of course by design) to report many of his significant judgment in the Tanzania Law Reports – these cases were frequently reported and discussed internationally however (‘Kijo-Bisimba & Maina Peter2006’:31-35). Kijo-Bisimba & Maina Peter (2006:35-36) argue that with Justice Mwalusanya’s retirement the High Court has retreated into silence (with the exception of Ndyanabo, Dibagula and Takrima).

\textsuperscript{368} High Court of Tanzania at Dodoma, Appellate Jurisdiction, High Court Criminal Appeal No. 90 of 1992.
charged of and whether the words spoken amounted to abuses and insults. This case did come before Justice Mwalusanya who acquitted the appellants:

No reasonable man who was in the audience could have taken the words spoke at their face value or in their literal meaning. The words were a figurative speech – that the President was a thief because he had bankrupted the country to Zanzibari’s, that the Father of the Nation had sold Tanzania or that the C.C.M. was a party of thugs. Any reasonable man knows that this country is not bankrupt and that it has not been sold at all; and that C.C.M. has a lot of respected members. And so no reasonable person could have taken the figurative speech literally more so that it was spoken in the context of a political speech by an aspiring member of an opposition party.

On the question of the constitutionality of the Police Force Ordinance that empowers policemen to prevent both public and private meetings and assemblies from taking place. Thus, the Attorney-General argued, under the claw-back clause (that the bill of rights is subject to the laws of the land), the Police Force Ordinance trumps freedom of association. As I elucidated in Chapter 5, part of the Nyalali Commission report was list of laws that they recommend should be withdrawn from the statute book. This list included Section 41 of the Police Force Ordinance. Justice Mwalusanya agreed, stating that the only offending laws that have been saved by the claw-back clauses are those that provide a procedure as a safeguard.

_Mtikila II_ came before Justice Lugakingira. In essence Mtikila was challenging the validity of the entire 1977 Constitution. Mtikila argued that certain Constitutional amendments and statutes appear to infringe the right to participation in national public affairs and freedom of association, both of which are guaranteed by the Constitution. The statutes highlighted included provisions of the Political Parties Act 1992 which, the petitioner claimed, infringed freedom of association; some provisions of the election laws which made it impossible for independent candidates to contest in elections; certain provisions of the Newspapers Act 1976 which he claimed were arbitrary and liable to abuse, and an infringement to freedom of expression; and certain provisions of the
Police Force Ordinance, Cap 322, and the Political Parties Act 1992 which, he claimed, infringed the constitutional right to peaceful assembly and public expression by requiring a permit to be obtained before one can hold a public meeting or a rally. The petitioner also sought a declaration whether or not the appointment of people from Zanzibar to offices in Mainland Tanzania dealing with non-union matters was constitutional. Besides opposing the petition on substantive grounds, preliminary objections were raised for the Respondent regarding whether the petitioner had locus standi, whether he had a cause of action, and whether the issues he raised were justiciable (see 1995 TLR p.32).

It was certainly an important jurisprudential development for Tanzania when Justice Lugakingira declared that:

the orthodox common law position regarding locus standi no longer holds good in the context of constitutional litigation in that the notion of sufficient personal interest over and above the interest of the general public has more to do with private law rather than public law; in matters of public interest litigation the Court will not deny standing to a genuine and bona fide litigant even where he has no personal interest in the matter; In the circumstances of Tanzania, if a public spirited individual springs up in search of the Court's intervention against legislation or actions that pervert the Constitution, the Court, as guardian and trustee of the Constitution, must grant him standing;

Justice Lugakingira, following in the footsteps of the Indian judiciary, then went on to opine on the importance of public interest litigation in a poor and developing society such as Tanzania.

The relevance of public interest litigation in Tanzania cannot be over-emphasized. Having regard to our socio-economic conditions, this development promises more hope to our people than any other strategy currently in place.

Other factors could be listed but perhaps the most painful of all is that over the years since independence Tanzanians have developed a culture of apathy and silence. This, in large measure, is a product of institutionalised mono-party politics which in its repressive dimension, like detention without trial, supped up initiative and guts. The people found
contentment in being receivers without being seekers. Our leaders very well recognise this, and with the emergence of transparency in governance they have not hesitated to affirm it.

Mtikila was successful in overturning Section 40 of the Police Force Ordinance that requires the issuance of a permit to hold a political rally. As Lugakingira notes, “the requirement for a permit infringes the freedom of peaceful assembly and procession and is therefore unconstitutional. It is not irrelevant to add, either, that in the Tanzanian context this freedom is rendered the more illusory by the stark truth that the power to grant permits is vested in cadres of the ruling party.” The rest of the law regarding public gatherings was held to be constitutional, for the Police do have a role in maintaining law and order. On the core issue of whether it was constitutional to require political party membership as a requisite for running for the office Justice Lugakingira noted the following:

> What happens when a provision of the constitution enacting a fundamental right appears to be in conflict with another provision in the Constitution? In that case the principle of harmonization has to be called in aid. The principle holds that the entire Constitution has to be read as an integrated whole, no one particular provision destroying the other but each sustaining the other;

On the matter of whether it is unconstitutional for the President to appoint Zanzibari’s to head non-union ministries and departments on the mainland, Justice Lugakingira acknowledged the haphazard legal nature of the Union. But ultimately concluded that the President has the authority to appoint whomever he or she wants.

Unfortunately Mtikila II was rendered null and void with the passage of the 11th Constitutional Amendment which, once again, outlawed independent candidates. It is interesting to note that the government replaced the nullified statute of the Political Parties Act of 1992 with a Constitutional Amendment. Undeterred Reverend Mtikila
would come back in May 2006 when the High Court declared that constitutional provisions banning the participation of no-party candidates were unconstitutional and the court direct the government to put in place mechanisms to enable the electorate to know that no-party candidates can now run in time for the 2010 general election.369

Unfortunately for Mtikila the case, although filed in February 2005 was not resolved until May 2006. Mtikila did run in the 2005 Presidential election, but on the Democratic Party (DP) ticket. One wonders if these delays were intentional to allow the 2005 elections to run smoothly and to allow the government time to incorporate the ruling into new policy.

The Union Question Very few cases have importance have come before the court in regards to the nature of the union between Zanzibar and Tanganyika. This is, in part that many of the issues would fall under the political questions doctrine. The question strikes at the heart of Tanzanian identity and it has so many profound economic, political and social implications, it is not surprising that the Tanzanian judiciary would not want to touch Union related cases

Perhaps encouraged by the modest successes of the early 1990s by Mtikila and others, Paul Mhozya initiated a case alleging that President Ali Hassan Mwinyi had violated the constitution (Mwalimu Paul John Mhozya v. Attorney General (1994)370 (Mhozya I). Mhozya sought an interlocutory injunction (Mhozya II371) restraining the President from discharging his functions pending determination of the main case in which the applicant sought orders of declaration that: (a) the Constitution of the United Republic had been violated - The alleged violation concerned Zanzibar’s unilateral


371 High Court of Tanzania, [1996] TLR 130
decision to join the Islamic Conference Organisation (ICO) and the President was implicated by virtue of his failure to stop Zanzibar; (b) the President was guilty of having allowed or enabled the said violation; and (c) the continued exercise of presidential powers by President Ali Hassan Mwinyi was unconstitutional and a potential danger to the well being of the country and its citizens. The Attorney General raised a preliminary objection against the application on the grounds that the affidavit in support of the application was fatally defective, and that the Court had no jurisdiction to make the orders sought ([1996] TLR at p.131). Unsurprisingly the application was dismissed; however several interesting issues were contemplated by Justice Samatta. Defending the separation of powers, Justice Samatta stated that the legislature has exclusive prerogative over the right to institute impeachment proceedings against a sitting President. In addition, no injunction can be issued against the President.

In *SMZ v Ali* (2000)372 the Court was forced to confront the union head on. The accused (18 members of the opposition Civic United Front (CUF)) had been charged with treason against the government of Zanzibar and had been languishing in custody for almost three years. The accused claimed that they could not be charged with treason because Zanzibar was not a sovereign state. Although this charge was accordingly dropped by the Attorney-General, the High Court of Zanzibar decided against the petitioners on other issues. They therefore appealed to the Court of Appeal on the mainland. Following the hearing of the appeal the prosecution dropped the charges against the individuals. The Court decided, however that despite the fact that a trial was no longer pending they could, in view of the grave constitutional issues raised by the appeal deliver a ruling regarding the High Court’s decisions. The Court held that treason charges could only be brought against an individual with respect to the United Republic

372 [2000] 1 EA 216
of Tanzania and not Zanzibar. Thus the provision in the Zanzibar Penal Decree providing for the offence of treason was held to be inconsistent with the Constitution of the United Republic of Tanzania and therefore void. Treason was a Union matter. This case was important both politically and legally. It was being heard at the time when Zanzibar was in turmoil due to election related violence during the 2000 presidential and parliamentary elections.

In addition to the obvious importance of the case as it relates to the opaque union between Zanzibar and the mainland, it is an interesting example of the Court going beyond a strict adherence to procedural rules and technicalities. The court ordered a revision in what was originally a criminal application (see Peter 2007:249). Professor Peter leads us to another union related case to examine the seeming contradictory behavior of the Court of Appeal. In *Seif Sharif Hamad v. S.M.Z.* (1992)373 the Court was asked to address conflicts that existed between the 1977 Constitution of Tanzania and the 1984 Zanzibar Constitution. Instead of directly addressing these significant constitutional issues the Court suggested that appropriate authorities take measures to harmonize the provisions of the respective constitutions.

Very little of significant interest happened in the late 1990s. It appeared that the new restrictions on the filing and hearing of constitutional cases were working; the cases simply weren’t coming to the court. As I describe below both the *Dibagula* and *Ndyanabo* cases created some interest and excitement, but it would be a case filed by the Legal and Human Rights Centre (and other legal NGO’s) that would end this drought period (*Legal and Human Rights Center and Others v. Attorney General* (2006)374;

---

373 Criminal Appeal No. 171 of 1992 (Unreported)

374 Miscellaneous Civil Case No. 77 of 2005, High Court of Tanzania at Dar es Salaam (Kimaro, J, Massati,J and Mihayo, J). Reported in [2006] 1 EA 141
otherwise known as the Takrima\textsuperscript{375} case) and bring the judiciary back into the spotlight. Previously, under the Elections Act of 1985, the ‘feting’ of voters on the campaign trail was outlawed. Politicians protested by arguing that it “is ‘unAfrican’ not to give friends something to eat.”\textsuperscript{376} Act No. 4 of 2000 amended the National Elections Act by introducing provisions which legalized the offering, by a candidate in election campaigns of anything done in good faith as an act of hospitality to the candidate’s electorate or voters. These provisions are popularly known as the “takrima” provisions. The provisions are silent on the amount and timing of the ‘hospitality’ to be provided and violates the right against discrimination, the right to equality before the law and the right of the citizens to participate in fair and free election through encouraging corrupt and offensive practices.

The preliminary objection filed by the Attorney General sought to remove the applicants standing to bring suit in the first place. Arguing that locus standi can be given to natural persons only, and that the petitioners had created a hypothetical case because human rights violations cannot be against a company or institution. The Attorney General did not cite any authorities to support his argument and the Judge agreed with the petitioners that there is nothing in Article 30 of the Constitution which confines the definition of a person to natural persons.

The High Court found in favor of the petitioners. Justice Natalie Kimaro,

We do not see any lawful object which was intended to be achieved by the ‘takrima’ provisions apart from legalizing corruption in election campaigns. We do not consider this to be a societal interest. As illustrated the ‘takrima’ provisions discriminates between the high-income earner and the low-incomes earner as well as between selected classes of persons with similar functions [. . .] it has created a serious mischief by allowing high-income earner candidates to use their class to influence voters to win the elections [. . .] enactment of the ‘takrima’ provisions is a very

\textsuperscript{375} In its traditional context takrima was meant to be a thanksgiving gesture for one’s achievements.

\textsuperscript{376} “Judges Refuse to Entertain ‘Hospitality’ Law”, The East Africa, May 9\textsuperscript{th}, 2006
dangerous approach in the whole process of conducting elections. It amounts to building a culture, which if sustained, will lead this nation to a bad destination. People should get the opportunity to think freely and decided freely and should not be subjected to influences of ‘takrima.’

The media widely applauded this decision from the High Court. The East African declared this a landmark case in which “the High Court’s bold ruling is a positive sign of how the Tanzanian government system [...] is working to provide checks and balances. The High Court has used its power to stand form for what is right.” It was a pretty straightforward case for the High Court; the 2000 and 20005 elections had shown how problematic the practice was. Indeed, it was newly-elected President Jakaya Kikwete who called for a review of the law; thus signaling to both the NGO community and the courts that the time had come to address this. As Michael Okema writes in the East African, “an important less learnt from the takrima case is that civic organizations can make themselves relevant . . . It is an example that other non-governmental organizations should emulate.” Would takrima have been decided the same way ten years earlier? When asked this questions a High Court judge told me that the Court was not just reading the wind seeing which way government and popular opinion was heading, but they had to wait for the case to come to them. “When it came it was accepted. The general public was happy. The rich had been buying people to vote for them.”

In contrast, a prominent Tanzania legal scholar articulated a different position: “If that case had been decided during the last phase of government. It wouldn’t


379 Ibid.

380 Author Interview with High Court Judge, June 2007.
have been decided in that way. [They are] trying to be politically correct. They wait for signals.”

Writing a year and a half later in the Citizen newspaper, Michael Okema addressed both the usefulness and strategic relevance of pursuing policy objectives through the courts in Tanzania. There has been a vigorous debate in Tanzania in the last couple of years over whether to change the medium of instruction in schools from English to Kiswahili. The Ministry of Education and Vocational Training (MOEVT), in August 2007, declared that the government had not yet decided on a timeframe for implementing the switch. A veteran teacher has decided to speed up the process through the courts by suing MOEVT. Okema notes the following:

What we should remember is that even if the teacher wins he won’t be the first one to win a case against the government. The importance of this realization stems from the fact that the government has been at best sluggish and at worst reluctant to implement the rulings of the courts. How long did it take or has it taken to implement the court’s ruling against ‘takrima’? What about the ruling in favour of independent candidates? Thus one of the challenges is to advocate that the separation of powers between the executive, judiciary and the legislature is workable enough to ensure that what courts rules against the government can be executed accordingly. This is a battle that has to be wielded fervently if we really want to effect policy changes through legal channels . . . If the policy cycles strictly follow the rule that laws follows from policies then it is high time that the battles for certain policies head to the court of law.

B. Treatment of Procedural “Obstacles” and Public Interest Litigation

The technical and procedural obstacles to the fair administration of justice in Tanzania are numerous. They run from small and mundane, to substantial and unconstitutional. The Court of Appeal has exhibited a particular zeal for adhering to procedural rules over

381 Author interview with Tanzanian Professor of Law, May 2007.

and above the interests of justice. As Tanzanian lawyer Ben Lobulu (cited in Peter 2007:245) writes:

The Court of Appeal is a court that preoccupies itself and it evidently does so with gusto and relish, with its own administrative and procedural rules. As if that were not bad enough, the court is not predictable, reducing, in large measure, pursuit of an appeal into a game of chance.

In interviews I found Tanzanian legal scholars used the words “discouraging” and “disaster” to describe the performance of the Court of Appeal. One scholar noted that because decisions are made in the group form (there are no dissenting decisions) at the Court of Appeal, appealing your case to the top court means certain death. This rules out the possibility of activism at the highest level. A Tanzanian lawyer noted that this had become a problem across the region:

... whenever a hard issue is raised. The problem with that is that it becomes part of your culture. That has happened in all three countries with the apex court. The apex court becomes an extremely technical court, a predatory court. They are like predators waiting to pounce... Even something as simple as numbering the pages, they will throw your petition out.

One example of this strict adherence to technical rules can be found in Rule 61 (1) and 76 (1) on the Notice of Appeal. The Court of Appeal has consistently held that a Notice of Appeal not signed by the Registrar is invalid and renders the appeal incompetent. Colman Ngalo (2007:116) cites six cases filed between 1999 and 2002 that were dismissed due to the Notice of Appeal not being signed by the Registrar. However, in 2003 in 21st Century Food and Packing Ltd v. Tanzania Sugar Producers Association & Others (2003) the Court stated that:

[I]t is the duty of the Registrar to see to it that the dating and the endorsement are done as required by the Rule. If that is not done, it is the


384 Court of Appeal of Tanzania, Civil Appeal No. 91 of 2003 (unreported)
Registrar or the Registrar of the High Court, as the case may be, who is to bear the blame. The appellant or whoever lodges the document cannot be made a scapegoat.

Unfortunately although the court accepted that the signing of the notice of appeal signed by a non-registrar is irregular it did not suggest at remedy. Ngalo (207:118) reports that the Tanganyikan Law Society has been struggling to amend the rules. At the 2004 meeting of the Law Society is was noted that there were at least 162 pending civil appeals to the Court of Appeal in which the notice of appeal had not been signed and or endorsed by the Registrar.

Consent to Sue Government One of the significant obstacles to the evolution of a strong and independent judiciary in Tanzania is the paucity of cases filed. As the 1990s progressed it became increasingly clear that cases were just not being filed because of a plethora of procedural obstacles and tests that frequently amounted to obscenely lengthy delays. One such obstacle was the Government Proceedings Act of 1967, in which individuals had to seek permission of the Attorney General or Minister of Justice in order to file a suit against the government. Naturally to get this permission would take a significant amount of time – in some cases several years. As Kijo-Bisimba & Maina Peter (2006:317) note the intended effect of this statute was to “wear out the claimant and force him to settle the matter out of court with the government . . . some claimants just died waiting for the Attorney-General’s permission.” In 1992 two cases came to the courts testing the constitutionality of this law. In Peter Ng’omango v. Gerson M.K. Mwangwa and the Attorney General (1992)385 the plaintiff (a teacher) sued the principal of his school and the government for malicious prosecution and defamation. The Attorney General raised the preliminary objection to the effect that the suit was incompetent for want of consent of the Minister of Justice. Justice Mwalusanya declared

that the requirement of a ministerial fiat before one could sue the government in was unconstitutional and void as it deprived an individual of their constitutional right of free access to the courts. The case was ordered to proceed on its merits. *Ng’omango* was followed by *Pumbun and Another v. Attorney General* (1993)\(^{386}\) this time going all the way to the Court of Appeal. The Court of Appeal was in agreement with Mwalusanya – in addition to violating the constitution the restriction militated against the principles of good governance which calls for accountability and openness or transparency on the part of the Governments. The courts only succeed in gaining parity for citizens. While citizens on Tanzania Mainland could not sue the government without getting the permit, those in Tanzania Zanzibar could sue the same government just after giving it one month’s notice.

If we move forward two more years it is possible to look back on how little impact these two cases would have in regards to a very significant procedural area of the law. In 1994 two statutes were passed by the legislature that made is exceedingly difficult for people to challenge the government in a court of law. The first of these was the Government Proceedings (Amendment) Act (Act No. 30 of 1994); this introduced a notice period of not less than 90 days if you want to sue the Government. This is an improvement in the sense that ministerial fiat is no longer required (only a notice to the Attorney-General and the respondent), but still presents a significant delay and obstacle. Justice Ramadhani (2007`:229) cites this as a notable success for the Court of Appeal.\(^{387}\) The second is the now infamous Basic Rights and Duties Enforcement Act (Act No.33 of 1994). In order to litigate the Bill of Rights first a single judge will have to gauge the soundness of the claim; then secondly, if a prima facie case has been made before the


\(^{387}\) Other “notable successes” cited by Justice Ramadhani include giving itself power of review in 1979, raising the remuneration for dock briefs and establishing the East African court of Justice.
single judge the matter will be brought before a panel of three judges. In both the writings of legal scholars and activists and in interviews I carried out, the Basic Rights and Duties Enforcement Act is (indirectly) cited as the most significant cause of the very few significant “good” cases in Tanzania over the last fifteen years. One scholar stated that there had been only ten human rights cases since the passage of the Basic Rights and Duties Act in 1994 it has been a very negative development. There are numerous difficulties associated with getting a panel of three High Court judges together to hear a case in Tanzania. Some cases filed ten years ago are still pending. Another aspect of this constitutional amendment is the serious weakening of powers of judicial review. As Yongolo (2000) writes:

[T]he Eleventh Constitutional Amendment emerged to take away the judicial powers of review through the mechanism of delaying the deliverance of courts’ judgments. It is a technical way of beating the constitutional remedies arising out of breaches of Article 12-29 of the Constitution because, usually, remedies follow breaches. (Yongolo 2000:240-241)

**Locus Standi** In *Lujuna Shubi Ballonzi, Senior v. The Registered Trustees of CCM* (1992) the plaintiff was seeking, amongst other things, a declaration that CCM had no rights to properties they had acquired by using subventions from the government and compulsory contributions from millions of people, the majority of whom were not members of the party. The defendants were quick to address the justiciability of the suit, and led the court to consider the plaintiff’s locus standi. Justice Samatta considered the issue of locus at length:

The provisions of s.26 (2) of the Constitution of the United Republic of Tanzania (the Constitution) do not seem to extend the rule to the degree done by the Supreme Court (of India). Bearing in mind the realities of our society, including the comparable educational backwardness and poverty

---

388 Author interview, University of Dar es Salaam Law Professor, May 2007.
of the majority of the people . . . An ordinary person is likely to be more conversant with his private law rights than with his public law rights. By necessity the rule of locus standi insofar as it relates to human rights litigation, must be wide. I can see no warrant for making similar extension to the rule as far as private interest litigation is concerned.

Although the Chief Justice granted locus, he ultimately found no merit in the case:

I agree with the learned advocate's submission that the remedy, if any, for any wrong allegedly committed in relation to subventions received by the applicants does not lie in the judicial field. In general, the management of public funds, like the management of the economy and foreign policy of the country, is the prerogative of the executive; it is not amenable to judicial process. In the exercise of its powers in that field the executive is accountable to parliament. It would be straining to the utmost the power of judicial innovation to say that in the exercise of its powers in that area the executive falls under judicial superintendence or scrutiny. Generally speaking, judicial process is unsuitable for determining issues arising from the exercise of those powers . . . Judging from what he avers in his plaint, Mr Ballonzi, Senior, feels very strongly about the weaknesses of the political system which existed in this country before the multi-party system was adopted a few years ago, but the law regards him as lacking status to maintain the proceedings he has instituted before this Court. While he may deserve commendation for his vigilance in support of democracy, the applicants have demonstrated to my satisfaction that his suit has been properly framed and some of his causes of action are incontestably bad in law.

Judge used a restrictive approach to dismiss the case. The seminal locus case in Tanzania is *Mtikila II*. In which Justice Lugakingira sought to broadly extend the locus to any individual without the burden of proving that the individual has been personally or directly affected. Lugakingira went on to justify his reasoning at length; giving reference to the importance of a broad interpretation of locus in a poor country with low literacy rates is critical.

C. Election Petitions and Use of Court by Opposition Parties

It must first be noted that under the 1977 Tanzanian Constitution Presidential election results can not be challenged in a court of law.\footnote{Article 41(7) of the Constitution ousts the jurisdiction of the Courts to inquire into the election of the President once the Electoral Commission has declared the election results.} Therefore, unlike Malawi and Uganda,
the Tanzania court has largely avoided being dragged into high-profile political disputes. Parliamentary election dispute cases can be challenged in the Court and indeed many of such cases have been filed. However, up until the 2001 *Ndyanabo* verdict comparatively few cases were filed because of the very large security deposit required - Tshs5 million.

In comparison to Malawi and Uganda opposition parties in Tanzania have not frequently used the courts as an outlet to challenge the CCM and create political space in which to operate. Reverend Christopher Mtikila is the exception to this.

In 1993 the constitutionality of the Political Parties Act of 1992 was challenged in *Mabere Nyaacho Marando and Edwin Mtei v. The Attorney-General (1993).* The Court found that the procedures used to authorize demonstration permits for opposition parties were far more stringent than for the CCM, and that this offended Article 20(1) of the Constitution; the right to freedom of peaceful assembly, association and public expression. In addition the Court found that the monopolization of Radio Tanzania by CCM was a misuse of a Government institution for political gain. It should be noted that the Judge pointedly stated that it was the duty of the court to pronounce the law unconstitutional, but it was up to the parliament to repeal the law. In addition the plaintiffs sought a declaration that no election can be free and fair unless a constitutional conference has been held and the Constitution accordingly rewritten to accommodate the multiparty system. The Judge was unequivocal in his response – this was a political question.

[T]he plaintiffs are inviting me to question the validity of the Constitution I swore to defend without fear or favor . . . If the Constitution does not cater adequately for multiparty interests, one would have thought that such matter would be a legitimate subject to be included in a general election manifesto. In the alternative . . . the plaintiffs should look for

---

391 Civil Case No. 168 of 1993, High Court of Tanzania at Dar es Salaam (Unreported)
lawful means to pressure the Government into amending the Constitution . . . (Cited in Mwaikusa 1996:250).

Of the three judiciaries the Tanzanian judiciary has been the most resistant to considering questions of a “political nature.” For example, it is unimaginable that the Tanzanian courts would have been willing to entertain the kind of intra-party disputes the Malawian courts have heard.

_Attorney-General and Two Others v. Aman Walid Kabourou (1995)_ The High Court at Tabora allowed a petition by the Respondent and duly declared the results of the Kigoma by-election null and void. The Third Appellant, Azim Suleman Premji, had as a result of the by-election been declared the new M.P. for Kigoma Urban Constituency. The present appeal is a consolidation of two separate appeals begun, on the one hand, by the aggrieved Third Appellant, and on the other hand, by the First and Second Appellants jointly. The First Appellant was joined as a respondent in the High Court petition as a necessary party, pursuant to rule 4(1) of the Elections (Election Petitions) Rules, 1971. The Second Appellant, Radio Tanzania Dar es Salaam, was sued in the petition because the Respondent alleged that its broadcasts had affected the results of the by-election ([1996] TLR at p.156). This case was an embarrassment to the government, when the ruling party candidate subsequently lost the seat. There is one other point of interest worth noting in this case. The court noted a lacuna in the Elections act of 1985, it only provides for legal challenges to parliamentary elections and not Presidential elections. As Chief Justice Nyalali articulate:

> The last point we need to point out, in view of the forthcoming presidential and parliamentary elections is a lacunae or gap in the Elections Act concerning presidential elections. Section 108 deals only with challenges to elections of constituency members of the Parliament . . . . We can find no provision concerning disputed Presidential elections. We cannot understand why this lacunae was not remedied . . . The

---

392 Court of Appeal Tanzania, Civil Appeals Nos. 32 and 42 of 1994. Reported in 1996 TLR 156 (CA)
omission is puzzling, since in multi-party Presidential Elections, such lacunae is an invitation to political chaos. We hope appropriate amendments of the relevant law would be made before the forthcoming multi-party presidential elections.

Needless to say to date, the law still has not been changed; thus demonstrating a lack of concern, consideration and genuine dialogue between the judiciary and the legislature.

Jwani Mwaikusa (1996) makes the case that the status quo is preferable on the basis that contesting presidential election results would be too destabilizing for the country, it would cause unnecessary delays to the business of governing. I consider this in further detail in the conclusion. Placed within the context of the prior five years it is easy to see why this case caused so much embarrassment to the government. As Mwaikusa writes:

> By ignoring or disregarding the law, the establishment was deliberately inviting the powers of judicial review over its actions, and the opposition exploited this fact. It was a weakness of the establishment which was increasingly used to embarrass it with court actions leading to the erroneous impression that the courts were being sympathetic to the opposition. Thus, in the first by-election after the opposition was allowed to operate and contest elections, the ruling party candidate who won subsequently lost the seat following a successful petition by the defeated opposition candidate (*Attorney General & Others v. Kabourou*, [1995] 2 L.R.C. 757). Among the successful grounds were several election offences and illegal practices committed by very senior members of the government, including the President. (Mwaikusa 1996:246-247)

Both the *Marando* case and *Dr. Aman Kabourou* sent an important message to the government. That CCM was no longer the only game in town and the playing field must be leveled to ensure a free and fair election. In 2001 an important constitutional case was filed in relation to election petition requirements (*Ndyanabo v. Attorney General* (2001)393). During the 2000 Tanzania general elections Ndyanabo unsuccessfully ran for the Nkenge Parliamentary seat. Immediately thereafter he challenges the results. In order to fix a date for hearing of the petition the petitioner must pay the court TShs 5

---

393 [2001] 2 EA 485; [2001] LLR 18 (CAT)
million as security for court costs. Ndyanabo failed to pay the deposit and a date was not fixed for the hearing. Ndyanabo decided to appeal against this statute on the basis that it was arbitrary and unreasonable and it violated the guarantee that all were equal before the law. The High Court accepted the Attorney-General’s arguments that the provision was aimed at protecting the respondents in elections petitions against burdensome and unnecessary potential costs. Ndyanabo would appeal again to the Court of Appeal.

The Court of Appeal agreed with Ndyanabo and held that a statutory provision requiring a Tshs 5 million deposit as security for costs in order to file an electoral petition was effectively denying access to justice. Section 111(2) of the 1985 Elections Act was therefore unconstitutional, effective from the date of its enactment. In his decision, Chief Justice Samatta, was laid out the general principles of Constitutional interpretation as it relates to the constructive repeal of non-compliant statutes. Justice Samatta declared that:

i) the Constitution was a living instrument with a soul and consciousness of its own

ii) that fundamental rights provisions had to be interpreted in a broad and liberal manner

iii) that there was a reputable presumption that legislation was Constitution

iv) the onus of rebutting the presumption rested on those who challenged the legislation’s status save that,

v) where those who supported a restriction on fundamental rights relied on a calback or exclusion clause, the onus was on them to justify the restriction (EALS Constitutional Digest 2005:139).

In his judgment Chief Justice Samatta quoted the former Chief Justice of The Gambia, who in a paper presented at a seminar on the Independence of the Judiciary noted that “A timorous and unimaginative exercise of the judicial power of constitutional interpretation leaves the Constitution a stale and sterile document.” This meant that constitutional rights must be interpreted in a liberal and broad manner, and that any restrictions on rights should by strictly construed. Moving on from this broad
pronouncement Samatta, CJ went to consider the heart of this case: access to justice.

Here he did not hold back:

> Access to courts is, undoubtedly, a cardinal safeguard against violations of one’s rights, whether those rights are fundamental or not. Without that right, there can be no rule of law and, therefore, no democracy. A court of law is the “last resort of the oppressed and the bewildered.” Anyone seeking a remedy should be able to knock on the doors of justice and be heard.

*Ndyanabo* holds a place of particular importance in Tanzanian jurisprudence. Its importance is perhaps reflected in the vehement objections to the Court of Appeal ruling by certain members of the political community. Chris Maina Peter (2007a’:243) notes the particularly virulent attacks by the Speak of the Parliament Pius Msekwa. The Speaker wrote numerous articles in newspapers and prepared a special edition of Bunge News on the separation of powers. Peter goes on to applaud the conduct of the judiciary in the face of these comments: They ignored the complaints and allowed the Tanganyikan Law Society to respond instead. This was a rare instance of Court of Appeal assertiveness nestled amongst a plethora of mediocre decisions.

**D. Significant Rights Cases**

One early case to particularly highlight the conservatism of the Court of Appeal versus the High Court is *Mbushuu @ Dominic Mnyaroje and Kalai Sangula v. Republic* (1994). The right to life is guaranteed under Article 14 of the 1977 Constitution, it was first introduced as part of the 1984 Bill of Rights. In the High Court Justice Mwalusanya came to the conclusion that the death penalty amounted to a form of torture and was unconstitutional. Mwalusanya’s judgment is extensive relying on various forms of non-legal human rights materials, including citations from religious texts. Mwalusanya’s

---

judgment fell in line with the recommendations of the Nyalali commission that the death penalty be removed from the statutes. In his judgment Mwalusanya preemptively addresses the arguments that the public endorse the death penalty by stating that it is the responsibility of the government to educate the public:

We live in a troubled world with many threats to the security and well being of our society. In such an atmosphere there is often a tendency to advocate draconian measures to protect society against real and imagined ills. The necessity for such measures can frequently appear plausible and the most well-intended citizen can be tempted to advocate the principle that the “end justifies the means.” Suffice to say that the history of the world is replete with the disastrous consequences of the law of man being replaced by the dictates of expediency. A progressive government will assume the responsibility of informing the public and seek to influence their views in a more enlightened direction, to the effect that the end does not justify the means. I hold that . . . the death penalty is a cruel, inhuman and degrading punishment or treatment and also that it offends the right to dignity of man in the process of execution of the sentence . . . it is therefore my finding that the death penalty is unconstitutional and so void as per Article 64 (5) of the Constitution.

The Court of Appeal upheld the findings of the trial court that the right to life is not absolute and that the death penalty is inherently inhuman, cruel and degrading punishment and thus offends the right to dignity. However, to the Court of Appeal the important question was whether the death penalty was “lawful” (not arbitrary) and reasonably necessary. The court held that the death penalty was both lawful and reasonably necessary and therefore constitutional. Members of the human rights community decried the Court of Appeal for allowing this opportunity to slip through their fingers.

In his written judgment395 Justice Ramadhani referred to earlier Court of Appeal decisions where Article 30 (2) of the Constitution had been handled:

---

395 It was in this judgment that the Court of Appeal famously chastised Justice Mwalusanya for his “style” of judgment writing: “We commend the learned Trial Judge for his unexcelled industry in his exploration of the human rights literature. However, we would also like to point out that the style he has used in writing the judgment, dividing it into parts and sections, with headings and sub-headings, is unusual. That style is more suited for a thesis than for a judgment.”
We have found it necessary to quote at length what we have said because we feel that the learned Trial Judge seems not to have fully grasped its import. We have said that art 30(2) allows derogation from basic rights of the individual in public interest. Whether or not legislation which derogates from a basic right of an individual is in public interest depends on first, its lawfulness that is, it should not be arbitrary and second, on the proportionality test, that is, the limitation imposed should not be more than reasonably necessary.

Freedom of Religion  In Hamisi Rajabu Dibagula v. Republic (2001)\textsuperscript{396} the Court of Appeal once again had an opportunity to make significant pronouncements on religious freedom. But the pronouncements made were merely symbolic and did not substantially impact either party (Peter and Kijo Bisimba 2007b:15). The background to this case is as follows: a Muslim preacher was incarcerated for eighteen months by a magistrate for alleging saying that Christ was not the son of God but only the name of a human being. The High Court called the file and Justice Chipeta upheld the conviction but reduced the sentence. Dibagula appealed to the Court of Appeal where Chief Justice Samatta stated that Dibagula did not intend to wound anyone’s religious feelings and that he was exercising his constitutional freedom of believing in and propagating his religion (Shivji 2006:82).

Vigilantism Before the bill of rights came into effect Justice Mwalusanya, sitting on the High Court in Mwanza, decided a series of cases on vigilantism. As Jennifer Widner (2001:376) writes “in Tanzania, vigilantism came to the center of public attention earlier than it did in many countries, and people drew the courts into the picture by bringing suits against neighbors who took the law into their own hands.” The sungusungu vigilante groups received endorsement from the government in 1975 with the passage of the People’s Militia Act (see Chapter

\textsuperscript{396} Court of Appeal Tanzania at Dar es Salaam, Criminal Appeal No. 53 of 2001.
4). The problem in the 1980s is that the groups were engaged in policing criminal activity, these extra-constitutional paramilitary groups thus had no legal mandate. In three consecutive cases Justice Mwalusanya declared sungusungu groups to be unconstitutional (Charles Charari Maitari v. Matiko Chacha Cheti and Four Others (1987); Ngegwe s/o Sangija and Three Others v. Republic (1987) and Misperesi K. Maingu v. Hamisis Mtongori and Nine Others (1988)). In Ngegwe the appellants were members of the Sungusungu groups from a village in the Mara Region. After “disciplining” a suspected cattle rustler (they pulled down the 8 houses belonging to the rustler, stole various pieces of his property and then severely beat him) the members of this particular sungusungu group were arrested on charges of assault and theft. The trial court found them guilty of the aforementioned crimes and on appeal the High Court upheld this ruling and declared that the various activities if the sungusungu were unconstitutional. In dicta Mwalusanya referred to the bill of rights (despite it not being in effect), noting that the right to liberty (Article 15) and the right to privacy and security (Article 16) were significantly abrogated through the sungusungu militia groups. In the wake of Mwalusanya’s decisions the government chose to continue to condone the sungusungu and in 1989 the President granted to all sungusungu members arrested on suspicion of having committed crimes, those already convicted and in prison. In 1990 the minister for home affairs announced


398 High Court of Tanzania at Mwanza, Civil Case No. 15 of 1987. (Unreported)

399 High Court of Tanzania at Mwanza. Criminal Appeal No.72 of 1987 (Unreported)

400 High Court of Tanzania at Mwanza. Civil Case No.16 of 1988. (Unreported)
that he would encourage the expansion of the sungusungu to urban areas (Widner 2001:379). “When one group exceeded its mandate the following year and removed a magistrate from the bench while court was in session, the president ordered the charges brought against the group dropped” (Mwaikusa (1995) cited in Widner 2001:379). Throughout the 1990s Chief Justice Nyalali attempted to introduce legislation that would harmonize existing laws with the constitution – but to no avail (Widner 2001:279). The issue of vigilantism continues to be a problem in Tanzania today, some twenty years after Mwalusanya’s decision. Today it is equally a problem in rural and urban areas.

Protection of Land Rights In the absence of clear and uniform written land law, issues of land tenure and ownership had shifted over time. In the case of Tanzania the forced villagization programs of the 1970s were not based on any law. Issues of land tenure have been a problem from the early days of colonialism right through to the present day, in all three countries. However, Tanzania has faced perhaps more problems than the other two. Under colonialism customary land ownership was not properly recognized. People had the right to “occupancy” or “use” of land, but ownership was deemed to be held in the hands of the community as a whole. The state has always reserved the right to acquire land when and where needed.401 A series of Land Reform by-laws were passed in the late 1980s. As Peter (1997: 218) explains, the legality of these laws was suspect and unsurprisingly they were struck down as unconstitutional in the case of Tito Saturo and 7 Others v. Matiya Seneya and Others (1986)402 As is often the case in Tanzania, the government struck back and moved forward at striking customary


402 High Court of Tanzania at Arusha, Civil Case no. 27 of 1986 (unreported).
land tenure from the books – Regulation of Land Tenure (Established Villages) Act, 1992. What is interesting about this act (in addition to the fact that it struck customary land tenure), is that it ousted the jurisdiction of the courts. Thus as the economy liberalized in the 1980s so people started to bring land claims to the court:

A lot of people were displaced by villagization and others were forced to leave land entirely. At the time, if a person challenged the changes he would be held under the Preventative Detention Act . . . After the enactment of the Bill of Rights, all these people gathered the courage to come to the courts. We saw a lot of cases . . . The government grew worried and enacted a law that said no claims could be contested. The courts’ jurisdiction was ousted. People would have to take their disputes to land tribunals in the political wards. The decisions would be political then.” Justice Eusebia Munuo cited in Widner (2001`:369-370).

This is the background behind which the seminal case of Attorney General v. Lohay Akonaay and Another (1995). Lohay Akonaay and Joseph Lohay were father and son, and in 1987 they had sued to recover land confiscated by the government during villagization. The Court agreed with the plaintiffs and ordered the government to return the land. The Government appealed, and while the appeal was pending the Regulation of Land Tenure (Established Villages) Act of 1992 eliminated customary rights in land in areas subject to villagization during the 1970s. In addition the government would not issue compensation to people whose customary title was extinguished – thus ousting the jurisdiction of the courts (Widner 2001`:370). Chief Justice Nyalali made sure to transmit the gravitas of this case in his judgment: “We have considered this momentous issue with the judicial care it deserves. We realize that if the Deputy Attorney-General is correct, then most of the inhabitants of Tanzania mainland are no better than squatters in their own country. It is a serious proposition.” The three judge bench was unequivocal in its ruling:

For all these reasons therefore we have been led to the conclusion that customary or deemed rights in land, though by their nature are nothing

403 Court of Appeal Civil Appeal No. 31 of 1994. Reported in 1995 LRC 399; 1995 TLR 80
but rights to occupy and use the land, are nevertheless real property protected by the provisions of art 24 of the Constitution. It follows therefore that deprivation of a customary or deemed right of occupancy without fair compensation is prohibited by the Constitution.

We are also of the firm view that where there are no unexhausted improvements, but some effort has been put into the land by the occupier, that occupier is entitled to protection under art 24(2) and fair compensation is payable for deprivation of property. We are led to this conclusion by the principle, stated by Mwalimu Julius K Nyerere in 1958 and which appears in his book 'Freedom and Unity', published by Oxford University Press, 1966. Nyerere states, inter alia: 'When I use my energy and talent to clear a piece of ground for my use it is clear that I am trying to transform this basic gift from God so that it can satisfy a human need. It is true, however, that this land is not mine, but the efforts made by me in clearing that land enable me to lay claim of ownership over the cleared piece of ground. But it is not really the land itself that belongs to me but only the cleared ground which will remain mine as long as I continue to work on it. By clearing that ground I have actually added to its value and have enabled it to be used to satisfy a human need. Whoever then takes this piece of ground must pay me for adding value to it through clearing it by my own labour.'

This in our view deserves to be described as 'the Nyerere Doctrine of Land Value' and we fully accept it as correct in law.

Finally, on the issue of the 1992 Land Tenure Act ousting the jurisdiction of the court, Justice Nyalali had this to say:

What we do not agree is that the Constitution allows the courts to be ousted of jurisdiction by conferring exclusive jurisdiction on such quasi-judicial bodies [...] It follows therefore that since our Constitution is democratic; any purported ouster of jurisdiction of the ordinary courts to deal with any justiciable dispute is unconstitutional. What can properly be done wherever need arises to confer adjudicative jurisdiction on bodies other than the courts, is to provide for finality of adjudication, such as by appeal or review to a superior court, such as the High Court or Court of Appeal.

The government passing legislation either post haste or preemptively would become a pattern that would continue throughout the 1990s. Chief Justice Nyalali’s blistering critique notwithstanding:

Bearing in mind that the 1992 Act, which can correctly be described as draconian legislation, was prompted by a situation in some villages in
Arusha Region, it is puzzling that a decision to make a new law was made where no new law was needed. A little research by the Attorney General’s Chambers would have laid bare the indisputable fact that customary rights in land in the villages concerned had been extinguished a year before the Bill of Rights came into force. With due respect to those concerned, we feel that this was unnecessary panic characteristic of people used to living in our past rather than in our present which is governed by a constitution embodying a bill of rights. Such behavior does not augur well for good governance.

The Court assuaged the government through noting that the practical effects of the judgment were limited, because the ruling did not extent to pre-Bill of Rights cases. “Thus the court’s ruling would not produce instability in landholding in most of the country” (Widner 2001:371). Although Akonaay remains an important part of Tanzanian jurisprudence the fact still remains that the appellants never got their land back.

Lohaay would be faithfully applied years later in Ami v. Safari. Ami v Safari (2001) concerned the forced “villagisation” of twenty acres of the appellants’ fathers’ land in 1974. In 1987 the appellants’ father died and in 1991, the appellant began proceedings against the respondents in the primary court seeking recovery of the land on the grounds that the villagisation exercise was an abrogation of basic human rights. The appellant would move all the way from the primary court, to the District Court to the High Court and finally the Court of Appeal. The final appeal asked for a final ruling on the period of limitation within which to file the suit and on whether the seizure of the land without compensation contravened article 24(2) of the Constitution. The Court found that there was no basis for holding that the appellant’s constitutional rights had been contravened. The basic rights enacted into the Constitution became justiciable only

404 Widner (2001) also notes how the High Court would later continue to uphold the statute of limitations – 12 years in most cases.

405 [2001] 1 EA 3
after the land had been taken away and the provisions of the basic human rights of the Constitution were not retrospective. The justices faithfully applied Lohay Akonaay.

_Ami_ stands as an important case in recent Tanzanian case history. Beyond the issue of land rights, this case tested whether provisions of the Constitution related to the Basic Human Rights can be applied retrospectively. The Constitution is silent on whether or not Constitutional rights can be applied retrospectively. Justices Lugakingira, Makame and Kisanga did not want to open a Pandora’s box of human rights cases dating back to the pre-1984 period.

In a companion case - _Lohay Akonaay, Lekengere Faru Parutu Kamunyu and 52 Others v. Minister for Tourism, Natural Resources, and Environment (1998)406_ - Masai pastoralists sought to reinstate their customary claims to land after being evicted from land within the Mkomazi Game Reserve. In the High Court the Maasai had some success – presiding Judge Munuo recognized their claims to certain areas of the reserve, but not all. In addition the Judge denied restitution, instead ordering the defendants to pay monetary compensation and reallocation of other suitable grazing land. Finally, the plaintiffs were not granted the right to represent their whole community (Widner 2001:173). On appeal to the Court of Appeal the Masai were not successful. The Court upheld the lower-court rulings with regard to the groups claim to ancestral title and to the demands for restitution, finding monetary compensation to be more appropriate. Chief Justice Nyalali claims the court had little choice in this decision, to recognize ancestral claims would be to open a Pandora’s box of potential litigation (Nyalali cited in Widner 2001:374).

The significance of these land dispute cases in Tanzania is obvious. It is a country where over 80 percent of the population still live in rural areas and make a living off the

---

406 Civil Appeal No. 53 of 1998 from Consolidated Civil Case No. 33 of 1994 (Unreported)
land. Given the complexity of the different claims of different ethnic groups, set against the historical background of socialist policies of “villagization” the courts had a difficult task put before them. However, as Jennifer Widner (2001:375) highlights the courts in Tanzania “with less concentrated, more equal landholding had an easier time building acceptance than did courts in countries where much of the arable land was in the hands of the few, as it was in Zimbabwe.” Politically this has been a major headache for the ruling CCM. Unlike in Uganda and Malawi the CCM had been in power for so long that rulings that dealt with controversial issues from thirty years ago were still significant because the CCM is still in power.

Right to Organization Restrictions on the ability of groups to register and organize has been a major impediment to the development of civil society in Tanzania. The landmark case in this regard is he Registrar of Societies and 2 Others v. Baraza la Wanawake Tanzania (2000). On 30th June, 1997 the government banned Baraza la Wanawake wa Tanzania (BAWATA). Chris Maina Peter (1997a `:730) notes that this was “a culmination of a concerted effort by the government to squeeze this autonomous women’s organization out of existence.” The governments’ explanation was that the organization was operating as a political party and had not been submitting their accounts on time. The respondent filed a petition in the High Court challenging their registration from the Register of Societies. They sought a declaration that the cancellation was null and void and an order of certiorari or mandatory injunction or an order restoring their registration on the Register of Companies. The state raised a technical preliminary objections, however the High Court overruled the objection, ruling that proceedings for obtaining redress in respect of violations of basic rights guaranteed under the country’s Constitution may be initiated by way of petition or originating

407 Civil Appeal No. 82 of 1999 Court of Appeal Tanzania
summons. The State appealed and the Court of Appeal declared that to require complainants of breaches of fundamental or basic rights and freedoms to use two parallel processes to commence a single action is an obstacle to access to justice. The procedure of originating summons is suited to actions where there is no great dispute on the facts. Allegations of human rights violations are highly contentious matters.

III - Analysis and Conclusions

No Significant Watershed Moment  It is clear that the lack of a watershed moment in Tanzanian history, the absence of a complete change of regime symbolized by a new constitution has been more a hindrance to the construction of judicial power. On the negative side, conservative institutional practices the entrenched status of the judiciary in the CCM infrastructure and the simple lack of being “shaken-up” has resulted in a more passive, less dynamic judiciary. However, on the positive side the judiciary has never experienced any major exogenous shocks and has tried to adopt a strategy of incremental reform within the existing system, rather than wholesale attack of the system from the outside. In sum, the promulgation of the bill of rights in 1984 and the transition to a free-market liberalized economy would become more significant watershed moments for the Tanzanian judiciary.

Internal Culture of the Tanzania Judiciary One of the distinguishing characteristics of the Tanzanian judiciary is its institutional longevity. For the most part appointments to the judiciary under Nyerere were more or less merit based. More often than not positions were filled with judges from lower down the rungs of the judicial ladder. Thus career paths were well mapped out along the vertical hierarchy. Because the judiciary was never really shaken up significantly under Nyerere they were able to foster

408 Author interview with Tanzania lawyer and judge, May/June 2007.
a strong institutional identity and culture. I argue that the central norms of this culture were to avoid conflict with the government, to not stick out and your upward path along the judicial career ladder was guaranteed. One other important symbol of the institutional continuity of the Tanzanian judiciary was the longevity of Chief Justice Nyalali; an individual who, as documented by Jennifer Widner (2001), would play a pivotal role in shaping the judicial institutions through profound economic and political change.

Sufian Bukukura (1995) categorizes Chief Justice Nyalali’s career into two halves. The first half Nyalali was cautious and conservative, some even accusing him of being executive-minded. Given the general distrust, hatred of the judiciary at the end of the 1970s perhaps he had no choice. In addition, Bukukura argues, Nyalali probably had career ambitions – looking towards a seat on the National Executive Committee of the ruling party perhaps. This is all purely speculative however. Jennifer Widner discussed Bukukura’s book with Nyalali directly. Nyalali felt that the changes in his behavior were not due to a change in the political environment. Instead Nyalali points to the strong institutional norms of the judiciary in existence at that time: –

When I was appointed Chief Justice, I was eleventh in the order of seniority, so there was a commotion. There were people who deserved the job. I was young, and they thought I would repeat the mistakes of my predecessor, with potentially disastrous consequences for the institution. . . I was determined to say less and act more. I would succeed on merit.

One of the ways in which Nyalali built up this institutional acceptance was through improving the terms of service of judges – including procuring transportation. Overall though according to Widner’s account, it appears that in the early years Nyalali was preoccupied with simply learning the job. Furthermore, the one-party state was omnipresent and stifling. The leadership of the judiciary had to search for openings. As Widner (2001) characterizes:
During the mid-1980s, eastern and southern Africa approached a critical juncture, a point at which hard experience suddenly made people more open to ideas they had rejected earlier, to new views, and to advocates of change. In several countries, there was suddenly political space to negotiate a new relationship between the branches

There are number of factors that account for Nyalali’s shift in the 1980s. The release in internal institutional limitations, combined with changes in the political environment allowed the Chief Justice to take a far more proactive role. Chief Justice Samatta was in office for a far shorter period than Nyalali, but in many ways his path mirrors that of Nyalali. Samatta was not known as a particularly activist judge was careful in his conduct. However, as he advanced in years and came closer to retirement it appeared that he became bolder in his criticism of government – both on and off the bench. Samatta wrote the judgment in *Ndyanabo* and was quite outspoken against the conduct of the government. As did Nyalali, it was during his retirement speech that Samatta chose to air his fears for the judiciary when he said that corruption in the judiciary made him lose sleep at night:

> What I have always found surprising is that some of the corrupt elements were top officials in the judicial system. Obviously, it is very difficult to address this issue definitively and comprehensively enough unless each of those concerned has fear of God . . . Improving practical education for law scholars, higher salaries and generally better working conditions to judiciary staff are sure ways to make the (judicial) system perform more effectively, efficiently and ethically409

Jennifer Widner (2001) makes the important argument that the Tanzanian courts have been unable to look to elites (political and private) to uphold their end of the bargain. Instead the courts have to work on building their own constituency. Widner illustrates this argument in significant detail through an examination of the court under Nyalali. Based on my research it appears that Nyalali has set something on a precedent.

Subsequent Chief Justice’s appear to have taken on the political elements of the position

---

attempting to build institutional viability from both off and on the bench. This is an important theoretical insight that negates regime based theories that suggest the judiciary is reliant upon the government to confer institutional power and legitimacy. As a further addendum to Widner’s work, my research suggests that the Tanganyika Law Society may finally be emerging as an important external actor in terms of building legitimacy and supporting the independence of the judiciary. This was demonstrated in the aftermath of the *Ndyanabo* case as the TLS spoke out against the verbal attacks from the parliament.

*Liberalization of the Economy; Entrenchment of the CCM*

“During one party government, even the judgments were written in that ‘one-party language’ now we are on the right track, we are writing in the ‘multiparty language.’”

The history and then rapid transformation of Tanzania’s economy has profoundly shaped the judiciary – perhaps in many ways more than the political transformation. I identify two main ways: 1) The legal profession, as I explain in Chapter 5 was co-opted into the state. The liberalization of the economy led to the liberalization of the legal community. Private practice lawyers have blossomed and the Tanganyikan Law Society (TLS) is finally beginning to show some signs of activism. 2) Resources and technical assistance from the international community appear to have been disproportionately directed towards the commercial law sector. In the belief that a sufficiently strong legal system with which to underpin the liberalized economy and attract foreign investment.

While on the surface it might appear that the stable political environment in Tanzania is most conducive to the emergence of an assertive judiciary under

---

410 Tanzania High Court Judge, author interview, June 2007.
multipartyism I have discovered that in fact the opposite is true: Stability in sub-
Saharan Africa, it seems, comes at a price and that price is open dialogue

“Struggle of Powers” and Asymmetric Judicial-Legislative Dialogue

There have been numerous significant pronouncements on the separation of powers in Tanzanian jurisprudence. As in Uganda and Malawi the judiciary has been fighting against the assumptions of the inherited colonial political system, at the heart of which is parliamentary sovereignty. Whilst Judges appear to have little problem in applying the separation of powers concept it is apparent that MP’s have struggled. Below Yongolo relates an unusual direct dialogue that took place when the Principal Judge was called to the Parliament to explain separation of powers:

By the year 1995 so many Acts of Parliament in Tanzania had been declared unconstitutional that the MPs got alarmed. In a seminar organized by the Legal and Constitutional Affairs Committee of the National Assembly held in Dar es Salaam in May 1996, some MP’s sought clarification from the then Principal Judge of the High Court of Tanzania, Justice Samatta, as to which organ, between the Judiciary and Parliament, was supreme. In his lengthy speech, the learned judge challenged the Parliamentarians to view the Dicean concept of unlimited sovereignty in the light of the wind of change currently blowing over Western Europe as a result of some decisions of European Community law made by the European Commission and Court of Human rights on questions relating to human rights. Also quoted an Indian judge, who said, that in a nation governed by a written political Constitution it is in vain to look for supremacy in Parliament since the written Constitution becomes the supreme verdict of the people and all other organs must be subservient to it. Justice Samatta then posed six questions to the MPs, all of which questions had an effect of challenging them to concede to the fact that the notion of unlimited supremacy was an obsolete concept, overtaken by events and out of place in our country. He challenged them that they could no longer alter the Constitution in order to repeal what the learned judge considered, as in MTIKILA and KESVANANDA’s cases, essential features of the Constitution. (Yongolo 2000:244-243)

Issa Shivji has been one of the most vocal critics of the Tanzanian judiciary. Yet he has in recent years acknowledged the struggle the judiciary has faced in terms of protecting
the separation of powers. In September 2004 Shivji (2006:80-81) published an article in *The Citizen*:

[I]nstead of the separation of powers we end up in a struggle between the three powers.

. . . in both the Mtkila and Ndyanabo episodes, the Parliament nullified court decisions, a grave matter for a polity which claims to follow the principles of the rule of law . . . At a breakfast meeting . . . [the TLS] unanimously agreed to condemn this dangerous trend of the Executive using its dominance of the Parliament to nullify decisions of courts of law which they do not like.

But barking without biting hardly ever made a difference as demonstrated by the next episode, the Dibagula case. Dibagula was charged . . . with the offence of uttering words with intent to wound the religious feelings of Christians. He was alleged to have that Christ was not the son of God but only a name of a human being. The magistrate found Dibagula guilty of the offence as charged and sentences him to eighteen months imprisonment.

As I have already discussed, the *Dibagula* case went on to the High Court, then the Court of Appeal where Justice Samatta concluded that the preacher was only exercising his religious freedom. The Fourteenth Amendment to the 1977 Constitution included a derogation clause that would outlaw any person or group to endanger the security of the Nation or social solidarity. As Issa Shivji would later opine on 25th September 2004:

I hate to think that the Executive is once again trying to nullify a reasonably modest decision of the Court to enable citizens to enjoy their constitutional freedoms without fear and harassment. One freedom, which is always very risky to tamper with, is the freedom to practice one’s faith. (Shivji 2006:83)

This pattern of nullifying judicial decisions was evident in my analysis of significant judicial review and human rights cases. This theory needs to be tested further with a more substantial and complete dataset of cases. However, the point here is that the failure of the Tanzania judiciary to implement judicial decisions is as grave attack on judicial independence as can be made.
Indirect Pressure on the Judiciary

“When a decision is given in favour of wananchi, the government slashes funding to the Judiciary.” (Former Chief Justice Nyalali at a workshop, 1998.411)

A former President of the Tanganyika Law Society argued that the biggest threat to judicial independence in Tanzania is the lack of transparency in the appointments system:

In our court system the judges are appointed by the President. But the Judicial Service Commission is supposed to recommend to the President it has a set of criteria under the law that must be followed. Names go to the President and we wonder where we got these people from. They are political appointees. Imagine you are going through a panel of recommended judges. You can see the judges are not very interested. You can see where their sympathy is. The bench is not as independent as it should be. We don’t really have an independent judiciary, especially with the new president. He is very popular, for two years it is a honeymoon. No one can fault the President right now and be understood. In the name of peace and popularity so many things are happening that later will undermine the judiciary. I would say that three quarters of his recent appointees were not on merit, they came there to literally to be rewarded for political work done.

Will it reach a crisis point?

In the near future, yes. I will give you an example. Recently a high placed political figure shot a man in cold blood. Real murder. But because this is non-bailable - this man is a close friend of the President - the DPP reduces the charge from murder to manslaughter. He is released on bail. We now have dangerous precedent. The other remand prisoners went up in arms. This is a signal of what we are running up against.

You can see large amounts of money going down the drain because of bad deals. So much money went the wrong way and the Prime Minister was involved. Even the Prevention of Corruption Bureau. Corruption Bureau is now used as a cleansing organ [to absolve people rather than prosecute.]

How has the judiciary handled cases of corruption?

Corruption cases are not coming to the courts. They are supposed to. All prominent corruption cases end up in acquittals because of the personalities involved. We have never really had a test case where those

charged are proven corrupt. One conviction...but was overturned in less than a year in the Court of Appeal.

Thus despite the handful of more assertive and dynamic decision-making by the Tanzanian judiciary this individual at least is quite pessimistic about the future. He concluded with the following: “That’s the way life will be in the future – a judiciary that will be an appendage of the government.”

To summarize, the Tanzanian judiciary experienced a very short period of judicial assertiveness at the High Court level in the early 1990s. This should not be seen as an institutional development however, because these decisions were concentrated in the courtrooms of two specific judges: Justice Mwalusanya and Justice Lugakingira. Overall the internal institutional culture of the Tanzanian judiciary has remained conservative and deferential to executive power. Any possibility that other members of the judiciary would follow the lead of these more activist judges was shut off in 1994 with the passage of the Basic Rights and Duties Enforcement Act. Since then the government has developed a habit of nullifying judicial decisions.

The paucity in number and significance of cases coming to the Tanzanian court has resulted in less publicity and less public attention. The effects of this are decreased institutional legitimacy and diminished protection from executive interference. Consequently Tanzania has the far lower levels of institutional legitimacy in comparison to Malawi and Uganda.
Chapter 8

Uganda 1995 – 2007
In Kampala on the 16th November 2005, as a sitting High Court Judge released 22 prisoners (members of the opposition Forum for Democratic Change (FDC) and suspected ‘terrorists’) on bail, the state-sponsored “Black Mamba’s Urban Hit Squad” stormed into the court room and violently seized the freed suspects. Members of the Urban Hit squad were dressed in unmarked black t-shirts and were wielding automatic weapons. In the days following this extraordinary event, lawyers demonstrated outside the court and the Judge withdrew from the case citing military interference. Principal Judge of the High Court, Justice James Ogoola referred to this event as a “rape of the temple of justice.” After being held in detention for over one year the suspects appeared before another Judge at the same High Court on March 1st, 2007, and once more were released on bail. In an exact replay of the previous events, unmarked military personnel stormed the court, tried to force their way into the Registrar’s office to rearrest the suspects. After a standoff that lasted several hours the prisoners were dragged off into waiting vans, while their lawyer covered in blood, descended the steps of the High Court. Once again the executive had demonstrated total disregard for judicial authority and the rule of law. This time, however, the judiciary would not only release a condemnatory statement but would put down their gavels and go on strike (they were also joined by Ugandan Lawyers). This brief narrative highlights the curious juxtaposition of a vocal, assertive judiciary valiantly attempting to maintain its power and independence, but doing so within a highly threatening and volatile political environment. Paradoxically the judiciary has been its most assertive at times of the most extreme duress.

This story begs the question – why has the judiciary chosen to stand its ground in the face of such horrendous attacks? Back in 1993 Joe Oloka-Onyango captured this contradiction as a "Jekyll and Hyde" syndrome. On the one hand the Judiciary has more room to maneuver, but is also facing greater interference from the government (Oloka-Onyango 1993:39). There is a high-level of tension in this situations; meaning the
judiciary could chose to assert itself or could lose its independence to executive interference. It would appear that continued attacks against the judiciary – in particular, military interference - have reached a critical point. A critical point where each individual judge is so rattled and concerned with their own tenure and safety it affects their decision-making. This is the point at which the level of institutionalization of the judiciary becomes critical. Has the institution matured enough, built up enough institutional capital to withstand the attacks from the executive? As I will demonstrate in this Chapter, the answer to this question is mixed.

As both the Supreme and Constitutional Courts have handed down judgments that have embarrassed the government in the unfolding political transition, Museveni has heightened the attacks on the judiciary. Following the government’s loss of a landmark Constitutional Court case in June 2004, Museveni made vitriolic attacks on Uganda’s Judges. In November 2004 he threatened to appoint a judicial Commission of Inquiry comprised of neutral judges from Commonwealth countries to suggest comprehensive reforms designed to make the Ugandan judiciary more professional. Critics of Museveni, however, contended that although the judiciary may have its problems, it does not warrant a blanket overhaul. Moreover, the president’s proposal is unconstitutional since the law provides that the president in conjunction with the Judicial Service Commission can only investigate individual judges, not the entire judiciary.

Museveni’s battles with the judiciary stems largely from his bid to tame the judiciary and undercut certain constitutional provisions that check the excesses of executive power. Some parts of the Constitutional (Amendment) Bill, 2005, contain radical proposals that would make the judiciary more responsive to executive fiat. For instance, it proposes shortening the time by which Supreme Court judges and High Court judges would have worked prior to their appointments. Although Museveni has
stated that this change is intended to create a larger pool of recruits, critics argue that this would give him the opportunity to appoint sycophants. The most controversial proposal in the Constitutional Amendment Bill was removing the power of the courts to overturn a referendum decision, reinforcing Museveni’s assertion that courts have no power to hijack decisions of the people. (USAID 2005:39)

This Chapter will begin with a brief overview of Uganda’s political development between 1995 and 2007, moving on to an analysis and roadmap of judicial decision-making over the same time period, and finally analyzing and interpreting the major findings from the Ugandan case.

I: Political Environment

A. Museveni’s Vision of Movement ‘Democracy’

When Yoweri Kaguta Museveni was sworn into power in 1986 it marked a new beginning for Uganda. Today, looking back on the past 20 years, it rapidly becomes clear that while Museveni marked a break with the past in certain areas – achieving a certain level of stability combined with economic growth and expansion – there are many aspects of Museveni’s regime that have not broken with the past at all. A highly powerful Presidency and military combined with the suppression of political opposition through illegitimate and violent means, an exceedingly poor human rights record and high levels of corruption are indicative of a sense of continuity that can be traced back to Milton Obote and Idi Amin. Of all the arms of government, it is the judiciary that stands at the apex of this evident tension between positive democratic advances (active civil society and press, holding of elections (albeit flawed elections) on the one hand, and an anti-democratic, militaristic government with a disregard for the rule of law on the other.
The mixed record of decision-making by the Ugandan judiciary is in part, a reflection of the contradictions within the political environment. Several observers have been generous in their praise of the judiciary as an institution. Rubongoya (2007:184) asserts that “Of the three branches, the judiciary had acquired the highest levels of efficacy, having kept its independence from the executive branch and rendered justice in as impartial manner as possible.” In their 2005 Democracy and Governance Assessment, USAID saw the judiciary as one bright spot in an otherwise dismal assessment:

One of the NRM’s exemplary achievements was to improve the rule of law [. . .] judges and courts have, for the most part, operated without much interference. But while respect for legal institutions has grown, Uganda remains a long way from constitutionalism, that is, the elimination of intervention by the executive and legislative branches in the administration of justice [. . .] increasingly as higher courts have intervened in political contests surrounding the expansion of competition, they have been subjected to more pressure from the executive branch. A variety of high profile political cases have also been referred to military courts.

Today Uganda is in a situation where, according to Andrew Mwenda (2007), the democratic gains of the last ten or so years have been thrown into reverse.412 The observer of Ugandan politics has to disentangle the genuine democratic advances towards democracy from those that represent a strengthening of the façade of democracy. Aili Tripp (2004) notes the paradox of a move to multipartyism being instigated by a regime as a means of staying in power. Thus we are faced with a mess of contradictory democratic and anti-democratic elements – a sub-form of delegative democracy. Tripp’s argument shares similarities with Jose Maria Maravall’s (2003) theory that democracy and the rule of law are not mutually enforceable. Maravall claims that in states where political institutions are weak, society is divided in its support of the regime, the judiciary is beyond the control of parliament and the government is hostile to

---

412 Mwenda notes the diminution of voices of dissent – civil society, middle-class, foreign donors – combined with the concentration of power in the presidency and concomitant weakening of the legislature (Mwenda 2007:23)
democracy, then there is a strong possibility that politicians will use independent judges as an instrument against democracy. Maravall identifies two main strategies that might be utilized by politicians: one is that politicians rule without consideration of the courts, the other is when politicians exploit a conflict with the judiciary in order to destabilize the regime. In other words, “[i]f rulers are scarcely accountable politically and reduce their political responsibilities to legal liability, incentives for a judicialization of politics will be strong” (Maravall 2003:298). As I will demonstrate in Uganda, as the opposition has failed to receive electoral pay-offs over time, they have been more willing to engage in legal disputes through the courts – ranging from the disputed referendum on multipartyism to Presidential election disputes to the denial or bail to the PRA suspects. Thus neither the opposition (nor the government) are acting beyond the fundamental boundaries of democracy, but are acting to destabilize it through the judicialization of politics. The dispersion of political power distorts the rules of the democratic game and the rule of law becomes a weapon against democracy rather than an enforcer of democracy.

By successfully equating multipartyism with conflict, anarchy and violence (despite the fact that multipartyism in Uganda was only in place between 1962-64 and 1980-1985 (Mugaju 2000:9)) Museveni was able to convince the majority of the people that the “Movement” system of democracy was the best path forward for Uganda. Uganda, Museveni argued, needed time to heal and reconcile its differences, and it was crucial that African values of consensus and togetherness should now be emphasized. In addition Museveni (like many of his African forbearers) sought to posit this system of government as apposite to westernized democratic governance.413

413 Museveni particularly stressed the centrality of class interests as it relates to the formation of political parties in western democracy. Without these class differences in Uganda, parties will emerge on the basis of sectarian and ethnic differences. In contrast, the Movement system is passed on a politics of inclusivity – where leaders come to power on the basis of “individual merit” rather than party affiliation (Uganda Constitutional Uganda Constitutional Commission 1993). This pseudo-marxism has formed an important
When the NRM captured power in 1986 they did not ban opposition parties using the law, but simply through practice. Parties were not allowed to organize nor present candidates for office. As Jean John-Barya (2000) notes, these practices were unconstitutional and illegal because they did not exist in any actual known law. The NRM interim government was to last only 4 years, but was extended in 1989 for another 5 years. The 1995 constitution then gave the NRM another year in office before the first elections were held. “No-party” elections were held in 1989, 1992, 1996 and 2001 with Constituent Assembly elections held in 1994 to debate the draft constitution. In 2006 the first multiparty Presidential and Parliamentary elections were held. The promulgation of Uganda’s new constitution was an inherently political process and the most controversial elements revolved around the notion of the “movement” or “no-party” system of democracy in Uganda.

It was not hard to accept the movement system as a temporary or transitional form of government. Museveni’s Movement system did not hurt his reputation with international donors - throughout the 1990s Museveni remained a darling of the international community. Despite this, there were strong arguments against it becoming a semi-permanent, or permanent form of government. From a rights perspective this was an absolute infringement of freedom of association. But beyond that opposition political parties are important purveyors of pluralism of thought. To stifle political organization is to stifle the free exchange of ideas and thoughts, this is damaging to the political, social and economic development of Uganda. Moreover, scholars have argued that ironically the suffocation of political party activity has actually exacerbated the problem of tribalism and ethnic consciousness. Recruitment into the Movement frequently is taking place on the basis of regional and tribal preferences (see Barya 2000:33). Human Rights

ideological backbone for the Movement. Using a derogatory, paternalistic tone, Museveni argues that Uganda is still a rural agrarian society, and that peasants would merely be exploited by rival political parties.
Watch noted that most opposition politicians they interviewed viewed the NRM as a narrowly based political group from southwestern Uganda (Human Rights Watch 1999:49). Furthermore, as Mahmood Mamdani (1995) notes the NRM did not seek to create a program of reconciliation through broad-based government – appointing members of the opposition into high-powered position – but instead were simply expanding their base of support.

Ugandan scholars have been quick to dismiss the construction of the “movement” as a system of ideas or beliefs, or ideology (see Barya 1999, 2000 and Oloka-Onyango 2000). The use of pseudo-Marxist ideological rhetoric is simply a strategic populist device. It does not have any meaning as far as policy formulation is concerned. It is simply a type of electoral system, and the people in the 2000 Referendum were being asked to choose a type of electoral system. Oloka-Onayngo (2000:41) argues that the Ugandan “no-party” invention is “neither novel nor is it an exemplary expression of the democratic ideal.”

The use of populist sentiment has been part of Museveni’s strategic tool-belt in marginalizing the judiciary. Museveni has frequently derided the judiciary for its anti-majoritarian decision-making. In the aftermath of the Ssemogerere case the President publicly stated that the judiciary had “usurped the power of the people.” The populist sentiment has little to do with the realities of democratic governance and the separation of powers but everything to do with Museveni consolidating support for his Movement system of government.

Finally, it is important to note one of the major contradictions between

\[414\] Methods of inculcating individuals into the Movement ideology included mandatory political education and a military science course called Chaka-mchaka. Opponents of chaka-mchaka argue that it demonizes political parties and places them at the root of Uganda’s past political troubles. This part of the training was the political education, the military training revolved around demystification of the gun. In the early 1990s the vast majority of students entering university would first undergo chaka-mchaka training, this number has since dropped. This has been described by many observers as an incredibly effective way of winning and solidifying support for the movement (Human Rights Watch 1999:65-67). Susan Dicklitch and Doreen Lwanga (2003) report that anyone moving to any position of prominence in society are required to attend (regardless of party affiliation); the opposition complain they are regularly villified as enemies of the state in these schools.
Movement rhetoric and the reality of Movement governance. It became clear early on that not only did the NRM lack any sense of internal democracy, but it was gradually shifting to a highly centralized form of Presidentialism. As Nelson Kasfir (1998:61) concludes the “evident lack of interest in its international democracy further underlines the hollowness of its post-1986 rationales for no-party democracy.”

The Movement was successful, where other Ugandan governments had failed due to a number of different factors. As Rubongoya (2007:92-93) notes Museveni was able to begin with a fresh start. By wiping away the opposition he did not have to make any deals, or buy-off patronage networks. Secondly, Museveni was able to create a new army – one without the sociopolitical hangovers of the colonial and immediate post-colonial era. Finally, Museveni as an individual was a powerful intellectual, military and economic leader. At least in the beginning, people perceived that finally a leader had come to Uganda to work in the best interests of the Ugandan nation and people. As time passed, however, it became evident that not everything had changed. To those playing close attention, it became apparent that the transition to “movement” democracy was being closely managed and directed from the top-down.

Rubongoya (2007:127) claims that 1991-1996 marked “the pinnacle of NRM rule and of Pax Musevenica.” The state had been fully resurrected, the government signaled its intent to further devolve power to the local level and to restore (at least some) power to the political kingdoms. The state was beginning to collect revenue and disperse funds. Other institutions of government were not fully established and constituted various degrees of legitimacy. In short, Rubongoya claims that by 1996 Museveni’s government had already proven itself to be more effective than previous Ugandan governments. That the country (with the exception of parts of the East and North) had experienced peace for ten years was alone, enough proof of success for many. The question of institutionalizing this new political framework and legitimizing the regime would prove to be more testing.
B. Redefining Politics: 1996-2001

“We really became a one-party state because the movement is organized as any party, and it uses state resources while denying others freedom of association.” (Professor Frederick Jjuuko, in Human Rights Watch 1998:61).

By 1996 the Ugandan state had been reconstituted – restoration of order, centralization of administrative and military power – and power was finally being transformed into legitimate political authority (Rubongoya 2007). Furthermore, “The outcomes of liberalization—an assertive Sixth Parliament, an increasingly vibrant independent media, an independent upper judiciary, and a local council system that reflected and defended local interests—were embraced, to the extent that they operated within the Movement system” (USAID 2005:V). And those final words are key; a newly legitimate state did not equal democracy. Central to the NRM’s monopoly on power was its continual denial that it was a political party. While neighboring Tanzania and Malawi were defining their political system as a liberal multiparty democracy, Uganda was moving in a distinctly different direction.

In the five years following the promulgation of the constitution in 1995, Museveni and his supporters sought to consolidate movement power. At the heart of these efforts was the National Resistance Council (NRC). The NRC was the legislative arm of government and the political organ of the Movement party. As Oloka-Onyango (2000:52) observes, “this was a classic case of fusion of powers, and a return to the status that had only been in existence in the early phases of colonialism. Looming over all this was the ever present threat this if the politicians failed in the task, the army
would only be too willing to ‘correct’ their mistakes.” It is important to note, however, that the opposition was not entirely dead.

Article 269 of the Ugandan Constitution severely restricted the right to freedom of association. This included a blanket ban on political rallies and delegate conference; bans which have been vigorously implemented by the Museveni regime (Human Rights Watch 1999). The 2007 Police Act has gone even further in tightening up public assemblies in public places. This has been a severe hindrance to civil society development. After the years of violence, repression and disorder under Obote, Amin and various military regimes civil society was decimated. As Dicklitch and Lwanga (2003:495) note, “The Movement regime has certainly encouraged more societal political engagement, but it too has been limited, allowing for pro-Movement politics and involvement in the state-directed Local Council system and clamping down on “illegal” political party rallies, unregistered NGO assemblies, and even university student demonstrations.”

Despite the curtailment of party activities and harassment of multi-party supporters, political parties continued to thrive, largely as an expression of opposition to the NRM. Party political affiliations were evident during Constitutional Assembly deliberations and the local and national elections in 1996 and 2001. In these elections, candidates identified as either “Multi-partyists” or “Movementists.” As previously noted, the Movement’s attempts to suppress the reemergence of ethic and sectarian divisions have been ineffective, due in large part to the continued identification of the Movement

415 Although it is certainly the case that since 1986 there have been a flood of NGO’s operating in Uganda415, their vast numbers do not necessarily mean that they have been effective in developing a strong watchdog role against the state. They suffer from “fragmentation, a lack of coordination and strong leadership, competition for foreign funds, dependence on foreign funds, an apolitical focus, and a “gap-filling” orientation” (Dicklitch & Lwanda 2003:497).
as an organization from the southwest. Naturally the opposition would follow by organizing along regional lines (USAID 2005).

The 1995 Constitution extended the Movement system for another five years after the promulgation of the constitution, at which time the people would choose the new political system through a referendum. In 1999 the NRM brought the Referendum Bill to parliament. This bill set up a constitutionally mandated referendum in 2000, a referendum that would determine what kind of political system Uganda would adopt – ‘Movement’, ‘multiparty’ or some other system. Without the required quorum the bill was passed through parliament. The referendum went ahead in 2000 with over 90% of voters coming down in favor of the Movement system.\footnote{Aili Tripp (2004:17) reminds us, however, that turnout was very low. On average around 50 percent showed up, but was reported as low as 11 percent in some areas.} The opposition boycotted the campaign; they had no choice, because under the heavy restrictions on party activities they could not campaign freely in support of multipartyism. Later in this chapter I discuss the heated court battle and multiple cases related to the referendum. The Constitutional Court ruled (too late to stop the referendum) that the 2000 Referendum Bill was void because it violated parliamentary rules.

The Presidential and Parliamentary elections of 2001 marked an important milestone in Uganda’s democratic development. The parliamentary elections uncovered a split within the Movement, between moderates that supported the transition to multipartyism and the Movement die-hards who supported Museveni and continued status quo. Museveni actively worked to remove the moderates as candidates for parliament. These individuals were “blacklisted” and in some instances Museveni actively campaigned against them (Twesiime 2003). The Presidential election was a hotly contested election between incumbent President Museveni and Dr. Kizza
When Dr Besigye entered the race Museveni declared that Besigye could not run because his candidacy had not been approved by the “Movement.” If this sounds contradictory, that is because it is, many people declared that these really exposed the sham of supposed “individual merit” principle. This alone would be celebrated by many. However, the 2001 election contest was heavily marred by violence, and as the evidence presented in the Supreme Court Presidential Election Petition indicates, wide-spread vote rigging, voter intimidation took place. It was obvious to all that Museveni was using state resources to seriously tilt the playing field in his favor. State owned television and radio stations were biased in favor of Museveni both in terms of the amount of coverage and terms of a ‘positive’ bias in the reporting (Twesiime 2003:73). That the losers chose to protest the election results in the court room instead of on the streets was another positive sign and development. It was also indicative of a sense of respect and trust in the judiciary as an institution. As the Chief Justice jubilantly declared:

The petition symbolized the restoration of democracy, constitutionalism and the rule of law in Uganda. It demonstrated the fundamental democratic values contained in the 1995 Constitution, which include the sovereignty of the people, the right of the people to choose their own leaders through regular, free and fair elections, and the peaceful resolution of disputes (C.J. Odoki Judgment at p.49. cited in Twesiime 2003)

Despite obvious flaws, most individuals reflecting on what the future would hold for Uganda were quite optimistic. Perhaps next time would be Besigye’s time. That this period would end on a mixed note is reflective of this period overall. The fact that elections were held, that incumbent politicians stood a chance of losing, and that those that felt they had unfairly lost took their battle to the courtroom were all positive developments. On the other side, as Rubongoya (2007) notes, there appeared to be a steady movement of power away from the legislature into the executive. It had become

---

417 There were four other candidates, but they became almost irrelevant by the time Election Day came round. Dr Besigye was Museveni’s Doctor during the civil war the Movement loyalist left the party with his wife prominent Movement member Winnie Byanyima.
evident that the claims of broad-based, “no-party” representation could not hold and, moreover, that the movement “party” had welded itself onto the state. As it became clear by the 2001 election that the NRM had created political “insiders” and “outsiders” (Rubongoya 2007:158); concurrently partisan and sectarian interests crept into NRM politics.

C. “Movement” Backwards, not Forwards: 2001-2006

In a year 2000 survey, 83 percent of Ugandan’s said they trusted the Movement, by 2002 that number had dropped to 56 percent (Rubongoya 2007`:158). Why and what happened? In part this trend mimics the widening chasm within the NRM; dissenting voices were cast outside of the Movement. Secondly, 2001 marked the beginning of an era in which cases of corruption would rise to the surface and be aired in public through the media. In addition the numerous court battles would only serve to augment negative attitudes towards the NRM – particularly in the lead up to the 2006 election. Observers of Ugandan politics widely perceive the 2000’s onwards as the period in which Museveni’s neo-patrimonial regime became further entrenched and consolidated.

One of the first significant developments after the 2001 election was the establishment of a Constitutional Review Commission, to be chaired by law Professor Ssempebwa. The work of the committee would come to be dominated by a single provision – that of Presidential term limits (Article 105(2). Part of Museveni’s tactics (similar to those of Bakili Muluzi in Malawi) was to eliminate ‘dissenters’, those individuals that stood in the way of his ‘third term project’ (Mugisha 2004). The Constitutional Review Commission was merely another technique designed to proffer legitimacy upon the Museveni regime. Museveni did not believe in the power of constitution to protect and maintain order, for in the wake of the 2001 election the
President increased the size of his own personal protection unit (Presidential Guard Brigade – PGB). This is an elite force of over 7,000 soldiers, headed by the President’s son and composed mainly of Ankole soldiers. The PGB became an important symbol of what was wrong with Museveni, as the 2005 USAID report notes how the opposition charges that the creation of the PGB “[...] heightens instability. As it overshadows the regular army, the PGB represents the militarization of politics in ways that recall the traumatic periods in Uganda’s post-independence history” (USAID 2005:25).

The Political Parties and Organizations Act came into law in 2002. The original version of the Act was rejected by Museveni and sent back to parliament for debate and amendment. The version what would eventually pass was another blow to the multipartyists. Severely restricting the scope of their activities, and containing their activities to the national stage, whilst banning grassroots activities. As I outline later in this chapter the Political Parties Act would become the subject of an intense legal battle in the Constitutional Court. The Democratic Party’s Paul Ssemogerere would file one petition and Dr. Rwanyarare of the Uganda People’s Congress (UPC) another contesting the constitutionality of the Political Parties Act. The Constitutional Court overturned certain sections of the Act; for example, the section allowing parties to campaign at the local as well as national level.

In May 2005 Parliament voted to hold a referendum on multipartism in July of that year. 28 July, 2005, voters cast their ballots and ended the ‘no-party’ era of democracy in Uganda. The 2006 elections marked the most tumultuous period in Uganda’s recent history. This began with the return of Dr Kizza Besigye this time under the umbrella of the Forum for Democratic Change (FDC) opposition party. The majority of the drama surrounding Besigye’s arrest and detention, the aftermath of another highly dubious election and the issues related to the People’s Revolutionary Army suspects would all play out inside of the courtrooms of the High Court, the Court of Appeal and
the Supreme Court. The 2006 election once again cast a spotlight on the central
importance of the military in Uganda. As one observer\textsuperscript{418} noted even the opposition FDC
party were former rebels, in other words it would take military might to fight military
might:

\begin{quote}
They are all rebels. We are still in a military situation; we want a military
man to fight a military man. That is why the DP and UPC did not get
votes. Most were given to the FDC, or those that were fearful voted for the
NRM. People were saying we were moving into multipartyism . . but
NRM, FDC are all birds of the same feathers.
\end{quote}

\ldots{} If you vote for FDC does it have the army? This is not about politics it
is about the military. President said that if FDC comes to power the
military would not be able to salute them. Museveni says f FDC comes to
power the military would overthrow the government. Chaos from DRC,
Southern Sudan, etc. will come over the border if I’m not around.

Rubongoya (2007:179-181) identifies six characteristics of the 2000-2006 period,
characteristics that share strong parallels with the Obote II and Amin eras.: First, levels
of corruption had reached an all-time high. The Global Fund scandal would become
symbolic of just had bad corruption had become, and represented how corruption began
at the top levels then trickled down through society.\textsuperscript{419} Second, the war against the LRA
in northern Uganda persisted. Fourth, the party had been fully conflated with the state,
this stunted the development of the rule of law as institutions were weakened. Fourth, as
with any large monolithic party, it is perhaps inevitable that internal splits will occur.
Pushing key elites (such as Winnie Bynayima, Kizza Besigye, Amanya Mushega and
others) outside of the party helped to create a vibrant opposition. Those remaining
within the party appear to be splitting along ideological and ethnic lines. Fifth, Museveni
successfully co-opted legislative power, to the point at which several observers have

\textsuperscript{418} Author interview with Makerere Political Scientist, January 2007.

\textsuperscript{419} In their article “Politics, Donors and the ineffectiveness of anti-corruption institutions in Uganda” Roger
Tangri and Andrew Mwenda conclude that efforts to combat high-level elite corruption have been weak.
Anti-corruption institutions have been influenced and controlled whenever they threatened to expose
corruption. This is made worse by the failures of the donor community to withdraw aid from such an
obviously corrupt government.” (Tangri 2006).
referred to the Parliament as a rubber stamp legislature. Finally, Museveni surrounded himself with a cadre of elite security forces – symbolic of his high level of insecurity, and of the militaristic nature of the Ugandan state. The military continued to illegitimately step into the constitutional and political sphere.

The only real positive democratic trend then was the legalization and emergence of the opposition. From the perspective of the judiciary, it was clear that this period marked increasing violations of and restrictions placed on the constitutionally mandated separation of powers. As USAID notes (2005:22-23) the transition to multipartyism occurred against a backdrop of weak institutions, these institutions have increasingly become captured by executive power thus narrowing the separation of powers. The reduction in political space has emasculated the legislature the most. “The Seventh Parliament degenerated into an ineffective institution plagued by the contentious relations between NRM loyalists who did little more than the executive’s bidding and those critical of the regime who were powerless to do much more than complain “ (USAID 2005:32). Within the context of an overbearing executive branch and emasculated legislature there appears little the judiciary could do. Despite these constrictions however, the judiciary was able to carve out space within which to maneuver and to take a stand that on several occasions put them in opposition to the government.


The centralization and concentration of political and economic power into the hands of a small oligarchy surrounding a powerful president, combined with the weakening of democratic institutions is a familiar path taken by many authoritarian regimes. The combination of corruption, ethnicity and patronage have made Museveni’s regime, in the
words of Joe Oloka-Onyango (2004:47) “look little different from the predecessors he so vigorously condemns.” The most significant events of the last two years happened to take place in and around the Ugandan Courts and will therefore be narrated in-depth later in this chapter.

Oloka-Onyango’s (2004) tale of the “new breed” leadership on the African continent is one of great disappointment. Individuals, who initially represented a new beginning, have continued along the same path as their predecessors. In addition to laying the blame on individuals, it is important to note that the key enablers of these regimes are the international community, particularly key Western powers such as the United States. The United States has focused on Museveni’s embrace of neo-liberal economic reforms and anti-terrorism policy, and has rewarded him with a large flow of aid and development money. Anti-democratic behavior and continual (well-documented) human rights abuses have not apparently been enough to cut off aid to Uganda. For the most part donors continue to at least implicitly support the notion that stability is required for economic development, and stability can only be achieved through restricting the activity of opposition political parties. In the last few years Museveni-donor relations have been fraught; culminating in the period after the siege of the High Court in 2005.

Interviews conducted with donors in 2007 relayed a tremendous sense of frustration – of not knowing where to go or what to do in terms of the bigger picture. For USAID it is clear that Uganda plays an important part in the wider post-9-11 geopolitical strategic regional framework. As one donor informant told me, this complicates


421 In recent years European donors have significant reduced aid to the Ugandan government. After Museveni decided to run for a third term the UK government stopped $10 million of aid. The Irish government also withdrew aid shortly thereafter. Aid withdrawal also occurred in the aftermath of the 2005 court siege.
the business of aid giving. The USAID officers in Kampala are heavily constrained by edicts issued from Washington. This point was illustrated in an interview I conducted with a Political Scientist at Makerere University:

The President here has drummed the question of international terrorism so much. That is the only way we can get resources from Bush . . . this is the best diplomatic language to gain resources. He says he has 1000 troops to send to Somalia . . . Issue of terrorism came up frequently during the election in relation to Besigye. The President chose to demonize the regional countries – Rwanda, DRC, Sudan are the “axis of evil” – statement was made by the President during the elections. Our President is a big fan of President Bush, he likes his language.

Based on interviews across two bi-lateral donor agencies it is clear that the donor community is scaling back to more manageable projects. In terms of good governance, the donor community is obviously supporting civil society, but the environment for civil society is very hostile. Furthermore, offering strategic and financial support to the opposition parties is problematic. In the words of an executive officer at DANIDA:

We are providing funding for opposition parties through our “deepening democracy program” [. . .] We recognize that you need two parties. We have been supporting delegations of MP’s to visit parliaments in other countries. We support caucusing of MP’s. We are not scared about it, but it is tricky. How are you supporting parties in their efforts? Challenge is to find out how to do so without being accused of supporting one side over the other [. . .] How do you maintain a political watchdog role as civil society organizations without being partisan? I think the present government, because of the support to civil society by donors; they are seen as enemies of the government. . . . They are struggling with their internal problems. They need to be political…but not party political, party politics is something different.

These reflections from the donor community symbolize a political system centered on a single viewpoint; all other viewpoints are seen as being treacherous. This marginalizes the space for debate and eliminates the possibility of dissent.

The donor community has also played an important role in the professional

---

422 Author interview with international donor executive officer, January 2007.

423 Author interview with DANIDA executive officer, January 2007.
development of the judiciary itself and the Ugandan Law Society; funding training, workshops, seminars and further education. This is important in terms of strengthening both the judicial and civil society institutions. As I discuss in chapter 5 the Ugandan Law Society is the most organized with the largest membership of Tanzania, Malawi and Uganda.

What could have been a positive development – the transition to multipartyism – was entirely overshadowed by Museveni’s decisions to run for a third term of office. The final question remains – did Museveni ever intend to build a democracy? Andrew Mwenda (2007:28) argues that Museveni never intended to build a full liberal democracy because he refused to repeal the myriad repressive laws that remained on the books in 1986. However, I would argue that in its early days the Movement did include more moderate, more reformist voices. But as these voices either gave up on the NRM, because of the direction it was heading it, or in other cases was squeezed out as the space for dissent became ever narrower, the likelihood that Museveni’s regime would solidify into a neo-patrimonial state increased. As Rubongoya (2007:190) phrases it, “Museveni lost the benefit of discordant or revolutionary ideas and views.” Museveni has personalized the state, relying on his control of the military to provide physical force behind the charismatic force. The military is used to suppress dissent, money is used to buy off opponents and formal institutions have been undermined. Although Museveni has used the military force in moderation (that is outside of the conflict with the LRA in the north and the conflict in the north-east Karamoja region) it is clear that the military pervades all aspects of Ugandan politics. I asked a Makerere University Political Scientist to explain the significance of the military in Uganda today:

> The military is the core of both domestic and foreign policy. All political, economic, security issues are handled by the military. Museveni is more of a soldier now than he was in 1986. In 1986 he was getting into power.

---

424 Author interview with Makerere University Political Scientist, January 2007.
with support at the national level. He wanted to bring in people, to absorb
people in order to create a base. That base is wearing away, 90% of people
in Juba today are military people. If you look at the Kony group they
have more civilians present than the Ugandan government.

*How does military spending today compare to fifteen years ago?*

Museveni is spending more on the military. He is worried more about the
military at the personal level. He knows the game . . . he knows the deals
that were made with the military before. He is worried that he changed
the goalposts. He is more or less like Musharaf [of Pakistan], this country
has moved towards the Nigerian style. Any politician must either be
connected to the military or scared of the military or otherwise you can’t
survive. A rebel army can’t be kept in the barracks that is why they have
this appetite for engaging in regional disputes. We don’t have a national
army. Army doesn’t take civilian orders.

*How does this affect the separation of powers?*

Even what you call political, is political-military versus the judiciary.

The example of the PRA rebels, these guys are freed by the High Court
and Constitutional Court but still held in prison. Even to be brought to
the courts you must have the backing of the military. The prisons are
controlled by the military. Army has been asked to do all sorts of dirty
work for the politicians, from 1964 until today. The army has continued
to be part and parcel of our political process.

*Is the President in control of the army?*

Museveni is less in control of the military today than before. One, many
of the top military cadres have joined politics. Second, corruption and the
struggle for resources by the military has become a problem.

Presidential brigade has been expanded, they campaign for him, and they
guard his family. These are the only people he trusts. The rest are either
in barracks or deployed in Somalia or somewhere.

Black Mamba’s are part of the Presidential Guard Brigade – an inside
unit. We have gone back beyond Amin’s structures in terms of the
military. These are security people who are preparing to bomb the court.

The President is not in charge of the army.

The PRA suspect’s cases have demonstrated that once the constitutional avenues to

---

425 Interviewee is referring to the peace talks between the LRA and the Ugandan government being held in
Juba, Sudan.
resolving disputes are blocked than the rule of law breaks down and potential for
democratization diminishes. This is an ominous sign, for what distinguishes the
Museveni regime from Uganda’s past regimes is the reconstitution of the state. The
question then becomes: To what extent can the NRM undermine institutions while
maintaining the legitimacy, functionality and identity of the state? Or to coin Aili Tripp’s
use of the term “semi-authoritarian” (Tripp 2004:24): To what extent can formal
institutions remain democratic in a semi-authoritarian regime? Does the judiciary
represent a potential force to pull back from the recent march towards authoritarian
rule? The recent abuse of the upper level judiciary does not portend well for the future.


During the period between 1986 and 1995 the judiciary quietly attempted to regain its
lost independence. Some cases in the early 1990s indicated a new found independence
and strength in the judiciary. On the 18th of January 1994, the Daily Topic Newspaper
declared on its front page “Welcome Judicial Independence”, the article claimed the
following:

It is pertinent to point out that yesterday’s acquittal of […] a former
Minister in the Obote II administration; on the capital charge of treason is
eloquent testimony that the Ugandan judiciary enjoys a reasonably
unfettered degree of independence from the Executive.426

However, that same year several events occurred that suggested the judiciary was being
interfered with in much the same way as it had in previous decades. In the year prior to
Professor Ojok’s emancipation it was leaked to the press that the Deputy National
Political Commissar, Jotham Tumwesigye had “dipped his hands into court matters”, by

sending a letter telling the judge to overturn his verdict.\textsuperscript{427} In September of 1993 the government attempted to pass a law banning the right to bail. The Ugandan Law Society stepped in stating, "we shall do all that is possible on our part to resist the move . . . we shall not allow the independence of the judiciary to be eroded."\textsuperscript{428} In December of 1993 Museveni was admonished by the Ugandan Law Society once again when he preemptively threatened to ignore a court ruling. The Law Society responded arguing these statements were a threat to judicial independence and that Museveni should be told: “Don’t scare the courts.”

The judicial system was in bad repair after years of conflict and instability. Museveni’s Minister of Justice, Abu Mayanja, the newly appointed Chief Justice Samson Wako Wambuzi (who was called back from exile), and Peter Kabatsi (Solicitor General) led a group of reformers who attempted to build the judicial system back up again (Widner 2001:153). Part of their argument to Museveni was that effective dispute resolution was essential to attracting foreign investment. In an interview with Jennifer Widner, Peter Kabatsi (November 1995) acknowledged this challenge:

\begin{quote}
We had to persuade the president too. The president started his own education in law at Dar es Salaam, but he felt too straight jacketed. He went for economics, instead. He had a general appreciation of the rule of law, but we had to persuade him that he too would be subject to the rules. He couldn’t go out and disparage decisions.
\end{quote}

The first constitutional case of the NRM era, \textit{Ssempebwa vs the Attorney General} (1986)\textsuperscript{429}, is noted as an example of the weak adherence to the rule of law in Museveni’s early years. Ssempebwa obtained judgment against the NRM government – based on a claim against the former Obote government for wrongful arrest and imprisonment –

\textsuperscript{427} August 27, 1993. “NRM Shot Twists Judges Ear.” Monitor


\textsuperscript{429} Constitutional Case No. 1 of 1987
attempted to have the judgment executed. After failing to retrieve payment from the
government Ssempebwa filed for a writ of mandamus to compel payment by the
government. As Mugwanya (2001:165) recounts,

Declaring Legal Notice No 6 of 1986 unconstitutional, and finding that the
NRM government was bound by the terms of the constitutional regime it
had itself introduced, the Court pronounced that: . . . even the NRC
(National Resistance Council), as the sovereign power who made the
proclamation of Legal Notice No 6 of 1986 is bound to work within the
new Constitution. The NRC, having by Legal Notice No 1 of 1986 set
itself the legal framework, is bound to work within that framework. It
cannot therefore, validly legislate outside that framework. The reaction
of the NRM was to make a mockery of the Court’s judgment by drafting a
verbatim re-enactment of the Legal Notice No 6 of 1986 that complied
with the Court’s demand to work within the new Constitution. Because
the reenactment was of retroactive application, the applicant was, in
effect, deprived of any real remedy

Creating new statutes (and then apply them retroactively) to deal with ‘unfriendly’ court
decisions has also been widely practiced by the Tanzanian government. This practice
severely undermines both the sincerity and legitimacy of purported governmental
adherence to the rule of law. The reaction of the court is significant because it marked a
departure from the characteristic timidity and conservatism of the past. As Oloka-
Onyango (1995:161) “such chicanery has not been confined to state-court relations, but
has also found expression in several other facets of the operation of the regime,
extending from constitutional amendments to the massive show of military forces when
challenged over the proscription of political party activity.”

Ssempebwa would come to be recognized as a landmark case in Ugandan history.
What is perhaps less exciting about this case is that the judiciary is asserting itself over
property a right – which was not a radical departure from established economic and legal
norms. Oloka-Onyango (1993:45) also notes the continued emphasis and reliance of
technicalities involved in the case, there was little address in terms of substance. The
government was able to redraft the law and reform the technical points exposed to be
unconstitutional by the judiciary.
Another early case of note was *Ontario Lt v. Crispus Kiyonga & Ors* (1992)\(^{430}\) an unremarkable contract dispute made remarkable by the fact that the defendants were now high ranking members of the new NRM government. The contract had been entered into between the Canadian company and Kiyonga, et al. who were high-ranking (founding) members of the National Resistance Army. Ontario was now attempting to sue the NRM government for this broken contract. Justice Byamugisha made some important declarations:

1. Revolutionary movements are not legal entities until they assume power
2. The government was a wrong party to the suit because the movement was non-existent in law prior to its assumption of power.
3. The NRM interim government did not exist in law at the time of the alleged contract. Therefore there was no valid concluded contract.

This case is representative of the reluctance of the courts to hold the current government responsible for acts committed during the war. The thousands of claims against the government who had confiscated property while acting as a rebel movement during the war were generally quite unsuccessful.

**A. Judicial Review**

As chapters 4 and 5 demonstrate, the Ugandan judiciary has spent the vast majority of its post-independence years simply preoccupied with survival. Survival in an institutional sense, but also in the individual sense – note the death of former Chief Justice Kiwanuka. The promulgation of the 1995 constitution marks a significant watershed moment for the Ugandan judiciary as they move forwarded with both expanded powers and expanded protections. Now armed with the power of judicial review the Ugandan

\(^{430}\) [1992] 1 KALR 14
judiciary was equipped to hear and resolve politically charged disputes. The foundational case of the post-1995 era is *General David Tinyefuza*. The Court struck out at Museveni’s government, within the context of one of the most sensitive areas of Museveni’s regime – the military. Below is a discussion of the facts of the case and an analysis of the legal and political implications.

*Attorney General v. Major General David Tinyefuza* (1997). In late 1996 Major General Tinyefuza was summoned by the Ministry of Defence to appear before a Committee of Parliament to testify as to why the war in Northern Uganda was not ending. In his testimony before the Committee General Tinyefuza was very critical of the Army Leadership. This obviously did not go down well with the Army leadership, including the Commander in Chief (President Museveni). The President ordered an investigation in to whether the testimony before the Parliamentary Committee disclosed any offence committed by the Petitioner. After learning about this criminal investigation the petitioner wrote a letter to the Minister of Defence resigning from the army. The Minister replied rejecting Tinyefuza’s resignation for it did not comply with NRA regulations. There were threatening mutterings from both the NRA and President that Tinyefuza would have to be punished. Tinyefuza was trapped by the executive branch and by the military; his only choice was to seek assistance from the two year-old Constitutional Court.

Tinyefuza filed a constitutional petition in the Court of Appeal, seeking declarations that the threats to punish him for his testimony before the Parliamentary Sessional Committee would be in contravention of Article 97 of the Constitution; that the rejection of the resignation letter was unconstitutional and finally that the Army regulations were no longer applicable because he had been appointed to a post in public

---

service in 1993 (as Presidential Adviser on Military Affairs) and thus had effectively been removed from the army. The Constitutional Court agreed that Tinyefuza was no longer a part of the army and could not be a full time “Presidential advisor” and army member therefore military law did not apply. They also ruled that threats by the army and President to the petitioner were unconstitutional. The verdict was greeted with unprecedented interest and excitement in the legal community and beyond. This was seen as the coming of age for democracy in Uganda. As New Vision editorial announced that “the case has done as much for jurisprudence, for democracy, as any in our history and is surely a crowning moment for the new Uganda”432

Many saw this as a vindication for the judiciary who, up until 1997, had done very little. Professor Oloka-Onyango was quoted in the New Vision saying, ”The judiciary has of recent made very controversial rulings especially in election petition cases but this has now exonerated it from the accusations.”433

A court which has previously suffered the death of a Chief Justice and has had its decisions disrespected by the state re-arresting people it has acquitted, this must be a moment of dignity. That their Lordships can freely rule against the government without fear, is no mean feat. (“A New Era Dawns”, New Vision, April 27, 1997)

The government reaction was restrained with hostile overtones. The case goes straight to the heart of Uganda’s most sensitive issues – executive privilege, the power of the military and a long history of disrespect for the constitution. Instead of conceding misbehavior and the need for change on the part of the military, Museveni assured the country that any laws that were unconstitutional would be changed through parliament. After all the NRM had a clear majority in parliament and it would be easy to make those


433 Tinyefuza Victory Excites Kampala” 27, April, 1997. New Vision
changes.434

The Attorney General appealed to the Supreme Court on the basis of several procedural issues related to evidence, timing of petition and jurisdiction. The Supreme Court Justices ruled in favor of the government. By a majority of five (Justices Wambuzi, Tsetooko, Karokora, Kanyeihamba and Kikonyogo) to two (Oder and Mulenga). The Justices found that although Constitutional Court did have jurisdiction over the resignation issue they did not have jurisdiction over the alleged threats by the government, which were not a constitutional question. In addition the Supreme Court found that the Constitutional Court had incorrectly allowed the admission of certain types of evidence (newspaper reports). Ultimately Tinyefuza was still subject to military law – appointment to public service did not amount to effective removal from the military. The reaction to the Supreme Court decision was just as vocal as to the Constitutional Court decision. This was an important test case for the new Constitutional Court, but would be equally as important for the newly constituted bench of the Supreme Court. This was the first case of judiciary versus executive and most were unsurprised that the judiciary decided to side with the government, nor were they surprised at the breakdown of 5 to 2 votes. This decision politicized and delegitimized the Supreme Court, but bolstered the legitimacy of the Constitutional Court. As an editorial in the Sunday Monitor noted – “The judges of the Supreme Court who stifled Tinyefuza's cry for freedom read the same books as the Constitutional Court judges who had earlier given it to him. That they could adduce verdicts so different from the same evidence is therefore not a function of the law but of fickle opinion.”435 At a conference held a few months later Justice Leticia Kikonyogo defended the ruling of the Supreme

434 See “Leave Tinyefuza Alone” Crusader, 1, May, 1997, for analysis of Museveni reaction and alleged comments.

435 “Tinyefuza: A False Prophet or Saviour?” Sunday Monitor, 1, February, 1998
Court: "What the public think is constitutionalism is anything decided against the state [. . .] but that is not the case." In addition to its enormous political ramifications, *Tinyefuza* would become a foundational case for Ugandan jurisprudence because it explicitly laid out the general parameters and principles of constitutional interpretation for the first time. Deputy Chief Justice Manyindo (as he then was) posited that Constitutional provisions should be given “the widest construction possible” because while the constitution does not change, “the changing circumstances of a progressive society for which it was designed may give rise to new and fuller import to its meaning.” In short, Justice Manyindo characterized the role of the judiciary as being to expand the various constitutional provisions through a board and liberal construction. One of the techniques through which this can achieved is through reading the constitution as a whole by taking a harmonious approach.

Justice Kanyeihamba reminds us of the parameters of judicial review in this case – a reminder that would become pertinent once again in 2006 when the Uganda Law Society challenged the government with respect to the simultaneous cases against Kizza Besigye and the 22 PRA suspects in both the High Court and General Court

---

436 Kikonyogo quoted in The Monitor, “Justice Odoki Attacked over Tinyefuza Case” The Monitor, 1, May, 1998. The Monitor also claimed that allegations were circulating claiming that government representatives had met with Supreme Court representatives.

437 Early on in Kanyeihamba’s career on the bench people questioned his level of independence because of his history as a top member of the Movement early on. The following article appeared in the New Vision before the Tinyefuza appeal commenced: “Supreme court Justice George Kanyeihamba has refused to step down from a panel of the Court Judges hearing a government appeal against Major General David Tinyefuza. In response Kanyeihamba said, "I was sworn in as Justice of the Supreme Court of Uganda on September 3rd, 1997, not only to adjudicate matters before me fairly, impartially and without fear of favour, affection or ill-will but also to do right to all manner of people in accordance with the constitution" He added that to alleged falsehoods and ask that I stand down because of them would not only be manifestly unjust but a betrayal of the judicial oath he solemnly took. ["Kanyeihamba Says “No” to Tinyefuza" New Vision 20, November, 1997.] Kanyeihamba would go on to be one of the most outspoken and critical anti-government voices in the years that followed; thus showing that judicial appointees do not always behave in the ways expected by those that appoint them.
Martial,\(^{438}\)

Courts should refrain from reviewing decisions relating to military affairs unless they have to. The exercise of judicial power must be within proper bounds and should fall short to the point beyond which it might be considered as an intrusion in the powers of the co-ordinate branches, namely, the Legislature and the Executive. The Constitution has empowered Parliament, and not the Judiciary, to supervise the Executive when the latter is exercising its functions in military operations.

It may be true in an established democracy that the judiciary does not have the power to review decisions related to military affairs, but given the weak separation of powers, the lack of transparency in military policy and Uganda’s past history, a strong case could be made to characterize the Tinyefuza affair in different terms altogether.

*Rwanyarare & Another v Attorney General* (1997)\(^{439}\) Opposition politician James Rwanyarare filed this petition on his own behalf and on behalf of the opposition party the Uganda Peoples Congress (UPC). The petition sought to undermine the constitutional credibility of Movement system of government. Seeking declaration that the system was never chosen or adopted by the people of Uganda; that no law establishing a Movement Political system was enacted prior to the 1996 Presidential and Parliamentary elections and finally that the results of the 1996 elections were themselves null and void. Ultimately the petition was struck down in its entirety because 1) the petition was partly filed in the wrong court and 2) the petition was wholly time barred. This early test case, Rwanyare’s ambitious attempt to throw-out Museveni’s government, was legally flawed and never garnered serious consideration from the judiciary.

*Ssemogerere and Others Referendum Cases* After the foundational Tinyefuza case, very little time passed before another series of seminal cases were to come to the Constitutional Court. The three cases filed by Paul Ssemogerere, President of the opposition Democratic Party (DP), opened the gate to some of the most forceful opinions

\(^{438}\)The defense drew on Kanyeihamba’s decision (but perhaps not in a way that Kanyeihamba would have approved of).

\(^{439}\) Constitutional Court of Uganda Constitutional Petition No. 11 of 1997 (unreported).
of the court in Ugandan history. The judgments of both the Constitutional Court and Supreme Court of Appeal were loaded with political and legal significance. Writing in 2005, Erica Bussey (2005:2) was a little premature when she suggested that the cases “indicate the beginning of a process of dialogue between the courts and the legislature in Uganda”, although Bussey does go on to note that recent developments “such as Museveni’s reaction to the Referendum Act, 2000 Case and the subsequent Supreme Court decision overturning the Constitutional Court’s ruling, indicate that the future of dialogue in Uganda is uncertain.” Today, with three additional years of perspective, it has become clear that the four years in which these cases were filed and heard marked the climax of judicial power in the post-1995 era. Since 2004 the courts have suffered a profound and deliberate undermining of their authority and power by the regime. This does not negate the significance or importance of these cases in Ugandan constitutional and political history. What follows is a brief overview and analysis of the three constitutional petitions and appeals from 1999 to 2004.

*Ssemogerere and Anor v. Attorney General (2000)*\(^440\) (*Ssemogerere 1*) Paul Ssemogerere was President of the Democratic Party (DP). The same Democratic Party founded almost fifty years earlier at independence. Ssemogerere and two other MPs filed this petition to challenge the constitutionality of the Referendum and other Provisions Act no. 2 of 1999.\(^441\) The petitioners alleged that the Act was passed by Parliament when it lacked quorum to transact business. In addition Article 271(3) of the Constitution requires that a referendum be held four years after the first elections under the constitution. The Referendum and other Provisions Act was adopted on the final day of the deadline – July, 2, 1999. When the petition first came to the Constitutional court it

\(^{440}\) Constitutional Petition No. 3 of 1999. [2000] LLR 61 (CAU). Hereinafter *Ssemogerere 1*

\(^{441}\) The Referendum and other Provisions Act established the timing and procedures of a referendum on whether the Movement “no-party” system of government should be established or whether multipartyism should be introduced.
was dismissed on a preliminary objection raised by the Attorney General. The Court concluded that they did not have jurisdiction to hear the petition. The Supreme Court on appeal (Paul Ssemogerere & Anor v Attorney General (2000)\textsuperscript{442}) ordered the Constitutional Court to hear the petition on its merits. In their decision the Supreme Court addressed whether parliament could validly refuse any person the use of the Hansard in the court as evidence. Justice Oder made clear in his judgment that in Uganda the parliament was not supreme, instead the constitution was supreme.

Courts have jurisdiction to adjudicate on matters involving Parliamentary privilege . . . In Uganda, the position is different from that of the United Kingdom. We have a written Constitution which as Article 2 (1) provides, is the supreme law of the land and has binding force on all authorities and persons throughout Uganda. Parliament is subject to the Constitution. Where it is alleged that parliament has acted unconstitutionally the Courts, as the protectors and interpreters of the Constitution, have jurisdiction to inquire into such alleged acts of Parliament even if they relate to matters of internal Proceedings of Parliament.

This is the first time that the Ugandan courts have directly questioned parliamentary supremacy, again testing and giving meaning to the 1995 Constitution. Furthermore, as Kanyeihamba argued, the Parliament has a duty to assist the courts:

Under Article 128 (3), all organs and agencies of the State shall accord to the courts such assistance as may be required to ensure the effectiveness of the courts. Members of all the organs and agencies of the State including members of Parliament who are members of that special organ of the State known as the legislature are similarly bound to assist the courts.

Justice Kanyeihamba then went on to chastise the Constitutional Court for upholding the Attorney General’s arguments that the parliament is a sovereign body:

I noticed that counsel for the Attorney General relied very heavily on authorities derived from English courts while applying and interpreting the unwritten British Constitution which operates under a sovereign Parliament. In Uganda, it is not Parliament but the constitution which is

\textsuperscript{442} Supreme Court Constitutional Appeal No. 1 of 2000 from Constitutional Petition No.3 of 1999. (SCU)
supreme. Relevant authorities should have included those derived from countries with similar written constitution.

So the case then went back to the Constitutional Court. While the case was still pending the legislature passed another Referendum Act, the Referendum (Political Systems) Act of 2000 (passed into law on June, 7, 2000). Within two hours the bill had been debated, read three times and passed into law (Gloppen, et al.2006:16) Three days before the referendum was held Paul Ssemogerere and Zachary Olum filed another petition in the Constitutional Court testing the constitutionality of the Referendum Act of 2000. In addition James Rwanyarare and Badru Wegulo sought an interim order to prohibit the holding of the referendum until the final disposal of the first Ssemogerere case. However, that petition was not heard until after the referendum. This was too late to stop the Referendum from taking place and it was under 2000 Referendum Act that the actual referendum on multipartyism was held on June, 29, 2000. The outcome of the referendum came down strongly in favor of the status quo: the ruling Movement system was declared 90.7 percent victor as against 9.3 percent for multipartyism.

In a companion case to Ssemogerere 1, another member of the opposition (Zachary Olum) disputed the validity of section 15 of the National Assembly (Powers and Privileges) Act, where Members of Parliament and certain employees of Parliament were prohibited from using evidence of proceedings in the Assembly or its Committees elsewhere without special leave of the Assembly first being obtained (Hon. Zachary

---


444 Petition No. of 2000 (CAU) (Un reported).

445 The Rwanyarere case was completed and was eventually dismissed in November, 2000. In the judgment the Constitutional Court held inter alia that the enactment of Act 9 of 2000 did not contravene article 79(1) and (3) of the Constitution. (Gloppen, et al.2006)
Olum & Hon. Rainer Kafiire v. Attorney General (1999).\textsuperscript{446} This petition was a challenge to the National Assembly (Powers and Privileges) Act for being unconstitutional because it infringed the right of access to information in the hands of the state (Art. 14 Uganda Constitution). Moreover the Act infringed Art. 41 of the Constitution which guaranteed the right of access to information in the possession of the state; the right to freedom of speech and assembly (Art. 29 1 (1) and (d)) and the right to fair trial (Art. 28 (1)).\textsuperscript{447} In addition to broadly citing authorities from the Commonwealth and the United States, the Petitioners relied heavily on the Tinyefuza decision, where it was held that the evidence act was unconstitutional as it impeded a litigant’s freedom of access to information in the hands of the state, thus imposing a restriction on the right to a fair trial. In short, the court was bound by their own precedent. The Attorney General argued that the precedent was not relevant as the Tinyefuza case had been overturned by the Supreme Court, who held that restrictions may be placed on the enjoyment of all rights, including the right to fair trial.

The Petitioners were successful. The Court upheld the findings of the Constitutional Court on the unconstitutionality of S.121 of the Evidence Act, finding that the Act infringed the right to a fair trial and the right of access to information. In short, any restrictions on which information may be used as evidence are a derogation of the right to a fair trial. The court declared that it was required to follow the principle of \textit{stare decisis et no quieta movera}. Secondly, the court stressed that each of the separate rights (right to fair trial, access to information) should be considered together; the derogation of right of access to information is tantamount to the derogation of the right to a fair

\textsuperscript{446} Constitutional Petition No. 6 of 1999 (CAU), [2002] 2 EA 508

\textsuperscript{447} This particular statute of the National Assembly (Power and Privileges) Act had already come before the Constitutional Court in 1998. \textit{Re. Jim Katugugu & Others v. Attorney General} (1998) Constitutional Petition No. 4 & 6 of 1998. In that case the court pronounced that Section 15 of the National Assembly Act applied to both members and non-members, and that where the provisions were complied with, any evidence adduced was inadmissible for non-compliance with the manner of accessing evidence.
trial. Deputy Chief Justice Manyindo and Justice Berko dissented. Mpagi Bahigeine, Twinomujuni and Okello were in the majority. Once again, as they did in General David Tinyefuza the court was asserting its supremacy (as guardian of the Constitution) over that of Parliament. As Justice Twinomujuni echoed the words of Kanyeihamba in David Tinyefuza, “The Parliament of Uganda is not sovereign. It is the Constitution that is supreme.” This case is of pivotal importance not just in terms of developing Ugandan constitutional jurisprudence, and securing access to the courts, but it would be pivotal to the continued fight by the opposition against Museveni’s attempts to right rough-shod over constitutional principles in his efforts to contain and manipulated the opposition parties.

Meanwhile on August 10, 2000, Ssemogerere 1 was finally heard back in the Constitutional Court. The Petitioners asserted that the Constitution required Parliament to transact business only when it had a quorum of minimum one-third, and that quorum should be ascertained by counting the members present. The Speaker maintained that there was quorum and used the written register to support this claim. The Court concluded that when a lack of quorum was raised the Speaker had the obligation to make an actual headcount to ascertain the existence or otherwise of quorum. He had no discretion to rely on his own observation of ayes and nays (i.e. a visual headcount), or to rely on the signing-in register. In short, the conduct of the speaker had violated Articles 88 and 89 of the Constitution, thus rendering the Referendum and other Provisions Act No. 2 of 1999. It had never been an Act of Parliament it therefore had no force of law in Uganda. Justice Twinomujuni wrote an editorial in the Sunday Vision days after the judgment posing this question: “Why do judges become incompetent only when their decisions present a problem for the politicians who realise too late they had messed up and a celebration for the rule of law when they present no crisis?” Justice Twinomujuni
goes on to suggest that the best way to have resolved the Referendum Act dispute would have been outside of the courts so as to have “spared the judges.”

Justice Twinomujuni felt compelled to speak out and defend the judiciary as a result of the extraordinary verbal attacks that were been issued by the President. The President’s attacks took on a populist tone in which he pitted the elitist (out of touch) judges against the people. Museveni was quoted by the New Vision newspaper as saying that: "They (judges) are insensitive. What they have done shows legal bankruptcy and insensitiveness to the aspirations of the ordinary people." Top level members of the NRM suggested that the dispute between the judiciary and the government over the Referendum decision could be resolved by inviting the Supreme Court judges for a cup of tea. The high level of tension even brought the Judicial Service Commission into the fray when they called on the three arms of the State to be “tolerant in dealing with the aftermath” of the Constitutional Court ruling. An editorial in the Sunday Monitor sought to give encouragement to the judiciary by ending with these words – “The Movement might not like it, but the public appreciates it.”

Less than twenty days later, in response to the judgment, the government quickly moved to amend the 1995 Constitution. The Constitution Amendment Act 13 of 2000 (August 29th) amended the process by which a bill could be passed into law. Rules that require a bill to go to the Sessional Committee were suspended to enable immediate passing of the bill without waiting for 14 days. As Bussey (2005:11) notes, “the

---

448 “Justice Twinomujuni the Whipping boy” The Sunday Vision, August 20th, 2000
450 Ibid.
452 “Give the Judges a Break, The Sunday Monitor August 20, 2000
amendment was introduced in Parliament, debated, passed and received the Presidential Assent on the same day.” The intention of the amendment was to validate previous laws, resolutions and actions of parliament that had been challenged by the Constitutional Court decision. The outcome of the amendment was that two areas previously subject to judicial review were now removed beyond the point of scrutiny. Now quorum was required only during the time of voting and not during debate, and secondly the leave of the speaker had to be obtained before using parliamentary records as evidence. The act also gave retrospective effect to the Referendum Act of 2000. These actions unofficially drew the ire of the judiciary. As Kanyeihamba explained, this move was seen as a direct threat to the supremacy of the judiciary and the constitution and the Principal Judge Ntabgoba, wrote a letter in response to a speech given by the Prime Minister. Below is an extract of that letter:

... I am surprised that the Rt. Hon. Prime Minister and indeed, the 6th Parliament, do not realize that when they decided to amend the Constitution because of the decisions of the Constitutional Court, without first making an appeal to the Supreme Court, the highest Court in the land, they interfered with the independence of the Judiciary by denying the citizen the final authority on the Referendum Petition. This is not to say that Government and Parliament had no power to amend the Constitution in the event the Supreme Court upheld the decision of the Constitutional Court as the authoritative decision, when the likelihood is that it is a wrong decision especially with regard to the mode of voting in Parliament by “aye” and nay.” (Kanyeihamba 2002:286)

Paul Ssemogerere and Zachary Olum v. Attorney-General (2000) 453 (Ssemogerere 2) sought a declaration from the court that the Constitutional Amendment Act was null and void because it was not passed by constitutional means. Demonstrating an apparent
reversal of assertiveness the Constitutional Court (in a majority of three to two\textsuperscript{454}) held that the procedures for amending the constitution could be waived. The case was appealed (Constitutional Appeal No. 1 of 2002) on three grounds: The first is whether the Constitutional Court had jurisdiction to construe one provision of the Constitution against another. The second issue was whether the Constitutional Amendment Act No. 13 of 2000 amended the various Articles enumerated by the appellants. The third issue was whether the right procedure was followed in making the amendments.

The Supreme Court ruled that the Constitutional (Amendment) Act was null and void because the procedures for amending the constitution had not been followed. As Justice Odoki (p.28) stated,

\begin{quote}
Parliament has the power to makes Rules of Procedure to govern its business, but those Rules had to be consistent or \textit{intra vires} the Constitution. Parliament cannot change provisions of the Constitution through its Rules. It can only make Rules to implement the provisions of the Constitution. Therefore in making amendments the correct procedure laid down in Articles.
\end{quote}

Further, the Constitutional Court had erred in not following the precedent set by the Supreme Court, and for not addressing the provisions of the constitution as a whole. Kanyeihamba wrote the lead judgment for this case and in his own true inimitable style\textsuperscript{455} critically addressed the decision of the Constitutional Court and the behavior of the legislature. First (quoting Sir Owen Dixon) Kanyeihamba explicitly addressed the failure of the legislature to abide by rules of procedure:

\begin{quote}
[I]f Parliament is to successfully claim and protect its powers and internal procedures it must act in accordance with the constitutional provisions
\end{quote}

\textsuperscript{454} Mukasa-Kikonyogo, DCJ, Kato, Kitumba JJA; in majority with Mpagi-Bahigeine and Twinomujuni JJA in dissent.

\textsuperscript{455} After the reading of the 2006 Presidential Election Petition judgments the author observed lawyers for the defendant (outside the courtroom) dismissing Kanyeihamba’s judgment as being an academic paper rather than a legal judgment, suggesting that Kanyeihamba was more of a Professor than a judge. Author observation, Uganda Supreme Court of Appeal, January 2007.
which determine its legislative capacity and the manner in which it must perform its functions.

Justice Kanyeihamba went on to note the dangers (as articulated by Nigerian Professor of law Nwabueze) of written constitutions without a sense of ‘constitutionalism.’

In Uganda, courts and especially the Constitutional Court and this Court were established as the bastion in the defence of the rights and freedoms of the individual and against oppressive and unjust laws and acts. Courts must remain constantly vigilant in upholding the provisions of the Constitution . . . It is the solemn duty of the courts of Uganda to uphold and protect the People’s Constitution.

It is clear that once again the Supreme Court was taking the lead in being the more assertive of the two Courts (the first time by sending Ssemogerere I back to the Constitutional Court for consideration). This case represents an important piece of constitutional jurisprudence not just for Uganda, but for the rest of East Africa and beyond to the Commonwealth. The Supreme Court is spelling out the supremacy of the constitution and the prerogative of the judiciary to uphold the constitution.

Furthermore, this case enunciates the principles spelt out in General David Tinyefuza regarding the “constitutional harmonization principle” in which no one provision of the constitution may be separated from the other and that the constitution must be given purposive construction as an integrated whole.

While the debate concerning the Referendum Act of 2000 went on both inside and outside the courts, the government sought to restrict opposition party activity through passage of the Political Parties and Organizations Act of 2002. Article 269 of the Constitution restricting political party activity was only meant to transitional; the Political Parties Act was therefore a way to entrench these restrictions without running afoul of the constitution. The Political Parties Act restricted party activity at the national level and prevented the holding of public rallies, from sponsoring candidates for
elections to office and from holding meetings. In addition, new political parties faced insurmountable obstacles just to register with the state.\footnote{Requirements include requiring parties to show that they have founding members in one-third of all districts and to pay a substantial fee. Note Human Rights Watch critique of this.} In Ssemogerere and Others \textit{v. The Attorney General} (2003)\footnote{Constitutional Petition No. 5 of 2004 (CAU), decided 21st March, 2003. (unreported)} the opposition once again turned to the courts to challenge the constitutionality of the Political Parties legislation. The Constitutional Court held that the restrictions contained with the Political Parties Act were inconsistent with Sections 29(d) and (e) of the Constitution and were not justifiable in a free and democratic society. Perhaps the most earth shattering part of this decision though was the declaration that the Movement “system” was not a system, but a political organization. Thus, as a political organization, the Movement was also subject to the requirements of the Political Parties Act. Finally, the Court ruled that section 18 of the Act rendered political parties non-functional, thereby effectively creating a one-party state.

The legality of the Referendum (Political Systems) Act would be decided when the Constitutional Court finally heard and ruled on \textit{Ssemogerere 3 (Paul Ssemogerere and Zachary Olum v. Attorney General} (2000)\footnote{Constitutional Petition No. 3 of 2000 (CAU) (Unreported)} in 2004. The hearing was delayed for procedural reasons. The Court found that the Act had not been passed in conformity with constitutional procedures, Article 89 of the Constitution had not been followed and the Bill had not been referred to the Standing Committee of Parliament. This was to be the last of the Referendum related cases and the court had saved the best until the end. This case raised the ire of the government in a way that none of the earlier decisions had.

In their judgment the Constitutional Court carefully reiterated the position taken by the Supreme Court in the Constitutional Amendment Act case – constitutional
procedures cannot be waived. The implication of their judgment is that by failing to hold a referendum under Article 271, Article 74 (providing for the holding of a referendum “for the purpose of changing a political system”) of the constitution may never come into operation. A political system was never put in place and Article 271 was never complied with. In short, the act was invalid, thus the referendum was invalid; this made the current government illegal. In his lead judgment Justice Twinomujuni reminds us to look back at “the history of constitutionalism in this country for the last forty years in general and the last five years in particular”, he then goes on to cite Justice Kanyeihamba’s warnings in Ssemogerere 2 that “courts must remain constantly vigilant in upholding the provisions of the constitution.” Twinomujuni (Constitutional Petition at p.48) was bold in his judgment:

In this case, the Act is null and void . . . Anything which was done under the authority of that Act was invalid. To rule otherwise would be tantamount to authorizing the stampeding of Parliament (as was the case here) to pass Kangaroo style legislation oblivious of the Constitution; perform unconstitutional acts allegedly under the authority of such legislation, all with impunity. That would be licensing anarchy.

President Museveni was not happy with this ruling and would display this displeasure in ways more aggressive than ever seen before. However, he would come out and openly reject the ruling in public, once again using populist rhetoric to rile the people against the judiciary. Museveni appeared on national television a few days after the judgment complaining that the Courts had not protected the constitution but instead had usurped the power of the constitution:

A closer look at the implications of this judgment ...shows that what these judges are saying is absurd, doesn’t make sense, and reveals an absurdity so gross as to shock the general moral of common sense. ...In effect what this means, is that this court has usurped the power of the people ... This court has also usurped the power of parliament, to amend the
constitution. Government will not allow any institution even the court to usurp the power of the constitution in any way.459

A few days later Museveni famously was quoted as saying that the “major work for the Judges is to settle chicken and goat theft cases but not determining the country’s destiny.”460 In addition there was a widespread believe that the court had triggered a constitutional crisis. Monica Tusiime (Tusiime Kirya 2006) describes the aftermath in the days following the Constitutional Court ruling:

In a clear act geared at intimidating the Constitutional Court on June 29 2004 hundreds of Movement Supporters poured onto the streets of Kampala to protest the ruling. They chanted anti-judiciary slogans and appealed to the President to sack five judges who presided over the case. They presented a petition to the Speaker of Parliament, demanding that punitive action be taken against the judges.461 In a show of so-called “people power” against the Judiciary, some judges were forced to stay away from their chambers and the courts.

The judiciary would come out to defend itself, but the reaction was muted. The Chief Justice called upon the government to leave the judiciary alone and attempted to calm fears of a constitutional crisis (Tusiime Kirya 2006). Criticism of the government came from all corners, including the international community. This was a turning point for the judiciary and the government. The government became bolder in interfering with and threatening the judiciary. The judiciary became more timid and cautious.

Most likely as a way of averting anarchy and chaos, the Supreme Court on September 2nd of 2004 issued their judgment in Attorney General v. Paul Ssemogerere


461 The petition accused the Judiciary of trying to thwart and reverse the progress of the people and demanded that the Chief Justice takes disciplinary action against all the corrupt, sectarian, partisan and political judges who participated in this absurdity. The memo added that the President should dismiss those judges for attempting to usurp the people’s power (IBA 2007:22-23).
The Supreme Court agreed with the Constitutional Court that the Referendum (Political Systems) Act of 2000 was inconsistent with provisions of article 271(2) of the constitution and was thus null and void. However, ultimately they chose not to hold that the referendum itself contravened Article 69. Therefore the results of the referendum held; the government was legal. It is important to note here that the timing of justice was crucial to the political implications of these significant cases.

Despite the final decision in the Supreme Court, the opposition politicians had won an important victory. As Gloppen, et al. (2006:18) note:

During 2004 the courts appeared to move towards a new resolute, the age of technicalities seemed to be giving way to substantive justice, the question of constitutionality of laws passed under the 1995 constitution took centre stage as opposition politicians acted on a renewed faith in the judiciary.

There is evidence that an important feedback mechanism was at work here. Early decisions (although mixed) sent signals to the political opposition that the judiciary was receptive to their claims against the NRM regime. But the judiciary had to exercise extreme caution for they did not want to lead Uganda back down a path of chaos and they did not want to marginalize their own power. To that end the Supreme Court’s compromise is reminiscent of the two Presidential election petition judgments. Acknowledging that the government had done wrong, but not being prepared to (potentially) destabilize the country and force the government to hold another Referendum.

In *Tumukunde v Attorney General and Another (2005)* member of the Uganda People’s Defence Forces (UPDF) and a Member of Parliament, representing the

---

462 1 EA 23

463 [2005] 2 EA 291
UPDF\textsuperscript{464} filed a case against the President. As a result of critical public comments (made on television) about the military made by Tumukunde, the petitioner was directed by the President, as Commander-in-Chief to write to the Speaker tendering his resignation as a Member of Parliament.\textsuperscript{465} Tumukunde subsequently wrote the resignation letter, was arrested thereafter and charged in a court martial. The petitioner asserted that for the Commander-in-Chief to direct him to resign was in contravention of Articles 80, 83, and 84 of the Constitution; that the Speaker’s action in accepting and declaring his seat vacant on the basis of the letter were also in contravention of the constitution; and finally that the act of the UPDF restraining him from expressing political matters while allowing others to do so also contravened the constitution under freedom of speech provisions.

Central to this case was whether the Commander-in-Chief could be challenged in a Court of Law. The Court agreed with the Attorney General that the President could not be challenged in a court of law, further that each arm of government needed to respect the independence of the other; otherwise “there exists a threat of judicial interference with the executive branch through orders, and other court decisions which would violate the separation of powers principle.” However, the Court did go on to note, with reference to the recent U.S. case \textit{William Jefferson Clinton v Paula Corbin Jones} (1997)\textsuperscript{466} the President may still be subject to disciplinary action (principally through mechanism of impeachment). In short, while the actions of the President of Uganda can be challenged in a competent court of law, while holding office the President shall not be liable to proceedings in court. Instead suit should be filed against the Attorney General.

\textsuperscript{464} Under Article 78(c) of the Ugandan Constitution – Parliament shall consist of such members of the army, youth, workers, persons with disabilities and other groups as Parliament may determine.

\textsuperscript{465} Under the Ugandan Constitution the military has a number of seats reserved in the Parliament. Section 78 (1) (c) of the Constitution declares that Parliament shall consist of: such numbers of representatives of the army, youth, workers, persons with disabilities and other groups as Parliament may determine.

\textsuperscript{466} 520 U.S. 681 (1997)
Under the Ugandan constitution there was little more that the judiciary could do. This was ruled by a majority of four to one. Justice Kavumba goes as far to assert that the court should not even be addressing this issue because it falls under the “political question doctrine.” This issue, Kavumba argues, is beyond the Courts’ competence. Instead this issue should be left to the people who “through the exercise of their sovereignty, either directly or through their representatives in Parliament, may bring an end to the incumbent’s presidency thereby opening the door for legal action to be taken against him or her.”

On the second issue – whether the letter written to the Speaker was a real resignation letter, because the Commander-in-Chief had “forced” the plaintiff to write it. The court found that the plaintiff could have ‘refused’ to write the letter, and that there was no evidence that he had been forced, therefore the letter remained in effect. On issue 3, whether the Speaker was in contravention of the constitution through informing the electoral commission that the seat was no vacant, the court found that the Speaker had indeed complied with the law. Issues 2 and 3 were both decided unanimously.

Issue 4 was in regard to the Court Martial charges brought against Tumukunde. Tumkunde was court martialed on alleged charges of contacting the press and making public statements over the radio which were prejudicial to the good order and discipline of the army, and with spreading harmful propaganda contrary to the UPDF Act. Kikonyogo found that soldier members of Parliament are full members of Parliament with equal rights and obligations as the civilian members of Parliament. But as an officer of the UPDF must remain a soldier –

He must, therefore, obey the army code of conduct and observe the discipline. To defend the Constitution, the petitioner does not have to commit a breach of the law. He is enjoined to employ lawful means to fulfill his obligations. The rights and freedoms provided under articles 20, 21 and 29 of the Constitution must be enjoyed within the confines of the law. Those rights are apparently not absolute. They are important but
are no derogable freedoms under article 44 of the Constitution. (Kikonyogo judgment at p.11)

The essence of the army code of conduct is that the petitioner needed to get prior approval to go on the talk show from the commanding officer. Deputy Chief Justice Kikonyogo claims this wasn’t an unreasonable requirement and that -

It must have been enacted to enforce observance of discipline and also for security reasons . . . To deny the UPDF to enforce military law and especially the army code of conduct against its officers representing it in Parliament would be tantamount to authorizing indiscipline on their part.” (Kikonyogo judgment at p.12)

Issue four on who the petitioner swears his primary oath to – parliament or military - was decided by a majority of only three to two – Justices Mukasa-Kikonyogo, Kitumba and Kivumba in assent, and Mpagi-Bahigeine and Twinojujuni in dissent. In dissent Justice Mpagi-Bahigeine argued that General Tumukunde’s primary oath as a Member of Parliament was to the legislature:

Once an army representative, who is so vulnerable, is allowed to subscribe to the oath of Member of Parliament, he/she is put in a situation where he or she is faced with two masters to serve, the army code of conduct or the oath of Member of Parliament. Who is the supreme master? The oath of Member of Parliament. The petitioner becomes a legislator just like any other civilian Member of Parliament having descended into that arena. Consequently the instructions to be listening post and pressing charges against him would conflict with and violate articles 20, 21 and 29 of the Constitution. The oath to uphold the Constitution has an overriding effect over any thing else.

While the discussion concerning the ability of the courts to hold the President accountable is interesting it is Issue 4 that speaks to one of the largest barriers to democratization in Uganda – the continued prominence of the military in political affairs and the lack of civilian oversight and accountability enjoyed by the Ugandan military. Justices Mukasa-Kikonyogo, Kitumba and Kavumba are in essence privileging the laws and code of conduct above the constitution, which is supposed to be the “supreme law of the land.” If you consider that the petitioner was speaking out in his capacity as a
Member of Parliament, is it constitutional then to try him as a military officer in a Court Martial? This case provides further evidence in support of the claims that President Museveni’s style of leadership is still very much one of low-intensity, guerilla warfare in both in military and civilian matters.

B. Treatment of Procedural Obstacles and Public Interest Litigation

Article 126 (2) (e)Article 126 (2) (e) of the Ugandan constitution declares that the courts are enjoined to administer justice without undue regard to technicalities. In interviews I conducted I found that when I addressed the wide-spread critique (amongst both legal practioners and scholars) that the Ugandan judiciary frequently uses procedural issues and legal technicalities as an easy way to dismiss petitions, judges would automatically point me to Article 126 (2) (e) of the constitution. This did not really answer the question I was asking. As Gloppen, Kasimbazi, et al. (2007:15) highlight:

A particular approach to balancing judicial autonomy with self restraint, and avoid crossing the boundaries of policy and politics, emerged in the Constitutional Court during this period. Whenever possible the court cautiously avoided a conflict with either the executive or the legislature, and for years, technicalities and controversies rather than meritorious issues marked its judgments. This is particularly noteworthy in light of the emphasis in the 1995 Constitution on the administration of substantive justice without undue regard to technicalities.

This then begs the question: Are Ugandan judges using legal and technical procedural rules as a strategic “way-out” of difficult or controversial cases? One place to examine the veracity of this assertion is to trace the judicial treatment of Legal Notice No. 4 of 1996 over the last few years.
Legal Notice No. 4 of 1996

“It is certainly an irony that a litigant who intends to enforce his right for breach of contract or for bodily injury in a running down case has far more time to bring his action than one who wants to seek a declaration or redress under Article 137 of the Constitution” (Justice Oder in Ismail Serugo v. Kampala City Council & Attorney General (1997)\footnote{2 EA 514 (CAU)}).

Legal Notice No. 4 of 1996 declares that a constitutional petition filed outside of 30 days is incompetent. The Constitutional Court struggled with this procedural rule right from the beginning. In 1997 Rwanyarare & Another v Attorney General (1997)\footnote{Constitutional Court of Uganda Constitutional Petition No. 11 of 1997 (unreported).} the court adopted a strict positivist approach to the application of Rule 4(1) and dismissed the action. That same year, 1997, another important constitutional petition was dismissed by the Constitutional Court as being time barred, under the thirty day rule (Ismail Serugo v. Kampala City Council & Attorney General (1997)\footnote{2 EA 514 (CAU)}. Serugo had been wrongly arrested and convicted to 4 months’ imprisonment. Serugo’s appeal was allowed on the ground that he had been convicted of a non-existent offence. On 22, October, 1997, he was released from prison and a month later, on 24, November, he filed a petition against Kampala City Council and the Attorney General seeking a declaration that the government had violated his human rights and requested compensation. When the petition came up for hearing, the respondents raised preliminary objections on numerous grounds, however, the only relevant objection was that the petition was time barred. The Court had by now recognized how problematic this provision was, but had not been given the opportunity to directly rule of the constitutionality of the said rule.
Two years later another high profile case would come before the Constitutional Court involving the Mayor of Kampala, Mr. Sebaggala (*Sebaggala v. Attorney General & Others* (1999)470). Sebaggala had been convicted of a criminal offence in the District Court of Massachusetts in the USA. The Solicitor General sent out a letter stating that Sebaggala had in effect vacated his seat of office, because he had been sentenced to a jail term greater than nine months. This contravened the Ugandan Constitution. Sebaggala sought an injunction to stop another election from proceeding and to challenge the constitutionality of declaring the seat vacant in the first place because his conviction was outside of Uganda. Despite the protestations of plaintiff’s council, the court dismissed the petition in its entirety because it fell foul of Rule 4(1) – being filed outside of the 30 day limit.

In the case of *Dr. James Rwanyarare and Anor. v. The Attorney General* (2000)471 the court relaxed its treatment of the time bar rule by declaring that the time within which to lodge a Petition begins to run when the petitioners perceive breach of the Constitution, and not when the alleged breach of the constitution actually took place. This was also the case in *Olum and another v. Attorney-General (2)* (2000)472 in which the court gave more latitude in regard to procedural rules (both in regard to time-barring the suit and in regard to the jurisdiction of the court).

Two years later Dr Rwanyarare would file another petition addressing the constitutionality of the Referendum Act of 2002. This time, however, the court tried to address the procedural obstacles of Rule 4 definitively. It got part way there by declaring that each case must be decided on its own set of peculiar facts. But they weren’t willing to go as far as to say that Rule 4(1) was unconstitutional. First the court recounts the

470 1 EA 295 1999
471 Constitutional Petition No. 5 of 1999
472 1 EA 258
In the infancy days of this Court, we decided in a number of cases that a constitutional petition filed outside the thirty days of limitation was incompetent. We held that the thirty days began to run the date (in case of an Act of Parliament) when it became law and in case of any other “act” from the date it occurred. This was the holding in the cases of Rwanyarare (supra), Sebbagala (supra), Rukundo (supra) and Serugo (supra). Almost all these cases were decided in 1997. However, the Constitutional Court began to realise the problems being caused by the traditional literal interpretation of the thirty days rule especially the hardship it caused in its application to human rights and freedoms cases.

On two separate occasions the Supreme Court expressed its dissatisfaction with Rule 4, but yet have failed to come up with a final solution. However, the Constitutional Court has attempted to “modify and mitigate” the more harmful effects of the law (Olum (1999), Kikugwe (2000), Alenyo v Attorney-General (2001) and Nakachwa (2002)) – allowing the thirty day period to begin from the perceived breach rather than actual breach of the constitution. This has been done to in the words of the Constitutional Court to “make the rule workable and encourage, rather than constrain, the culture of constitutionalism”.

Finally in 2003, in the case of Uganda Association of Women Lawyers and 5 others v. The Attorney General (2003)473 the Constitutional court unanimously declared Legal Notice No. 4 of 1996 to be unconstitutional. Justice Okello ruled that Rule 4 is in conflict with Article 3 (4) a of the Constitution (which sets no time limit), it must therefore be described as null and void. Justice Okello concluded, “It is clearly against the spirit of the Constitution and it is now high time that this Court restored, in full, the citizens right to access to the Constitutional Court by declaring that the rules is in conflict with the Constitution and is therefore null and void.” It is interesting to note how long it took for the Court to get to this point. It is a reflection of the cautious and

473 Constitutional Petition No. 2 of 2003 (CAU)
incremental approach the judiciary has taken in the years since the implementation of the 1995 Constitution.

Public Interest Litigation It is certainly the case that the Rwanyarare and Ssemogerere political cases are examples of Uganda’s nascent public interest litigation movement. A movement that has far outgrown what we see in Tanzania and Malawi. Other examples include the Uganda Law Society petition on the death penalty, the Greenwatch actions; the TEAN actions on smoking and tobacco products. In sub-Saharan Africa the obstacles to simply filing public interest suits in the first instance are immense. They range from practical and organizational problems to lack of funding and resources. Once the petitions have been filed, they have been “beset with technicalities” (Karugaba 2005:4). As noted in Tanzania and Malawi, judges often lack training and awareness of public interest litigation, and demonstrate a certain discomfort with the process. That being said, Uganda has had several public interest litigation success stories and these are in part attributable to the Ugandan Constitution. Uganda’s constitutional provision on locus standi is significantly more expansive than in Malawi and Tanzania. Article 50(1) instead of saying only “an aggrieved person” can bring suit, states “any person” can bring suit to protect the rights of another even when that individual is not suffering the injury complained of. Article 3(4) of the Ugandan Constitution imposes a right and duty on every citizen to defend their Constitution. It is worth citing the Article 50 of the Constitution in its entirety:

Enforcement of Rights and Freedoms by Courts.
50. (1) Any person who claims that a fundamental right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a rights and competent court for redress which may include compensation.
(2) Any person or organisation may bring an action against the violation of another person’s or group’s human rights.
(3) Any person aggrieved by any decision of the court may appeal to the appropriate court.
(4) Parliament shall make laws for the enforcement of the rights and
freedoms under this Chapter.

However, in regard to Article 50 (4), as Phillip Karuguba (2005) notes no rules have yet been made by the government. In two recent cases the government asserted that there was no law in place for the enforcement of rights under Article 50 because there are no rules for the enforcement of those rights. As the High Court states in Jane Frances Anamo v. Attorney General (2002)\textsuperscript{474} “until Parliament makes laws under Article 50(4), Article 50(1) is in abeyance.” Karuguba (2005:7) describes the Anamo decision as a “tragedy in that that Court was in effect suspending the Constitution by declaring it unenforceable on account of absence of procedural rules.” Karuguba goes on to contrast the Anamo case with the cases of Chumcha Marwa (1988) and Daudi Pete (1991) cases from Tanzania (which not coincidental were both decided by the late Justice Mwalusanya), where the judiciary did not shrink away from enforcing human rights before the relevant rules were made. A final procedural issue to consider in the context of public interest litigation is that an action must relate to a fundamental right within the constitution. Thus the case of Pastor Martin Sempa v. Attorney General (2002)\textsuperscript{475} challenging new electricity tariffs was thrown out because it did not directly relate to a fundamental human right.

Despite the more generous constitutional provision on locus standi, the Ugandan courts have thrown out cases on the issue of standing. In Rwanyarare v. Attorney General (1997)\textsuperscript{476} the court decided that they could not accept an action (alleging political rights had been infringed) brought on behalf of an unnamed group of persons (the Uganda Peoples’ Congress). In short the Court could not be sure that all members were knowledgeable about, or in support of the action. However, in the smoking in

\textsuperscript{474} High Court Miscellaneous Application No. 317 of 2002

\textsuperscript{475} Miscellaneous Application No. 71 of 2002 (Unreported)

\textsuperscript{476} Constitutional Petition No. 11 of 1997. (CAU) (Unreported)
public-places Environmental Action Network Limited (TEAN) litigation (*Environmental Action Network Limited v. Attorney General* (2001)\(^{477}\)) the court overruled the Attorney General’s objection and declared that in public interest litigation there was no requirement for *locus standi*. This case would go on to be cited by Justice Mukasa in *Greenwatch v. Attorney-General and another* (2003)\(^{478}\) where the applications brought an application seeking a declaration that plastics violated the rights of Ugandans to a clean and healthy environment and sought various orders to rectify the situation. The High Court held that “any concerned person or organization may bring a public interest action on behalf of groups or individual members of the country even if that group or individual was not aware that his fundamental rights or freedoms were being violated pursuant to article 50 of the Constitution.” *Greenwatch* was an important case for the judiciary and the people of Uganda. It upheld the justiciability of the right to a healthy environment; this clears the way forward for future public interest litigation. However, it will also require a sustained level of courage if these small victories are to be carried further. As the public interest litigation lawyer Phillip Karugaba (2005:31) “We need a bold and courageous Judiciary to take the challenge of public interest litigation and through judicial activism give life and vitality to the Constitution. We need judicial creativity to bring new thinking to old problems and seek new solutions.”

C. Election Disputes and Petitions

“*Everybody knows that there was rigging, but you know the stomach dictates on what the brain decides. These judges are presidential nominees and hence will not help Besigye’s case.*” (Presidential Candidate Aggrey Awori on Besigye’s 2001 Election

---

\(^{477}\) LLR 2 (HCU)

\(^{478}\) 1 EA 87
In 2001 incumbent President Museveni ran against General Kizza Besigye, his former personal Doctor and Ugandan Army General. The election was controversial and allegations of corrupt practices at the ballot box and beyond reverberated around the country. Under Ugandan law the Supreme Court is the court of first instance for Presidential election disputes. Besigye filed in the Supreme Court, but lost. On April 4th, 2001 the Justices gave their decision without reasons. They produced their reasons and written judgments on July 6th, 2001.

The case of Kizza Besigye v. Yoweri Kaguta Museveni (2001) was complex, asking the Justices to address a whole slew of issues. These ranged from procedural problems concerning evidence (including standard of proof), voting without voters cards, chasing polling agents from polling stations, voting more than once, underage voting, intimidation and abduction of Besigye’s supporters, partisan deployment of the military, whether Museveni had falsely and publicly accused Besigye of suffering from AIDS, and finally whether all of this was enough to annul the final election results.

The majority opinion held that:
1: Evidence submitted by the plaintiff was admissible in court
2: The NRM had failed to compile, update and display the National Voters Register and the Voter Rolls for each constituency and this resulted in malpractices such as multiple voting, ballot stuffing, ghost voters and denial to vote.
3: Petitioner proved that electioneering activities were grossly and unlawfully interfered with by the army and some government officials.
4: Petitioner failed to prove that voting outside the prescribed period took place and that the Petitioners’ agents were chased away from polling stations.


There was substantial criticism in the lull between verdict and reasons for verdict. But the 2001 gap turned out to be far shorter than the gap in 2006/2007 – which was closing in on one year.

Supreme Court of Uganda Presidential Petition No. 2/2001 (July 6th 2001)

Besugye consulting lawyers Mark S. McNeil and Mark Messenbaugh were also consultants in the Florida election petition. “Foreign Petition Lawyers Talk” Sunday Vision, April 5th, 2001)
5: With regard to the slanderous accusation of the Petitioner being infected with AIDS. The Justices concluded that Besigye had not proven the allegations were false because he had not submitted evidence to the court proving he was not infected. Further, the respondent proven that he had reasonable grounds to believe that the petitioner suffered from AIDS because of the concept of “community diagnosis” of AIDS based on loss of partner and a child.

6: Petitioner did not prove that respondent was guilty of illegal deployment of a partisan army or that the respondent had engaged in acts of bribery.

7: Finally, the justice determined that while “there was partial non-compliance with the provisions of the electoral law and its principles. However the non-compliance was not proved by the petitioner as to how is had affected the results in a substantial manners since no re-adjustment regarding the number of votes was done in respect to each instance of non-compliance” (KALR 2001:vii).

Justices Odoki, Karokora and Mulenga were in the majority. Justices Tsekooko and Oder dissented and ruled that the electoral malpractices had substantially affected the outcome and that the election should be annulled. Further they ruled that the petitioner had proven that Museveni had committed electoral offences through the deployment of a partisan army who had intimidated voters and through publishing a false statement that the petitioner suffered from AIDS substantially affected the outcome.

Chief Justice Odoki began his opinion by stating that –

The petition symbolized the restoration of democracy, constitutionalism and the rule of law in Uganda. It demonstrated the fundamental democratic values contained in the 1995 constitution, which included the sovereignty of the people, the right of the people to choose their leaders through regular free and fair elections and the peaceful resolution of disputes. . . The outcome of the petition would have far reaching consequences on the peace, stability, unity and development of Uganda” (KALR 2001:1).

Odoki concludes that –

The burden was on the Petitioner to prove that the 1st Respondent did not obtain more than 50% of the valid votes of those entitled to vote. He failed to do so. His attempt to prove by statistical analysis what percentage of votes, the 1st Respondent could have obtained in a free and fair election was academic, theoretical and speculative and lacking in expertise and credibility.
In dissent, Justice Oder was damning of Museveni personal conduct. Oder concluded that the President had been sufficiently made aware of how serious the situation was on the ground when the Chairman of the Electoral Commission wrote, asking that the President respond. President Museveni chose to ignore and not act on the letter and “violence, intimidation, harassment, and threats by the PPU in Rukungiri and Kanungu and by some soldiers of the UPDF elsewhere continued up to polling day.” In other words Justice Oder believed that evidence indicated the President had known about this and that he chose not to act upon it.

Justice Tsekooko, in dissent was unequivocal in his condemnation of government practices:

I have already found that there was no justification for involving the army in the election exercise . . . It may be noted here that the country was not under an emergency nor under a threat of sudden invasion . . . No democratic choice can be made freely when members of the UPDF force the voters how and for whom to vote. That means it is the Army personnel who voted for would be voters.

Justice Tsekooko goes on to highlight one interesting pattern in voting, which he believes provides the required evidence for vote interference and rigging:

There is one remarkable matter, which has not been explained and which I find pertinent to mention. It is evident that in areas of Northern Uganda, and some parts of Eastern Uganda and Central Uganda, where brutality against the representatives or agents and supporters of the Petitioner was minimal or least, the Petitioner got most votes. Yet the opposite is true in areas of Western and most populated areas where there was much brutality, intimidation and harassment. The sound explanation appears to be that brutality affected the election and this indeed in a substantial manner in my opinion.

In regard to the ‘bribing of voters’ Tsekooko focuses on the timing of substantial public works projects right before the election:

What is remarkable is the ostentatious style of signing of the contracts for
tarmacking and or upgrading the roads. It is the fashion it was done, which is correctly interpreted to mean that it is intended to win votes for the first respondent. On the authority of the Tanzanian case of Kabourou the decision to announce work on the roads during the height of campaigning is not in keeping with normal Government operations. . . . It violated the principles of fair play in an election, which is supposed to be conducted under a democracy . . . The government had more than the election time in which to implement its policies. To implement as it was done here amounts to dangling a carrot before the voters. Herein lies the evil.

Upon reviewing the extensive evidence\(^483\) outlined in the individuals judgments of each of the Justices, it is hard for the lay-reader to believe that the Court could conclude that these malpractices did not “substantially affect” the outcome. It is trite to conclude that this was an exhaustive sample that therefore did not represent practices across the country as a whole. If it had been seen as a representative sample (assuming many more infractions took place but was not reported) then the results were substantially affected. It goes without saying that these judges were under the most immense pressure of their lives. It was reported in the Monitor newspaper that according to Professor Nabudere, “there is information that four out of five Supreme Court judges had initially nullified the results of the March 2001 presidential elections, but two of them changed their judgments after receiving coup threats.”\(^484\) Although, with Museveni’s majority of 15%, the argument that the irregularities did not substantially affect the results is a salient one, it is disappointing that the justices did not attempt to propose how narrow a margin would warrant nullification. The justices seemed to be tied-up in arguments about quantifying the effects of the irregularities. The bottom line was the Justices acknowledged the misdeeds, but effectively declared the Museveni camp and the military to have gotten away with it because they obtained a large enough majority.

As in similar Malawi election petitions the Electoral Commission was criticized

---

\(^{483}\) The petitioner filed 174 affidavits and the respondents filed 133 and 88 affidavits respectively. The combined judgments ran to over 1000 pages (Twesiime 2003:86)

(by Tsekooko in particular) for failing to ensure the open and transparent conduct of the elections. In particular, the Commission decided arbitrarily to reduce the period of display of the voter registers from 21 days to 3 days. Thus the Commission was arbitrarily breaking the law, and depriving the voters and officials of an important ‘clean-up’ exercise. There were other important cases that would have significance for the development of electoral law in Uganda – cases that again exposed the flawed conduct of the Electoral Commission. In *Masiko Winifred Komuhangi vs. Babihuga Winnie* (2002)485 the Constitutional Court issued a disappointing decision, setting aside the finding of the High Court, and reinstating the Appellant Komuhangi into her Parliamentary seat – citing no evidence of non-compliance with provisions of the Parliamentary Elections Act. Although irregularities had existed the court claimed that these were not “quantifiable” in terms of votes. According to Edith Kibalama (2005) this decision caused significant public debate and cast doubt on the level of judicial independence in Uganda. In the second, more promising decisions *Amama Mbabazi and Electoral Commission v. Garugba James* (2002)486 in the High Court the Judge ruled that there was non compliance with the Parliamentary Elections Act and that malpractices and offences have affected the results of the election in a substantial manner. The Court of Appeal upheld the decision of the High Court and set aside the appeal. The Court of Appeal ruled that the overwhelming violence, intimidation and sectarian campaigning had qualitatively affected the outcome to the extent that it warranted nullification of the results. Of additional interest in these two cases is that complaints were lodged about President Museveni illegal campaigning for candidates. Justice Egonda Ntende in the Mbabzi case found the President guilty of an electoral

---

485 Election Petition Appeal No. 8 of 2002 (CAU) (Unreported)

offence for campaigning for the candidate of his choice.

The Courts handling of election matters after the 2001 election drew the ire of President Museveni. He came out with some of the most direct attacks against the judiciary, expressing a lack of confidence in respect to election matters (Kibalama 2005:34). Perhaps the most distressing attack was a threat to bring in foreign judges to assess the corruption and incompetence in the judiciary. The Monitor newspaper reported the following comments, alleged to have been made by the President.

These biased state officials, the judges and magistrates are anti-NRM. Some of their decisions are amazing. They excel in showing their unprofessional behaviour during elections. . . They should know that there is some other authority. The judiciary needs to be transformed just like what’s happening to the police following the appointment of Maj. General Katumbwa Wamala . . . A situation where we have DP, UPC judges, and it is known! I would not persecute my own people because of a decision of these judges. We need to fight a new war (against judges).487

Presidential Election Case 2006

“Personally, I can never be involved in bribing judges because it’s not how I work, and for all the years I have led the Movement government, we have never considered bribery as part of our strategy in the struggle to emancipate Uganda” President Museveni, responding to opposition allegations that he bribed judges to rule against rival Kizza Besigye

Kizza Besigye v. Yoweri Museveni and Electoral Commission (2006)488 Only five years after his legal campaign to overturn the election decision of 2001, Colonel Kizza Besigye was back in court seeking to challenge the 2006 election results. Once again the court was split in its decision, although this time seven justices sat on the bench instead of five. The Supreme Court concluded by a 4 to 3 majority that although there were serious irregularities the results had not been “substantially affected” by these


488 Presidential Election Petition No. 1 of 2006 (SCU) [2005] 1 EA 20
irregularities. The judgment was delivered orally on April 10, 2006. However, the judges’ individual written judgments would not be produced until almost one year later on January 31, 2007. I was present at the reading of the judgments and what was particularly interesting was Justice Kanyeihamba’s decision to read excerpts of his decision aloud. Many people at the reading seemed to think that this was an example of Kanyeihamba posturing and making a political statement rather than presenting his legal argument. Justice Oder had died since the oral judgment had been delivered and Justice Tsekooko chose not to refer to his written judgment. This placed Kanyeihamba in stark relief when the majority four justices chose not to read from their written judgments. The next day (February 2nd, 2007) the Daily Monitor newspaper published Kanyeihamba’s judgment in full. On the front page of the newspaper they had photographs of each of the Justices (almost like a series of mug-shots) under each the caption “Election Valid” or “Cancel Election” was printed underneath. This is how Justice Kanyeihamba chose to close his judgment:

There can be no justification for the view that the irregularities, malpractices and illegal acts were few and far in between. Judges have the responsibility to pronounce themselves on a disputed matter guided only by the Constitution and laws of Uganda. In my view, to prove that the results of a Presidential election were affected in a substantial manner, all that a petitioner needs to show is that both the Constitution and the laws of the land were substantially violated. It is also my view that thereafter the court must come out bravely and vigorously protect the Constitution and legitimate laws of Uganda.

It certainly seems very difficult to accurately assess the degree to which the results were affected by these irregularities. Again one of the major issues at stake is the time within which the plaintiffs have to file an election petition complaint. Thirty days is not enough time to collect evidence and affidavits, at the national level, in a country as big as

---

489 Justices in the majority were Odoki, Katureebe, Mulenga and Karokora
Uganda. The total length of the individual judgments combined was 702 pages long, each judge went to significant pains to address all the evidence presented. The justices were in agreement that there was noncompliance with the provisions of the Constitution, the Presidential Elections Act and the Electoral Commission Act – this included disenfranchisement of voters by deleting their names from the voters’ register or denying them the right to vote. In addition there was unanimous agreement that the principle of free and fair elections was compromised by bribery, intimidation and violence in some parts of the country. Yet, on issue No.3, by a majority of four to three, the court found that it was not proved to the satisfaction of the court that failure to comply with the provisions and principles as found on the first and second issues, affected the results of the Presidential election in a substantial manner.

It is hard to tell whether the delay between the oral judgment and the written judgments (or “findings” as Justice Kanyeihamba prefers to use) was a strategic move by the judiciary. The amount of time it would take to wade through the multitude volumes of affidavits and evidence, digest it, then to write substantial and thorough judgments is extensive. In addition, Justice Oder passed away the summer after the election. What is clear, however, is that almost one year later the tension and combustive atmosphere had dissipated. Attendance in the court room on the day of the release of the written judgments was sparse, later reaction suggested that the role of the judiciary (at this stage in the game) was now redundant. That Museveni was now entering the second year of his third term and that despite the unanimity of the justices that series irregularities took place the ultimate outcome would remain the same.

Meanwhile Museveni was continuing to assert his control over Besigye, despite gaining closure over the election results, through the continued custody of 11 suspect rebels of the People’s Redemption Army (PRA). To look at the use of the courts to
control and suppress opposition political party activity we must go back to the fall of 2005; when leader of the opposition Forum for Democratic Change (FDC) Colonel Kizza Besigye was arrested on charges of rape and treason. These charges created massive amounts of stress and negative publicity for the judiciary. But it was the post-election treatment of the “PRA suspects” by the Museveni government that would lead to the most violent attacks on the judiciary since the abduction and murder of the Chief Justice during the Amin era. The climax of this series of events led to both the Uganda Law Society and the entire judiciary going on strike. The attacks on the judiciary stand out as by far the most serious attacks on judicial independence in Commonwealth Africa since the early 1990s. There has been a mixed response within the judiciary some individuals being frightened away (Justice Lugayizi withdrawing from Besigye treason case) and others being moved by a sense of indignation to stand up and declare war on the executive branch. The trials and tribulations of Besigye are also testament to the problems Uganda has faced trying to rationalize and harmonize military law with the 1995 constitution.

Besigye Rape and Treason Cases and the PRA Suspects In the fall of 2005 Colonel Kizza Besigye came out of exile to return to Uganda, declaring his candidature in the 2006 Presidential Election. As a portend of things to come a couple of months before Colonel Besigye returned, the judiciary created a public relations office and named Nakawa High Court Circuit Judge Eriasi Kisawuzi as its publicist (Rubongoya 2007:229). Besigye easily won the candidature of the Forum for Democratic Change (FDC) Party and suddenly a great deal of excitement and a flurry of activity in Kampala seemed to suggest that President Museveni should be worried and that he had a serious

---

490 Besigye had played an important role in the NRA war as Museveni’s personal Doctor.
challenge on his hands. Below I recount the events in chronological order starting with the arrest of Colonel Besigye just weeks after his return from exile.

*Monday 14th November 2007*

Besigye is arrested in Kampala after returning from a campaign rally. He later appears in court and is charged with treason, concealment of treason and rape. Along with 22 others Besigye is alleged to have plotted to overthrow the government by means of the Peoples’ Redemption Army, a rebel organization. The rape charge related to an incident that occurred back in 1997. The charges carry a death sentence; this meant that bail would not normally be granted until after six months (after the election). Because of the high level of animosity surrounding the arrest of Besigye and the PRA suspects the government banned demonstrations, processions, public rallies and assemblies related to the case.491 Furthermore, the Minster of Information told journalists that the government would cancel the licenses of any media house that did not heed the ban.492

*Wednesday 16th November 2007*

Besigye applied for and was granted bail by the High Court but, on the basis of a warrant of commitment on remand issued by the General Court Martial he was not released (Naluwairo 2006 :8). As Judge Edmond Ssempa Lugayizi pronounced that Besigye and his co-accused were to be released on bail 30 paramilitary men from a new Unit of the Joint Anti-Terrorism Team (JATT) dubbed the “Black Mambas Urban Hit Squad”493 arrived at the High Court, surrounded the premises then stormed into the courtroom to rearrest the suspects (IBA 2007 :18). Following this incident Judge Lugayizi withdrew

491 This ban came after the government had violently suppressed demonstrations with tanks and tear gas.


493 This military unit was part of President Museveni’s personal security force.
from the case, citing military interference. Principal Judge Ogoola took over the proceedings.494

International condemnation of the “Black mambas” incident was immediate and several donor countries withdrew budgetary support from the Ugandan government. Criticism within the judiciary would come a little later. At the beginning of December the Pan Africa Parliament (PAP) passed a resolution calling for the immediate and unconditional release of Besigye. The PAP released a statement expressing “great concern” over the current political events in Uganda including the intimidation of the Uganda Judiciary.495 In addition the important regional legal association, the East Africa Law Society blasted the government’s direct interference in judicial matters. The President of the East Africa Law Society was quoted as saying the “application of martial law to matters which are purely within the competence of the laws of general application in Uganda” is very worrying, furthermore the “recent siege of the High Court does not reflect positively on the independence of the judiciary in Uganda.”496

18th November 2005

The PRA suspects were brought before the court martial.497 The day after his first hearing at the Court Martial Dr. Besigye was granted “interim bail” by Judge Ogoola.498 However, the authorities refused to release him pending the Court Martial proceedings. Besigye proceeded to file an application for bail, stating that under the Constitution the High Court has higher authority than the Court Martial (IBA 2007:18). The use of this


495 “Call for release of Uganda’s Besigye” The Daily Monitor, December 5th 2005.

496 “East Africa Society has blasted the governments interference in judicial matters” Arusha Times. December 6th, 2005.

497 Criminal Case No. UPDF /GCM/075/05

498 High Court Criminal Case No. 955/2005
concept of “interim-bail” was seen to be a compromise, although legally it has since been deemed problematic. Ogoola was on the one hand recognizing the prior ruling of Judge Lugayizi, but yet acknowledging that the Constitutional Court had yet to rule on whether the right to bail is a constitutional right. There was a general sense that Judge Ogoola’s decision was politic. As Gloppen, et al. (2006:8) write:

Justice Ogoola draws criticism after he declares having shuttled between Luzira prison and State House to seek a political solution. While not unusual in civil matters, arbitration is unprecedented in criminal procedure and the Principal Judge is seen to run the government’s errand. This is fed by reports that Defence Minister Mbabazi and the Director of Public Prosecutions visited Judge Ogoola in his chambers.

This is interesting when contrasted with the public statements of Judge Ogoola, which have been come of the most frank and damning of the government. This leads one to begin to suspect that those closest to the government, are the ones with the most power and the ones most likely to have enough political capital to criticize, but retain their position within the judiciary. Ogoola, as the head of the High Court had a leadership role to play here. If he hadn’t 1) created a compromise and 2) publicly criticized the government he would have lost respect within the court system. The question is are the two sets of actions contradictory?

The Uganda Law Society, meanwhile, had petitioned the Constitutional Court seeking declarations that the Black Mamba’s siege of the High Court had been unconstitutional, and that on the basis of double jeopardy, the PRA suspects could not be simultaneously tried in the High Court and General Court Martial on weapons charges.

*December 2005*

High Court Judge Remmy Kasule found that there Besigye had raised “serious issues as to whether the military court has powers to try him” and ordered the army to stop the

---

Court Martial proceedings. He did not order Besigye’s release however (IBA 2007:18). General Elly Tumwine, the Chairperson of the Military General Court Martial lashed out for setting aside the Court Martial Terrorism proceedings against Besigye. The General Court Martial, according to General Tumwine, was not subject to the jurisdiction of the High Court. President Museveni largely stayed in the background throughout these events. On December 5th it was reported that when asked about the treason trial of the opposition leader he said: “If Besigye insists his case is political and not criminal, the right place to prove this is in court.” Indirectly, however, Museveni was sending signals to the judiciary. On November 21st the President was quoted as saying, the government will not tolerate the eviction of tenants caused by the rulings of corrupt judges and magistrates. I will suspend any judicial officer and constitute a judicial commission of inquiry into his or her activities if there is evidence of any violation of the Land Act.

In Malawi and Tanzania we have seen how the national (and regional) law societies are becoming more active in terms of speaking out both for and against the judiciary. They play an important role in speaking out where the judiciary is unable to do so without perhaps threatening their independence. The Uganda Law Society wasted no time in expressing their dismay over the “Black Mambas” incident and engaged in a protest strike outside the High Court. They also called on the Attorney-General, Dr. Khiddu Makubuya to resign, declaring him as incompetent and no longer recognizing him as head of the national Bar Association. The Law Society also pursued a legal strategy filing a Constitutional Petition seeking declaration that the invasion of the High

---


501 Legalbrief Africa “Quotes of the Week” December 5th, 2005.

Court premises by the Black Mambas was illegal. The events of November and December 2005 saw the most well-organized and concerted effort on behalf of the legal community to protest the actions of Museveni’s regime. This was something new and became an important part of shaping public opinion towards to judiciary as well. Several observers were quick to draw parallels with Idi Amin Dada’s brutal “removal” of Chief Justice Ben Kiwanuka in the 1970s. This was a continuation of what I label a “narrative of victimization.” With the exception of Principal Judge Ogoola’s “Rape of the temple of justice” speech the judiciary has remained mute. The withdrawal of Judge Lugayizi was a little mysterious. Certain sources cite that the judge gave no reason for his withdrawal, other state it was because of “military interference.”

Meanwhile there were accusations flying, apparently instigated by Winnie Byanyima (Besigye’s wife) and Jack Sabiiti (FDC treasurer), that two judges had been bribed by Museveni to influence the outcome of Besigye’s criminal trial and Constitutional petition. The two judges were Laeticia Mukasa Kikonyogo (Deputy Chief Justice and head of the Constitutional Court) and Remmy Kasule (the High Court judge who had ruled that the GCM should stop until the Constitutional Court ruling). The bribes were alleged to have been in return for rulings that reaffirmed the jurisdiction of the GCM over the High Court and to deny Besigye’s bail application. Museveni responded by saying, “personally I can never be involved in bribing judges because its not how I work, and for all the years I have led the Movement government, we have never considered bribery as part of ou strategy in the struggle to emancipate Uganda.”503 The two judges strenuously denied the accusations and Justice Kikonyogo vowed to remain as Chair of the panel that would hear the Besigye case in January.504

503 Quotes of the Week. Legalbrief Africa. 23rd January 2006.

504 See “Kikonyogo refuses to quit Besigye case”, Sunday Monitor, 1 January 2006; “Police must probe judge bribery claims, says government.” The Daily Monitor, 2 January 2006; “Odoki warns Winnie, Sabiiti over allegations” Sunday Monitor, 8 January 2006. Several months later in August, Jack Sabiiti
These allegations were highly damaging to the judiciary, in particular to Justice Kikonyogo who had undergone a turbulent confirmation procedure into the position of Deputy Chief Justice. The Chief Justice released a statement declaring the beginning of an inquiry, but also noted that the burden of proof lay with the accuser.

January 2006

Both the High Court treason and rape trial and the Constitutional Court trial would resume in January. In the High Court Judge Katutsi (newly appointed) orders the release of Besigye from custody. The Judge ruled that the remand order from the Court Martial has expired and the renewal was void, given that the proceedings had been stopped by the High Court.505

On January 31st, 2006 the Constitutional Court, in a majority of 4-1, ruled that it was unconstitutional to subject the PRA accused to criminal proceedings in two courts based on the same facts. That the trial before the military court contravened Articles 22(1), 28 (1), 120(1, 3b&c), 126 (1) and 210 of the Constitution.506

February 2006

At the beginning of the month Judge Katutsi withdrew from the Besigye treason case (although he remained on the rape case). The Judge announced that he had been subject to unbearable pressure and allegations that he was politically biased.507 Justice Kabagala was assigned to replace Judge Katutsi and the treason trial was postponed until after the

apologized to the two judges stating he had been given information from reliable sources, whom he believed to be correct at the time, but he has since learnt that there was no foundation to the allegations.

505 ‘Besigye Free at Last” The Daily Monitor, 2nd January 2006.
506 Constitutional Petition No. 1 of 2006. (UCA) (Unreported).
presidential elections, which were to be held on 23rd February 2006. By this stage it is clear that significant damage had already been done to the opposition candidate.

March 2006
Perhaps coming too late, Besigye is acquitted of rape on March 6th (Col. Rtd Dr. Besigye vs. Uganda (2006)). Judge Katutsi was damning of the way in which the prosecution had conducted the case, ending his judgment by saying “the best way to describe the way the investigation were conducted and carried out is that it was “crude and amateurish” and betrays the intentions behind this case.” With these words Judge Katutsi removed any lingering doubts, if there were any, that this case was entirely political fabrication, designed to remove Besigye from the electoral competition.

January 2007
After the March rape acquittal the remaining Besigye charges and PRA suspect’s case went quiet. It wasn’t until January of the following year - more than a year after they had been granted bail by Judge Lugayizi, but had remained in detention - that the tensions came back to the public fore. Without Dr. Besigye (who had been removed from the list of the accused) the Court Martial proceedings recommenced on 5, January, 2007. On 11, January, the Constitutional Court repeated its earlier ruling on the illegality of the court Martial proceedings and ordered the release of the PRA accused. When the accused were still not released, the High Court ordered that they be produced before it. The Prison Authorities refused, the High Court then summoned the Commissioner General of Prisons (Byabashaija) to explain his actions. The government continued to

---

508 High Court Criminal Session No. 149 of 2005 (Unreported).

509 Some of the most egregious evidence that was uncovered outside the courtroom was the credibility of the government’s key witnesses. Several had been supported (through provision of houses, business) by the state for the last few years.
appeal the constitutional court decision (IBA 2007:19) reaction in the media, by the public and the international community was swift and unanimous: this was a threat to the rule of law and democracy in Uganda. Both the army and the Prisons Department were continuing to defy judicial authority. An editorial in the Daily Monitor written by David Mpanga (January 22, 2007), opined on the following:

Right-thinking members of society will wonder how the army [. . .] can so flagrantly persist in this regrettable travesty. These arbitrary actions border on impunity. It is imperative that the Chief Justice, his deputy (who heads the Constitutional Court) and the Principal Judge, who together lead the Judiciary, be seen to speak for the integrity of the entire court system [. . .] This case is the tip of a very deadly iceberg. Of what value is a declaration of the Constitutional Court if the military can simply look at it and sneer?

At a fresh application by the state seeking cancellation of the bail granted on 16, November, 2005, High Court Judge Mwangusaya issued fresh orders against the suspects; remanding them in custody until 1, March. This ruling drew a collective gasp of horror from the Ugandan legal community. Former Attorney-General Peter Walubiri was quoted as saying “Has he [the judge] now cancelled the bail that was granted to the accused? In over 20 years in legal practice, I’ve never heard of a judge remanding people in a civil matter. This is a travesty of law – the most absurd.”510 The Uganda Law Society responded with a letter to the President. In that letter they urged the President, the Chief Justice and the Speaker of Parliament to urgently take remedial action to save the country from further deterioration. “ULS has read in disbelief the statements of (Museveni) referring to orders of courts as illegal – thereby directing the elective organs of the government not to comply.” The ULS went on to condemn the “dubious court rulings” with pointed reference to Judge Mwangusya’s remand order on a civil bail application.511 The Besigye camp responded by threatening to take their complaints to

---


511 “President Urged to restore rule of law” The Daily Monitor, 12th February, 2007.
international bodies:

"The impotence of courts and the Judiciary is therefore complete. Their [Judiciary] orders are worthless, if the executive chooses to ignore them as it has done," "this is a matter of fundamental grave concern that goes to the heart of the creation of the Constitution. All the efforts we are making are to restore the potency of court." He said it is astonishing for him, the leader of PRA to continue to enjoy bail but to continue to detain his co-accused.512

The Chief Justice felt the need to protect the judiciary from these attacks, noting that the judiciary “as an arm of the state, is enabled to carry out its duties only if the other arms provide it with the necessary assistance as constitutionally mandated.”513 Meanwhile, several PRA suspects were released under the Amnesty Act of 2000.514 The remaining nine PRA rebel suspects would have their day in court once again on March 1st 2007. Once again the suspects were released on bail. Immediately after the judge ordered their release under the 2005 bail terms, ordering them to reappear on March 6, the police moved in. The troops stormed the court chambers and attempted to enter the Registrar’s office in order to seize the men. Confrontation between the men and the defendant’s lawyers led to a standoff at the High Court. Meanwhile Deputy Chief Justice Kikonyogo held a crisis meeting in her chambers with the most senior judicial officers, Court registrars, Director of Public Prosecutions and senior police and security officers. The members of the Judiciary tried (unsuccessfully) to negotiate a peaceful solutions for the accused’s release (IBA 2007:29). There was a scene of utter chaos at the court as police and dogs were heavily deployed. Perhaps the most shocking image is that of the suspect’s lawyer descending the steps of the High Court bleeding profusely from his head.515

The next day senior members of the Judiciary held a crisis meeting at the High Court, following which the judiciary released a statement in the Daily Monitor newspaper, expressing its anger at the “atrocious and unprecedented event.” It wanted the executive to apologize; to give assurances of the non-repetition of these incidents of affront to the integrity and independence of the judiciary; security personnel responsible for the violence to be cited in contempt and/or prosecuted. In addition it suspended all judicial business for all courts with effect from March 5th. In their 2007 report, the IBA notes that several interviewees informed them that if the Chief Justice had been in the country the strike would not have been possible. This was also reported to me by two different sources. This is an interesting commentary on the strength or hierarchical control within the judiciary.

The government responded with the following statement:

If it is true, however, that the courts have taken industrial action to lay down their tools, then it is unfortunate, unprecedented and legally questionable. Government wishes to note that there are proper channels through which the Judiciary can articulate its grievances. Industrial action is certainly not one of them.

The President continued to insist that the government had not defied court orders. The IBA (2007) reports that several interviewees indicated that the President continued to single out the original 2005 decision of Judge Edmond Lugayizi, felt by many to be a measure designed to damage his reputation and career. It would appear that this was a strategy to make an example out of a single judge in order to warn other judges away from ruling against the government.


516 IBA delegation reports that at this crisis meeting those in attendance considered collective resignation, the boycotting of all government cases including those against the PRA accused and the calling for mass mourning and prayer for the Judiciary.

The Uganda Law Society once again took the lead in condemning the latest affront to judicial independence. On March 12th the lawyers, following the lead of the judiciary went on strike for three days. On March 17th members of the ULS met with President Museveni. At that meeting Museveni began by stating that he has not interfered in the work of the Judiciary or caused changes in the institution. “In the integrity surveys carried out by the Office of the Inspectorate of Government, the Judiciary was singled out as one of the most corrupt institutions in the country . . . In spite of these negative integrity surveys, I have never rushed to cause changes in the Judiciary.” He goes on to state that he always follows the recommendations of the Judicial Service Commission when appointing judges. Museveni then went on to enumerate five major reasons for the current tension between government and the court

- The erroneous ruling by Justice Lugayizi that bail was an automatic constitutional right for even people accused of very serious crimes
- Fear by the state lawyers and security agencies that these suspects would use that bail to escape to Congo and be out of reach of the laws as Kony has done
- Turbulent history of Uganda
- Possible overreaction by government lawyers and security agencies
- Suspicion of partisan tendencies by some of the judicial officers.

Museveni then reiterated the Movement’s commitment to justice and the rule of law from the early days on. He recalled that as ‘Chief Justice’ in the bush, he presided over the trial of two fighters who were sentenced to death for killing two wanainchi. The President also responded to Professor Joe Oloka-Onyango’s New Vision article that argued that whilst the courts can legally interfere with the work of government, the government could not interfere in the work of the court and this included the President questioning certain court rulings. President Museveni pointed out that the separation of power and
the facts that the courts should also be held accountable because the judicial power is derived from the people. The judiciary is accountable to the people through the parliament, which acts as an intermediary.

The treason trial against the PRA suspects resumed in June of 2007, it is ongoing.

D. Significant Rights Cases

There are few significant human rights cases that have been brought before the Constitutional Court. Certainly there have been more human rights and public interest cases filed in the last five to ten years than in the whole of Uganda’s prior history combined. Those cases that have been filed have been pursued by lawyers and NGOs – some quite successfully. However, no cases have yet been filed that invoke the numerous international and regional human rights treaties Uganda has ratified. The judiciary (on the whole) has tended to adopt a conservative and restrained approach to these cases, often through the use of technical and procedural legalities. There are some positive exceptions that I will elucidate below.

Property Rights In Ostraco Ltd v. Attorney General (2002)\footnote{2 EA 654} the presiding judge takes a bold stance against the government. The plaintiff sued the Attorney-General on behalf of the Minister of Information and Broadcasting seeking an order for eviction of the defendant from the suit premises. Plaintiff was the registered proprietors of the suit property, yet the employees of the Ministry were refusing to vacate. The judge declared that Section 15 of the Government Proceedings Act (Chapter 69) prohibiting issuance of an order of injunction and eviction against the government was not in conformity with
the letter and spirit of the Constitution and had to be construed with such modifications, adaptations, qualifications and exceptions as was necessary to bring it in line with the Constitution. This was a bold decision by the court, it represents a positive development with regard to enforcement of fundamental rights and does so through a broad and liberal interpretation of the constitution. It should also not be overlooked that taking on the government in this way took formidable courage.

*Attorney General v. Salvatori Abuki & Anor (1998)* remains one of Uganda’s most important constitutional cases in the post-1995 era. The case was an early test of Uganda’s new 1995 constitution, asking the Justices to rule on the right to a fair trial, the constitutionality of Witchcraft (under the Witchcraft Act) and freedom from cruel and degrading treatment.

The facts of the case are as follows: Salvatori Abuki was charged with and convicted of practicing witchcraft. Punishment was a prison sentence and banishment order from his home. Abuki and his co-petitioner Richard Obuga, sought relief from the Constitutional Court claiming that their trial and conviction were unconstitutional because Sections 2 and 3 of the Witchcraft Act were contrary to Article 28 (12) of the Constitution. Further, they claimed that their banishment orders were unconstitutional because they imposed punishment that was cruel, inhuman and degrading. The Constitutional Court found in their favor. Upon review the Supreme Court reversed the decision of the Constitutional Court by a majority of 6 to 1 (Justice Oder dissenting). Finding that Sections 2 and 3 of the Witchcraft Act were amply defined and as such is not contrary to Article 28 (12) of the Constitution that requires that every accused person must undergo a fair trial therefore their trial and conviction was not unconstitutional. However, the court did find (by a majority of 6 to 1, Chief Justice Wambuzi dissenting) that the imposition of banishment orders constituted cruel and degrading punishment.

---

*Supreme Court Constitutional Appeal No. 1 of 1998*
This order results in the possible effect of making the convict a destitute, without a livelihood, because of his failure to access his home. Thus it is unconstitutional according to Article 24 of the constitution.

Justice Oder made a lucid and compelling argument that charges brought about under the Witchcraft Act are necessarily vague (given that Witchcraft is a supernatural phenomenon), this in turn abrogates the rights to a fair trial - in which an individual has to be charged with a defined offence. Oder makes an interesting point (that clearly identifies him as a “lawmaking” rather than “law interpreting” judge) on the role of the judiciary in supporting the process of making law

[W]here practical difficulties prevent the legislature from framing the statutory provisions in precise terms, the mediating role of the judiciary is of particular importance, and a differential approach should normally be taken by the courts in relation to legislative enactments having legitimate social policy objectives. Legislators are entitled to expect that the courts would, through interpretation based upon experience, flesh out the generality of such provisions so that they do not have to attempt an exhaustive codification of every circumstance that is prohibited

Justice Oder goes on to address the issue of whether or not the 10 year banishment from the home is a cruel and unusual punishment. Oder refers to the Tanzanian case Republic v. Mbushuu and Another (1994) [1994] 2 LRC 335, in which Justice Mwalusanya held that the death penalty was as a whole cruel, inhuman and degrading punishment. Oder notes, that “concepts like cruel, inhuman and degrading are not immutable but subject to evolving standards of decency that mark the progress of a maturing society.”


---

[520] [1994] 2 LRC 335


[522] [2007] Uganda Constitutional Court Constitutional Petitions Nos. 13/05 & 05/06.
divorce law (2003) and challenging the constitutionality of sections of the Penal Code Act related to unequal treatment of women in regards to adultery (2007).

In Uganda Women Lawyers all give justices on Constitutional Court found that the impugned provisions of the Divorce Act were in contravention of the Constitution. Justice Twinomujuni wrote, “It is, in my view, glaringly impossible to reconcile the impugned provisions of the Divorce Act with out modern concepts of equality and non-discrimination between the sexes enshrined in our 1995 Constitution. I have no doubt in my mind that the impugned sections are derogation to Articles 21, 31, and 33 of the Constitution.” In addition, as previously noted this case would hold additional importance because it declared the Rule 4(1) of 1996 (thirty-day time bar on constitutional petitions) to be unconstitutional.

In Law Advocacy for Women, Section 154 of the Penal Code Act treats married men differently from married women in that a married man commits no adultery with an unmarried woman; however it is an offence for a married woman to have sex with any man whether the man is married or not. This was naturally an abridgment of the equal protection clause of the Ugandan constitution. The court found that Section 154 of the Penal Code Act was inconsistent with the stated provisions of the Constitution and that Section was void.

Section 27 of the Succession Act gives no provisions for female intestate in the case of distribution of property. Section 43 provides for the appointment of the testamentary guardian, but only a father can appoint a guardian. The Court found all pertinent sections of the Succession Act to be inconsistent with relevant sections of the constitution, and therefore void.

Death Penalty As in Tanzania and Malawi there has been strong local NGO and international civil rights group interest in abolishing the death penalty. The most recent
test case to come before the Constitutional Court was in 2005. It was filed by a collation of civil society groups called the “Abolition of the Death Penalty in Uganda. The Court ruled that the death penalty was not unconstitutional because it was given by the laws as punishment after due process. However, the Justice found that laws that mandated the death penalty for certain crimes were unconstitutional and should be amended by Parliament. The judgment was an important part of post-1995 human rights jurisprudence in Uganda.

In *Kigula and others v. Attorney-General* (2005) petitioners on death row (convicted of various offences) all of whom had been sentenced to death, petitioned the Constitutional court seeking declarations that the imposition of the death sentences was unconstitutional and inconsistent with articles 24 and 44 of the Constitution of Uganda, which prohibited cruel, inhuman or degrading punishment or treatment. In the alternative, the petitioners sought declarations that the mandatory application of the death penalty was unconstitutional, and further in the alternative that the long delay between sentence and death is itself cruel and unusual punishment. Finally, the petitioners asked the court to rule on the method of execution, which in Uganda is still death by hanging. The Attorney-General’s defense rested on the continued strong popular support for the death penalty in Uganda.

The Court unanimously found that the death penalty is protected by the Constitution, and does not fall under ‘right to life’ provisions and the method of death by hanging is also found to be constitutional. However, in a majority of three (Justices Okello, Twinomujuni and Byamugisha) to two (Mpagi-Bahigeine) the court found that 1)

---


524 [2005] 1 EA 132
mandatory death sentences and the prohibition of the right of appeal against the mandatory sentence are unconstitution as they curtail the right to a fair hearing and violate the principle of separation of powers; 2) lengthy periods between conviction and execution renders the death sentence as exceedingly cruel and as degrading treatment. Finally, 3) in the interpretation of the Constitution of Uganda the views of the people, wherever they can be reasonably accurately ascertained, must be taken into account. As Twinomujuni opined:

[U]nlike South Africa where people’s opinion may not be a relevant consideration in constitutional interpretation, in Uganda, the people’s views are very relevant because of article 126 of our Constitution. . . as long as the people of Uganda still think that it is the only suitable treatment or punishment to carry out a death sentence, their values, norms and aspirations must be respected by the Courts.

Article 126(1) of the Constitution states that “Judicial power is derived from the people and shall be exercised by the Courts established under this Constitution in the name of the people and in conformity with the law and with the values, norms and aspirations of the People.” Twinomujuni goes on to argue that because neither Tanzania and South Africa have these provisions in their constitution, their authorities on the death penalty (note Mbushu in Tanzania) are not very helpful in Uganda. It is interesting to consider Twinomujuni’s emphasis on this point within the context of the Ssemogerere decision one year earlier. President Museveni chose to critique the decision using a populist style rhetoric, accusing the judges of usurping the power from the people and acting in their own self-interest, not in the interests of the people.

*Freedom of Association* In *Lymoki and others v. Attorney General* (2005) the petitioners sought declarations that various statutes such as – setting minimum number of persons required to form an employees association (1000 for a trade union); ordaining the National Organisation of Trade Unions as the only principal organization

525 [2005] 2 EA 127
of employees and provides for compulsory affiliation of all unions – are all derogations of the constitutional right to freedom of association. In their decisions the judges found that a provision of the Trade Union Act that prevents 29 of less employees from forming an association is null and void under the constitution. The other limitations, however, were seen to be an important part of regulating the trade union movement – ensuring harmony between employees and employers. The right and freedom to associate is not absolute, it is derogable, as is the right to collective bargaining and representation. As Twinomujuni writes,

The Trade Unions Act, 1976, was enacted long before the promulgation of the 1995 Constitution. A number of its provisions are not in conformity with it. . . The effect of this judgment is not to condemn The Trade Unions Act or NOTU out of existence. Only those parts which have been declared to be inconsistent with and in contravention of the Constitution are affected.

*Freedom of Expression* More than both Malawi and Tanzania, the Ugandan media has suffered from a climate of oppression created by the government. The regime has intimidated journalists, charged them through the courts with crimes of sedition, treason and defamation. Naturally this has led much of the media to self-censor. However, based on my unstructured comparison of the three presses, Ugandan media is by far the most vocal and critical. It is also quite well developed and organized (certainly more so than in Malawi). The major opposition paper *The Monitor* is funded by the Aga Khan group. The major pro-government newspaper, *The New Vision* is owned and funded by the regime. The papers are quite vocal in playing a watchdog role with regards to rights abuses and have increasingly played a watchdog role with regards to the Ugandan judiciary. Although at times the ‘gossipy’ nature of their coverage, particularly with regards to internal disputes and conflicts within the judiciary was particularly harmful.

In comparison with Malawi and Tanzania there appear to be many more defamation cases filed and the government has been very aggressive in pursuing the top
tier editors of major national newspapers. *The Daily Monitor* opposition newspaper has repeatedly clashed with the government. In October 2007 the government filed sedition charges against three Monitor journalists in relation to a report alleging soldiers were secretly trained as policemen in order to have the police force placed under military control. The International Federation of Journalists (IFJ) released a press statement condemning the actions of the Ugandan government as baseless. That the story was a ‘balanced and professional’ piece of work.’ This case is ongoing as of early 2008. There has developed a trend for the courts to give large payouts to plaintiffs in defamation cases. Ibrahim Sscmuju, political editor of Uganda’s Observer Weekly said endless court cases were the biggest threat to media freedom, adding that they had thrown the media into financial crises, limiting freedom of speech.  

Before examining the major freedom of expression cases it is worth taking note of *In re Alcon International Ltd (Ex Parte)* (1998) in which Alcon, engaged in a bitter contract dispute requested that the press be dismissed from the court on the grounds that if members of the press are allowed to stay in the courtroom for the duration of the case, they will subsequently file erroneous, negative, and adverse reports against ALCON. Justice Ogoola was unequivocal in his response:

> [T]he press as the informal fourth estate of Government has a protected right and a sacred duty in our constitutional scheme to fulfill its function of informing the public . . . Second, the courtroom in our judicial set-up is an open forum, accessible by every member of the public whether scribe or Pharisee, where friend or foe. We are not kangaroo courts. We have nothing to hide. We are totally transparent.

Justice Ogoola went on to note the importance of both sides airing their “dirty linen” in public – that such secrets should be exposed openly to the people of the Republic of Uganda.

---


527 [1998] V KALR 39
One of the first cases to be filed in response to government arrests over alleged publication of false news (contrary to section 50 of the Penal Code\textsuperscript{528}) is \textit{Charles Onyango Obbo & Anor v. Attorney General (1997)}.\textsuperscript{529} The second plaintiff was the well-known journalist and (now former) political editor of the Monitor Andrew Mwenda. The background to the case is that the Monitor published a story (based on a report from a foreign publication) entitled “Kabila paid Uganda in Gold.” The petitioners were arrested and criminally prosecuted. This case was filed based on the petitioners argument that the constitutional guarantee to freedom of expression (Article 29(1)(a) and (e)) had been infringed and these rights were not, as the Attorney General claimed, subject to qualifications and restrictions. The Constitutional Court found by a majority of four to one, that Section 50 of the Penal Code is not inconsistent with Article 29(1)(a) of the constitution. Also of interest, in relation to this case is the prior ruling by the Constitutional Court (Constitutional Petition No. 15 of 1997) on December 15\textsuperscript{th}, 1997 that they could not hear the constitutional case until the criminal proceedings had been resolved: “Where criminal proceedings are pending in another court and a petition is brought to the Constitutional Court in respect of the same matter, the petition should be stayed pending the determination of the criminal matter in the trial court.” The petitioners were acquitted of the criminal charges and thus their civil petition was heard in the Constitutional Court.

In the year 2000 the Supreme Court of Uganda heard Charles Onyango Obbo and Andrew Mwenda’s appeal (\textit{Charles Onyango Obbo and Andrew Mujuni Mwenda v}

\textsuperscript{528} 50(1) Any person who publishes any false statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace is guilty of a misdemeanour.

(2) It shall be a defence to a charge under sub-section (1) if the accused proves that prior to publication, he took such measures to verify the accuracy of the statement, rumour and or report as to lead him to believe that it was true.

\textsuperscript{529} [1997] V KALR 25
The issue on appeal was whether Section 50 of the Penal Code was inconsistent with freedom of expression (which includes freedom of press and media).

Each Supreme Court Justice wrote extensive individual opinions (despite the unanimous verdict). Justice Mulenga addressed the origins of Section 50 of the Penal Code (which had its origins in the colonial era).

I think it is reasonable to infer from the wording of Section 50, that at the time, when political agitation for self-governance was in early stages, the colonial legislature in Uganda would have wanted to provide a legal safeguard against the spreading of news, rumours or reports that could destabilise the populace, with probable effect of undermining the authority of the colonial regime. As for the retention of that law subsequent to the colonial administration, the probable reason is that the process of law reform has not been vigorous or extensive enough to review the relevance of laws, such as section 50, in the changed circumstances since their enactment. In the circumstances, one cannot with certainty, point to the purpose for which section 50 is retained in the Penal Code today.

Justice Mulenga chose to grant the declaration that section 50 of the Penal Code Act was inconsistent with Article 29(1) (a) of the Constitution and is consequently void. Further, the Supreme Court found that the Constitutional Court was in error to suspend the hearing of the constitutional petition pending the conclusion of the criminal prosecution. The Court should have heard the petition first and suspended the hearing of the criminal case, because a Constitutional case takes precedence over other cases.

In his written judgment, Justice Oder addressed the issue of subjectivity as it applies to a test of what is “acceptable and demonstrably justifiable in free and democratic society.” After criticizing the Constitutional Court for being more concerned with justification of the limitation with s. 50 imposes on the freedom of expression and

---

530 Supreme court of Uganda Constitutional Appeal No. 2 of 2002 (unreported)

531 Ironically, as Justice Tsekooko notes, the British Colonial Authority must have introduced the law in Uganda at the time when the offence had ceased to exist in England where it originated.
freedom of the press than on protection of those freedoms, Oder J. argues

I am unable to accept [his] argument that the test of what is acceptable and demonstrably justifiable in free and democratic society must be a subjective one. To my mind the test must conform with what is universally accepted to be a democratic society. There can be no varying classes of democratic societies.

Finally, Justice Kanyeihamba sets the context for this decision and emphasizes the supremacy of the Ugandan constitution.

In both our recent decision[s] [. . .] we have made emphatic pronouncements that the Uganda Constitution is the supreme law of the land. We have also made a clear distinction between constitutional provisions and those of ordinary laws. No laws, rules or regulations, let alone decisions of any authority, which are in conflict with the provisions of our Constitution can stand in opposition to those constitutional provisions. The Uganda Constitution is to be interpreted both contextually and purposefully. It is an ambulatory living instrument designed for good governance, liberties, welfare and protection of all persons in Uganda.

The pronouncements by each of the Supreme Court Justice are strong. Each stating that it is impossible to nurture a new democracy if the freedom of press and media is restricted. It is noteworthy that this decision lies in sharp contrast to that of the Constitutional Court, who took a weak position that seemed to focus more on the “limitations” aspect than on the freedom itself (Justice Twinomujuni was the lone dissent).

III - Analysis and Conclusions

The struggle to establish judicial power in Uganda since 1995 has been a battle to enforce the separation of powers and to protect the supremacy of the constitution over both the legislature and executive branches. For as Chief Justice Odoki (2005:354) reminds us: “Each organ must avoid intimidation or undue influence in the performance of the
others [. . .] Unless such a tendency is avoided, it may create a dictatorship of one organ against the rest and the entire country.”

The judiciary was cautious at first in establishing its new institutional identity. In Uganda more so than in Malawi and Tanzania there was a sense that this really was a new start and a new institution. Firstly, many more of the Ugandan judges had gone into exile during the 1970s and 1980s. They returned from exile to enter the judiciary beginning in the early 1990s and onwards. Secondly, the structure of the Ugandan judiciary was reformulated the new Court of Appeal would now become the court of first instance for all constitutional cases. Those constitutional cases would be appealed to the Supreme Court of Appeal which would become court of first instance for Presidential election petitions and appellate court for all constitutional cases. The establishment of a full-time constitutional court has had an important impact on the emergence of judicial power in Uganda. On a practical level cases are heard and disposed of far more expeditiously than in Malawi or Tanzania. The permanent court aids in the establishment of a strong and distinct institutional identity and in the emergence of a distinct jurisprudence. Moreover this has allowed for a more frequent and substantive dialogue to be established between the constitutional court and the Supreme Court of Appeal. This again aids in the institutionalization of the Ugandan judiciary. Frequently the Supreme Court seizes the opportunity to educate the lower courts in their written judgment. For example, Chandia v. Uganda (2002) the Supreme Court examined the use of confession statements in criminal trials. In an obiter dictum the Supreme Court cautioned the trial courts to be more cautious in the admittance of this evidence. On the more challenging issues and decisions the Constitutional court has looked to the Supreme Court for backing. For example, on the issue of constitutional supremacy (and judicial power) over parliamentary sovereignty, Constitutional Court judges have

532 [2002] 2 EA 360
frequently looked to Supreme Court decisions, particularly those of Justice Kanyeihamba
for guidance and for affirmation. Both courts have mixed records of decision-making,
but of the two the Supreme Court appears to have been more assertive. In the first
Referendum case the Supreme Court sent the case back to the Constitutional Court
insisting that they did have jurisdiction and the matter should proceed.

The case of David Tinyefuza was the first politically significant case to come
before the Supreme Court; indeed one Constitutional Court judge told me that this case
remains the most important case in the courts history and the case that she is most
proud of.533 This case presented a way for the Constitutional Court to justify their
establishment, to justify the vast amounts of donor money and aid that had placed in the
judiciary and to test out their newly mandated powers. When they wrote their decision
the Constitutional Court would know that it would be appealed and they knew that there
was a strong likelihood that their ruling would be overturned. This case was the first test
of whether or not the military, and by extension the executive branch, still had the power
to abrogate the bill of rights without consequences. There could not have been a more
sensitive or fundamental issue, given Uganda’s history of military and executive
disregard for the constitution. This case sent an important signal to those operating
outside of the NRM regime: that the courts are receptive to you and that your rights can
be protected.

The Ssemogerere referendum cases represent the pinnacle of judicial power in
Uganda and the emergence of real judicial independence in a time of constitutional and
political crisis. I characterize these decisions as the pinnacle of judicial power because
the implications of the decisions substantially threatened Museveni and the NRM regime
– particularly Ssemogerere 3. These cases became a test of the separation of powers.
Ssemogerere 2 the Constitutional Court backed down from its previously assertive

position by ruling that the government did not have to abide by constitutionally mandated procedures in amending the constitution. In *Ssemogerere 3* the Supreme Court gave its most aggressive anti-government decision to date and the reaction from the government was the fiercest to date. What made the government reaction different this time was the bold mobilization and manipulation of the people. This is where a one-party state can be effective in mobilizing people and turn a legal-political argument into a populist cause – in this case the conduct of the judiciary. While it is clear that the judiciary was willing to go against the NRM where necessary, would they be willing to go against public opinion?

What can we learn from the referendum cases episode? Overall the Referendum cases filed by Ssemogerere simply demonstrate the lopsided nature of Ugandan politics: the legislature and the executive and the military versus the judiciary. When the legislature tries to assert parliamentary sovereignty to defend cover up their malpractices they are doing so as the mouthpiece of President Museveni. However, the Ssemogerere cases also served an important democratic function. As Bussey (2005:16) notes the Ugandan limitation clause (Article 43) is similar to section 36 of the South Africa Bill of Rights and section 1 of the Canadian Charter in that it allows the government to justify infringements on rights as long as those limitations are reasonable within a free and democratic society. Pushing the legislature to justify limitations on those freedoms (in this case freedom of information) is an important and transparent mechanism by which the democratic process is furthered. As one Ugandan observer put it:

> Government does not have to lose cases for the judiciary to show that it is independent. Independence of the judiciary is, and indeed should be made of sterner stuff. This petition seems to be asking the judiciary to shine a torch into the internal workings of the legislature. The Supreme Court has obliged, one could say.\(^{534}\)

It still remains to be seen whether the limitation clause will push democratic dialogue or

become a tool for further repression in the future. Bussey argues that at a minimum the article forces the government to give reasons for its limitation of rights. The recent debate and cases concerning the right to bail indicate it is being used as a tool of suppression. In short, can we trust the government to properly define “democratic society?” In sum the evidence suggests that the Ugandan legislature simply accepts decisions that it can live with and ignores those it can’t. The inklings of dialogue between the legislature and courts have not advanced or matured, in part because the 7th Parliament is seen as the weakest to date.

The Ssemogerere cases also highlighted the importance of feedback mechanisms – the decisions themselves send signals to potential litigants that the court is receptive to their cases and complaints. Moreover the courts are sending important signals to the government. The judiciary went far, particularly certain individuals such as Justice Twinomujuni in criticizing and attempting to censor government behavior. However they often moderated the criticism with weak enforcement prescriptions – in other words they had ways to soften their judgments. They seem to be saying to the government that we are watching you and we know what you are doing is wrong, but we are not prepared to take the final steps necessary to remove the NRM from power. In other words the judiciary has always stopped short of the one final step – indirectly jeopardizing or directly attempting to remove the NRM regime from power. Here it is interesting to consider in comparison to the Malawi Supreme Court ruling in the Presidential Referral – in that case the court did directly jeopardize the ability of the government to stay in power. I submit that how far the courts are willing to go in jeopardizing the government’s position in power is dependent on history. Whereas Malawi has not suffered significant periods of violence and war Uganda has. This forces the judges to err on the side of caution when it comes to possible regime change. There has never been a change of regime in Uganda through peaceful means. This has to
profoundly affect the psyche of the Ugandan judiciary.

The historical path taken by Uganda has placed the military at the center of politics. In regards to the military versus the judiciary two significant cases have come before the courts. The first was obviously General David Tinyefuza in 1997 and the second was General Tumukunde in 2005. In both cases the military maintained its ability to censor their own members even if that included violation of their rights. The military proved itself to be wholly subservient to the Museveni regime through issuing Court Martial charges to opposition candidate Dr. General Kizza Besigye and then interfering with the bail process later in court.

The use of the courts by Museveni to control and defeat the opposition is an example of the dependency syndrome of the courts. As I demonstrated in Chapter 4, the rule of law can and has been used for anti-democratic means. Cases can be filed that seek to restrict the rights of individuals; even when the charges are fabricated it will distract or remove the defendant from the system. Museveni plays the system to meet his own ends, when it looks as though the system is not complying (i.e. by releasing the suspect on bail) then Museveni always has the backup power of the military. However, as I have argued throughout this dissertation the courts are political actors in their own right seeking to maximize and protect their own power. Therefore the judiciary was not totally compliant and did exhibit important signs of independence. The Court threw out the rape charges, rejected the superior jurisdiction of the military Court Martial and ultimately released the suspects on bail again. When, for the second time, the NRM regime refused to comply and sent in a military unit to recapture the prisoners the judiciary took the unprecedented step of going on strike. Importantly the courts ensured that the multiparty Presidential election took place; it is fair to say that without the courts Museveni would have run unchallenged with little serious competition from the UPC and DP.
The Court has faced a series of strategic decisions in balancing the protection of the democratic constitutional order, particularly the bill of rights on the one hand, without antagonizing the government and inviting possible retribution. It is clear that they do rely on significant tacit support from the international community. Outrage from the international community (including some withdrawal of budget support from the U.K. and other EU donors) following the 2005 siege of the court was seen as a direct protest against Museveni's militarization of the state and the breakdown of the rule of law. The international community is not significant in directly protecting the judiciary but instead they help draw a line which, if the Museveni chooses to cross will threaten their budget support. Dean McHenry (2006) suggests that the strong external (donor) and internal (civil society/law society) support allowed the judiciary to challenge the government through the election period. Moreover, McHenry points out that the challenges were ultimately not that serious for Museveni who recaptured the Presidency and sustained his majority in the Parliament.

The Ugandan judiciary supports Ton Ginsburg's (2003) argument that the courts must choose their battles carefully. For if the courts limit their battles to those they can win their future threat capacity is made more credible. If we examine the 2006 Presidential Petition, the Supreme Court was unanimous in its declaration that the results of the election had been manipulated through various forms of interference. However, although the Court willingly accepted the bomb it stopped itself from pulling the detonator. If the Court had declared the results had substantially affected the outcome it remains highly doubtful whether Museveni would have followed though with another election. However, many critics of the judiciary would argue that the reasoning in the Presidential Petition decision did undermine the credibility of the judiciary because while admitting there were serious flaws in the campaigning they found very elaborate ways to decide that those flaws didn't substantially threaten the result.
It is clear that the courts have provided an arena for debate and discussion on important political issues and disputes, rights protections and on matters of substantial public interest. The relative success of the public interest law movement in Uganda is testament to the vibrancy, organizational superiority and economic viability of key strategic sectors within civil society. But it is also testament to the quality and institutional strength of the Ugandan bench. Better trained, many left the country and went into exile and have only recently returned. This gives judges a cosmopolitan global legal outlook. This is not to suggest that spending time either for educational or vocational purposes abroad is a necessary requisite of assertive and progressive decision-making, but certainly it creates an intellectually diverse and perhaps more modern bench.

In the beginning the court proceeded with caution. This is a function of the court itself, but it took a while for the constitutionally significant cases to come to the court. As the court decides those early cases they are sending signals out to members of the private sector and to the government. Early cases (1996-2000) sent out mixed signals regarding the receptivity of the courts to rights violations (particularly those committed by the government). However, as Gloppen, Kasimbazi, et al (2006:14) note:

Over time more assertive interpretations of the liberal rights in the constitution have been forthcoming. This has in turn given the political opposition more hope and faith in the judiciary as an arena for contesting the government, and with a growing number of cases, this has thrown the courts into the thick of political struggles.

Back in 1996 one observer opined on the weakness of the Ugandan judiciary:

. . . The courts of law and its personnel have lacked a revolutionary spirit in the leadership to effect radical changes that are deemed necessary. Meanwhile the President of Uganda, the Law Society, judges, members of parliament, the business community and the public generally have continued to express misgivings about Uganda's seriousness in wishing to establish a vigorous judiciary which is independent and competent enough to do justice to all manner of persons without fear or favor.535

Twelve years later there are certain individuals that have emerged as radical leadership within the Ugandan judiciary. Some have chosen to exercise this leadership on the bench (Justice Twinomujuni) others have exercised their leadership both on and off the bench (Justices Kanyeihamba and Ogoola). However, despite these bright spots a critical mass of judges has not yet been reached. Indeed it is unclear whether that critical mass will ever be reached. As Lisa Hilbink found in Chile, even when liberal assertive judges came to the bench they were constrained by the more conservative majority. Most Ugandan judges continue with an approach characterized more by self-serving timidity and a concern for personal survival than by a selfless concern for the institutional well-being of the judiciary as a whole. Given the difficult socioeconomic conditions of Uganda this is entirely understandable.

Twelve years later the Ugandan judiciary has endured some of the worst attacks in history ranging from direct interferences with the discharging of judicial duties to the public disparagement and criticism of individual judges and an outright defiance of court orders. When the International Bar Association visited Uganda on an emergency mission the delegation found that in its meetings and interviews there was a tendency to judge the government’s actions leniently by comparing them with previous dictatorships that have rule the country (IBA 2007:8). Uganda has come a long way and it can be argued that of three branches of government it is the judiciary that has come the furthest. Indeed as Oloka-Onyango (1993:36) reminds us: “No other post-colonial government has had as important an impact on the phenomenon of judicial power and constitutionalism, as has Yoweri Museveni’s . . . NRA/M.”
Chapter 9

Conclusions and Implications
Is it reasonable to expect an institution that has spent 90 percent of its existence under non-democratic rule to rapidly transform itself into a pro-liberal-democracy, pro-rights fighting institution? This question is even more salient where, in the case of sub-Saharan Africa, to be pro-liberal democratic rights is almost certainly to be anti-regime? The assumption of democratization scholars and policymakers alike has been that the courts should and indeed can transform themselves as institutions in the same way that the legislature and executive are transformed through the introduction of multipartyism. In addition, scholars of comparative judicial politics such as Bill Chavez (2004), Helmke (2005) and Ramseyer (1994) have found that a competitive democracy is a necessary requisite for strong judicial power.

This study rejected these assumptions and demonstrated that a longitudinal view of the courts, across three diminished sub-types of democracy, reveals a more nuanced and complex picture of the construction of judicial power over time. Regime behavior shapes the institutional development of the judiciary, but as this study revealed, judicial institutions are also shaped from within and these internal dynamics have developed over the course of time. In other words, we should look beyond the external dependence and interference and examine the viability and legitimacy of the judiciary as an institution. Combining an analysis of the institutional viability and legitimacy with a close examination of the political environment allows us to build a more complete theory of judicial power in emerging democracies.

This dissertation has shown that the courts are one piece of a larger puzzle, and even the most determined pro-rights judge will be stymied by an anti-rights executive. On the other hand this study has demonstrated the powerful pro-democracy role the judiciary can and has played even in exceedingly testing circumstances. I therefore believe that comparative politics scholars must take the study of courts seriously as they do other political phenomena, such as the development of political parties and civil
society.

Shortly after the transition to democracy it became clear that the commitment of political elites to creating a substantive and viable liberal democracy was tenuous at best. Within this context, it is therefore not surprising that in all three countries groups and individuals have sought the assistance of courts in giving meaning and substance to the new bills of rights, and to acting as a bulwark against ‘creeping authoritarianism.’ The success of these cases and the reactions of the governments have been investigated in-depth across the three cases of Malawi, Uganda and Tanzania and important and significant differences have been uncovered.

I – Emerging Judicial Power in Transitional Democracies

This dissertation sought to answer two questions: 1) Is competitive multiparty democracy a necessary condition for judicial independence? 2) Do judges adjust their decision-making according to the perceived threat level of current and future political environments? These questions were generated from the existing public law literature on the relationship between regime and judicial power, and from the observation of a surprising paradox: In Malawi and Uganda the judiciary exhibited higher levels of judicial assertiveness and independence than their more politically stable neighbor Tanzania.

In order to understand the seeming paradox of the presence of sporadically strong judicial power in weak and volatile democracies we must unpack our assumptions about democracy and move beyond theories of the electoral marketplace. This diagram summarizes the findings of this dissertation and presents one possible solution to the apparent paradox.
External Autonomy = Political environment. (Level of external control, influence and interference in judiciary (formal and informal)).

Internal Institutional Autonomy = Degree to which judges within institution are able to give positive meaning to independence. (Levels of durability, differentiation from political environment and perceptions/legitimacy).

As this diagram demonstrates, even when levels of external autonomy are low, judicial power can emerge within the space created by a strong and established institutional viability. In other words, despite the periodic high-level threat environment in Uganda,

536 These two dimensions are not mutually exclusive and do interact and influence one another. They have been separated for the sake of theoretical clarity. The center point, marked by a dotted line indicates the point at which zero internal institutional autonomy and zero external autonomy exist. The further away from the center the greater the levels of autonomy.
strong internal institutional autonomy has created space in which the judiciary has demonstrated assertiveness (vis-à-vis the government) and has developed a strong pro-liberal rights, pro-public-interest litigation progressive agenda. It should also be noted that even in Uganda the level of external autonomy is not too far to the left – although governments are clearly not constrained from interfering in the judiciary by the electoral market they are constrained by international donors.

In Malawi there is a slight improvement in level of external autonomy, however, there is also a decrease in internal institutional autonomy. This leaves a diminished zone for the construction of judicial power. Finally, as explained in Chapter 7, although Tanzania faces an improved level of external autonomy it also experiences the lowest level of internal institutional autonomy. This is substantially related to Tanzania’s

Analysis of judicial decision-making in Chapters 6, 7 and 8 confirm a strong relationship between the size of the zone available and the judicial output. A greater number of assertive decisions are found in the country with the largest zone for the construction of judicial power: Uganda. Below I shall examine the explanations for these differences within the context of existing theories.

A. Has the judiciary functioned as an insurance mechanism?

The answer to this question is yes and no. Here it is important to examine the differences between the colonial, authoritarian and multiparty eras. I will review the answer to this question in relation to each period below. In short, I find that the judiciary functioned as a more reliable insurance mechanism during the colonial and authoritarian era than it has done in the multiparty era. Generally this is true across all three cases; however there are important and distinct differences that I will highlight.

When entering the High Court buildings of Commonwealth Africa in 2007 one is confronted with the incongruity of the imposition of the colonial ‘other’ onto an African
context. The omnipresent colonial cases and statutes on the shelves of the court library and within the judgments; the imported attire of gowns and wigs on the judges and lawyers; and even the colonial buildings themselves are still intact and in use. The raison d’être of the colonial judiciary was to act as a guarantor against the possibility of instability, to protect property and to support the everyday governance of the imperial territories. This rationale is very much the same as the rhetoric we hear today from the international donor community. It is a very limited definition of judicial power – as enforcer of rules, rules intended to prop up the regime, rather than protector of rights. To this end the judiciary acted as an insurance policy for the colonial government. They enforced the economic deals made between the colonial administration and native populations, and more importantly they maintained law and order.

The construction and subsequent manipulation of customary law would act as an important precursor to the authoritarian era. In Malawi in particular, President Banda was quick to manipulate aspects of the traditional to meet his own undemocratic ends. While the colonial experiences of three countries with regards to the judiciary and its role and function were quite similar; important differences emerged during the authoritarian era with regards to the strategic use of the courts. The autocratic leaders of Uganda, Tanzania and Malawi spearheaded, what Kwasi Prempeh (2007) refers to as an “assault on constitutionalism.” First, it is notable that the three regimes did not scrap the higher judiciaries in their entirety. Indeed in the early years there were even a few bright moments of judicial independence.

In Chapter 4 I tackled the question posed by Neil Tate (1993): Why would the post-colonial authoritarian regimes allow a partially independent judiciary? While formally leaving the judicial institutions more or less intact, the three authoritarian regimes perfected the use of informal and indirect attacks on judiciary. A close examination of the rhetoric of the three Presidents reveals sustained attacks on the
integrity and independence of the judiciary over time. This technique of informal pressure continues to be used today in varying degrees across the three countries.

One of the ways in which Nyerere and Banda established and maintained popular support was through the use of populist, nationalist rhetoric. As agitators for independence they were seen as political heroes and father figures of the nation. This put the courts in an impossible position because any anti-regime decision was immediately tossed back in their faces as “anti-nation” or “anti-development” in the case of Tanzania, or “anti-tradition” in the case of Malawi. In Chapter 4 I outline the use of this technique of judicial control. In the case of Tanzania, control extended beyond mere populist rhetoric to include the incorporation of the judiciary into Nyerere’s ambitious ideological agenda.

As I document in Chapter 4 Malawi, Tanzania and Uganda affirm, in large part, Neil Tate’s (1993) thesis on courts under crisis regimes. None of the three regimes scrapped the judiciary but they did employ different methods of control. In Malawi President Banda ensured that there were no major setbacks from the judiciary by establishing a parallel system of traditional courts in 1969. This refers to what Tate terms “restricting the scope and depth of decision-making.” The Malawian traditional courts usurped all significant power from the conventional judicial institutions – trying and convicting individuals on charges of treason, sedition and murder without representation. The traditional tribunals represented the complete emasculation of the legal system, from that point on it was subsumed under Banda’s personal political rule. In the case of Malawi therefore it was more a case by-passing the courts rather than attacking or eroding their power. The conventional judicial system was only useful to Banda to the degree in which it provided external and internal legitimacy and validity. This only required the shell of judicial institutions, all power could be scooped out and place in the hands of traditional courts. Naturally traditional courts were easy to control
and were packed with pro-MCP individuals.

The traditional tribunals in Malawi were established early on, whereas in Tanzania the use of parallel jurisdictions came a little later with the establishment of the special Economic Crimes Court. In fact under Nyerere the judicial structure and power remained largely intact, but the individuals that made-up the institution were under significant ideological pressure to support *u*jamaa even when this meant restricting and violating rights. Thus for a long time Nyerere tried a more indirect strategy to control the courts. At times the CCM infrastructure would meddle in the independence of the court; some of those instances have been documented. However, Nyerere frequently appeared to fix the situation when he was made aware of it.

In the case of Uganda, the tendency to by-pass the courts appears to have become a habit that is hard to break. The major difference between Uganda on the one hand and Malawi and Tanzania on the other is the high level of militarism. The most powerful parallel judicial institutions in Uganda were the military tribunals, particularly under Idi Amin. After Museveni seized power in 1986 through military means he remained head of state and head of the military. The incomplete separation of the military from the civilian state has had important consequences for the Ugandan judiciary in recent years.

At the point of transition in the 1990s the judicial institutions of Malawi, Uganda and Tanzania were not beginning at the same point. The Malawian judiciary survived the authoritarian era to the point at which they started the multiparty era at point zero rather than in negative territory. Whereas the Ugandan judiciary had been marginalized and violently attacked; the Malawian judiciary, although verbally chastised, did not suffer the same kind of military interference. Moreover, years of conflict in Uganda led to the economic neglect of the courts so resources were barely adequate for the courts to simply function. The transition to multipartyism in Tanzania was ultimately less significant for the judiciary than 1) the introduction of the bill of rights in 1984 and, 2)
the transition to a free-market liberalized economy. The absence of a significant watershed point would be both a strength and a weakness for the Tanzanian judiciary.

The transition to multipartyism should have resulted in the dispersal of power away from one-party or one individual. The three cases represent three different degrees of dispersal of power. In the case of Tanzania the CCM have given up the least amount of power; by virtue of the fact that they have had over fifty years in power to organize from the grassroots up to the President. Although the space in which to hold elections was created in 1995 the opposition have failed to present a serious challenge to the incumbent CCM. This is in part due to a lack of ideological coherence, a failure to build coalitions and lack of funding. But it is also due to persistent efforts on the part of the CCM to control, manipulate and repress the nascent opposition movement. Of the three countries the party structure of the CCM in Tanzania is by far the most entrenched and sophisticated both historically and today. The Tanzanian judiciary has remained close to the party and has done very little to threaten this status quo. The few individual elements within the judiciary who have pursued a path that diverges from the mainstream CCM position have been restrained by the weak formal independence mechanisms. This has limited judicial review by making it non-binding, and by limiting the access of individuals to file constitutional cases. This has resulted in a continual formal, strategic statute-based method of constraint. The case of Tanzania mirrors the findings of Mark Ramseyer and Eric Rasmusen (1997) and David O’Brien and Yasuo Ohkoshi’s (2001) from Japan. Despite the presence of a strong institutional independence, the Japanese judiciary has been passive and deferential due to LDP dominance in the electoral marketplace and the internal judicial bureaucracy. It is this internal control that stifles judicial independence the most. Both of these factors are present in the Tanzanian case.

In the case of Uganda early optimism that President Museveni and his NRM represented a positive democratic change has been replaced by a sense of pessimism and
doom over Uganda’s descent into a semi-authoritarian regime. The opposition was not allowed to fully-participate until 2001. The old parties of the post-independence era did not mount a serious challenge to Museveni; that challenge instead came from an ex-movementist and military man Colonel Kizza Besigye. Besigye’s FDC has to date failed to threaten Museveni’s regime in any major way. At the point at which Uganda created a new constitution in the early 1990’s it looked as though Museveni and the members of the opposition saw a strong judiciary as an insurance mechanism. Although not perfect, the Ugandan constitution has the most comprehensive set of provisions with regard to judiciary of the three cases. As I document in Chapter 8, although President Museveni professes to believe in the rule of law this clearly only applies when decisions are made in favor of the Movement. For the opposition the courts have provided a critical and at times life-saving avenue in which to protect their space to operate. This is well documented by Gloppen, Kasimbazi and Kibandama (2006).

But it would be too simple to dismiss the multiparty era as another period of autocracy and personal will. Rules of the game have been established and with varying degrees those rules have been followed. As Posner and Young (2007:126) have recently noted that “formal institutional rules are coming to matter much more than they used to and have displaced violence as the prime source of constraints on executive power.” Although inconsistent and to varying degrees the judiciary has functioned as a check on power and as protector of basic rights and freedoms. According to the regime-based insurance theories (See Ramseyer (1993), Ginsburg (2003), Magaelhaus (1999)) we should expect to see deferential judicial decision-making in all three of the cases. There is one exception to this Malawi between 2003 and 2007.

Although I characterize Malawian politics as dysfunctional, the Malawian polity is the most competitive of the three cases. Between 2003 and 2004 it was clear that there would at least be a change of President, if not party. After 2 terms in power
President Bakili Muluzi would reluctantly step down and crown his hand-picked successor. In a Shakespearian twist Muluzi’s prodigy, Bingu wa Muthrika, would split and form a new party. Between 2005 and 2007 Mutharika’s legal grasp on power was weak and weakened due to his defection from the UDF party. In addition, there were greater divisions within the Mutharika parliament than before.

The evidence indicates that at the point at which it became clear that President Muluzi would not be running for a third term there was a marked upward trend in assertive decisions vis-à-vis the government. Under the new leadership of President Bingu wa Mutharika this trend has continued. As I demonstrated in Chapter 6, Mutharika’s grip on power has not been certain; this is in part due to the rulings of the judiciary. Although the judiciary temporarily saved the President from impeachment proceedings, there is nothing to stop the legislature from drawing up a constitutional set of procedures to attempt impeachment again. The court did not rule on the constitutionality of impeachment itself. Mutharika looked to the court to resolve the Section 65 debate. The debate was resolved, but not in the way Mutharika hoped for.

Political power in Malawi is more dispersed than in Uganda and Tanzania. This partially accounts for some of the recent decision-making of the Malawian judiciary.

There is an important common thread across the three cases and that is the importance of the international donor community. All three countries are dependent upon donor aid. Donor aid allows leaders to pay-off their supporters or ‘clients’ and thus remain in powers. This is significant for the courts because the international donor community has placed considerable weight on the importance of the rule of law. The attempted impeachments in Malawi and the military storming of the court in Uganda both resulted in significant criticism, pressure, and condemnation and in some cases withdrawal of money from international donors. Therefore I submit that the judiciary is serving an insurance function, but insurance to protect against withdrawal of donor
funds.

The recent attempted use of the courts to *subvert* the democratic process in Uganda is an indication that Museveni believes that the courts do offer his an insurance mechanism against regime change. The treason and rape cases filed against opposition leader Kizza Besigye almost had the intended effect of removing Besigye from the electoral arena before the election took place. However, when the court failed to play into the hands of the Museveni the military were there to insure that NRM interests were served anyway. This in many ways describes Tate’s theory on judicial power in crisis regimes. The regime is able to maintain a semi-independent judiciary because the risks associated with doing so are manageable. For Museveni it is a cost-benefit analysis. How far can he go in interfering with the judiciary before facing censure and donor withdrawal from the international community? The answer to that question based on the events of the last two years is that Museveni can ignore the rule of law and attack the judiciary and receive only limited disapproval (in the form of withdrawing funds) from the international community.

The lack of political competition in Uganda and Tanzania renders the insurance theories of judicial decision-making irrelevant. Indeed these theories would predict that the judiciaries should perfectly mirror the preferences of the NRM and CCM regimes. But this is not the case. This dissertation has argued that we should instead look to internal institutional explanations for the emergence of judicial power.

B. Are judges strategically responding to changes in the political environment over time?

Iaryczower, Spiller and Tommasi (2002) and Rebecca Bill Chavez (2004) find that the greater the level of control of the President over the legislature the judiciary will be more likely to exhibit dependence and deference. If that same government looks as though it
will lose power it becomes more likely that the judiciary will attempt to distance themselves through anti-government rulings. Gretchen Helmke (2005) refers to this as “strategic defection.”

The Tanzanian and Ugandan parliaments are both close to being rubber-stamp legislatures. The ruling party holds significant majorities, significant enough that they push through their policy agendas with little obstruction. The case of Malawi is substantially different. Over the course of the last three general elections the power has become more diffuse in the legislature. No single party commands a majority. The dispersal of seats across three parties and the high number of independent candidates gives the appearance of high levels of party competition. This is misleading. As I describe in Chapter 6 the opposition parties and independent candidates rarely have the resources to turn parliamentary seats into real influence. They lack the ideological coherence and appear to lack the will or skills to form the coalitions needed to ousted incumbents. In short, the proliferation of political parties in Malawi is a function of the weakness of democracy rather than its strength. In fact intra-party bickering rather than cooperation has result in the virtual paralysis of parliament. Mostly seriously in 2007 this delayed the passage of the budget.

Evidence of judicial assertiveness in the Malawian judiciary partially affirms Helmke’s argument. It is not clear-set that one party will lose and one party will prevail, but the ambiguity and at least small potential for change opens up the space for the judiciary to be more assertive than they would be in a single dominant party regime. The judiciary appears to have gained confidence over the last five years and there has been a small increase in anti-government decisions. Although it is beyond the parameters of this dissertation Kenya possibly presents an affirmative case for Helmke’s theory. In an interview with a Tanzanian lawyer the case of Kenya was suggested as an example of
“strategic defection.”

This is exactly what happened in Kenya, it is tied in with ethnicity. We had the golden years with purposive litigation and jurisprudence. We could see even sections of the bench got very activist because we knew the government was its sunset years. Then we had regime change. Now the activists are in power, on the bench and in the bar and the executive. Individuals that staked their lives on being activist are now extremely conservative. People who were at the vanguard of legal thought, now it is us in power. We will be in power for a while, why should I burn my bridges.

Recent post-election events in Kenya appear to reflect the claim above. The opposition did not file a petition in the courts disputing the election results – suggesting they perceived that there was no chance of winning.

Although we cannot track judicial decision-making across regime change in Malawi, Tanzania and Uganda, in this dissertation I have discerned an evolving pattern judicial decision-making and responses from the government. I have set this out across five phases. These phases are mapped out in the table below:

---

537 Author interview Tanzanian Lawyer, June 2007.
Table 9.0 Trends in the Emergence of Judicial Power in Transitional Democracies

<table>
<thead>
<tr>
<th>PHASE</th>
<th>TREND</th>
<th>COUNTRY/YEARS</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>Judiciary adopt a cautious path as it tests out new powers and bills of rights.</td>
<td>TZ – 1987-1989</td>
</tr>
<tr>
<td></td>
<td></td>
<td>UG – 1995-1997</td>
</tr>
<tr>
<td></td>
<td></td>
<td>MW – 1993-1995</td>
</tr>
<tr>
<td>II</td>
<td>First few cases are filed judiciary makes a few bold opinions</td>
<td>TZ – 1989-1992</td>
</tr>
<tr>
<td></td>
<td></td>
<td>UG – 1998-2000</td>
</tr>
<tr>
<td></td>
<td></td>
<td>MW – 1995-1997</td>
</tr>
<tr>
<td>III</td>
<td>Number of cases sharply increases. Decision-making becomes mixed.</td>
<td>TZ – 1992 – 1995</td>
</tr>
<tr>
<td></td>
<td></td>
<td>UG – 2000 – 2007</td>
</tr>
<tr>
<td></td>
<td></td>
<td>MW – 1998-2002</td>
</tr>
<tr>
<td></td>
<td></td>
<td>UG – 2000 – 2007</td>
</tr>
</tbody>
</table>

First, I demonstrate with this table that the emergence of judicial power is not linear. This is important. It highlights the non-linear development of formal institutions specifically and of democratization in sub-Saharan Africa generally.

In Phase I there is strong evidence across the three cases that in the early years after being granted powers of judicial review and strong bills of rights the judiciary set out to test those powers. Few significant cases were filed in the very beginning (perhaps Press Trust is an exception in Malawi). Therefore this caution was partly externally-imposed, but also partially self-imposed. Judicial institutions an inherently conservative
and it thus follows that they would tread a cautious path in the beginning. International
donors placed the rule of law at the centerpiece of their policy prescriptions and they also
directly invested money into the legal system. A Makerere political scientist reflects on
the impact of financially favoring the judiciary over the legislature:

Most donors wanted to build the judiciary fast, not parliament. Donors have put
a lot of money in the judiciary, at the beginning of the NRM administration the
judiciary could be tolerated because it was only one organization. 1986-1996 –
there was a time of real fear. When new constitution came in the judiciary had to
prove its existence. They had been given a lot of money by donors, to empower
themselves. Now they were facing a challenge on how to protect the constitution,
how to react to the election process itself. This is a government that had not been
tested in elections before.

The interviewee then suggests that the retraction as far as judicial assertiveness is
concerned was a reaction to the possibility of anarchy and disorder rather than a fear of
personal retaliations by the government:

The judiciary started to get a lot of cracks. It tries to resist interference . . . it is
not because of government pressure; but because of a fear of going back to total
chaos. They may not be afraid of dying, but say, “If we die what will the country
become?” This fear of going back to chaos makes them look as though they are
siding with the government at times. Our history has dictated the path the
judiciary has taken. You can see when you look at the three arms of state. At the
moment government sees the judiciary as sometimes being obstinate or as an
obstacle.

Ultimately however, the interviewee goes on to warn about investing in the judiciary and
ignoring an increasingly weakening parliament:

The government wants to weaken the parliament and make it just a shell. .
. . You wouldn’t expect Uganda with a population of 27 million to have a
parliament of 350 [. . .] What for? How many electoral districts are there?
. . . 333 – they are just villages. This personalizes politics. Question of
trying to weaken the parliament, has consequences, now parliament is
completely weakened the judiciary will not be safe. If one weakens the
others will weaken too.

Phase III was short-lived in the case of Tanzania. As I document in Chapter 7 the a
handful of activist judges, notably Justices Mwalusanya and Lugakingira in the High Court handed down a number of decisions that marked a remarkable break with the past and placed the judiciary in direct conflict with the executive. As these decisions were rendered so more cases would be filed, particularly in Dodoma – Mwalusanya’s court. By 1994 the government sought to restrict the filing of constitutional cases with the passage of the Basic Rights and Duties Act. This served as an obstacle to access. Furthermore the government amended the constitution to prevent the court from striking down statutes outright. Instead they would be required to allow the government a certain period of time within which to rectify the offending statute. Thus Tanzania moved from Phase III to Phase IV rather fast and does not appear to have truly moved away from Phase IV yet. Two recent decisions have been the source of some optimism Ndyanabo and Takrima. But as I note in Chapter 7, Takrima came in the wake of signals sent by the executive that the legalized system of electoral bribes in Tanzania was problematic. In other words this could be the beginning of a new pattern or phase: The judiciary making these assertive decisions 1) if the executive signals that the time is right and, 2) if a group of individuals can get together and file the case in the first place.

Phase III in Uganda offered the Court of Appeal and Supreme Court the opportunity to render important constitutional decisions - decisions that would impact the separation of powers. In particular the Ssemogerere Referendum cases gave the Supreme Court the opportunity to chastise the legislature and by extension the executive, for attempting to operate in contravention of the 1995 constitution. The Court reminded the legislature that they too were subject to the constitution; for it was the constitution that was now supreme and not the parliament. This was an opportunity for the judiciary to finally hold government accountable for their actions. The decision came at a price however, and that price was substantial attacks on the judiciary from the government and the people (spurred on by government rhetoric). Indeed the response to
Ssemogerere 3 pushed the judiciary into Phase IV. As I noted in Chapter 5 the severe levels of interference in the judiciary have prompted a backlash by the judiciary. Certain individuals have spoken out publicly and the judiciary even went on strike. What is not clear at this point, however, is how this has affected judicial decision-making at the institutional level. It is too early to tell.

The Malawian judiciary has not experienced the same level of threat environment as Uganda. In Phase IV I highlight 2 separate years instead of a time period. 2002 refers to the attempt impeachment. 2006-2007 highlights the increased negative rhetoric and verbal attacks on the judiciary and the anti-corruption forces raid on an individual judge’s home. Again the decision-making is mixed, but as I have previously asserted, particularly in regards to the Section 65 Presidential Referral the judiciary made a bold decision in the sense that it jeopardized President’s position in power. I posit that this decision would not have been made in Uganda. This is because of Uganda’s turbulent and violent history. It has shaped the judicial psyche in a way that the Malawian judiciary simply did not experience.

In contrast to Uganda the Malawian judiciary has exhibited reluctance in engage in the internal affairs of the parliament. The Malawian judiciary appears to see itself as the forum of last resort in the sense that unresolved disputes from the political arena come to the courts. To date the judiciary has successfully kept its institutional legitimacy intact. However, it is far from clear that they can continue to maintain their legitimacy – which is dependent on perceived independence – if these high level political disputes continue to be filed.

C. Institutional Explanations

The Ugandan and Malawian courts have been placed at the center of contemporary
political disputes. The increased visibility and exposure has, on balance, increased their legitimacy. Increased support then feeds back into the judicial decision-making process. This is important, for as A.E. Dick Howard (2001:105) notes, “the inchoate status of constitutional culture in some countries makes it more likely that a court will take public opinion and the likelihood of compliance into consideration.” However, some of the recent more assertive decisions have engendered the wrath of the current regimes, and they have responded by attacking the judiciary and seeking to delegitimize both the courts and individual judges. Therefore it is important to consider both the negative and positive effects of increased visibility. As a researcher it is hard to separate out differences. This is reflected in Gibson, Caldeira and Baird’s (1998) findings.

Georg Vanberg (2005) finds that positive public support for judicial decisions both empower and grant legitimacy on the courts, but on the other hand, negative public support can make legislators more likely to bypass or override court rulings. Perceptions of the judiciary are crucial. Because the judiciary as an institution has represented the least amount of change, or transformation from the colonial/authoritarian era, then they are in a way the least trusted. Perceptions of the judiciary are central to the construction of judicial power. The battle for power between the executive and judicial branches is often played out in the media (particularly in Malawi and Uganda). For the Ugandan judiciary this is a struggle because of the propensity of President Museveni to speak out and attack the judiciary. In Chapter 8 I document the history of Museveni’s verbal attacks against the judiciary. The one card the Ugandan judiciary has to play against President Museveni is what I refer to as a “narrative of victimization.” In Uganda it appears that because of the violent death of former Chief Justice Kiwanuka, then more recent storming of the High Court by members of the Black Mamba Urban Hit Squad, the judiciary has to construct and reinforce over time a “narrative of victimization.” This is evident in the language used in the public statements and speeches made by senior
judges in the aftermath of recent events. Moreover, the language used is set within a historical framework of victimization. Due, in large part to the milder experiences under authoritarianism neither the Tanzanian nor Malawian judiciaries have successfully adopted this strategy. Paradoxically, the most brutalized pasts can create the space for the construction of judicial power today.

Conventional thinking is that when the judiciary receives significant political cases it is in a no-win situation. There will always be an important political stakeholder that has lost and the judiciary ends up being politicized, thus threatening its legitimacy. While this is true to a degree, I adopt the position James Gibson has articulated (1998 and elsewhere) that courts ultimately benefit from more exposure. Significant cases involving government, forces engagement and dialogue on key issues; in turn this dialogue creates more exposure for the courts, increases their legitimacy and thus feeds back into their institutional viability. When members of the public and private sector see the success of others they will be more likely to file cases in the future – thus ensuring the courts future relevance and legitimacy. This theory is strongly supported by the findings of this research in eastern and southern Africa.

Lisa Hilbink (2007:226) argues that in Chile the autonomous bureaucracy of the judiciary was “empowered to reinforce and reproduce their own views through discipline and promotions within the institution. This served to freeze a nineteenth century understanding of the law, society, and the judicial role into the institution.” The findings in Eastern and Southern Africa are not as stark. However, as I argue in Chapter’s 4 and 5 although the institutional characteristics of the colonial period would not define judicial decision-making per se, it would continue to feed-back into the institution over the next one hundred years. Kathleen Thelan (2003) challenges us to identify what aspects of institutions are renegotiable and under what conditions. In the case of sub-Saharan Africa there were two important points of renegotiation in the post-colonial era colonial
era. The first came in the authoritarian period when although judicial structures remained intact they were without notable power. In the multiparty era the judicial institutions were imbued with new power however, the courts frequently exercised the type of self-restraint Hilbink refers to in their exercise of these powers. The most restrained of which is Tanzania. As Hilbink found in Chile, contemporary activist judges in Tanzania, Malawi and Uganda have frequently been contained by their conservative institutional setting. In Tanzania the activist decision-making of Justices Mwalusanya and Lugakingira at the High Court level was on most occasions overturned by the far more conservative Supreme Court of Appeal. In sum it is the normative legacy of the colonial era that is most entrenched and that normative legacy is a continued deference to executive power.

In this dissertation I have argued that it is important to identify the positive or enabling aspects of institutions in addition to the restraints they impose on actors. The colonial era did establish an important framework of judicial identity which in turn, became a source of legitimacy. The distinct identity of the judiciary established during the colonial period has been an important source of differentiation from the political environment. As I discuss in Chapter 3 this framework was not in any way related to the local people or culture it was directly imported from England. Judges were trained in London and brought back the established procedures of English Common law (stare decisis for example) and indeed the law itself. Institutional legitimacy based on the imported identity has not only remained intact over the next one hundred years, but it could be argued that it has saved the judiciary from even greater interference than it has already endured. The institutional legitimacy that I refer to is based on the concept that the judiciary is a distinct and separate arm of government that exists above the dirty fray of the everyday politics. This is merely a perception, but an important perception nonetheless. Aspects of this institutional identity and institutional norms would become
an important defensive tool for the judiciary during the authoritarian era. Excessive reliance on the principle of *stare decisis* and of intricate procedural details of English Common law (including reference to several outdated statutes) would reinforce the image of an apolitical judiciary, who were just reading the law as it was placed before them.

It is clear that during the authoritarian period the judiciary had to strike a balance between supporting the regime (to ensure their survival) on the one hand, but on the other their long-term institutional identity and viability was dependent on at least keeping a façade of legal integrity. Hilbink’s thesis that the courts were sticking to a path of legal positivism due to a pragmatic antipolitics rather than an ideological adherence to legal conservative principles is compelling. The British educated judges had a set of tools at their disposal and they had to adapt and apply them to the new political climate of independence Africa. In short, they were a means to an end rather an ideological end in itself.

In Chapter 5 I submit detailed evidence with regards to the internal and external autonomy of the courts in Malawi, Tanzania and Uganda. First, it is clear that the colonial legacy has played an important part in affirming differentiation from the political environment over time. The courts are housed in separate buildings and judges are seen as professionals, appointed under constitutional guidelines that mandated specific years of experience and education. Despite this fairly strong political differentiation the courts continue to suffer from weak durability and inadequately entrenched sense of institutional legitimacy. Poor resources and life tenure abruptly cut short with young retirement limits weakens the durability of the courts. It is Malawi that lacks the most with regard to resources. However, the demands on the court system are not as significant as in Uganda for example (just in terms of the number and complexity of cases filed). The issues associated with early mandated retirement and insecure
tenure was most highlighted in Tanzania where judges negotiate contract extensions directly with the executive. Weak durability places the courts in a position of vulnerability. They do not have strong control over their budget (they merely submit a suggested budget) and they have had to negotiate directly with the executive for salary increases.

I demonstrate in Chapter 5 that formal autonomy is at times weak, particularly with regards to the judicial appointments process; which lacks transparency. Informal interference in the external autonomy of the judiciary has been most stark in Uganda. However, I am sure there is plenty of less-public evidence of informal meddling with judicial independence that I was simply not able to access. Whether it was the infamous ‘telephone justice’ or simply pushing political appointees on to the bench.

The work of Siri Gloppen (2003) and Peter VonDoepp (2005) on the decision-making of judges in eastern and southern Africa suggests that judges are not simply bound by convention when they use procedural technicalities to dismiss cases, but that they are strategically avoiding hearing politically hot cases. Implicitly embedded in this argument is the suggestion that although judges are not strategically responding to regime change per se they are acting strategically nonetheless. I believe this is more often than not acting strategically to ensure survival. When I asked Tanzanian lawyer to what extent the use of legal and procedural technicalities amounted to a ‘strategy’ he expressed skepticism:

*Are judges acting strategically in their heavy use of technical/procedural issues?*

Strategic in the sense of looking for signals. I think a lot of them just “cop-out” You see judicial conservatism/neutrality whenever a hard issue is raised. The problem with that is that it becomes part of your culture. That has happened in all three countries with the apex court. The apex court becomes an extremely technical court, a predatory court. They are like predators waiting to pounce. Even their body language, they are hunched. Even something as simple as numbering the pages, they will throw your
petition out. In Uganda, has to be spiral-bound and numbered with a big pen. If that is not done they throw it out.

The motivations are different, after a while it builds into a culture at that level of litigation. After a while that is the institutional culture. Even when a new entrant comes you’d think he is a breath of fresh air, [but] he is intoxicated with that culture. If you sit on a panel of three and you are the youngest, you can’t say you disagree. It has become a specific feature of the Courts of Appeal in Kenya and Tanzania especially and to a certain extent in Uganda; a Court of extreme technicalities, even when the world trend is [moving] in the other direction. That is why I have problems with the term strategic because in a sense it kind of grows in the institution because of a number of motivations: 1) power/ego trip 2) I don’t want to be the one to offend the political elites 3) after a while because you developed it for constitutional and public interest matters it becomes a culture so that even in civil and commercial law [cases] it is applied.

The tone of this interviewee and other evidence I uncovered suggests that, unlike their Chilean counterparts, judges in eastern Africa were not simply being “slaves to the law.” Here it is pertinent to go back to the evidence of judicial durability. At a very basic level the poor working conditions of the judges often means that they move very slowly, there are no incentives to move faster and if they can remove a case from the docket then they will do so on the basis of technical issues. However, it is important to draw a distinction here between the Constitutional Courts and the Apex courts. In Tanzania and Malawi the courts of first instance for constitutional cases are the High Courts. The High Courts have extensive case backlogs on their dockets. However, the case backlog for the Supreme Courts of Appeal is not significant; the working conditions are less arduous. In short, there is a greater likelihood that the Supreme Court judges are acting strategically in dismissing cases than the High Court judges. The en banc review of constitutional cases also makes it very difficult for newly minted judges to come in and revolutionize the culture of the Supreme Court. Finally, we should not forget that the Supreme Court is the court of last resort. This necessarily forces it to deeply consider the practical and political ramifications of its decisions.
Jennifer Widner (2001) demonstrates that judicial elites can be powerful forces off-the-bench when it comes to strengthening the institutional power and legitimacy of the courts. A combination of interviews and newspaper articles provided strong evidence that the phenomena described by Widner is still apparent today; that it is a strong judicial norm for leadership to quietly approach political elites off the bench in crisis situations or perhaps to preemptively “smooth the way forward”, as one judge inferred[^38], for potentially problematic, high-stakes cases. From a normative and institution building standpoint it is not clear that this is always a good thing. I argue that these compromises are more about institutional survival than about judicial assertiveness. One of the more recent developments in all three countries is that judges are becoming more media savvy. Court leadership recognizes that in order to build constituency amongst members of the public it is necessary to speak up and defend yourself. The Ugandan courts recently hired a full-time public relations person/spokesman. In Malawi one judge expressed the need for a spokesperson – stating that it was too much to expect the registrar to fill this duty.

Widner does not explore the darker side of so much power and influence being vested in the hands of a few. In the case of Uganda, for example, judicial leadership has played a large part in ensuring institutional survival. However, the current Chief Justice Odoki is a known conservative and NRM insider. Although speculative, it is highly probable that the Chief Justice has attempted to shape controversial verdicts and has exercised strong hierarchical control over both the Supreme Court and the lower branches. This was partially affirmed in an interview with a Tanzanian lawyer:[^39]

Is it simply a case that Ugandan judges have more to fight for?

[^38]: Author interview with Tanzanian Judge, June 2007.
[^39]: Author interview with Tanzanian lawyer, June 2007.
There is more to fight for. That is the larger picture. It also boils down to the capabilities of leadership. The last major statement made by the judiciary was done in the absence of the Chief Justice. Benjamin Odoki is seen as a bit of a conservative and weak. Odoki is alleged to have collaborated with every government in power including Amin, he never left the country. Some lawyers said at an open forum, at a special general meeting of Uganda Law Society – “We are very lucky Ben Odoki was out of the country and the Deputy Chief Justice was in charge. She took a firm stand instantaneously, if Ben Odoki was here it wouldn’t have happened.” True to form, the next day we went to see Ben Odoki, and he said “You’ve made the statement I’ve called the President and the President has assured me that everything will be okay, I don’t think you should do any more. The man has already relented.” Of course he hadn’t. If there is a dynamic person at the top you might get change. Of course there are a few independent judges, George Kanyeihamba, he really doesn’t care. He says, “So what are they going to me – shoot me?”

Although promotion in the African judiciary is still heavily influenced by the executive branch, the African Chief Justice is a powerful force, as one informant told me in Uganda no judge wants to be posted to the High Court in Gulu (outside of Kampala). As Lisa Hilbink (2007) discovers in Chile, the establishment of internal control over discipline and promotion within the judiciary in the 1920s did not necessarily equate to judicial independence. Although now independent from executive control judges instead now looked to their superiors on how to decide cases. Moreover, in cases that are not heard en banc the Chief Justice can play an important role in case assignments. It is not a coincidence that the most outspoken (through both their decisions and off the bench) have not been Chief Justices or Principal Judges. In Tanzania this would be Justice Mwalusanya, in Uganda it is Kanyeihamba. Although it should be noted that the past and present Principal Judges in Uganda have been very activist and outspoken both off and on the bench.

Vanberg (2005) like Widner (2001), notes the need for courts to adjust to their environment. Vanberg (2005:170) finds that in advanced democracies the principal enforcement mechanism for judicial decisions consists of public support for a court and the concomitant threat of a public backlash against elected officials who fail to heed
judicial rulings. Through the use of ‘incompatibility rulings’ and ‘insofar’ clauses, Vanberg found in interviews with German judges that they would use words like “dampen”, “mitigate”, “reduce the impact” - to describe the methods by which they seek to reduce political costs. Courts may also provide deadlines for the implementation of their rulings as a way to strengthen their rulings. The recent ruling of the Tanzanian High Court on the legality of independent candidates gave the government a specific time-frame within which to make the required statutory changes needs. Upon review of the decision-making in both Malawi and Uganda it is clear that judges frequently dampen their judgments in order to make them more acceptable to the government. The difference between Vanberg’s Germany and eastern Africa is that African judges, in addition to ensuring compliance, are seeking protection from further interference.

II - Implications

First it is important to identify what is specific to the sub-Saharan African context. As Goran Hyden (2006:104), reminds us:

African rulers [. . .] are not concerned with transaction costs – what they do is allowed to cost as much as is necessary to remain in power – but rather with transgression costs. They watch carefully what the consequences of their actions are for their clients and followers.

Despite the many differences I have highlighted between the three cases of Malawi, Tanzania and Uganda, Hyden’s description of the rationality of African leaders applies across the cases. This research has sought to build upon the emerging literature on hybrid regimes in sub-Saharan Africa. We know that these regimes are different from the past in the sense that they do now abide by formal institutions, whereas in the past they would simply resort to violence. The judiciary is at the center of these new
developments. For on numerous occasions across many different countries the judiciary has peacefully resolved Presidential election disputes - disputes that otherwise would have inevitably turned violent. This dissertation has demonstrated that judicial institutions have, although unevenly, shaped executive and legislative behavior over time. This is important in the context of sub-Saharan Africa. I join Posner and Young (2007) in their recommendation that we need to focus less on classifying types of regime and focus more on the factors that constraint executive power. It is clear that in Tanzania, Malawi and Uganda the judiciary has restrained executive power. However, when restraint turns into threat the executive has shown that they are not willing to abide by those formal rules and have interfered in the independence of the judiciary. This means that the emergence of judicial power is neither linear nor unidirectional. The judiciary thus is both a reflection of the broader political process and of dynamics of democratization, and is also an agent in that process.

This study has demonstrated the problems of transferring theories and concepts from the advanced industrial democracies to the post-colonial developing African state. The young judicial institutions of sub-Saharan Africa are still grappling to build enough institutional viability and legitimacy through which they can withstand the uncertainties of a transitional democracy. However, I have demonstrated the judiciary has successfully created a strong institutional identity that has differentiated it from the political environment. This then has protected the space for the construction of judicial power despite the continued, and in the case of Uganda, worsening executive encroachment on judicial independence. As scholars of judicial politics we must be aware of the specific social, cultural and historical setting of judicial institutions.

These findings are important for scholars of comparative judicial politics in other transitional settings. First, it is clear that in the twenty-first century the developing state
is porous. In terms of external autonomy, international donor money forms part of the strategic equation for African executives, therefore indirectly protecting the judiciary. In terms of internal autonomy the global legal community has significantly contributed professional development and training of judges. This improves institutional viability and legitimacy. Our unit of analysis can no longer be confined to the state. Furthermore, we cannot assume that low levels of negative independence will automatically mean a meek and timid judiciary. In short, although regime dynamics will limit the expansion of judicial power it will not define or shape judicial power. Judicial power is the result of complex interactions both within the judicial institution itself and between judicial institutions and the broader environment.

III - Future Research Agenda

This dissertation sought to extend our analysis of judicial politics into the realm of the relatively new phenomenon of democratic regime sub-types. By their very nature, transitional democracies are not stable political environments with predictable outcomes. Thus, theories of judicial decision-making are difficult to apply in these settings.

One of the stand-out findings of this dissertation is that the most stable “democracy” of the three cases has the most marginalized and conservative judiciary with the weakest institutional viability. It would be fruitful to compare Tanzania to some of sub-Saharan Africa’s long-term stable democracies such as Botswana and Mauritius. Stability, it appears, comes at a price – that price in Tanzania is a near absence of true dissent, a weakened opposition and a more timid judicial branch.

Another area of importance highlighted in this dissertation is the significance of an empowered and active bar association. At the most obvious level it is the lawyers that
bring cases to the courts. If the lawyers do not bring the cases to court, then the court is by default rendered impotent. However, as I have examined the law associations also become important by virtue of their role as protector of the judiciary, as a watchdog body, as a source of potential new judges, as a legal aid body, as a disseminator of key judgments and new developments in the law. Further research on this dynamic within the context of sub-Saharan Africa is needed.

As highlighted above, it is clear that international actors and the forces of globalization more generally have profoundly shaped the attitudes and behaviors of the executive and legislature towards the judiciary and vice-versa. In this dissertation I have begun to sketch out how these causal mechanisms operate but further research is clearly needed within the context of sub-Saharan Africa. Donor aid to the judicial reform sector in sub-Saharan Africa has been substantially different to equivalent aid programs in Latin America. To this end cross-regional comparative work could be particularly fruitful.
Appendix A

Flow Chart of Court Systems

MALAWI 1962 - 1994

Supreme Court of Appeal

High Court

Senior Local Courts Commissioner

Local Courts

Local Appeal Courts

Resident Magistrates Court

First Class Subordinate Courts

Second Class Subordinate Courts

Third Class Subordinate Courts
The Court of Appeal of the United Republic of Tanzania was established in 1979 (Act No. 14) following the dissolution of the East Africa Court of Justice.
PRESENT SYSTEM (Zanzibar Courts integrated into mainland system in 1985)

- Court of Appeal
  - High Court (Tanzania)
    - District Court (Tanzania)
    - Regional Magistrates Court (Tanzania)
  - High Court (Zanzibar)
    - Magistrates Court (Zanzibar)
    - Khadhis Courts (Zanzibar)
**UGANDA 1995 – PRESENT**

*Is court of first instance in constitutional cases, i.e. is constitutional court*
** Only hears appeals from Court of Appeal, with exception of Presidential election petitions where Supreme Court has original jurisdiction
## Appendix B

### Summary of Published Law Reports in Malawi, Uganda and Tanzania

<table>
<thead>
<tr>
<th>COUNTRY</th>
<th>YEARS</th>
<th>COURTS</th>
<th>NOTES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Law Reports Tanganyika</td>
<td>1955-</td>
<td>Tanganyika High Court</td>
<td>Excluding Zanzibar</td>
</tr>
<tr>
<td>And East African Court of</td>
<td></td>
<td>Court of Appeal for Eastern Africa</td>
<td></td>
</tr>
<tr>
<td>Appeal</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Law Reports of Zanzibar and</td>
<td>1868/1918-1919</td>
<td>Zanzibar High Court</td>
<td>Excluding Tanganyika High Court</td>
</tr>
<tr>
<td>East African Court of Appeal</td>
<td>1900s</td>
<td>Court of Appeal for Eastern Africa</td>
<td></td>
</tr>
<tr>
<td>Tanzania High Court Digest</td>
<td>1967-1972</td>
<td>Tanzania High Court</td>
<td>Including Zanzibar</td>
</tr>
<tr>
<td>The Law Reports of Tanzania</td>
<td>1973-1979</td>
<td>Tanzania High Court and Court of Appeal</td>
<td>Including Zanzibar</td>
</tr>
<tr>
<td></td>
<td>1980-1997</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Uganda Law Reports</td>
<td>1904-1973</td>
<td></td>
<td>Published by government</td>
</tr>
<tr>
<td>East Africa Law Reports</td>
<td>1968-1975</td>
<td>Cases from the court of Appeal for east</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Africa, and the High Courts of Kenya,</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Tanzania, and Uganda and the Court of</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Justice for the Common Market for Eastern</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>and Southern Africa</td>
<td></td>
</tr>
<tr>
<td>East Africa Law Reports</td>
<td>1999-2003</td>
<td>Cases from High Courts of Kenya, Tanzania,</td>
<td>Published by LawAfrica in conjunction with</td>
</tr>
<tr>
<td></td>
<td></td>
<td>and Uganda and the Court of Justice for the</td>
<td>Lexis Nexis</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Common Market for Eastern and Southern</td>
<td>Butterworths SA</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Africa</td>
<td></td>
</tr>
<tr>
<td>Malawi Law Reports</td>
<td>1923-1972</td>
<td>Malawi High Court and Court of Appeal</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1973-1989</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
## Appendix C

### Timeline of Judges Salary Dispute

<table>
<thead>
<tr>
<th>Date</th>
<th>Article</th>
<th>Issue</th>
</tr>
</thead>
<tbody>
<tr>
<td>July 13th, 2001</td>
<td>Judges’ Pay Hiked</td>
<td>Parliament yesterday approved higher pay and better perks for high court and Supreme court of Appeal Judges, saying they have got difficult tasks to perform and should be protected from temptation of corruption. CJ will get K80, 600, SCJ, K707, 040 and HCJ, K639, 600 Plus an elaborate system of grants and subsistence allowances.</td>
</tr>
<tr>
<td>September 22nd, 2001</td>
<td>Judges give Government 14 Days</td>
<td>Judiciary has given the government an ultimatum. Pay in full or face &quot;a recourse we deem fit in order to enforce our constitutional right&quot; The demand is contained in a September 10, 2001 memo signed by HC Registrar Healey Potani addressed to Treasury Sec.</td>
</tr>
<tr>
<td>September 26th, 2001</td>
<td>Government gives in to Judges Demands</td>
<td>Government has back tracked on its earlier proposal to cut by half new salaries and allowances for judges and magistrates as approved by Parliament in July this year and backdates to November 1, 2000. Salaries for judicial officers - judges and magistrates are supposed to be reviewed once every three years according to Healey Potani, and the last review was in 1997. Sources say government owes judicial officers about K21 million in arrears.</td>
</tr>
<tr>
<td>July 26th, 2004</td>
<td>Judiciary Takes Government to Court</td>
<td>Judiciary has taken to court the minister of Finance and Secretary to the Treasury for their failure to implement new conditions of service for the judiciary approved by Parliament (Civil cause no.107 of 2004). There is a conflict between the two arms of government with the ministry of finance saying the new salaries and benefits for the Judiciary do not include support staff. Finance ministry is saying that the IMF has asked them to show restraint in salary increases. Ivy Kamanga (Registrar) says, salary is protected. Kamanga said &quot;If the IMF advises the Malawi Government to go outside the Government's Constitutional obligations the same translates into a mockery on good governance, a principle the IMF encourage the Malawi Government to adhere to&quot;</td>
</tr>
<tr>
<td>August 8th, 2004</td>
<td>Judiciary Stops Pay</td>
<td>Judiciary has withdrawn case against Ministry</td>
</tr>
<tr>
<td>Date</td>
<td>Event Title</td>
<td>Details</td>
</tr>
<tr>
<td>-------------------</td>
<td>----------------------------------</td>
<td>------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>January 20th, 2005</td>
<td>Judges go on Strike</td>
<td>Judges from Supreme Court and High Court throughout country yesterday abandoned cases after government failed to meet the seven-day ultimatum to acquire 26 vehicles for them. Kalemba disclosed that over the weekend government already placed an order for five vehicles but said this did not please the judges who chose to maintain their demand of 26 vehicles. They are entitled to a Mercedes Benz or a BMW, but this time gave in to government pleas for less expensive Toyota Prado’s.</td>
</tr>
<tr>
<td>July 31st, 2006</td>
<td>Law Body Backs Judges' Salaries</td>
<td>MLS says the proposed salaries are justifiable as there officers need a level of remuneration that prevents them from compromising their professionalism.</td>
</tr>
<tr>
<td>November 7th, 2006</td>
<td>Sorry, No New Salaries Says Bingu</td>
<td>Says is not going to effect new salaries because there is no money. Two senior judges met with the President to express concern. One judge said the President was very angry with the senior judges' demand for new salaries and he started shouting at them. &quot;He told the judges point blank that their new salaries will not be implemented because government has no money&quot; The source went on to explain that the President also accused them of supporting the opposition and that this was annoying him.</td>
</tr>
<tr>
<td>December 10th, 2006</td>
<td>Judges case to proceed</td>
<td>HC in Blantyre refused to give government a temporary breather when it quashed lawyer Maxon Mbendera's application to have the judicial review on judges' salaries adjourned until the on-going negotiations between the judiciary and the executives arms are finalized. The court ruled that the judicial review is independent of the ongoing negotiations and that its outcome would be a useful precedent for future cases.</td>
</tr>
<tr>
<td>February 14th, 2007</td>
<td>Judges to Meet on New Salaries</td>
<td>HC registrar yesterday said salaries and remuneration of the Chief Justice and other judicial officers which were approved by Parliament and upheld by the Constitutional</td>
</tr>
<tr>
<td>Date</td>
<td>Event Description</td>
<td>Details</td>
</tr>
<tr>
<td>--------------------</td>
<td>------------------------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>February 17th, 2007</td>
<td>“New Deal” Salaries very low</td>
<td>Court ruling last Friday are higher than the ones which the Judiciary agreed with the executive. 20% increase by July 2006. Government says this is all it can offer. The MLS took matter to Constitutional Court. But before the court made its ruling the Judiciary agreed on a negotiated pay which government which has turned out to be lower than what the courts have said should be implemented. CJ's take home pay is K580,035 from the proposed K667,040 Justices of Appeal are now getting a new pay of K412,173 about K103,043 less than the proposed salary of K515,216. Government has also given the high court judges about K90,000 less than what the National Assembly approved. They are getting K356,594 down from K445,743.</td>
</tr>
</tbody>
</table>
# Appendix D

## Timeline of Events Concerning Referendum on Multipartyism

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>July 1999</td>
<td>Referendum and Other Provisions Act passed as the legal framework under which the Referendum would be held.</td>
</tr>
<tr>
<td>July 30 1999</td>
<td>Referendum and Other Provisions Act 1999 was challenged in court for being invalid first lack of quorum at the time of its enactment and secondly, after being enacted after the expiry of the date stipulated in the constitution.</td>
</tr>
<tr>
<td>September 23 1999</td>
<td>Constitutional Court rejects petition on the grounds that parliamentary records (the Hansard) could not be used as evidence without the permission of the Speaker. Further, according to rules of procedure in parliament, courts of law had no jurisdiction to inquire into the internal workings of parliament.</td>
</tr>
<tr>
<td>May 31 2000</td>
<td>Supreme Court overturned the decision of the Constitutional Court. Held that the need to get permission from speaker to use parliamentary records was unsustainable.</td>
</tr>
<tr>
<td>June 7 2000</td>
<td>The Referendum (Political Systems) Bill tabled before parliament. The Rules of Procedure were suspended to enable the Bill to proceed to the second reading and was passed the same day.</td>
</tr>
<tr>
<td>June 22 2000</td>
<td>Petition contesting the validity of the Referendum (Political Systems) Act 2000 filed</td>
</tr>
<tr>
<td>June 29 2000</td>
<td>Referendum held. Ruling Movement system was declared 90.7% victor as against 9.3% for multiparty</td>
</tr>
<tr>
<td>August 10 2000</td>
<td>Constitutional court declares the Referendum Act of 1999 was unconstitutional on the grounds that the method of voice voting offered no precise vote and there was no quorum at the time of voting.</td>
</tr>
<tr>
<td>August 29 2000</td>
<td>The Constitution (Amendment) Bill 2000 was tabled. Rules that require a bill to go to the Sessional Committee were suspended to enable immediate passing of the bill without waiting for 14 days</td>
</tr>
</tbody>
</table>

Intention of amendment was to validate
previous laws, resolutions and actions of parliament that had been challenged by the Constitution Court decision. The Constitution was amended without taking it back to the people.

Quorum was required only during the time of voting and not during debate.

Leave of speaker had to be obtained before using parliamentary records as evidence. This placed two matters beyond ambit of judiciary inquiry.

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>December 2000</td>
<td>Presidential Elections Act passed</td>
</tr>
<tr>
<td>February 6 2001</td>
<td>Uganda’s Sixth parliament presented the Political Parties and Organizations Bill to the present for assent. Parliament had allowed parties to open branches at district level.</td>
</tr>
<tr>
<td>February 7 2001</td>
<td>Constitutional Review Commission was elected in the heat of the Presidential elections</td>
</tr>
<tr>
<td>March 12 2001</td>
<td>Presidential elections, Museveni relected</td>
</tr>
<tr>
<td>April 10 2001</td>
<td>President returned Political Parties and Organizations Bill to Parliament for reconsideration arguing that political parties should restrict their activities to national headquarters</td>
</tr>
<tr>
<td>June 27 2001</td>
<td>Parliamentary General Elections</td>
</tr>
<tr>
<td>March 9 2002</td>
<td>Political Parties and Organizations Act passed by parliament</td>
</tr>
<tr>
<td>July 17 2002</td>
<td>Political Parties and Organizations Act became law having been signed by the President in June 2002</td>
</tr>
<tr>
<td>July 31 2002</td>
<td>President retired Chair and 5 Commissioners from the Electoral Commission in the interests of the public. Appoints new Electoral Commission in November.</td>
</tr>
</tbody>
</table>

Source: Adapted from Kituo Cha Katiba East African Centre for Constitutional Development. “Uganda: Key Historical and Constitutional Developments” (www.kituochakatiba.co.ug)
Bibliography


Gillman, Howard. 1999. "The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making." In


543


544


Langa, Joseph. July 28th, 2006. "'Opposition Forsee Delay on Section 65'." **Nation.**


———. June 5th, 2001. ""Court tells MCP to find Solution"." *The Nation.*


———. March 4th, 2006. ""Judiciary on Trial."" *Nation.*


———. 2006. Let the People Speak: Tanzania doesn the Road to Neo-Liberalism. Dakar, Senegal: CODESRIA.


VITA

Rachel L. Ellett

PLACE OF BIRTH: Southampton, United Kingdom

DATE OF BIRTH: October 10th, 1976

GRADUATE AND UNDERGRADUATE SCHOOLS ATTENDED:
University of Sheffield, United Kingdom
Northeastern University, Boston, USA

DEGREES AWARDED:
Master of Arts in Political Science, 2002 Northeastern University
Bachelor of Arts in Politics and Sociology, 1997, University of Sheffield

AWARDS AND HONORS:
Outstanding Teaching Assistant Award 2005, Northeastern University
Doctoral Dissertation Writing Fellowship 2008, Northeastern University

PROFESSIONAL EXPERIENCE:
Teaching Assistant, Department of Political Science Northeastern University