Notes on the Role of the Judiciary in the Constitutional Systems of East Africa Since Independence

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This article examines the role of the courts in Kenya, Tanzania and Uganda since their independence. The different roles structured for the courts by the three independence constitutions are contrasted against their backdrop of common historical experience. The actual roles played by the courts, and the courts’ perceptions of their own powers of judicial review are discussed with an eye to the problems created by the juxtaposition of the modern documents (the constitutions) and the political perceptions of African legal practitioners, inevitably infused, after the English colonization, with English attitudes about governmental balance.

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*I give the devil the benefit of the law for my own safety’s sake.

Sir Thomas More

in

“A Man for All Seasons”

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INTRODUCTION

FROM THE LATE 1950's until the present day the territories, colonies, and later the new nations of English-speaking Africa have been engaged in a continuing effort to develop their own national constitutions. The effort has been toward establishing in written constitutions the government structure and political system which would best express the national political will and guide the nation through the difficult early years of independence.

As a new nation struggles to state in legal form its own peculiar political plans for independence, stability, and progress, it must face the question of how to distribute its new sovereign power. This requires answers to a hundred difficult questions: Should the chief executive be head of state as well as head of government? How should authority be distributed between the executive and the national legislature? Should there be written, justiciable, fundamental human rights in the Constitution as in the United States, or are these best left protected by the free expression of the national political will in Parliament as in the United Kingdom? What roles are most appropriate for the judiciary and the courts? How should judges be appointed or elected? Should the courts be allowed to undertake judicial review of the constitutionality of either legislation or administrative action, or both? And, if political parties are to be mentioned in the national constitution at all, how many, and what kind of, parties should a constitution countenance in order best to provide a productive balance between free individual expression, legal political activity, and stable and progressive governance? These are only a handful of the most obvious questions which require answers.

For the purposes of this paper, the object of study and the focus for constitutional comparisons is former British East Africa, now the independent states of Kenya, Tanzania and Uganda. These nations together present a unique opportunity to examine the issues and practical problems involved in a new state's effort to resolve difficult constitutional issues. Each of them enjoyed a different legal status within the British colonial system.¹ Their common pre-independence experiences under British rule, however, plus their geographical proximi-

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¹Kenya and Uganda began their colonial status as Protectorates. Kenya became a Colony in 1920 while Uganda remained a British Protectorate until independence. Tanganyika was administered as a Trust Territory under a League of Nations Mandate which later became a United Nations Mandate. Zanzibar, despite its Union with Tanganyika in 1964, is outside the scope of this paper.
ty and general cultural similarity, allow one to highlight the contrasts in their respective solutions of constitutional problems against a common historical landscape.

The issue to be examined here is one of the major unresolved problems confronting constitutional lawyers concerned with the establishment of a democratic political order: What should be the judicial role in the constitutional distribution of authority at the national level? In other words, in apportioning the power to affect national policy, where and how, if at all, do the courts fit in?

I. THE PROBLEM: INDEPENDENCE AND THE ROLE OF THE COURTS

The differences of opinion and practice in this area of constitutional law are both basic and numerous. Most obvious, of course, is the traditional and fundamental difference between Great Britain and the United States on the issue of the role of courts of law in the national constitutional system. The former has neither a formal, written constitution nor a tradition of judicial review. In the latter almost every national political issue becomes to some extent a question of the federal courts' interpretation of the letter and spirit of a sparsely worded, two hundred year-old set of written rules.

There is, of course, great diversity among the tribal African societies of East Africa, including their anthropological background, tribal size, culture, social organization, etc. The point here is that for the purposes of this paper, all three future states were populated predominantly by indigenous Africans with a numerically significant minority of Asians and/or Arabs, usually in the commercial sector, and a small administrative/agricultural European elite of varying size and importance.

It is perhaps important to explain at the outset of the essay the considerable constraint that limitations of time and space place upon a subject as broad as this comparative study must be. The theoretical questions are interesting and must be covered before proceeding to look at the constitutions and the constitutional cases themselves. The emphasis inevitably will be upon an analysis of how the courts seem to be doing in each of the three countries. As this is an essay and not a thesis, field research and all that might provide in terms of access to unreported cases, interviews with East African lawyers and judges, and local political opinion on the role of the judiciary has not been obtained by the author. The scope of the subject and particularly its comparative nature have necessitated the emphasis upon drawing what I have called the "right conclusions" after a study of the relevant constitutional instruments, legislation where relevant, cases decided in the courts of East Africa and reported in the East African Law Reports, and the research of publicists in this field.

See E. McWhinney, Judicial Review in the English-Speaking World (1965). There is, of course, a certain amount of judicial review of administrative acts in Britain, especially through the use of prerogative writs. The point is that a judicial challenge to a particular policy of the executive (e.g., impoundment of appropriated
Because the constitutional systems of Britain and the United States are the dominant ones in the English-speaking, common law world, and because Britain presided over the process of constitutional evolution toward independence in East Africa, some mixture of British and American constitutional theory was bound to determine the final form of the independence constitutions in Kenya, Tanzania and Uganda. That those responsible for this evolutionary process during the late 1950's and early 1960's may not have looked hard enough for alternative constitutional arrangements among those existing in non-Western industrial societies or traditional African societies is regrettable. It is understandable, however, given the fundamental philosophical bias of the principals, and what was accepted as the general stability and democratic political nature of Britain and the United States.

Generally Britain chose to emulate her own constitutional arrangements, but in written form, as the constitutional model for her former colonies. This became known as the "Westminster Model" export version. It established legislative, executive, administrative and judicial institutions along lines roughly equivalent to those in England. The single most important, and probably unavoidable, difference was the enactment of an elaborate written constitution in each new state. These were to be more than merely political statements describing achievements and goals. They were formal bodies of legal rules for the ordering of political life which were superior in authority to ordinary statutes. They were to be interpreted and upheld by an independent judiciary. In Uganda and Kenya the independence constitutions contained extensive justiciable human rights provisions meant to secure certain fundamental individual liberties against the capricious or ar-

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*See S. De Smith, The New Commonwealth and Its Constitutions (1964). See also K. Wheare, Modern Constitutions (1966); Wolf-Phillips, Classification of Constitutions, 18 Political Stud. 18 March, 1970. Perhaps the most striking example of this effort was the splitting of executive authority between a head of state and head of government. Tanganyika's commission to study a republican constitution reported in the spring of 1962 that this was one of the least comprehensible aspects of that nation's independence constitution from the point of view of the average African.
bitary exercise of legislative or executive authority. In Tanzania such provisions were avoided; the independence constitution instead contained in its preamble an affirmation of the nation's commitment to the human rights normally contained in traditional bills of rights.

It can be seen immediately from even the broad constitutional outlines described so far, that the national courts in East Africa were structurally situated to occupy a position of some substantial political significance at the apex of national government. This was necessarily so for the following reasons:

— The national judiciary was charged with upholding the higher prescriptions of the constitution from encroachment by legislative enactment; 6
— The existence of written constitutional limitations upon the power of the executive in a constitution which was to be interpreted and upheld by the courts required the judiciary to stand against the unwarranted extension of executive authority;
— The presence in the independence constitutions of Uganda and Kenya of justiciable human rights required, at the very least, judicial explication if not protection of highly sensitive political values.

The point here is a basic one: At independence the very nature of the constitutions in all three East African countries cast the national courts into key positions within the "separation of powers" structure of the national government. One of the leading commentators on East African public law, J.P.W.B. McAuslan has described this prescribed role of the independence judiciaries as that of being "institutions of control." 7 It seems clear that the British government accepted for installation in East Africa a concept of the judiciary which Claire Palley later summarized, in her analysis of courts and judges in the Commonwealth, in the following way: "If emotionalism and sentimentality are shed, the judiciary will be seen as a specialised institution within the

6It is at least arguable that this is true by definition whenever a "constitution" is amendable only through a process which is more stringent than that for the enactment of a statute, and the constitution is ratified on the basis of its being a higher law. See, e.g., Uganda Const. of 1967, § 1. But other language may be used to convey the same meaning, i.e., that the constitution prevails over the other national laws. See Kenya Const. of 1969, § 1.

structure of government . . . which also exercises functions protective of the individual as against governmental power." What the British government may not have appreciated sufficiently during the period of rapid constitutional evolution prior to independence was the fundamentally paradoxical nature of this arrangement.

At independence, the fledgling national courts of East Africa occupied a constitutional status and role not unlike that of the federal courts in the United States after the 1803 Supreme Court decision in *Marbury v. Madison.* But at the same time they were thoroughly imbued with the formal conservatism of the legal and judicial culture of England, and manned by individuals who were themselves products of that culture. To this incongruity one must add the fact that the independent governments and courts of East Africa faced from the outset the constant political pressures of attempting to govern in highly diverse and dynamic developing societies.

Was it realistic to expect an institution as potentially powerful but inherently powerless as an "independent judiciary" to perform the role that East Africa's independence constitutions prescribed for the courts? McAuslan suggests that "[A]ny constitution which so subordinates executive power to its control, as occurred in Kenya and Uganda particularly, carries within itself the seeds of its own destruction." Yet, as a former Solicitor-General (later to become Chief Justice) of Kenya has stated with some force, "[I]f constitutional laws are to qualify as such, independent courts of law must have the power to uphold them, either by positive enforcement or by rendering ineffectual any breach of those laws, as may be appropriate." These two statements, of course, do little more than describe the natural tension inherent in judicial review. But as one looks deeper, as one must, into the legal, political, social and economic context of East Africa, into which the structural seeds of judicial review were planted almost a

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8Palley, *supra* note 7, at 35.
95 U.S. (1 Cranch) 137 (1803).
10That culture held the separation of the courts from politics to be a very important value indeed. Parliament is supreme in England; judicial review of official behavior is limited to egregious cases of improper administrative behavior, and precedent is only rarely overruled.
decade and a half ago, the complexity and difficulty of that semina-
tion emerge.

The term "paradox" has been used above to describe the position
of each national judiciary in East Africa at independence. This is
because in each country the courts were commissioned to perform a
function within the new national governments of Kenya, Uganda and
Tanzania which courts had not performed in Britain itself,¹³ nor in
East Africa during the colonial period,¹⁴ nor, in any analogous sense,
in the vast majority of traditional African societies.¹⁵ To the extent
that any external models can be of practical use in such situations, the
constitutional and judicial history of the United States might have been
of the greatest comparative value.¹⁶ A study of the complicated and
precarious politics of judicial review, which have evolved over two cen-

¹³*Supra* note 10.

¹⁴*See generally* S. de Smith, *supra* note 5; H. Morris & J. Read, *Indirect Rule
and the Search for Justice* (1972); Y. Ghai & J. Mcauslan, *Public Law and
Political Change in Kenya* (Nairobi 1970); J. Cole & W. Denison, *Tanganyika,

¹⁵*See* L. Mair, *Primitive Government* (1962). Internal tribal political organiza-
tion differed markedly from tribe to tribe, as Lucy Mair points out; nevertheless, as a
generalization, this statement is true. Perhaps as important for these purposes, it is
believed to be true. *See also* M. Fortes & E. Evans-Pritchard, *African Political
Systems* (1940); *Tribes Without Rulers: Studies in African Segmentary Systems*
(J. Middleton & D. Tait eds. 1967).

¹⁶This point has been made clearly and forcefully by B. Nwabueze, *Presiden-
tialism in Commonwealth Africa* 305 (1974):

The older-established nations face exactly the same conflict of human rights
*versus* state security. It is said, however, that their approach to the problem
is irrelevant to the conditions of a new nation which "has neither the long
tradition of nationhood, nor the strong physical means of national security,
which older countries take for granted." This is true if we view these older
countries in their present state of maturity and advancement, and ignore
their past history, when conditions then prevailing within them were fairly
comparable with those in the new states of today. When the strongest and
most advanced of these nations, the United States of America, emerged into
independent statehood in 1783, it too had to grapple with the usual teething
problems of infancy, problems of state security and of unity, and the means
then available to it for dealing with these problems could hardly be said to
have been "stronger" or better organised than those at the disposal of the
new states today. *The American approach to the conflict of state security ver-
sus individual liberty is therefore relevant, both because America had
undergone a similar experience of colonial rule and of independence, and*
turies in the United States, would have helped the Bench and Bar of East Africa appreciate and succeed in the position into which they were placed at independence. In both form and content, the autochthonous Indian and United States Constitutions, suited as they both were to new states with a widely heterogeneous citizenry and distinct minorities competing for influence, might have been a better model for the drafter of independence constitutions in East Africa than was that of Westminster. This is not to suggest that the Indian and American constitutions were not considered at this time: In the areas of fundamental rights, judicial review and, to a lesser extent, separation of powers they clearly were considered. But the history of this period of British colonial administration in Africa reveals a preoccupation with capturing the English constitutional structure in a written document. Understandable though it may have been, as Professor de Smith and others have ably demonstrated, it proved an elusive goal.

Britain’s unique constitutional system is the product of centuries of political development. The national political institutions of that country have evolved out of not years or decades, but whole eras of institutional rivalry, whole generations of conflict, compromise, and consolidation. The balance that now exists between Parliament, the executive, the courts, the Monarchy, and the electorate is guided by a weight and conscience of custom which far outmeasures that obtainable by even the most eloquently stated and unanimously supported modern document.

The creation of a constitutional/political order out of the vacuum of colonial domination and government by executive decree is a totally different exercise. There was in East Africa a great need to provide a map for the development of the nation’s institutions of government, to delineate the kind of political system and the political values that that nation would strive to build and protect, and also to provide an expectant polity with tangible evidence of constitutional progress already

also because it is governed under a written Constitution. That approach, significantly, remains basically the same today as when the American nation was formed in 1787 with the adoption of the Constitution. It was maintained, even during the dark days of the greatest civil war known to history, and through the several smaller insurrections of which American history is replete, such as the Dorr insurrection in Rhode Island in 1849. (emphasis added) See generally B. NWABUEZE, CONSTITUTIONALISM IN THE EMERGENT STATES 14-20 (1973).

17 Supra note 5.
18 Id.
achieved. These are all necessary functions of a constitution in a new state; they also partially explain why in every case a newly independent nation will require a written constitution.

But the British have never liked the idea of written constitutions. In discussing the constitutional evolution of Canada, Australia and New Zealand toward Dominion status in a manner consonant with the history of the British Constitutions, de Smith described this approach to constitutions as "[a] predilection for preserving ancient forms . . . and for awaiting the gradual crystallisation of ancient usages within a traditional framework [. . .] was complemented by a deep distrust of definitions, of inflexible statements of principle and of abrupt changes effected by statute." It could be argued, then, that the creation and installation of a written constitution where one did not exist before was made especially tenuous in East Africa because the grantor of the independence constitution was a state that organized its institutions of government according to custom rather than written dictum.

One might further ask whether any formal, entrenched, and elaborate constitution could be a workable plan for ordering political life and governance in a developing society with widespread illiteracy and limited infrastructure.

It will be the purpose of this essay to focus upon the role of the national courts in the constitutional law and political life of East Africa at and especially since independence in the early 1960's.

In retrospect, one looks back upon those enthusiastic, early days of independence with more than a little bewilderment. Could it have seemed possible to the British authorities that the fledgling governments of Kenya, Tanzania and Uganda, manned as they were by men reared in a traditional tribal environment and politicized during years of unquestioned supremacy of the Colonial Governor, would be content to face the enormous tasks of nation-building inhibited by a constitution they did not write and judges they had neither appointed nor were able to legally remove? It will be useful to look first at the role of the courts during the British colonial period.

II. THE COLONIAL BACKGROUND

In the case of each of the three East African territories, Orders in Council issued in London early in the twentieth century established the

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19S. DE SMITH, supra note 5, at 1-2.

20The High Court in each of the three countries will be the focus; it is these "national courts" which have the specific authority to uphold the constitution.
authority of the British Crown over the area concerned and placed a Governor\textsuperscript{21} in charge as the Crown's representative.\textsuperscript{22} An Executive Council was established by the original or a subsequent Order in Council or Royal Instruction to sit with the Governor as a form of embryonic mini-cabinet.\textsuperscript{23} A Legislative Council was similarly established, as was a judicial system consisting of a High Court with a Chief Justice and a number of puisne judges appointed by the Governor. Judicial appointments were made upon the advice of the Colonial Office. Later such subordinate courts as were necessary were instituted in each of the three East African territories.\textsuperscript{24}

The establishment and development of the executive, legislative and judicial functions occurred at a different time and pace in each territory.\textsuperscript{25} In all three areas, however, the pattern of colonial administration was basically the same: The executive powers of the Governor were to be dominant over the collective will of a Legislative Council, which in any case consisted solely of \textit{ex officio} and appointed members until well into the 1950's.

The peculiarities of the constitutional evolution of each country are too numerous to be included here. For now it is important to deter-

\textsuperscript{21}In the case of Kenya, known as the East African Protectorate until 1920, the chief executive officer of the administration was known as "Commissioner" until 1905, after which time the term "Governor" was employed.

\textsuperscript{22}This occurred at different times in each territory: 1897 for Kenya, 1902 for Uganda, and 1920 for Tanganyika. An example of the language empowering the Governor is that used in the Tanganyika Order in Council, 1920 where it stated that the Governor was "authorized, empowered, and commanded to do and execute all the things that belong to his said office according to the tenor of any Order in Council relating to the territory, and of such Commission and Instructions as may be issued to him. . . ."

\textsuperscript{23}Initially membership was exclusively official and the Council served in an advisory capacity only; for example, in Tanganyika the Chief Secretary, the Attorney-General, the Treasurer, and the Director of Medical and Sanitary Affairs made up the original Executive Council.

\textsuperscript{24}These differed slightly from one territory to another. The establishment and alteration of the court systems of East Africa is carefully charted in \textit{JUDICIAL AND LEGAL SYSTEMS IN AFRICA}, supra note 14; see also 1962 ed.

\textsuperscript{25}There is a full literature on the constitutional evolution of the East African territories. In fact, the literature on colonial history generally is so rich that even the most superficial outline, as attempted here, is difficult to draw without offending an important distinction somewhere. My purpose is not to summarize effectively or even inform generally, but rather merely to set the stage for a consideration of the judiciary during the colonial period.
mine the effect of the colonial period generally upon the development of the courts as institutions of government. Later, at independence, the national courts were expected to become "institutions of control" over the authority exercised by the legislative and executive branches of the independent governments of Kenya, Tanzania and Uganda. If one considers the operation and composition of the courts during the colonial period, and particularly just prior to independence, the problems involved in assigning the judiciary an important protective function after independence become more understandable.

There were at least seven characteristics of the judiciary in East Africa during the colonial period that encumbered the establishment of an independent judiciary capable of limiting government power after independence. These are worth reviewing:

1. The dual courts system

Each East African territory had a dual system of courts. These were distinct and separate judicial systems: One to administer the general law established by the colonial administration, the other to settle disputes arising among members of the indigenous African population. And although an integration of the court systems took place after independence, at issue in the 1920's and 1930's was whether the African courts were to be administered by the District and Province Officers of the colonial administration (with appeals going up to the Governor) or be part of the judicial system headed by the Chief Justice of the High Court. The issue was a basic one: Should a marriage of the executive and judicial branches of government be allowed at the local level? Sir Donald Cameron, Governor of Tanganyika in the 1920's and a great proponent of the "Indirect Rule" system of colonial administration, thought that it should. Against the opposition of the

26"General law" meant the entirety of the law established by the colonial administration; African customary law was excluded. For example, in Kenya the general law consisted of certain Codes and Acts of India, locally enacted statutes, and so far as these did not apply, the Common Law, doctrines of equity, and statutes of general application in force in England on August 12, 1897.

27Cameron expressed his views on this subject in the following words from a Confidential Dispatch to London, Feb. 17, 1927, reprinted in H. Morris & J. Read, supra note 14, at 146:

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 judicial system based on European ideas and, this belongs so, the
Chief Justice of Tanganyika and other persons sensitive to the traditional "independence" of the judiciary from the executive, Governor Cameron obtained his desired Native Courts Ordinance in 1929. Although the separation of the African courts from the national courts was never to be as complete in the other two judicial systems in East Africa as in Tanganyika, the Governors of Kenya and Uganda requested similar native court systems within the year. Moreover, in all three countries, administrative officers exercised wide judicial powers as local magistrates. H. F. Morris explains that the role of the judiciary in the process of native court development was insignificant until at least the 1950's. According to Morris, "few judges or resident magistrates during the colonial period showed any interest in, or knowledge of, customary law or the workings of the native-court system." It was at times even considered advantageous that the District Officer presiding over the settlement of a dispute did not have legal technicalities of evidence and proof before him to threaten "efficient" justice.

In 1953 the first Judicial Advisers' Conference encouraged change by recommending the gradual separation of judicial and administrative authority. But by then the fusion of the executive and judicial functions in the person and office of the Governor's District Officer must have made some impression upon future African leaders. The situation is tellingly summarized by Morris:

> It was accepted that the union of executive and judicial functions in the same person was contrary to British theory and practice, but, it would be maintained, this had always been a feature of African life and the African public saw nothing wrong in it: moreover, the district officer would argue, it would not have been practicable or advisable, in the interests of good government, to have attempted to separate the two.

native courts should be under the supervision of the administrative officers and not under that of the High Court. The reasons are obvious: the judges of the High Court know nothing of the language, the customs and the modes of life and thought of the natives, whereas, on the other hand, the natives know nothing of the High Court and do not understand its intervention between themselves and their administrative officers, who in their eyes represent the Governor.

See H. MORRIS & J. READ, supra note 14, chs. 5, 9.

Id. at 132.

Id.

Id. at 161-62.

Id. at 134.
2. The predominance of the administration during the colonial period

The Governor, the Queen's representative, was the fount of official authority in colonial East Africa. His representatives, scattered over hundreds of miles of rugged, undeveloped countryside, were the obvious, and often the only, figures seen by local indigenous communities to possess political legitimacy and influence. The previous point explains the position of the local judiciary, and its integration into the administrative service at the local level. As mentioned above, Legislative Councils developed later and slowly. Until just prior to independence, they contained significant *ex officio* and nominated majorities, many of the members of whom held positions of leadership in the colonial civil service.

3. The extensive personal powers of the Governor

Despite his responsibility to the Colonial Office, Whitehall, and Parliament, and the need to deal with the local, unofficial European community, the discretionary powers of the Governor himself were established early and, if anything, were strengthened in later years.

The central and dominant constitutional position of the Governor during the colonial period is suggested by the case of *Corbett Ltd. v. Floyd* decided in the Court of Appeal for Eastern Africa. In 1939 an Emergency Powers Order in Council had been passed to provide for the administration of Kenya during wartime. On October 20, 1952, as part of the commencement of the Emergency, section 6 of these Emergency Powers was applied to the Colony and, for certain purposes, the legislative powers of the Governor became exactly co-extensive with those of the Legislative Council. The question then arose as to whether or not the Governor, like the Legislature, could legislate retrospectively. In discussing the appeal, Briggs, V-P, found the enabling Order in Council legitimate and, therefore, the Governor empowered accordingly. In his words:

[I]t has never in twenty years been suggested that the Order in Council was itself ultra vires, and although since the end of the war measures taken under it have been criticized as dictatorial, undemo-

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34The "Emergency," of course, was the rebellion of certain African, predominantly Kikuyu, factions popularly referred to as "Mau Mau."
cromatic and destructive of liberty, it has never, so far as we are aware, been suggested that such measures were incompetent. 35

In *Corbett* neither the Court of Appeal for Eastern Africa nor the Supreme Court of Kenya could find statutory, constitutional, natural justice or jurisprudential reasons for inhibiting the Governor of Kenya.

The point here is not that the courts wavered in their constitutional duty in the face of an overwhelming executive challenge. To the contrary, *Corbett* illustrates the lack of any active constitutional role at all for the courts in the limitation of executive authority in colonial East Africa. 36

4. The nature of the inherited English administrative law

It may be argued that the English law bequeathed to the East Africans affected the future role of the courts in the independent constitutional systems of Kenya, Tanzania and Uganda because that law was peculiarly weak in the area of administrative law. Despite the use of the prerogative writs, in Britain the courts tend to defer, by definition and custom, to the statutory and administrative acts of Parliament and the civil service, respectively. There is neither a Constitutional Court (nor, of course, written constitutional prescriptions to invoke) as in the Federal Republic of Germany nor administrative Conseil d'Etat as in France to resolve constitutional or administrative grievances against the executive in a judicial or quasi-judicial forum. In the fourth edition of *The English Legal System*, Radcliffe and Cross describe the situation in England this way:

> With us the position in this field [i.e. administrative law] is most unsatisfactory. . . . [T]he new powers conferred on the executive by statute to enable it to administer the services provided by the 'Welfare State' have largely escaped judicial control. It is easy to be wise after the event and looking back one may say that the Courts had themselves to blame. If when the activities of the state began to


36Part of the predominance of the colonial administration was based upon the lack of any constitutional authority for the courts to review administrative acts and decisions. Judges could use only the prerogative writs relied upon in such situations in England. The Uganda High Court case of Ex Parte E. Province Bus Co. (1945) Ltd. v. Road Transp. Appeal Tribunal, [1959] E.A.C.A. 449 demonstrates the practical limitations of judicial relief in such situations. For a review of administrative law in Kenya, see McAuslan, *Administrative Law in Kenya—A General Survey*, 1966 *EAST AFR. L. TODAY* 23, 55-65.
increase at the end of the last and the beginning of this century the judges had extended the scope of the prerogative writs and adopted a less literal approach to the construction of statutes and statutory instruments they might well have been able to establish an effective control over administrative decisions and to build up a body of administrative law. In fact, however, they did not realise what was happening until it was too late. . . . Indeed sometimes, especially in the war years, they have shown an almost servile deference to the claims of the executive. . . . [I]t remains true to say that over a very wide field the executive is a law unto itself.37

The point here is that what is at its worst something of a judicial blindspot or incapacity in England may be a considerable congenital weakness in independent East Africa, where the political and customary constraints on executive power existing in England are not often present.

5. The nationality of the colonial bench

Prior to independence the High Court judges in Kenya, Tanganyika and Uganda were almost invariably European; they tended to come from either England, Ireland or the Dominions. After independence black judges trained in London were gradually appointed to the bench, coming first from the West Indies, then West Africa, and only in the middle and late 1960's from East Africa itself.

The race and social background of the members of the High Court (the only territorial court with jurisdiction in constitutional matters)38 therefore could have been a factor in the consideration by nationalist leaders of that institution's role in government after independence.39

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38Constitutional cases may be heard in a subordinate court, but appeal lies of right to the High Court. This was a standard feature of preindependence constitutions. See Judicial and Legal Systems in Africa, supra note 24.

39See Palley, supra note 7, at 11 n.70. It must be remembered that as the Executive Council, the administration, and the Legislative Council were gradually Africanized during the latter stages of the colonial period, the judiciary remained,
6. The association of the judiciary with English precedent and procedure

The national courts in East Africa have been engaged, since their establishment, in applying received English and Indian law to East Africans of diverse ethnic backgrounds. This was their assigned role during the colonial period when their public policy responsibilities were minimal, and both the bar and the litigants before them were usually of European or Asian nationality. But in modern Kenya, Tanzania and Uganda, on the other hand—all with both written constitutions that demand interpretation and new institutions of government unregulated by custom—courts that continue to be strictly bound by English precedents and procedures may never assume a credible, effective and secure place in a national constitutional system. Here one confronts the view expressed by Professor Charles Black and others that the peculiar anthropology of English public law may simply not have been able to provide a viable example for the judiciary in a new nation whose national government is both based on a written constitutional instrument and organized according to a separation of powers philosophy.  

7. Lack of security of judicial tenure

Before 1958, the tenure of a colonial judge was as stated in Terrell v. Secretary of State for the Colonies, i.e., “at the pleasure of the Crown: the Act of Settlement does not apply to them.” Orders in Council of 1958 afforded the colonial judiciary in Kenya and Uganda “a strict legal security of tenure of office on more precise terms than their brethren on the bench of England.” Rather than providing an even after independence, the preserve of highly professional and, it could be argued, socially isolated Europeans.

41The constitutional provisions strengthening judicial tenure were Kenya (Constitution) Order in Council, 1958, S.I. 1958, No. 600, § 61; Uganda (Amend.) Order in Council, 1958, § 2; and later, Tanganyika Order in Council, 1960, S.I. 1960, No. 1373, § 6.
42[1953] 2 Q.B. 482.
44Read, supra note 43, at 41.
admirable example for East Africa's future political leaders of the importance of an independent judiciary, this change, coming only a few years before independence, may have inspired only cynicism. And, as Professor Seidman has pointed out, "When the independence African Constitutions created judicial independence, they went far beyond the colonial position, and even beyond the English system."45

The above points have been considered to illustrate some of the difficulties facing East African courts at independence, when, for the first time, they assumed jurisdiction over the interpretation of a written constitution and were given authority to uphold constitutional limitations upon the exercise of government power.

III. THE INDEPENDENCE PERIOD

As independence inevitably approached, constitutional conventions held in London, with increasing African and Asian participation, produced a series of constitutions, and the outlines were drawn for "Westminster Model" parliamentary rule in each territory. Political parties began to crystallize around men or issues. Coalitions among indigenous politicians blossomed instinctively. Debate over the institutional distribution of authority began but never flourished; perhaps the momentum for independence in almost any form inhibited discussion of such a complex and potentially divisive problem. The paradoxical nature of the role prescribed for the constitution, and the national courts whose responsibility it was to interpret and uphold it, was described in an earlier section. Here it might just be emphasized that "[t]he Constitution, which during the colonial period has never been a determinant of power relationship [sic], suddenly becomes the centre of all controversies . . . . There is a tendency to view all political issues as problems for constitutional settlement."48

Various devices were used to dispense and inhibit governmental

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45Seidman, supra note 43.
46Ghai, supra note 7, at 410. For a lucid expansion of this, see Palley, supra note 7, at 20. For an explanation of the "dissonance" between the liberal East African independence constitutions and the "autocratic administrative structure" which the Africans inherited at independence, see McAuslan, supra note 11, at 8-9. There were, of course, attempts made during the colonial period to inhibit administration policy by reference to earlier Agreements or Orders in Council. These were normally denied. See Sobhuza II v. Miller, [1926] A.C. 518; Nyali Ltd. v. Attorney-General, (2) [1956] 1 Q.B. 1, especially Denning, L.J., at 15; Daudi Ndibarema v. Enganzi of Ankole, [1959] E.A.L.R. 552 per Sheridan, J. in the High Court of Uganda, appealed [1960] E.A.C.A. 47.

To the extent that constitutional disagreements influenced the immediate political positions of persons or groups involved in the negotiating process they were pursued. But the African participants seem to have accommodated themselves to the wishes of the Colonial Office, and in the end they accepted independence constitutions which greatly limited the authority of the national government generally and the executive in particular. In the words of Yash Ghai:

> It follows from the compromise nature of the Constitution that it provides for a weak form of government. Indeed all [three of] 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.

The independence constitutions, then, as McAuslan has said, introduced certain political/constitutional values to Kenya, Tanzania and Uganda which had not existed there before in any institutional form. Those values, of course, were liberal, democratic, procedural and Western. But the circumstances of nationhood raised new and possibly unforeseen problems of constitutional governance, and therefore applied new pressures upon the supposed protectors of those constitutions, the courts. In each country the national courts seem to have played a slightly different role in meeting these problems and pressures.

A. Kenya

Even before the adoption of the independence constitution in late 1963, constitutional developments in Kenya were beginning to establish a central role for the national courts in that country's public life. In 1960, based on decisions made at the Lancaster House Conference,

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47"Entrenched" is used here to mean that, de minimus, the legislative requirements for constitutional amendment are more extensive than for the enactment of ordinary statutes. See, e.g., the Tanganyika (Constitution) Order in Council, 1961, S.I. 1961, No. 2274, Schedule II, § 30; the Uganda (Independence) Order in Council 1962, S.I. 1962, No. 2175, Schedule I, § 5. In each nation these requirements were reduced in subsequent constitutions.

48Ghai, supra note 7, at 412-13.

49McAuslan, supra note 11, at 7.
and at the same time that a new Legislative Council was established, an extensive fundamental rights provision was introduced as a schedule to the Kenya (Constitution) Order in Council of 1958. In 1962 an Order in Council provided for appeals to lie to Her Majesty in Council direct from the Supreme Court of Kenya in matters involving the interpretation of the Kenya Constitution. (From other decisions there continued to be an appeal to the Court of Appeal for Eastern Africa.) In April, 1963 a self-government constitution became law, which provided the decentralization of authority desired by Kenya's racial minorities and by the Kenya African Democratic Union (KADU), (the main opposition party to the dominant Kenya African National Union (KANU)). A lengthy, complicated independence constitution followed in December of the same year. The Supreme Court of Kenya was authorized to interpret and uphold its provisions, which included an elaborate, justiciable bill of rights.

The constitutional position of the judiciary at independence was clearly defined and potentially an important one within the separation of powers framework of the independence constitution. The Chief Justice was to be appointed by the Governor-General (retained as representative of the head of state, the British sovereign), acting in accordance with the advice of the Prime Minister (Jomo Kenyatta), with the proviso that the latter obtain the concurrence of the Presidents of at least four Regional Assemblies. The puisne judges were to be appointed by the Governor-General acting in accordance with the advice of the Judicial Service Commission. Judicial tenure was secure—age, inability to perform, or misbehavior being the only grounds for removal other than through an elaborate referral process involving a recommendation for removal by the Judicial Committee of the Privy Council. Questions involving the interpretation of the Constitution were allowed immediate reference to the Supreme Court, which in those circumstances was to be composed of an uneven number of judges, being not less than three. The independence constitution excluded the Court of Appeal for Eastern Africa from jurisdiction in cases involving interpretation of the Kenya Constitution or contraven-

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53Id. at § 172.
54Id. at § 175(1).
tion of any of its human rights provisions.\textsuperscript{55} Appellate jurisdiction in these matters was explicitly extended as of right to the Judicial Committee of the Privy Council.\textsuperscript{56}

At independence, then, the structural position of the national courts was strong. Although the republican constitution of 1964 and the re-organization and restatement constitution passed in 1969 gave more control over the appointment and removal of judges to a strengthened President, there remained extensive provisions for fundamental human rights. And the High Court (formerly the Supreme Court) retained jurisdiction over the interpretation of the constitution and the enforcement of the protective human rights provisions.\textsuperscript{57} To an outside observer, the judiciary still seemed to occupy an important position in the national government of the country. In practice, however, this was not the case. The consensus among the most knowledgeable commentators seems quite clearly to be that the judiciary and the fundamental rights that it was constitutionally authorized to protect have had very little impact upon government and administration in independent Kenya.\textsuperscript{58} The High Court is simply not an important factor in the evolution of public policy in the community. Why?

To answer this, one must understand the strength of the executive administration in Kenya and the consistent emulation of English judicial and legal culture at all levels of the legal profession.

First, it must be remembered that the independence constitution which established the judiciary's responsibility for the interpretation of the constitution and enforcement of human rights was seen by the KANU government almost from the outset as an unfortunate expedient. That constitution's basic characteristic was regionalism and "[t]he Government saw the constitution as presenting a challenge to it, for which the Opposition was basically responsible. To conform meant to cease to exercise powers which had hitherto been considered necessary in Kenya to tackle problems which remained in existence notwithstanding independence. . . ."\textsuperscript{59} Prior to independence, public order, not human rights and judicially enforced limitations on ex-

\begin{itemize}
\item \textsuperscript{55} Id. at § 176(3).
\item \textsuperscript{56} Id. at § 180.
\item \textsuperscript{57} The Constitution of Kenya (Kenya Gazette Supp. No. 27) (Act No. 3), 18 April 1969, at §§ 67 and 84, respectively.
\item \textsuperscript{58} This is the ultimate conclusion, and a pervasive theme, of Y. Ghai & J. McAuslan, supra note 14, especially ch. 11.
\item \textsuperscript{59} McAuslan, supra note 11, at 17. See generally H. Bienen, Kenya: The Politics of Participation and Control (1974); C. Gertz, The Politics of In-
\end{itemize}
executive authority, had been the primary concern of the colonial administration.\textsuperscript{60} Border problems with Somalia increased this concern after independence. The government of Jomo Kenyatta felt constitutionally ill-equipped for the difficult job of nation-building and economic developments that it faced. Consequently, the constitutional changes of the first two years after independence sought to remedy the weaknesses of the independence constitution. These changes have been summarized as having the effect of:

- Increasing the powers of the executive;
- Decreasing the powers or status of the institutions whose function it was to control the executive; and
- Weakening the legal safeguards on the exercise of power by the executive.\textsuperscript{61}

At the same time that the executive branch and administration were being strengthened around the office of the President\textsuperscript{62} (A republican constitution was adopted in December 1964 which consolidated the head of state and head of government functions in Jomo Kenyatta.) and the Regional Assemblies established by the independence ("Majimbo") constitution were abolished, Kenya was becoming a de facto one party state. KANU absorbed the opposition in 1964 in a wave of national unity and became luxuriously inactive on the local level after that time.\textsuperscript{63} By 1966, KANU party officials were concerned about the rapid atrophy of local party organizations. In the electoral districts during this period, the members of the civil service began to exert more influence than elected officials. When KANU split in the spring of 1966, the government retaliated with a constitutional amendment (No. 5) forcing any member of Parliament (MP) who changed his party to stand in a by-election.\textsuperscript{64} An attempt to seek judicial relief

\textsuperscript{60} See, e.g., Corbett Ltd. v. Floyd, [1958] E.A.C.A. 389 discussed \textit{supra}. This preoccupation with stability and order may have been more pronounced in Kenya than in either Tanganyika or Uganda.

\textsuperscript{61} Y. GHAJ & J. MCAUSLAN, \textit{supra} note 14, at 511.

\textsuperscript{62} Id. at ch. 6. \textit{Compare} the powers accorded to the president in ch. II, pt. 1 and to the executive branch generally in ch. II, pts. 1, 2, and 3 of the \textit{KENYA CONST.} of 1969 \textit{with} the far less substantial powers accorded to the Prime Minister at independence.

\textsuperscript{63} Y. GHAJ & J. MCAUSLAN, \textit{supra} note 14, at 513; O. ODINGA, NOT YET UHURU 269-72 (1967).

\textsuperscript{64} Prior to these events, the percentage of votes required in Parliament to amend
from this amendment was initiated but never pursued or acted upon in the courts.

Also in 1966 a constitutional amendment (No. 3) was passed which excluded from operation of the guarantees of fundamental rights acts done while Kenya was at war or while Part III of the Public Security Act was in force. Giving wide discretionary powers to the national executive, this allowed for the use of preventive detention measures far beyond the intention of the independence constitution. Its effect was to broaden the control of the administration over national political life. And in addition to the political atmosphere and the constitutional amendment process, conventional statutory enactments extended very considerable administrative discretion to members of the executive branch at both the ministerial and local levels. In some situations judicial review of a Minister's decision was specifically ousted by the act itself. And in 1969 (the same year that the new opposition party, the Kenya People's Union (KPU) was banned and its leader, former Vice-President Oginga Odinga jailed) the Local Government (Transfer of Functions) Act was passed. This statute authorized the president to amend, by regulation, any act of Parliament so far as was necessary to transfer to the central government the functions of certain local authorities.

An anecdotal affirmation of this seemingly inexorable consolidation of authority in the executive is seen in a newspaper account of a National Assembly debate which took place on July 20, 1973. The Daily Nation of the following day reported the government's rejection of a motion by Mr. J. M. Seroney (MP, Tinderet) asking for constitutional clarification by amendment of the right of an MP to hold political meetings in his own district. Both Seroney and Mr. Mark Mwithaga, (MP, Nakuru Town), who seconded the motion, told of such meetings the Constitution was lowered, as was that needed for the extension of emergency powers. This particular amendment (No. 5), clearly a reaction aimed at punishing the opposition and strengthening the executive in Parliament, bypassed the Standing Orders of Parliament. Nothing similar had been suggested, of course, when KADU members had crossed the floor to join the government in 1964.

67See, e.g., the Development Plan and the Societies Act (No. 4 of 1968). See also Y. GHAI & J. MCAUSLAN, supra note 14, at 444-56.
68See, e.g., the Societies Act, supra note 67.
69(No. 20 of 1969).
being repeatedly “cancelled” by the District or Provincial Commissioners for “security reasons.” It might seem odd to an observer of this debate that although both MP’s complained of a denial of their constitutional right to “freedom of expression,” there does not seem to have been any mention of seeking judicial relief.

How did the courts respond to this trend? After charting the process of increasing presidential and administrative control of Kenyan public life, Ghai and McAuslan comment that:

On the surface the courts' power of review of administrative action is greater under an African Government than ever it was under the colonial authorities, and this power remains relatively un-molested. But it is not beyond the bounds of possibility that the reasons for the immensity of the court's control powers is that they are very infrequently exercised and when they are, it is rarely in the crucial areas—the courts' powers in other words do not really affect the administrative process.

The judicial tradition in Kenya, of course, is not much help here. Besides the obvious lack of constitutional limitations upon the colonial executive, the colonial judiciary accepted the ousting of its jurisdiction to review administrative acts and often demonstrated reticence in considering the merits of an administrative decision in situations where it did hear an appeal. An example of the former is the 1958 case of Re Marle's Application in which the Kenya Supreme Court followed the English precedent of Smith v. East Elloe Rural District Council and held that because section 10(5) of the Immigration Act of 1956 provided that the Minister's 'decision should not be questioned in any court, and since the Minister acted in an administrative rather than a judicial capacity, he was justified in refusing to allow the appellant to state his case or to know the evidence against him.

Even when they reached the merits, the colonial judiciary did little that would have inspired a principled adherence to fundamental rights and the rule of law in the hearts of post-independence courts. Attorney-General v. Kathenge concerned the validity of a curfew order whose application was restricted to Africans only. The order had

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70 The Daily Nation, July 21, 1973, at 4-5.
71 Y. GHAI & J. MCAUSLAN, supra note 14, at 303.
72 See supra note 36.
been issued under section 10 of the Public Order Ordinance, 1950 (as amended) which provided that such orders could be applied to "every member of any class of persons" specified therein. As has been noted elsewhere, "[w]ithout considering what might have been intended to be the proper purposes of this phraseology, the court held that it permitted racial discrimination." 76

Certainly since independence there have been occasions when the judiciary has exercised its authority in such a way as to enforce an individual's rights against an administrative body. In *Haridas Chhaganlal v. Kericho Urban District Council* 77 the Supreme Court ruled that the District Council had applied bylaws which were *ultra vires* for unreasonableness. In the well known cases of *Madhwa v. City Council of Nairobi* 78 and *Devshi & Co. v. Transport Licensing Board* 79 the courts did review and declare invalid for unconstitutionality acts of public authorities which were found to be racially discriminatory. 80 In *Muhuri v. Attorney-General* 81 the court held that administrative machinery established by statute for the settlement of claims for compensation for loss of property under the Stock and Produce Theft Act was unconstitutional because it lacked the essentials of a court procedure. Such procedures were considered to be required by Article 19 of the Constitution upon any compulsory taking of property. But such cases have been rare. 82 And they may be even more rare in the future:

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80 See Y. GHAI & J. MCAUSLAN, *supra* note 14, at 422-24 for a discussion of these cases. Both *Madhwa* and *Devshi* were straightforward and important examples of judicial review of administrative decisions in protection of the individual according to provisions prohibiting discrimination against Kenya citizens. The provisions used were KENYA CONST. of 1963, § 26 (in *Madhwa*), and § 82 (in *Devshi*). See also *Re Maangi*, [1968] E.A.L.R. 637. But it must be remembered that the Kenyan Constitution allows legislation which discriminates against non-citizens. KENYA CONST. of 1963, § 82(4)(a). This has allowed the Kenya Government to move against Asian non-citizen traders on a racial basis without offending § 82 of the Constitution. *See generally* Y. GHAI & J. MCAUSLAN, *supra* note 14, at ch. 11.
82 For an affirmation of the fundamental right to compensation in cases of compulsory acquisition of property, see *New Munyu Sisal Estates, Ltd. v. Attorney-General of Kenya*, [1971] K.H.C.D. 120. An order by a chief prohibiting preaching without his permission was held unconstitutional in *Ali Bin Abubakar v. Republic*, [1972]
The Kenya Constitution now provides, through broad qualifying language, that the fundamental right to personal liberty, protection against arbitrary search or entry, freedom of expression, of assembly and association, freedom of movement and protection from discrimination on grounds of race, etc., may be derogated from by legislation.8

The fact of the matter is that judicial review of legislation or administrative action has neither occurred with any frequency, nor caused a significant public impression in Kenya. Judicial relief from violations of the Constitution's separation of power prescriptions is practically unheard of. Relief for human rights violations is occasional and rarely


8The qualifying language in the following text of KENYA CONST. of 1963, § 76, the Kenyan constitutional provision protecting against arbitrary search or entry is representative and illustrative:

76.—(1) Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—

(a) that is reasonably required in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development and utilization of mineral resources, or the development or utilization of any other property in such a manner as to promote the public benefit;

(b) that is reasonably required for the purpose of promoting the rights or freedoms of other persons;

(c) that authorizes an officer or agent of the Government of Kenya, or of the East African Community, or of a local government authority, or of a body corporate established by law for public purposes, to enter on the premises of any person in order to inspect those premises or anything thereon for the purpose of any tax, rate or due or in order to carry out work connected with any property that is lawfully on those premises and that belongs to that Government, Community, authority or body corporate, as the case may be; or

(d) that authorizes, for the purpose of enforcing the judgment or order of a court in any civil proceedings, the entry upon any premises by order of a court,

and except so far as that provision or, as the case may be, anything done under the authority thereof is shown not to be reasonably justifiable in a democratic society.
occurs in controversial or sensitive areas. Yet it has not been any weakness in its constitutional position which has kept the High Court of Kenya from exerting itself as an "institution of control" on the other two branches of government in the country. Rather, at least in part, and as McAuslan and Ghai have argued, the answer lies in the pervasive control of public policy by the Kenyatta administration and the attitudes of those in positions of responsibility within the legal profession, the law enforcement establishment and the judiciary. In their view:

- The legal profession has not shown any appreciation of the possibilities of challenging the validity of laws and their administration;
- Individuals and political parties are seldom aware of the extent of their rights;
- No provisions exist for legal aid; and
- The courts lack experience in deciding litigation of this kind, and in any event are too ready to accept the arguments of the Executive.8

As stated above, in Kenya the constitutional structure exists for an active judicial role in the constitutional life of the country; however, the inclination to exercise the authority inherent in its constitutional charter seems to have not been present. In Kenya, one is forced to conclude that despite the adherence to formal constitutional appearances, practical executive authoritarianism is the reality of political life.

B. Tanzania85

Whereas in examining the role (or non-role) of the national courts in the government and administration of public policy of Kenya one is, more than anything else, struck by the stark contrast between constitutional appearances and reality, even a cursory look at Tanzania sug-

84 Y. GHAI & J. MCAUSLAN, supra note 14, at 455 & chs. 11, 13.
85 As mentioned at the outset, this discussion of the role of the national judiciary in Tanzania will be without reference to Zanzibar despite the ratification on April 26, 1964 of Articles of Union between those islands and Tanganyika. One reason is that the administration of justice is not an area of government which the Articles reserved for the United Republic. There is still a High Court in Zanzibar theoretically co-equal to the High Court of Tanzania, which serves the mainland only. Both McAuslan, supra note 11, at 11, and H. MORRIS & J. READ, supra note 14, at ch. 9, refer to the unusual constitutional and judicial situation in Zanzibar.
gests that something quite different is happening. As two commentators have suggested upon compiling and reviewing the speeches and writings of Mr. Justice Telford Georges, "one discerns an attempt to forge a completely new relationship between the Bench, Bar, Society and Government—a relationship of inter-dependence."

An understanding of the role of the judiciary in the constitutional structure of Tanzania requires some knowledge of the unusually tranquil pre-independence political atmosphere in the territory, a realization of the great impact that Julius Nyerere's personality and philosophy have had on the country, and the political/ideological values upon which post-independence Tanzanian society is based.

Tanganyika was the first East African nation to achieve independence, doing so on December 9, 1961. By that time the Tanganyika African National Union (TANU) had swept every election and its leader, Nyerere, had gained the respect and support of nearly all the territory's many ethnic and racial groups. Prior to independence the colonial administration in Tanganyika had fewer local political factions, either indigenous or immigrant, to contend with than did the administrations of Uganda and Kenya. The Indirect Rule System established by Governor Cameron in the 1920's ran relatively smoothly. Though the administration's control over the local judiciary was quite complete, the Resident Magistrates and High Court judges were more

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88 Chief Justice of the United Republic of Tanzania from 1965 to 1971.


90 Independence came quickly and with relatively little British apprehension of its arrival for several reasons: Tanganyika was the poorest economically of the East African territories; its European settler population was small and relatively apolitical; its ethnic composition was so diverse that special constitutional protection for recognized minorities was considered much less necessary than for either Kenya or Uganda; Tanganyika was administered as a U.N. trust territory and therefore not only invoked greater international interest in her independence, but also did not represent the same national loss to Britain as did the other two territories; and, perhaps most importantly, Julius Nyerere led the indigenous African political forces in a manner reassuring to the British colonial administration. See generally B. Chidzero, Tanganyika and International Trusteeship (1961); H. Bienen, Tanzania: Party Transformation and Economic Development (rev. ed. 1970).


independent of the administration. And in 1960 judges of the High Court of Tanganyika were granted significantly greater security of tenure.91

At independence the appointment and removal provisions of the independence constitution relating to judges of the High Court were much like those in Kenya's 1963 constitutions.92 Appeals lay to the Privy Council and, in certain cases, to the Court of Appeal for Eastern Africa. The High Court of Tanganyika had jurisdiction over the interpretation of Tanganyika's constitution. But for the purposes of this essay, and as an early indication of the future role of the judiciary in Tanganyika, the most significant aspect of the independence constitution was its lack of any justiciable fundamental human rights provisions. It is arguable that this immediately limited the potential for the courts to be a significant source of protection for an individual against excessive executive authority or discriminatory legislative enactment. But it also limited some of the potential for tension between the executive and the judiciary. The lack of a bill of rights will be discussed further in the context of what became Tanzania's unique approach to the problem of the role of the judiciary in a developing state.

Although Tanganyika's independence constitution was less restrictive in terms of limitations upon the executive branch than those of Kenya and Uganda,93 the decision was taken within two months that major changes were necessary. Prime Minister Nyerere resigned from office in order to work for national unity through TANU. Study of a republican constitution began shortly thereafter. Why this almost immediate move to revise the independence constitution? McAuslan has written that the three major reasons were a basic dissatisfaction with:

— The seemingly artificial and, to many Africans, incomprehensible separation of functions between Head of State and Head of Government;

91See supra notes 42-44.
92But there was an exception that in Tanganyika there were no regional presidents who had to approve of the appointment of a Chief Justice. See the Tanganyika (Constitution) Order in Council, 1961 S.I. 1961, No. 2274, § 59(1). In the case of puisne judges the position was the same in all three independence constitutions: appointment by the Head of State (the Governor-General) in Kenya and Tanganyika, the President in Uganda, in accordance with the advice of the Judicial Service Commission. This appointment process was opposed by all three elected Heads of Government; its alteration was among the first constitutional adjustments made after independence.
—The absence of a clear constitutional role for the party (TANU);
—The absence of effective political control over the civil service.\textsuperscript{94}

On December 9, 1962, Tanganyika became a republic. Julius Nyerere, having both observed the administrative efficiency of Tanganyika's colonial system of indirect rule and experienced the problems of organizing TANU in the 1950's, felt that "the needs of economic development overrode the claims of undiluted liberal democracy. A strong centralised executive was required to urge, if necessary, to compel the country forward and this made a change from the diffused and confusing Westminster model imperative."\textsuperscript{95}

In the early change to a republican constitution Nyerere's philosophy of government began to crystallize; and it is in the context of this philosophy that the constitutional role of Tanzania's judiciary must be studied. The appointment, security of tenure, or jurisdiction provisions of any of the three different constitutions that the country has had since independence hold few secrets as to the actual position of the national courts in the separation of powers system of independent Tanzania. One would benefit more from studying the Arusha Declaration of 1967 and its plan of an egalitarian socialist society for Tanzania.

Nyerere's particular views of constitutions and courts themselves are interesting. Constitutions seem to have been regarded as symbols of political legitimacy or "acts of national rededication,"\textsuperscript{96} but not as binding bodies of rules whose letter and spirit prescribe all legitimate acts of government. Ghai has said of Nyerere that:

\begin{quote}
[H]e does not regard the constitution as solving all the nation's problems or defining all power relationships. He has argued that in the absence of an appropriate national ethic, the Constitution can be of little avail; therefore, there are and have to be forces outside the Constitution which determine the way the power given by the Constitution is to be used. This concept of power outside the Constitution is a key to the understanding of Tanzania's constitutional experiments. . . .\textsuperscript{97}
\end{quote}

And on the persistent problem of balancing the need for public order with the desire for personal freedom, Nyerere has said that:

\begin{itemize}
  \item [\textsuperscript{94}]McAuslan, \textit{supra} note 11.
  \item [\textsuperscript{95}]\textit{Id.} at 18.
  \item [\textsuperscript{96}]McAuslan, \textit{supra} note 7, at 154.
  \item [\textsuperscript{97}]Ghai, \textit{supra} note 7, at 419.
\end{itemize}
The principles of individual freedom and the rule of law require that no person is arrested and held without quickly being convicted of illegal actions. But we know that we cannot always get the proof necessary for conviction, especially in cases of subversion, corruption and intrigue. Yet if we then adhere to the principles of the rule of law, without any exception, our young democracy—and these principles themselves—may be the sacrifice.\(^8\)

Yet despite the absence of justiciable fundamental rights provisions in either the independence constitution, the republican constitution, or the interim constitution of Tanzania devised in 1965 after the Union with Zanzibar, and Nyerere's general view of constitutions, Tanzania has consistently stressed the importance of the rule of law and the independence of the judiciary. A month prior to independence, Julius Nyerere stated, “Our judiciary at every level must be independent of the executive arm of the State.”\(^9\) And in January 1964, when the Presidential Commission on the Establishment of a Democratic One-Party State received its presidential directives and guidelines, the second of six points specifically placed beyond the competence of the Commission to reconsider was that the rule of law and the independence of the judiciary should be preserved.

This may have been either contradiction or cynicism, or perhaps both; but it is equally arguable that it is neither. For the operative judicial philosophy borne of this seeming conflict is that Tanzania's judiciary, finally fully integrated and separated from the executive administration by the Magistrate's Court Act of 1963,\(^{10}\) is both independent of the executive and excluded from decision-making in important areas of public policy. In fact, seen in this light, the first fifteen years of Tanzanian independence indicate the goal of establishing an independent judiciary, free to settle disputes without fear of direct political pressure or retribution, and with an increasingly clear identification with the societal goals of TANU, but with a limited ability to review the acts of public policy makers, whether those acts be legislative or executive.

The tone of this constitutional role was first enunciated in Tanganyika in the “Proposals of the Tanganyika Government for a Republic.”

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\(^8\)J. NYERERE, FREEDOM AND UNITY 6 (1966). These remarks were made at the first formal ceremony of University College, Dar es Salaam, Tanzania (then Tanganyika) on October 25, 1961.

\(^9\)J. NYERERE, supra note 98, at 131.

The proposals stated, "[T]he rule of law is best preserved, not by formal guarantee in a Bill of Rights which invite conflict between the executive and the judiciary, but by independent judges administering justice free from political pressure."^{101} (emphasis added)

This point is made again and amplified in the 1965 Report of the Presidential Commission on the Establishment of a Democratic One-Party State.^{102} There a justiciable bill of rights and the judicial review that it would require were rejected for the following reasons (presented in various states of paraphrase):

1. The reduction of ethical propositions about government into print may allow the letter of the law to replace its spirit.
2. A bill of rights which limits in advance of actual events the measures a government may take to protect itself from subversion may be a luxury that new states cannot afford.
3. A government could so hedge such statements of rights with qualifications that it provides little protection for the individual and induces cynicism about the whole process of government.
4. A bill of rights could invite conflict between the judiciary and the executive and legislature.
5. Involvement of the judiciary in political controversy would make more difficult the impartial administration of the law.
6. At independence the judiciary in Tanganyika was almost entirely expatriate.
7. Tanganyika's plans for development will necessitate revolutionary changes in the social structure. Decisions concerning the extent to which individual rights must give way to the wider considerations of social progress are not properly judicial decisions.^{103}

An avoidance of judicial involvement in politically sensitive issues, however, is only one side of Tanzania's particular approach to the role of the courts. While "independent" the Tanzanian judiciary is not "separate" from the predominate political philosophy and institutions of the nation. Chief Justice Telford Georges, the first man of African descent to sit as the highest judicial officer in Tanzania, has written about the problem of the role of the judiciary in a one-party state such as Tanzania. He has admitted that the result of the combination of


^{102}This commission was chaired by Vice-President Rashidi Kawawa. See comments by Mwendwa, supra note 12, at 18.

^{103}See the 1965 Report of the Presidential Commission on the Establishment of a Democratic One-Party State ch. 21 (Gov't Printer, Dar es Salaam 1965).
the colonial legacy, the expatriate bench, a one-party policy, and the government's plans for nation-building was:

[A] growing concern over what the term "independence of the judiciary" meant and what the result of such independence would be in a society where the party was so powerful. In that regard some rethinking is necessary. The concept of the Judge as the neutral, belonging to no party in the multi-party democracy, can have no meaning here—where there is one party. If he stands aloof seeming to play the a-political role which is supposed to be his, his motives will doubtlessly be suspected. A new way must be found.\textsuperscript{104}

The "new way," it is submitted, is a kind of Tanzanian "strict construction" approach to the constitutional role of the national courts, allowing for both judicial independence and the integration of the judiciary into the political mainstream of the party and nation.

By "strict construction" is meant that although certain areas of judicial review of official acts remain,\textsuperscript{105} the practical reality of judicial

\textsuperscript{104}Georges, \textit{supra} note 90, at 27.

\textsuperscript{105}The \textsc{Tanzania Interim Const.} of 1965, § 64 provides that an appeal shall lie as of right direct to a full bench of the High Court from final decisions of any court or judge in Tanzania on questions as to the interpretation of the Constitution. The decision of the full bench is to be final. According to Section 36 of the Constitution, any question regarding membership in the National Assembly is part of the exclusive jurisdiction of the High Court. And while the National Executive Committee of TANU has been accorded the same powers and privileges, \textit{e.g.}, to take evidence, as has the National Assembly, (National Executive Committee (Powers and Privileges) Act 1965 (No. 49 of 1965)), contempts of the Committee's authority are punishable only through the courts. There have been some, though relatively few, constitutional and administrative law cases in which official authority has been challenged. For cases arising out of the 1965 National Assembly elections, see Re K. A. Thabiti, [1967] \textsc{E.A.L.R.} 772; Ayo v. Simeon, [1967] \textsc{E.A.L.R.} 229, in both of which election results were declared void; Bura v. Sarwatt, [1967] \textsc{E.A.L.R.} 234; Mbowe v. Eliufoo, [1967] \textsc{E.A.L.R.} 240. \textit{See also} Isango v. Republic, [1968] \textsc{E.A.L.R.} 140, in which Georges, C.J. allowed the appeal of a local TANU official from a conviction for corruption; Konywaki v. Republic, [1968] \textsc{E.A.L.R.} 195, in which the petition alleging a wrongful arrest was dismissed; and In the Matter of a Petition by Habel Kasenga, [1967] \textsc{E.A.L.R.} 455, in which the court acknowledged the ouster of its jurisdiction by the Local Government (Elections) Act, 1966, § 78(2). On the other hand, the High Court has demonstrated its independence by holding that derogatory remarks about the Vice-President did not constitute the crime of using obscene language likely to cause a breach of the peace. Republic v. Kunanga, [1972] \textsc{H.C.D.} (Tanz.) 181. And there have been a series of cases upholding the right to bail. Republic v. Ally, [1972] \textsc{H.C.D.} (Tanz.) 119; Republic v. Olale, [1972] \textsc{H.C.D.} (Tanz.) 198; Republic v. Ahmed Panju, [1972] \textsc{H.C.D.} (Tanz.) 161; and Jaffer v. Republic, [1972] \textsc{H.C.D.} (Tanz.) 92.
review, in its traditional sense, exists even less in Tanzania than in Kenya or Uganda. As Chief Justice Georges admitted:

It may well be that the High Court of Tanzania has no such power. . . . It seems unlikely that the courts would seek such a role today—though it could be urged that they could legitimately pronounce against any law which patently cut across any of the aims for which the Constitution has been established—e.g. the existence of free and impartial courts. The argument would be fascinating.106

Georges believed that a colonially instituted legal system could realize the new ideals of socialism without fundamental structural changes. He also believed, however, that the judiciary could neither remain apart from the process of nation building107 nor fail to identify with party politics.108 His thesis about the role of a judiciary in a developing state has been summarized as follows: "An independent judiciary can better be realised when the personnel involved are equipped with the ability to base their decisions on predetermined normative premises."109 And yet Georges was opposed to a deprofessionalization of the legal and judicial functions, and he supported a separation of powers constitution.110 But perhaps Georges' greatest contribution, and the one that differs most from the highly Anglicized, formal and urban nature of bar and bench in neighboring Kenya, was that:

He took every opportunity, whilst on circuit, to visit remote rural areas and educate the people on the role of the judiciary and how best they could help in the administration of justice. So as to make the courts as informal a place as the traditional baraza he dispensed with the wearing of wigs.111

A final factor of importance in considering the nature of the Tanzanian judiciary is the introduction, in 1966, of an administrative om-

But compared to Kenya and Uganda there are very few Tanzanian cases reported which involve constitutional or even administrative law issues.

106Georges, supra note 90, at 26.


108Branches of TANU have been opened in the High Court as in many other government departments and parastatal organizations. See, Georges, supra note 90, at 58 n.8.

109Supra note 87, at 6.

110Id.

111Id.
budsman: the Permanent Commission of Enquiry (PCE). The three members of the Commission are appointed by the president for non-renewable two-year terms. They are to travel the countryside hearing complaints against members of the administration and non-statutory as well as statutory and governmental bodies. Their investigations are not to be barred by statutory finality clauses (as the courts often are), information may be compelled, and they may conduct their hearings in private. A hearing need not be extended to any person accused of misconduct except those on whom the Commission comments adversely in one of their annual, confidential reports to the president. The reports are addressed to the president only, and it is he, not the PCE, who then prepares a report for the National Assembly.

Despite the central control of the president and the lack of public knowledge concerning the resolution of those complaints found to be justified, the PCE does provide a forum in which an individual, injured by the wrongful or capricious exercise of official authority, can seek protection and/or compensation. The PCE provides, in a Tanzanian fashion, a form of review of administrative action which, as McAuslan has said, is more relevant and comprehensible to Tanzanians "than the High Court with its paraphernalia of prerogative writs and orders."

In the first three years of its operation there were forty-eight complaints filed against Regional Commissioners, seventy-five against Area Commissioners and a considerable number against the judiciary, although judicial decisions as such are outside the Commission's jurisdiction. Twenty of these were considered justified by the PCE.

Whether or not the Permanent Commission of Enquiry, without any executive powers of its own, will provide sufficient protection for the individual in a state with a rapidly expanding public sector remains to be seen. At present, it at least remains a creative attempt at providing a forum to which the common individual can go for a hearing and possibly relief when he feels that his government has not dealt with him fairly.

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112See the Act to Prescribe the Procedures, Powers, and Privileges of the Permanent Commission of Enquiry, 1966 (No. 25 of 1966). For the extension of the PCE's jurisdiction, see the Interim Constitution of Tanzania (Amendment) Act (No. 4 of 1966).


114McAuslan, supra note 7, at 170.

115See Norton, supra note 113, at 624.

116Id. Norton's work explains the publicity function of the PCE's trips around the
One sees in Tanzania, therefore, an active effort being made to find a role for the courts and perhaps innovative systems for the administration of justice which will meet the needs of a developing, one-party socialist society which retains a constitutional and philosophical commitment to the rule of law. But enormous tensions remain. Yash Ghai has written on the inevitable but, he thinks, reconcilable conflict between law and ideology in socialist Tanzania. Rude James has examined the dual forces of “expediency” and “legality” in his incisive examination of the role of the law, lawyers and the judiciary in the implementation of Tanzania’s social and political goals. James expressed concern over “the cavalier approach to traditional land tenure” and “the continuing and increasing infringement of the State and Party functionaries in the actual decision-making process of the courts.”

The concepts of law, judges, and courts are in something of a state of flux in Tanzania. In the meantime, within its unambitious constitutional role, the judiciary appears to be operating independently. The dynamism and uncertainty are real, probably necessary.

C. Uganda

Professor Ali Mazrui of Makerere University in Kampala has argued that prior to 1966 a vigorous tradition of constitutionalism existed in Uganda. In Mazrui’s words, “For our purposes . . . we define ‘constitutionalism’ broadly to mean a procedural approach to politics; a faith in legal solutions to political tensions; a relatively open society with institutionalized competition for power in the polity.” And as “legal solutions to political tensions” necessarily involve the courts, if Mazrui’s assessment is correct the role of the judiciary in Uganda should be immediately distinguishable from that in either Kenya or Tanzania. As discussed above, Tanzania has developed its own unique constitutional structure and perception of the judicial role, and in Kenya, despite constitutional appearances, the judiciary has little im-

countryside, the width of their jurisdiction, the “poor man’s lawyer” function of the Commission, and the fact that the simple, straightforward explanations of the Annual Reports are comprehensible to most Tanzanians.

19Id. at 190.
pact upon public policy. But in Uganda there have been a series of important constitutional cases, both before and since independence in 1962, which have directly involved judges of the High Court of Uganda in the resolution of important public problems.

Why was Uganda different in this regard? The answer may lie in the social structure and history of the country, in a colonial judicial experience somewhat different from its neighbors, and in the institutional struggle for influence in independent Uganda which intensified during the constitutional studies done by the Wild and Munster Commissions in 1959 and 1961, respectively, and continued in the National Assembly and the country until 1966.

The existence of the traditional, autonomous kingdoms of Buganda, Ankole, Bunyoro and Toro, each with a relatively advanced political organization, caused the British government to enter into separate agreements with them early in the colonial period. Although later decisions in both the High Court of Uganda (Daudi Ndibarema v. The Enganzi of Ankole) and the Court of Appeal for Eastern Africa (Katikiro of Buganda v. Attorney-General of Uganda) declared that these agreements could not be invoked as part of the municipal law of Uganda to limit subsequent acts of the central colonial administration, they did represent to the communities concerned a source of authority and legitimacy separate from that of the national administration. An inevitable pluralism was the result, followed, arguably, by a tendency to find legal solutions to political disputes earlier than is seen in Kenya and Tanzania. These peculiar colonial arrangements were essentially preserved in the quasi-federal nature of the independence constitution of Uganda.

An example of this phenomenon was the 1965 case of Attorney-General of Uganda v. The Kabaka's Government involving the allocation of revenue to Buganda from the central government, a highly political issue in the country at that time. The case is noteworthy for two reasons. First is that an issue of such sensitivity should be left to the decision of the courts. Second is Slade, J.'s assertion of the

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111Even the 1955 Buganda Agreement was seen there as a protection against unilateral change on the part of the colonial administration.


114See Ghai, supra note 7, at 428-29.

right of the High Court to rewrite the paragraphs of the Ninth Schedule to the 1962 constitution because the court would not be departing from the intention of the legislature in doing so. This type of judicial initiative is not easy to find in Kenyan or Tanzanian decisions. A similarly activist position was assumed by Bennett, Ag., C.J., in *Jowett Lyaboga v. Bakasonga*. There the High Court found for the plaintiff against six elected members of the District Council of Busoga and a man elected as Kyabazinga of Busoga, and in so doing invalidated the defendants' membership resolution which had already been approved by the Governor of Uganda.

An early example of professional legal interest in constitutional matters in Uganda was the "Petition against the Bill" (the Native Courts Ordinance) presented to the Legislative Council by the Uganda Law Society in April, 1932. The Society's first argument against the proposed subordination of the native courts to administration control was that the Ordinance would be unconstitutional, as the Governor could not act as court of appeal without being in conflict with his executive position as sovereign's representative. The Ordinance was finally passed despite the objections of the Law Society in 1940.

The provisions in the 1962 independence constitution relating to the appointment, tenure and jurisdiction of the High Court were similar to those in the independence constitution of Kenya. This constitution was long and complex because of its quasi-federal nature; it contained extensive human rights provisions which the courts were authorized to uphold. It allowed special status for all four kingdoms and the district of Busoga, but provided Buganda with unique, and constitutionally entrenched, privileges. As McAuslan has suggested, this compromise constitution "can be seen as the continuation of the

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118 Slade, J., sitting with Udo Udoma, J. and Bennett, J., elaborated as follows:

[W]e are of the opinion that provided we can ascertain the intention of the legislator from the rest of the Independence Order and Constitution, aided by a consideration of the surrounding circumstances and historical background, we should not hesitate to modify the language used in order to give effect to the intention. *Id.* at 403.


116 See H. MORRIS & J. READ, supra note 14, at 150-51. Other factors are cited which distinguish Uganda from either Kenya or Tanganyika, e.g., longer contact with Europeans, higher percentage of literate Africans.

115 Except, of course, that Buganda had its own High Court until it was abolished in 1966. The relevant provisions relating to the Judicature of Uganda are §§ 83-91, *UGANDA CONST.* of 1967.
conflict between Buganda and the rest of the country, the need to try and contain that conflict, and obtain advantages by the manipulation of the constitutional rules.\textsuperscript{180} This constitution, but especially the necessarily compromising attitude of the competing political factions, may have significantly encouraged an atmosphere in which the judiciary was called upon, and felt able, to play out its constitutionally prescribed role.

Even after the 1966 coup d'état, in which neither the courts nor the fundamental rights provisions of the independence constitution suffered significant apparent injury, both the judicial consideration of difficult constitutional cases and an active public debate of constitutional issues continued.\textsuperscript{181}

In 1966 the High Court of Uganda sat in judgment of the legitimacy of its own government in the famous constitutional case of Uganda v. Commissioner of Prisons, Ex Parte Matovu.\textsuperscript{182} The constitutional subtleties of this case could be the subject of an entire essay. Most significant for present purposes was the court's direct involvement in a highly political matter concerning both the government's powers of preventive detention under a provision of the new interim constitution of April 1966 and the validity of that constitution itself. The case resulted in a judicial decision favorable to, and relatively uncritical of, the Obote government on both counts. The opinions of Sir Udo Uduma, C.J. and Sheridan, J. are elaborate and deserve study.\textsuperscript{183} But despite the outcome, Ex Parte Matovu is of interest because of the central role played by the nation's highest court in the resolution of the most fundamental constitutional issue that can face any country: the legitimacy of the constitution itself.

The point is that Matovu, despite its ruling in favor of the government, is only the best known and most interesting of a series of con-

\textsuperscript{180}McAuslan, supra note 11, at 17.

\textsuperscript{181}After Obote's February 1966 coup d'état an interim constitution was issued and passed by the National Assembly in April. The permanent Constitution of 1967 was enacted a year later. Ghai has written with regard to the 1966 coup led by Obote, supra note 7, at 430, "It is indicative of the strong roots that constitutionalism had taken in Uganda, that his régime soon began the search for a return to constitutionality."


institutional cases decided in Uganda during the 1966-1971 period. At that time President Obote was expanding his own power within the government and the country. Nation-building and the need for national unity were used to rationalize the centralist 1967 constitution and greater executive authority generally. The Obote government, armed with new and broad powers of preventive detention, was becoming increasingly sensitive to criticism and precipitated the well-known Transition magazine sedition trial in 1969. That trial occasioned much publicity and inspired a courageous decision against the government and in support of freedom of expression and due process by Chief Magistrate M. Saied. In fact, 1969 was a key year for the Obote regime: It saw the issuance of Uganda's version of the Arusha Declaration (called the Common Man's Charter), the Transition trial, an attempt on President Obote's life in December, and the subsequent Declaration of Emergency, which gave the executive special powers to maintain public order.

It is difficult, if not impossible, to assess the impact that these developments had on the national courts. In some important constitutional (Matovu, supra) and human rights cases (G. S. Ibingira v. Uganda and Ochieng v. Uganda) the High Court found for the Government. In both of the latter, the High Court upheld pre-trial practices which represented a substantial diminution, if not abrogation, of section 19 of the Uganda Constitution concerning the right to personal liberty. And there were, as might be expected from a judiciary still stiffened by English formalism, cases involving constitutional issues which were dismissed on technical grounds (e.g., Odongkara v. Kamanda). But there were also decisions which reflected the brighter moments of Uganda's constitutional past and the judiciary's ability and occasional desire to play a significant role therein. In Muyimba v. Uganda the High Court of Uganda nullified

14 On the 1967 Constitution see generally Mayanja, The Government's Proposals for a New Constitution in Uganda, 32 TRANSITION 20 (1967); Akena Adoko, The Constitution of the Republic of Uganda, 33 TRANSITION 10 (1967). At this time there was beginning to be some debate over the role of the judiciary in a developing society. See Ali, Ideological Commitment and the Judiciary, 36 TRANSITION 47 (1968). But the debate never attracted the attention, participation, or sophistication that somewhat similar discussions did in Tanzania.

185 Reported in 38 TRANSITION 47 (1971).


a criminal conviction and ordered a new trial because of a contraven-
tion of section 15(2)(d) and (e) of the 1967 constitution concerning the
right to counsel. In Shah v. Attorney-General of Uganda\textsuperscript{140} the High
Court found for the plaintiff against the Government, holding the lat-
ter liable to the plaintiff on an obligation owed him by the defunct
Buganda government and which had been assumed by the central
government. The Court of Appeal for Eastern Africa upheld this judg-
ment in a decision highly critical of the Uganda government. Although
in In Re Ibrahim\textsuperscript{141} the High Court upheld the validity of a ques-
tionable detention order issued under the Emergency Powers (Deten-
tion) Regulations, 1966, the court was pointedly critical of the govern-
ment's use of its emergency powers in ordinary criminal cases. In West
Nile District Administration v. Dritoo\textsuperscript{142} the Court of Appeal for
Eastern Africa affirmed a decision of the High Court of Uganda\textsuperscript{143}
which held the defendant administration vicariously liable for false im-
prisonment by its police officers.

The process of determining the judicial role within the increasingly
authoritarian one-party government of Milton Obote was cut short by
a military “coup d’etat” on January 25, 1971. This was only one month
after Obote had been elected to a seven-year term by the Uganda
People’s Congress. General Idi Amin Dada has been the self-proclaimed
head of state since February 2, 1971, on which date he announced
that all executive and legislative powers would be vested in himself.
Under the present regime it is hardly informative to study the in-
dependence or “constitutional” role of the national courts. Certainly
cases are still being litigated,\textsuperscript{144} but the courts cannot now be expected

\textsuperscript{144}In at least three cases since the coup the High Court of Uganda has held
against the Government in situations of some political sensitivity. See Sengendo v.
the Government responsible for the unlawful shooting of the plaintiff by soldiers
(although the incident had taken place prior to the coup). See also Namwandu v.
137, in which the High Court upheld the right to bail, even where the crime was
serious, if there was likely to be considerable delay before the trial. An ambivalent
decision (but again one concerning an incident which took place under the Obote
government) was Nsubuga v. Attorney-General, Uganda, [1974] E.A.L.R. 1, in which
the High Court, although finding a Minister’s Detention Order not challengeable,
to provide a check upon the arbitrary exercise of official authority. During the tenure of the Amin regime Chief Justice Kiwanuka was physically removed from his courtroom by soldiers and, later, found murdered.

Since 1971, therefore, significant constitutional debate has ceased in Uganda. Whether the Obote government, and the High Court judiciary serving thereunder, would have begun to look for new approaches to the problems of law and courts in dynamic, developing societies (as Tanzania has), retreated into passive formalism (which has characterized the Kenya judiciary's participation in constitutional life), or somehow built upon its own meager but promising tradition of pluralism and judicial activism, no one can tell. What will happen when constitutional government returns to Uganda is equally uncertain.

IV. TENTATIVE CONCLUSIONS

Summary judgments have been offered on each of the three countries discussed above. No reiteration of those ideas will be attempted here. Most of the commentators that have looked at the problems of constitutions, courts and the rule of law in East Africa have offered one or more explanations of the situation. Professor J.N.C. Paul has, in a concise and thorough summary, compiled a compendium of the factors that scholars and statesmen have suggested explain the limited successes and rather glaring failures of democratic constitutionalism and judicial review in Africa. It would be of little benefit to attempt to summarize that summary. Perhaps for present purposes, however, its most important implication is that despite past shortcomings, constitutions, courts and the notion of the rule of law, seen in new ways through enlightened eyes, have too much potential as vehicles for orderly and progressive development and the protection of human dignity to be cast aside as no longer relevant or workable. What is needed, Professor Paul and others suggest, is new inter-disciplinary examination of old ideas, present institutions and future needs. In short, we need work and debate which will better enable us "to see the problems in new contexts." This process of bringing new ideas to bear on

nevertheless awarded the plaintiff U. Sh40,000 damages for false imprisonment and U. Sh60,000 for injuries inflicted by the police.


145Id. at 869.
old problems has already begun. Lawyers and social scientists interested in East Africa, for example, are focusing on political participation rather than institutional structure, on law as part of the development process rather than merely as part of a legislative and judicial process, on judicial role perception and opinion style rather than methods of appointment, tenure and removal of judges, and on the nature and role of the bar and the population's comprehension of and access to the legal process rather than the outcomes of litigated cases.

The traditional debate over judicial review focused primarily upon institutional pluralism, democratic theory, and constitutionalism. Today throughout much of the developing world, certainly in Anglophonic Africa, and, perhaps in Tanzania in particular, the focus has shifted. Yesterday's concern with structure has been replaced by today's examination of context and relationship. This is beneficial and necessary. We must not be so concerned with where the courts stand, as with how, if at all, they listen, comprehend, speak, and respond.

The purpose of this paper has been to explore the problem of the role of the judiciary in the constitutional systems of East Africa. The first decade and a half of independence tells us that in each East African country the national courts have fulfilled a somewhat different role despite largely similar historical origins and constitutional status. It is clear that constitutional appearances had little or nothing to do with determining that role. While recently it has become fashionable to point out that "[t]he African sun has proved too hot for the frail European flower of parliamentary democracy," in fact, with but a few exceptions, Commonwealth African presidents have respected the structural independence of the judiciary. As institutions, however, the courts are both passive and vulnerable. They have little political voice

147See, e.g., Seidman, Participation, Feedback and Control (in an unpublished ms.); H. Bienen, supra note 59.
148See, e.g., Seidman, supra note 147; James, supra note 118; Ghai, supra note 117.
149See, e.g., Seidman, supra note 147; LAW AND ITS ADMINISTRATION IN A ONE PARTY STATE: SELECTED SPEECHES OF TELFORD GEORGES, supra note 86.
or physical force to employ in their own promotion or defense. The role they occupy in the public life of any society will always be a function of the attitudes of those in government who must execute judicial decisions, of those trained or certified to request them, of those in society who submit to them, and, just as importantly, of the judges themselves who make them. The judiciary's own role perception, in fact, and its assessment of the responsibilities and possibilities of its position may be the most important factors of all in determining the part the courts will play.\textsuperscript{152}

Whether they are called "judges" and "courts" or something else makes no difference. What does make a difference is that law and the procedures and institutions established for its promulgation, application and enforcement represent not only past and present agreement on certain issues of government and society. They also represent a collective admission that differences of opinion will arise in the future. For this reason alone, and despite the compelling appeal of current ideology and the pressures of nation-building, as a system they are abrogated or ignored with peril for the peaceful resolution of disputes in the years to come.\textsuperscript{153}

\textsuperscript{152}The obvious example of this being the impact of the views of Chief Justice Telford Georges of Tanzania, as expressed during his judicial tenure in that country from 1965 to 1971. See generally \textit{Law and Its Administration in a One Party State: Selected Speeches of Telford Georges}, \textit{supra} note 150.

\textsuperscript{153}Research and writing upon this and related topics was begun by the author under the supervision of J. S. Read of the School of Oriental and African Studies, University of London, in 1971-72, and continued under J.C.N. Paul at Yale Law School in 1976. The guidance and insight of both were invaluable. The conclusions expressed herein, however, except as noted, are those solely of the author. The collection of materials and research in East Africa was made possible by a travel fellowship from the Thomas J. Watson Foundation.