

Courts and the emergence of statehood in post-colonial Africa

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Introduction

Fifty years ago Roberts Wray proclaimed, '[B]ritish administration in overseas countries has conferred no greater benefit than English law and justice' and 'the ideal of justice and good government is the guiding star of British administration'.¹ The establishment of formal English legal institutions in African settings was believed to be one of the great 'civilising' achievements of British colonialism. For the coloniser, courts were critical to effective governance: protecting both property rights and the rights of the government to control its citizens. Since independence, African courts have waxed and waned in providing a veneer of legitimacy and credibility in the eyes of citizens and international audiences while simultaneously being subjected to coercion, co-option and marginalisation by increasingly autocratic regimes. Roberts Wray's proclamation epitomises many early accounts of the British legal legacy which had a tendency to be overly positive and self-congratulatory. The vast majority of contemporary scholarly attention is instead focused on the gap between the artificially imposed foreign institutions and society.² Moreover, as Okoth-Ogendo,³ Makau Mutua⁴ and others have argued, it was precisely these colonial legal institutions and practices which set the context for the emergence of post-colonial authoritarian regimes. For these critics, colonial courts remained intact and symbolise the mid-air suspension of the African state above society.⁵ Formal institutions are meaningless on paper; in order for democracy to be secured judges must continually reaffirm the spirit and intention of constitutional provisions. From the colonial period to the present day, for African judges, this necessitates a shift away from a 'jurisprudence of executive supremacy'

1 Cited in Ravit Reichman, 'Undignified Details: The Colonial Subject of Law' (2004) 35(1–2) *ARIEL* 81–101.

2 See, eg, Sandra Fullerton-Joireman, 'The Evolution of the Common Law: Legal Development in Kenya and India' (2006) 41(2) *Journal of Commonwealth & Comparative Politics* 190.

3 H W O Okoth-Ogendo, 'Constitutions without Constitutionalism: Reflections on an African Political Paradox' in I G Shivji (ed), *State and Constitutionalism: An African Debate on Democracy Human Rights and Constitutionalism Series*, No 1 (Southern African Political Economy Series (SAPES) Trust, Harare, Zimbabwe 1991).

4 Makau Mutua, 'Human Rights in Africa: The Limited Promise of Liberalism' (2008) 51 *African Studies Review* 17–39; Makau Mutua, 'Justice under Siege: The Rule of Law and Judicial Subservience in Kenya' (2001) 23 *Human Rights Quarterly* 96–118.

5 Goran Hyden, 'Urban Growth and Rural Development' in G M Carter and P O'Meara (eds), *African Independence: The First Twenty Five Years* (Indiana University Press 1986).

to a 'jurisprudence of constitutionalism'.⁶ The gap between the formal institutional trappings and the actual realisation of judicial power in sub-Saharan Africa is not a new challenge. In this article I argue that, since their colonial inception, African courts continue to be suspended between two visions of the African state. The first, driven by powerful political elites, is a predatory state founded on neopatrimonial practices which maximise power and capital in the hands of the few.⁷ The second is a vision of a more accountable, developmental state. Just as it is reductive to capture the African state in a superficial binary between authoritarianism and democracy; so the English common law legacy cannot lay claim to an entirely positive or negative inheritance. The colonial/post-colonial legal institutions were simultaneously instruments of political power and manipulation, in addition to sites of contestation and resistance. Moreover, the ability of the courts to resist was concomitantly constrained and enabled by the colonial legacy. The colonial era established a judicial identity which aided in bolstering institutional legitimacy and political differentiation. Judges were trained in London and brought back the established procedures of English common law (*stare decisis*, for example) and, indeed, the law itself. I refer to institutional legitimacy here as the concept that the judiciary is a distinct and separate arm of government that exists above the dirty fray of everyday politics. The courts are housed in separate buildings and judges are seen as professionals, appointed under constitutional guidelines that mandate specific years of experience and education. Aspects of this distinct institutional identity would become an important, although not always effective, defensive tool for the judiciary during the authoritarian era. Excessive reliance on the principle of *stare decisis* and of intricate procedural details of English common law (including reference to several outdated statutes) would reinforce the image of an apolitical judiciary. It can be argued that the cautious stance of the judiciary created a source of institutional protection. However, this conservative jurisprudence has been heavily criticised by members of the scholarly legal community⁸ who see this as the source of a weak judiciary unwilling to protect human rights and unwilling to reform to the contemporary needs of African society. During the authoritarian era, the judiciary had to strike a balance between supporting the regime (to ensure its own survival) on the one hand, but on the other maintaining legal integrity.⁹ As Ghai and McAuslan write in relation to the emergency period in Kenya, '[j]udges were prepared if necessary to bark, they felt considerable hesitation over biting'.¹⁰

In Tanzania, Uganda and Malawi distinct legal identities and strategies of legal co-option have stayed consistent in the face of changing domestic political regimes, changing global power structures (political, economic and legal), societal conflict and divisions and, indeed, alterations to the internal judicial structure. Given the delayed transition to multiparty democracy in sub-Saharan Africa, the courts become a useful constant location of inquiry as we unravel the contradictory aspects of the British legal legacy. This article

6 H Kwasi Prempeh, 'A New Jurisprudence for Africa' (1999) 10(3) *Journal of Democracy* 135–149.

7 While neopatrimonialism is a contested concept, broadly it refers to the accumulation of executive power through informal and corrupt clientelistic practices. See, eg, Jean-Francois Bayart, *The State in Africa: The Politics of the Belly* (Longman 1993); Michael Bratton and Nicolas van de Walle, *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective* (Cambridge University Press 1997).

8 Joseph Oloka-Onyango, 'Judicial Power and Constitutionalism in Uganda' in *Centre for Basic Research Working Paper* (Centre for Basic Research, Kampala 1993) 47; Chris Maina Peter, *Human Rights in Tanzania: Selected Cases and Materials* (Rudiger Koppe Verlag 1997).

9 Lisa Hilbink, *Judges beyond Politics in Democracy and Dictatorship: Lessons from Chile* (Cambridge University Press 2007); Hilbink posits that the Chilean courts were sticking to a path of legal positivism due to a pragmatic antipolitics rather than an ideological adherence to legal conservative principles.

10 Y P Ghai and J P W B McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present* (OUP 1970) 161.

strives to move beyond these binaries to reach into the liminal spaces of the emerging African state and highlight the multifarious implications of the British legal legacy for courts¹¹ in Tanzania, Uganda and Malawi. The central continuity that threads from the colonial, to post-colonial, to post-authoritarian period is the court as a site of simultaneous resistance and oppression, of political contest and political censure. As Roberts and Mann argue, 'law formed an area in which Africans and Europeans engaged one another – a battleground as it were on which they contested access to resources and labor, relationships of power and authority, and interpretations of morality and culture'.¹²

The central concern of this article is to highlight and consider the positive and negative continuities of the British legal legacy in sub-Saharan Africa from the post-colonial to the post-authoritarian period. The implications of this historical legacy are drawn with reference to contemporary political dynamics in the conclusion. The discussion that follows is divided into three sections. First, I examine the foundations of African courts under British colonialism. Second, through analysis of preventive detention laws and parallel jurisdictions, I highlight the continuities of British legal colonialism under authoritarianism. This section is framed through application of Neil Tate's theoretical framework on courts in crisis regimes.¹³ Finally, I conclude by highlighting some of the continued challenges and possibilities presented in the contemporary post-authoritarian era.

Distorted imposition of colonial British law

Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed but it needs careful tending. So with the common law. It has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour all the world over: but it has also many refinements, subtleties and technicalities which are not suited to other folk. These off-shoots must be cut away. In these far off lands the people must have a law which they understand and which they will respect. The common law cannot fulfill this role except with considerable qualifications. The task of making these qualifications is entrusted to the judges of these lands. It is a great task. I trust that they will not fail therein. (Denning LJ commenting on power conferred on the High Court of East Africa in 1902, in *Nyali Ltd v Attorney-General* [1956] 1 QB 1, 16–17)

LAW FOR WHOM?

As Lord Denning captures above, under colonialism the vast majority of power and agency was located in individual judges rather than institutional structures. A functionalist approach allowed greater flexibility and manipulation of the law under colonialism. As Ghai and McAuslan note, '[n]either the lawyers nor the politicians saw the function of the law as standing impartially between two sides, or even leading in favour of the weaker side, but as making the way smooth for the stronger'.¹⁴ The colonial court system was essentially the same across Uganda, Tanganyika and Malawi (although in Malawi appeals would go straight from the High Court to the Privy Council): Native Courts, to Magistrates Courts, to national High Courts, East Africa Court of Appeal and, finally, to the Privy Council. Customary law

11 The primary focus of this article is on the high courts and courts of appeal.

12 Richard Roberts and Kristin Mann, 'Law in Colonial Africa' in *Law in Colonial Africa* (Heinemann Educational Books and James Currey Ltd 1991).

13 C Neal Tate, 'Courts and Crisis Regimes: A Theory Sketch with Asian Case Studies.' (1993) 46(2) *Political Research Quarterly* 311–88.

14 Ghai and McAuslan (n 10) 34.

was tacked onto the bottom of the judicial hierarchy and this is where most Africans' experience with colonial law would begin and end. Customary law was the foundation upon which English common law was placed. The dual system, one for colonisers and one for the colonised, maintained the social, economic and political status quo.¹⁵

The integration of customary law was a mechanism by which the state could legitimise itself; albeit an invented tradition.¹⁶ Yet customary law remained a distinctly separate, parallel system of law; a system which was not always to the benefit of those who had experienced injustice. A pluralistic legal system generated inequalities in access to and application of the law.¹⁷ Moreover, the idea of integration is misleading. The goals of the British were to, where possible, resolve disputes in the customary or informal tribunals, this being cheaper and more efficient for the colonial government. If a case could not be settled in a Native Court of Appeal, it was brought before a superior (Magistrates' or Supreme) Court. British officials in these courts were instructed to apply native or customary law to colonial subjects, provided that this law met the requirements of the 'Repugnancy Clause',¹⁸ which excluded practices that were anathema to justice, equity and good conscience.¹⁹ This repressive measure was not just used to maintain the social and 'moral' order (as its name suggests), but it was also used as a means to achieve specific political and economic goals. The repugnancy clause enabled imported judges to pick and choose which customs were in their interests to maintain, and which should be abolished. Further, it expanded the scope for conflict in the community as individuals, or local experts, would present individual accounts of 'custom' as they wanted. Judges, with no understanding of indigenous custom, would pick and choose as they wanted.²⁰ One of the major difficulties the British experienced in the interpretation of customary law was the fact that it did not fit within the common law concept of *stare decisis*, or written precedent. Thus, British administrators had local experts testify to the existence of their laws, which were then converted into writing and incorporated into common law precedent.²¹ By recording decisions in this way, British legal administrators established:

a body of precedent, turning local law into something akin to English case law. Precedents were invoked and debated not only in British courts, but also in indigenous ones, where actors sometimes framed their arguments against the backdrop of their understanding of how matters would be handled in colonial courts.²²

While there were clearly many problematic aspects to the judicial (in)validation of customary law, it could also be argued that it was an early exercise of judicial review, thus establishing legal institutional norms and socialising judges in preparation for the formal delegation of judicial review powers at independence.

15 Oloka-Onyango (n 8) 47. See also Ghai and McAuslan (n 10) ch 4.

16 See Martin Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Heinemann 1998); and Reichman (n 1).

17 Fullerton-Joireman (n 2).

18 The repugnancy clause was a standard in all instruments that applied the basic principles of common law and equity and statutes of general application to colonial territories. Any customs or traditions found offensive were declared 'repugnant' and abolished. See, eg, H F Morris and James S Read, *Uganda: The Development of its Laws and Constitution* (Stevens & Sons 1966) 6.

19 Reichman (n 1).

20 Roberts and Mann (n 12) 13–14.

21 Reichman (n 1) 257.

22 Roberts and Mann (n 12) 14.

COLONIAL JUDGES: LAW WITHOUT LEGALISM

There was a symbolic dislocation of law and the courts from everyday life. Judges were required to wear full British regalia, wigs, robes and all. An observer visiting Nigeria in 1937 noted this incongruous juxtaposition:

The newcomer to Africa visiting the Courts of Law in different parts of the country for the first time views with astonishment the scene before him. The presiding magistrate or Judge, on special occasions in his official robes of scarlet, seated with native assessors – counsel in their robes and the prisoner in the dock – the crowd of spectators kept back by native police in uniform. A repetition of an English scene in African surroundings, often of a primitive nature.²³

This impressive regalia did not, however, align with the weak power of the judges. Executive privilege operated above the law and governors had broad swathes of power to rule through executive fiat. Judges were part of the colonial civil service and typically advanced internally through a system of promotion.²⁴ The implication of this bureaucratic structure was a weakening of independence as judges were keen to ensure their continued tenure and promotion at the hands of the executive. In *Terrell v Secretary of State for the Colonies*,²⁵ Chief Justice Goddard outlined the colonial concept of independence of the judiciary:

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

Judicial independence for colonial judges was heavily circumscribed. It was a rare occasion when the courts attempted to restrain the governor. As Seidman notes in the case of *Mbui v Rex* (1951):

[T]he enabling ordinance gave the governor the power to limit coffee growing by areas. The regulation made under the ordinance limited it by ethnic classifications. It was held *ultra vires* . . . These invocations of the received English law to curb the power of the governor were the exception not the rule. In most areas, the governor's decision-making powers were beyond the reach of judicial process, justified by a variety of technical grounds. Administrative decisions with respect to chieftaincy, land and deportation, and the detention of Africans were all insulated from challenge.²⁶

Colonial judicial decision-making reflected the role of judges as representatives of the government and not the people.²⁷ The expansion of regulations created an increasingly powerful and oppressive colonial state as criminal convictions rose dramatically. In Tanganyika, the importation of English law generated a whole new rule book of restrictions: the Deportation Ordinance 1921, the Expulsion of Undesirables Ordinance of 1930, Emergency Power Orders in Council 1939–1961, the Witchcraft Ordinance 1928 and the Collective Punishment Ordinance 1921.²⁸ The statutes provided for the extensive

23 Cited in Reichman (n 1).

24 B O Nwabueze, *Judicialism in Commonwealth Africa: The Role of Courts in Government* (C Hurst & Co 1977) 265. (1953) 3 WLR 331

26 Robert B Seidman, 'Administrative Law and Legitimacy in Anglophonic Africa: A Problem of Reception of Foreign Law' (1970) 5(2) *Law & Society Review* 161–204, 178.

27 Ghai and McAuslan (n 10).

28 See Michael Kajela Beatus Wambali, 'Democracy and Human Rights in Tanzania Mainland: The Bill of Rights in the Context of Constitutional Developments and the History of Institutions of Governance' (PhD Dissertation, School of Law Faculty of Social Studies, University of Warwick 1996).

powers of state to deny freedom of movement. Freedom of association was curtailed through the Societies Ordinance of 1954 (the same year the first official Tanganyikan political party was established). These restrictive laws were the direct ancestors of aged – many by this point overturned – English decisions and statutes.

To imply here that all colonial judges were identical is a fallacy. It is misleading to ignore the level of disharmony that existed within the colonial service in terms of attitudes towards the implementation and development of colonial law. It was not one homogenous whole. Morris and Read classify two distinct groups of colonial officials when they discuss attitudes towards the suitability of wholesale adoption of English law: the ‘administrative’ point of view versus the ‘judicial’ point of view:

Broadly speaking, there were two clear-cut and opposing points of view, most members of the administrative service adhering to the one, and most members of the judiciary adhering to the other. According to the administrative point of view, the imported legal system needed very considerable modification if injustices were to be avoided, or, indeed if it were to bring any real benefit to the largely illiterate African populations, whose conditions of life differ completely from those in England, where the system had evolved. The adherents of the opposing judicial point of view maintained, on the other hand, that there should, and could be no serious watering down of English rules to meet what the administration claimed to be African needs; what might appear to be complexities and technicalities were, in fact, an integral part of the English legal system, and, in themselves, helped to ensure that high degree of justice which the system professed to provide: without them the standard of justice must be lower, and that a lower standard of justice should be provided for the African population could not be contemplated.²⁹

Like chiefs, the district commissioners of colonial Africa were not only the rulers, but also the judges. Thus any judicial check on administrative power was eliminated. District commissioners existed as another form of bureaucratic supervision over the native administrators; but also had restricted power to interpret the law and sentence. Again, it is important to emphasise the role of the individual here. The lack of uniformity across districts and cases was dramatic, both in terms of the individuals involved and the local response to these individuals. Chanock illustrates this point:

The experience of and response to the coming of colonial courts and legal forms was by no means uniform. Variations in the average length of a district officer's stay in a particular district and, more importantly, the relative wealth of the community; the strength of its indigenous organisation; and its degree of tribal homogeneity; appeared to have influenced local response to the new courts.³⁰

Most cases coming to the native courts and to the district commissioners were of a criminal nature. The district commissioners passionately defended their legal power and in many cases even pushed for more. The following extract is from the report of a Tanganyika district officer in 1932:

I consider that the present system of professional magistrates and judges should be abandoned. The conception that, because a man has passed Bar examinations and has eaten a number of dinners in one of the Inns of Court, he is fit to be a magistrate is, in my opinion, fallacious. It is a relic of the old English guild system, the modern relic of which in more humble occupations is the trade

29 H F Morris and James S Read, *Indirect Rule and the Search for Justice: Essays in East African Legal History* (Clarendon Press 1972) 73.

30 Chanock (n 16) 136.

union . . . I submit that the class of official most qualified to exercise judicial functions is the administrative official and I would base a reorganization of the judiciary on this fact . . . Where I have attacked the legal profession it is because I feel it has a stranglehold on the country which should be loosened; the territory is rapidly becoming a lawyer's udder to the enrichment of the advocate and the impoverishment of the people.³¹

According to Morris and Read, the judiciary vociferously defended its position. Writing in 1926, Alison Russell, the then Chief Justice of Tanganyika wrote:³²

There are no doubt some administrative officers who look back regretfully to the days of Livingstone under his tree or James Martin marching up from the coast: days when, unencumbered by stationery, undistressed by the labour of keeping a record and untroubled by the thought that somebody might want to read it, decisions were given off hand and out of the head; and so on to the next shauri. This method of disposing of cases is no doubt extremely prompt and agreeable. But everyone who has tried cases knows how often a quiet perusal of a well kept record influences a judgment.

The lack of training and general inadequacies at the lowest levels of the legal system were highlighted by the Commission of Inquiry into the Administration of Justice in Kenya, Uganda and Tanganyika Territory in Criminal Matters, May 1933 (Colonial No 96).³³ Most of the detailed recommendations of the committee were accepted by the East African governments, but the broader recommendations met with resistance. For example, the governors were unable to accept the commission's contention that the dispensing of justice by lay magistrates was undesirable and should be taken over by professional magistrates.³⁴

Colonial judges rejected and applied certain aspects of customary law in a discretionary manner. This was perhaps a reflection of the limited legal training received by individual judges. In his *Handbook for Magistrates in Nyasaland* (1940), C C Ross states that:

The great majority of district officers who are called upon to undertake magisterial work have, however, had no experience and are not as a rule professionally qualified. In many cases natural aptitude and ability makes up to a large extent for this lack of experience but it can never do so entirely and, especially during his early years as a magistrate, the administrative officer is beset by many pitfalls into which, for want of this experience, he almost inevitably tumbles from time to time.³⁵

Ross further suggests that the best training an African judge could get was to go and observe the magistrates' courts in England, in order to acquire the 'atmosphere' of a court. This once again underscores the misguided emphasis on order, procedure, English legal regalia and custom over substance. It was as if they had imported the skeleton (structure) and the clothes to dress the skeleton in, but the vital organs of the body were missing.

The discussion heretofore has focused on the cultural and structural aspects of the English common law legacy. Many see the longest-lasting and perhaps most profound legacy to be located in the legal culture established under colonialism. Legal conservatism is typically characterised as the strict binding of legal interpretation to precedent. The picture painted by African legal scholars is one of a clash between imported rules and

31 W E H Schupham and D O Mwanza, 29 February 1932, DSA 26002, cited in Morris and Read (n 29) 84–85.

32 Chief Justice to Governor, 2 January 1932, DSA 21429, cited in Morris and Read (n 29) 86.

33 For more on the work of the commission see, Oloka-Onyango (n 8).

34 Robert B Seidman, 'Administrative Law and Legitimacy in Anglophonic Africa: A Problem of Reception of Foreign Law' (1970) 5(2) *Law & Society Review* 161–204.

35 CC Ross, *Handbook for Magistrates, Nyasaland Protectorate* (Nyasaland Protectorate 1940) 5.

norms on the one hand, and a specific African political, economic and social context on the other. According to Yash Ghai, in Kenya the rigid adherence to English precedent became more pronounced as the colonial period advanced. Until the 1930s the Supreme Court of Kenya recognised that law applied in Kenya need not necessarily be exactly the same as law applied in England. This later changed due to the fact that the early judges had served for a much longer period in Kenya than in the latter half of the colonial era, and therefore had more opportunity to think in Kenyan terms.³⁶

The colonial era established three important trends. First, the law and judges themselves were used as instruments of control and repression. The British judges were there to maintain law and order, to ensure that private property was protected, and that contracts were honoured. Law helped to create a system of order through which the colonisers ruled. Economic extraction was eased through a received system of British common law that protected colonisers at the expense of indigenous workers. The masses had little contact with the higher levels of the judiciary. Criminal cases were tried by High Court judges sitting with local assessors; almost no civil action was commenced.³⁷ As Ghai and McAuslan surmise, the judiciary was less human and impartial than it thought. The courts existed to prop up and propel forward the colonial administration. They did not exist to further the needs of the African population.³⁸

Second, the courts had no ability to check the power of the colonial government. Despite the establishment of constitutional organs, power remained vested in the executive branch where the governor had power of veto and could rule through decree. The courts were weak in terms of their ability to check the power of the government (no judicial review), and in terms of their ability to protect the rights of citizens. Thus, their 'accountability role' within the colonial political order was minimal at best.

[T]he 'separation of powers . . . was precisely contradicted in colonial East Africa. Not merely were administrative officers in control of the bureaucratic organisation but they also pre-empted to a great extent the areas of legislation and the administration of justice. The colonial territories might be termed administrative states: the structure of the administrative hierarchy was, in effect, the Constitution.³⁹

Therefore, the inherited court system at independence was politically weak and marginalised. Judicial review was explicitly rejected in Tanzania and weakly adopted in Uganda and Malawi.⁴⁰ Despite some restructuring, and an attempt to Africanise the higher levels of the judiciary, this legacy remained intact.

Third, the weak institutionalisation of the courts, frequently unprofessional judges, and few lawyers created a very unstable base upon which to build a powerful judiciary at independence. Judicial power was a reflection of the distribution of political power under colonial rule. Although the courts did not build up any kind of substantial political power during the colonial era, they did establish an institutional identity and culture which continued to manifest long after independence through the use of traditional English legal regalia, including wigs for both judges and lawyers, the continued practice of legal conservatism and caution, and, above all, an overriding concern with 'the maintenance of the status quo

36 Ghai and McAuslan (n 10) 171.

37 See Morris and Read (n 29).

38 Ghai and McAuslan (n 10).

39 See Morris and Read (n 29) 288.

40 In Tanzania, judicial review was seen as anathema to the populist government of Julius Nyerere. The party embodied the state and represented the will of the people.

(inclined towards judicial restraint).⁴¹ This distinct identity, while certainly problematic and restricting, also served an important symbolic purpose as the judiciary came under increasing threat in the post-colonial authoritarian era. It aided in the (at least symbolic) separation of courts from the messy business of post-colonial African politics.

At independence African states were faced with a new dilemma. What configuration of laws and courts should the newly established state adopt? Under colonialism it was beyond the scope and power of the judges to develop a sense of constitutionalism. The primary *raison d'être* of the colonial judge was to support the economic project of extraction and not to challenge the colonial state. Thus, new independence constitutions were imposed on states and societies that were lacking a sense of constitutionalism. A commitment to constitutions without constitutionalism is democratically meaningless, for as Okoth-Ogendo claims:

all law, and constitutional law in particular, is concerned, not with abstract norms, but with the creation, distribution, exercise, legitimation, effects, and reproduction of power; it matters not whether that power lies with the state or in some other organised entity.⁴²

In each country new constitutional arrangements were negotiated closely with the British government and consensus on the constitution became a precondition for securing independence.⁴³ This was the first time that the British had paid significant, close attention to constitutional matters. The goals of the political project may have slightly shifted, but the mechanisms through which the goals were achieved did not. As Ekeh summarises, most independence constitutions

were silently premised on the received notion of colonialism that the state belonged to its rulers. African nationalists were pressing for a change of personnel, not for a change in the system of rulership. In effect, decolonization became a process of transferring ownership of the state from the alien European rulers to native nationalists.⁴⁴

The independence constitutions were not a domestic negotiated consensus, but were instead the outcome of a compromise between the colonial rulers and the nationalist leaders. As Shivji captures, their more important function was symbolic; an embodiment of the 'constitutional moment'.⁴⁵

Post-colonial (dis)continuities

The past is always there, it doesn't go away. Whenever something goes wrong or seems to be going wrong people look to the past. This affects the judiciary. People are more determined to fight for the independence. For us we are so conscious of what we've gained now, we don't want it taken away.⁴⁶

41 Sufian Hemed Bukurura, 'Judiciary and Good Governance in Contemporary Tanzania: Problems and Prospects' in *CMI Report* (Christian Michelsen Institute 1995) 5.

42 Okoth-Ogendo (n 3) 67.

43 Y P Ghai, 'Constitutions and the Political Order in East Africa' (1972) 21(3) *International & Comparative Law Quarterly* 403–34.

44 Peter P Ekeh, 'The Impact of Imperialism on Constitutional Thought in Africa' in O Akiba (ed), *Constitutionalism and Society in Africa* (Ashgate 2004) 33.

45 Issa G Shivji, 'Problems of Constitution-Making as Consensus-Building: The Tanzania Experience' in O Sichone (ed), *The State and Constitutionalism in Southern Africa* (SAPES Books, Harare, Zimbabwe 1998).

46 Author interview with Ugandan Constitutional Court judge, January 2007.

The leadership of Nyerere of Tanzania (1960–1986⁴⁷), Banda of Malawi (1964–1993) and both Obote (1962–1966 and 1980–1985) and Amin (1971–1979) in Uganda followed patterns of classic neopatrimonial rule. As noted by Prempeh, in each country the process of ‘reconfiguring legitimacy within the post-colonial state and society had but one beneficiary, the president. All other institutions and constituencies with potential countervailing power within the post-colonial society and the state were under the superior will of the putative philosopher-king.’⁴⁸ Under the three respective republican constitutions,⁴⁹ control was embodied in the hands of the president. The 1962 Tanzanian Republican Constitution enabled Nyerere to exercise his enormous powers ‘in his own discretion and shall not be obliged to follow advice tendered by any other person’ (s 3(3)).

Leaders across Africa defended their undemocratic forms of governance in a reactionary, nationalistic manner. Often this was a paternalistic-type argument that Africans were not ready for democracy and that democracy was a Western invention and thus not suited to Africans. There was also a very practical notion that the nation was fragile and needed to be kept intact through a powerful, autocratic state and that a ‘strong-state’ was best suited to development. In 1962, writing in the London *Observer*,⁵⁰ Nyerere stated that: ‘Our constitution differs from the American system in that it . . . enables the executive to function without being checked at every turn . . . Our need is not to apply brakes to social change . . . We need accelerators powerful enough to overcome the inertia bred of poverty.’⁵¹ In short, there were remarkable continuities between the colonial and post-colonial African constitutional order, ‘the postcolonial project would thus be executed by a “colonial state in African guise”’.⁵²

In Malawi and Uganda, high and appellate court expatriate judges stayed on the bench, in some cases until long after independence. At independence all senior positions in Malawi’s judicial system were held by expatriates. This colonial personnel hangover proved to be an important dynamic in the institutional restructuring of the post-colonial state. Indeed, ‘[T]he main tendency of post-independence legal reform was not toward the democratisation of the legal system inherited from colonialism, but toward its deracialisation.’⁵³ Deracialisation in the higher levels of the judiciary began to take place, albeit at different speeds in different settings.⁵⁴ Maintaining colonial judges on the bench represented a symbolic and intellectual continuity across dramatic regime change. Colonial judges aided in the continued entrenchment of English common law practices and symbolised the ongoing detachment of the courts from the people and the courts from the new African government. Again, this could be seen as positive in that it initially prevented

47 Although Nyerere would step down as President of Tanzania in 1986, he would remain chair of the CCM party until 1993.

48 H Kwasi Prempeh, ‘Africa’s “Constitutionalism Revival”: False Start or New Dawn?’ (2007) 5(3) *International Journal of Constitutional Law* 469–506, 481.

49 Malawi 1966, Uganda 1967, Tanzania 1967.

50 Cited in J T Mwaikusa, *Towards Responsible Democratic Government: Executive Powers and Constitutional Practice in Tanzania 1962–1992* (Faculty of Law, University of London 1995) 105.

51 For discussion on Nyerere’s mixed legacy on human rights, see Chris Maina Peter and Helen Kijo-Bisimba, ‘Mwalimu Nyerere and the Challenge of Human Rights’ (Pambazuka Press 13 October 2009) issue 452 <<http://pambazuka.org/en/category/features/59511>> accessed 21 August 2012.

52 Prempeh (n 48) 479.

53 Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press 1996) 136.

54 Uganda had a white British Chief Justice appointed (Justice Peter Allen) as late as 1986. Whereas in Tanzania the ‘Africanisation’ of the judiciary was rapid under Nyerere. In Malawi, the expatriate judges suddenly left of their own volition in 1966, after Banda began to openly defy the decisions of the court. See Peter Forster, ‘Law and Society under a Democratic Dictatorship: Dr Banda and Malawi’ (2001) 36(3) *JAAS* 275–93.

higher levels of interference in the judiciary. However, from a democratic standpoint it was clearly less desirable as it served to further alienate the people from their own institutions of justice. There are also important considerations as far as the structural elements of independence are concerned. Expatriate judges were, and continue to be, appointed on contract, and those contracts are typically renewed through executive decree.⁵⁵ Further, the expatriate judge does not have an obvious stake in the government and may be less willing to risk tenure through challenging that government.⁵⁶

The ideological and intellectual climate had a significant effect on the courts. In Tanzania in the years during and immediately subsequent to independence, the courts' performance was evaluated in academic and journalistic spheres and there was significant pressure on the newly indigenised bench to support Nyerere's sweeping socialist policy reforms. As Chief Justice Saidi noted in 1972: 'As citizens and TANU [Tanganyika African National Union] members, the courts are bound to further ujamaa'.⁵⁷ The Dar es Salaam law faculty, under the guidance of Professor Nabudere, developed a curriculum that was grounded in radical Marxist theory. These developments were preceded by hot debate. The most famous of these debates occurred in the Makerere University magazine *Transition*.^{57a}

In the aftermath of the Kabaka's exile and the promulgation of the 1967 republican constitution, Obote embarked on his 'movement to the left' strategy. This occurred simultaneously with the move to a single-power authoritarian state. As Nabudere notes, the judiciary was a vital part of pushing this 'new order' forward.⁵⁸ Indeed, it had successfully done that through ruling against *Matovu* in 1969.⁵⁹ Picho Ali was a Soviet-trained lawyer and a man on the staff of President Obote's office. In his article, 'Ideological Commitment and the Judiciary', Ali advocated that the normative school of jurisprudence was wrong in insisting on the application of legal norms in isolation of the apolitical rims. Ali later reflected on two other important cases from this time. The first was the trial of two mercenaries from Congo (in which an ex-pat judge overturned the original conviction and sent him back to his country of origin), and the second was the trial of 20 Ugandans under treason charges following the 1966 revolution (judge advised that separate charges be brought against the individuals and the state withdrew its case). In response to Ali's article, Nabudere argued that Ali had not correctly appraised the judiciary. Further:

Although I agreed with the main thrust that law must reflect the ideology of a given society, my main interest was to define what kind of society existed in independent Uganda. After everything is said, I think we ought to agree – and I here agree with Picho – that there is no such thing as the independence of the judiciary anywhere. The judiciary has always been created by the politics of the economic based and not vice-versa. So it is always pointless to talk about the judiciary sitting in judgment of the economic base and its politics and hence its ideology. To say the judiciary (should) be at par with the ideology of an independent Uganda is therefore to beg these questions: What is the ideology of

55 Nwabueze (n 24) 273. For discussion of contemporary challenges surrounding use of expatriate judges, see John Hatchard, Muna Ndulo and Peter Slinn, *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective* (Cambridge University Press 2004).

56 Nwabueze (n 24) 311; Rachel Ellett, *Politics of Judicial Independence in Lesotho* (Report prepared for Freedom House 2012) < www.freedomhouse.org/article/new-report-finds-lesotho-s-judiciary-lacks-independence > accessed 7 September 2012, 47–52.

57 'Put Ujamaa First', *Daily News* (Tanzania, 26 September 1972), cited in Maina Peter (n 8) 489.

57a Picho Ali, 'Ideological Commitment and the Judiciary' (1986) 36 *Transition* 47–49.

58 D Nabudere, *Law, the Social Sciences and the Crisis of Relevance* (Heinrich Boll Foundation, Nairobi 2001) 53.

59 *Uganda v Commissioner of Prisons, ex parte Matovu* (1966) EA 514. For detailed discussion of the legacy inducing implications of this case see Oloka-Onyango (n 8).

an independent Uganda? Who has stated and propounded it? What is its economic base? Why is the judiciary still colonial-oriented in spite of such ideology (if any)?⁶⁰

Later the debate was joined by two mainstream lawyers who argued the case for an independent judiciary against the ideological view of Picho Ali. The first extract is from Kazzora:⁶¹

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

Abu Manyanja pointed to rumours that the appointment of Ugandan Africans to the High Court had been delayed mostly because of tribal considerations. As Nabudere writes:

These pointed remarks on the issue of tribal considerations influencing the retention of expatriate judges and attacks on lack of ideology of the ruling party and their retention of colonial laws landed Abu Manyanja in trouble. The following year, he was arrested under the State of Emergency and detained without trial under one of the colonial laws, which had been retained by independent Uganda.⁶²

The editor of the magazine was also arrested under sedition charges. Nabudere surmises that it was beneficial for the judiciary to remain independent because it retained the colonial laws and these laws protected the interests of the property-owning classes.⁶³

While this debate raged in the academy, newly formed governments began to consider the mechanisms through which colonial court structures could be mobilised in support of authoritarian goals in addition to ideological goals. Across Malawi, Tanzania and Uganda a key trait of the legal order was the enabling characteristics of the law, 'empowering, in very wide and unrestricted terms, the executive organs of the state to effect a wide variety of "functions" i.e. exercise arbitrary/discretionary power'.⁶⁴ Shivji's description of the 'extra-legal' state in Tanzania dovetails neatly with Neil Tate's explanation for why 'crisis rulers' do not always dismantle or significantly alter their judiciaries in the same way they do the legislature or political party.⁶⁵ Tate is not arguing that judiciaries are unaffected, but that structurally they emerged looking more or less the same. There are three foundational parts to Tate's thesis.

60 Nabudere (n 58) 55.

61 In Salvatore Yoanna Olwoc, George Kaggwa, A C Duffield, Krishan M Maini, Ian Livingstone, J E Goldthorpe, Shiraz Dossa, E R Watts, Elspeth Huxley, Russell Tain, Bilgram E Nsaba, Alexander Goodall, J W Onyango-Otieno, Eriya T Kategaya, D W Nabudere, John W R Kazzora, A K Manyanja and Tibor Kovacs, 'Letters to the Editor' (1968) 37 *Transition* 6–16, 13.

62 Ibid 42.

63 Ibid 392.

64 Issa G Shivji, 'The Changing State: From an Extra-Legal to an Intra-Legal State in Tanzania' in C K M A M Okema (ed), *Constitutional Reforms and Democratic Governance in Tanzania* (Friedrich Naumann Foundation and Faculty of Law, University of Dar es Salaam 1994) 82.

65 Tate (n 13).

1 Rulers assume little risk: by leaving the judiciary alone the regime is able to maintain at least some semblance of legitimacy. Moreover, a judiciary that is strongly on the side of the regime is an important enforcement mechanism. To illustrate, below is an extract from expatriate Justice Peter Allen's diary:

Wednesday January 15th, 1975

This evening my contact dropped in to see me⁶⁶ . . . He'd been asked by Amin and the Defence Council to obtain my unofficial reaction to a suggestion that they were considering for implementation. Their proposed scheme is to appoint one air force and two army officers, all captains, to be High Court judges and thus ensure, so they hoped, that they had an effective say in the running of the courts to the satisfaction of the military. I asked if the officers selected were legally qualified and the answer, of course was no. They had chosen three officers who had attended, but not completed secondary schools and spoke some English; which they considered to be a sufficient qualification . . . I pointed out that we still had a good working judiciary and it was pointless to destroy it in this way. I certainly would not want to be part of such a set-up and no doubt many of my colleagues would feel the same way. I mentioned that such a move would not be received at all favourably by the outside world and it would certainly result in bad publicity for Amin.

Thursday January 16th, 1975

My contact called in this evening and brought me the news that Amin had dropped the plan to infiltrate the Judiciary with his military officers.⁶⁷

2 Restrict scope and depth of decision-making: parallel judicial structures presented a severe restriction on judicial power and frequently became heavily politicised and ridiculed. In the cases of Uganda and Malawi, hyperpoliticised parallel structures (traditional courts in Malawi and military tribunals in Uganda) reduced interference in the conventional court structures which were marginalised and underfunded but frequently left alone.⁶⁸ This interpretation aligns with Jose Toharia's work on authoritarian Spain, where the author found a surprising level of ideological diversity among members of the judiciary.⁶⁹ Toharia's explanation for this apparent paradox is the existence of a parallel set of special courts closely supervised by the regime; courts which became politicised thus reducing politicisation of and intervention in the conventional courts.

3 No major setbacks from judiciary: courts in newly independent Africa proceeded with caution. In *Uganda v Commissioner of Prisons, ex parte Ojok*,⁷⁰ the Ugandan High Court gave legitimacy to the extra-constitutional seizure of power by an illegal government, thus rendering the court less threatening. It was important for new governments to maintain the veneer of rule of law, for domestic and international audiences, and that meant the judiciary continuing to hear non-threatening, non-political cases. As previously noted, the more threatening cases could instead be dealt with through extra-judicial structures. As one judge in Malawi commented, 'If you look back at the Banda government, Dr. Banda was

66 It is interesting to note the use of the term 'my contact'. This implies that regular, informal contact between the judiciary and government was in place. Even if the government contact wasn't at the highest levels of government, he would certainly have access to those levels.

67 Peter Allen, *Interesting Times: Uganda Diaries 1955–1986* (Book Guild 2000) 390–91.

68 Rachel Ellett, *Emerging Judicial Power in Transitional Democracies: Malawi, Tanzania and Uganda* (PhD dissertation, Department of Political Science, Northeastern University, Boston, USA).

69 Jose J Toharia, 'Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain' (1975) 9(3) *Law & Society Review* 475–96.

70 [1966] EA 514.

a stickler for legality. Whatever he did he had some law for it.⁷¹ People must at least perceive that the system is acting in the interests of justice. Indeed, the traditional courts in Malawi were extra-legal, extra-constitutional bodies, but, despite this, were often popular amongst rural peasants.⁷²

Despite a political reticence to allow a truly independent judiciary, there was, to a remarkable degree, a great deal of lip service played to the concept. At the opening of the new faculty of law at the University of Dar es Salaam, Nyerere pronounced: 'It is of paramount importance that the execution of the law should be without fear or favour. Our judiciary at every level must be independent of the executive arm of the state.'⁷³ This perception of independence was critical if 'the law' was to be an ally of the rapidly expanding state. Although the courts examined in this paper align with Tate's central thesis, they were able to carve out small pockets of resistance. This resistance did not change the status quo, but perhaps slowed the authoritarian onslaught; further indicating that the regimes were sometimes slow to respond to potential judicial threats. Appointment and removal processes for judges were amended after the consolidation of power in the presidency.⁷⁴ I capture these competing tensions with reference to preventive detention cases and the use of parallel jurisdictions in Uganda, Tanzania and Malawi.

PREVENTIVE DETENTION

Preventive detention laws were part of the package of laws inherited at independence⁷⁵ and they originated directly from English common law. These powers were dramatically expanded with the excessive stretching of the concept of 'emergency powers'; a concept that continues to be abused by autocratic executives today.⁷⁶ Emergency powers gave governors the right to detain citizens without trial, to deport aliens, to deprive a naturalised British subject of citizenship and to anything else necessary to secure law and order in the colonies. Post-colonial preventive detention laws were numerous and appeared across a wide range of statutes and emergency powers provisions.⁷⁷ As Harding and Hatchard note: 'the modern statutory version of preventive-detention law may be said to have its origin about 200 years ago in the attempts by British authorities to preserve order and restrict political subversion or criticism in England'.⁷⁸ Preventive detention laws enabled governments to arrest individuals before they had committed a crime. Across Malawi, Tanzania and Uganda, governments were responsible for the derogation and irrelevance of

71 Author interview, Malawi High Court judge, Blantyre, Malawi, May 2007.

72 Author interview, Malawi Supreme Court judge, Blantyre, Malawi, May 2007.

73 J K Nyerere, 'Education and Law' in *Freedom and Unity: A Selection from Writing and Speeches, 1952–1965* (OUP 1966) 13.1.

74 Note, the independence safeguards for judicial appointments in Uganda remained until 1971, see Nwabueze (n 24) 268.

75 Note, Native Court Regulation of the East Africa Protectorate 1897, s 77; Tanganyika Deportation Ordinance 1921; Tanganyika Expulsion of Undesirable Persons Ordinance 1930; Townships (Removal of Undesirable Persons) Ordinance 1944; and the Criminal Procedure Code 1945 (cited in Nabudere (n 58)).

76 Eg, the rather elderly English common law precedent of *Liversidge v Anderson* [1942] AC 206 (which defines the legal relations between personal liberty of the subject and the security needs of the government) would continue to be cited by African courts long after it has been overruled in England itself, perhaps most famously in the Ugandan case *Ex Parte Matorn* [1964] EA 514. Colonial preventive detention laws have recently been resurrected in Uganda in response to protests by the opposition. See Tabu Butagira and Al-Mahdi Ssenkibirwa, 'Besigye Detained under Colonial Law', *Monitor*, 20 May 2011.

77 Jennifer Widner, *Building the Rule of Law* (1st edn, W W Norton and Co 2001) 118.

78 Andrew Harding and John Hatchard (eds), *Preventive Detention and Security Law: A Comparative Survey* (Martinus Nijhoff Publishers 1993).

individual human rights in the post-colonial era.⁷⁹ Insecure governments developed legal mechanisms through which to silence, and in some cases, eliminate opposition. The premonitory writing of Morris and Read in 1966 accurately predicted that:

[t]here are signs there that the judicial ideal derived from the traditions of English law may not enjoy the final victory. Such signs may be detected in the refinement of powers of preventive detention without trial (established in the laws of each East African state).⁸⁰

The principle fact that the preventive detention laws were not subject to judicial review was established under colonialism. In Tanganyika, *In The Matter of Railal Bhikhabhai Patel and In the Matter of an Application for a Writ of Habeas Corpus ad Subjiciendum*,⁸¹ Justice Lowe held that the High Court had no power to vary or revoke a deportation order made by the governor. In short, executive will and power was beyond revocation by the courts. In all three countries, the judiciary consistently shied away from confrontation. A fear of disorder permeated both the judiciary and society at this time. Indeed, this fear of returning to disorder is a theme reflected in some of the present-day judicial decision-making in Tanzania, Malawi and especially Uganda.⁸²

In Uganda, both Obote and Amin used unlawful arrest and detention as a central plank to their official security policy. 'The Government relied on provisions in the Emergency Powers Act, 1963; Emergency Power (Detention) Regulations, 1966 and the Public Order and Security Act, 1967 to effect endless arrests which were fruitlessly challenged in the courts.'⁸³ The 1964 Deportation Ordinance gave the Ugandan government carte blanche to arrest whomever it wanted and its actions were not subject to review by the courts. Occasionally, a lower court attempted to push back, but would subsequently be shut down on appeal. Oloka-Onyango describes one attempt to challenge the Obote government in *Ibingira & Others v Uganda*.⁸⁴ After hearing of potential action against him by his cabinet, Obote arrested five ministers and detained them under the Deportation Ordinance. The ministers challenged the validity of the ordinance in relation to the fundamental rights contained in the 1962 constitution. Their case was first upheld in the High Court. However, on appeal Justice Spry of the Court of Appeal concluded that the Deportation Ordinance had been abrogated by the 1962 constitution. The ministers were subsequently detained. This, according to Oloka-Onyango, was a high point for the Ugandan High Court.⁸⁵ In the case of Uganda, the ability of the courts to try those charged before them and to enforce their judgments gradually weakened to the point that under Amin's regime they virtually came to a standstill.

Despite the introduction of a Bill of Rights in 1984 and the later introduction of judicial review, today Tanzania continues to maintain preventive detention statutes.⁸⁶ By the late

79 Most frequently cited is *Liversidge v Anderson* [1942] AC 206.

80 Morris and Read (n 18) 330.

81 High Court of Tanganyika at Dar es Salaam [1956] 2 TLR R 227.

82 Ellett (n 68).

83 Uganda Commission of Inquiry into Violations of Human Rights, *The Report of the Commission of Inquiry into Violations of Human Rights: Verbatim Record of Proceedings* (Government of the Republic of Uganda 1995) 879–82.

84 [1966] EA 306 and 445

85 Oloka-Onyango (n 8) 24.

86 The 1991 Nyalali Report, the 1999 Kisanga Report and Tanganyika Law Society Report all recommend the repeal of Tanzania's numerous preventive detention laws. For further discussion, see Mwesiga Baregu, 'Tanzania's Hesitant and Disjointed Constitutional Reform Process' (Conference on Constitution Making Processes in Southern Africa, Sheraton Hotel, 26–28 July 2000 <www.eldis.org/vfile/upload/1/document/0708/DOC8308.pdf> accessed 1 December 2011.

1970s the Chama Cha Mapinduzi (CCM) regime's use of preventive detention measures was frequent. By the early 1980s there were some calls for change, including from the legal community, because these laws were not subject to review in the courts.⁸⁷ There were occasions when some of the bolder judges attempted to release individuals only to have them immediately rearrested outside the court.⁸⁸ The prevalence of preventive detention cases in Tanzania belies the fact that there were many, according to several prominent Tanzanian scholars, opportunities for the court to strike down the statute.⁸⁹ Like many other preventive detention cases in Tanzania, *Attorney-General v Lesinai Ndeanai & Others*⁹⁰ dealt with technicalities around the execution of the detention rather than the decision to detain itself.⁹¹ In *Lesinai* Justice Kisanga noted:

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

Adhering to these technicalities was a mechanism through which the court could, in part, protect individuals from wanton behaviour on behalf of the state. The courts could not legally challenge the mechanism of preventive detention until after 1985.

Public detentions in Malawi were widespread as government officers made a practice of detaining people concomitant to criminal investigations.⁹² President Banda used the Preservation of Public Security Regulations 1965⁹³ as a way to control potential opposition forces, to muzzle the judiciary and essentially nullify the Bill of Rights. On a few occasions the courts ensured the correct application of the Preservation of Public Security Regulations, but they never substantively stepped in. In the cases of *In re Pindeni*⁹⁴ and *Nyirenda v Republic*,⁹⁵ the High Court held that the period of detention prescribed by the 1965 regulations, regs 3(7) and 4(8), could not be extended. Later, in *Soles v Republic*,⁹⁶ the court stated that detention under the Preservation of Public Security Regulations was to be no longer than reasonably necessary to obtain a decision as to whether to make a detention order. *Soles* is the paramount preventive detention case in Malawi. Subsequent to this case, new legal provisions were enacted to establish a detention review board, the chair of which was a High Court judge. There was never a case in which the High Court ordered the release of a detainee on the grounds that the minister acted *ultra vires*, or on the grounds that the

87 The use of a parallel jurisdiction, the Economic Crimes Court, enabled a high rate of conviction under preventive detention laws. Over 100 people were incarcerated between 1981 and 1982 under preventive detention laws. See Widner (n 77) 144.

88 See, eg, *Happy George Washington Maeda v Regional Prisons Officer*, High Court of Tanzania at Arusha, Miscellaneous Criminal Cause No 36 of 1979 (unreported). Also see Chris Maina Peter, 'Incarcerating the Innocent: Preventative Detention in Tanzania' (1997) 19(1) Human Rights Quarterly 113–35, 125.

89 Eg, *Ally Lalakwa v Regional Prisons Officer* (1979) High Court of Tanzania (unreported). For discussion of preventive detention cases from the 1970s, see Lutfried X Mbunda, *Freedom of Speech and Association in Tanzania: A Study of Rights and Constitutional Development, 1961–1992* (Graduate School of Arts and Science, Department of Law, Policy and Society, Northeastern University, Boston 1999).

90 [1980] TLR 214

91 See Peter (n 88).

92 Clement Ng'ong'ola, 'Managing the Transition to Political Pluralisms in Malawi: Legal and Constitutional Arrangements' (1996) 34(2) Journal of Commonwealth & Comparative Politics 85–110.

93 The Act originated under British Colonial rule in 1960, but was revamped in 1965.

94 5 MLR 207, 211.

95 [1977] 8 MLR 273.

96 [1982] 10 MLR.

minister acted on facts which did not constitute a threat to order. During this era, a ministerial order was never challenged in the court on either procedural or substantive grounds.⁹⁷ Towards the end of the Banda era, the courts became a little bolder in striking down preventive detention cases; 85 per cent of applications in the 1980s and 95 per cent in 1991 resulted in unconditional release orders. Unfortunately, however, the release orders were largely ignored.⁹⁸

Parallel jurisdictions

As the Ugandan state militarised, public detentions became easy because judicial powers were transferred to the Military Tribunal, the Economic Crimes Tribunal, the State Research Bureau, the military police and the armed forces.⁹⁹ There was little the judiciary could do to rein in these excesses of power. As Justice Russell opined:

There appears to be a widespread but mistaken belief not only among the general public and apparently even in legal circles that the police, soldiers and private persons lawfully entitled to arrest without warrant, persons whom they reasonably suspect of having committed or about to commit designated offenses, may shoot them in cold blood should they fail to acquiesce in their arrest.¹⁰⁰

As with the establishment of parallel tribunals elsewhere, the government was dissatisfied with the work of the mainstream courts and sought an alternative with more reliable outcomes. In the Economic Crimes Tribunal (established in 1975) guilt was presumed and illegal sentences, not provided for under the decree, were common.¹⁰¹ The removal of jurisdiction from the conventional courts had a profound effect. As Justice Allen writes:

[Our courts] . . . cannot even remand such accused persons nor release them on bail. People are just slung into prison and left to await the arrival of a tribunal in that area. It could be quite a long wait as they don't sit very often . . . There is a provision for a Military Appeals Tribunal for appeals against their arbitrary decisions, but it has not yet been set up. It's just a paper court.¹⁰²

In 1973 Amin established military tribunals which tried individuals and arbitrarily sentenced to death by firing squad.¹⁰³ As Amnesty International reported in 1978, the regular rules of the court were completely suspended. Normal rules of evidence did not apply, individuals rarely had access to a legal adviser and in some extreme cases trials were conducted in secret without the defendant's knowledge. There was no appeal from these tribunals to a non-military legal authority, only to the defence council, namely, President Amin.¹⁰⁴ Extra-legal behaviour by the military continues apace today. Recent incidences range from the military police storming the High Court to re-arrest suspects already granted bail, to civilians tried in military courts.¹⁰⁵ The absence of exclusive legal authority vested in the courts thus continues to thread through Ugandan history.

97 B P Wanda, 'Malawi' in Andrew Harding and John Hatchard (eds), *Preventive Detention and Security Law: A Comparative Survey* (Martinus Nijhoff Publishers 1993) 125.

98 Joint Delegation of the Scottish Faculty of Advocates, The Law Society of England and Wales and the General Council of the Bar to Malawi, *Human Rights in Malawi* (London 1992) 85.

99 Oloka-Onyango (n 8) 30.

100 From *Ejilayimu Bukonya v The Attorney General* [1972] 329, cited in Oloka-Onyango (n 8) 31.

101 Uganda Commission of Inquiry (n 83) 42.

102 Allen (n 67) 392.

103 Trial by Military Tribunals Decree No 12/1973.

104 Uganda Commission of Inquiry (n 83) 15 v.

105 Rachel Ellett and Alexei Trochev (2010) 'Victims, Villains, Heroes or Insurance Providers? Judicial Behavior in Uganda and Ukraine' (International Political Science Association RC 09 Annual Meeting (Comparative Judicial Studies), Bologna, Italy, 21–23 June 2010).

It was in Malawi that the most radical legal structural changes took place. Banda openly indicated his dissatisfaction with the inherited colonial system early on in the independence era, and in 1967 established a Commission of Inquiry into the criminal justice system. The main thrust of the commission's report was that convictions should be meted out without undue regard to technicality.¹⁰⁶ In 1969 certain traditional courts were upgraded to allow for the trial of all types of criminal cases and had conferred on them the authority to pass the death sentence. This further allowed Banda to direct that no appeal from these courts could go to the High Court, thus generating a parallel but separate system.¹⁰⁷ Which system a defendant entered depended on the political nature of the case, or the politically desired outcome. Banda personally had a hand in deciding which cases went through which system. However, it is important to distinguish between the very small traditional courts that were popular with the people, and the bigger regional traditional courts that became politicised. In this interview extract the judge further explicates this division between the 'real' traditional courts and Banda's introduced traditional courts:

We had the *real* traditional courts. The small, small, what you would call the primary courts, they were in the villages, remote areas . . . It is when Dr. Banda created the bigger courts at the regional level and then national level to run parallel at the high level. That is where the problem was. When he created them it was to deal with murder and manslaughter cases involving Malawians . . . but over the years he started abusing the other courts, taking jurisdiction away from the regular courts.¹⁰⁸

The construction and subsequent manipulation of customary law under colonialism would operate as an important precursor to the authoritarian era. President Banda was quick to manipulate aspects of the traditional to meet his autocratic ends. The establishment of parallel systems of justice in Malawi restricted the 'scope and depth of decision-making' in the court system.¹⁰⁹ Malawian traditional courts usurped significant tranches of power from the formal judicial institutions – trying and convicting individuals on charges of treason, sedition and murder without representation. Malawi's traditional tribunals were established early in the post-independence era, whereas in Tanzania the use of parallel jurisdictions came significantly later with the establishment of the special Economic Crimes Court.

Authorised under the Economic Sabotage Act of 1984, the Economic Crimes Court was established without supervision from the judiciary and its punishments were widely described as draconian. As Mbunda writes: '[A]ll cardinal principles of criminal jurisprudence were abrogated to ensure conviction of the suspects.'¹¹⁰ In an interview, Nyalali paraphrased the President: 'I hope the judges and lawyers will forgive me; this time I am going to deal with these people outside the courts.'¹¹¹

Nyalali went on to say:

106 'We had in this country before the British came and set up an administration in 1891, a judicial system that was far superior [to the British system] . . . Justice in this country must not only be done, but must be seen to be done . . . not only by 8,000 Europeans . . . but by the four million Africans', Hansard, Malawi, 21 November 1969, 220–22 (Government Printer, Zomba).

107 Morris and Read (n 29) 329; Faculty of Advocates (Scotland), Law Society (Great Britain), General Council of the Bar (England and Wales), *Human Rights in Malawi: Report of a Joint Delegation of the Scottish Faculty of Advocates, the Law Society of England and Wales and the General Council of the Bar to Malawi* (Law Society 1992).

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

109 Tate (n 13).

110 Mbunda (n 89).

111 Widner (n 77) 145. Nyalali's shift to confront the CCM executive in person, outside of the court, would set a precedent. His behaviour has been followed by his successors (author interviews in Tanzania, June 2007).

The legislation came as a shock. We had admired President Nyerere's intellect and courage . . . How could I continue to preside over the courts when it was declared a matter of policy to bypass the judiciary?' Ultimately the Economic Crimes Court came under the jurisdiction of the High Court and then in the early 1990s it was disbanded entirely.¹¹²

While on the one hand the creation of parallel jurisdictions was an entirely post-colonial phenomenon, on the other it can be argued that there are strong, albeit indirect links to the colonial state. The construction of multiple simultaneous jurisdictions due to contemporary political and economic exigencies was a norm established by colonial authorities. The institutional fluidity or malleability of colonial institutions marked continuity from the post-colonial period. The creation of colonial law was a contested and negotiated process.¹¹³ Post-colonial legal orders remained contested spaces, but the space for contestation contracted in the face of an expanding administrative state whose *raison d'être* was the consolidation of executive power. Application of Tate's framework demonstrates the logic behind the maintenance of the overarching colonial legal institutional frameworks despite the rapid descent towards authoritarianism.

Conclusion

While the colonial experiences of these three countries with regards to the judiciary and its role and function were quite similar, important differences emerged during the authoritarian era with regards to the strategic use of the courts. The autocratic leaders of Uganda, Tanzania and Malawi spearheaded what Kwasi Prempeh refers to as an 'assault on constitutionalism'.¹¹⁴ While formally leaving the judicial institutions more or less intact, the post-independence authoritarian regimes perfected the use of informal and indirect attacks on the judiciary. As agitators for independence, Nyerere and Banda were seen as political heroes and father figures of the nation. This put the courts in an impossible position because any anti-regime decision was immediately tossed back in their faces as 'anti-nation' or 'anti-development' in the case of Tanzania, or 'anti-tradition' in the case of Malawi. In 1969, after an expatriate judge had acquitted five men on murder charges, President Banda forcefully stated: 'Those people are not going to be let loose. Not let loose. I am in charge, and I am not from England either.'¹¹⁵ After the wholesale resignation of expatriate judges, the courts had little choice but to operate within the boundaries of that regime, even when that meant applying draconian and oppressive legislation. Early signs of judicial independence in Malawi were virtually shut down, first with the resignation of expatriate judges, followed by the removal of judicial review, and, finally, the removal and then transplantation of judicial power into traditional courts. The judiciary made a few attempts to chip away at the broad preventive detention laws over time, but this never posed a threat to the Banda regime.

After being placed under house arrest – based on a colonial preventive detention law – in May 2011, the Ugandan opposition leader came out of his house and declared the following: 'What they are doing is typical of [former presidents] Amin, Obote times. And I think this government is trying to bring back such obnoxious laws.'¹¹⁶ But that same month the Uganda Law Society had already started to fight back, presenting a petition to the Chief

¹¹² Ibid 149–51.

¹¹³ Chanock (n 16); Martin Chanock, 'Paradigms, Policies, and Property: A Review of the Customary Law of Land Tenure' in Roberts and Mann (n 12).

¹¹⁴ Prempeh (n 48).

¹¹⁵ J L Lwanda, *Kamezu Banda of Malawi: A Study in Promise, Power and Paralysis* (Dudu Nsomba Publications 1993) 73.

¹¹⁶ Butagira and Ssenkibirwa (n 76).

Justice and going on strike for three days.¹¹⁷ The Law Society drew on its actual and symbolic authority rooted in common law traditions.¹¹⁸ Despite the promulgation of a new and expanded liberal constitution in 1995, there is the simultaneous use of the courts by Museveni to attempt to control dissent, but the refusal of the courts to acquiesce.¹¹⁹ When it appears as though the system is not complying, then Museveni always has the backup power of the military. This game of cat and mouse is firmly rooted in Uganda's past. Today though, recent cases indicate that the Ugandan judiciary has refused to be totally compliant. In 2006, the court threw out rape charges against opposition members, rejected the superior jurisdiction of the Court Martial and ultimately released the opposition suspects on bail again.¹²⁰ When, for the second time, the regime refused to comply and sent in a military unit to recapture the prisoners, the judiciary took the unprecedented step of going on strike. The photographs of hundreds of Ugandan lawyers standing outside the colonial courtroom on strike in their full legal regalia serves as a powerful symbol of the distinctiveness and separateness of the courts from everyday politics.¹²¹

In multiparty Malawi, the courts have been successful at finding legal solutions to what are frequently purely political disputes. Overall, the language of judges is cautious and they rarely use appeals to a higher national morality or sense of justice. The courts have not accumulated legitimacy through dramatic populist appeals but instead through the delicate navigation of high-stakes disputes.¹²² Consequently, until very recently the judiciary enjoyed some respect for its independence and willingness to challenge the executive. Recent trends under Bingu wa Mutharika indicate a reversal of this trend and increased interference.¹²³

In the case of Tanzania, the judiciary experienced a very short period of judicial assertiveness at High Court level in the early 1990s.¹²⁴ This should not be seen as a wholesale institutional transformation because these decisions were concentrated in the courtrooms of two specific judges: Justices Mwalusanya and Lugakingira. Any possibility that other members of the judiciary would follow the lead of these more activist judges was shut off in 1994 with the passage of the Basic Rights and Duties Enforcement Act.¹²⁵ Since 1994 the government has developed a habit of nullifying judicial decisions. In 1995, a

117 Emmanuel Mulondo and Anthony Wesaka, 'Lawyers Petition Chief Justice Over Judicial Abuse', *Monitor*, 5 May 2011.

118 Law societies have become reinvigorated bodies in eastern and southern Africa in the past decade. With the expansion of local legal education, the number of lawyers has increased and the law societies appear to have reached critical mass. For further discussion on the political role of lawyers and law societies in sub-Saharan Africa, see Jeremy Gould, 'Strong Bar: Weak State' (2006) 37(4) *Development & Change* 921–41.

119 See, eg, *Charles Onyango Obbo and Anor v Attorney General (Constitutional Appeal No 2 of 2002)* [2004] UGSC 1 (11 February 2004).

120 *Col Rtd Dr Besigye v Uganda* (2006) Constitutional Petition No 1 of 2006 (UCA) (unreported).

121 'Courts Suspend Work Over PRA Suspects', *New Vision*, 2 March 2007.

122 See Peter Vondoepp, *Judicial Politics in New Democracies* (Lynne Rienner Press 2009).

123 Peter Vondoepp, *Freedom House Malawi Country Report* (2011) <www.freedomhouse.org/uploads/ccr/country-7868-9.pdf> accessed 6 December 2011.

124 Peter Vondoepp and Rachel Ellett, 'Reworking Strategic Models of Executive-Judicial Relations: Insights from New African Democracies' (2011) 43(2) *Comparative Politics*.

125 Act No 33 of 1994. Under this Act, in order to litigate the Bill of Rights, first a single judge will have to gauge the soundness of the claim; then, if a prima facie case has been made before the single judge, the matter will be brought before a panel of three judges. There are numerous difficulties associated with compiling a panel of three High Court judges to hear a case in Tanzania. Some cases filed 10 years ago are still pending. Another aspect of this constitutional amendment is the serious weakening of powers of judicial review. By allowing a delay in the deliverance of courts' judgments, the government is given an opportunity to remedy the offending law before it is deemed unconstitutional.

workshop was held in which the principal judge of the High Court was called to explain the recent flurry of parliamentary Acts being overturned by judicial review.

In his lengthy speech, the learned judge challenged the Parliamentarians to view the Diceyan concept of unlimited sovereignty in the light of the wind of change currently blowing over Western Europe as a result of some decisions of European Community law . . . Justice Samatta then posed six questions to the MPs, all of which questions had an effect of challenging them to concede to the fact that the notion of unlimited supremacy was an obsolete concept.¹²⁶

In regards to the sense of entrenched conservatism and strict adherence to technicalities, Tanzania appears to be the most problematic in that individuals are choosing not to file cases under the belief that they will not be successful.¹²⁷ One Tanzanian lawyer did not link this approach to colonialism, but characterised the 'problem' in the following way:

You see judicial conservatism/neutrality whenever a hard issue is raised. The problem with that is that it becomes part of your culture. That has happened in all three countries with the apex court. The apex court becomes an extremely technical court, a predatory court . . . The motivations are different, after a while it builds into a culture at that level of litigation. After a while that is the institutional culture. Even when a new entrant comes you'd think he is a breath of fresh air, [but] he is intoxicated with that culture. If you sit on a panel of three and you are the youngest, you can't say you disagree. It has become a specific feature of the Courts of Appeal in Kenya and Tanzania especially and to a certain extent in Uganda; a Court of extreme technicalities, even when the world trend is [moving] in the other direction . . . [A]fter a while because you developed it for constitutional and public interest matters it becomes a culture so that even in civil and commercial law [cases] it is applied.¹²⁸

While there continue to be institutional–structural problems related to judicial independence and empowerment in Tanzania, there are key individuals sitting on the bench who seek to challenge the status quo. The former Chief Justice and other sitting judges strongly support the current and ongoing constitutional review process.¹²⁹

This paper has demonstrated the series of historical continuities and discontinuities in English common law institutions in three African countries. Looking forward, it will be important for judges to continue to draw on legal traditions that support the continued democratisation of the African state, while rejecting outdated statutes, norms and conventions that generate timid and subservient behaviour. The British legal tradition in Africa is not reducible to a set of facile positive or negative stereotypes. We should instead consider it to be a set of tools, some of which are outdated and damaging, others which may continue to support and protect the evolution of judicial power and independence in the twenty-first century.

126 Yohana John Barnabas Yongolo, *Constitutional Developments and the Democratisation Process in East Africa: A Case Study of Kenya and Tanzania* (University of Dar es Salaam, Tanzania 2000) 243–44.

127 Author interviews, Dar es Salaam, Dodoma, Arusha, May–June 2007.

128 Author interview, Arusha, Tanzania, June 2007.

129 Rosemary Mirondo and Rosina John 'Tanzania: CJ Joins Debate on New Constitution', *The Citizen*, 9 December 2010.

