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THE JUDICIARY AND DEMOCRATIC GOVERNANCE IN SUB-SAHARAN AFRICA: THE COMPLEXITIES OF REGULATING COMPETING INTERESTS*

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ABSTRACT

Countries in sub-saharan Africa, like their counterparts elsewhere in the world, have been going through social, economic, legal and political changes. The changes range from colonialism to independence, from one party and military dictatorships to the current multi-party democracy. Through all these changes, the legal system in general and the judiciary in particular, which were imposed by colonial powers, have been influenced by the demands of each phase as much as they have attempted to influence or cope with these changes. Notions of liberalism and individualism, inherited at independence from both the English and Roman-Dutch common law, for example, had to measure up to or to be measured against the requirements of one-party ideologies administered by state bureaucrats in circumstances where ruling parties were regarded as supreme. These changes and corresponding demands of the time did not pass without consequences and/or implications on the legal system and the judiciary. Political centralism appears to be on the way out and multi-party democracy is on the way in.

During centralised governance, several things went wrong and the World Bank has recently identified the judiciary among institutions which have been run down. The Bank expressed the need for and willingness to take part in rebuilding these institutions so that they could effectively regulate competing political and economic interests, preserve the rule of law and protect human rights in the newly introduced political pluralism and free market systems.

This article examines how the judiciary was marginalised during centralised governance and analyses the complexities they will have to grapple with in the new era. Conclusions are drawn that the judiciary in the sub-region will have to do a lot more not only to win the hearts and minds of most of the people in their respective countries but also to satisfy social expectations and rebuild the otherwise tarnished legitimacy. In order for the proposed reconstruction to be meaningful, public indignation with law and legal institutions need to be recognised and addressed. Such comprehension calls for constructive public participation in all forms of legal reform as part of democratisation.

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INTRODUCTION

The observance of the rule of law and respect for individual human rights are said to be among the important components of good governance. The judiciary is known to be the custodian of most, if not all, the ideals that go with the rule of law and human rights. Law and the judiciary, therefore are expected to be essential pillars in the emerging era of political pluralism in sub-saharan Africa as the two are central in the regulatory process for purposes of fair play. Much as these observations are made by the proponents of political pluralism and good governance, they are echoed by the players in the game of power and power-seeking and heard by all of us (small-time players and spectators most of the time). With the exception of South Africa, very little has been said about the complexities of the law and the uncertainties surrounding justice administration in general and sensitive constitutional interpretation and protection of human rights in particular in other countries in the sub-region. Very rarely have the parties involved in the promotion of political pluralism and good governance made sober and concerted efforts to examine the practices, strengths and weaknesses inherent in the law, the legal systems and institutions expected to be responsible for providing the necessary regulation during the era now in the making. In Tanzania, for example, one political commentator recently suggested in a newspaper article that the judiciary was favouring the opposition.¹ The cartoon that accompanied the story showed a person wearing a CCM (ruling party) shirt playing volleyball against another, in an opposition shirt, with the judiciary on the opposition side. These observations, which have been made several times even before the publication of this newspaper article, are partly based on a faulty understanding of legal technicalities and may oversimplify the complexities inherent in judicial decision making.

The judiciary is known to very conservative and there is little to suggest that it is likely to make any adjustment and act otherwise in the new era. This rather sceptical and pessimistic observation derives not from any disrespect for the rule of law and independence of the judiciary or a distrust of personalities entrusted with the regulation process. Far from it. It is based on abundant evidence available from places that are geographically, economically and culturally divergent. The places from which evidence for this conclusion is based include: England, India, Kenya, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe, to mention only a few.² Literature from these countries shows that the judiciary can be and has been compliant, subservient, and executive-minded, to the detriment and at the expense of individual rights. These are genuine concerns which need to be recognised and addressed during the transition period. Discussions on this important aspect of political pluralism and democratisation seem to be lacking. Law and legal institutions are taken for granted to an extent that opportunities for reflecting on and reviewing of the strengths and weaknesses of the system, the institutions, and the persons who are the main actors in the institutions are wasted.

1. See *The East Africa*, 17th April 1995.
2. Literature from the countries in question include: England (Griffiths 1977), India (Baxi, 1982, Iyer 1987), Kenya (Days III: 1992, Kuria 1991), South Africa (Dugard 1978, Ellmann 1992), Swaziland (Hlatshwayo 1992), Tanzania (Mwaikusa 1991, Mwalusanya 1995 a & b, Shivji 1985), Zambia (Mbao 1989 & Mubako 1983/84) and Zimbabwe (Gutto & Makamure 1985, Christie 1983). In these countries the role of the judiciary and especially its limitations in the protection of human rights has been widely discussed. In the course of such discussions judges were not only made aware of public expectations regarding their important role; they were also reminded of the consequences of their abdication of judicial duty.

The elevation of law and legal machinery from marginality, suffered during one party rule and military dictatorships, to centrality during the democratisation process, without adequate discussion might not only obscure the history of liberal legalism in general, and its application in the sub-region, but might also prevent us from learning important lessons elsewhere. This article does not provide any concrete answers to the questions it raises but marks signposts towards the search for answers. An opportunity to reflect on the questions may help us to come to terms with what we have already observed (in the form of constitutional enactments and cases decided by judges in superior courts) and deliberate on potential courses of action and decisions. By so doing we may be able to avoid arriving at rushed and potentially erroneous conclusions.

LIBERAL LEGALISM AND THE LEGITIMACY OF THE JUDICIARY

The existing legal systems in most countries in the sub-region are basically English and Roman-Dutch in origin. One can safely conclude that the judiciary imposed on these countries by colonial masters survived as an institution through the colonial era to independence, through the socialist construction and military rules, and now into the multi-party system of government. Although personalities have to a large extent changed, due to wear and tear and other reasons, the institution and most of the rules and practices applicable have remained largely the same. This partly reflects the resilience of the institution in question but, on the other hand, it is also evidence of how some institutions are very difficult to change. The judiciary being professional in character, the manner and patterns of its application of legal rules are matters acquired through long term training and assimilation and, therefore, internalised and not easy to shake off.

It is common knowledge that crises involving the state in most countries in Africa, also affected the legal system. The executive monopoly and domination which did not end with the economic sphere but extended to the political process, including the law making body (the legislature) also affected the judiciary somewhat. It has also been noted in the literature that the judiciary, being aware of the trends in the exercise of executive powers, adopted a subservient posture and that some of its members even became executive-minded. With the advent of multi-partyism in Tanzania, for example, the Honourable Chief Francis Nyalali observed that legalism was marginalised in favour of policy during the one-party rule.³

Partly due to these crises the International Bank for Reconstruction and Development (World Bank) and the International Monetary Fund (otherwise known as the terrible twins) in collaboration with other western donors, intervened and demanded not only the liberalisation of economies but also a change in the governance approach, both of which have implications to the application of law and legal institutions (World Bank 1989).

Questions which arise out of these economic, social and political developments include: how much has judicial credibility and legitimacy been affected by the crises? What has the judiciary done to remedy the injury and how? What are the feelings of the powers-that-be and the general public towards the crises and remedial measures? These are not easy

3. See *Daily News*, 8th June 1993.

questions and answers may differ along political and ideological lines. Some things are certain however. Members of the judiciary, at least those in decision making positions, acknowledge that some of the mud thrown at them did stick. The extent of the washing and the cleanliness of the linen are matters which will be decided with time. Although there may be differences as to the causes of the crises and the remedies thereto, free market and political pluralism have already been chosen as part of the way out of the crises. The centrality of law with the independent judiciary as custodians of the rule of law, individual human rights and regulators of competing interests are part of this system now being put in place. It is because of this elevation of law and legal institutions, especially the judiciary in this case, that a proper understanding of the legal processes in general and the judiciary in particular is called for.

TOWARDS AN UNDERSTANDING OF JUDICIAL DECISION MAKING

It has been suggested that in free market and political pluralism, law and legal institutions are accorded a central and prominent role. This is in sharp contrast to the centralised state and one-party regimes where law and legal institutions are marginalised and played down. In order to understand the legal system and legal institutions, certain important historical facts have to be borne in mind.

For the sake of clarity, therefore, it must be stressed that the judiciary, as an institution, in Tanzania for example, has gone through three important phases. It was created during the colonial era, inherited at independence and has survived through the Arusha Declaration and one party rule. With political pluralism, the judiciary is entering into a fourth phase. Each of these had its own importance in the history of that country and, therefore, each phase had and was likely to have its own demands on the judiciary. The judiciary in other countries can be categorised almost in the same way. For want of time and space the treatment of that history will have to wait for another occasion. For the purpose of this paper, it suffices to say that the judiciary in Tanzania, and elsewhere in sub-saharan Africa, has remained an important institution for the settlement of disputes, notwithstanding the constraints within which it is operated. Although this is no meagre achievement, it should also not be a reason for complacency especially in the light of new demands.

Challenges and demands placed on the judiciary during the one-party and military rule were wide ranging. As has already been noted, law was used to promote a single ideology and maintain the power of an unchallenged ruling class and the judiciary endorsed most of these aspirations (see Kuria 1991: 28). All these difficulties notwithstanding, the judiciary survived. It performed important functions and even managed to stir out of trouble. How the judiciary managed to avoid trouble yet still perform such an important role is an indication of what it is capable of doing. How the judiciary performs in times of trouble depend on the approaches its members adopt in the interpretation of the Constitution and other laws made by Parliament. These approaches need to be considered.

Approaches to Judicial Decision Making

In the performance of their duties judges often find themselves not only dealing with both easy and difficult cases but also having to decide cases in normal and abnormal situations. In whatever condition they find themselves they are expected to apply the law made by

Parliament or decrees issued by the powers-that-be, to the facts before them and pronounce judgement on the matter. There are several methods by which they do that. For the purposes of this discussion examples of two dominant styles of judicial opinion may help to illustrate how judges approach sensitive political issues in both the Anglo-American and Roman-Dutch legal tradition. From these illustrations a conclusion may be drawn regarding the category to which judges in the superior courts in sub-saharan Africa may be placed.

Masons in the Judiciary: The Exercise of Restraint⁴

Under this category it is argued that judges do not make law but they administer the law. It is said that they do that by interpreting the law literally by seeking to ascertain its purport through the sole medium of words. The argument goes on that by so doing judges are acting in accordance with the doctrine of separation of powers, which among other things, requires that each branch of government should perform only the functions entrusted to it. In this case of the judiciary, the function is to interpret the law and never to make it. By restricting themselves to the interpretation of law they do not only maintain their independence but also their impartiality. Judges in this category are also called formalists, timorous souls, traditionalists etc.

A warning given against dangers inherent in judicial creativity is that judicial law-making is unacceptable because it is undemocratic and that if allowed would create rights where there were none. Mauro Cappelletti, who has researched and published extensively on the law-making powers of judges, has observed that:

in all its expressions, formalism tended to accentuate the element of pure and mechanical logic in judicial decision making, while neglecting, or hiding, the voluntaristic, discretionary element of choice . . . choice means discretion even though not necessarily arbitrariness; it means evaluation and balancing; it means giving consideration to the choice's practical and moral results; and it means employments of not only the arguments of abstract logic, but those of economics and politics, ethics, sociology, and psychology (Cappelletti 1981: 21).

His conclusion is that the role of judges is not to interpret the law literally. They go beyond the literal meaning of words.

Judicial Architects: The Purposive Approach

The opposite of judicial restraint is judicial creativity. Some theorists have suggested that judicial creativity was a revolt against judicial restraint. They emphasize that it was false and illusory to suggest that pure deductive logic could help the judge ascertain the law uncreatively and without personal responsibility. It is argued that in the field of judicial interpretation there is a middle ground where choice and discretion may be exercised and a purposive approach brought into play. The words of Lord Reid capture the distinctions as follows:

Those with the taste for fairy tales seem to have thought that in some Aladdin's Cave there is hidden the common law in all its splendour and that on a judge's appointment

4. The distinction between mason and architects is adopted from the categorisation of pericles and plumbers of Twining (1967). See also Bridge (1975).

there descend on him knowledge of the magic words "Open Sesame!". Bad decisions are given when the judge muddles the password and the wrong doors open. We do not believe in fairy tales any more (Quoted in Lord Lester 1993: 269).

In its history this revolt has not been smooth. However, through it, legal rights were extended to blacks and women in America which no one disputes today. In England judges read into the common law, without the intervention of parliament (though endorsed later), the rights of the wife to hold the title to property jointly with her husband when the title was doubtful. Many examples of rights may be listed which were created and recognised through judicial activism.

As expressed by Lord Reid in the quotation above, English judges have for a long time fallen in either of the two broad categories. Those who exercise judicial restraint and limit themselves to finding the meaning of words as laid down by Parliament and those who are willing to go beyond the meaning of words and explore the purpose for which legislations were passed. Those in the former category do not in most cases upset the executive. But judges in the latter category do cause some disquiet among executive ranks (see Woodhouse 1995 and 1996).

During the apartheid era in South Africa and especially in the mid-1960s, judicial restraint was the most favoured approach (see Dugard 1978: especially Chapter 9). There is abundant evidence to show that most judges in sub-saharan Africa, like most of their colleagues in Britain and apartheid South Africa, adopted the former approach in favour of the latter. They shielded themselves behind formalism and ignored creativity. Accordingly, most decisions justified executive action in the place of the rights of individuals who appeared before the courts. The laws were interpreted literally irrespective of the social, cultural and political harm they caused. By so doing, the judges stirred themselves out of trouble but, in turn, undermined their role as custodians of justice, the rule of law and human rights.

The conflict between these two approaches brings with it several difficulties indicative of the dilemma faced by the judiciary in the course of their exercise of their functions in general and during the transition towards the multi-party era. An understanding of this dilemma may take up some way towards an appreciation of the inherent difficulties surrounding judicial decision making processes. Judicial neutrality and independence, which are among the cornerstones of judicial processes, do not mean the same thing to different interest groups especially in the light of the changing nature of governance in the light of newly found freedoms enacted in justiciable Bills of Rights. Examples from Namibia, Tanzania and Zambia illustrate this.

The Judiciary in Sub-Saharan Africa: From Marginality to Prominence

The role of the law and the functioning of the legal system, and especially the judiciary in the sub-region, during political pluralism, has to be understood within the historical and comparative perspectives discussed above. This is more so because not only has the failure of centralised governance, and its attendant consequences to social institutions, been extensively demonstrated (see Wunsch & Olowu 1990), but also because it is due to that failure that democratic governance in general, and constitutionalism and human rights in particular, have been promoted as part of the cure (World Bank).

The transition from centralism to multi-partyism is associated with changing emphasis in the way in which political power is exercised. Unlike times gone by, judiciaries in countries in the sub-region will be expected to play an important role in the control of the law-making powers of parliaments as well as executive powers where these are suspected of offending the respective constitutions. In other words, constitutional supremacy. As would be expected, these momentous changes are not without difficulties.

A judge appointed to the High Court in Namibia was assumed to be a staunch opponent of apartheid (Steyley 1993: 493). His appointment was considered objectionable in some quarters and there were calls for his dismissal on grounds of his alleged allegiance to the ruling party — SWAPO. It was not long after appointment that he presided over a matter and handed down a decision which stunned his alleged allies. They not only turned against him by demonstrating on the streets; they also called him names ranging from "Apartheid judge", "Colonial judge", to "Racist judge." They also called for his dismissal. The following is what the judge had to say:

Two years ago some people called for my dismissal on the ground of alleged sympathy with SWAPO. Now a SWAPO-leader and SWAPO-supporters ask for my dismissal, *inter alia*, on the ground of an alleged colonialist and anti-black mentality. According to them I have become irrelevant to black thinking in Namibia as I should not be on the High Court Bench at all.⁵

The judge acknowledged the quandary in which he found himself. He quoted the provisions of the Constitution at length and called on those in power not only to observe and protect the Constitution, under which his office is created, but also pleaded with them to exercise their power and take action against whoever was involved in inciting the public to get on to the streets.

The material on the developments in Zambia is scanty but nevertheless informative. A High Court judge was reported to have resigned recently.⁶ Two reasons were given. One of these reasons was that the judge had not been promoted above the position of the High Court judge which he had held for more than eight years. Colleagues who came to the Bench after him had been promoted to the Supreme Court. The resignation, though, came after the said judge had been suspended from duty for several months and a Constitutional Tribunal of Inquiry appointed by the President to determine whether his services should be terminated or otherwise. In regard to the pending inquiry the second reason for the resignation was given. The judge observed that he had decided to leave because he was not sure whether the tribunal appointed to probe him would be fair. The judge remarked that he had information that a judge had been sent abroad to appraise a member of the tribunal before it sat. He is quoted to have said that:

5. Page 786 of Judge O'Linn's judgement in the case of *S v Heita and Another* 1992 (3) *South African Law Report*, 785-796.

6. This was not the first resignation of a judge in Zambia nor is it likely to be the last there and elsewhere in sub-Saharan Africa. In 1969 Justice James Skinner, the Chief Justice of Zambia, resigned after enormous pressure was exerted on him and other judges by President Kaunda and ruling party officials (see Hall 1969: Chapter 14). Chief Justice Annel Silungwe, also a Zambian, resigned in June 1992 following his alleged involvement in a high profile case and public outrage about a Supreme Court decision (see Mbaio 1992). Dugard (1978: 22) reports that President Kruger dismissed Justice Kotze in 1897 after a decision in which the judges asserted the court had power of judicial review.

To me, this is clear evidence that our Supreme Court, as currently constituted, has desecrated and thrown to the winds the sacrosanct principle of impartiality in a trial (*Times of Zambia*, 15th August 1997).

Press reports suggest that the judge in question had fallen out of favour with the authorities because of his tough stance against supposed government heavy-handedness. Two examples were cited. First, the judge had at some stage issued a ruling to the effect that the Speaker of Parliament had no power to send newspaper editors to prison. Secondly, the said judge is reported to have released suspects who had spent several years in prison without trial. The judge did not comment on the first of the two. As to the second one he maintained that there was nothing wrong in him releasing suspects who had been detained for more than four years without being tried. He added that he was not the only judge who had done that.

In Tanzania, on the other hand, a judge of the High Court has expressed his frustration with his brethren who, he said, have been party to the abuse of power and violation of human rights in the country. He has gone to great length to show how this had come about. Expressing his frustration the judge made remarks like: "lawyers in ideological fog", "burying their heads in the sand", "the legitimacy of the judiciary is undermined" "community confidence in the judiciary has declined". Unlike the Namibian judge, who complained that he was called names by the demonstrating public, the Tanzanian judge pinned labels on his colleagues.

After identifying the above weaknesses among his colleagues the judge in question has declared categorically that he supports democracy in general and multi-partyism in particular. He has noted that human rights have to be respected by those in power and have to be protected by those who occupy judicial offices. The judiciary, the judge said, "must make itself relevant to society."

The ambiguities in the above case studies are very glaring. A point relevant to this discussion is that contenders were pulling in different directions. In each of them the contesting parties (the demonstrating public in Namibia, the power-that-be in the case of Zambia and the judges) may claim to have exercised some aspects of democracy. The judges in question may insist that they were doing their work in accordance with their oaths of office — without fear or favour — and as one would expect, with the help of God. The events and processes leading to the issues discussed above, however, did not please everyone. The Namibian judge appeared to be puzzled by the demonstration. How could a section of the population be allowed to undermine the integrity of the judge and the judiciary in general, threaten the ethos of the rule of law enshrined in the Constitution and undermine constitutional democracy? His Tanzania counterpart, on the other hand, considered it prudent to declare what he thought was not right within the judiciary and had the courage of appealing to colleagues to correct their attitudes and adopt what he regarded as the proper approach.

The Namibian judge was in no doubt about the source of his powers — the Constitution, from which he quoted at length. He even quoted the oath of office for Namibian judges in order to show his accuser that he has never fallen short of what was expected of him in his performance of judicial functions. Whereas leaders of the legal fraternity in Namibia issued strong statements in support of their brethren, it is apparent from the statement of the

Zambian judge that the constitutional principles were being undermined with the connivance of certain members of the legal profession or that some of these colleagues were abetting the disregard of established principles.

Whereas the Tanzanian judge appealed to his colleagues to harmonise constitutional provisions with the practical realities and the plight of the common man, the Namibia judge, on his part, called on his counterparts to rally behind him and condemn the demonstrating public and in so doing protect the Constitution. Their Zambian colleague, on the other hand, appeared to have no constituency to appeal to. He had lost confidence in his own brethren, who he suspected of partiality. He did not seem to have anything to tell the general public nor did he have audience. He decided to call it a day by offering his resignation — which the President, we were told, accepted without any regrets.

Senior lawyers rallied behind their colleague in Namibia. There has not been any such show of solidarity among Zambian lawyers in general and judicial officers in particular. It appears that Zambian judicial officers have preferred to express their neutrality by remaining silent and shielding behind the abstract rules of the Constitution. Judicial reticence in that particular instance, like in other similar circumstances, may be defended as being in keeping with the judicial oath of office which demands of them to decide matters which come before them in one way or another and let parties to the cases and other observers and commentators decide for themselves. That does not necessarily mean, however, that their conscience and political leanings cannot be determined.

Public displeasure with judicial decisions can be dismissed with impunity as in the case in Namibia. Calls for the arrest of those instigating the public to protest against such decisions could be made and even implemented. This is only possible because members of the public have limited influence, if any, and no effective means of enforcing their disapproval. Judicial frustration, as in the case of Tanzania, could be expressed and implemented, as in the case of Zambia, with little regard for constitutional safeguards and with impunity. The roles played by lawyers and judicial officers in the above case studies demonstrate how safeguarding democracy in general, and protection of human rights in particular, are much more complex than currently provided for by the constitutional rules in general and liberal constitutional principles in particular.

As part of the reflection on the complexities, several questions need to be asked here: which one of the contending forces (the powers-that-be, as in the case of Zambia and Tanzania, and the powerless demonstrating public, as in the case of Namibia) poses more threat to democracy, constitutionalism, the rule of law and human rights? Is it democracy, the Constitution and its principles, the judges, other powers-that-be or the general public? How and who should provide that protection? These questions and others of the like need to be debated and should not be taken for granted.

Allegations of Corruption in the Judiciary?

Notwithstanding the complexities surrounding the distinction between the masons and architects in judicial decision making, and the attendant suspicions surrounding them, allegations of corruption among judicial officers have also been voiced. This is not to be regarded a phenomenon limited to sub-Saharan Africa. Such allegations are known to have been recorded in places like Britain sometime in its history (Pannick 1987: 89). Similar suggestions have been heard in the Indian sub-continent (Singhi 1981) and the West Indies.

In the case of sub-saharan Africa allegations of corruption among judicial officers have been made in Kenya, Tanzania, Zambia and Swaziland to mention only a few. These allegations could not have come at a worst point in time, this being the time when almost all centres of power and influence are said to be involved in one form of corruption or other. Judicial officers would have done better if they were spared those negative aspects in order for them to be able to exercise their power of censure more effectively. There is only a meagre chance that the above is the case.

If we were to extend our imaginations as to the feelings of judicial officers regarding this state of affairs one of several replies might be expected. Without proof beyond reasonable doubt the above allegations remain unsubstantiated and should be regarded merely as such. Correct as that reply sounds, it does not, however, mean that members of the general public who appear before judicial officers, either as complainants and victims of human rights violations or as witnesses, take such allegations lightly. As expressed in the legal jargon that, "justice need not only be done, it must manifestly be seen to be done." Surely, in prevailing circumstances one cannot safely say that "Caesar's wife is beyond reproach." In the absence of that the bases on which liberal justice rest are already in doubt. Even if justice was to be done it may not be said to have manifestly been seen to be done. That, in itself, has enormous consequences not only to the institutions of power, but also to the wider social fabric in which the institutions concerned operate.

CONCLUDING REMARKS

It was suggested earlier that there appears to be a tendency of taking some of the issues raised here for granted. If this view is shared then there is need to consider and reflect more rigorously not only on the transformation that is taking place in the world in general and in the sub-region in particular, but also on the consequences which these transformations have on the allocation of power in general and on judicial decision making in particular.

Judges deference to the executive and to some extent acquiescence to abuse of power, which characterised the judiciary in centralised regimes, was unacceptable and is least desirable and without a place in multi-party democracy. To what extent members of the judiciary will be able to discard past images, in the context of the constraints discussed above, we should not speculate on but deliberate. One feature, though, is clear. Democracy and the protection of human rights in particular, which entails among other things, participation and openness, has to extend not only to the ways in which judicial power is exercised; they must encompass the manner in which the consumers of legal services relate the taxes paid to services rendered. Democracy, of whatever form, will be incomplete without that.

What can be gathered from the three case studies above, and experiences from other sub-saharan African countries in general, is that all is not well with existing structures of governance. Constitutional provisions and prevailing practices in governance institutions give a raw deal to the general populace. Besides periodic franchise the general population is at the mercy of power holders, be it the Executive, Legislature and even the Judiciary. This imbalance in power arrangements cannot be justified in whatever form of democracy. It is high time that the imbalance is consciously deliberated upon and measures of putting it right are considered. In the absence of that we will all be accused, as Justice Mwalusanya has done, of burying our heads in the sand like ostriches.

REFERENCES

- Baxi, U. (1982). *The Crisis of the Indian Legal System*. New Delhi: Vikas.
- Bridge, J.W. (1975). "The Academic Lawyer: Mere Working Mason or Architect?" *Law Quarterly Review*, 91: 488-501.
- Cappelletti, M. (1981). "The Law-Making Power of the Judge and its Limits: A Comparative Analysis." *Monash Law Review*, 8: 15-67.
- Christie, R. (1983). "The Executive and Judiciary in Zimbabwe." *South African Law Journal*, 100:297-301.
- Dugard, J. (1978). *Human Rights and the South African Legal Order*. New Jersey: Princeton University Press.
- Ellmann, S. (1992). *In Time of Trouble: Law and Liberty in South Africa's State of Emergency*. Oxford: Clarendon Press.
- Ghai, Y. (1991). "The Role of Law in the Transition of Societies: The African Experience." *Journal of African Law*, 35, 1: 8-20.
- Griffiths, J.A.C. (1977). *The Politics of the Judiciary*. New York: Fontana. Paperback edition.
- Gutto, S. & K. Makamure (1985). "Judicial Subversion under the Cloak of Legality: The Judgement of the Minister of Home Affairs v. Bickle and 3 others." *Zimbabwe Law Review*, 3:119-129.
- Hall, R. (1969). *High Price of Principles: Kaunda and the White South*. Harmondsworth: Penguin Books.
- Hlatshwayo, N. (1992). "The Ideology of Traditionalism and its Implications for Principles of Constitutionalism: The Case of Swaziland." Unpublished LL.M Thesis: York University.
- Iyer, V.R.K. (1987). *Our Courts on Trial*. New Delhi: B.R. Publishing.
- Kuria, G.K. (1991). "Kenya's Constitutional Crisis and the Courts." *Nairobi Law Monthly*, 31: 21-28.
- Lord Lester (1993). "English Judges as Law Makers." *Public Law*, 269-290.
- Mbao, M. (1992). "The Criminal Justice on Trial in Zambia: A Case Note." *Journal of African Law*, 36,2: 175-182.
- (1989). "Extension of Powers of Preventive Detention to Economic Crimes in Zambia." *Journal of African Law*, 33,1:116-125.
- Mubako, S. (1983/84). "Fundamental Rights and Judicial Review: The Zambian Experience." *Zimbabwe Law Review*, 1, 2: 97-132.
- Mwaikusa, J.T. (1991). "Government Powers and Human Rights in Africa: Some Observations from the Tanzanian Experience." pp. 75-105 in N.S. Rembe & E. Kalula (eds.) *Constitutional Government and Human Rights in Africa. Proceedings of a Workshop*. Maseru: Lesotho.
- Mwalusanya, J.L. (1995a). "The Bill of Rights and the Protection of Human Rights — The Tanzanian Court Experience." *Nairobi Law Monthly*, 52: 41-46.
- (1995b). "Checking the Abuse of Power in a Democracy." Paper to the International Conference on Constitutionalism and the Legal System in a Democracy, held at Arusha (Tanzania), 28-29th March 1995.
- Pannick, D. (1987). *Judges*. Oxford: Oxford University Press.
- Shivji, I.G. (1985). "Introduction: The Transformation of the State and the Working People." pp. 1-15 in I.G. Shivji (ed.) *The State and the Working People in Tanzania*. Dakar: Codesria Book Series.
- Singhi, S.R. (1981). "Corruption in the Administration of Justice and Accountability of the Legal Profession." *All India Reporter (Journal)*. 158-159.
- Steytler, N. (1993). "The Judicialization of Namibian Politics." *South Africa Journal of Human Rights*, 9,4: 477-499.
- Twining, W.L. (1967). "Pericles and Plumbers: Prolegomena to a Working Theory for Lawyer Education." *Law Quarterly Review*, 83:396.

- Woodhouse, D. (1996). "Politicians and the Judges: A Conflict of Interest." *Parliamentary Affairs*, 49, 3: 423-440.
- World Bank (1989). *Sub-Saharan Africa: Stagnation to Sustainable Growth, A Long Term Perspective Study*. Washington, DC: World Bank.
- Wunsch, J.S. & D. Olowu (eds.) (1990) *The Failure of the Centralized State: Institutions and Self Governance in Africa*. Boulder: Westview Press.
- (1995). "Politicians and the Judiciary: A Changing Relationship." *Parliamentary Affairs*, 48, 3: 401-417.



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