

Neither “timorous souls” nor “bold spirits”: Courts and the politics of judicial review in post-colonial Africa

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In one of his most celebrated dissents on the Court of Appeals of England, the legendary common law jurist Lord Denning suggested a binary classification of judges: “On the one side there were *timorous souls* who were fearful of allowing a new cause of action. On the other side there were *bold spirits* who were ready to allow it if justice so required.”¹ The progressive development of the law, according to Denning, is to be credited to the judicial creativity and courage of bold spirits; timorous souls showed blind allegiance to existing rules and precedent – the ‘dead hand of the past’ – and, in so doing, served a sterile, not a constructive, role in the law.² If “[t]he powerful still abuse their powers without restraint,”³ it is thanks to the dominant influence of timorous souls; bold spirits will not let stand “any rule of law which impairs the doing of justice – they will do all they “legitimately can to avoid that rule – or even to change it – so as to do justice in the instant case before [them].”⁴ Denning saw law – and for that matter, judicial office – as an instrument for doing instant justice.

Lord Denning practiced what he preached. As a judge, he exemplified the bold spirit *par excellence*.⁵ In his thirty-eight years on the English bench, Denning blazed many new trails in the common law, frequently upsetting the doctrinal status quo in the process. In time, many of his dissenting judgments, including the famous “timorous souls”/“bold spirits” dissent in *Candler v. Crane, Christmas & Co.*, became the law of the land – not only in England but in the larger common law world.

Postcolonial Africa was born in the “age of Lord Denning.”⁶ Denning in fact played a pioneering role in the design and establishment of formal legal education and training in Africa from the late 1950s onwards, serving as chairman of the Committee on Legal Edu-

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¹ *Candler v. Crane, Christmas & Co.* [1951] 2 K.B. 164, 178 (emphasis added).

² Hon. Justice M. D. Kirby, Lord Denning: An Antipodean Appreciation, *Denning Law Journal* 1 (1986), pp. 103-116.

³ *Lord Alfred Thompson Denning*, *The Discipline of Law*, London 1979, p. 315.

⁴ *Id.*

⁵ See *P.S. Atiyah*, Lord Denning’s Contribution to Contract Law, 14 *Denning L.J.* 1, 1999.

⁶ In a 1977 column in the *TIMES*, Sir Leslie Scarman wrote: ‘the past 25 years will not be forgotten in our legal history. They are the age of legal aid, law reform and Lord Denning.’ *Denning*, note 2, p. 315.

cation for Students from Africa.⁷ The committee's report became popularly known as the "Denning Report" and "won Denning a devoted following in Africa."⁸ But among past and present communities of lawyers, jurists and law students in common law Africa, Denning is best remembered and widely celebrated for his activist judicial philosophy, his path-breaking judgments, and his prescient dissents.

In particular, Lord Denning's view that judges, *properly so called*, must be "bold spirits," not "timorous souls," appears to have left an enduring imprint on conceptions of the judicial role held by postcolonial Africa's professional and academic lawyers. Indeed the term "timorous souls" has become an epithet of choice used by contemporary Africa's common law lawyers to describe a judiciary that appears unable to use judicial power to restrain or counter the excesses of the legislative and executive branches. Conventional accounts of the performance of African judiciaries in the postcolonial period, specifically with regard to judicial review of legislative and presidential action, are quick to blame judicial timidity – or at a minimum a want of judicial creativity – for the authoritarian turn in Africa's political governance in the early decades after the end of colonialism. I aim in this essay to challenge that conventional narrative.

There are multiple problems with the conventional narrative. First, it fails to acknowledge the significant differences between common law judging (Lord Denning's domain) and judicial review mediated by a constitutional text. The latter must abide certain constraints that do not necessarily apply to the former. Second, the conventional narrative, insofar as it measures judicial failure solely in terms of a judiciary's inability or failure to countervail authoritarian exercises of legislative or executive power, assumes that (constitutional) judicial review is, by definition, a counter-authoritarian (or counter-majoritarian) institution. While this one-sided understanding of what judicial review does is pervasive, it is inaccurate. Judicial review is double-edged; it "performs not only a checking function but also a legitimating function."⁹ Third, close study – and historical contextualization – of the popular comparative models of judicial heroism, notably the Marshall Court in *Marbury v. Madison*¹⁰ and the Warren Court in *Brown v. Board of Education*,¹¹ shows that even these idealized stories of judicial review turn out to exemplify politically *strategic* judging more than they do heroic judging. Fourth, the conventional narrative of African judicial performance in the authoritarian postcolonial period treats judicial review as a purely legal and judge-centered phenomenon and, for that matter, sees judicial behavior and agency as purely endogenous. In the process, it fails to acknowledge the larger world of

⁷ John A. Harrington and Ambreena Manji, 'Mind with Mind and Spirit with Spirit': Lord Denning and African Legal Education, 30 *Journal of Law and Society* 3, September 2003, pp. 376-99.

⁸ Jennifer Widner, *Building the Rule of Law in Africa*, New York 2001, p. 50.

⁹ Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, New Haven 1986.

¹⁰ 5 U.S. (1 Cranch) 137 (1803).

¹¹ 349 U.S. 483 (1954).

politics and the socio-political context within which judiciaries are situated as well as the oftentimes determinative influence that these have on judicial action and decision-making.

While this essay addresses each of these various flaws of the conventional critique, it is concerned principally with the last two. The remainder of the essay is organized as follows. Section A reviews the performance of African judiciaries in the exercise of judicial review power during the authoritarian postcolonial period. The discussion is organized around a small selection of representative cases decided by postcolonial African courts. Section B proceeds to discuss the judge-centered explanations commonly offered for the failure of judicial review in postcolonial Africa. In Section C, I situate postcolonial judicial review within its relevant political and social contexts and, then, offer an alternative, political explanation as to why judge-enforced constitutionalism had little chance of success in the heyday of authoritarian rule in Africa. I conclude with some brief comparative reflections drawn from the American experience.

A. In the Beginning: The Fall of Judicial Review in Postcolonial Africa

On August 28, 1961 the Supreme Court of Ghana delivered its judgment in the first case in postcolonial Africa to challenge, on substantive grounds, the constitutionality of national legislation. The case, *Re Akoto & Seven Others* (“*Re Akoto*”),¹² stemmed from the Ghana government’s use of its preventive detention law to arrest and detain eight members of the opposition party in November 1959. Enacted by the Ghanaian Parliament in 1958, only one year after the country’s independence, the Preventive Detention Act had been modeled after a colonial ordinance.¹³ The law gave the President (or a Minister acting on his behalf) authority to order the detention without trial of any citizen of Ghana for up to five years at a time, if the President was “satisfied” that the detention was necessary to prevent the person detained from acting in a manner prejudicial to the defense or security of Ghana or to her external relations.¹⁴ The law did not require as a predicate for its application, that the government declare or establish the existence of emergency.

The petitioners in *Re Akoto* initially challenged the legality of their detention by means of an application for a writ of *habeas corpus* before the High Court, the superior court of first instance in Ghana. Once their habeas corpus petition had failed, they invoked the original jurisdiction of the Supreme Court to determine questions of constitutionality,¹⁵

¹² *Supreme Court of Ghana, Re Akoto & Seven Others*, Ghana Law Review 2 (1961), p. 523. The case and related facts are extensively discussed in William Burnett Harvey, *Law and Social Change in Ghana*, Princeton 1966, pp. 281-95 and in Francis A. R. Bennoin, *The Constitutional Law of Ghana*, London 1962, pp. 220-26.

¹³ See Harvey, note 12, pp. 282-83 (discussing colonial ancestor to the Preventive Detention Act).

¹⁴ The relevant provisions of the Act are reproduced in Bennoin, *id.*, p. 221.

¹⁵ Article 42(2) of the 1960 Constitution of Ghana provided as follows: “The Supreme Court shall have original jurisdiction in all matters where a question arises whether an enactment was made in excess of the powers conferred on Parliament by or under the Constitution and if any such

asking the three-judge apex court to declare the Preventive Detention Act invalid on the ground that it violated certain restrictions on the power of Parliament contained in Ghana's 1960 Constitution. Specifically, the *Re Akoto* petitioners argued that the preventive detention law violated certain "fundamental principles" set forth in Article 13(1) of the constitution and which the President was sworn to uphold.

Under the constitution, the President, prior to assuming office, was required to make a "solemn declaration" of his "adherence" to certain "fundamental principles." The relevant text read as follows:¹⁶

Immediately after his assumption of office the President shall make the following solemn declaration before the people –

On accepting the call of the people of Ghana to the high office of President of Ghana, I [name of President] solemnly declare my adherence to the following principles –

That the powers of Government spring from the will of the people and should be exercised in accordance therewith. ...

That freedom and justice should be honored and maintained

That no person should suffer discrimination on grounds of sex, race, tribe, religion or political belief.

That subject to such restrictions as may be necessary for preserving public order, morality or health, no person should be deprived of freedom of religion or speech, of the right to move and assemble without hindrance or of the right of access to the courts of law.

That no person should be deprived of his property save the public interest so requires and the law so provides.

According to the petitioners, the foregoing provisions, contained in article 13(1) of the constitution, constituted a Bill of Rights and thus operated as a limitation on executive and legislative power. On this view, the preventive detention law was unconstitutional insofar as it purported to authorize the president to infringe the "fundamental principles" contained in article 13(1). Petitioners' counsel "made extensive use of American constitutional cases and materials in urging upon the Supreme Court an extensive power of judicial review of legislation."¹⁷

The Ghana supreme court rejected as "untenable" the petitioners' argument that the President's solemn declaration to adhere to certain "fundamental principles" transformed those principles into a justiciable bill of rights.¹⁸ In the court's view, the President's solemn

question arises in the High Court or an inferior court, the hearing shall be adjourned and the question referred to the Supreme Court for decision."

¹⁶ GHANA CONST. (1960) art. 13(1).

¹⁷ *Harvey*, note 12, p. 287.

¹⁸ Criticizing the Court's decision in *Akoto*, Professor Seidman has argued that: "The Court blinded itself to alternative possible solutions – for example, to create out of Article 13 a presumption that the President would not violate his oath. Using that presumption at least to read into the Preventive Detention Act a violation of that oath would have required no greater strain of its language than occurs whenever a court reads a *mens rea* requirement into a criminal statute that on its face imposes liability without fault." *Robert B. Seidman*, *Judicial Review and Fundamental Freedoms in Anglophonic Independent Africa*, 35 *Ohio St. L.J.* 820 (1974), p. 847.

declaration was akin to the “coronation oath” of the British monarch.¹⁹ As such, it imposed on the president of Ghana only a “moral obligation,”²⁰ not a legally binding one.²¹ The fundamental principles provided, at best, “a political yardstick by which the conduct of the Head of State can be measured by the electorate.”²² The remedy for an alleged breach of any of the fundamental principles was therefore “through the use of the ballot box, and not through the courts.”²³

Without such limitations as might be imposed by a bill of rights, the Ghana Constitution of 1960, as the courts read it, left the president and legislature practically unrestrained in their exercise of power. Politics, not some “higher law,” was left as the only check against abuse of presidential or legislative power. But in Nkrumah’s Ghana even the restraint that might have been imposed by periodic elections would soon cease to matter, and the preventive detention law would be instrumental in the accomplishment of that goal.²⁴

¹⁹ *Supreme Court of Ghana*, note 12, p. 535.

²⁰ *Id.*

²¹ This reading of the “fundamental principles” appears to contradict statements made by the Nkrumah Government explaining to the Ghanaian public aspects of the proposed republican constitution before it was submitted to a national referendum. In a White Paper, the Government had explained the import of Fundamental Principles as follows: “The proposed Constitution for Ghana is based upon Freedom and Justice and it is therefore desirable that these principles should be elaborated and protected by the Constitution. The existing [1957] Constitution does make certain provisions in this regard. For example, there is a provision preventing the expropriation of property without compensation. Laws based on religious or racial discrimination are prohibited and the position of Chieftaincy is guaranteed. In the draft Constitution these provisions, and a number of others, are set out in Article 14 [appearing as Article 13 in the final Constitution].” *Harvey*, note 12, p. 418 (reproducing Government Proposals for a Republican Constitution, White Paper No. 1/60) (emphasis added). In a contemporaneous public address, Nkrumah himself also stated that “the Constitution is based firmly on the Rule of Law and leaves no scope for arbitrary action or for discrimination against any individual or community. This is underlined in the requirement which is contained in the proposals, that a new President must declare his adherence to certain fundamental principles ...” *Leslie Rubin / Pauli Murray*, *The Constitution and Government of Ghana*, London 1964, p. 39 (quoting Nkrumah). Furthermore, a government pamphlet explaining the proposals, included in question-and-answer format the assurance that, “The rights of the people are *firmly entrenched* in the Constitution and in particular in Article 14 [Article 13 in the final text].” *Id.* pp. 38-39.

²² *Supreme Court of Ghana*, note 12, p. 540.

²³ *Id.* p. 541.

²⁴ Arrest or detention under the preventive detention act brought with it certain collateral consequences, including, notably, disqualification of persons so detained from contesting national legislative elections. In addition, a Member of Parliament against whom an order of detention had been issued lost his seat. By the combination of these provisions, the preventive detention law became an effective weapon in the destruction of formal opposition in Nkrumah’s Ghana, paving the way to a one-party state in 1964. The country was already a *de facto* one-party state by 1962.

Far more audacious acts by other African chief executives received similar judicial approval in their national courts. For example, in February of 1966, Prime Minister Obote of Uganda, reacting to a vote of censure passed against him in the legislature, unilaterally abolished his country's constitution in force since 1962, summarily dismissed its non-executive president and assumed total power; all in the name of "national stability and tranquility" and "in furtherance of the wishes of the people of this country for peace, order and prosperity."²⁵ A month later, without recourse to the amendment procedure of the 1962 constitution but using, instead, a "national assembly" he had convened, he proclaimed a new "revolutionary" constitution, which confirmed him in power as executive president.²⁶ In effect, the Ugandan prime minister had used his incumbency to engineer a *coup d'état* against the established constitutional order, assuming, in the process, far-reaching powers not otherwise authorized under the prior constitution. His actions were nonetheless approved by Uganda's high court in *Uganda v. Commissioner of Prisons, Ex Parte Matovu*.²⁷

At issue in *Ex Parte Matovu* was the most fundamental constitutional issue that can come before any court: the legitimacy of the constitutional order itself. The Ugandan court acknowledged that, "there were no pretensions on the part of the Prime Minister to follow the procedure prescribed by the 1962 Constitution." This fact, however, was not enough to cause the court to invalidate the change in the constitutional order wrought by the prime minister's unilateral act. In the court's view, the 1962 Constitution of Uganda had been "abolished as a result of a victorious revolution" and had thus ceased to exist. The same "victorious revolution" had made the newly proclaimed 1966 Constitution "a legally valid Constitution." The court relied on Kelsen's Pure Theory of Law.²⁸

Similarly, the plan of Zambia's President Kaunda to turn the country into a *de jure* one-party state encountered no judicial resistance. In *Nkumbula v. Attorney-General*,²⁹ the Zambia Court of Appeal dismissed the petitioner's argument that the president's one-party plan threatened existing constitutional guarantees of freedom of association. The petitioner's claim faced obvious ripeness problems, as the President's plan had yet to be implemented at the time of the suit. But the opinion of the court dismissing the claim was far reaching in its conception of the breadth of the government's powers.³⁰

²⁵ See *Ben O. Nwabueze*, *Presidentialism in Commonwealth Africa*, London 1974, pp. 344-45.

²⁶ See *James C.N. Paul*, *Some Observations on Constitutionalism, Judicial Review and Rule of Law in Africa*, *Ohio State Law Journal* 35 (1974), p. 851, n. 22.

²⁷ *High Court of Uganda*, *Uganda v. Commissioner of Prisons, ex parte Matovu*, 1966 E.A. 514.

²⁸ *Hans Kelsen*, *Pure Theory of Law*, Vienna 1934.

²⁹ *Zambia Court of Appeal*, *Nkumbula v. Attorney-General*, *Zambia Law Reports* (1972), p. 204.

³⁰ *Id.* p. 210.

It is unthinkable to suggest that the government of a country elected to run an ordered society is not permitted to impose whatever constitutional restrictions on individual liberties it regards as necessary to enable it govern to the best advantage for the benefit of society as a whole.

Throughout independent Africa, judicial review proved to be largely an impotent power. After studying the record, Robert Seidman provided this summation: “The judicial response in Africa to claims that fundamental freedoms have been violated ... has been almost without exception in favor of governmental action and against the claim of freedom.”³¹ In most countries, there was not a single case of a court declaring a statute unconstitutional in the first three or four decades after independence.

B. Timorous Souls?

What explains cases like *Re Akoto*, *Ex Parte Matovu*, and *Nkumbula* – landmark cases that exemplified the relationship between courts and politics in Africa for much of the post-colonial period? In his *Kwame Nkrumah: The Anatomy of an African Dictatorship*, Ghanaian sociologist Peter Omari supplied this personal assessment of why sub-Saharan Africa’s first postcolonial state was also the first to hand down a case like *Re Akoto*: “Three things must be held responsible for the inadequacy of the 1960 Constitution and for the Ghanaian’s loss of liberty under that Constitution – President Nkrumah, the Justices of the Supreme Court and Parliament. Of these three, the judiciary must take the most blame.”³² This account of the authoritarian turn in Africa’s postcolonial political governance, which focuses the blame on the judiciary, has the concurrence of many of Africa’s contemporary lawyers. In a recent article, African human rights lawyer Chidi Odinkalu states this position with particular conviction:³³

The first generation of Constitutions and Bills of Rights in Common Law Africa was destroyed not so much by the intolerance of the executive as by the enthusiastic abdication of judicial responsibilities by the persons and institutions mandated under those Constitutions to perform them, coupled with a readiness to share across national borders the wrong models and bad precedents.

The underlying opinion, if not the tone, of Odinkalu’s statement is one that is widely shared by his professional peers across common law Africa. The dominant opinion blames the *Re Akoto* generation of cases and the general impotence of Africa’s postcolonial judiciaries a combination of what might be called “bad” judges and “bad” jurisprudence. For example, one of Africa’s most influential legal scholars of an earlier generation, Nigerian Professor Nwabueze identified as “the primary reason” for the “unsatisfactory” performance of

³¹ Seidman, note 18, p. 827.

³² T. Peter Omari, *Kwame Nkrumah: The Anatomy of an African Dictatorship*, London 1970, p. 13.

³³ Chidi A. Odinkalu, *The Judiciary and the Legal Protection of Human Rights in Common Law Africa: Allocating Responsibility for the Failure of Post-Independence Bills of Rights*, *African Society of International & Comparative Law - Proceedings* 8 (1996), pp. 124,136-37.

Africa's postcolonial judiciaries their "inherited common law attitude towards the judicial function," an attitude characterized by "literalness and analytical positivism in the interpretation of the law" and a "narrowness of outlook towards problems presented for decision."³⁴ Similarly, Seidman, writing in the 1970s, described African judges as "supine in their posture toward laws challenged on constitutional grounds,"³⁵ blaming the general tenor of African judicial decision-making during this period on narrow legalistic reasoning by Africa's appellate judges; the judges' socialization in the colonial legal order; and their social class background and its values.³⁶

In Ghana, for example, where *Re Akoto* is today recalled with exceptional opprobrium,³⁷ a judge of Ghana's modern supreme court has expressed regret that, "in the *Re Akoto* case, our Supreme Court missed the opportunity to designate article 13 of the 1960 Constitution as a Bill of Rights."³⁸ Another commentator has expressed disappointment that "the judiciary ... that the citizen looked up to for the protection of his liberty and fundamental rights failed him miserably in the *Re Akoto* case."³⁹

There is no question that English juristic ideas, methods and doctrine have exerted a strong influence on judicial attitudes in common law Africa.⁴⁰ In *Re Akoto*, for example, the court relied on the wartime English case of *Liversidge v. Anderson*⁴¹ to support its conclusion that the truth or reasonableness of the grounds adduced for a detention order was not a proper matter for judicial review. The *Re Akoto* court also found it significant that the constitutional text, on the strength of which petitioners sought to impose a judicially enforceable duty on the president, had employed the precatory "should" instead of the mandatory "shall". To the court, this was proof that the disputed "fundamental principles" to which the president had sworn adherence did not have the force of legal compulsion or obligation behind them. In both instances, the three-judge court followed an interpretive course that preordained the outcome of the case.

Still, even to blame *Re Akoto* and its generation of cases on the influence of English interpretive methods or "bad" jurisprudence is to render far too simplistic an account of the matter. It is not clear that the outcomes in cases like *Akoto* and *Ex Parte Matovu* will have been different but for the influence of bad doctrine. Judicial deference to the will of domi-

³⁴ *B.O. Nwabueze*, *Judicialism in Commonwealth Africa: The Role of Courts in Government*, New York 1977, p. 310.

³⁵ *Seidman*, note 18, p. 825.

³⁶ *Id.*, pp. 834-45.

³⁷ See *S. Y. Bimpong-Buta*, *The Law of Interpretation in Ghana: Exposition and Critique*, Accra 1995, p. 320 (calling the decision "spineless").

³⁸ *New Patriotic Party v. Inspector General of Police*, Ghana Sup. Ct., Suit No. 4/93, 30 November 1993 (unreported), discussed in *Buta*, note 37, p. 314.

³⁹ *Buta*, note 37, p. 314, n 19.

⁴⁰ See discussion in *infra* Part III.B.4.

⁴¹ [1941] All Eng. Rep. 338.

nant politicians can be observed even in jurisprudential cultures where the force of Austinian positivism⁴² or of Diceyan constitutional thought⁴³ is remarkably weak.

In the end, the judge-centered explanation for the failure of judicial review and constitutionalism in post-colonial Africa must fail because it approaches the study of judicial power – and, for that matter, of constitutionalism – primarily as a self-contained legal (doctrinal) phenomenon detached from the social and political (and economic) forces that define the institutional context within which courts must operate. In that regard, the solution or prescription it offers for addressing the problem of constitutionalism in Africa is necessarily limited and primarily technocratic.

In accounting for the failure of constitutionalism in postcolonial Africa, the judge-centered view fails, importantly, to query the empirical (“political”) *legitimacy* of constitutionalism and, for that matter, of judicial review during the post-independence period. As a matter of fact, the judge-centered view is absolutely unconcerned with matters of legitimacy – except in the narrow legalistic sense. Yet, once cases like *Re Akoto* are situated and analyzed within their relevant historical, socio-economic, and political contexts, a more nuanced picture emerges, which is that the courts and constitutionalism in postcolonial Africa faced, from the very beginning, a profound crisis of legitimacy--and as long as this deficit of empirical legitimacy persisted neither judicial review nor constitutionalism had much chance of gaining a firm footing in Africa.

To understand the sources of this problem and their implications for constitutionalism in the early decades of post-colonialism in Africa, we must examine the politics as well as the *context* of politics during the post-colonial period – an endeavor which, in Africa’s case, must begin necessarily with the colonial experience.⁴⁴

C. The Colonial Legacy and the Politics of Postcolonial Development.

I. The Challenge of Nation Building and Development

Colonialism in Africa left in its wake immense challenges in multiple areas. The two most pressing of the challenges, at least in the estimation of the first generation of African leaders, were “nation building” and social and economic “development”.

⁴² See generally *John Austin*, *The Province of Jurisprudence determined*, London 1954.

⁴³ See generally *Albert Venn Dicey*, *Introduction to the study of the law of the Constitution*, London 1924.

⁴⁴ See *Kofi A. Busia*, *The Challenge of Africa*, New York 1962, p. 51 (“It is impossible to understand our contemporary [African] society without considering [colonialism’s] impact.”); *Richard Sklar*, *The Colonial Imprint on African Political Thought*, in: *African Politics in Postimperial Times – The Essays of Richard Sklar* (ed. Tonyi Falola), 2002, p. 208 (“Until the centrality of colonialism, its ‘epochal’ nature, and transformative influences have been deeply and objectively investigated by African scholars, the demon of colonialism – the psychology of dependence – cannot be exorcised from African political thought.”).

The colonial project in Africa had consisted in “putting together” coercively and administering as a centralized unit a collection of disparate peoples, some of them with long precolonial histories of autonomous existence and mutual rivalry. With independence won, the foremost challenge for Africa’s new ruling class was how to “hold together” and mould into a nation what was, in essence, a patchwork of separate groups involuntarily placed under a common sovereign by colonial design (or in some cases, by colonial accident). As Kwame Anthony Appiah has noted, “Europe left Africa at independence with states looking for nations.”⁴⁵

Yet there was no question of undoing the legacy of colonialism. Within the various colonies, it had become clear even before the process of decolonization was complete that the African nationalist elite at the head of the anticolonial resistance – and heirs apparent to the colonial authorities – had no intention of dismembering the colonial state or returning to precolonial formations. To all intents and purposes, the colonial project, however objectionable, was a *fait accompli*, and Africa’s anticolonial elites – and postcolonial rulers – had every intention of holding on to the colonial inheritance.⁴⁶ The question was how to accomplish that task.

Compounding the challenge of nation-building was the massive deficit in social and economic development passed on to the new African elites along with the colonial state. “The colonial states were made for raising – not spending – government revenues.”⁴⁷ “Once roughly half of the colonial government revenues had been spent on paying for expatriate bureaucrats and another sixth had been spent on servicing loans raised for capital expenditures, many of which were in the interest of control rather than development, there was little left for the cultivation – through education, health, and social services – of human capital.”⁴⁸ In consequence, Africa’s new states emerged from colonialism with monumental needs in health; in education; in domestic industrial output; in employment; in public infrastructure; and in indigenous control of the economy.⁴⁹

For Africa’s founding elites, the urgency of these twin challenges of nation building and development assumed the character of a national emergency. The metaphor of war – “war against illiteracy,” “war against disease,” “war against poverty,” etc. – was one that was commonly invoked by postcolonial African governments to underscore this fact. The crucial question, however, remained what choice of model – of state and economic organization – would best answer this challenge. Various factors conspired to make the authoritarian model the easy choice.

⁴⁵ Kwame A. Appiah, *In my Father’s House: Africa in the Philosophy of Culture*, New York 1992, p. 163.

⁴⁶ Christopher Clapham, *Africa and the International System: The Politics of Survival*, Cambridge 1996, p. 35.

⁴⁷ Appiah, note 45, p. 164.

⁴⁸ *Id.*

⁴⁹ See Ben O. Nwabueze, *Constitutionalism in the Emergent States*, Rutherford 1973, p. 99.

Within the founding generation, the dominant opinion (but one that was vigorously contested even then) was that multiparty democracy and decentralization of power would encourage partisan mobilization and resurrection of those precolonial identities and multiple sovereignties that had been suppressed but never completely extinguished by colonialism. "The theory of the single-party regime as the authentic embodiment of the aspirations of nationalism achieved wide currency."⁵⁰ Demands for "federalism" or "a reasonable degree of provincial devolution"⁵¹ to accommodate the postcolonial state's disparate territorially-based subnational communities or to countervail centralized governmental power were summarily dismissed as secessionist-inspired "tribalism," as were proposals to include or integrate indigenous chiefly institutions into the local government system (as many had been co-opted to do under the English colonial policy of "indirect rule").

The African elites' preference for centralized power in the name of nation-building was reinforced on the economic side by the argument that the absence, at the time of independence, of an indigenous capitalist class with the means or scale of operation necessary to lead rapid economic development left the state no choice but to step into the void. State-led development, which meant central planning, thus became the preferred model of economic organization.

On both the nation-building and economic organization sides of the issue, the preference of African elites for command-and-control solutions had behind it the added authority of influential academic opinion in the West. The scholarly works of such respected Western social scientists as Huntington,⁵² Wallerstein,⁵³ and Hodgkin,⁵⁴ all provided powerful and positive citations for the practitioners and supporters of one-party rule and "strong state" ideology in postcolonial Africa. The few dissenting but prescient voices that warned Africa's new elites to shun the path of authoritarianism or unitary centralism were ignored.⁵⁵

Proof of the normative superiority of the command-and-control model of economic organization for poor postcolonial states was also supposedly self-evident in the big post-war leaps in economic growth and industrialization that were, at the time, associated with

⁵⁰ Crawford Young, *The Third Wave of Democratization in Africa: Ambiguities and Contradictions*, in: Richard Joseph (ed.), *State, Conflict, and Democracy in Africa*, 1999, p. 286.

⁵¹ W. Arthur Lewis, *Politics in West Africa*, New York 1965, p. 55.

⁵² See generally Samuel P. Huntington, *Political Order in Changing Societies*, New Haven 1968.

⁵³ See generally Immanuel Wallerstein, *Africa: The Politics of Independence*, New York 1961.

⁵⁴ See generally Thomas Hodgkin, *African Political Parties*, Baltimore 1961.

⁵⁵ Prominent among the "dissenters" was Nobel Prize economist W. Arthur Lewis. A Carribean of African descent, Arthur Lewis advised a number of African governments in the very early years after independence. His observations and views about postcolonial African politics are summed up in his *Politics in West Africa*. Lewis, note 51. See also Busia, note 44, pp. 65-77 (refuting claims that the African one-party state is based on traditional African culture and tradition.).

the countries of the Soviet bloc and Mao's China. And from the West, the impressive post-war reconstruction of Europe under the Marshall Plan and the success of New Deal interventionism in rescuing the United States from the Depression, all went to reinforce belief, widespread in postcolonial society, that the state had the superior capacity – and a duty – to organize and lead economic development.

Internally, the decision in favor of authoritarianism was made all the easier by the fact that, with it, Africa's founding elites would not have to reinvent the wheel. The colonial model and its institutional bequest were readily at hand. Not only did it provide "a machinery of government in working order"⁵⁶ and so obviate the need to create a new one from scratch, but, even more important, the infrastructure and example of the colonial state, with its unitary centralized executive (the colonial governor), centralized bureaucracy, systems of revenue extraction, subordinate courts, compliant chiefs, and the exclusion of an organized opposition party, answered, almost perfectly, the needs of Africa's founding elites.

Retention of the institutions of the colonial state was, however, not without its contradictions. In particular, it had profound implications for the role of law – and thus, of the courts – in the new postcolonial project. The primary tension was between the colonial legal order and the new constitutions bequeathed to the sovereign African state on the eve of independence.

II. *The Colonial Legal Order in the Service of the Post-Colonial State*

The colonial state in Africa was *par excellence* a rule by law state, as opposed to a rule of law state. Within the colony, the colonial governor had power to pass and enforce "whatever legislation he thought was right in the public interest."⁵⁷ Law in colonial Africa was primarily a mechanism for asserting, enabling, and legitimating state power, not for constraining or limiting it. The object of colonial law was to control and exploit the material, cultural and human resources of the colony to further the purposes of imperial policy.

Instrumental to the execution of the colonial project were the colonial courts, including the "native" courts that were sanctioned by the colonial authorities to enforce "customary law".⁵⁸ The judiciary in colonial Africa was, in fact, the handmaiden of the colonial administration. As Ghana's first Prime Minister Kwame Nkrumah would later recall, "The judiciary and the executive under a colonial regime are one and the same thing."⁵⁹ The colonial judge wore multiple hats. Among other things, he was a close adviser to the gover-

⁵⁶ Clapham, note 46, p. 35.

⁵⁷ George E. Metcalfe, *Great Britain and Ghana: Documents of Ghana history 1807-1957*, London 1964 (quoting a 1934 statement of the Secretary of State for the Colonies).

⁵⁸ See Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*, Princeton 1996. Mamdani notes that, as with colonial public law, "[c]ustomary law was not about guaranteeing rights; it was about enforcing custom. Its point was not to limit power, but to enable it." *Id.* p. 1100.

⁵⁹ Kwame Nkrumah, *Ghana: The Autobiography of Kwame Nkrumah*, Edinburgh 1957, p. 123.

nor, assisting the latter in the formulation of policy and drafting of legislation for the colony.⁶⁰ The colonial chief justice acted as governor during the latter’s absence.⁶¹ Colonial judges, including the colonial chief justice, enjoyed no security of tenure, holding office, as they did, “at pleasure”.⁶² Importantly, the colonial courts were without power to countermand or review decisions or decrees of the colonial governor. In fact, the governor had power, by decree, to deny access to the colonial courts for persons seeking to challenge a legislative or executive act of the colonial administration.⁶³

The dominant constitutional position of the colonial Governor was captured in the judgment of the Court of Appeal for Eastern Africa in the 1958 case of *Corbett Limited v. Floyd*.⁶⁴ Upholding the decision of the Governor of colonial Kenya to apply a 1930s emergency wartime measure to deal with a local insurgency in 1952, the colonial court stated:⁶⁵

It has never in twenty years been suggested that the Order in Council was itself ultra vires, and although since the end of the war measures taken under it have been criticized as dictatorial, undemocratic and destructive of liberty, it has never, so far as we are aware, been suggested that such measures are incompetent.

The notion that *African* managers of a sovereign state would be limited in their exercise of power whereas their *European* predecessors of the colonial era had not been similarly restrained, provided Africa’s postcolonial elites additional grounds to discredit the idea of postcolonial constitutionalism as a neocolonial imposition designed to keep Africa in subservience.⁶⁶ As Ghana’s first Attorney General (himself British) would later ask: “If denial of access to the courts was justified in 1948 [when the colonialists were in charge] why was it wrong in 1957 [with Africans now at the helm]?”⁶⁷

⁶⁰ See *Geoffrey Bing*, *Reap the Whirlwind: An Account of Kwame Nkrumah’s Ghana from 1950 to 1966*, 1968, pp. 204–206. See also *Fui Tsikata*, *Towards an Agenda of Constitutional Issues under the Kwame Nkrumah Regime*, in: Kwame Arhin (ed.), *The Life and Work of Kwame Nkrumah*, Trenton 1993, p. 210.

⁶¹ *Bing*, note 60, p. 231. See also *Jill Cottrell / Yash Ghai*, *Between Two Systems of Law: The Judiciary in Hong Kong*, in: Peter H. Russell / David O’Brien (eds.), *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World*, Charlottesville 2001, p. 209.

⁶² See *Terrell v. Secretary of State for the Colonies* [1953], 2 Q.B. 482 (colonial judges hold office “at the pleasure of the Crown: the Act of Settlement does not apply to them”); *Bing*, note 60, p. 205; see also *Widner*, note 8, p. 58.

⁶³ *Bing*, note 60, p. 221. See also *Ocansey & ors. v. Buernartey & ors.*, [1921–25] *Gold Coast Colony Rep.* 178 (Div. Ct., 1925) (holding that court’s jurisdiction to adjudicate a claim of title to the position of Chief had been taken away from the courts).

⁶⁴ *Court of Appeal for East Africa*, *Corbett Limited v. Floyd* (1958), E.A. 389.

⁶⁵ *Id.*, p. 392.

⁶⁶ See *Dullah Omar*, *Address at the African Renaissance Conference on Constitutionalism* (Nov. 16, 1999), available at <http://www.polity.org.za/html/govdocs/speeches/1999/sp1116a.html>.

⁶⁷ *Bing*, note 60, p. 222.

The supporting role played by law and the courts in the colonial project would ultimately inform and shape the form of African nationalist resistance to colonial rule.⁶⁸ Recognizing law and the courts as servants of colonial power, Africa's nationalist leaders took an alternative path--the path of political agitation and mobilization. Thus the struggle against colonial rule in Africa, which began to gather popular momentum in the period after the Second World War, was essentially a struggle of *politics* against *law*. For Africa's founding generation then, the eventual triumph of anti-colonial politics over colonial rule not only represented the triumph of politics over law, but also affirmed, in their view, the superior legitimacy and efficacy of the former over the latter. Perhaps even more significant for the future course of events, their personal experience of law and of judicial power under colonial rule led Africa's founding elites to view the courts "primarily as the institution through which a government, colonial or otherwise, imposed its policy behind a cloak of magisterial propriety."⁶⁹

Yet, whereas the colonial legal regime had not concerned itself with rights or instilled in judges or African politicians a respect for rights or legal limitations on governmental power, the new constitutions drafted by departing colonizers, and which would be passed on to Africa's incoming governments on the eve of independence, envisioned a post-colonial state of a rather different character.⁷⁰ In contrast to the colonial order, the newly independent African state was to be, belatedly and by constitutional fiat, a rule-of-law state, one in which politics and the exercise of political power was supposed to be constrained by formal checks and balances, including an independent judiciary, regional assemblies, opposition parties and, in some cases, a bill of rights.⁷¹

Historian Basil Davidson has identified the continuities and contradictions between the colonial legal order and the independent constitutions as one of many conflicts between "theory" and "fact" that would bedevil the post-colonial African state:⁷²

Theory, as the new nation-states took shape, said that government was to be democratic. ... Fact said that colonial powers had invariably ruled by decree, and decree had been administered by an authoritarian bureaucracy to which any thought of people's participation was damnably subversion. Fact went on to say that the new nation-state inherited the dictatorship and not the democracy, and that anyone who thought it wasn't so had better have his head examined.

⁶⁸ *Nkrumah*, note 59, p. 123 ("I had long since come to learn that in the colonial struggle, when faced with a situation of this sort [namely, criminal prosecution or punishment], it is not a question of justice.").

⁶⁹ *Id.* p. 225 (relating conversation with Ghana's first Minister of the Interior).

⁷⁰ See *William Dale*, *The Making and Remaking of Commonwealth Constitutions*, *International & Comparative Law Quarterly*. 42 (1993), pp. 67, 72 (describing the key features of the "Whitehall" constitutions bequeathed to Britain former African colonies).

⁷¹ *Yash P. Ghai*, *Constitutions and the Political Order in East Africa*, *International and Comparative Law Quarterly INT. & COMP. L.Q.* 21 (1972), pp. 403, 412.

⁷² *Basil Davidson*, *The Black Man's Burden: Africa and the Curse of the Nation-state*, London 1992, p. 208.

This contradiction was exacerbated by the fact that, alongside the new constitutional precept, the new African state had also received as part of its colonial bequest the authoritarian legal order – the full panoply of colonial legislation, orders, ordinances, by-laws, and judicial precedents – upon which colonial authority had been based. Even where the constitution contained the obligatory supremacy clause asserting the supremacy of the constitution in cases of conflict between a constitutional precept and pre-existing legislation, the latter – the “received” law – was cloaked with a presumption of continuing validity, and thus remained in force until affirmatively repealed or overturned. In effect, the African state that emerged from colonialism combined within it an “authoritarian-democratic paradox.”⁷³

Apart from functioning as the *default* legal regime (because it was that which Africa’s post-colonial elites and citizens alike were accustomed to on account of the colonial experience), the inherited (sub-constitutional) legal order, not the new constitutions, “offered African elites real power and the bureaucratic machinery with which to exercise it effectively.”⁷⁴ The problem with the colonial legal order, however, was that it had been conceived under colonialism primarily for purposes of “domination rather than legitimacy.”⁷⁵ Its continued deployment in a post-colonial era by the same elites who had fought against it could not be justified or defended on the same grounds. In the end, justification for retaining and enforcing the most authoritarian aspects of the colonial legal order came instrumentally by the name *development*. The ideology of “development” would provide the new legitimating rhetoric for the authoritarian legal order and, in time, challenge the legitimacy of constitutionalism, and thus of judicial review, in post-colonial Africa.

III. *The Political Impossibility of Judge-enforced constitutionalism in postcolonial Africa*

In 1964, Tanzania’s Julius Nyerere defended his introduction of a preventive detention law with a classic statement of the “development first” ideology: “Development must be considered first ... Our question with regard to any matter – even the issue of fundamental freedom – must be, ‘How does this affect the progress of the Development Plan?’”⁷⁶ The primacy of development on the agenda of postcolonial Africa was affirmed by the world community when the period 1960 to 1970, coinciding with the emergence of sovereign states in Africa, was declared the first UN Development Decade.

⁷³ Peter J. Schraeder, Political Elites and the Process of Democratisation in Africa, in: Jochen Hippler (ed.), *The Democratisation of Disempowerment: The Problem of Democracy in the Third World*, London 1995, p. 46.

⁷⁴ See H.W.O. Okoth-Ogendo, *Constitutions without Constitutionalism: Reflections on an African Paradox*, in: Douglas Greenberg et al. (eds.), *Constitutionalism and Democracy: Transitions in the Contemporary World*, 1993, p. 71.

⁷⁵ Appiah, note 45, p. 164.

⁷⁶ Quoted in Dennis Austin, *Politics in Africa*, Manchester 1984, p. 69.

In the beginning, Africa's ruling elites conceded that "development first" could place freedom in jeopardy. In time, however, development and freedom would be conceptually harmonized, except the freedom that mattered was not the constitutionalist's "negative" freedom. What mattered as freedom – and as development – was "freedom from poverty, freedom from illiteracy and ignorance, freedom from ill-health, and freedom from the hardship and cruelty that exist when a society lacks the minimum of social security and social services."⁷⁷ These being "positive" freedoms, they carried with them an implied duty on the part of the state to act affirmatively to create the conditions necessary to make them realizable.

There were other intellectual efforts to discredit and delegitimize any notion of imposing countervailing checks on the political leadership through the medium of a constitution. Constitutionalism, with its focus on restraining governmental power, was, according to its detractors, a needless "brake" on Africa's development ambitions. Law in Africa, it was argued, needed to be an accelerator, not a brake, to the achievement of popular national development goals.

The decision by Africa's postcolonial elites to delegitimize constitutionalism and, instead, rest their legitimacy on *supra*constitutional values and projects placed the African judiciary in a rather difficult position, to say the least. The difficulty was compounded by the fact that the purveyors of the anti-constitutionalist doctrine were the people's idolized Founding Fathers themselves, leaders like *Osagyefo* ("Redeemer") Kwame Nkrumah (Ghana), *Mwalimu* ("Teacher") Nyerere (Tanzania), Jomo Kenyatta ("The Flaming Spear of Kenya"), and Kaunda (Zambia). Credited with leading their peoples from colonialism to sovereign statehood, this first generation of African leaders came to possess a tremendous amount of "charismatic authority,"⁷⁸ providing them with a reservoir of additional legitimacy with which to underwrite their every agenda. As Professor Nwabueze has noted, Africa's Founding Fathers enjoyed exclusive "founder rights,"⁷⁹ a status that gave them implicit immunity from personal blame for their many errors.

The postcolonial judiciary's position was further weakened by inherent legitimacy deficits of its own. The postcolonial judiciary was, after all, a holdover judiciary, one that had been created originally for the express purpose of implementing the colonial project. By virtue of its identification with the implementation of the colonial enterprise, the judiciary had a (recent) history of doctrinal opposition to the anti-colonial or nationalist struggle. As one commentator correctly observed with regard to the courts in post-colonial East Africa, "the courts were commissioned to perform a function within the new Governments of Kenya, Tanzania, and Uganda, which they had not performed in Britain itself, nor in

⁷⁷ *Denis V. Cowen*, *African Legal Studies – A Survey of the Field and the Role of the United States*, *Law & Contemporary Problems* 27 (1962), pp. 545, 562.

⁷⁸ See *Max Weber*, *The Theory of Social and Economic Organization*, in: Talcott Parsons (ed.), *New York* 1964, pp. 363-73.

⁷⁹ *Nwabueze*, note 49, pp. 302-03.

East Africa during the colonial period, nor, in any analogous sense, in the vast majority of traditional African societies.”⁸⁰

To put all of this in broader perspective, one also must note that the African judiciary was far from alone in facing this crisis of legitimacy. Other institutions within the African state and society, including some with fairly credible claims to social legitimacy, were similarly in danger of subordination by Africa’s politically ascendant elites. These included parliaments, opposition parties, the chiefs, the academic community, and the legal profession. Even before Africa’s judiciaries had been neutralized, these other potential holders of countervailing power had been rendered similarly impotent. The whole process of re-figuring legitimacy within the postcolonial state and society had but one beneficiary, the President. In Ghana, for example, immediately following independence, Nkrumah moved quickly to dispense with regional assemblies established under the independence constitution to check the central government from overriding certain local interests.⁸¹ Nkrumah also acted speedily to deprive Ghana’s historically powerful chiefs of their customary economic base by bringing all “stool” lands and mineral and forest resources under the management and control of the President.⁸² And with Ghana’s adoption of the 1960 Constitution, Nkrumah also gained parallel law-making power as First President, enabling him to circumvent and supersede parliament whenever he deemed necessary.⁸³ Other African presidents effected similar power grabs.

Under these circumstances, when all other institutions with potential countervailing power (and with far superior social legitimacy than the judiciary) had been subdued by an executive with a huge reservoir of *supra*constitutional legitimacy, it is unrealistic to expect the “weakest” institution within the postcolonial state – the judiciary – to be the one to constrain state power. Significantly, this was a problem that would remain even after Africa’s politicians and governments had ceased to honor the democratic imperative of regular competitive elections, as life presidents, one-party states, and military juntas came to dominate the political landscape. The judiciary’s legitimacy deficit remained despite these changes in regime form, because successive political elites continued to ground their legitimacy (at least rhetorically), not in elections or constitutions, but in *supra*constitutional (“bread and butter”) values that were directly tied to the material needs and concerns of the average citizen. The notion that some aspect of the postcolonial “development” project, including the manner of its implementation, could be constrained by a “higher law” enforceable by the courts was simply out of the question.

In looking for comparative support for their “emergency constitutionalism,” postcolonial Africa’s political managers often leaned on New Deal constitutionalism. The New Deal

⁸⁰ Steven B. Pfeiffer, The Role of the Judiciary in the Constitutional System of East Africa, *Journal of Modern African Studies* 16 (1978), pp. 1, 37.

⁸¹ Bennoin, note 12, pp. 64-65.

⁸² Harvey, note 12, pp. 104-19.

⁸³ Bennoin, note 12, pp. 271-72.

response to the America's 1930s national economic emergency was characterized by extraordinarily high levels of popular support for bold, if constitutionally novel, presidential action that occasioned a substantial rebalancing of power in favor of the federal government and the President, usually with the acquiescence of the judiciary. Tanzania's Presidential Commission on the Establishment of a Democratic One Party State invoked the New Deal to justify a decision to omit a bill of rights in its proposed interim constitution:⁸⁴

[Tanzania] has dynamic plans for economic development. These cannot be implemented without revolutionary changes in the social structure. In considering a Bill of Rights in this context we have in mind the bitter conflict which arose in the United States between the President and the Supreme Courts as a result of the radical measures enacted by the Roosevelt Administration to deal with the economic depression in the 1930's. Decisions containing the extent to which individual rights must give way to the wider considerations of social progress are not properly judicial decisions. They are political decisions best taken by political leaders responsible to the electorate.

The Ghanaian authorities under Nkrumah similarly cited FDR's *unsuccessful* "court packing" plan for precedent when they decided in 1964 to push through an amendment to the Ghana constitution to allow the president to remove judges at pleasure:⁸⁵

In the United States of America, the President has power to "pack" the Federal Supreme Court, that is, to appoint new Judges of his liking. He also has the power to retire Judges before the stipulated retiring age. These were powers which President Franklin Roosevelt Delano Roosevelt used very effectively in the mid-nineteen-thirties when he was fighting for his New Deal Programme. This is what the proposed amendment seeks to do.

The new managers of the postcolonial state in Africa were clearly in no mood for a judicialization of any aspect of what to them was all "politics." The function of a judge, as the government White Paper on Malawi's Republican Constitution made clear, should not be "to question or obstruct the policies of the Executive Government, but to ascertain those policies by reference to the laws made by Parliament, and fairly and impartially to give effect to those purposes in the courts when required to do so."⁸⁶ On their part, Africa's judges of that era were no doubt been keenly aware of the superior limitations and constraints of the judicial role. Possessing neither the requisite socio-political legitimacy nor the support of influential allies or constituencies within postcolonial society, Africa's judges could do little to countervail the political agenda of national elites or advance a politically discredited liberal constitutionalism.

Not only did constitutionalism – and judicial review – suffer from a severe shortage of influential domestic constituencies in pre-1990s Africa, but also Africa's then isolated

⁸⁴ Quoted in *Robert Seidman*, *Constitutions in Independent, Anglophonic, Sub-Saharan Africa: Form and Legitimacy*, *Wisconsin Law Review* 83 (1969), p. 105.

⁸⁵ *Henry L. Bretton*, *The Rise and Fall of Kwame Nkrumah: A Study of Personal Rule in Africa*, London 1967, pp. 91-92.

⁸⁶ Quoted in *Simon Roberts*, *The Republican Constitution of Malawi*, PUB. L. 304, 1966, p. 318

domestic champions or advocates of constitutionalism (and democracy) could count on little sincere or sustained support from the world community or influential external actors. In the Cold War rivalry and maneuvering to secure and extend spheres of influence in Africa, neither the Soviet bloc nor the United States and its Western allies found it helpful to their interests to apply a democratic or constitutionalism “litmus test” to their selection of client states or allies in Africa. The global human rights movement also was not nearly as strong or influential then or even as concerned about developments in Africa (outside of apartheid South Africa) as it is today, while the then near-universal recognition of a robust, self-centric conception of sovereignty served to shield matters of domestic political governance from the formal scrutiny or sanction of international actors. In short, prior to the 1990s the promotion or defense of constitutionalism was one item that was noticeably absent from the agenda not only of Africa’s governing elites but also of those international and multi-lateral actors and constituencies who might have exerted a measure of positive influence over African governments.

Conclusion

That the idea persists in African legal communities that constitutionalism in Africa could have been saved had the judges being “bold spirits,” and not “timorous souls,” is due perhaps to the persistent tendency, particularly noticeable among common law lawyers outside the United States, to associate the genesis and *practice* of judicial review – and of the judicial role in constitutionalism – with a certain mythologized and decontextualized view of *Marbury*.⁸⁷ This view of *Marbury* sees Marshall’s *opinion* as a solitary act of judicial heroism; one that supposedly created from whole cloth a powerful institution to which chief executives and legislatures were bound to submit. Viewed from this perspective, one can understand why judicial review appears to some to depend on little more than the initiative of “bold spirits” on the bench.

American constitutional history, however, amply demonstrates that judicial review is profoundly political and inherently insecure.⁸⁸ Indeed, the persistent trend throughout U.S. history is not one of popular acquiescence in unpopular rulings by the Supreme Court, but

⁸⁷ See e.g. Justice *Michael Kirby*, *Comparative Constitutionalism – An Australian Experience*, Address at University of Chicago Ctr. For Comparative Constitutionalism, Conference on Constitutionalism in the Middle East (Jan. 23-25, 2004) (describing *Marbury* as involving a “bold assertion ... of the power of judicial review” and thus “a defining moment for modern constitutionalism”).

⁸⁸ See e.g. *Jack Balkin*, *Plessy, Brown, and Grutter: A Play in Three Acts*, *Cardozo Law Review* 26 (2005), pp. 101, 130 (“[U.S.] Supreme Court decisions tend to match the views of national political majorities – and particularly the views of national elites.”); *Reva B. Siegel*, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, *Harvard Law Review* 117 (2004), pp. 1470, 1546 (“efforts to transform a society through constitutional adjudication require the political confidence and consent of the very groups a court would subject to the force of law”).

of popular outrage and resistance followed by political pressures to neutralize or undo the impact of the court's rulings – efforts that have been generally successful over the *long run*. Recounting this history in a recent study, Larry Kramer concludes, “What is certain is that popular constitutionalism was the clear victor each time matters came to a head.”⁸⁹

Regarding the Marshall Court itself, Louis Henkin has reminded us that the Court “did not ‘take on’ the most powerful political forces, but built judicial authority principally by prescient betting on the winning political side – the nation as against the states.”⁹⁰ At the time of *Marbury*, the Marshall Court, composed then of Federalist appointees, was in a strategically weak position and so adroitly refrained from issuing against the Jefferson administration (which also had a legislative majority) an order which the President could easily – and very likely would – have ignored with impunity. Notably, despite Chief Justice Marshall's determination that the plaintiff had indeed suffered a legal wrong, the *Marbury* judgment was unable to offer him a remedy, the Court having ultimately declared itself without jurisdiction to entertain the suit. In the end, *Marbury* established the principle of judicial review but “was too weak to exercise it.”⁹¹ In fact, Marshall's proclamation about judicial review notwithstanding, his Court did not once use the power it had asserted in *Marbury* again to strike down a single *federal* law. Nor did the Marshall Court exercise its power to protect *individual rights*.⁹² As a matter of fact, the U.S. courts would not become seriously involved in the latter enterprise “until after the Civil War, indeed much later, after their power had been established”⁹³ – and, one might add, after domestic social movements and Cold War politics had forced the matter of rights and justice embarrassingly onto America's national political – and judicial – agenda.⁹⁴

Contemporary scholarly accounts of the Warren Court's “revolution” in *Brown* also offer a more robustly political explanation of the landmark decision, one that has come to displace the conventional narrative that celebrates *Brown* as the triumph of law/judicial heroism over politics – and judicial review in *Brown* as an essentially “counter-majoritarian” project. Examining *Brown* and the doctrinal changes it effected in American equality jurisprudence, American legal scholar Michael Klarman has noted that “changes in the

⁸⁹ Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review*, New York 2004, p. 207.

⁹⁰ Louis Henkin, *The Age of Rights*, New York 1990, p. 175.

⁹¹ Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*, Oxford 2004, p. 1123. The Jefferson administration, which had made no secret of its hostility to Marshall and his Federalist-packed court, in fact boycotted the court proceedings in *Marbury*. With talk of impeachment of Supreme Court justices in the air, the Marshall Court played safe.

⁹² Henkin, note 90.

⁹³ *Id.*

⁹⁴ See Mary L. Dudziak, *Desegregation as a Cold War Imperative*, *Stanford Law Review* 41 (1988), p. 61.

social and political context of race relations [in the United States] preceded and accounted for changes in judicial decision making.”⁹⁵

Placed in proper historical and comparative context then, the failure of judicial review in postcolonial Africa should not be blamed primarily on “timorous souls” on the bench. Judicial review is not a self-contained, self-sustaining power detached from the social and political forces of the moment. Stressing the overriding social and political enablers of judicial review, as opposed to the purely judge-centered accounts, is not intended to dismiss judicial agency or the role of judicial preferences. Rather, it is to emphasize that prospect of transformative, counter-authoritarian judicial review is dependent, for its success, on sustained support from influential social and political constituencies (popular as well as elite) and on prevailing conditions outside the courts. Judges, even when vested with the constitutional review powers, cannot by themselves undertake the project of social and political change. Progress and transformative shifts in the direction of the law, when they come by means of judicial decisions, are often products of the interaction between the legal and political axes. That it often took time and, more importantly, the emergence of favorable academic and professional endorsement within influential legal communities for Lord Denning’s famous dissents to become accepted as the majority rule suggests that even with the common law, progress and doctrinal shifts ultimately depend on more than the will of bold spirits.

⁹⁵ Klarman, note 86, p. 443.