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Abstract:
Achieving political stability in a transitional democracy is a fundamental goal, the resoluteness of which is in part maintained by courts of judicial review that are independent from political bias and devoid of deference to traditionally more powerful branches of government. The recent democratic transitions occurring in the African nations of South Africa and Uganda provide a unique, contemporary insight into the formation of a constitutional jurisprudence. This study is an examination of pivotal cases decided by the Constitutional Courts of South Africa and Uganda, the roles that these decisions play in political stability, and the potential for political bias in the interpretation of a newborn constitution. Topical cases include S v. Makwanyane and Another (1995) and Attorney General v. Susan Kigula and 417 others (2009) - decisions of the Constitutional Court of South Africa and the Supreme Court of Uganda, respectively - which contemplate the constitutionality of the death penalty. Though the judiciaries of both countries resist the influence of outside bias admirably, they do so with varying degrees of success. Notably, courts in Uganda have at times taken recourse to foreign law as a guide and given unctuous consideration to constitutional arguments but ultimately decided cases in strong consideration of executive will. Conversely, decisions in South Africa have sometimes taken the opposite route, disregarding political bias in favor of political stability. The cases and analyses herein are indicative of the fragile balances that each of these emerging democracies must strike in order to ensure the continuance of their newly formed constitutional governments.

Introduction

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Although the provisions of both the Uganda and South African constitutions are remarkably similar, there have been considerable differences in regard to their respective constitutional jurisprudences. In addition, although both countries’ new constitutions promised a fresh start and a robust stance by their respective courts of judicial review vis-à-vis the executive and legislative branches, their performance departed from each other in significant ways since the promulgation of those constitutions. This article traces those differences, attempts to provide answers to those differences and makes recommendations for the promotion of an independent judiciary and rule of law.

At just about the same time in the 1990s both South Africa and Uganda embarked on momentous roads to democratic transition embracing constitutional review and the rule of law as the bedrock of transition. Both countries resolved never again to revert to their traumatic past. This article examines the extent to which both countries have fulfilled their aspirations and attempts to explain the differences. The courts of judicial review in both countries have done a commendable job in light of the political circumstances under which they operate. The judgments of the South African Constitutional Court have had a positive impact not only in South Africa, but in nations well beyond it, including Uganda. The South African jurisprudence is cited by the Ugandan courts of judicial review, particularly the death penalty cases. The test of the relative strength of the South African and Ugandan courts of judicial review must turn on their judicial decisions in which the Courts meet the challenges of upholding a constitutional democracy in a transitioning society. This article, therefore, will focus on the analysis of pivotal cases where constitutional lessons can be learnt.

The challenges for courts of constitutional review in both countries can be daunting in light of the mostly political demands of the transition. Because the language

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1 The comparison of the constitutional jurisprudence of South Africa and Uganda can be justified in part by the fact that Uganda (and Malawi) borrowed from the South African 1993 interim constitution in crafting its own constitutional reforms. See Hugh Corder, From Separation to Unity: Accommodating Difference in South Africa’s Constitutions During the Twentieth Century, 10 TRANSNAT’L L. & CONTEMPT. PROBS. 539, 556 (2000). The Uganda Constitutional Commission (UCC)—the body that prepared the document that was the basis for the debate of the Constituent Assembly that framed the Uganda Constitution (1995)—would make recourse to foreign sources. The UCC stated that “[t]he final source has been the comparative study of constitutional arrangements of other countries and studies and developments in constitutional matters and all matters related to democracy, human rights and the rule of law. The aim was to discover relevant lessons for Uganda.” See, Uganda Constitutional Commission, THE REPORT OF THE UGANDA CONSTITUTIONAL COMMISSION: ANALYSIS AND RECOMMENDATIONS, 7 (1993). It is also important to note that since South Africa is arguably the “beacon of hope for the rest of the continent and a model for its neighbors” many African nations would do well to measure their progress by comparison to a country whose political and economic conditions are not radically removed from those obtaining in its own jurisdiction. The international recognition that South Africa received pursuant to its peaceful transformation into a stable, democratic, and law-abiding nation, gives it the legitimacy to act as a beacon of hope and leader on the African continent. International regard for this South African political and diplomatic clout and leverage endures in spite of its internal contradictions mainly attributable the persisting gap between the have and have-nots. See Hany Besada, Enduring Political Divides in South Africa 1, 10-14 (2007), http://www.cigionline.org/cigi/Publications/technica/enduring (last visited July 8, 2008). As President Mbeki concedes, South Africa is constituted of two differentiated sub-economies—one highly industrialized and complex and the other based on subsistence agriculture and informal trading. In this latter respect, South Africa resembles many other Sub-Saharan countries, including Uganda. These socio-economic conditions are important in understanding the challenges to the rule of law and judicial review in particular. See Kate O’Regan, Human Rights and Democracy—A New Global Debate: Reflections on the First Ten Years of South Africa’s Constitutional Court, 32 INT’L J. LEGAL INFO. 201, 201 (2004).
of the constitutional text is meant to be broadly construed, courts of judicial review have
the wiggle room to accommodate such demands. This article argues that in the
transitional democracies of Uganda and South Africa, courts of judicial review have
reason to base their decisions not only on legalistic claims but on cautiously pragmatic—
if patently political—compromises as well. The traumatic political histories of the two
countries compel these courts to hand down decisions in support of the transitional
process. Less compelling, though, at least in the case of Uganda, is judicial deference
to the executive and legislative branches of government. Many cases have little or nothing
to do with the transition but instead tend to cater to the executive branch of government
dictating a certain outcome on the basis of political self-interest. Whatever the
justification for judicial deference, there can be long-lasting and serious negative
consequences for judicial independence—notably a degeneration into an ineffective
delivery of justice or even corruption. The article therefore argues that because it is
critically important to retain core fundamental trust in the judiciary it is imperative that
the courts of judicial review in both countries carefully delimit the extent to which they
base their decisions on deference to the exigencies of transition and/or political
imperatives. This article makes the argument that although the Ugandan courts of judicial
review have stood up to the government in some cases where the government dictated a
certain outcome, they have not been nearly as consistent as their South African

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2 In interpreting the language of the Constitution there is no single “objective” meaning because the
Constitution is to be interpreted broadly. The interpreter of the constitutional text will often have to rely on
subjective and extra-textual factors—perhaps even the interpreter’s own personal, political, and philosophical
views—to give meaning to that text. This requires the acknowledgement of the inherent “political” nature of
constitutional adjudication. See Pierre De Vos, South Africa’s Constitutional Court: Starry-Eyed in the
aware of the fallacy of supposing that general language must have a single “objective” meaning. Nor is it
easy to avoid the influence of one’s personal intellectual and moral preconceptions.” Judges, however, often
deny these extra-textual influences and project the view that their decisions are inevitable and are the
outcome of the constitution framers’ intention. See State v. Zuma, 1995 (4) BCLR 401 (CC), 1995 SACLR
LEXIS 219.


4 Constitutional Courts play an inherently political role. Heinz Klug observes that “the experience of the
South African Constitutional Court demonstrates how constitutional courts in particular may play a highly
political role by providing a space in which often irreconcilable conflicts may be temporarily if not
permanently mediated, allowing the political contestants to embrace democratic procedures and outcomes.”
Heinz Klug, CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA’S POLITICAL
Constitutional Court emphasizes the need for courts in the transitional societies to pay attention to the
necessities of the transition, stating that “the Constitution must not be a barrier to that transition, but
facilitate it.” O’Regan, supra note 1, at 216.

5 In countries experiencing democratic transition, Heinz Klug argues, democratic constitutionalism
provides an opportunity for compromise, by postponing decisions on sensitive and potentially unresolvable
questions. Klug, supra note 4, at 18.

6 Under the Constitution of Uganda, judicial review is conducted by both the Constitutional Court and, on
appeal, by the Uganda Supreme Court. Article 137 of the Uganda Constitution provides, inter alia, that
“Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal
sitting as the Constitutional Court.” Article 132(3) provides that “Any party aggrieved by a decision of the
Court of Appeal sitting, as a Constitutional Court is entitled to appeal to the Supreme Court against the
decision.” In South Africa, both the Constitutional Court and the High Courts have the power of
constitutional review. Decisions of the High Court in this regard, however, are subject to confirmation by
counterpart. To that extent, the Ugandan courts have a bigger task in the delimitation of judicial deference. While focusing on death penalty cases, this article reviews a number of judicial decisions in support of the arguments delineated above. In South Africa, compromise and accommodation are more prevalent approaches to constitutional or judicial review – which can be attributed to the negotiated settlement that undergirds the Constitution – whereas in Uganda there is more attention paid to and near-obsession with upholding a political stability that had eluded the country. The concept of stability fundamentally informs the Constitution.7

Ugandan and South African Judicial Review: Politico-Constitutional Background

It is important to describe the social, economic and political context within which judgments of the courts of judicial review must be read. Both countries can be described as transitional democracies, although with uniquely different histories. In South Africa, the rule of law was among the greatest casualties of apartheid. The system created a society in which the majority came to regard the courts, judges, and the administration of justice with suspicion and anger.3 The practice of law was one side of the system. In the main, the judiciary did not have the option to review and reverse unjust laws; rather, the courts had to implement and administer such laws.

The history of the courts under apartheid in South Africa is well-documented.9 The judiciary tended to shy away from commenting critically on apartheid and its legal consequences in their judgments. Indeed, on occasion they went as far as sanctioning discrimination even in the absence of laws compelling them to do so.10 At the same time, under the cloak of parliamentary sovereignty, there was no possibility of challenging draconian laws passed by the Parliament which, seemingly, was above the law.11 Thus, during the transition, it became imperative that some credible body be vested with the power to blow the whistle when the parameters and the spirit of the transition, as embodied in the constitution, were transgressed.12 The new South Africa would urge the

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7 The Constitution is awash with references to stability. The opening statement of Preamble states that “RECALLING our history which has been characterized by political and constitutional instability.” National Objective and Directive Principle III(i) of the Constitution which, along with others, guides constitutional interpretation, provides that “[a]ll organs of State and people of Uganda shall work towards the promotion of national unity, peace and stability,” National Objective III(v) provides that the “State shall provide a peaceful, secure and stable political environment.” For the first time in Uganda’s constitutional history, and unlike the South African Constitution, the Article 3(1) and (2) Uganda Constitution provides that “[i]t is prohibited for any person or group of person to take or retain control of the Government of Uganda, except in accordance with the provisions of this Constitution,” and that “[t]his Constitution shall not lose its force and effect even where its observance is interrupted by a government established by force of arms.” Article 126(1) of the Constitution then urges the judiciary to exercise judicial power in “conformity with law and with the values, norms and aspirations of the people.” Clearly, there was a desire in Uganda to make a clean and fundamental break with a past which was characterized by military take-overs and dictatorships.


9 Id. at 748.

10 Id. at 750.

11 Id. at 756.

12 Id. at 756.
The judiciary to be fundamentally different. The South African Constitution creates an independent judiciary, urging the judges to bring all aspects of South African law in line with constitutional values and giving the judiciary powers to do so.\(^\text{13}\) In light of the complex situation of South Africa, it was inevitable that the constitutional court would seek to establish a complex relationship with all the stakeholders in the South African political settlement and seek to protect the confidence and sacred trust bestowed to it by the negotiators as a third party forum for resolving the particularly contentious issues in the settlement. To this end, the South African court would seek refuge and solace in foreign law and jurisprudence to buttress its third party role. The Ugandan courts felt a different type of pressure\(^\text{14}\) — the courts tended to play a subservient role relative to the executive that not only appointed the judges, but had unilaterally set in motion the political transition and sought to ground it in a seemingly liberal constitution. The Ugandan courts would grip with this force and cautiously walk the fine line between politically sensitive cases that would not threaten the political establishment and those that did, risking and perhaps sacrificing the court’s legitimacy and credibility in some cases and salvaging it in others.

Both Uganda and South Africa created their current constitutions in the early 1990s when what has been described as a ‘renaissance’ in the politics and constitutional dispensations was taking place in Africa. Although both countries arrived at their respective democratic transition ‘cross-roads’ by different means—South African through a negotiated settlement, Uganda through a protracted guerilla warfare accompanied by a popular constitution-making process—they both had the determination to move forward and transcend their traumatic political and constitutional experience.\(^\text{15}\) The preambles of the constitutions of both countries speak of the desire of both countries to transcend the divisions of the past and establish societies based on democracy and respect for fundamental human rights. In the case of South Africa, the Constitution was conceived against the backdrop of its history of apartheid. In light of that fact, as Judge Arthur


\(^{14}\) The Uganda Constitutional Commission (UCC) made recourse to foreign sources. The UCC states that “[t]he final source has been the comparative study of constitutional arrangements of other countries.” THE REPORT OF THE UGANDA CONSTITUTIONAL COMMISSION: ANALYSIS AND RECOMMENDATIONS, 7 (1993) [hereinafter Uganda Report].

\(^{15}\) The preamble to the Constitution of Uganda states that “RECALLING our history which has been characterised by political and constitutional instability... RECOGNISING our struggles against the forces of tyranny, oppression and exploitation; COMMITTED to building a better future by establishing a socio-economic and political order through a popular and durable national Constitution... DO HEREBY, in and through this Constituent Assembly solemnly adopt, enact and give to ourselves and our posterity, this Constitution of the Republic of Uganda, this 22nd day of September, in the year 1995.” See UGANDA CONSTITUTION (1995) (hereinafter Uganda Constitution), Preamble. The Supreme Court of Uganda has recognized this history of instability in its own decisions. In Attorney General v. Tumefutuza, [1997] LLR 241 (SCU), Justice Kanyeihamba observed that “[t]he makers of the Uganda Constitution, did for themselves and in the name of all Ugandans, recall, the country’s history which had been characterised by political and constitutional instability. They took into consideration, the struggles of the Ugandan people against the forces of tyranny, oppression and exploitation.”In Semogerere and another v. Attorney General, [2001] LLR 204 (SCU), Justice Kanyeihamba reproduced the preamble of the Constitution which includes reference to political instability and indicated that the Court would be guided by that preamble stating that “I have reproduced these solemn words of dedication lest we ever forget them. It is the solemn duty of the courts of Uganda to uphold and protect the people’s Constitution.” [emphasis supplied].
Chaskalson notes, the South African Constitution is concerned largely with equality.\textsuperscript{16} That objective would also guide the Constitutional court in its decisions. Judge Arthur Chaskalson makes the observation that

The Constitutional Court has been sensitive to the need to treat everyone as equal members of society. This is reflected in its judgments striking down capital punishment, corporal punishment, the criminalizing of sodomy, regulations of the education department that discriminate against foreign employees, immigration regulations that discriminate against unmarried heterosexual and homosexual couples, and an employment policy discriminating against a job applicant because he was HIV positive.\textsuperscript{17}

Some of the measures to that end were to entrench a bill of rights in the Constitution, make it justiciable, and institutionalize judicial review.\textsuperscript{18} But constitutional review was only a first step, albeit an important one—an indicator of willingness to govern under law and to constrain the exercise of political power. The task of realizing the success of these constitutional experiments would be an even more important and demanding exercise that would require sustained goodwill, sacrifice, patience and selflessness—the ingredients of an enabling political culture that is indispensable to constitutionalism, notwithstanding the progressive nature of the constitutional provisions themselves. The creation of these virtues of constitutionalism has taken place and continues to take place in a crucible that has often been characterized by setbacks in both countries on the promises that they set for themselves. The disillusionment that accompanies such set-backs has not managed, however, to derail the general trajectory of the constitutional experiments. To account for this phenomenon, it is important to examine the way the courts of judicial review have handled their tasks, often prudentially striking political compromises without making any explicit statements to that effect.

Like South Africa, Uganda’s embrace of democratic constitutionalism was very much part of an international process of political reconstruction that swept much of Africa, although it went well beyond it. Part of this process was the adoption of a bill of rights in the South African Constitution as well as the adoption of a similar bill of rights in the Ugandan Constitution.\textsuperscript{19}

In Uganda, the rule of law was the victim of brutal dictatorships. In 1966, Prime Minister Dr. Milton Obote, backed by a military largely drawn by the British from the ethnic groups closely linked to him, overthrew the President and suspended the 1962


\textsuperscript{17} Id. at 607.

\textsuperscript{18} Article 137(1) of the Uganda Constitution provides that “Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court.” In the \textit{Col (RTD) Dr. Besigye v. Museveni Yoweri Kaguta and another}, Election Petition No. 1 of 2001, (Uganda Supreme Court), the Supreme Court acknowledges that “[t]he Constitution was made in 1995 against the background of troubled political and constitutional history through which Uganda had passed during the previous 21 years....This is reflected in the preamble to the Constitution. It is inter alia, that the history of Uganda had been characterized by political and constitutional instability.”

\textsuperscript{19} Klug, supra note 4, at 2.
‘independence’ Constitution. Obote’s perception was that Uganda needed strong central government and a powerful executive in order to foster national unity, for which monarchies—protected under the independence Constitution—were an obstacle. Obote’s government therefore enacted the 1966 Interim Constitution abolishing monarchies and providing for a strong executive. But that was only the beginning of Ugandan dictatorships that would subjugate and arm-twist the judiciary to make decisions favorable to executive will.

In this respect, *Uganda v. Commissioner of Prisoners, ex parte Matovu*20 is paradigmatic. In that case, the applicant sought to challenge the validity of the 1966 interim Uganda Constitution and validity of the Emergency Powers (Detention) Regulations of 1966 enacted pursuant to that Constitution. The remarkably executive-minded *Matovu* court held that a successful, irreversible revolution (backed by the military) had been affected by Obote and thus upheld that Constitution and the constitutionality of the impugned regulations. Dr. Joe Oloka Onyango notes that, in effect, the *Matovu* Court dressed the patently illegal actions of the government with a shroud of legitimacy and refused to protect constitutionalism, individual liberties and freedoms.21 With that step the descent into dictatorship and utter rejection of the rule of law was swift. Shortly after the 1966 events, the Obote regime enacted the Uganda 1967 Republican Constitution. The Uganda 1967 Constitution transformed the nature and character of the Bill of Rights section of the Constitution, introducing several additional restrictions to the exercise of these rights (such as the right to personal liberty) and making such stipulations such as, “[N]o order made under such law …shall be questioned in a court of law.”22 The 1967 Constitution also concentrated executive powers in the President without checks and balances.

This civilian dictatorship was replaced in 1971 by the unequaled military dictatorship of General Idi Amin who suspended several significant sections of the 1967 Constitution, particularly those on the supremacy of the Constitution.23 The embodiment of rejection of any semblance of legality and rule of law was epitomized in Idi Amin’s *Proceedings Against the Government (Protection) Decree,*24 which provided that courts could not grant relief in any actions brought against the military government for injuries sustained as a consequence of measures taken to maintain public order and security. Judicial review of presidential decrees was excluded. In effect, the President became the “supreme law” of the land. As Dr. Joe Oloka Onyango puts it, the Amin regime had attained the highpoint of fascist ideology and secured the complete emasculation of judicial power and any remaining notions of judicial review and constitutionalism.25 There were no cases concerning constitutional law brought before the Courts of Uganda from 1972 until Amin was overthrown by military struggle in 1979.

However, even after 1979, Courts remained subjugated by a strong executive backed by the military. The important case of *Kayira and Semwogerere v. Rugumayo, Ojok, Ssempebwa & Eight Others,*26 dealt with the patently unconstitutional removal of

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22 See Constitution of Uganda (1967) (Repealed) art. 10(5).
23 See Uganda Legal Notice No.1 of 1971.
24 Uganda Decree No.8 of 1972.
26 Uganda Constitutional Case No.1 of 1979.
Professor Lule, the first post-Amin era President. The Court abdicated its constitutional responsibility and held that the case was moot as it had been overtaken by events, namely the appointment of another President, Mr. Godfrey Binaisa, by the powerful National Consultative Council which had control over the military. In turn, Binaisa was removed by a military Council, which then arranged sham elections in 1980 purportedly to return Obote to power. This led to a guerrilla war led by the National Resistance Movement (NRM) of Mr. Yoweri Museveni, the current President. Upon coming to power in 1986 President Museveni promised a new Constitution for Uganda, one based upon popular will, promulgated by a Constituent Assembly elected by the people themselves. Under the 1995 Constitution, the framers wanted to have a President who would be accountable to the people and greater separation of powers among the three arms of government as system of checks and balances. Whereas under the 1967 Constitution the executive had a role in making laws, the framers of the 1995 Constitution [hereinafter the Constitution of Uganda] wanted ultimate authority to determine what should become law to lie with the Parliament.\textsuperscript{27} The Constitution of Uganda attempts to “tame” the executive. One way to do that was to provide for judicial review within the new Constitution. The Constitution of Uganda provides for an independent judiciary and gives it significant powers to tame parliament and enforce constitutional values.\textsuperscript{28} Thus, the Constitution of Uganda provides for constitutional supremacy.\textsuperscript{29} It is no wonder that the Uganda Constitutional Commission reported that “there is a feeling among many that during much of that period [25 years prior the drafting of the 1995 Constitution], the courts did not play a strong enough role in standing against the executive in support of the Constitution.”\textsuperscript{30} According to this Commission,

many people expressed deep concern about the way the executive arm of government has interfered with the judiciary over many years. This has extended to murder of a Chief Justice, and the practice on the part of incoming Presidents of appointing new Chief Justice and other judges, giving the appearance of trying to ensure a favourable composition of the superior courts. The Courts are widely perceived as being unwilling to take stands against the executive, especially in constitutional and human rights cases.\textsuperscript{31}

The Commission made that report in 1993. The Commission observed that judicial “[i]ndependence is …crucial if the courts are to act as an effective check on unconstitutional acts of the executive and the legislature.”\textsuperscript{32} The Commission also observed that the “performance of the courts in dealing with constitutional matters since independence has not been spectacular. They have tended to be conservative and literal in their interpretations, and have been far from activist in their approach.”\textsuperscript{33}

\textsuperscript{27} Uganda Report, \textit{supra} note 14, at 326.
\textsuperscript{30} Uganda Report, \textit{supra} note 14, at 437.
\textsuperscript{31} \textit{Id.} at 442.
\textsuperscript{32} \textit{Id.} at 444.
\textsuperscript{33} \textit{Id.} at 456.
It is important to examine how the Ugandan courts of judicial review have related with the executive since 1993. The 1995 Constitution did not necessarily eliminate executive excesses in its relation with the judiciary. Indeed, old habits die hard. In order to prevent the grant of bail to civilian members of the political opposition (Dr. Kizza Besigye and 22 others) by the High Court of Uganda, security agents interrupted court proceedings on November 16, 2005 and sent them into military custody to be tried by the General Court Martial. These actions, as well as the constitutionality of certain provisions of the relevant military code, were challenged in Law Society of Uganda v. The Attorney General of the Republic of Uganda. Deputy Chief Justice Laetitia Kikonyogo, reading for the Court, found that “acts of security interference…violated the Judiciary’s independence in Article 128(1)(2) and (3) of Constitution.” Justice Okello held that “the act of surrounding the High Court by those armed men…was calculated to intimidate the judicial officers into being partial in favor of the State…It contravenes the principle of independence of the judiciary.”

Comparative Jurisprudence Relating to Judicial Review

Judges often see themselves as the protectors of social and political stability. That attitude might explain most of the decisions courts of judicial review have handed down in the two transitional democracies. A fair assessment of the performance of the Uganda courts of judicial review requires first an appraisal of cases in which they have demonstrated a heretofore surprising ability to stand up the executive in politically sensitive cases. In Uganda, one of the most prominent actors in the process of recent constitutional development has been the Judiciary. Part of the reason for this prominence is rooted in the constitutional provisions that provide – to an extreme – for the independence of the judiciary and try to insulate the judiciary from the whims of the executive in regard to appointment, remuneration and tenure, among other concerns.

And yet, those successes should not blind a keen observer to the fact that these courts are at their core significant political actors. The Uganda Constitutional Court has,

34 Constitutional Petition No. 18 of 2005.
35 Corder, supra note 3, at 255.
36 See Simwogerere Kyazze, Suddenly the Courts of Law Matter a Great Deal, THE MONITOR, Feb. 18, 2004, (observing that in striking down a referendum law passed by the legislature contrary to procedural rules, a draconian law that protected Parliamentary records from public scrutiny and declared sections of the penal code relating to false news as being unconstitutional, the courts of judicial review had demonstrated that the “good justices are anything but poodles” of the executive). See also, Paul K. Ssemogerere & Others v. The Attorney General, Constitutional Appeal No. 1 of 2002 (holding that the Constitutional amendment intended to bar scrutiny of parliamentary records and its internal procedures was unconstitutional).
39 Id. art. 142.
40 Id. art. 144.
41 See Simwogerere Kyazze, Suddenly the Courts of Law Matter a Great Deal, THE MONITOR, Feb. 18, 2004. (observing that the “Judiciary is also as much a political player as the other two branches of government.”).
in critical cases, ruled to uphold the status quo.\textsuperscript{42} Overall, the Uganda Supreme Court has been more robust in its constitutional interpretation. But even the Supreme Court is not without blemish in regard to particularly politically sensitive cases. As Professor J. Oloka Onyango notes, “while the Supreme Court has made some decisions that could be considered quite revolutionary in the Ugandan context, it has also erred in favor of caution if the matter may have implications of a serious political nature.”\textsuperscript{43} These observations can be demonstrated in a number of cases. With respect to the Uganda courts of judicial review (the Constitutional Court and the Supreme Court) the cases reviewed in this article in which the courts either explicitly or implicitly made deference to the transitional exigencies or the dictates of a powerful executive branch of government include Susan Kigula and 416 others v. The Attorney General (hereinafter UG Death Penalty Case I)\textsuperscript{44} and Attorney General v. Susan Kigula and 417 others (hereinafter UG Death Penalty Case II), upholding the constitutionality of the death penalty.\textsuperscript{45} The South African counterpart is S v. Makwanyane and Another \textsuperscript{46}(hereinafter SA Death Penalty Case) in which the South African Constitutional Court\textsuperscript{47} struck down the death penalty.

Cases in which the Uganda courts of judicial review lived up to the promise of constitutional review include Law & Advocacy for Women in Uganda v. Attorney General of Uganda (2006),\textsuperscript{48} Charles Onyango Obbo and Andrew Mijuni Mwenda v.

\textsuperscript{42} Oyango, supra note 37, at 12.
\textsuperscript{43} Id. at 13. The author observes that this is the reason the result in Kizza Besigye v. Y.K. Museveni & The Electoral Commission, Electoral Petition No. 1 of 2001, because “while all the judges found that there were serious irregularities in the 2001 contest, only 2 of 5 were willing to state that those anomalies were so excessive as to impugn the results.”
\textsuperscript{44} Constitutional Petition No.6 of 2003, Uganda Constitutional Court. The Constitutional Court of Uganda held that the constitution having legalized the death penalty, it can’t be said that section 99(1) of the Trial on Indictments Act contravenes Articles 24 and 44(a) of the Constitution.
\textsuperscript{46} 1995 (3) SA 391; 395 (6) BCLR 665 (CC).
\textsuperscript{47} The South African Constitutional Court was created by the 1993 interim Constitution as the highest authority on constitutional matters.
\textsuperscript{48} Constitutional Petitions Nos. 13 /05 & 05 /06 [2007] UGCC 1 (5 April 2007) (striking down section 154 of the Uganda Penal Code for violation of the anti-discrimination provisions of the Constitution because the code criminalized and punished acts of adultery committed by a married woman who engaged in sexual relations with any man not being her husband or any man who engaged in sexual relations with a married woman not being his wife, but did not do so in respect of a married man who engaged in extra-marital sexual relations with an unmarried woman). The reaction of the government to this holding was reminiscent of its reaction to the holding in Charles Oyango case. See supra, note 28. Condemning the decision striking down the adultery provisions as “inconceivable or even reprehensible” a government Minister, Mr. Buturo, vowed to enact an even tougher adultery law. According to the Minister, the Court decision, and many like it, amounted to “coordinated pressure to adopt values that are ungodly, inhuman and basically useless.” Mr. Buturo said the Government’s stance against homosexuality, pornography and prostitution had annoyed apologists and neo-liberals. See, Anne Mugisa, Stifler Adultery Law Coming, Govt Says, in THE NEW VISION, April 10, 2007. This anti-discrimination case, just like the Uganda Association of Women Lawyers & 5 other v. Attorney General - Constitutional Petition No.2 /03(striking down as discriminatory certain provisions of the divorce law which required a woman to provide more grounds than a man to secure a divorce), is on almost equal footing with those of their South African counter-part. See, in particular, National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) (holding that the criminalization of consenting sexual relations between men as sodomy was unconstitutional) and National Coalition for Gay
In all these cases, the executive branch of government furiously responded to the outcome, threatening to amend the relevant laws and thus render those judicial decisions nugatory. However, in patently ‘political’ decisions which could have significant ramifications for the transitional process and for the executive, the courts of judicial review have tended to act remarkably differently by consistently deferring to the preferences of the executive. This is particularly evident in the case Paul Kawanga Ssemogerere & another v. Attorney General52 whose holding—essentially to the effect that the 1999 referendum on political systems and by extension the presidential elections subsequently held on the basis of the chosen political system were invalid—provoked a public rebuke from President Museveni, who insisted that the result was “totally unacceptable.”53 Although


50 Uganda Constitutional Court, Constitutional Petition No. 3 of 1999 (Unreported) (striking down a referendum law).

51 Constitutional Petition No. 5 of 2004 [Uganda Constitutional Court], holding that the Income Tax provision for taxation of salaries of judges was contrary to the Constitution. The Court argued that the constitutional provision was aimed at putting the judiciary beyond the sufferance of the executive or at the whims of the legislature and thus provide for judicial independence. The Uganda Constitutional Commission had reported that “persistent financial constraints imposed on the judiciary tend to undermine its independence.” Uganda Report, supra note 14, at 455.

52 Uganda Constitutional Court, Constitutional Petition No. 3 of 2000 (Unreported). While striking down a referendum statute as unconstitutional Justice Twinomujuni observed that “With this holding that no political system was ever put in place and that Article 271 was never complied with, the holding of the referendum under Article 74 no longer arises. It would be unconstitutional to use a single penny of the tax payers money to change something that has no physical or legal existence.” The implication of this ruling was that both the referendum on the choice of Uganda’s political system (non-party versus multi-party political systems) and the subsequent presidential elections held pursuant to the political system of choice would be in jeopardy. This is precisely the sort of circumstance that the executive branch of government would not countenance, because it viewed it as being contrary to the spirit of transitional politics to the extent it would sow doubt in the public as to whether the promissory of fundamental political and constitutional stability promised by the transitional government would hold. This argument is based on President Museveni’s reference to the struggle for political change in Uganda, the same change acknowledged in the preamble to the Uganda Constitution. He said: “We fought Kony, defeated him, we fought these other groups ADF, FOBA to defend the NRM system, to defend Uganda and to defend the sovereignty of the people. That sovereignty can’t be taken away by court maneuvers by Ssemogerere and his group. It will not happen…… I am repeating that the government, including the national executive will not allow any institution including the court to usurp the power of the constitution in any way.” See Museveni Mad With Judges Over Nullifying 2000 Referendum Act, THE NEW VISION, Jun. 30th 2004.

53 Museveni Mad With Judges Over Nullifying 2000 Referendum Act, THE NEW VISION, Jun. 30th 2004. According to Professor J. Oloka Onyango, President Museveni even sought to have the Constitution amended so he could “tame and harness the Judiciary.” According to Professor Oloka Onyango, “the substance of that tension relates to the judicial power to check Executive excess. Consequently, the President would like to see an increase in his powers over the choice of who becomes a judge and their tenure of office in order, essentially, to ensure that “anti-Movement judges” (as he describes them) can be weeded out of the Judiciary.” The “Movement” refers to President Museveni’s political establishment. See
the Constitution provides that “the courts shall be independent and shall not be subject to the control or direction of any person or authority,” according to President Museveni “once the people have spoken in a referendum, nobody on earth can question it except God.” The Supreme Court would reverse the decision of the Constitutional Court in *Attorney General v. Paul K. Ssemogerere and Another* relying on a technicality to hold that the Constitutional Court erred in making the declaration that the referendum was invalid when the ground for so holding was not proved as the corresponding legal issue had not been pleaded and argued by the petitioner. In the view of the Supreme Court, even if the referendum was held under a void statute, the referendum was nevertheless constitutional as long as it was actually held according to dictates of the constitution, the failure of Parliament to enact a valid referendum law notwithstanding. What counted, according to Justice Mulenga, was that “despite the absence of law permitting political parties to canvass, the conduct of the referendum was free and fair.” Notably, the Supreme Court asserted that “circumstances warranted the exercise of the court's discretion to decline granting the declaration.”

Justice Mulenga went on to say that “[t]he court has to weigh all the pertinent circumstances in order to determine if it is just to grant the remedy” and that the court has a discretion to grant a remedy or not. He therefore argued that “[u]pon finding that an act or omission is inconsistent with or in contravention of a provision of the Constitution, the court should consider if granting the declaration is an appropriate remedy.” Justice Mulenga then succinctly provides the circumstances that dictated the outcome:

\[i\n\text{In the instant case, even if the court’s finding that the referendum contravened Article 69 [of the Constitution] was correct, the court [Constitutional Court] in exercise of that discretion ought to have considered if in all the circumstances it would be appropriate to grant the declaration that the referendum was invalid. The pertinent circumstances were that the respondents’ petition, which had pre-emptively challenged the referendum, was not tried and concluded until four years after it was filed. Meanwhile the referendum was held in which the majority of the electorate voted in favor of the movement political system and the system was duly adopted. The following year, Presidential and Parliamentary elections were conducted in accordance with that system. Later the same was done in respect of local governments, and generally the political affairs of the state were for more than four years conducted on the basis of that system. A declaration that the referendum was null and void would in all probability nullify not only the referendum but also all that had been done in consequence of its result. Needless to say, that would have}\]

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54 Constitution of the Republic of Uganda (1995), art. 128(1)


created political and constitutional instability and uncertainty, unproportional to the benefit the country would have derived from such remedy. In my view those were compelling circumstances, where the court would judicially exercise its discretion to refrain from granting the declaration. But, for avoidance of doubt, I have to reiterate that in the instant case the exercise of the discretion did not arise since, as held by this Court, the referendum was not invalid.\textsuperscript{59}

This political expedience as the basis for some decisions of the Supreme Court appears in subsequent presidential, electoral petitions not subject to constitutional review. In \textit{Kizza Besigye v. Y.K. Museveni and the Electoral Commission} (2001) and \textit{Kizza Besigye v. Electoral Commission and Yoweri Kaguta Museveni} (2006) the Supreme Court’s decision to a great extent accepted that the conduct of the election was illegal, but refused to order a re-run of the election arguing that “[t]he fact that these malpractices were proved to have occurred is not enough...the petitioner had to go further and prove their extent, degree, and the \textit{substantial} effect they had on the election” (emphasis added).\textsuperscript{60} According to one commentator, the Supreme Court handed down a political judgment because “[t]hey decided not to be responsible for the potential chaos that would follow a fair but calamitous judgment.”\textsuperscript{61}

In contrast to the Uganda Constitutional Court, the South African Constitutional Court’s rulings in its landmark cases reflect a court that is less deferent to the executive branch of government, although it also seriously takes into account the circumstances of

\textsuperscript{59} \textit{Id.} at 12. [emphasis added]

\textsuperscript{60} As Monica Twesiiime notes, the crucial issue was whether once it was proved that there were irregularities in the election, and such irregularities were shown to have affected the result in a “substantial manner” that would justify the nullification of the result of the election. See Monica Twesiiime, \textit{The State of Constitutional Developments in Uganda, 2001,} (2001), http://www.kitughatib.co.ug/Constm 2001 Monica UG.pdf. For whereas all five Justices were agreed on the issues that there was non-compliance with the Presidential Elections Act and that the principles of a free and fair election had been compromised, the crux of the matter eventually rested on whether the result of the election was thereby affected “in a substantial manner.” Three Justices held that the result was not thereby affected and there was no need to nullify it, while two were of the view that it had been affected, and accordingly, the election should have been nullified. Unfortunately, the electoral law is silent about the test for determining a “substantial manner,” whether it should be a qualitative determination in which only numbers mattered, or whether it should be qualitative in which case even issues like intimidation and violence by the military would suffice to render an election not free and fair. Three Justices were of the view that the standard should be quantitative, which was the argument of Museveni, as opposed to qualitative, which was accepted by two justices as pressed by the petitioner, Besigye. Be that as it may, the result of the petition seems to have turned on judicial fear of plunging the country into chaos and bloodshed. The Chief Justice seemed to make reference to these implications of the case when he said: “This is not an ordinary case but an important case involving the election of the President of the Republic of Uganda. It raises serious constitutional and legal issues... The effect of the decision on the governance and development of the country, and on the well-being of the people of Uganda, cannot be overemphasized.” This could explain the ambiguity apparent in the decision in virtue of the lack of a consensus on the definition of “substantial effect.”

\textsuperscript{61} Kyazze, \textit{supra} note 41. The author adds that “while some law experts believe the Supreme Court erred in indicting the election and simultaneously upholding it, one can understand where they were coming from. The judges, like other Ugandans, have lived through some very bad times, when it was not even possible to seek court redress for anything, leave alone to challenge the government.”
the transition.\textsuperscript{62} For example, although the result in the \textit{UG Death Penalty Case I and UG Death Penalty case II}\textsuperscript{63} had a lot to do with the express provisions of the Uganda Constitution,\textsuperscript{64} the Constitutional Court and Supreme Court could have creatively arrived at the same result as the South African Court Constitutional Court in \textit{SA Death Penalty Case}.\textsuperscript{65} The primary ground for holding capital punishment to be unconstitutional in the \textit{SA Death Penalty Case} was that the Interim Constitution’s prohibition of cruel, inhuman or degrading treatment or punishment.\textsuperscript{66} In the \textit{UG Penalty Case I}, the Constitutional Court held that:

\begin{quote}
Article 22(1) of the Constitution recognizes death penalty as an exception to the enjoyment of the right to life...[and] that the right to life is not
\end{quote}

\textsuperscript{62} Although there had been a moratorium placed on executions from the end of 1989, as part of the initial moves towards a negotiated transition, as many as 400 persons were awaiting execution at the time of the Court’s ruling. Klug, \textit{supra} note 4, at 144. Concurring opinions in \textit{SA Death Penalty Case} provide as their grounds for their approach to the death penalty the recognition of a national will to transcend the past and to uphold the standards of a ‘civilized democratic’ society, that is society’s will to break with its past and to establish a community built on values antithetical to capital punishment. The court reached its decision despite evidence that capital punishment was subject to extensive debate in negotiations before and during the constitution-making process. Klug, \textit{supra} note 4, at 145-146.

\textsuperscript{63} Although the Constitutional Court held that the Uganda laws that mandate the death penalty for certain crimes were unconstitutional, it stopped short of declaring death penalty \textit{per se} unconstitutional as a form of punishment.

\textsuperscript{64} The South African Constitution also provides that the Constitutional Court of South Africa may grant any remedy that is “just and equitable.” \textit{See} Constitution of the Republic of South Africa (1996) Art. 172 (b). There is no similar provision in the Uganda Constitution. Chucks Okpaluha argues that this provision of the South African Constitution gives the Court “immense discretion” which would also confer significant flexibility on the Court. Chucks Okpaluha, \textit{Of “Forging New Tools” and “Shaping Innovative Remedies”: Unconstitutionality of Legislation Infringing Fundamental Rights Arising From Legislative Omissions in the New South Africa}, 12 STALLENBOSCH L. REV. 462, 467(2001). The only comparable provision in the Uganda is “redress where appropriate.” Article 137(3)(b) of the Constitution of Uganda, 1995. However, unlike South Africa where the remedy granted by the Constitutional Court may be amended by the legislature (\textit{Id.} at 475), Article 92 of the Constitution of Uganda (1995) provides that “Parliament shall not pass any law to alter the decision or judgment of any court as between the parties to the decision or judgment.”

\textsuperscript{65} Article 22(1) of the Uganda Constitution provides that “No person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court.” Because of the wording of this provision, the Constitutional Court of Uganda could distinguish the \textit{SA Death Penalty Case} (Makwanyane) saying, “[i]n Makwanyane’s case (\textit{supra}) to which counsel for the petitioners referred us, the Constitutional Court of South Africa found death penalty to be inherently cruel, inhuman or degrading and, therefore, unconstitutional. Under the Constitution of South Africa, the right to life is unqualified.” The Uganda Supreme Court, moreover, refused to consider that the right to life under the Uganda Constitution was qualified under the general limitation clause (Article 44 of the Uganda Constitution) in the Bill of Rights. Justice Okello argued that “Article 44(a) only covers those acts which have not been specifically excepted as in article 22(1) of the Constitution. The right to life is not absolute. It is qualified. I agree with counsel for the respondent that if the framers of the Constitution had intended to make it absolute, the right to life would have been one of the items spelt out in article 44 of the Constitution.” However, even if that were the case, the South African Constitutional Court was able to find the death penalty as being unconstitutional in part because it was ‘cruel and degrading treating’ and the Uganda Constitution’s general limitation clause does not allow any limitation of the right to freedom from torture, cruel and degrading treating.

\textsuperscript{66} Corder, \textit{supra} note 3, at 267.
included in article 44 [of the Constitution] on the list of non derogable rights...Imposition of the death penalty therefore, constitutes no cruel, inhuman or degrading treating.

On appeal, in *UG Death Penalty Case II*, the Uganda Supreme Court agreed with the Constitutional Court on virtually every count. The respondents relied on the *SA Death Penalty Case* where the court considered provisions in the South African Constitution similar to Article 24 of the Uganda Constitution and declared the death sentence to be cruel, inhuman and degrading, and therefore unconstitutional in South Africa. Counsel for the respondents argued that since Article 44(a) of the Constitution provides that “Notwithstanding anything in this constitution, there shall be no derogation from the enjoyment of the freedom from torture, and cruel, inhuman or degrading treatment or punishment,” it follows that any provision of the Constitution which provides for a punishment that is cruel, inhuman and degrading, like the death penalty, is inconsistent with Article 44(a) and would be unconstitutional. Counsel for the respondents further argued that “[t]he purpose and wording of Article 44(a) was to resolve any anomaly in any part of the Constitution and it allows no exceptions or qualifications, even those implicitly or expressly envisaged by Article 22(1). The death penalty is therefore not saved by Article 22(1).” Justice Ngonda-Ntende’s dissent agreed in part with that analysis. He states, “[t]he wording of Article 44 is instructive. It starts with the words, ‘Notwithstanding anything in this Constitution...’ The framers were aware of what they had enacted in Article 22(1). The framers decided, notwithstanding that the death penalty was constitutionally permissible, to subject it to Article 24 without derogation.”

The majority of the Uganda Supreme Court first recognizes that the right to life is the “most fundamental of all rights.” But it notes that different Constitutions may provide for different things precisely because each Constitution is dealing with a philosophy and circumstances of a particular country, even as there are common standards of humanity that all constitutions set out to achieve. Uganda Supreme Court then held that the death penalty was constitutional. The court bases its conclusion on a number of reasons, which will now be analyzed.

The Court does not merely rely on the text of the Uganda Constitution but begins its analysis by trying to interpret the provisions of several international instruments. For example, in interpreting the Universal Declaration of Human Rights (UDHR) the Court states that because the UDHR provides first for the right to life and the right to freedom from torture, and then for freedom from inhuman and degrading treatment in separate articles of the document it cannot be argued that the United Nations thereby abolished the death penalty in the world. In addition, the Court references the International Covenant on Civil and Political Rights (ICCPR) and draws the conclusion that because the ICCPR provides that the right to life may not be “arbitrarily” taken away, “under certain acceptable circumstances a person may be lawfully deprived of his life.” It argues that because the ICCPR provision in Article 6(2) notes that “[i]n countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes,” it recognizes the “reality that there were still countries that had not yet abolished capital punishment.” The Supreme Court adds that “[i]t is noteworthy that the above

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67 *UG Death Penalty Case II, supra* note 45.
provisions of the Covenant are in pari materia with articles 22(1) and 24 of the Constitution of Uganda.”

The Uganda Supreme Court deferred to the legislative and executive branches of government with respect to the abolition of the death penalty. The Court prescribed, “[w]e wish to add that the right to life is so important that the abolition of the death penalty requires specific progressive measures by the State to eventually expressly effect such abolition.” However, the Uganda Parliament rarely departs from the preferences of the executive. And, the executive is not likely to adopt an abolition policy any time soon. Soon after the Supreme Court issued its decision, President Museveni praised the decision in a national address and argued that the death penalty was mother of all deterrents.

What seems to be missing from the Supreme Court’s analysis is a sufficient acknowledgment of the general pro-abolition stance of the international community. The Supreme Court should have seized upon the growing and incontrovertible trend toward abolition. In its General Comment on Article 6 of ICCPR, the United Nations Human Rights Committee states that “[t]he article also refers generally to abolition in terms which strongly suggest (paras. 2 (2) and (6)) that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life.” In addition, the Committee noted in its General Comment on Article 7 of the ICCPR that, when imposing capital punishment, the execution of the sentence “… must be carried out in such a way as to cause the least possible physical and mental suffering.” As Justice Egonda-Ntende pointed out in his dissenting opinion in UG Death Penalty Case II, because Uganda is a state party to the ICCPR, under international law it has the obligation not to infringe treaty and the Supreme Court ought to interpret Uganda law in conformity with the international obligations of Uganda.

In addition, it is important to note that the ICCPR refers to the right to life as being an “inalienable right.” The ICCPR does not use that language in regard to other rights. The right to life is fundamentally rooted in human dignity. The emphasis on human dignity is the reason that the United Nations recently adopted its Moratorium on

68 The Court instead shifts the responsibility to the legislative and executive branches of government in regard to the abolition of the death penalty. It states: “we wish to urge that the Legislature should re-open debate on the desirability of the death penalty in our Constitution, particularly in light of findings that for many years no death sentences have been executed yet the individuals concerned continue to be incarcerated on death row without knowing whether they were pardoned, had their sentences remitted, or are to be executed. The failure, refusal or neglect by the Executive to decide on those death sentences would seem to indicate a desire to do away with the death penalty.” See id.
69 See id.
70 President Museveni said, “[t]here were some people asking the Supreme Court to abolish the death penalty. It is not the work of the Supreme Court to do this but Parliament. I am glad the courts also saw it and said it is not their duty.” See, Museveni Backs Court on Death Penalty, THE NEW VISION, January 26, 2009.
the Use of the Death Penalty. This U.N. resolution, although non-binding, is a serious indication of the direction that the majority of states are determined to take. The Council of Europe may not be the only death-penalty-free-zone for a long time.

As a matter of constitutional interpretation, could the Uganda Supreme Court have avoided deferring to the legislature or the executive in regard to the abolition of the death penalty? It could be argued that the Uganda Supreme Court unduly subscribed to a legal positivist interpretation of the Uganda Constitution in regard to the death penalty. It observed that “executing a death sentence in Uganda may constitute a cruel punishment, but not in the context of Article 24 because the death penalty has been expressly provided for in Article 22(1).” The Court stated Constitution of Uganda (1967) (Repealed) art. 10(5).

Courts cannot now take on the role of the Legislature to abrogate a substantive provision of the Constitution by a process of interpreting one provision against another. In our view, this is the work of the Legislature who should indeed further study the issue of the death penalty with a view to introducing appropriate amendments to the Constitution.

However clearly, the Constitution does not envisage only a legal positivist mode of interpretation if the outcome would be contrary to human dignity. All rights elaborated in the Constitution ought to be interpreted against the backdrop of the general introduction to the Bill of Rights in the Uganda Constitution. That introduction provides that “[f]undamental rights and freedoms of the individual are inherent and not granted by

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74 G.A Res. 62/176, U.N. Doc. A/RES/62/176 (Dec. 18, 2007). The moratorium urges States to establish “a moratorium on executions with a view to abolishing the death penalty.” The resolution was passed by a vote of 104 in favor of 54 against, with 29 abstentions. Eighty-seven countries -- including the 27 European Union states, more than a dozen Latin American countries and eight African states -- jointly introduced the resolution. 133 countries have abolished the death penalty in law or in practice.


76 UG Death Penalty Case II, supra note 45. (emphasis added). Elsewhere, the Court states “these are deliberate provisions in the Constitution which can only point to the view that the framers of the Constitution purposefully provided for the death penalty in the Constitution of Uganda.” It also argues that “[h]ad the framers intended to provide for the non-derogable right to life, they would have so provided expressly.” [emphasis added]. It also maintains “the Constitution specifically provides for it under a substantive article of the Constitution.” [emphasis added]. The Court cites decisions of the United States Supreme Court stating that in “GREGG v. GEORGIA, 428 U.S. 153 (1976) rejected the decision in FURMAN that the death penalty is per se cruel and unusual.” The Court justifies its use of comparative jurisprudence from the United States by stating that “the United States...Constitution has, in some respects, influenced the Constitution of Uganda.” See, UG Death Penalty Case II. But, the Court does not acknowledge that in recent years there has been a movement in the U.S. Supreme Court toward restricting the death penalty. In Atkins v. Virginia 536 U.S. 304 (2002), the U.S. Supreme Court held that the execution of mentally retarded criminals is unconstitutional; in Roper v. Simmons 543 U.S. 551 (2005) it held that imposing the death penalty on convicted murderers who were younger than 18 at the time of their crimes is unconstitutional, and in Kennedy v. Louisiana 554 U.S. 634 (2008) it held that the death penalty is unconstitutional as a punishment for the rape of a child.

77 UG Death Penalty Case II, supra note 45.
the State." Indeed, the Constitution recognizes that the enumeration of rights in the Constitution does not exhaust the scope of human rights. Article 45 of the Constitution provides that “[t]he rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned.” These provisions would be redundant if the Court interpreted all the rights in the Constitution as if the State provided the ultimate criterion for understanding the nature and scope of the rights enumerated therein. However, the Court seems to reject this view. Commenting on the argument of counsel for the respondents, the Court states “Counsel’s argument is based on the assumption that the death penalty per se amounts to “cruel, inhuman or degrading treatment” which is outlawed by article 44(a).” But in light of the constitutional backing, it would seem that that argument is based on more than just an assumption.

Refusing to construe the provisions of the Constitution on the right to life in light of the inherent nature of that right, the Court defers to the State in regard to abolition of the death penalty. In addition, it emphasizes the view that at the time of the making of the Constitution the majority of Ugandans preferred to retain the death penalty. The Court states that “[w]e fully understand the need for a change of attitude to capital punishment. We have, however, not found sufficient reasons to justify going against the majority views expressed and analysed.” But if human rights are inherent and not granted by the State, they cannot be the product of consensus. The Constitution itself recognizes that when it comes to human rights, consensus cannot be decisive. That is why rights are described as “inherent and not granted by the State.” A majority cannot decide which human rights are valid. A human right must be recognized to the fullest extent of nature and scope.

In connection with its failure to recognize the inherent nature of the right to life, the Court refuses to embrace the developments in other countries that have abolished the death penalty, choosing to emphasize countries where the death penalty is still on the statutes. Adopting a relativist argument, the Court maintained that “[e]ach situation must be examined on its own merits and in its context.” However, it may be argued that the validity and nature of human rights are not subject to the exigencies of time and space. Arguments based on context or particularity are diametrically opposed to the universal character of human rights.

A holistic interpretation of the relevant provisions of the Constitution might also have yielded a different result. Like the Constitutional Court, the Supreme Court held that “[i]n our view there is no conflict between article 22(1)[right to life] and

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78 Constitution of Uganda, Art. 20(1) [emphasis added].
79 The Court itself refers to the fact that the Constitution recognizes the “sanctity of human life” and that “life is sacrosanct,” but it adds that “under certain circumstances acceptable in the country, that right might be taken away.” See UG Death Penalty Case, supra note 45.
80 The Uganda Supreme Court seems to subscribe to the view that human dignity is not inherent but depends on the evolution of common consciousness as to the value of human life. “We believe these provisions are part of the evolving standards of common decency.” [emphasis added] See id. Indeed, while ruling that the death row phenomenon was unconstitutional, the Court argued that “[a] condemned person does not lose all his other rights as a human being. He is still entitled to his dignity.” See id. It is difficult to understand why the Court is silent on the issue of human dignity when it comes to the death penalty itself.
82 See id.
44(a){prohibition, *inter alia*, on derogation from the right to freedom from torture, cruel, inhuman, or degrading treatment}.” It is difficult to understand why the Uganda Constitutional Court and Supreme Court refused to holistically interpret the two provisions. The Uganda Supreme Court instead emphasizes the fact that the Constitution’s provisions on the right to life and on the right to freedom from torture, cruel or degrading treatment are in separate parts of the Constitution. The Court then makes the conclusion that the framers of the Constitution meant that the two provisions would be construed separately, stating that “[t]he concern about torture, cruel and inhuman treatment was considered [by the framers] as a separate subject.”

Ironically, the Court notes that “[t]he Constitution should be looked at as a whole with no provision destroying another, but provisions sustaining each other. This has been said to be the rule of harmony or completeness.” Yet, the Court goes on to construe the provisions on the right to life and prohibition of torture, cruel, inhuman or degrading treatment in isolation of each other, rather than conjunctively. The Supreme Court distinguishes the *SA Death Penalty Case* that adopted a holistic approach. It stated that “[s]ome Constitutions have not qualified the right to life and it has been easy for the courts to rule that the death sentence is unconstitutional as happened in South Africa with the *MAKWANYANE* case *(supra)* upon which the respondents have put so much reliance.” However, the South African Interim Constitution provided for a general limitations clause that could have been read by the South African Constitutional Court as to imply the same exception that the Uganda Courts insist on when refusing to declare death penalty unconstitutional. But the South African Courts did not do that.

In his dissent in *UG Death Penalty Case II*, Justice Egonda-Ntende points out the failure of the Uganda Supreme Court to pursue a holistic interpretation. He states that Article 22(1), concerning the death penalty, and Articles 24 and 44, concerning the prohibition of torture, cruel, inhuman and degrading punishment and non-derogation from that prohibition, had to be harmoniously construed as a requirement of constitutional interpretation. According to Justice Ntende, even if the Constitution allowed the death penalty, that punishment had to be carried out in a manner that was consistent with the provisions of Articles 24 and 44.

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83 See id.

84 Section 9 of the South African 1994 Interim Constitution provided that “Every person shall have the right to life.” However, the general limitations clause in Section 33 provided that “The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation shall be permissible only to the extent that it is reasonable; and justifiable in an open and democratic society based on freedom and equality.”

85 He relied on the decision of the European Court of Human Rights in *Soering v United Kingdom* (Application No. 14038/88, 7th July 1989) (refusing the extradition of Soering to the United States on the ground that he was likely to face the death row phenomenon, and that even if Article 2 of European Convention on Human Rights did not prohibit the death penalty, the conditions under which such a punishment could be imposed had to be within the threshold set by Article 3 of the Convention prohibiting torture, or to inhuman or degrading treatment or punishment.). He also relied on a similar approach to the same issue with by the U.N. Human Rights Committee in *Chitat Ng v. Canada*, Communication No. 469 of 1991 delivered on 7th January 1994. See para. 16 of the opinion. Justice Egonda-Ntende concludes that the imposition and mode of implementing the death penalty had to meet the threshold provided by Articles 24 and 44 of the Constitution of Uganda. According to him, “Death penalty is authorised but must be in compliance with Articles 24 and 44(a) as these provisions render cruel, inhuman and degrading treatment or punishment unconstitutional.”
In the *SA Death Penalty* decision all judges agreed that the method of interpretation of fundamental rights involves a broad and holistic interpretation of the right followed by an application of the limitations’ clause, requiring that the State justify its interference with the right “according to the criteria prescribed by s 33.”

The *SA Death Penalty Case* set the tone and the standard for future judgments.\(^8^6\) just like Uganda’s *Charles Onyango Case*\(^8^8\) arguably set the tone for a more robust stance against unconstitutional legislation. In the *SA Death Penalty Case*, the Court adopted the “generous and purposive” approach\(^8^9\) to constitutional interpretation and abandoned former legalistic judicial practices. The Court was even ready to lead a reluctant public in a direction that they were not ready to embrace by declaring the death penalty unconstitutional.

By contrast, the Uganda courts of judicial review have not been strong enough to go down that road, preferring to defer to public opinion in certain respects. For example, in regard to the death penalty, the Constitutional Court insisted that public opinion was relevant because the Uganda Constitution, unlike the South African Constitution, provides that “[j]udicial power is derived from the people and shall be exercised by the Courts…in conformity…with the values, norms and aspirations of the people.”\(^9^0\) However, this reasoning seems to ignore the fact that fundamental human rights and freedoms are beyond the dictates of public opinion and that public opinion can be instructed and shaped by a judicial decision. It also ignores the fact that the Uganda

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\(^8^6\) Klug, *supra* note 4, at 1.

\(^8^7\) Corder, *supra* note 3, at 255.

\(^8^8\) This is so because of the heightened degree of state interference with press freedom that had gone on and the press being the only sound opposition to the government in the absence of meaningful political pluralism. The other case would probably be the one in which the Supreme Court of Uganda declared that it would be unconstitutional to prohibit the existence of a multi-party political system. See Dr. Paul K. Ssemwogerere *et al* vs. Attorney General of Uganda, Uganda Constitutional Court, Constitutional Petition No. 5 of 2002 (Unreported) (observing that “[p]luralism is a core concept in democracy and that political parties are not always negative and can offer constructive criticism to the government.”)

\(^8^9\) Ugandan Courts of judicial review could have adopted a similar approach if they wanted to live up to the expectations of the people. According to the Uganda Constitutional Commission, “performance of the courts in dealing with constitutional matters since independence has not been spectacular. They have tended to be conservative and literal in their interpretations, and have been far from activist in their approach.” Uganda Report, *supra* note 14, at 456. The Uganda Court does not need to follow only the South African approach. Although the Constitutional Commission reported that many countries that had abolished the death penalty were considering reinstating it (citation?), very many countries’ courts have ruled that mandatory death penalty is incompatible with fundamental human rights. See, U.S. cases of *Furman v Georgia* (1972) 408 US 238, *Woodson v North Carolina* (1976) 428 US 280, *Roberts v Louisiana* (1977) 431 US 633; India: see *Milu v State of Punjab* [1983] 2 SCR 690; Eastern Caribbean Court of Appeal in *Spence v the Queen and Hughes v the Queen* (2nd April 2001), affirmed by the Privy Council in *Reyes v the Queen* [2002] 2 AC 235, *R v Hughes* [2002] 2 AC 259 and *Fox* [2002] 2 AC 284; Hungary (Constitutional Court decision No. 23/1990 (X.31)AB). Indeed, in *Ocalan v Turkey* (2003) 37 EHRR 10 p.238 the European Court of Human Rights noted that the meaning of inhuman and degrading punishment had probably evolved to the point where the implementation of the death penalty can be regarded as inhuman and degrading treatment. The European Court of Human Rights observed that “it can also be argued that the implementation of the death penalty can be regarded as inhuman and degrading treatment contrary to Article 3.” *Ocalan, supra*, para. 198. In addition, nearly all the members of the European Union—which the African Union tries to emulate in many respects—have abolished the death penalty and ratified the Protocol No. 6 (to the European convention on Human Rights) (concerning the abolition of the death penalty).

Constitution acknowledges and places human rights beyond the whims of the state, which represents the people, by providing that “[f]undamental rights and freedoms of the individual are inherent and not granted by the State.”

The Uganda Constitutional Court rejected the idea that it was simply following the popular will, noting that

[i]t was common ground that this court was NOT being called upon to decide whether a death penalty is desirable in Uganda or not. That is accepted to be the preserve of the people of Uganda through their legislature. The main issue is whether the death penalty is a lawful sentence under our Constitution. This is what this court is being called upon to decide.

So too did the South African Constitutional Court reject this idea because, in the words of Chaskalson J., if public opinion were to be decisive, “there would be no need for constitutional adjudication.” Instead of taking a cue from the generous interpretation arrived at by the South African court, the Uganda Constitutional Court insisted that its ruling in the UG Death Penalty Case I would be determined in part by the exigencies of the Uganda transition, noting that:

[i]therefore, Uganda is not isolated or alone in retaining the death penalty. It can thus be stated with certainty that the abolition of the death penalty is not a mark or indication of civilisation (sic) as remarked by Mr. Katende. In Uganda’s case it is retained as a result of historical circumstances as the Preamble to the constitution proclaims: “Recalling our history which has been characterised by political and constitutional instability....”

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91 Article 1(2) of the Uganda Constitution provides that “all authority in the State emanates from the people of Uganda.”


93 William Tumwine argues that Courts retain the death penalty on the books in part because of public opinion. William Tumwine, The Role of Public Opinion in Court Decisions in the Legality of the Death Penalty: A Look at Uganda and South Africa, LL.M Thesis, Faculty of Law, University of Ghana, Legon, (2006), http://www.chr.up.ac.za/academic_pro/lm1/dissertations.html. See also, Judge Tips on Death Penalty. THE NEW VISION, April 3, 2008 (arguing that few African countries strike down the death penalty “just to please their citizens who would otherwise resort to mob justice as a means of solving their grievances.”).

94 Judgment of June 6, 1995 (State v. Makwanyane and Another), Constitutional Court No. CCT/3/94 (hereinafter S.A Death Penalty).

95 In the S.A Death Penalty decision, all judges agreed that the method of interpretation of fundamental rights involves a broad interpretation of the right followed by an application of the limitations’ clause, requiring that the State justify its interference with the right ‘according to the criteria prescribed by s 33.’ Chaskalson P analysis of the right was first to give a ‘generous’ and ‘purposive’ meaning to the right chosen – the right prohibiting ‘cruel, inhuman or degrading treatment or punishment’ and then giving further texture to the meaning of this right by interpreting those rights associated with it: the rights to life, dignity and equality. Klug, supra note 4, at 162.
Just like the Constitutional Court, the Uganda Supreme Court noted the importance of taking into account the country’s history of murder and torture but chose to emphasize the fact that, in spite of that history, the people of Uganda created an exception to the right to life by retaining the death penalty and that in any case the history of murder related to political opponents.  

The Court stated that

We take judicial notice of the fact that the debate and subsequent promulgation of the Constitution of Uganda 1995, came after a long period of strife in the country – a period when there had been gross violations of human rights by various organs of the state, particularly the Army and other Security Agencies. This was a period when there were thousands of extra-judicial killings, as well as wanton torture of people.

It is noted that African countries have not carried out executions in the last ten years, but fear to abolish the death penalty. It could be argued that the results in UG Death Penalty Case I & II are simply a nod to the political establishment and popular sentiment in Uganda which expressed its desire for the continuation of the death penalty, although the Constitutional Court legalistically stated that “[t]he main issue is whether the death penalty is a lawful sentence under our Constitution. This is what this court is being called upon to decide.”

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96 The Court stated that “[m]any of the instances of extra judicial killing and torture were found to have been meted out to perceived political opponents.” See, UG Death Penalty Case II.


98 The Uganda the Uganda Constitutional Commission noted that “abolition of capital punishment did not receive substantial submissions. This may be a reflection of the past history of the country. The majority of views analyzed on the issue supported the retention of capital punishment.” Some of the arguments advanced for the retention were as follows. First, that “[b]ecause of the long periods of unrest in the country, there are many criminals who fear only death and no other punishment. If capital punishment is removed they are likely to continue to commit wanton murders without much fear of life imprisonment when arrested. Second, that “[h]istory has shown that as each new regime came to power, prisoners sentenced to life sentences for murder have used the confusion to escape and to again terrorize society and commit murders.” On the basis of these arguments, the Commission recommended that “Capital Punishment should be retained in the new Constitution.” Uganda Report, supra note 14, at 165-166. About ten years later, in 2005, an international fact-finding mission on the death penalty found that the majority of Ugandans still favored the death penalty, at least in respect of certain crimes. However, human rights must be not depend on the wishes of the majority. See International Federation of Human Rights, Uganda: Challenging the Death Penalty, 11 (2008) http://www.fidh.org/IMG/pdf/ug425a.pdf (accessed July 7, 2008).
The reality in South Africa was that all parties to the negotiated settlement were not strong supporters of continuing death penalty. Parties to the South African transition understood that the constant struggle for political advantage and the fragmentation of power required political accommodation under the threat of mutual destruction. Political players realized that neither party could achieve its aims without some form of settlement, and thus there emerged the political will necessary for the acceptance of democratic constitutionalism as the guiding motif of a new South Africa.  

"[N]ew constitutional order...must be seen to be the result of several factors: the strength of the old order during the negotiating process, the old order’s suspicion of the new environment, the adherence of the ANC to the notion of fundamental rights, and the strong belief ...that ethnicity and division, ought not be part of a post-apartheid South Africa."  

According to Hugh Corder, constitutional thinking in post-apartheid South Africa coalesced around the “associated notions of limited government under law, protection for fundamental rights, and the exercise of constitutional review by an independent and impartial judiciary.” But the trust in the judiciary had to be earned in order to propel the South African transition. Initially, the opponents of apartheid regime viewed judicial review with a deep mistrust that was born of a clearly executive-minded judicial record in the face of the manifest injustice of apartheid courts. The 1993 interim or ‘transitional’ South African Constitution would try to assuage those apprehensions. It would be a long, complex document, endeavoring to “resolve or reconcile often vehemently conflicting points of view.” It incorporated ‘constitutional principles’ with which the constitution had to be consistent—a written guarantee that no matter who held power, certain structures, procedures, and interests would be sacrosanct. The South African Constitutional Court acknowledges that the necessities of the transition would determine constitutional interpretation. In Premier, Mpumalanga, and Another v. Executive Committee, Association of State-Aided Schools, Eastern Transvaal, for example, O’Regan, J., stated that “[i]n this case highlights the interaction of two constitutional imperatives indispensable in this time of transition. The first is the need to eradicate patterns of racial discrimination and to address the consequences of past discrimination which persist in our society.” The equivalent provisions in the Uganda Constitution are the National Objectives and Directive Principles of State Policy.

In the UG Death Penalty Case, the government pressed for the retention of the death penalty. In deference to that executive will, the Uganda Constitutional Court would

99 Klug, supra note 4, at 71.
100 Jeremy Sarkin, The Drafting of South Africa’s Final Constitution From a Human-Rights Perspective, 47 American Journal of Comparative Law 67 (1999).
101 Corder, supra note 80, at 547.
102 Id. at 547.
103 Id. at 550.
104 Id. at 551.
105 Premier, Mpumalanga, and Another v. Executive Committee, Association of State-Aided Schools, Eastern Transvaal, 1999 (2) SA (CC) 91.
rationalize that states have the right “to derogate from the right to life but only to the extent strictly required by the exigencies of the situation.”106 Such deference is in large part owing to the drastically disparate transitional periods of South Africa and Uganda.

The circumstances of the transition in Uganda are definitely different than those of South Africa. Uganda’s transition was not a negotiated settlement. The 1994 transitional constitution of South Africa was instrumental in building confidence between the previously warring factions. In Uganda, the victors who militarily rode into power had no counterparts to deal with. They unilaterally decided on legitimizing their rule by initiating the process of making a new constitution through a popularly elected constituent assembly. In sum, that process would compose the transition. It is no wonder that the rebellion continued in the northern parts of Uganda. This was in no small part due to the fact that the results of the constitution-making process were considered illegitimate because they were seen as being eschewed in favor of the ruling regime.107

The decisions of the Uganda courts of judicial review would be seen as a continuation of the sense of being beholden to the ‘benevolent’ ruling elite that had ‘saved’ the country and set it on a path to recovery and that all means should be put at the executive branch of government to avoid a repeat of the tumultuous past, which the Uganda courts acknowledge. A projection of power, and not weakness—which is evident in the retention of the death penalty—is in keeping with the means desired by the ruling elites in Uganda, which were aimed at sending a clear message of the dire consequences for any would-be trouble makers. In South Africa, it was clear to all contesting parties that a continuation of muscle flexing would be fruitless.

President Mandela set the tone by means of his frequently expressed respect for the work of the Constitutional Court. He chose to do so on several occasions immediately in reaction to judgments which had found legislative or executive conduct unconstitutional.108 President Mbeki and several officials of the ruling African National Congress (ANC) have been less forthcoming in this respect, making some critical comments on occasion.109 It is remarked that he was conspicuously correct in his dealings with the judiciary, even when its exercise of constitutional review power found his government’s actions wanting.110 In Uganda, a projection of power was and continues to be seen as the guarantee for a stable transitional process.

In South Africa, the parties focused their attention on the content of the Constitutional Principles as a way of continuing their struggles for particular outcomes. The South African Constitutional Court is a powerful court because the political negotiators left parts of the constitution dealing with key political issues so vague that the

106 Judgment of Justice Mpago Bahigeine in UG Death Penalty Case I. (emphasis added)
107 Professor J. Oloka Onyango notes that the “tendency to create Political Monopoly, which essentially means the desire to absolutely dominate the political arena to the exclusion of any contending force, and particularly to eliminate all forms of opposition to the existing system of government...has been true regardless of the kind of political system” in Uganda. To this end, the politicians manipulate the constitution and the law. J. Oloka Onyango, The Socio-Political Context of the 2006 Elections, OCCASIONAL PAPERS, NO. 4, 5 (2006).
108 For example, Executive Council, Western Cape Legislature v. President of the Republic of South Africa 1995 (4) SA 877 (CC).
109 Corder, supra note 3, at 266.
110 Corder, supra note 80, at 556.
court will have to use political judgment when it rules on them.\textsuperscript{111} Issues pertaining to land would be an essential part of South Africa’s transition, the primary concerns being land restitution and land reform.\textsuperscript{112} The South African Constitution not only guarantees restitution of land taken after 1913 and the right to legally secure tenure for those whose tenure is insecure as a result of racially discriminatory laws and practices, but also includes an obligation on the state to enable citizens to gain access to land on an equitable basis.\textsuperscript{113} Furthermore, the state is granted a limited exemption from the protective provisions of the property clause so as to empower it to take “legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination.”

Despite agreement in the Constituent Assembly, the property clause was presented to the Constitutional Court as violating the Constitutional Principles, thus giving grounds for denying certification of the Constitution.\textsuperscript{114} Two major objections were raised: first, that unlike the 1994 South African Interim Constitution, the new clause in the ‘final’ 1996 South African Constitution did not expressly protect the right to acquire, hold and dispose of property; second, that the provisions governing expropriation and the payment of compensation were inadequate. The Constitutional Court rejected both of these arguments. The Court noted that the applicable test was whether the right met the standard of a ‘universally accepted fundamental right’ as required by the Constitutional Principle II.\textsuperscript{115} In conclusion, the Court argued that it could not “uphold the argument that, because the formulation adopted is expressed in a negative and not a positive form and because it does not contain an express recognition of the right to acquire and dispose of property, it fails to meet the prescription of CP [Constitutional Principle] II.” Both the option of widespread nationalization initially advocated by the African National Congress, which may have been facilitated by the exclusion of a property clause, and the demands for a strict protection of property guaranteeing market-value compensation for any interference were silenced. Instead parties were able to use the international and foreign lexicon of treaties, constitutions and case law to formulate a specifically South African compromise. This resolution both enabled the political transition and left open, for future fact-specific confrontations, the exact interpretation to be given to the new Constitution’s property clauses. This had much to do with the preservation of the spirit of the South African transition. It is argued that peaceful transition to democracy required important compromises including the recognition of existing property rights; but it is also true that the focus on land left the country’s real wealth—now in the companies, mines, stocks and bonds as well as urban housing—completely unchallenged.\textsuperscript{116}

Both the South African and Ugandan courts of judicial review have followed the framers of the two countries’ constitutions in making recourse to foreign law in the

\textsuperscript{111} Klug, \textit{supra} note 3, at 141.
\textsuperscript{112} Id. at 131.
\textsuperscript{114} Klug, \textit{supra} note 3, at 131.
\textsuperscript{116} Klug, \textit{supra} note 3, at 138.
interpretation of the constitutional text.\textsuperscript{117} The two countries usually do so out of necessity. As the president of the South African Constitutional Court pointed out in \textit{SA Death Penalty Case},\textsuperscript{118} the dearth of indigenous Constitutional jurisprudence would tend, at least in the first few years, to increase the importance of foreign law. A similar situation in Uganda seems to have dictated a recourse to foreign law. In \textit{Charles Onyango Obbo and Andrew Mujuni Mwenda v. The Attorney General},\textsuperscript{119} counsel for the appellant argued on appeal that many authorities from other jurisdictions had been cited by the appellants to the lower Court, the Constitutional Court, but there was nothing to suggest that the Court’s decision had been considered to be informed by foreign judgments. The Uganda Supreme Court held that foreign judicial decisions, though not binding, are of persuasive value and when invoked by Counsel they must be considered and rejected only for good reason.

The Constitutional Court of South Africa was mindful of the exigencies of the transition in other landmark cases and it understood its critical leadership role in the early stages of the transition. The great extent to which the Court fulfilled this role earned it respect and legitimacy.\textsuperscript{120} It is recognized that the Constitutional Court of South Africa did make some mistakes but, overall, its record shows that it had a clear sense of judicial responsibility and stuck to a remarkably balanced approach in keeping with the necessities of the South African transition.\textsuperscript{121} One manifestation of this record was a case involving the demarcation of local government boundaries and constituencies—the \textit{Western Cape Case}—in which the Court declared section 16A of the Local Government Transition Act 209 of 1993 (LGTA) an unconstitutional delegation of legislative power to

\textsuperscript{117} The use of international law is specifically mandated in the South African 1996 Constitution. Section 39(b)-(c) of the South African Constitution, for example, provides that in interpreting the bill of rights the Court must consider international law and may consider foreign law, and section 233 provides that “[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. Although the Uganda Constitution contains reference to international law, this is done merely in the national objectives and directive (Nat’l Obj.) principles of state policy, Nat’l Obj. XXVIII(b). This principle enjoins the state to respect international law in regard to its foreign policy. However, one of the function of the Uganda Human Rights Commission is to monitor government’s compliance with international human rights treaties. The South African 1996 Constitution borrows from such a variety of foreign sources of law that no single source can claim parentage of that constitution. This has helped to retain the legitimacy of the Constitution. See François du Bois and Daniel Visser, \textit{The Influence of Foreign Law in South Africa}, 13 Transnat’l L. & Contemp. Probs. 593, 643 (2003). The Uganda Constitutional Commission acknowledges that the “Commission made comparative study of constitutions of numerous countries both of the developing and developed nations.” Uganda Report, supra note 14, at 26. The Commission adds that the “lessons learnt have informed the attitudes of commissioners in offering some recommendations for the new Constitution.” \textit{Id.} at 37.

\textsuperscript{118} 1995 (3) SALR 391, 414E-415A, para. 37 (CC)

\textsuperscript{119} Uganda Supreme Court, Constitutional Appeal No.2 of 2002 [Judgment of February 11, 2004] (Unreported)

\textsuperscript{120} The certification cases are particularly important in establishing the legitimacy and clout of the South African Constitutional Court. By the process of certification, the Court was granted the power to decide whether in regard to the final (1996) Constitution, the new constitutional text adopted by the Constitutional Assembly complied with the constitutional principles contained in the Interim (1993) Constitution. It was the mechanism of certification by an independent third party institution which had saved the political negotiations in the early 1990s from premature death. See O’Regan, supra note 1, at 205.

\textsuperscript{121} Corder, supra note 80, at 556.
the executive. The LGTA was negotiated as a mechanism to recreate local government before holding democratic local government elections. The conflict arose when President Mandela, acting in accordance with amending powers granted to the executive in section 16A of the LGTA, amended the Act: (1) transferring the power to appoint members of local demarcation committees away from provincial government—where it had been assigned when the administration of the LGTA had been assigned to provincial governments; and (2) limiting the wide powers of local administrators of the Act to make rules relating to the demarcation of local government structures and the division of such structures into wards. Mandela's actions were motivated by, and effectively reversed, an attempt by the National Party provincial government in the Western Cape to demarcate the Cape Town metropolitan area to concentrate all the resource-poor African areas into one local government area, thus excluding any of these areas form a neighboring, extremely wealthy, white, Afrikaans-dominated area. Given the historic structure of the Western Cape, this would have excluded all Africans from voting in this particular area. While the ANC objected to this process of demarcation, the NP in the Western Cape accused the national government of interfering in provincial matters. The Constitutional Court was faced with resolving a crisis that by early September 1995 was threatening to prevent the holding of nationwide local government elections and to halt the very process of democratic transition away from apartheid. Deflecting the potentially explosive issue of provincial autonomy and avoiding the politically sensitive issue of local government demarcation, the Constitutional Court raised the constitutionality of the legislature's delegation of amending powers to the executive, calling into question the constitutionality of section 16A of the Act which was the legal basis upon which President Mandela had acted. In reversing the lower court and striking down Mandela's proclamations and Parliament's amendment of the LGTA, the Constitutional Court was hailed by opponents of the government as defenders of the Constitution, for standing up to the ANC-dominated executive and legislature, and for fulfilling the promise of judicial

122 While South Africa's first democratic elections were held on April 27 1994, the final demise of apartheid governance and the completion of the formal process of democratization would only be completed in 1999 with the full implementation of the 1996 Constitution. The second wave of democratization—the local government elections—took place in November 1995 and was to have extended democratic participation to local government. However, a number of areas including the whole of the province of KwaZulu-Natal and the important metropolitan area of Cape Town, were only able to hold local government elections in the first half of 1996. Recognizing the difficulty of creating democratic local governments in a situation characterized by racial segregation and apartheid town planning, the negotiating parties established a special transitional regime for the restructuring of local government prior to the holding of local elections. Issues surrounding the restructuring of local government were, however, politicized by the determination of the South African governing National Party to protect a high degree of local autonomy, as away to ensure local control of resources. Furthermore, the ANC acknowledged that, given the system of proportional representation employed to elect national and regional government, it was important that there be some degree of direct representation at the local level so as to bring government closer to the people. Tensions over the question of local government were resolved through a political compromise requiring that half the wards of any local government be assigned to formerly white, coloured and Indian race zones. This compromise was entrenched in the interim constitution so as to ensure that within any local government area the 'minority' vote could prevent the African majority form obtaining the two-thirds majority needed to pass a local budget on its own. This consociational guarantee was negotiated by the apartheid regime as part of the transitional constitution in order to prevent any dramatic transfer of local resources form the wealthy 'white' suburbs to the resource-starved African townships. Klug, supra note 4, at 149.
review. However, when President Mandela publicly praised the Constitutional court’s decision, stating that “this judgment is not the first, nor will it be the last, in which the Constitutional Court assists both the government and society to ensure constitutionality and effective governance,” it became clear that the Court had effectively traversed the fundamental ‘questions of constitutional law’ and ‘matters of grave public concern’ which Chaskalson J had raised in the opening paragraphs of the Court’s decision. The legislature was given time to correct the defect in the Act and the executive concern was addressed by the Court’s tacit support for the powers of central government over the provinces in controlling the restructuring and regulation of local government. The Constitutional Court had struck down intensely politicized legislation passed by a democratically elected Parliament and a highly popular President. While the Western Cape won the case, it not only failed to achieve the degree of autonomy it was seeking, but also established a precedent denying it that autonomy.

The Constitutional Court of South Africa has been very cautious as it walks the tightrope between social, political and economic realities. The Court hails the Constitution as a dynamic and living instrument and refuses to interpret it in a narrow and legalistic way. The Court has deliberately employed a generous approach to the interpretation of the Constitution. In both the SA Death Penalty and Western Cape cases, the South African Constitutional court asserted its authority without drawing the fire of other governmental institutions or appearing to shake things so much that its own institutional legitimacy was questioned. Constitutional review, therefore, is meant to provide an institutional mechanism that would civilize the political conflicts which in the past tended to degenerate into violent confrontation. The creation of a constitutional court is meant to create an ultimate interpreter of the Constitution that will be able to sustain and civilize the tensions inherent in the repeated referral and contestation of essentially irreconcilable political differences. The South African Constitutional Court’s engagement with these political conflicts demonstrated the potential that democratic constitutionalism holds for the management and ‘civilizing’ of irreconcilable differences.

In the South African case Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995, one-third of the members of the Gauteng legislature petitioned the Speaker of the provincial legislature to refer the Gauteng School Education Bill to the Constitutional Court for abstract review. They argued, among other issues, that the Bill was unconstitutional to the extent that it prohibited public schools from using language competence testing as an admission requirement. The Constitutional Court silenced attempts to perpetuate racial segregation and privilege and pointed to alternatives that could in part address the demands of those claiming cultural protection. Upholding the power of the provincial legislature to prohibit language testing as a basis for admission,

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123 Id. at 150.
124 Madala, supra note 8, at 763. See e.g., S. v. Mhlungu, 1995 (3) SALR 867 (CC) (ordering that a South African constitutional provision denying application of the Constitution to matters pending before its promulgation was not to be interpreted as precluding a criminal defendant’s constitutional rights. In Mhlungu, the Court found that a literal interpretation of the provision “would deny a substantial group of people the equal protection of fundamental rights.” Id. at 884.
125 Klug, supra note 4, at 162.
126 1996 (3) SA 165.
the Court argued that the prohibition did not infringe ‘two clear constitutional rights: the right to instruction at a public school in the language of their choice and the right to establish schools of their own based on a common culture, language or religion.’ Writing his concurring opinion in Afrikaans, Krieger J forcefully argued that the Constitution protects diversity but not racial discrimination.127 In October 1996, the Northern Province government agreed to register a private ‘volk’ school established and financed by those parents wishing to maintain the cultural purity they felt was threatened by changes in the Potgietersrus Laerskool.

Unlike the ANC and the National Party (NP), the Inkatha Freedom Party (IFP) refused to concede its central claim to regional autonomy and continued to disrupt the transitional process. Proponents of the federal solution for South Africa advocated a national government of limited powers. Before the final constitution came into force, IFP insisted on having certain areas exclusively within the jurisdiction of provincial legislatures. This was the source of tension between the ANC and the non-ANC provincial governments—the extent of regional autonomy and the exact definition of their relative powers. It is in this context that three cases arose before the Constitutional Court in 1996. All three cases involved claims of autonomy or accusations of national infringement of autonomy by the province of KwaZulu-Natal. The cases concerned areas unresolved by the negotiated settlement. While two cases directly implicated actions of the KwaZulu-Natal legislature and its attempts to assert authority within the province—in one case over traditional leaders and in the other the constitution-making powers of the province—the first case involved a dispute over the National Education Policy Bill, which was then before the National Assembly. Objections to the National Education Policy Bill focused on the claim that the “Bill imposed national education policy on the provinces” and thereby “encroached upon the autonomy of the provinces and their executive authority.”128 The IFP made the further claim that the “Bill could have no application in KwaZulu-Natal because [the province] was in a position to formulate and regulate its own policies.”129 KwaZulu-Natal and the IFP assumed a form of pre-emption doctrine in which the National Assembly and national government would be precluded from acting in an area of concurrent jurisdiction so long as the province was capable of formulating and regulating its own policies. In rejecting this argument, the Constitutional Court avoided the notion of pre-emption altogether and argued instead that the ‘legislative competences of the provinces and parliament to make laws in respect to schedule 6 [concurrent] matters do not depend upon section 126(3)’, which the Court argued only comes into operation if it is necessary to resolve a conflict between inconsistent national and provincial laws. Thus the court avoided siding with either the provincial or national authority.130 The court noted that unlike their counterparts in the United States of America, the provinces in South Africa were not sovereign states. The Court’s approach was to draw a boundary around the outer limits of provincial autonomy

127 Klug, supra note 4, at 171.
130 Klug, supra note 4, at 173.
while simultaneously allowing concurrent jurisdiction to provide a space in which different legislatures can continue to imagine and assert their own, at times contradictory, solutions to legislative problems within their jurisdiction. In Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal, the Constitutional Court held that parts of the proposed Constitution appeared to have been “passed by the KZN Legislature under a misapprehension that it enjoyed a relationship of co-supremacy with the national legislature and even the Constitutional Assembly.” The Court rejected the attempt to confer legislative and executive authority upon the Province. The Court also rejected the attempt by IFP to assert its own vision of regional autonomy beyond the core meaning of the negotiated compromise represented by the 1993 Constitution. However, the IFP too obtained solace the same day when the Court refused to certify the draft of the final Constitution, particularly on the ground that it failed to grant provinces the degree of autonomy they were guaranteed in the Constitutional Principles. However, when the 1996 Constitution was finally certified by the Constitutional Court, the IFP remained dissatisfied over the limited degree of provincial autonomy recognized in the Constitution. But, by that time, the IFP was not about to exit the system; instead it joined other opposition parties to keep its visions alive at the next review of the Constitution.

Judicial review with respect to economic, social and cultural rights implicates the issue of whether the courts are overly interfering with the principle of separation of powers. However, the Constitutions of Uganda and South Africa provide for such rights and to that extent it was inevitable that their respective courts of judicial review would be confronted with questions regarding such rights. The courts of judicial review in the two countries have had to deal with the question of a country with limited financial resources attempting to make a transition from an authoritarian form of government to a democratic government responsive to all the needs of its citizens. In both countries, the inclusion of socio-economic rights in the Constitution was a response to pervasive impoverishment that needed to be redressed as part of the transition. This was in part due to the fact that both countries needed to project the view that their new Constitutions represented change and not the status quo. The argument for including economic, social and cultural rights

131 1996 (4) SA 1098 (CC).
134 On the one hand, there is a dearth of court cases in Uganda that deal with economic, social and cultural rights. According to Professor Oloka Onyango, this can be attributed to Human Rights organizations not law suits on these matters. In South Africa, on the other hand, the Treatment Action Campaign (TAC), has been particularly active in this area. See, J. Oloka-Onyango, Interrogating NGO Struggles For Economic, Social and Cultural Human Rights in Contemporary UTAKE: A Perspective From Uganda, in RIGHTS AND DEMOCRATIC GOVERNANCE WORKING SERIES NO. 4, 9 (2006).
135 O’Regan, supra note 1, at 213. In Uganda, however, the Constitutional Court in particular has been described as tending toward the protection of status quo rationalizing that the country needed to heal from the scours of war and instability which would trump any other considerations. See, Siri Gloppen, Alex Kibandana, & Emmanuel Kasimbazi, The Role of Courts in the Transition Dynamics in Uganda, (2005), http://www.cmi.no/pdf?file=uganda/doc/courts-update-April%202005.pdf (last visited July 31, 2004) (arguing that the “position taken by Court [is at times] directed at saving the status quo rather than constitutionality because the country was just healing from tatters of war.”)
in the South African Constitution was ultimately irresistible in part because such guarantees seemed an indispensable way of expressing a commitment to overcome the legacy of apartheid—the overriding goal of the new Constitution.\textsuperscript{136} For example, the right to shelter can only be understood against the backdrop of the fact that one of the central components of apartheid was a system of ‘influx control’ that sharply limited African occupation of urban areas.\textsuperscript{137} Compared to Uganda, it is probable that the South African apartheid experience would likely create more opportunities in adjudicating economic, social and cultural rights disputes.

Indeed, Uganda has not yet had any significant judicial discussion of socio-economic rights, even in instances where the Uganda Constitution provides for such rights. Judicial review in regard to socio-economic rights is constrained by the express provisions of the constitutions.\textsuperscript{138} This is much more the case in regard to the Uganda Constitution than in the Constitution of South Africa.\textsuperscript{139} Even then, where the Uganda Constitution provides for a substantive socio-economic right, the Uganda courts of judicial review have been more reticent in upholding such rights. In one case, the \textit{Dimanche Sharon and others v. Makerere University}\textsuperscript{140} (SDA case), the Uganda courts of


\textsuperscript{137} Id. at 6.

\textsuperscript{138} This includes the rights to education (Article 30 of the Constitution of Uganda), rights within the context of employment (Article 40 of the Constitution of Uganda), and the right to a clean and healthy environment (Article 39 of the Constitution of Uganda). The Constitution also pays attention to the rights of family (inheritance, marriage and parental duties) (Article 31 of the Constitution of Uganda), rights of children (Article 34 of the Constitution of Uganda), rights of persons with disabilities (Article 35 of the Constitution of Uganda) and the protection of minorities (Article 36 of the Constitution of Uganda). Overall, however, economic, social and cultural rights are assigned to the part of the Constitution of Uganda that deals with National Objectives and Directive Principles of National Policy. As such, apart from being directive principles to government with respect to development those principles are generally understood not to be judicially enforceable. However, Professor Oloka-Onyango argues that there are creative ways in which these principles can be justiciable, which is to “see these principles in linkage to the justiciable rights embodied within the Constitution. See, J. Oloka-Onyango, \textit{Interrogating NGO Struggles For Economic, Social and Cultural Human Rights in Contemporary UTAKE: A Perspective From Uganda}, in Rights and Democratic Governance Working Series No. 4, 2006, p. 25, also available online at. In \textit{Minerva Mills Ltd & Ors. v. Union of India & Ors} (1981) (1) SCR Chief Justice Chandrachud stated that the rights in the body of the Constitution need to be read together with the principles which form the ‘edifice’ on which the Indian Constitution is built. See Judgment at 257. The Uganda Constitutional Commission recommended that National objectives and directive principles be included in the Constitution in order to “guide government and society as a whole to move gradually towards the full realization of the people’s political, economic and cultural rights.” Uganda Report, supra note 14, at 14. According to the Commission, these objectives and principles envisaged cultural, social and economic rights that “cannot all be realized and given full effect immediately” but which “stand as clear objectives which both government and people should strive to achieve over the years” and “the judiciary is guided by them when interpreting or applying the Constitution.” Id. at 98-99.

\textsuperscript{139} In Uganda, for instance, there is no substantive right of access to health care. South African Constitution provides for the right of access to health care. See Section 27 (2) of the Constitution of South Africa. The Uganda Constitution, however, does not contain an express provision for the right of access to health care. Uganda Constitution’s National Objective XIV (b), though, provides that the State shall endeavor to fulfill the fundamental right of all Ugandans to, among other things, access to health services.

\textsuperscript{140} Uganda Constitutional Court, Constitutional Appeal No. 2 of 2004 ) [2006] UGSC 10 (1 August 2006).
judicial review had the opportunity to review government decisions in regard to the right to education which the Constitution expressly guarantees.\textsuperscript{141}

In South Africa, economic, social and cultural rights, such as rights to housing,\textsuperscript{142} health care, food, water, social security\textsuperscript{143} and education\textsuperscript{144} are incorporated in the Bill of Rights. This put the justiciability and enforcement of these rights virtually beyond challenge. In this connection, the Constitutional Court of South Africa delivered on the promise of the South African Constitution, particularly in regard to enforcement of socio-economic rights. In the First Certification Judgment,\textsuperscript{145} in which the justiciability of socio-economic rights was in question, the Constitutional Court of South Africa held that such rights “are, at least to some extent, justiciable” and that while “[i]t is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters …it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the Courts so different from that ordinarily conferred upon them by a bill of rights.” But the Courts were constrained by the limited resources available to the transitional states. In Soobramoney \textit{v. Minister of Health, KwaZulu Natal},\textsuperscript{146} the South African Constitutional Court held that there were limited resources for dialysis and that the policy adopted by the KwaZulu Natal government was not in breach of their constitutional obligations. However, the South African Constitutional Court’s Decision in \textit{Republic of South Africa v. Grootboom}\textsuperscript{147} has been internationally recognized for its balance between deferring to the decisions of a democratic government and establishing judicial criteria for advancing the constitutional obligations implied by the guarantee of socio-economic rights.\textsuperscript{148} In Grootboom, the Court held that the government must produce a reasonable plan to address the problem of emergency housing faced by the applicants. The Court determined that the pace of realization of the socio-economic right is “dictated by available resources.” The Court rejected the government’s argument against justiciability of the right to access to housing, noting that “[t]he question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case.” In the view of the Court, the issue of justiciability had been put to rest by the text of the Constitution.\textsuperscript{149} The Court also upheld the basic claims of applicants in \textit{Minister of Health v. Treatment Action Campaign }\textsuperscript{150} [\textit{TAC case}] requiring the government to address the issue of mother-to-child transmission (MTCT) of HIV, including removing the restrictions preventing Nevirapine

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\item[143] Id. at § 27.
\item[144] Id. at § 29.
\item[146] 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC).
\item[147] \textit{Republic of South Africa v. Grootboom}, 2000 (11) BCLR 1169 (CC), 2000 SACLR LEXIS 126
\item[150] 2002 (10) BCLR 1033 (CC), 2002 SACLR LEXIS 26. The applicants based their arguments on the State’s obligation to provide access to health care, s. 27(2) of the Constitution of the Republic of South Africa.
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\end{footnotesize}
from being made available for the purpose of reducing the risk of MTCT at public hospitals.

Yet, the Constitutional Court of South Africa has not been entirely without blemish in enforcing socio-economic rights. In the TAC Case, the Constitutional Court dismissed the argument that the principle of separation of powers prevented a court from enforcing socio-economic rights. Some argue that the Court has only been partially successful in the development of successful socio-economic rights jurisprudence.\textsuperscript{151} For example, it is argued that the Court’s jurisprudence leaves open to the State possible defenses against immediate implementation of certain socio-economic rights by failing to clearly define benchmarks for the attainment of minimum rights.\textsuperscript{152} To that extent, the Court adopts a policy of deference to the other branches of government. It is observed that although the African National Congress government began its term in 1994 with a commitment to an economic policy entitled “Reconstruction and Development Policy,” within the first five years of its rule it had shifted direction in favor of financial austerity and a minimalist role of the State,\textsuperscript{153} something that the Constitution may not have contemplated in entrenching economic and social rights. The Constitutional Court would not do more to promote economic and social rights in order to avoid clashing with the executive on key issues shaping the economy. In light of the need to reverse the legacy of apartheid, this would frustrate the constitutional experiment in a significant manner. Compared to its performance in other areas of constitutional jurisprudence, the Court can best be described as cautious in regard to economic and social rights. This sense of caution determines the extent to which remedies can be realized regarding socio-economic rights. In light of the more generous approach in the death penalty case, this result would amount to selective liberalism in judicial review. Yet, compared to Uganda, the Constitutional Court of South Africa has made some significant contributions to the realization of economic and social rights.

Perhaps the case that most tested the South African Constitutional commitment to compromise as its guiding principle in constitutional litigation was \textit{AZAPO v. President of the Republic of South Africa},\textsuperscript{154} the issue being whether those who committed gross violations of human rights under apartheid would, after receiving ‘amnesty’ from the Truth and Reconciliation Commission (TRC), be absolved not only from future criminal prosecution but also civil liability. The challenge was to the validity of the Act of Parliament that authorized the TRC to grant such amnesty. The unanimous judgment delivered by the most senior black judge on the court upheld the statute’s constitutionality, arguing that it was a simple reality that without the compromise on amnesty contained in the ‘postscript’ to the interim Constitution there would have been

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\item \textsuperscript{151} Dennis Davis, \textit{Socio-Economic Rights in South Africa: The Record After Ten Years}, 2 NZJPIL 47, 48 (2004).
\item \textsuperscript{152} Dennis Davis, \textit{Socio-Economic Rights in South Africa: The Record After Ten Years}, 2 NZJPIL 47, 55 (2004).
\item \textsuperscript{153} \textit{Id.} at 58.
\item \textsuperscript{154} 1996 (4) SA 671 (CC)
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on transition of political power.\textsuperscript{155} Here is a decision dictated primarily by the political climate in the country and the necessities of the transition.\textsuperscript{156}

The Uganda courts of judicial review have not had as many opportunities in regard to socio-economic rights. Article 30 of Uganda Constitution does provide the right to education.\textsuperscript{157} However, the courts of judicial review already demonstrated that their rulings would take into account the constraints imposed by the limited resources available to the state. Thus in \textit{Dimanche Sharon and others v. Makerere University},\textsuperscript{158} the Uganda Supreme Court held that the right to education could only be provided at “reasonable” cost to the State and that such a conclusion was warranted by public interest. But, unfortunately, the Court does not provide an elaborate analysis on the content of right to education. Thus, in this case, South Africa has a far more developed jurisprudence in regard to socio-economic rights.

**Responses of the Court to Accusations of Political Bias**

The Uganda courts of judicial review have been the focus of stinging accusations of political bias. The judges have been asked to recuse themselves on a number of occasions. In the \textit{Tinyefuza} case, it was Justice Kanyeihamba. In \textit{Dr. James Rwanyarare and another v. Attorney General},\textsuperscript{159} it was Justice Joseph Berko and Justice Mpagi Bahigeine whose impartiality was questioned. The justices have responded with cynicism, retorting that when the opposition wins politically charged cases the judiciary is said be unbiased, but when the government wins it is said to be biased in favor of the government.\textsuperscript{160} The South African judiciary has not been spared of such attacks either. The difference is whether the accusations were deserved or not.

**The Courts of Judicial Review and the Media**

\textsuperscript{155} Corder, \textit{supra} note 3, at 269.
\textsuperscript{156} This decision has been the focus of a number of criticisms. See for example, John Dugard, Memory and the Spectre of International Justice: A Comment on AZAPO, (1997) 13 SAJHR 269; and D Moellendorf, \textit{Amnesty, Truth and Justice: AZAPO}, (1997) 13 SAJHR 283.
\textsuperscript{158} Uganda Constitutional Court, Constitutional Appeal No. 2 of 2004 ) [2006] UGSC 10 (1 August 2006).
\textsuperscript{159} Uganda Constitutional Court, Constitutional Petition 11 of 1997.
\textsuperscript{160} See Anne Mugisa, \textit{Tracing Roots of the Debate About Independence of the Judiciary, THE NEW VISION}, March 8, 2007. (reporting that “Chief Justice, Benjamin Odoki, said the [political] opposition only see justice when they win cases and insult the court when they lose. This followed a scathing attack from the Uganda People’s Congress (UPC) and the Forum for Democratic Change (FDC) political parties, which accused the judges of the constitutional court and the Supreme court of fraudulently perpetuating the NRM [National Resistance Movement] in power.”). The UPC and FDC are the among the prominent political parties in Uganda. The NRM has ruled Uganda, under the leadership of President Museveni, since 1986.
Both courts have failed to successfully represent judicial decisions in public media. This can be particularly damaging to the reputation of these courts, especially in regard to controversial cases. This is important because the legitimacy of the Constitutional Court and the impact of their judicial decisions—given the significance of some of its rulings for the general public—depends a lot on public perception. The largely legally uninitiated general public relies on snippets of information in the media and does not and cannot be expected to read the long and complicated judicial opinions. But the media can report on the cases in a very inaccurate manner, causing confusion and even consternation and panic in some respects. The South African Court failed in this respect, for example, with regard to the SA Death Penalty case. Despite the fact that television cameras were permitted in the court room and a press release summarizing the issues and main findings in each case were issued, the reporting of judgments in the public media was extremely uninformed and often inaccurate.\footnote{161} This proved particularly damaging in the case of the SA Death Penalty Case, which was poorly covered in public media, prompting the issuing of press releases in subsequent cases.

**Response of the Legislative to Findings of Unconstitutionality:**

In South Africa, the legislature does not speedily respond to remedy findings of unconstitutionality.\footnote{162} This does not certainly help the public image of the two courts.

**Conclusion and Recommendations**

The 1996 Constitution of South Africa was shaped by struggles—political, social and intellectual—which continue to be waged over political participation, constitutional rights to property, equality, and the allocation of government power between different levels of government, and to deal with boundaries of these at times irreconcilable differences.\footnote{163} Officials have harnessed this political conflict by appeal to open dialogue and by incorporating interests of the various parties so that they see various parts of the Constitution as supporting their visions. The Constitutional Court of South Africa kept alive the hopes that alternative visions could be realized by seeking justice in particular cases. The Constitutional Court has become a central institution in the new South Africa. Despite popular attacks on some of its decisions—\footnote{164}—including outlawing the death penalty. It has demonstrated its capacity to incorporate and thus diffuse issues of intense political conflict.

By contrast, the Ugandan courts of judicial review continue to face growing criticism of being overly subservient to the powerful executive branch of government that insists that the exigencies of the transition are so important that the courts must use their

\footnote{161}{Corder, *supra* note 3, at 266-267.}

\footnote{162}{Id. at 267.}

\footnote{163}{Klug, *supra* note 4, at 176.}

\footnote{164}{There are allegations of political-bias with regard with regard to politically-charged cases. For example, African National Congress officials accused the Constitutional Court of being part of the “counter-revolutionary forces” trying to destroy ANC President Jacob Zuma and the party and a top ANC suggested ‘regulating the judiciary.’ See *ANC attacks a test for judicial independence*, LEGALBRIEF AFRICA, July 7, 2008.}
discretion even when the law would yield a different result. This may sustain the transitional effort but it certainly does not augur well for the legitimacy of the Court.