2010

The Role of International Actors in Promoting Rule of Law in Uganda

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CU Commons Citation
Joseph Isanga, The Role of International Actors in Promoting Rule of Law in Uganda, in Globalizing Justice: Critical Perspectives on Transnational Law and the Cross-Border Migration of Legal Norms 179, 197 (Donald W. Jackson, Michael C. Tolley, Mary Volcansek, eds., 2010).

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GLOBALIZING JUSTICE

Critical Perspectives on Transnational Law and the Cross-Border Migration of Legal Norms

EDITED BY
Donald W. Jackson, Michael C. Tolley, and Mary L. Volcansek
CHAPTER TEN

The Role of International Actors in Promoting Rule of Law in Uganda

JOSEPH M. ISANGA

INTRODUCTION

There is a perception that Uganda, like several African nations held to be beacons of hope in the late 1980s and 1990s, had made a break from bad governance and was headed toward democratization; however rule by men (i.e., the military) rather than by law persists. Yet the rule of law is critical to sustained political and economic development. The lack of respect for the rule of law has adversely affected the emergence of democracy in Uganda. The need for strong, principled, and concerted political leverage by international actors is clear. International insistence on constitutionalism and the rule of law are the keys to Uganda’s democratic transformation.

In an increasingly integrated world, characterized by notions of limited sovereignty, development assistance is linked to good governance and rule of law. Unfortunately, there are simply too many stakes in global politics, some of them undergirded by self-interest, that make this process painfully slow. Nevertheless, it would still be in the interest of international actors to exercise political leverage, which seems to be the only effective antidote to intractable violent conflicts in many African states, including Uganda, whose governments have promulgated progressive constitutions, but have ignored their provisions. The slogan is “Trust the bullet, but despise the ballot.” In particular, the Museveni administration in Uganda has encouraged judicial review, but only as a façade to placate the international community. Such
international action, however, would present an alternative that might forestall insurrection and military conflict. Conflict prevention ultimately costs less than international peacekeeping, humanitarian assistance, and other forms of intervention in the interest of international peace and security, not to mention the high costs of human suffering.

African conflicts have been caused in part by regimes that do not respect democracy. Uganda is an illustrative case. International actors have played along under an undeclared policy of constructive engagement, but this has essentially served only to delay democratic evolution. As a result, Ugandan leaders have become increasingly autocratic. In such circumstances, reliance on the military and personal rule based on patronage—as opposed to democracy and the rule of law—have become critically important in governance. Yet forceful measures often only beget forceful reactions. The best hope for democracy is for courts to enforce the will of the people as expressed in the laws enacted by their elected representatives. This would depend on both the effective, uncorrupted actions of the legislature and an emboldened and independent judiciary. There is still much work to be done in Uganda. At present, the executive turns courts into legitimization instruments for its otherwise undemocratic actions. Real change ultimately will depend upon an enhanced role of international actors and an emboldened and independent judiciary.

UGANDA: AN EMERGING DEMOCRACY?

Upon its promulgation in 1995 the current Uganda constitution (herein “Constitution”)—the fourth constitution in Uganda’s forty-four years of independence from the British—represented a culmination of a progressive departure from years characterized by draconian laws, absence of judicial review, lack of independent judiciary, gross human rights violations, partisan militaries, and life presidencies. It was against that backdrop that by 1994, President Bill Clinton called current Uganda president Yoweri Museveni one of the “new breed,” or new generation, of African leaders—the others being Paul Kagame of Rwanda, Isayas Aferwoki of Eritrea, Meles Zenawi of Ethiopia, Bakuli Muluzi of Malawi, Gerry Rawlings of Ghana, and the late Laurent Kabila of the Democratic Republic of Congo—who raised hopes that they would deliver peace, prosperity, good governance, respect for human rights, and the rule of law. Although still struggling, these countries represented emerging democracies in Africa. They represented beacons of hope on a continent that had endured a long plague of bad governance characterized by life presidents, despots and brutal dictators like Emperor Bokasa of the Central African Republic, Emperor Haile Selassie of Ethiopia, Mobutu of Zaire, Jerry John Rawlings of Ghana, Charles Taylor of Liberia, and Idi Amin of Uganda, to mention only a few. The international community thought it had seen the end of a seemingly intractable governance problem in Africa. Between 1986 and 1996, Museveni’s efforts at political stability and economic growth were rapid, phenomenal, dramatic, and unprecedented. Under his tenure, the country weathered one of the greatest threats to humanity with one of the most effective national responses to HIV/AIDS in Africa.

Occurring equally fast was a radical reversal—as opposed to mere setbacks—and the “new breed” idea is now discredited and all but dead. Increasingly, the Museveni administration became synonymous with personal rule. Yet this did not deter international actors from placating Museveni’s administration. For instance, President George W. Bush visited Uganda in 2003, two years after the highly disputed elections that provided a critical test for the rule of law under the new Constitution.

International actors could have used their leverage to require adherence to good governance and the rule of law. Instead, that option was pursued inconsistently and never forcefully enough. A group of international donors meets regularly with the Ugandan government and negotiates budget items, including defense spending. The economic contribution of international actors in this respect is significant and, at least in the long term, almost indispensable. Human Rights Watch reported that these donors provide half of the budget of the Ugandan government, their funds going directly to the treasury after the budget has been agreed on. Although the U.S. government is not part of this donor group, it has provided military assistance and training to Uganda’s military, but with no special human rights or good-governance conditions attached. Human Rights Watch further observed that in January 2006, the U.K. government’s development ministry announced the withdrawal of US$26 million of direct funding to the government due to concerns about a lack of democratic and economic reform. The United Kingdom, the Netherlands, Norway, Sweden, and Ireland also had reduced aid in 2005. According to the EU Election Observation Mission to Uganda, the February 2006 elections fell short of full compliance with international principles for genuine democratic elections, in particular because a level playing field was not in place.

These developments in Uganda are not mere setbacks or hitches in an inevitably imperfect process. There is a determined reliance on the military rather than on normal democratic processes for retention of political power. The military extends presidential term limits and does not worry about holding elections because it knows the outcome beforehand. Confident in its firm control of electoral commissions, the military intimidates both the electorate and the judiciary if election results are challenged. The consequences are inevitable: cronyism, corruption, decadence, repression of dissent and other freedoms, and economic stagnation or recession. These are the hallmarks of personal rule—the very antithesis of constitutionalism and the rule of law. The regime respects the rule of law only as long as its hold on power is not threatened.

In an increasingly globalized world, the possibility of prosecution of ex-presidents under international and transnational law only serves to compound
the difficulties of political evolution in emerging nations such as Uganda. Nevertheless, with concerted and consistent political leverage by international actors, the momentum of democratic evolution could be sustained. In recent years, international actors have expressed the desire to tie their development assistance and partnership only with countries in the African region characterized by good governance, rule of law, and democracy. Despite their estimable intentions, they have not acted consistently or firmly enough. As a result, African leaders have been able to “have their cake and eat it.” They have been able to get away with their actions under misplaced claims to sovereignty.

Good governance includes the rule of law, respect for human rights, free and fair elections, open political processes, and decision making that is transparent and accountable. In the sections that follow, two key and strategic areas of globalizing justice—constitutionalism and the independence of the judiciary—are examined. In emerging nations such as Uganda, these two areas constitute indispensable elements of democratic transition on which international actors should focus to establish the rule of law and firm foundations for development and thus avoid a return to a chaotic past. The international community cannot continue to placate African leaders who may at first wear democratic clothing but whose true dictatorial characteristics emerge a few years later.

In 2005, just ten years after the promulgation of the seemingly progressive Constitution, the current Uganda administration removed limits on presidential terms, in effect providing the necessary conditions for life presidencies, by bribing and intimidating members of Parliament. In the 2001 Uganda presidential elections, won by the incumbent (President Museveni), the military intimidated the electorate. Just before the 2006 presidential elections, the government pressed what were condemned as trumped-up charges of treason and rape against Dr. Kizza Besigye, the strongest political opponent to Museveni. When the court granted bail to Dr. Besigye, the government sent members of a militia to besiege the High Court in an effort to prevent the bail from taking effect. The Uganda Constitutional Court condemned this attack in *The Uganda Law Society v. The Attorney General* (2006) as having “violated the Judiciary’s independence in Articles 128 (1), (2), and (3) of the Constitution.” This was not the first time Ugandans saw the judiciary silenced by the government. In 1971, during the dictatorship of Amin, the military captured and killed the chief justice of Uganda. Besigye simultaneously had to answer charges of terrorism before the General Court Martial—the military tribunal. Yet even these high-handed tactics of the Museveni administration did not appear to be consequential enough to get the attention of international actors. There is a troubling perception that developing countries should not be pressed to adhere to the same standards as obtained elsewhere simply because they are developing countries. Yet foreign assistance to these countries is of no use unless the donors insist on the development of democratic institutions and respect for the rule of law.

Constitutionalism, understood here as the maintenance of constitutional supremacy, requires judicial review of the constitutionality of laws enacted by Parliament and the acts of governments. Judicial review is crucial to the maintenance of a democratic dispensation based on the notions of checks and balances of the central powers, the rule of law, and individual rights. The framers of the Constitution appreciated these notions. Judicial review became the power of the judiciary to bring state organs under the superior rule of law and thus control the excesses of government that are often used to subvert democracy.

The supremacy of constitutional rules is genuine only if it is guaranteed by an institution that is independent of the political authorities whose acts are being reviewed. This is perhaps the best rationale for judicial review. In an autocracy, in which judicial independence is nonexistent and judicial review is not exercised, constitutional supremacy is a myth. The Constitution provides for judicial review, under which governmental acts and laws can be challenged before the Constitutional Court and, on appeal, the Supreme Court. Judicial review is entrenched in the Constitution, because it provides that the people of Uganda are sovereign and that the constitution is supreme. In *Paul K. Ssemogerere et al. v. The Attorney General* (2002), the Uganda Supreme Court invoked that provision while observing that Parliament cannot clothe itself with “[s]upremacy which in Uganda lies in the majesty and sanctity of the Constitution,” and that “[i]n Uganda, it is in the people and the Constitution that sovereignty resides.” Ugandan courts handed down numerous decisions that evidenced this progressive understanding of the source of the Constitution’s legitimacy and authority. In just ten years from the time the Constitution went into effect, there have been close to forty constitutional cases. Although some applied cross-border legal norms on the supremacy of constitutions in constitutional democracies, most relied on the views and the intentions of the framers of the Constitution. However, after twenty years in power, the increasingly personal rule of Museveni has begun to adversely affect the progress made earlier in establishing the rule of law through judicial review. In fact, there have been instances in which judicial review was used to advance a contrary purpose—the legitimization of personal rule.

In a series of cases brought by the political opposition, the government endured stinging losses in the Constitutional Court. To that extent, it seemed like there was an increasing respect for the rule of law. Yet later decisions that involved challenges to the political establishment faced hostile reactions from Parliament and the executive. In *Major General David Tseiyiwa v. Attorney General* (1996), the Constitutional Court delivered its first landmark decision under the Constitution, setting a progressive trend. In *Dr. Paul K.*
the hallmark of democracy, is only assured through optimal exercise of the
to military power—the very antithesis of democracy and the rule of law. While
"meaningful participation of the governed in their governance, which is the same as in
the "Movement" system, and Museveni was said to have won the elections. When this
enact a new referendum law consistent with parliamentary procedure. The new
the requisite quorum. The government respected the decision and sought to
the current political establishment. In a statement that would have a chilling
effect on the capacity of courts to uphold the rule of law and democracy,
Museveni warned:

"[T]he ones who are playing these games, should play them in other
areas like they normally do and we ignore. Like for instance a judge
who declared recently that telling lies is legal. . . . We fought Kony,
defeated him, we fought these other groups ADF [Allied Democratic
forces], FOBA [Force Obote Back Again] to defend the NRM [National
Resistance Movement] system, to defend Uganda and to
The court held that the restrictions in the impugned statute were unjustifi-
able in a free and democratic society.

In Paul K. Ssemogerere and Zachary Olum v. Attorney General (1999),32 the
Constitutional Court struck down another Act of Parliament—the Referendum
and Other Provisions Act (1999)—on the ground that it was passed without
the national referendum was held and, if the results are to be believed,
the people of Uganda favored Museveni's preferred "Movement" system to a
multiparty system. Thereafter presidential elections were held under that "Move-
ment" system, and Museveni was said to have won the elections. When this
new referendum law came before the Constitutional Court, the outcome was
the same as in Paul K. Ssemogerere & Anor. v. Attorney General (1999).34

When Justice Twinomujuni held that "no political system was ever
put in place," the constitutionality of Museveni's election was placed under
question. An enraged Museveni promptly and publicly condemned what he
called the court's usurpation of people's power, which he called "totally unac-
ceptable." He maintained:

"[I]f the people do not have the power, then who are the judges?
You're even less qualified. . . . It is clear, legislative power belongs to
Parliament, executive power belongs to the President, and judicial
power belongs to the courts. But when you get a court trying to
legislate—now trying to make law or to write a constitution—then
if you don't correct that you get into problems.

The president's argument suggested that there were areas where the
Constitutional Court could exercise its judicial power, but that there were
also some prohibited areas. The Museveni administration's outrage about
judicial review escalated in Paul K. Ssemogerere et al. v. The Attorney General
General (2004).36 In the latter case, the Uganda Supreme Court held that
"meaningful participation of the governed in their governance, which is the
hallmark of democracy, is only assured through optimal exercise of the
freedom of expression. This is as true in the new democracies as it is in the
old ones. Yet the government's reaction made it clear that it would toler-
ate judicial oversight and the rule of law only to the extent that it did not
jeopardize its overall objective of retaining political power. The government
warned that if the judiciary ignored that critical interest it would resort
to military power—the very antithesis of democracy and the rule of law.

While stating that he could ignore the striking down of the "false news"
provisions in the Onyango case—which in his view amounted to the court
sanctioning "telling lies"—Museveni warned that the government and its
military would not tolerate court rulings that represented potential threats to
the current political establishment. In a statement that would have a chilling
effect on the capacity of courts to uphold the rule of law and democracy,
Museveni warned:

Such statements fundamentally undercut the rule of law and indepen-
dence of the judiciary. The current chief justice of Uganda, Benjamin Odoki,
responded to these threats:

"[A]s regards the Judiciary, its independence means that it is not in a
position to consult or compromise with any of the other two organs of
the State in making judicial decisions. The Judiciary has taken this
constituent role seriously in adjudicating constitutional and other
issues. This has sometimes provoked undue and harsh responses from
the executive. For as long as the Judiciary is alive to its institutional
role, constitutional mandate and jurisdictional limitations, it should
be left free to administer justice impartially and equally between
citizens and the government. . . . The three organs of the State must
learn to respect the functions and powers of each other. . . . Each
organ must avoid intimidation. . . . Unless such tendency is avoided,
it may create a dictatorship of one organ against the rest, and the
entire country.39
The bases for personal rule in Uganda are the use of the military in politics and the relegation of law to a secondary place in the resolution of political difference. The military is loyal to a single person—its founder—and is not sufficiently institutionalized and professionalized. The provisions of the Constitution alone cannot stop the use of the military in domestic politics.

The courts’ impotence in the face of the executive’s reliance on the military or intimidation to protect the political establishment is best illustrated in three recent instances. In the first, the courts have been powerless in political cases that challenged the conduct of presidential elections. In 2001, when Museveni faced the stiffest challenge to his grip on power, he quickly deployed the military to intimidate the electorate. In a split three-to-two decision, the Supreme Court largely accepted the evidence in Kizza Besigye v. Y.K. Museveni and the Electoral Commission (2001) but ambiguously ruled in the favor of Museveni, stating, “The 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 substantial effect they had on the election.”

In the second instance, as if the repressive conduct of elections was not enough to undermine the democratic process, the Museveni administration amended the Constitution to provide for what effectively amounts to “life presidency” and a significantly diminished competence of judicial review of executive and legislative action. The Constitution originally provided for only two presidential terms, but as a result of the amendment, Museveni—who came to power in 1986 through a protracted military struggle and has remained in power without any interruptions—became eligible for reelection in 2006 and for infinite times thereafter. In addition, Museveni’s government amended the Constitution to limit the extent to which courts would be able to review the constitutionality of laws passed by Parliament. In essence, the amendments excluded the jurisdiction of judicial review if a law was “repealed,” “spent,” “expired,” or “had its full effect at the date of delivery of judgment.” Moreover, even if the state did not repeal a particular piece of legislation before the court delivered its review of it, the amendment provided that such judgment would not affect any acts of the state completed under the impugned legislation. This meant that the court would be rendered impotent with regard to the review of laws or acts of government patently enacted or perpetrated in contravention of the Constitution. The fundamental objective was to place the political establishment’s actions beyond the reach of law. These developments effectively undermined the constitutional provisions relating to judicial review in Uganda.

These developments left a sense of constitutional desperation—the sense that although the Constitution was a largely progressive document in its letter and spirit, in practice it was only a facade to assuage international criticism and an instrument for the legitimization of the administration’s attempt to hold on to power. Yet these developments did not move international actors to step up and renounce the government’s actions. This reluctance to act did not augur well for Uganda’s constitutional development and the rule of law. The United States did not help, with the State Department issuing ineffective, fence-sitting rhetorical statements such as, “Democratization could suffer a setback if members of the National Resistance Movement are successful in removing presidential term limits from the Constitution,” and declaring that neither Parliament nor the judiciary in Uganda is “[s]trong enough to serve as a counterbalance to the powerful executive. Constitutional changes proposed by President Museveni’s cabinet, which are scheduled for a vote this year, would make the executive still more powerful.”

The third instance concerns the Museveni administration’s arrest of Col. Dr. Kizza Besigye. The charges involving treason and rape were brought before the High Court and those involving treason, terrorism, and illegal possession of firearms were brought before the military court-martial. Furthermore, the government sought to exclude its most formidable presidential contender from the race by challenging the validity of his candidacy on the grounds that he was in prison (on the government’s charges). The Constitutional Court dismissed the latter claims in Kabagambe, Farajabdullah and the Attorney General v. The Electoral Commission and Dr. Kizza Besigye, maintaining that there was no requirement in the law that the presidential candidate must be physically present before he is nominated. These circumstances cast serious doubt on the government’s commitment to democracy and the rights to political participation and due process. However, in an act of brute political power, the government deployed the military to besiege the High Court premises and prevented the court order granting bail to Besigye from taking effect. The government disregarded the views of Justice James Ogoola, who in granting bail observed that in light of the imminent presidential elections, it was imperative to secure the liberty of the accused until his conviction. Despite the devastating effect of these momentous events on the rule of law and democracy in Uganda, the United States, the British Commonwealth, and the European Union stood idly by, failing to exert any significant political pressure.

ROLE OF INTERNATIONAL ACTORS

The international community could and should have done better in assisting democratization in Uganda. Uganda, like other emerging nations, needs help in its transition toward democracy and the rule of law. More effective political pressure on the Ugandan government and greater insistence on the respect for the rule of law and independence of the judiciary were needed from the international community. Because the more developed democracies generally command greater authority based on their significantly established respect for the rule of law, they could and should have used that authority to send clear, unambiguous messages demanding that emerging democracies, such as


3. The Uganda Constitution (1995) and the Uganda judiciary borrow from constitutions of many democratic countries—consistent with the increasing cross-border flow of legal norms or transnational law. The Uganda Constitutional Commission reported: "The 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, Report of the Uganda Constitutional Commission, 7 (1993). In Charles Oryango Olbo and Andrew Muyiwa Mwenda v. The Attorney General, Uganda Supreme Court, Constitutional Appeal No. 2 of 2002 (Judgment of February 11, 2004) (unreported), the Uganda Supreme Court held that foreign judicial decisions are of persuasive value and, when invoked by counsel, must be considered and would be rejected only for good reason. However, beyond that borrowing, there has been no consistent adherence to constitutionalism and the rule of law, See Paul K. Siemegerere et al. v. The Attorney General, Uganda Supreme Court, Constitutional Appeal No. 1 of 2002 (unreported) Justice Kanyeihamba citing Professor Nwabueze that there are "many countries in the World to-day with written constitutions but without constitutionalism" and that in "a number of developing countries, constitutions are perceived by those in power, not as protectors of human rights and the liberties of the individual but as instruments for legitimizing the exercise of power"). Justice Kanyeihamba then concludes that the "founders and makers of the Uganda 1995 Constitution were determined to avoid the situation described by the learned professor."


5. Justice George Kanyeihamba (Uganda Supreme Court) observes that the Uganda Parliament is "impotent" and "weakened to the extent that whatever the Executive will, it must be done or must occur without resistance from the Parliament." New Vision, online at "Parliament Is Impotent—Judge," http://www.newvision.co.ug/ (visited December 11, 2005).

6. The Uganda constitution (1995) had the objective, inter alia, to "demarcate division of responsibility among the State Organs of the Executive, the Legislature and the Judiciary, and create viable checks and balances between them." Uganda Constitutional Commission Statute, Statute No. 5 (1988), § 4.


8. During the last decade, Uganda averaged annual growth rates of roughly 7 percent. See the White House, "Why Is The President Proposing This New Initiative?" March 14, 2002, online at http://www.whitehouse.gov/infocus/developingna­tions/newinitiative.html (visited December 12, 2005).

9. The 2001 presidential and parliamentary elections provided a critical test for the rule of law under the new constitution, which provides for free and fair elections. Article 1(4), Uganda constitution (1995). The U.S. State Department reported: "During the presidential and parliamentary campaigns, there were many reports of arbitrary detention... Many supporters of the opposition were arrested and detained." See US Department of State, "Country Reports on Human Rights Practices" (Uganda), March 4, 2002, online at http://www.state.gov/g/drl/hrp/2001/africa/8409.htm (visited December 12, 2005). Nevertheless, the Uganda Supreme Court did not find that the presidential election was fundamentally and substantially flawed—essentially endorsing the status quo. In Kizza Besigye v. Y.K. Museveni and the Electoral Commission (hereinafter Besigye I case) Uganda Supreme Court Election Petition No. 1 of 2001 (unreported), the Uganda Supreme Court noted that it had been proven that there had been state-inspired military violence in those elections. Yet the Supreme Court acquiesced the president of wrongdoing, holding that it had been proven that election malpractices committed by state agents had not been committed with his knowledge or approval. The Uganda Supreme Court came to the same conclusion in Red. Col. Dr. Kizza Besigye v. Electoral Commission and Yoweri Kaguta Museveni (hereinafter Besigye II case), Uganda Supreme Court, Election Petition No. 1 of 2006 (unreported), which challenged the 2006 Uganda presidential elections held under the new multiparty political dispensation. Although the court agreed with the petitioner that there had been noncompliance with the law in the disenfranchisement of voters, counting and tallying of results, bribery and intimidation or violence, multiple voting, and vote stuffing in some areas of the country, it found that the conduct of the election did not affect the results in a substantial manner.


12. The Ugandan military wreaked havoc in the Democratic Republic of Congo while President Museveni—who currently enjoys sovereign immunity—was in command. In Armed Activities on the Territory of the Congo (Democratic Republic of the Congo) v. Uganda, Provisional Measures, Order of 1 July 2000, I.C.J. Reports 2000, p. 111, the International Court of Justice observed: "It is not disputed that Ugandan forces are present on the territory of the Congo... that the fighting has caused a large number of civilian casualties in addition to substantial material damage... and... that grave and repeated violations of human rights and international humanitarian law, including massacres and other atrocities, have been committed on the territory of the Democratic Republic of the Congo."
Uganda, respect such international standards. For example, such leverage has been put to good use by the EU, which insists that nations seeking to join the EU respect human rights and the rule of law.

The return to democratic governance and the rule of law in countries like Nigeria and South Africa was due in part to lessons these countries learned from constitutional democracies around the world. It was also due to the role of the international community. The South African case aptly illustrates how effective external pressure by international actors—legitimized by their own traditions of respect for the rule of law—can be in complementing and advancing internal efforts toward greater democracy. After a remarkable transition, South Africa became the exemplar of democracy, constitutionalism, and the rule of law in Africa. Its new Constitutional Court soon established a reputation as being one of the finest in the world.

The Constitutional Court also played a key role in South Africa’s move away from its long, dismal, and antidemocratic apartheid past, characterized by repression and states of emergency, to become a multiracial democracy that respects rights, human dignity, and the rule of law. In its first politically important and publicly controversial decision, the South African Constitutional Court struck down the death penalty. The court emphasized that the transitional constitution established a new order in South Africa in which human rights and democracy are entrenched and in which the constitution is supreme. The justices emphasized that the court “must not shrink from its task” of review. Even with the recognition that public opinion seemed to favor the retention of the death penalty, the Constitutional Court answered with the clear statement that it would not “allow itself to be diverted from its duty to act as an independent arbiter of the Constitution,” and that public opinion in itself is “no substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear or favor.” Justice Arthur Chaskalson reasoned that if public opinion were to be decisive, “there would be no need for constitutional adjudication.” This should provide an answer to the populist arguments used in attacking judicial decisions by the Ugandan courts of judicial review.

Another decision by the South African Constitutional Court whose reception in South Africa stands in stark contrast to the Ugandan experience was *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* (1995). In this case, the court declared that s.16 (A) of the Local Government Transition Act 209 of 1993 (LGTA) amounted to an unconstitutional delegation of legislative power to the executive. The conflict erupted when President Nelson Mandela, acting in accordance with amending powers granted to the executive in s.16 (A) of the LGTA, took action to counter the attempt by the provincial government in the Western Cape, dominated by the National Party, to demarcate the Cape Town metropolitan areas, removing all the resource-poor African areas from the wealthy, white-dominated areas. In striking down Mandela’s action, the Constitutional Court was hailed by the National Party, opponents of the government, as defenders of the constitution for standing up to the African National Congress (ANC)-dominated executive and legislature and for fulfilling the promise of judicial review. In a surprising move, President Mandela praised the 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.” The court had successfully walked the tight line between law and politics, and the government respected its ruling. This notable case demonstrates how a Constitutional Court can use its power of judicial review, uphold the supremacy of the constitution over the actions of the party in power, and draw acceptance from all parties.

**CONCLUSION**

Credit must be accorded to Ugandan courts for some courageous decisions they have pronounced amid extremely arduous conditions. Uganda is a fledgling democracy and cannot be expected to instantly achieve standards obtained elsewhere in more developed democracies. However, all emerging nations must strive toward the same democratic ideals in virtue of the universality of human dignity—the grounding principle for human rights. The question is whether or not the state is doing enough given the sociopolitical realities in Uganda. The challenge for Uganda and other emerging democracies consists of demilitarizing its politics, respecting the rule of law, and complying with court orders pursuant to judicial review.

In an increasingly globalized world in which a particular country may not be capable of ignoring international opinion for a long time, the international community should exercise political pressure through the various measures available in an effort to demilitarize political conditions and promote respect for the rule of law. Such pressure would be legitimate because Uganda is a signatory to several international legal instruments, particularly with regard to international human rights, and is sensitive to its international image. As part of the effort to bring political pressure to bear, international actors should be less willing to cooperate with despotic governments. Strict international criteria of political accountability, financial transparency, and development-friendly social and economic policies should be enforced and used in the evaluation of international relations and the future course such relations should take.

**NOTES**


14. Rejecting the rape charges, the Uganda High Court in Col. (Rtd.) Dr. Kizza Besigye v. Uganda, Uganda High Court, Criminal Session No. 149/2005 (unreported) castigated the prosecution for bringing "monstrous" evidence to "ruin the honour of a man who offered himself as a candidate for the highest office in this country." While treason charges against Kizza Besigye and others were pending before the High Court of Uganda, the government brought charges of treason and terrorism against the same persons before the General Court Martial. This course of action was challenged in Uganda Law Society v. The Attorney General, Constitutional (hereinafter Law Society case) Uganda Constitutional Court, Constitutional Petition No. 18 of 2006 1/31/2006 (unreported). Citing transnational legal norms, in particular, the Manual for Court Martial United States, 1995 ed., 11–10, the Court held that, as a matter of state policy, a person who is pending trial or has been tried by a state court should not be tried simultaneously by the court martial for the same act omission. Despite this decision, the General Court Martial continued with the trial of the civilians. See also International Commission of Jurists, "Uganda—General Court Martial Must Respect Ruling by Constitutional Court," February 2, 2006, online at http://www.icj.org/news_mult.php?sid_groupe=2&id_mot=407&lang=en (visited October 30, 2007).


16. Law Society case, Uganda Constitutional Court, Constitutional Petition No. 18 of 2006 (unreported).

17. Subsequent events did not demonstrate government willingness to change course. On March 1, 2007, the Uganda police again sealed off the High Court in order to arrest persons allegedly belonging to a rebel movement who had been granted bail. The outraged Ugandan judiciary went on strike, accusing the government of invading the judiciary and disobeying court orders. See Anne Mugisa, "Tracing Roots of the Debate about Independence of the Judiciary," New Vision, March 8, 2007, online at http://www.newvision.co.ug/D/8/459/553039/judges%20strike (visited October 30, 2007).

18. Amin's brutal subjugation and near obliteration of the judiciary was the culmination of what Uganda's first postindependence president, Milton Obote, set in motion when he militarized the political process and abrogated the first Uganda constitution (1962). In response to the subsequent constitutional challenge in Uganda v. Commissioner of Prisoners, ex parte Matovu, East African Law Report (Uganda) (1966), 514, the court merely rubber-stamped Obote's actions, holding that there had been successful revolution establishing a new Grundnorm and as such, the new constitution could not be impeached based on the previous (1962) constitution.

19. Subsequently, Amin ruled by decree. In particular, he enacted the Proceedings Against the Government (Protection) Decree (Uganda Decree No. 8 of 1972), 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. The Amin regime was characterized by complete emasculation of judicial power and any remaining notions of judicial review and constitutionalism. There were no cases on constitutional law brought before the courts of Uganda from 1972 to 1979, the year Amin was overthrown by military struggle. However, even after 1979, courts remained subjugated by a strong executive backed by the military. See Joe Oloka Onyango, Judicial Power and Constitutionalism in Uganda (Kampala: Centre for Basic Research, 1993), 31.

20. However, following the arrest of Kizza Besigye, a prominent political opponent, the Netherlands withdrew $8 million in aid. But the British Commonwealth simply continued with its plan to hold its 2007 summit in Uganda, the implications of these developments for democracy notwithstanding.


25. Uganda Constitution (1995), art. 1(1) provides that "[A]ll power belongs to the people who shall exercise their sovereignty in accordance with this Constitution." Article 2 provides that "[T]his Constitution is the supreme law of Uganda . . . if any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void."


28. See note 3.
29. Major General David Tinyefuza v Attorney General, Uganda Constitutional Court, Constitutional Petition 1 of 1996 (unreported) concerned the constitutionality of the letter of the minister of state for defence rejecting the petitioner's resignation from the army and requiring him to follow military laws. Rejecting the proposition to dismiss the petition on technical grounds (defective affidavits), the court heard the petition on merits.

30. Uganda Constitutional Court, Constitutional Petition No. 5 of 2002 (unreported).

31. Upon coming to power in 1986, President Museveni established a de facto one-party political dispensation—the "Movement". Although President Museveni described it as broad-based, all-embracing, and not as divisive as multiparty politics, in practice it only provided an instrument for his personal rule and monopolization of political space.

32. Uganda Constitutional Court, Constitutional Petition No. 3 of 1999 (unreported).

33. The political system required candidates to contend for elective political office on the basis of the so-called all-inclusive, broad-based "Movement" that did not provide for political party sponsorship of such candidates.

34. Uganda Constitutional Court, Constitutional Petition No. 6 of 1999 (unreported).

35. Uganda Supreme Court Constitutional Appeal No. 1 of 2002 (unreported). The case questioned the constitutionality of the Constitutional Amendment Act No. 13 (2000), which provided, inter alia, that information in the custody of Parliament may not be adduced in evidence without its special leave. The Supreme Court held that the procedures for making this law had not been followed and that provisions on the right to a fair hearing had been impliedly amended, as it was not possible to have a fair hearing if access to information necessary for litigation was denied.

36. Uganda Supreme Court, Constitutional Appeal No. 2 of 2002 (judgment of February 11, 2004) (unreported). The decision in which freedom of speech (expression) was in issue, the appellants challenged the constitutionality of s.50 of the Uganda Penal Code, which prohibited the publication of "false news."

37. The government tended to respect orders of the court if they concern personal rights as opposed to political rights.

38. New Vision, "Museveni Mad with Judges Over Nullifying 2000 Referendum Act," online at June 30, 2004, http://www.newvision.co.ug/ (visited January 21, 2005). Whereas Kony, ADF, and FOBA were armed rebel groups that could lawfully criticize the government, "Ssemogerere" group was a civilian political opposition. Nevertheless, President Museveni signaled that the military would be deployed even against the latter group as well if the courts ruled in its favor and critically prejudiced or threatened the establishment's grip on political power.


40. In cases when the government has not used the military, it has employed or acquiesced in activities of paramilitary groups, police and/or other groups committed to the use of physical force to silence legitimate political opposition and demonstrations. See, e.g., Patrick Jaramogi, "CMI Boss Praises Kiboko Squad," New Vision, June 1, 2007, online at http://www.newvision.co.ug/D/8/13/568308?highlight=’kiboko’ (visited October 30, 2007).

41. Uganda Supreme Court, Election Petition No. 1 of 2001 (unreported).

42. On "substantial effect," see Monica Tswesime, "The State of Constitutional Developments in Uganda—2001," online at http://www.kitouchakatiba.co.ug/Monica2001.htm, noting that the electoral law is silent about the test for determining a "substantial manner"—whether it should be quantitative (number of votes) or qualitative (violation of law). The majority of the court agreed with the president that it should be quantitative. Be that as it may, the result of the petition seems to have turned on judicial fear of plunging the country into another cycle of chaos, political instability, and bloodshed. The chief justice, Benjamin Odoki, thus opines: "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." Arguments in favor of political stability may be sustained in the short term, but in the longer term they must yield to the argument that it is legal—as opposed to political—decisions that constitute the bedrock of the rule of law, engender respect for the law and guarantee ultimate political stability and development.

43. Extension of presidential mandate in Africa has been attempted (e.g., Nigeria, Malawi, and Zambia) or secured (e.g., Namibia and Burkina Faso) in many African countries by amendments to constitutions that limited presidential term limits.

44. Uganda Constitutional (Amendment) Bill, 2005, clause 58. This bill was later withdrawn by the state as it was an omnibus bill that did not meet the procedural requirements for amending provisions of the constitution. The proposed amendments respecting judicial review do not appear in the subsequent Constitutional (Amendment) Act (2005).


48. Law Society case. With regard to terrorism charges, the Constitutional Court held that the right to a fair trial was violated, as the General Court Martial did not have the necessary subject matter jurisdiction.


50. Ambassador Frazer, the U.S Assistant Secretary of State for African Affairs, attempted an explanation in these terms: "I don't know how it [response] cannot be as forceful when we specifically say that we have tremendous concerns about the arrest of Dr. Besigye. ... The thing about it is he [President Museveni] did it constitutionally. ... The fact that they're trying him both in a civilian court and in a military court—all of this is quite problematic." See U.S Department of State, "State's Frazer Heralds Spread of Democracy in Africa," December 7, 2005, online at http://usinfo.
51. The underlying premise of the reluctance of international actors to exert more effective political pressure is that the developments in Uganda fall within the country's constitutional framework—an understanding to which the United States makes express reference. However, the concern of international actors should be whether or not an emerging nation has a "constitution without constitutionalism," which encompasses the rule of law and independence of the judiciary. The irony is that in Africa there is "interest in constitutional reforms even by leaders that have established a long-standing reputation of disregard for the rule of law and their existing constitutions." Julius O. Ihonvbere, "Constitutions Without Constitutionalism? Towards a New Doctrine of Democratization in Africa," in The Transition to Democratic Governance in Africa: The Continuing Struggle (Westport: Praeger Publishers, 2003), 148. The "making of a constitution is one thing and implementing is quite another," for "in order to implement a constitution, the government must create, among other things, an enabling atmosphere for the 'protection of basic human rights and the rule of law.'" Benjamin J. Odoki, "The Challenges of Constitution-Making and Implementation in Uganda," in Constitutionalism in Africa: Creating Opportunities, Facing Challenges (Kampala: Fountain Publishers, 2001), 263, 281.

52. Kayode Oladele observes, "[S]uffice it to say that Nigeria's return to democracy was made possible by the intense efforts of the pro-democracy and human rights groups as well as the opposition to the military government in Nigeria by the International Community" Kayode Oladele, "Nigeria in the Threshold of Constitutional Crisis," November 21, 2006, online at http://www.nigeriavillagesquare.com/index.php/content/view/4327/46/ (visited October 30, 2007). In Nigeria, the judiciary is increasingly capable of performing its role without interference from the executive. The latest instance of that was the Supreme Court's ruling that the Independent National Electoral Commission (INEC) had no constitutional powers to disqualify any candidate found eligible for election by his political party, thereby allowing Vice President Atiku to feature as a candidate in the April 21, 2007, presidential election. However, beyond allowing Nigerian judges to express their opinions, executive compliance with court orders has been disappointing.

53. It is worth recognizing the efforts of South Africa in the wake of the arrest of the main political opponent to Museveni. South African president Thabo Mbeki promptly paid a visit to Uganda, presumably to exert political pressure on the Museveni administration. The reaction of the media to this visit included a statement to the effect that Mbeki should teach his host how to hand over power peacefully. The reaction of Mbeki was that naturally the two leaders had addressed the matter of the arrest of Dr. Besigye.