

SOME OBSERVATIONS ON CONSTITUTIONALISM, JUDICIAL REVIEW AND RULE OF LAW IN AFRICA

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My contribution is in the nature of an annotation to Professor Seidman's stimulating article.¹ His topic and thesis deserve more attention than either of us bestows. I shall outline why I think the subject is important, and, following Seidman, shall examine, first, constitutional experience with judicial review in Anglophonic countries and then explanations for it, and finally, some prescriptions for the future. All this is done in a very summary way and runs the usual risks of overgeneralization. At best our combined articles suggest issues worthy of more analysis.

A further caveat is in order. Not only is the subject difficult and politically charged, but American commentators may easily form skewed perceptions about public law in Africa because of the difficulty of understanding its context. Further, because of their own ethnocentrism, they may have perceptions about the value of and possibilities for judicial review which are not widely understood or shared in other cultures.² As will be apparent, I believe that efforts to secure better definition and protection of human rights are an important task of legal development. I do not think it has been proven, though it is often asserted, that because most Africans are poor, badly educated, and hungry—and because their freedom has been circumscribed in the past—they do not care about the issues at stake in the creation of the rule of law.³

I. THE SUBJECT

Seidman suggests that constitutionalism (Western-style) and judicial review were elements of a misguided colonial "vision" for independent Africa. These concepts were transferred, via independence constitutions,

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¹ Prof. R. B. Seidman's article is part of a comprehensive monograph on "law and development" in Africa which is the product of many years of teaching and study in various African law schools. See the following by Seidman: *The Reception of English Law in Colonial Africa Revisited*, 2 E. AFR. L. REV. 47 (1969); *Constitutions in Independent, Anglophonic, Sub-Saharan Africa: Form and Legitimacy*, 1969 WIS. L. REV. 83; *Law and Development: A General Model*, 6 L. & SOC'Y REV. 311 (1972); *Constitutional Standards of Judicial Review of Administrative Action in Nigeria*, 1 NIG. L. J. 232 (1956).

² For an earlier example of this phenomenon see Paul, *Legal Education in English-Speaking Africa* 15 J. LEGAL ED. 189 (1962). Cf. Justice Douglas' rather indiscriminating remarks about constitutional development in developing countries, Douglas, *Lawyers of the Peace Corps* 48 A.B.A.J. 909 (1962); Gunther, *The Constitution of Ghana—An American's Impressions and Comparisons*, 8 U. GHANA L.J. 2 (1971).

³ See generally the writings of African jurists and political leaders cited in notes 10 and 13 *infra*.

primarily devised by Whitehall technicians, as parts of an effort to reproduce parliamentary democracy Westminster style and a Commonwealth with shared, common political values and legal institutions. He examines Anglophonic African experience with judicial review under these constitutions and concludes that it did not work, and is not workable.

His thesis may find a receptive audience. It has become fashionable to dismiss the importance of constitutions in Africa. In essence the case is that they are of marginal significance.⁴ Perhaps, we are told, constitutions provide aspirational guidelines and organizational plans for a government of the day; but often they are facades which conceal the realities of power centers and the actualities of much political behavior. In any event, it is unrealistic to expect that they will be treated as laws having some superior force capable of regulating the exercise of government. We are sometimes reminded that constitutions are "borrowed" contrivances to establish the legality of a new government rather than cultural sources for legitimacy. A favorite, oft-used metaphor is to the effect that they have been brakes put on government which really needed accelerators.⁵ Constitutions did not reform land tenure systems, reduce poverty, secure education and literacy for the ordinary man, or generate economic growth. Thus constitutionalism and judicial review as developed in the West are inappropriate models for developing African political systems.

It is important to examine this array of arguments for several reasons. Since World War II, in diverse parts of the world—developed and less so—political leaders have promulgated constitutions which proclaim the existence of various human rights and endow the judiciary with power to enforce them as law.⁶

The ideal that power should be controlled by law seems more pervasively held today than ever before despite ample causes for cynicism about the gap between the ideal and day-to-day practices. By virtue of the Charter of the United Nations, its Declaration of Human Rights, and other U.N. institutions and various regional agreements, there has been increasing international recognition of the importance of human rights—

⁴ For various discussions which reflect one or another of the arguments presented below, see e.g., MARTIN, *PERSONAL FREEDOM AND THE LAW OF TANZANIA* (1974); L. PYE, *ASPECTS OF POLITICAL DEVELOPMENT* (1966); (especially chap. VI on law as a source of "instability" and "rigidity"); Spiro, *Constitutionalism and Constitutional Engineering* (Paper presented to African Studies Association Ninth Ann. Meeting, 1966); Lowenstein, *Reflections on the Value of Constitutions in our Revolutionary Age* in *COMPARATIVE POLITICS* (H. Eckstein & D. Apter eds. 1963); McAuslan, *The Evolution of Public Law in East Africa in the 1960's*, 5 *PUB. L.* 153 (1970); Palley, *Rethinking the Judicial Role: The Judiciary and Good Government*, 1 *ZAMBIA L.J.* 1 (1970); Seidman, *Constitutions in Independent, Anglophonic Sub-Saharan Africa: Form and Legitimacy*, 1969 *WISC. L. REV.* 83.

⁵ See J. NYERERE, *Democracy and The Party System* in *FREEDOM AND UNITY* (1967).

⁶ See M. CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* (1971).

and of the need for measures to secure them.⁷ The emergence of an international "common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family"⁸ has been solemnly proclaimed. Perhaps one day supra-national legal institutions with powers to provide remedies will exist; at least the force of consensus cannot easily be ignored by governments which seek respectability in the community of nations.⁹

Certainly, judicial review is no longer a purely western legal phenomenon. In Africa, the question of whether governments are to be accountable to legal standards, and if so by what means, has been identified by many outstanding jurists and political leaders as one of the most important problems of political development. Many have eloquently advocated some form of judicial review, and others have favored alternative, but analogous, form of control to achieve the same result. It is certainly arguable that many peoples and groups in Africa have a peculiarly vital interest in securing the protection of human rights.¹⁰

The study of experience with judicial review is also a fertile field for students of comparative law and politics, if one attempts (as Seidman does) not only to describe doctrinal evolution but also to explain that

⁷ See, e.g., L. SOHN AND T. BUERGENTHAL, BASIC DOCUMENTS ON INTERNATIONAL PROTECTION OF HUMAN RIGHTS (1973), setting forth, *inter alia*: the Universal Declaration of Human Rights (1973); the International Covenant on Civil and Political Rights (1948); the Proclamation of Teheran (1968); the Convention of the Political Rights of Women (1954); the Convention on Elimination of All Forms of Racial Discrimination (1965). For discussions, see L. SOHN AND T. BURGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS. chap. VI (1973).

⁸ Article 2 of the Proclamation of Teheran. U.N. Doc. A/CONF. 34/21 U.N. Publ. E68 XIV. 2 (1968).

⁹ See, e.g., C. JENKS, LAW IN THE WORLD COMMUNITY (1967). It is interesting to note that the bills of rights of Anglophonic African constitutions are patterned on the European Convention of Human Rights. Chief Justice Boni of the Ivory Coast has championed adoption of a pan-African convention on human rights. See Boni, *International Legal Process in LEGAL PROCESS AND THE INDIVIDUAL* (African Source Materials compiled by Centre for African Legal Development, Faculty of Law, Haile Sellassie Univ., 1971) (reporting the various papers, proceedings and resolutions of the Conference of African Jurists convened by the United Nations Economic Commission for Africa in 1971) [hereinafter cited as LEGAL PROCESS AND THE INDIVIDUAL].

¹⁰ See generally, LEGAL PROCESS AND THE INDIVIDUAL; M'BAYE, *Realities du Monde Noir et les Droits de L'Homme* in LES DROITS DE L'HOMME (1969); J. NYERERE, FREEDOM AND DEVELOPMENT (1968); African Conference on the Rule of Law, *A Report on the Proceedings of the Conference* (Lagos-Nigeria, January 3-7, 1971) in INTERNATIONAL COMMISSION OF JURISTS (Verhelst ed. 1961); Speech by Julius K. Nyerere given at the opening of the University Campus in FREEDOM AND UNITY 310 (1966); Amachree, *Fundamental Rights in Nigeria*, 11 HOW. L. J. 463 (1965); Bentsi-Ensil, *Problems in the Construction of Viable Constitutional Structures in Africa* in EXPANDING HORIZONS IN AFRICAN STUDIES (G. Carter and A. Paden eds. 1969); Collier, *Human Rights in Sierra Leone*, 11 HOW. L. J. 500 (1965); Elias, *The Evolution of Law and Government in Modern Africa* in AFRICAN LAW: ADAPTATION AND DEVELOPMENT (H. Kuper & L. Kuper eds. 1968); Kaunda, *The Functions of the Lawyer in Zambia Today*, 3 ZAMBIA L. J. 1 (1972).

experience by putting it in social context.¹¹ In view of the vastness of the writing on development, it is surprising that so little attention of this kind has been focused on this topic.¹² Most of the legal literature about judicial review is either aspirational or descriptive of doctrine or, as indicated, a contrast between what was said in the law books and what has happened.¹³ Political scientists, in their reaction against formal schools of comparative government, and in their attempts to develop new approaches to political phenomena in developing countries have largely neglected the study of constitutions.¹⁴ Nor has much attention been given to the character and behavior of courts as organs of government, or to attitudes of politicians and bureaucrats toward constitutionalism.¹⁵ Perhaps, before making authoritative judgments on the subject, we need

¹¹ For some attempts at "comparison," see Gunther, *supra* note 2; Baldwin, *A Constitutional Comparison: Mexico, United States and Uganda*, 10 CALIF. WEST. L. REV. 82 (1973). For an interesting attempt to find meaningful bases for "comparison" of the operation of judicial review to protect constitutional rights, see Sharma, "Law and Order" and Protection of the Rights of the Accused in The United States and In India: A General Framework for Comparison, 21 BUFF. L. REV. 361 (1972).

¹² On this point see Y. GHAI AND J. MCAUSLAN, PUBLIC LAW AND THE POLITICAL CHANGE IN KENYA (1970). This monograph is a model of the kind of studies needed to relate the development of public law to the political-economy context of particular countries.

¹³ A law-related bibliography on constitutional law for Anglophonic countries appears in Karlsson, *Sources for African Constitutional Studies*, 6 AFRICAN LAW STUDIES 123 (1972). See also, *Bibliography* in LEGAL PROCESS AND THE INDIVIDUAL, *supra* note 9. For different kinds of approaches to the subject and different assessments of experience and problems with judicial review, see generally sources cited in note 4 and statements of various distinguished African jurists set out in LEGAL PROCESS AND THE INDIVIDUAL, *supra* note 9. See also F. BENNION, CONSTITUTIONAL LAW OF GHANA (1962); I. FRANCK, COMPARATIVE CONSTITUTIONAL PROCESS: CASES AND MATERIALS ON FUNDAMENTAL RIGHTS IN COMMON LAW COUNTRIES (1968); W. HARVEY, LAW AND SOCIAL CHANGE IN GHANA (1966); W. JENNINGS, CONSTITUTIONAL LAWS OF THE COMMONWEALTH (1961); B. NWABUEZE, CONSTITUTIONAL LAW OF THE NIGERIAN REPUBLIC (1964); 1 J. PAUL & C. CLAPHAM, ETHIOPIAN CONSTITUTIONAL DEVELOPMENT, chap. I & IV (1967); 2 J. PAUL & C. CLAPHAM, ETHIOPIAN CONSTITUTIONAL DEVELOPMENT, at 615-619 & chap. IX (1970); Aguda and Aguda, *Judicial Protection of Some Fundamental Rights in Nigeria and In The Sudan Before and During Military Rule*, 16 J. AFR. L. 130 (1972); De Smith, *Fundamental Rights of The New Commonwealth*, 10 INT'L AND COMP. L.Q. 215 (1961); Ezejiakor, *Judicial Interpretation of Constitutions: Nigerian Experience*, 2 NIG. L.J. 70 (1967); Ghai, *Constitutions and the Political Order in East Africa*, 21 INT'L COMP. L.Q. 403 (1972); Gyandoh, *Principles of Judicial Interpretation of The Republican Constitution of Ghana*, 3 U. GHANA L.J. 37 (1966); Read, *Judicial Power and the Constitution of Ghana*, 11 U. GHANA L.J. 107 (1974); Seidman, *Constitutions in Africa*, *supra* n.1; Williams, *Fundamental Rights and the Prospect For Democracy in Nigeria*, 115 U. PA. L. REV. 1073 (1967).

¹⁴ For discussion of prevalent approaches to the study of political "change," "modernization," and "development" in the 1960's see generally C. LEYS, POLITICS AND CHANGE IN DEVELOPING COUNTRIES (1962); Huntington, *The Change to Change: Modernization, Development and Politics*, 1971 COMP. POL. 283; R. MACRIDIS, THE STUDY OF COMPARATIVE GOVERNMENT 7-12 (1955).

¹⁵ *But cf.* COMPARATIVE JUDICIAL BEHAVIOR (G. Schubert and D. Danetski eds. 1969) reporting studies of judicial attitudes, educational and professional backgrounds. Some of this work provides interesting perspectives on the legal profession in Commonwealth countries, but it seems unsatisfactory for reasons discussed by Seidman, *i.e.* the narrowness of the approach.

more systematic studies of experience, and explanations for it, within particular countries. Seidman's article offers the challenge of a number of propositions which might be tested by such research.

II. EXPERIENCE

The independence constitutions of former British colonies were designed to establish democratic methods for governance by creating parliaments chosen through competitive elections, parliamentary supremacy, cabinet government, guaranteed political freedoms and other human rights. These constitutions were also designed, in many instances, to protect minority groups and to preserve regional interests and local traditions. Devices frequently used for these purposes included provisions for federal or regional autonomy, bicameralism, constitutionally entrenched bills of rights, a politically neutral, independent civil service and an independent judiciary with power to enforce the constitution as superior law.¹⁶

Independence constitutions were like negotiated treaties. They were often more the product of *ad hoc* bargaining in London than the reflection of popular demands and manifestations of indigenous political culture. They were also often extraordinarily complex.¹⁷ But by accepting a constitutional document worked out in London on the eve of independence, a regime in Africa could hasten the attainment of national sovereignty and the entrenchment of its own power. Once independent, the regime could change the constitution to suit local needs and, not surprisingly, to tighten its own control over the political system. Most independence constitutions did not last long. They were soon formally scrapped or amended. The details of particular histories are of course complicated, but at the risk of overgeneralization, some trends may be noted.¹⁸ The parliamentary system was discarded in favor of an inde-

¹⁶ For general discussion see K. ROBERTS-WRAY, *COMMONWEALTH AND COLONIAL LAW* (1966); De Smith, *Constitutionalism in the Commonwealth Today*, 4 MALAYA L. REV. 205 (1962).

¹⁷ On these phenomena, see, e.g., Y. BHAI AND J. MCAUSLAN, *supra* note 12, at 177-219. For the most verbose and complex of these documents, see chapter II of the *Constitution of Kenya* (the bill of rights). For a good discussion of problems with "standard form" constitutions of the Colonial office, see McAuslan, *The Republican Constitution of Tanganyika*, 13 INT'L & COMP. L.Q. 502 (1964).

¹⁸ The literature on political change in Africa—both country studies and general—is of course enormous. For some recent collections of overviews, see, e.g., *THE MILITARY INTERVENES; CASE STUDIES IN POLITICAL DEVELOPMENT* (H. Biennen ed. 1968) (case studies of the military in politics); *GOVERNING IN BLACK AFRICA: PERSPECTIVES ON NEW STATES* (M. Doro and M. Schultz eds. 1970); *THE STATE OF THE NATIONS: CONSTRAINTS ON DEVELOPMENT IN INDEPENDENT AFRICA* (Lofchie ed. 1971); *BASIC ISSUES AND PROBLEMS OF GOVERNMENT AND DEVELOPMENT* (I. Markovitz ed. 1970); ("readers" containing some of the more lasting literature of the '60's); Decalo, *Military Coups and Military Regimes In*

pendently elected executive and head of state with broad powers, including emergency-type powers to control allegedly subversive political dissent. Federalism and bicameralism, where established, sooner or later, were abolished, and strong systems of central control were developed. In most countries, opposition parties lacked a broad base, and were co-opted or swallowed up by the group in power or otherwise rendered impotent—sometimes by extra-legal harassment. In the past decade, virtually no government in power has handed over power to another political faction victorious at the polls; succession to political power has come by force.

Political development has, of course, followed different models in different countries. In some, presidential regimes, built around a charismatic leader, have held power through a one-party system (*de facto* or *de jure*), quiescent parliaments, and co-option of the civil service. Government usually has controlled the major media directly, either because newspapers and broadcasting are established as state enterprises, or because the independent media are controlled.¹⁹ The leadership of independent interest groups—labor unions, capitalists, chiefs and others—has also often been co-opted.²⁰ Preventive detention laws are commonplace and have been written to provide little encouragement for judicial review of procedures followed or grounds invoked to curtail freedom.

Some presidential regimes have been deposed by military leaders. The cause of—or pretense for—this phenomenon is said to be impatience

Africa, 11 J. MOD. AFR. STUDIES 105 (1973) (an interesting review of much of the literature on military coups and the "political roles" of the military in Africa); Klinghoffer, *Modernisation and Political Development in Africa*, 11 J. MOD. AFR. STUDIES 1 (1973) (discussing "frameworks" for analysis); Wallenstein, *Class and Class Conflict in Contemporary Africa*, 7 CAN. J. AFRICAN STUDIES 375 (1973) (use of class and class conflict in the analysis of African political change).

¹⁹ See, e.g., W. HACHTEN, *MUFFLED DRUMS: THE NEWS MEDIA IN AFRICA* (1971); *REPORTING AFRICA IN THE AFRICAN AND INTERNATIONAL PRESS* (O. Stokke ed. 1971); *NIGERIAN PRESS LAW* (I. Elias ed. 1969). In 1966 the Minister of Information of Kenya was quoted as saying: "When VOK [the Voice of Kenya] was a private corporation it gave fair play to both sides but now that it is a Government voice, naturally it will only convey the voice of the Government." Nairobi Sunday Nation, May 29, 1966, in *GOVERNMENT AND POLITICS IN KENYA* (C. Gertzel, M. Goldschmidt and D. Rothchild eds. 1969). Cf. Y. GHAI AND J. MCAUSLAN, *supra* note 12, at 56. It is interesting to note that while social scientists have suggested the enormous importance of opening up the processes of communication in developing countries, little attention is paid to the working of law relevant to the system of communicating. See *COMMUNICATION AND POLITICAL DEVELOPMENT* (L. Rye ed. 1963).

²⁰ The formulation and conduct of interest group associations may be regulated in various ways, e.g., by the requirement that associations be registered with some government ministry. For a discussion of the use of these laws see Y. GHAI AND J. MCAUSLAN, *supra* note 12, at 450. Unsuccessful efforts in Zambia of the dominant party to co-opt its opposition are discussed, sympathetically, in Pettman, *Zambia's Second Republic—The Establishment of a One-Party State*, 12 J. MOD. AFR. STUDIES 231 (1974). Cf. *Steel v. Attorney General*, 1967-78 Afr. L. Rep. S.L. 1 (1967) (Suit to prevent government from establishing a one-party state on the ground that this would violate established guarantees of freedom of speech and association).

and disgust with existing political development, the desire for "disciplined," "honest," "stable," "efficient" government. Under this second mode of political development, self-proclaimed revolutionary military councils have usually suspended those parts of the constitution which are inconsistent with their own exercise of an absolute decree power. Military regimes abolish the pretense of electoral politics and often increase the control of the bureaucracy. The courts are usually told to continue to function as before, and, subject to the superior executive decree power, the legal system is left intact—at least so long as it is not used to dispute the legitimacy of those in power.²²

Tanzania supplies a third and interesting model of change. Public law has been shaped by an active innovative ideology calling for development of new political institutions in order to create a democratic, one-party, humanitarian, socialist state.²³ Subject to party regulation, competitive elections have been retained, and seats in Parliament have been vigorously contested, and incumbents regularly ousted; but the role of MP's and many of the powers of Parliament appear to have been subordinated to policies prescribed by party councils supposedly responsive to regional and local party bodies. A deliberate decision was made not to include a bill of rights in the Tanzanian constitution, and judicial power to review actions of government outside the realm of criminal adjudication is increasingly limited. President Nyerere has repeatedly asserted the "rule of law" as a value to be secured,²⁴ and there have been interesting debates on ways to assure legality within the new kind of polity envisioned. An ombudsman-type institution, the Permanent Commission of Enquiry, has been developed to secure protection against abuses of power by government officials.²⁵ A national legal corporation has been created

²² For an illustration of the kind of law promulgated to legitimize a military coup, see, e.g., *Proclamation for the Constitution of a National Liberation Council for the Administration of Ghana* (1966)—perhaps a "model" for this sort of legislative instrument. On the legality of governments which take power forcibly, see the extraordinarily academic approach of the Uganda High Court in *Ex parte Matovu*, 1966 E.A. 514; in this case the court entered into a learned discussion of Kelsen's jurisprudence to determine constitutionality of the government established by President Obote who had convened a rump of the "national assembly," and, with the coercion of armed soldiers, secured approval of a new constitution—which the members of the "constitutional" assembly were permitted to read after voting their approval. Cf. Crabb, *Coups d'Etat and Constitutions of Black Africa* in *LEGAL THOUGHT IN THE UNITED STATES OF AMERICA UNDER CONTEMPORARY PRESSURES* (J. Hazard and W. Wagner eds. 1970). Eweluka, *The Military System of Administration in Nigeria*, 10 *AFR. L. STUDIES* 67 (1974); Aguda and Aguda, *supra* note 13.

²³ See, e.g., *REPORT OF THE PRESIDENTIAL COMMISSION ON THE ESTABLISHMENT OF A ONE PARTY STATE* (Tanzania 1965); *The Arusha Declaration of TANU* (1967); L. CLIFFE & J. SAUL, *SOCIALISM IN TANZANIA: AN INTERDISCIPLINARY READER* (1972) (Contains a number of interesting documents and reading describing political institutions).

²⁴ See, e.g., Nyerere, *Terms of Reference to Presidential One Party State*, in *REPORT OF THE PRESIDENTIAL COMMISSION*, *supra* note 23, at paragraphs 57-59.

²⁵ See *REPORT OF THE PRESIDENTIAL COMMISSION*, *id.* For material on the Permanent

and the practicing profession may soon be socialized.²⁶ Courts are seen as part of government, not independent of it, and the inherited colonial legal system may soon be dismantled in other ways, *e.g.*, by efforts to "de-legalize" much of the business of the courts and to "de-professionalize" much of the work hitherto ascribed to lawyers.²⁷

Thus political systems in former British territories are characterized in part by: a leader or group who claim to speak for the masses; a strong central government; a one-party or no party system—or in any event the lack of competitive politics; strict governmental control over information and its dissemination; mistrust of political opposition; and a wide network of security laws and harsh penalties to control its manifestations. The civil service is not the independent, neutral body envisioned by the independence constitutions; its upper ranks are often—in comparative terms—wealthy and elitist, hierarchical and authoritarian in outlook. It is significantly controlled by the political leadership of the "executive" branch, and the line between politician and civil servant is blurred. Political leaders espouse a democratic, egalitarian ideology which often seems to embody more of the spirit of Rousseau than of the cold legalistic philosophy of earlier Anglo-American political developers. They claim to speak and act for a general will, and profess a fervent desire to improve conditions of life and opportunity. They demand unity and loyalty, and emphasize a new national identity and destiny, and the value of the new, omnipresent service state. Some may be skeptical of the sincerity of such claims, but there are many who believe that the authoritarian, technocratic service state, which blends tradition with political modernization, is the only appropriate model, at least for the time being.²⁸

As Seidman notes, it is generally thought that courts have played marginal roles in the course of this political development. There have been relatively few constitutional cases; litigants have not attempted to use the courts to challenge the legality of seizures or dubious exercises

Commission see, *e.g.*, MARTIN, *supra* note 4, at chap. V and *Annual Reports of the Permanent Commission for 1966/67* (1968); 1967/68 (1969); 1968/69 (1970).

²⁶ See, *e.g.*, MARTIN, *supra* note 4, at 54-81; LAW AND ITS ADMINISTRATION IN A ONE PARTY STATE: SELECTED SPEECHES OF TELFORD GEORGES (James and Kassam eds. 1973) (views of the Former Chief Justice of Tanzania). The Tanzania Legal Corporation was established pursuant to the Tanzania Legal Corporation (Establishment) Order, 1970 (Government Notice No. 32 published 19/2/71), and the Tanzania Legal Corporation (Board of Directors) Regulations 197 (Gov't Notice No. 137, 11/6/71). The Corporation is empowered to provide legal services to public corporations and to parastatals and to the government as directed by the Attorney General.

²⁷ See James, *Implementing the Arusha Declaration—The Role of the Legal System*, 3 AFR. REV. 1970 (1973).

²⁸ See sources in note 18, *supra*, for some literature on this subject. See H. BRETTON, POWER AND POLITICS IN AFRICA (1973) and R. FIRST, POWER IN AFRICA (1970) for critical analyses of recent trends.

of power by governments. The bar has not organized to defend constitutional rights; and few if any civil rights groups or other public interest law organizations exist to provide publicity, muscle and expertise for this kind of activity. Further, other basic legal tools for defending human rights are lacking—from law books (to provide detailed commentary on the meaning of complicated provisions commonly found in the bills of rights in African constitutions) to local theories about their efficacy. Until recently, most African lawyers learned little about constitutional law as a species of law to be made and enforced through a creative, assertive profession and judiciary.

Seidman discusses a few cases which he regards as illustrative of the way in which constitutional issues have been commonly treated by appellate courts. Some additional cases are cited and discussed below.²⁹ To a considerable extent these decisions share common characteristics.³⁰ Often issues are certified, usually in an abstract form, to the reviewing court for decision. Thus the courts may lack records sufficient to provide a factual context for analysis. The distinction between judging the

²⁹ See, e.g., D.P.P. v. Obi, 1961 All N.L.R. 181 (Sedition conviction upheld against constitutional objections; the test is the dangerous tendency of the words to incite disaffection against the government, it is an "objective" test; evidence of the actual effect of the publication is not necessary); Dahiru Cheranci v. Akali Cheranci, 1960 N.N.L.R. 24 (validity of statute proscribing incitement of minors to participate in political activity); Ex parte Motovu, 1966 E.A. 514 (Uganda) (validity of detention orders issued under emergency powers regulations; court refuses to review exercise of ministerial discretion); Ojibe v. Ubani, 1961 N.L.R. 277 (validity of law fixing Saturday as day of election, objection of religious group swept aside). See also Adegbanu v. Akintola, 1963 S.C. 614 (Privy Council decision upholding constitutionality of Akintola's removal as premier of the Western Region; dicta that the text of constitutions must be read literally; little consideration of jurisdictional and justiciability issues); *Awolowo v. Arki*, discussed in 1 NIGERIAN L.J. 104 (1964) (validity of immigration service order excluding Awolowo's counsel, a member of the Nigerian bar but not a citizen, from entering the country); Gamioda v. Ezezi II, 1961 All N.L.R. 584 (Procedure for Referral of Constitutional Issues; only the question is to be referred, not the record); Merchants Bank Ltd. v. Federal Minister of Finance, 1961 All N.L.R. 598 (validity of order revoking Bank's license; banking is "privilege" not a "right," therefore no deprivation of constitutional right to fair hearing and impartial tribunal).

³⁰ For discussion of these and related criticism, see, e.g., Aguda and Aguda, *supra* note 13; Ezejiofor, *supra* note 13; Read, *supra* note 13; Williams, *supra* note 13; and cf. Elias, *supra* note 19. On strict interpretation of constitutions, as if they were statutes, compare F. BENNION, *supra* note 13 with Gyandoh, *supra* note 13; see also L. GOWER, *INDEPENDENT AFRICA: THE CHALLENGE TO THE LEGAL PROFESSION* (1967). On the binding power of prior decisions, compare SAWYERS AND HILLYER, *THE DOCTRINE OF PRECEDENT IN THE COURT OF APPEAL* (1971) with Newbody, *Value of Precedent Arising from Cases Decided in East Africa as Compared with those Decided in England*, 2 E. AFR. L. REV. 1 (1969) (in which the Chief Justice is critical of the U.S. Supreme Court). On the indulgence in presumptions in favor of the legislative judgment, see, e.g., Zafer, *Kachusa's Case*, 1 ZAMBIA L.J. (1969) (critical analysis of Zambian decision upholding validity of compulsory flag salute and oath in school exercise). See also Gyandoh, *The Role of the Judiciary Under the Constitutional Proposals for Ghana*, 5 U. GHANA L.J. 133 (1968). For discussion of some of the problems of developing judicial review in Ethiopia, see 1 J. PAUL & C. CLAPHAM, *supra* note 13, at 401-02, and 2 J. PAUL & C. CLAPHAM at 919-25. A wide ranging review reviews in Akiwumi, *Human Rights and Africa Courts in LEGAL PROCESS AND THE INDIVIDUAL*, *supra* note 9.

validity of a law (or administrative rule) "on its face," as opposed to "as applied" in the case at hand, seems to be ignored, even when this technique might be used to circumscribe executive power without inviting great political controversy.

Courts have not only interpreted constitutional guarantees of individual rights narrowly, they have also assumed a heavy presumption in favor of constitutionality. They have often expressed the admonition that judges must not read their personal values into a constitution—sometimes naively assuming that by saying this and little more they avoid problems of choice and value analysis in decision-making. Courts have deferred to legislative judgments even in cases where the existence of such judgment would appear to be more fiction than fact. The decisions often reflect a mechanical application of the law—a reading of constitutions as if they were contracts to be strictly construed. Problems of interpretation are frequently treated as semantic matters (dictionary definitions may be quoted and emphasized) rather than as issues which call for identification and analysis of inevitably competing interests. When interests are identified, they are characterized in summary, superficial terms. The serious implications of a particular ruling (*e.g.*, the adoption of a "dangerous tendency" test for seditious words) are seldom explored. The courts have not used, or examined in any great detail, constitutional materials from other jurisdictions. Despite the autonomy of the constitution, reliance is placed on English cases, and sometimes the very cases relied upon have been both effectively criticized by persuasive commentary and qualified by subsequent decisions in England.³¹

Thus, as Seidman asserts, African decisions usually do not measure up to the "Grand Style"—although the "Grand Style" may be more an American phenomenon³² than one which often characterizes judicial decisions on public law questions in other parts of the common law world. In any event, if the expectation was that courts would be vigorous in developing a constitutional jurisprudence around bills of rights, these expectations have not been met.

Nevertheless, the experience has not been entirely negative. It would appear that legal scholars have attempted to measure the impact of constitutional guarantees by looking solely at the performance of

³¹ The "bills of rights" of Anglophonic African constitutions were drawn from the European Convention on Human Rights, *see, e.g.*, Elias, *supra* note 10, of conference on The Nigeria Constitution held in London in May and June 1957. It is somewhat surprising—as a matter of theory—that African jurists have been unwilling to search for a more *sui generis* constitutional jurisprudence, and to make wider use of comparative materials.

³² The "grand style" is, in part, a product—and reflection of the American Realistic Movement. It is a thesis directed at American appellate adjudication, *cf.* W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 205-15 (1973).

courts, rather than the performance of other agencies. It is possible that constitutional guarantees have influenced government lawyers when they counsel or draft legislation. These guarantees may have influenced parliamentary and cabinet debates as well as policy-making. They may even have influenced the training of police and other officials.³³

On some notable occasions judges in Africa have displayed independence and integrity in the handling of political trials, and in a number of cases courts have reversed criminal convictions using sharp terms for failure to recognize procedural rights of the defendant.³⁴ Judges in Africa have continued to insist that they are—and that they must be—independent. Many have continued quite openly, notwithstanding the growth of the authoritarian state, to support the ideas of constitutionalism and of an independent judiciary armed with the power to enforce a bill of rights.³⁵

Following the overthrow of Nkrumah, Ghanaian lawyers took the leadership in drafting a new constitution with an expanded bill of rights, reinstatement and expansion of judicial review, and other new institutions to secure observance of the constitution.³⁶ Similarly, an Ethiopian commission, appointed in the first era of the profound political change now underway and significantly staffed by lawyers, proposed an expanded bill of rights and power of judicial review to enforce it.³⁷ In Nigeria, the Supreme Court has adopted the position that the bill of rights has not been suspended as a result of the military coup. Rather, the court has held that unless the military government explicitly decrees otherwise, the bill of rights will remain in effect, and military legislation will be subject to judicial review.³⁸ Thus, despite a somewhat discouraging experience, the belief still prevails among many lawyers in Africa that judicial review

³³ Points stressed by L. GOWER, *supra* note 30.

³⁴ A good case study is set out in an unpublished monograph on the development of criminal procedure in Uganda, NSEKERE, *THE ADMINISTRATION OF CRIMINAL JUSTICE IN UGANDA* (1973).

³⁵ See, e.g., Aguda and Aguda, *supra* note 13 and writings by other judges cited in note 10. See ADEBIYI, *THE EXECUTIVE AND THE JUDICIARY: THE NIGERIAN EXPERIENCE IN LEGAL PROCESS AND THE INDIVIDUAL*, *supra* note 9 at 159. Adebisi is a Justice of the High Court of Nigeria.

³⁶ See *PROPOSALS OF THE CONSTITUTIONAL COMMISSION FOR A CONSTITUTION FOR GHANA* (1968); Gyandoh, *supra* note 30.

³⁷ The proposals of the Commission are set out in the *Ethiopian Herald*, August 10, 1974, p. 3. The Chairman and Vice-Chairman of the Commission which drafted the proposed constitution were distinguished Ethiopian jurists. The technical staff was primarily composed by law faculty, lawyers and law students. The bill of rights proposed is perhaps the most liberal in Africa.

³⁸ See *Lakanmi v. Attorney General of the West* set out in 5 NIG. L.Q. 133 (1970) discussed at length in Eweluka, *supra* note 22. *THE MILITARY SYSTEM OF ADMINISTRATION IN NIGERIA*, 10 AFR. L. STUDIES 67 (1974). See also Adebisi, *supra* note 35.

is an important institution to be developed within legal and political systems.

III. EXPLANATIONS

Seidman (and others³⁹) suggest that constitutional models patterned on the colonial office vision were doomed. Verification of this interpretation is found not only in experience, but in explanations for it. And, certainly an examination of reasons why constitutionalism and judicial review have allegedly failed should be of great importance to political leaders, jurists, planners and students of comparative law and government.

The explanations range from doctrinal, legalistic reasons to discussions of the social and political context; but few commentators have attempted to deal comprehensively with the subject, and there is, as previously noted, a considerable hiatus between the lawyer-authored literature on legal development and social science literature explaining political change. Evidence to support one theoretical explanation or another is frequently lacking.

Some legal commentators have emphasized weaknesses in the form and content of constitutions. The bills of rights of African states are said to be unworkable because they are too complex and cumbersome in content; they have been qualified to such a degree and in such a way that powerful officials and lawyers of government and the courts can all too easily rationalize evasions.⁴⁰

Further, it is noted that constitutionalism was not part of the colonial heritage; there were no established traditions and practices at the time of independence. Until the eve of independence, most colonial governments were organized as highly efficient administrative states. The colonial bureaucracy was subject neither to popular control nor to judicial control. Indeed the "modern" sector of the "dual" legal system—the transferred common law—was not developed to control government; rather it was developed as an instrument of colonial policy to facilitate growth of a "modern" social sector. The courts which administered "modern" law were an arm of the colonial government, staffed by judges who had been recruited for colonial service, who served first in one colony and then another, and whose roots were in the colonial system, not in any territory.⁴¹ African lawyers coming from these traditions could hard-

³⁹ See note 4, *supra*.

⁴⁰ See, e.g., Aihie, *Neo-Nigerian Rights in Zambia*, 3 ZAMBIA L.J. 43 (1972).

⁴¹ See Y. GHAI AND J. MCAUSLAN, *supra* note 12, at chap. IV, IX; Scotton, *Judicial Independence and Political Expression in East Africa—Two Colonial Legacies*, 6 E. AFR. L.J. 1 (1970).

ly be expected to move easily into the role of a John Marshall. Indeed, by virtue of its English-oriented, professional education and acculturation, the bar was not familiar with the roles which a system of judicial review requires. Many lawyers were probably weaned on the writings of those eminent English scholars who tell us that it is impossible to draft meaningful bills of rights without qualifying them, and it is impossible to qualify bills of rights without destroying them.⁴² These prescriptions have sometimes been treated by African-oriented commentators as if they were social facts, not arguments. In any event the profession, *qua* profession, seems to have lacked the ideology and possibly some of the technical legal skills to nourish the system. It lacked lawyers capable of playing an active articulate role in mobilizing the use of the legal process to defend human rights. The organized bar was not an active force in educating the public about constitutions and civil rights and the value of the system.⁴³

Further, current studies of the legal profession may tend to show that, despite the socio-economic status of lawyers as an elite group in urban society, the political influence of the bar, like that of the received modern legal system, has been limited. The work of the bar and the formal, modern courts (as opposed to local and customary courts) has been restricted, often to a small number of clients and primarily to private transactions falling within an urbanized commercial sector of society.⁴⁴ Lawyers, the processes and language of the law, and the books and technical learning required to understand them were alien in many ways to the ordinary citizen. Access to law was limited. Thus, the tenets of constitutionalism figured little in the socialization and education of most citizens. Perhaps people simply have not seen the courts as potential protectors of

⁴² See, e.g., K. WHEARE, *MODERN CONSTITUTIONS* 11 (1956). Cf. MARTIN, *supra* note 4 at 38-45.

⁴³ In East and Central Africa, an African bar is of very recent origin. In West Africa the training of lawyers for lawyer roles in developing countries was sadly neglected until independence. The weakness of the legal profession in providing legal services to the public is discussed in Dunning, *Legal Systems and Legal Services in Africa* in *LEGAL AID AND WORLD POVERTY: A SURVEY OF ASIA, AFRICA AND LATIN AMERICA* (1974). A good discussion of the state of the profession and professional training and acculturation is to be found in Y. GHAI, *LEGAL EDUCATION IN ANGLOPHONIC AFRICA* (1972) (Paper prepared for the International Legal Center Committee on Legal Education in Developing Countries). See also W. HARVEY, *LAW AND SOCIAL CHANGE IN GHANA*, chap. IV (1966); Twining, *Legal Education Within East Africa* in *EAST AFRICAN LAW TODAY* (1966).

⁴⁴ Useful material on the legal profession in Africa is sparse. But cf. Y. GHAI AND J. MCAUSLAN, *supra* note 12, at 386-96. The International Legal Center is sponsoring socio-legal research on the profession in Kenya and Ghana which seems to support the hypotheses suggested above. These studies were discussed at a Workshop on Social Science Research Methodology and Perspectives on Legal Research held in Nairobi in June 1974. For an indictment of the Ghana legal profession's failure during the Nkrumah period, see I. OMARI, *KWAME NKRUMAH: THE ANATOMY OF AN AFRICAN DICTATORSHIP* (1970).

their rights. Nor have they seen the bar and the judiciary as selfless, independent custodians of an autonomous constitution to be preserved for ages to come. Rather, the modern law and legal system may appear as arms of government and as agencies for enforcing government policy.⁴⁵

Arguably, there have been other conditions which have hindered the development of constitutionalism and undermined the role envisioned for courts. The "dualism" of African societies has often been noted; the term is used to emphasize the dichotomies between people who live in a "modern setting" and those who live "traditional" lives. We are told that colonial policy, *i.e.* the political arrangements of "indirect rule" and the economic activities and infrastructures encouraged by colonial government, accentuated this dualism and have thus segmented African societies. A small modern sector of the population has emerged as a well-educated, multi-lingual, Western-oriented, elite, urban, white-collar group. The traditional sector, the great mass of people, has remained largely illiterate, rural, non-English speaking and poor, living essentially at subsistence levels. Of course, generalizations are difficult, but in many regions, it is argued, traditional people have continued to follow clan and tribal customs and have been barely touched, if touched at all, by culture transferred by the colonial power. Traditional people have been politically inactive and passive toward the central government. Their primary concerns are provincial and parochial.⁴⁶

Until recently, the modern sector has been dominated in many ways by civil servants. Government employment, including employment in burgeoning, parastatal enterprises, has been a growth industry,⁴⁷ and it has been the primary goal of most secondary school and college leavers. Government employment is relatively secure, carries a promise of promotion, and provides an income which exceeds that of the average citizen.⁴⁸ Educational systems have oriented the educated young elite toward civil service careers. In various ways the importance of the managerial civil servant and the power and beneficence of the executive service state are

⁴⁵ See Dunning, *supra* note 43. President Kavnada noted:

Zambia today labours under many legacies of the colonial era. One is a very unfortunate attitude of many people towards the police and the courts and, indeed, the law itself . . . [which] came to be regarded as enemies of the people. This is very sad, and particularly so because the attitudes of this kind take a long time to eradicate. quoted in Thomas, *Legal Education in Africa*, 22 N. IRELAND L.Q. 3, 23 (1971); see Barnes, *The Politics of Law in MAN IN AFRICA* 1 (Douglas & Kanberry eds. 1969).

⁴⁶ See Harvey, *Democratic Values, Social Change and Legal Institutions in The Development Process* in *NATIONS BY DESIGN* (A. Rivkin ed. 1968).

⁴⁷ See Jolly, *Employment, Wage Levels and Incentives* in *MANPOWER ASPECTS OF EDUCATIONAL PLANNING; PROBLEMS FOR THE FUTURE* (1968); J. NYERERE, *EDUCATION FOR SELF-RELIANCE* (1967); Ghai, *Society, Education and Development*, 9 E. AFR. L.J. 16 (1972),

⁴⁸ See Kirk-Green, *The New African Administrator*, 10 J. MOD. AFR. STUDIES 92 (1972).

subtly celebrated. Thus the position of government and parastatal activity in the modern sector has tended to build up statist attitudes towards political life. Many in the private part of the modern sector—businessmen and private professionals—have become affluent, but the private sector has been less influential in developing powerful centers of independent activity and countervailing attitudes towards the administrative state. Rather, the private sector is supportive of political stability and the status quo. All of these factors may affect the outlook of lawyers and judges.

Again the propositions set forth above are oversimplified and, at best, illustrative hypotheses to explain the alleged failure of constitutionalism within African political systems. They are not necessarily supported by persuasive evidence, and more important, they may be grounded upon social conditions which are rapidly changing.

Indeed, it may well be that the dualism discussed above—and so often stressed in the literature—no longer exists, or at least is disappearing in many regions, as schools, roads, literacy, mass media, cooperatives and commercial agriculture penetrate the countryside. Further, in some countries, there are growing numbers of urban wage earners whose economic opportunities may be increasingly threatened by rampant inflation, growing unemployment and an increasing difference between wages paid for labor and the salaries automatically paid pursuant to fixed scales to more educated white-collar civil servants. Lower income urban groups may turn increasingly to trade unionism and other forms of interest articulation to assert new demands upon the political system. Students and unemployed school leavers too, may now also be a more vocal dissenting group in some countries.⁴⁹ These changes may significantly affect the context of the political system, the demand for new kinds of laws to protect the new interests and new kinds of access to the legal system.

IV. THE FUTURE

I turn now to a discussion of the future of constitutionalism and the desirability of judicial review in African political development.⁵⁰

The view among many academic lawyers is negative. Thus, judicial review is characterized as both cumbersome and alien to Africa's political and legal cultures, exalting the powers of judges unwisely. Citing the well-known English strictures, some lawyers argue that means for protec-

⁴⁹ See Gutkind, *The Unemployed and Poor in Urban Africa* in *THIRD WORLD EMPLOYMENT* (1973).

⁵⁰ See Harvey, *supra* note 46. See notes 4, 10 and 13 *supra*. The various viewpoints in this section were developed and discussed at the Nairobi Workshop (see note 44) by law teachers and lawyers from central and eastern Africa.

tion of human rights must be found in other democratic processes, *e.g.*, in a vital parliamentary institution and a properly trained civil service sensitive to "natural justice" and the protection of the public.

Others see the demise of constitutionalism as part of the general decline of law and the legal system as an independent force in society. The all-powerful service state is assumed to be a continuing, central, political fact of life, and can best function through the work of well-trained technicians. More and more, law will be made through executive and administrative action and enforced through administrative tribunals. Thus, special tribunals might be established to carry out changes in land tenure, and to regulate employment relationships and other aspects of the economy. These tribunals may also settle disputes arising with public corporations and other government enterprises and, perhaps, enforce government security laws. The judicial power to review acts of these tribunals will gradually decrease, and there will be fewer opportunities for citizens to challenge government actions in those courts which remain outside the governmental system. The role of lawyers in legal development and as guardians of legal values will slowly but surely diminish.⁵¹

This picture of the future is sometimes cast in more emphatic ideological perspectives. Thus, some take a highly critical view of African development over the last decade. The economic profile of societies is said to show increasing maldistribution of the benefits of economic growth, increasing disparities in income and the emergence of new centers of economic power. A political profile may show that the effective authority of the state is concentrated in an alliance of groups, *e.g.*, the upper strata in the civil service, military and private sectors. Corruption is said to be widespread, and Gunnar Myrdal's characterization of the massive "soft" state is cited to depict the situation. And the power of the law, it may be asserted, is on the side of the state.⁵²

Tanzania is sometimes contrasted with the model projected above. The Tanzanian model calls for a classless society, personal sacrifice, individual renunciation of economic gain, and collectivization of resources. The national party is to be a broad-based organ for governance and a primary vehicle for formulating policy to advance goals of equality, better standards of living and understanding and enforcement of one's social obligations: Although official Tanzanian ideology has stressed the "rule of law," this increasingly means a form of socialist legality which cannot

⁵¹ The importance of growth of administrative and special tribunals outside the legal system in Kenya is traced in Y. GHAI AND MCAUSLAN, *supra* note 12, at 299-309. Presumably the trends described there may apply elsewhere.

⁵² See Myrdal, *The Soft State in Underdeveloped Countries*, 15 U.C.L.A. L. REV. 1118 (1968).

be secured either by courts, or by formal legal processes of litigation. Rather, the appropriate organs to achieve this socialist legality are party councils, the ombudsman institution, and enforcement (through various agencies) of proscriptions against individual aggregation of wealth, attempts to abuse, or efforts to assume special status in society.

Of course, the Tanzanian model is not the only one. Some who applaud Nyerere's extraordinary leadership may, however, detect growing trends towards coerced collectivization and a stifling of individual independence and pluralism in society. The lack of legal guarantees and the absence of a commitment to law as an independent social force may, in the view of some, having troubling long-range implications.⁵³ In any event, other models for future political development—which make more use of law—may be advanced.

Perhaps the development of a powerful centralized state has been a necessary first step in nation-building: it was necessary to establish governments which could govern. But now, confronted with growing political oligarchies, authoritarian governments, powerful bureaucracies, abuse of power and maldistribution of public investment and the fruits of development, some have argued that what African polities need are leaders who will reverse the process of the previous decade and bring about a deconcentration of political power—and new institutions which will enable decentralization of government. Certainly it has now become fashionable to call for new institutions and processes to secure more popular participation in the political system and greater electoral control over regional and local units of government which should enjoy more control over taxation, expenditure, development planning and other functions of government.⁵⁴ Similarly, it may be argued that urban wage earners need to be given a greater share in the management of private and state enterprises. In essence, the service state has neither sufficient wisdom nor sufficient capacity to do by itself the things which must be done to satisfy emerging human wants. Further, development depends, far more than has been perceived, on enhancement of a citizen's sense of identity with, and stake and participation in, the civic and economic community. This approach may lead to new arguments that pluralism has undiscovered values, and efforts to stifle it by coerced efforts at unity and central control over local affairs may be counterproductive in the long run and incon-

⁵³ Cf. James, *supra* note 27.

⁵⁴ See Address by Robert S. McNamara to the Board of Governors of the World Bank (1973) for an eloquent exposition of this view. In effect McNamara argues—but without exploring the legal ramifications—for new rights for the rural poor, new rights to secure land reform, access to water resources and credit and technical services and schools, health, market and other facilities as well as new rights of access to institutions exercising political power.

sistent with fundamental goals of development. Thus, there may be new calls for an enlargement of the sphere of legally protected civil rights and a greater recognition of their importance.

These contrasting views raise fascinating issues, and perhaps demonstrate some aspects of the neglected importance of legal development as a component of political development. It may be that the ideal of rule of law faces severe challenges in much of the developing world. Perhaps, out of disagreements about the value of this ideal and its future may come some new synthesis. Perhaps, if formal law is to prove useful in the lives of most Africans, its benefits will have to become more visible and available than they have been heretofore. And the system whereby individuals can assert their claims must be made more accessible.

To increase access to the legal system and thereby reinforce the rule of law, one necessary step may be to broaden availability of professional legal services. This may be difficult in poor countries where the education of professionals is expensive, legal services are costly, and many in the private profession prefer the social status quo. Reforms here may require changes in the processes of acculturation and professional training of lawyers; these have heretofore placed too little emphasis on problems of social justice. In any event, the delivery of professional legal services may be only one aspect of a broad array of problems. Measures may be needed to strengthen access to and confidence in law by changing the language for its administration—by providing more education about law in society through schools, the media and other groups. Measures may be needed to open up access to basic level courts by reducing procedural formality and enhancing opportunities for popular participation. Alternative means for dispute settlement, such as arbitration and mediation, may need study and development. Policies towards customary law and its relation to modern law may need new examination. Another step, in some settings, might entail rehabilitation (through training and regulation) of the roles of traditional, non-professional legal functionaries—such as “bush lawyers,” lay pleaders, scribes and other kinds of agents who have provided services to the poor and ignorant in some African communities.

Efforts to open access to the legal system may need to be coupled with efforts to reformulate the content of guaranteed legal rights in society. The range of rights including equality of opportunity, freedom from oppression or overreaching in economic relations, freedom to form associations and secure access to the media, and freedom from abuses of administrative power may need re-examination and creative redefinition. Much

innovative, "normative" legal thinking may be needed to make civil rights law more relevant to popular needs.

Socio-legal thinking⁵⁵ and research are also surely needed. The lines of reform sketched above are only suggestive. They may depend on hypotheses yet to be formulated which will need empirical investigation. What should be done is obviously a subject for debate in other quarters. But perhaps fruitful discussion of the future of constitutionalism and judicial review in Africa (and perhaps throughout the world) may depend in part on the ability of political leaders, lawyers, legal educators and researchers—and those who goad them into action—to see the problems in new contexts.

⁵⁵ See Black, *The Mobilization of Law*, 2 J. LEGAL STUDIES 125 (1973).