

How to Assess the Political Role of the Zambian Courts?

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Chr. Michelsen Institute

P.O. Box 6033 Postterminalen,

N-5892 Bergen, Norway

Tel: + 47 55 57 40 00

Fax: + 47 55 57 41 66

E-mail: cmi@cmi.no

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Contents

INTRODUCTION	1
(I) THE ACCOUNTABILITY FUNCTION OF COURTS.....	2
(II) THE ROLE OF COURTS IN SOCIO-ECONOMIC TRANSFORMATION AND ACCESS TO JUSTICE FOR MARGINALISED GROUPS.....	3
(III) POLITICISATION OF THE COURTS AND THE FOUNDATION FOR JUDICIAL LEGITIMACY.....	3
THE PROPER ROLE OF THE ZAMBIAN JUDICIARY – AND WHY IT IS CRUCIAL TO DEMOCRATIC CONSOLIDATION	4
INDICATORS.....	6
THE COURTS AND SOCIAL INCLUSION OF MARGINALISED GROUPS	10
WHY IS THIS FRAMEWORK USEFUL?	13
BIBLIOGRAPHY:	14

Introduction¹

In Zambia, as in many other countries going through democratic reform processes, there is reason to believe that a stronger ideological emphasis on constitutional democracy, combined with international aid towards legal and judicial reform, have strengthened the courts.² Political accountability is currently regarded as a key to democratic consolidation in new democracies. There is an increasing focus on building and strengthening institutions that can create the required accountability structures, It is thus important to look more closely into what enables courts to fulfil such a function, and also to understand the limits to their role under various conditions.³

It is reasonable to assume that these developments have increased the capacity of the courts to contribute in processes of democratic consolidation and social transformation. But there is little systematic knowledge available about the role the Zambian courts actually have played in the political developments of the country – or about the role of other African courts for that matter.⁴ Important questions regarding the accountability function of the courts vis-à-vis the political authorities, their role in promoting socio-economic development, and their capacity to provide access to justice to marginalised groups are all under-researched. So are the conditions under which courts manage to generate legitimacy for their role, avoiding undue politicisation.

The paper aims to contribute to filling some of these gaps. Not primarily by filling in data, but by outlining a theoretical and methodological basis for analysing the social and political role of courts in democratisation processes. I will focus on two related but analytically distinct aspects of the courts' role: (i) the accountability functions of courts and (ii) their role with regard to social transformation and inclusion of marginalised groups. A potential consequence of an active judiciary is that the courts will be more politicised, and it is necessary to address this problem specifically, and investigate processes of building judicial legitimacy (iii).

¹ This paper reworks and builds onto the presentation "Accountability and the role of courts and institutions of restraint", prepared for the conference "Analysing political processes in the context of multiparty elections in Zambia 2001" held in Bergen 14-15 January 2002. In reworking and developing these ideas I owe much to the discussions and input from my colleagues in the "Courts in Transition" research group (in particular from Roberto Gargarella, but also from Elin Skaar and Ole Egil Andreassen). In developing a new research programme looking into the role of the courts in processes of democratic consolidation and social transformation in Latin America and Africa, we have discussed these issues extensively. My interviews with people in and around the courts in South Africa and Tanzania have also been most useful. So have the longstanding collaboration with Lise Rakner, Lars Svåsand and Inge Amundsen on the "Polinaf" programme.

² In the past decades there has been a growing ideological pressure in the international community towards democracy in the sense of liberal, constitutional democracy, with a strong emphasis on rights protection and institutions to check government power, leaving courts with a more prominent role. See Ackerman (1997), Choudry (1999) Klug (1997) Tate and Vallinder (1997).

³ The same holds for other accountability institutions such as human rights commissions, ombudsmen, anti-corruption agencies and independent electoral commissions. My focus is on the courts, but much of what is said here also applies at a more general level, also to other types of accountability institution.

⁴ There are partial exceptions, see for example Kunda (1998) on the Zambian judiciary; Gloppen (2000) and Klug (1997) on South Africa; Bukurura (1995 and 2002) on Tanzania and Namibia; and Widner (2001) on Tanzania and common law Africa generally.

Such analyses also require that we engage a number of normative questions regarding the role of judges in a democracy generally, and in the particular social and political context of Zambia. There is a need to clarify what should we should take as the 'standard' – in other words, which role should the Zambian judges aim for, given the constraints of their political and economic context?

(i) *The accountability function of courts*

Zambia, like many other African countries, have undergone processes of political and legal reform (with support/pressure from international donors) to establish civil, constitutional, democratic government, with the courts as the main guardians of the constitution and the rule of law. It has, however, proven difficult in practical terms to establish functioning boundaries for the political branches of power, in particular with regard to the President. The first question I want to address – and the one I will concentrate most attention of – is: *How should we go about investigating and assessing the capacity of courts to hold political power-holders (particularly the executive) to account?*

That Zambia, like many new democracies have a weak and fragmented political opposition (albeit no longer one absolutely dominant political party) makes the courts' accountability function particularly important – a bulwark against return to authoritarian rule. How can we best assess the strategies used by the courts to fill this function, and the extent to which they have succeeded?

In looking at this issue it is important to keep in mind that the idea of accountability is a multifaceted one. Political accountability can be defined as a situation where political power-holders and organs exercise their powers in a way that

- 1) is *transparent*, in the sense that it enables other institutions – and the public – to see whether it is done in accordance with the rules,
- 2) where the power-holders are *answerable* in the sense of being obliged to provide reasons for their decisions in public, and
- 3) where there are *institutional checks or control mechanisms* in place to prevent abuse of power and ensure that corrective measures are taken in cases where the rules are violated.

Each of the three components – *transparency*, *answerability* and *controllability* – may serve as the basis for an accountability relation. This means that there are very different ways in which courts may serve to strengthen the accountability of power-holders. It can do so by aiding the information flow about how power is exercised. By demanding that decision-makers provide the public or the affected parties with reasons for their decisions to show that they acted in a reasonable and rational manner – or by sanctioning unlawful actions by ruling the decision null and void, or order that some remedial action be undertaken.

The courts are part of a broader institutional set up for creating political accountability, but the courts have a special responsibility since they, as guardians of the constitution, also have an important role in securing that other institutions have the space to fulfil their accountability function.

(ii) The role of courts in socio-economic transformation and access to justice for marginalised groups

In Zambia, like elsewhere in Africa, the transition to a more democratic form of government has not been followed by significant changes in the social and economic structure of society to improve the plight of the poor majority. On the contrary, the twin processes of political and economic liberalisation, while bringing an increase in people's formal constitutional rights, have led to a downscaling of social services – which for many is a downscaling in the value of their new-found liberty.⁵ In this context it might seem as if the political opening, paradoxically, has made marginalised groups more dependent on the judiciary to defend their rights. The question is whether the Zambian courts are able and willing to take up such a role.

In some countries with a similar development there have been cases where vulnerable and marginalised groups (squatters, poor rural communities, women, children, people living with HIV/AIDS, and ethnic, religious and sexual minorities) have turned to the courts to have their interests protected. And in some cases these groups appear to have more success voicing their interests through the channels of the legal system than in the political arena.⁶ By analysing the strategies used by groups involved in such litigation, the extent to which they have been successful, and the nature of the courts' response, it may be possible to understand the extent to which the legal system is able to secure the political leaders' responsiveness and accountability towards the needs of poor and vulnerable groups. This – which – may be termed the *transformative potential* of the courts – is particularly relevant in a context like Zambia, where social transformation and development is widely understood to be crucial to the long-term consolidation of democracy. It is, however, also important to understand the political implications of fighting such battles in the legal arena. This brings us to the third and last issue I want to address:

(iii) Politicisation of the courts and the foundation for judicial legitimacy

A more central role for the courts and an increase in the scope for judicial activism has in some cases led to increased politicisation of the courts, sometimes to the point of open conflict between political power-holders and the judiciary as witnessed most dramatically in Zimbabwe, and to some extent also in Malawi, Uganda, Namibia – and in Zambia.⁷

In this context there is a need to know more about – not only the circumstances under which legal institutions can (and will) say 'no' to political power-holders, but under which conditions they are likely to have their authority respected. Given the significant international pressure for stronger and more independent courts, a pressure that in the case of most new and emerging democracies is backed by financial resources for judicial reform, it is important that we develop our understanding of the factors that make courts vulnerable to political influences and those that may lead to accusations of

⁵ See Dollar and Kraay (2000); Ravallion (2002); Przeworski and Vreeland (2000).

⁶ For a review of such experiences see Abramovich and Courtis (2002). See also Fabre (2000) At this stage the evidence of such a trend is, however, mainly anecdotal and there is a need to systematically investigate the prevalence of such 'political' and social rights cases in the courts.

⁷ In some Latin American countries there have been heated public debates and demonstrations at the homes and offices of controversial judges, protesting their lack of independence from the executive branch.

partisanship. It is also important to examine how these tendencies can be counter-acted, for example through judicial strategies to establish legitimacy across a range of constituencies.

The proper role of the Zambian judiciary – and why it is crucial to democratic consolidation

As noted above, an analysis of the performance of judiciaries in new democracies requires that certain (conditional and revisable) benchmarks are established concerning what to look for, what the ‘success criteria’ of judicial performance are. What are the qualities that we, on the basis of the theoretical literature, believe are important to develop in the judiciary in order for it to contribute positively to democratic consolidation?

In a democratic system judges should – we will argue – fulfil two main tasks, namely, to clear the channels of political change⁸ and to ensure protection to disadvantaged groups. This is particularly important in the context of new democracies where we often find that, despite reforms, the scope for political opposition is limited, and important interests are excluded. The judges are, according to this view, the guardians of the democratic process. They are the ‘*referees*’ in the democratic game.⁹

While those two tasks is a crucial responsibility of judges both in modern, *stable democracies*, and in regimes that are in a *process of democratisation*, it seems even more important in the latter cases, where political institutions tend to be fragile, the boundaries between the branches of power less respected, and the powers of the president formally and informally larger than in more stable democracies – giving form to what has been called ‘hyper-presidentialist’ regimes.¹⁰ Regimes that are still going through a democratisation process tend to have weak ‘vertical’ or ‘popular’ controls, something that makes it particularly important to have adequate “horizontal” ones.¹¹

⁸ ‘To clear the channels’ is to resist attempts to acquire/hold to power by illegitimate means (opportunistically amend the constitution, altering of election laws, gerrymandering, censorship, restriction of political rights etc.)

⁹ In one of the most influential books written on this topic, John H. Ely affirms that the constitutional role of the judges is defined by what he calls a ‘representative-reinforcing approach.’ Judges should try to ensure the proper functioning of the Constitution. Malfunctions occur, he says, when: ‘1) the ins [elected representatives] are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or 2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying the minority the protection afforded other groups by a representative system’ Ely (1980). Also, Nino (1990).

¹⁰ In ‘hyper-presidentialist’ regimes, the executive is given special powers in legislative matters (delegation of legislative functions), with regard to local decisions (the power to intervene with local governments, replacing authorities), or even to limit the rights of the people (i.e., by declaring a state of emergency). (Nino 1997).

¹¹ See for example (Schedler et al. 1999). Most modern democracies prefer horizontal over vertical controls. Apart from periodic elections most of the institutional mechanisms for controlling the representatives through the participation of the public have been suppressed (i.e., mandatory instructions and the right to recall). Political mandates have also been extended in their duration (less frequent popular elections). Internal controls include ‘political’ accountability mechanisms (the presidential veto, the senate’s capacity to prevent/delay the enactment of certain laws) as well as ‘non-political’ ones (performed by judges, and other agencies such as human rights commissions, ombudsmen, auditor generals, independent central banks etc.). The ‘non-political’ checks are particularly significant in

As the last and most fundamental protectors of the democratic process, judges should first of all scrutinise self-beneficial norms created by incumbents in order to retain their power and/or to weaken the influence of the opposition. Such initiatives have been all too common, also in Zambia (such as the constitutional amendments regarding eligibility for the presidency, aimed at barring particular candidates from running, and the (unsuccessful) attempt to introduce a third term as the rule of the incumbent was nearing an end...)¹² We also find numerous initiatives aimed at silencing the political opposition, sometimes to the point of violently encroaching upon the power of other branches.¹³ To look at election-related cases are thus particularly interesting.

Secondly, we suggest that the judges should strictly scrutinise all those norms aimed at affecting the rights of those groups that, even when they are not actually denied a voice or a vote, have particular difficulties in expressing and defending their views. This is particularly relevant in new and more fragile democracies, where the level of social conflict tends to be higher than in more consolidated regimes, and where the public institutions often seem less open to allow the political intervention of disadvantaged groups. In those cases, the judges, as ‘referees’ of the democratic game, should ensure that the underprivileged obtain the social benefits and the legal protection afforded other groups by the political system.¹⁴

From a normative perspective such cases represent opportunities for judicial intervention, as they regard the protection of the impaired rights of disadvantaged groups and ‘policing the process of political representation.’ On the other hand, it is important that judges know when they should remain silent or ‘passive’ (for example when a properly elected group or representatives, sanctions norms that the judges find unfortunate, but which are not self-serving or do not affect the procedural foundations of the democratic system). The questions of when and how to engage in judicial activism and when to exercise restraint, are particularly important to address for judiciaries in young democracies. It is thus of

dominant-party states (common among new democracies) as the only remaining institutional obstacle to unlawful use of power by the majority in cases where majority support has rendered political party dominant both in the executive and legislative branches of government.

¹²Manoeuvres on the part of presidents, aimed at securing re-election or to secure perpetuation in power by other means are numerous: Zambia’s ex-president Chiluba bowed off in 2001, but secured re-election in 1996 after a constitutional amendment barring ex-president Kaunda from running for office. Several other African presidents have attempted to get rid of constitutional provisions banning them from running for a third term, including Namibian president Sam Nujoma (who succeeded). The Malwian president is also involved in a bid for a third term. Similarly, in Argentina, ex-president Menem attempted to secure re-election by changing the rules. In Peru, ex-president Fujimori attempted to prolong his term by the ‘autogolpe’ in April 1992.

¹³ I.e., by directly shutting down Congress, as it happened in Peru in 1992, or in Zimbabwe, where the Chief Justice was forced to resign in 2001 after regime-induced demonstrators invaded and occupied the Chambers of the Supreme Court. Less violent means include the so-called ‘mordaza-law’ or ‘gag-rules’ promoted by president Menem, in Argentina. In Peru B.I. Bronstein was deprived of his ownership of the national TV channel, n.2, because of his opposition to president Fujimori’s regime (*Expediente n. 112-98-AA/TC*, April 24, 1998). In many African countries the opposition’s rights are restricted – at present most severely and overtly in Zimbabwe, where press freedom is severely restricted and journalists are jailed. Prior to the 2001 elections in Zambia there were complaints and court cases brought by the opposition over unequal access to the media and the ruling party’s use of state resources for campaigning purposes.

¹⁴ This is not what usually happens, but in South Africa, a number of court cases have brought over access to housing, health services, water and other constitutionally protected social and economic rights.

great interest to investigate strategies by which the Zambian courts have sought to accomplish this balancing act and the extent to which they have succeeded. In order to do this we need to develop an analytical framework that is informed by the theoretical and normative debates in this field, but at the same time provides for analyses that are grounded in the practical conditions of Zambia.

The establishment of a sound benchmark for this analysis requires not only thorough reflections on issues of *judicial activism/passivism*, but also of the related questions regarding *judicial independence* and *impartiality*. Our focus is primarily on power-relations that are internal to the political system (horizontal accountability – the capacity of courts to *say ‘no’* to the executive and *make their decision stick*) rather than the institutionalisation of popular control of those in power (vertical accountability relations). While the above discussion shows that there are strong arguments why effective checks on executive power by the courts are needed to consolidate modern democracies, there is still the question of how strong these internal controls should be. At the normative level there is the issue of the un-democratic nature of such institutions.¹⁵ At the practical level an extensive system of horizontal checks on power incurs *costs*, both financial and in terms of efficient decision-making. There is also the question of how to prevent misuse of the power by the judiciary itself. Reflections on what should be seen as an appropriate role for the courts also need to take into account issues of *judicial accountability* (how to guard the guardians) as well as the above-mentioned dangers of politicisation.

Indicators

Proceeding towards the actual analysis, the next step is to establish suitable indicators.

In order to assess the political role of the courts we need *performance indicators*. With regard to their accountability function vis-à-vis the government, these indicators need to take into account the preventive or *latent* function of the courts (other political actors’ anticipation of a likely negative sanction if they overstep) as well as the manifest or *displayed* ability to ‘say no and make it stick’.

When measuring courts’ ability to function as a check on executive authority, a commonly used indicator is to look at the number or percentage of cases in which courts decide against the state (normally this is restricted to the highest courts in the land). While this is a useful starting point, it does not take into account the significance of the decisions, or the merits of the cases in question. Meaningful accountability performance measures need to place importance on the significance of the ‘blocking events’ rather than their frequency, (although the latter also is relevant), and must also consider the substance of the courts’ argument in politically significant decisions going either way. It should also be noted that it may not be obvious what the significance of a decision is – or whether a formally contrary ruling actually does inconvenience the state. It is thus crucial that the analysis is based in an in-depth understanding of the broader political situation.

¹⁵ Un-elected judges nullifying elected representatives’ decisions, give rise to a counter majoritarian dilemma. Legalization of politics may cause empty the political sphere, and thus produce a democratic deficit.

In addition to finding ways to measure the courts' ability to say 'say no' to the government where this is called for, it is also necessary to have indicators addressing the courts' *authority* (their ability 'to make it stick'). To determine *government compliance* with adverse court decisions the political situation must be followed over time. (It is for example a common phenomenon that people released from police custody on court orders are rearrested shortly after.) It should also be considered whether the state only yields with regard to the particular case, or change behaviour patterns (repeatedly) sanctioned by the courts, as well as the institutional framework for pursuing claims originating from judicial decisions.

To find good observable indicators for the *latent authority* of the courts is difficult. But while it is not easy to observe to what extent other actors are influenced by their anticipation of a potential sanction by the courts, it is crucial to find ways to take the preventive or directive effect of these institutions into account since this is arguably the main mechanism by which courts exercise authority when they are firmly institutionalised. One possible path is to look at whether there are administrative processes to check for constitutionality in the drafting process of laws and policies in order to prevent adverse court decisions. Another path may be to analyse the extent to which issues of constitutionality are central in public and parliamentary debate, and whether threats of court action (or complaints to other accountability institutions) have a disciplining function. Interviews with legal practitioners and others may also shed light on the extent to which accountability institutions have such latent authority.

Related to this is the subtler phenomenon of cases not being brought before the judicial system because of the latter's lack of legitimacy among those whose interests the system should ideally defend. The state – or the judiciary – might also pursue a strategy of 'venting', i.e. allow certain cases to be tried and decided in favour of the plaintiff in order to maintain a lowest practicable threshold of legitimacy internally or in the interaction with the international community. The performance indicators are summed up in Table 1.

Table 1. Performance indicators

- a) Displayed judicial independence
 - frequency
 - significance
- b) Manifest judicial authority
 - compliance with court order
 - change of praxis ('precedence-effect' of judgments)
- c) Latent judicial authority
 - constitutionality considerations in legislation and policy-debates
 - cases not brought, 'venting'

In addition to the performance indicators, we need indicators on the institutional factors that are believed to impact on the courts' performance. These may be termed *indicators of structural independence* and aim to establish to what extent the institutional set-up and the legal framework guiding the operation of the courts is suitable, providing the necessary insulation from interference, and capacity and resources to function effectively.

An important factor here is the *powers and jurisdiction* given to the courts, in particular the extent of their review powers over legislation and executive action. (Are certain areas, such as emergency powers, shielded from review? How does cases reach the court? Can they take up cases on their own initiative? Can they review legislation in abstract or only in response to a particular case placed before them?)

A number of aspects are relevant here, but generally there are two dimensions: the scope of the courts' authority – the width of the domain where they can hold the government to account. The other regards the strength of their decisions – do they have the final say? Or if not, how easily can their decisions be overturned (i.e. in a subsequent proceeding at the same judicial level)? Particularly in new democracies this relationship tends to be relatively fluid – and the extent of the powers of the courts are to a large extent determined by the mindset of the judges themselves – what they see as their proper role. Who are the central actors on the stage thus becomes a factor of utmost significance – and a central factor in determining this is obviously the appointment procedures, and the criteria by which the appointees are selected.

The *appointment* of judge is widely regarded as one of the most important factors conditioning their independence – and the extent to which they are perceived by the public as independent. This is in turn important for their legitimacy. To lower the risks for political bias it is seen as important to avoid a too strong hand for the executive/political majority in the appointment of judges. On the other hand, the alternative (give some form of veto to the opposition, or leave it to the judicial profession) may also politicise the judiciary, creating a bench that is/appear to be unrepresentative or reactionary. A procedure involving at least two separate bodies is widely recommended. The extent to which this is in place – and effectively involves different interests – is thus important.¹⁶

In many countries, for example in Zambia, a special body – a judicial services commission or judicial council – is involved in the appointment process. This body is normally composed primarily of representatives from the legal profession, sometimes also politicians from across the political spectrum. Whether or not there is such a body, the nature of its involvement, how politically independent it is, and how transparent it operates, is relevant here. It is also relevant to consider the (implicit and explicit) criteria determining the selection of judges and the way this is reflected in the composition of the bench (in terms of class, gender, race, ethnicity, political background)

Arguably even more important for the independence of judges than their appointment, is the *terms and conditions of their tenure*. If dismissal, promotion or demotion is at the will of the executive/political majority, this seriously compromises their independence, likewise if their terms are renewable. From the perspective of independence, life tenure, or fixed non-renewable terms, and guarantees for salaries and benefits, is favourable. (On the other hand it is important to keep in mind the need to balance this against the need for appropriate mechanisms to discipline and impeach corrupt and/or incompetent judges).

¹⁶ The US model (appointment by the executive and ratification by the legislature) is rarely effective in contexts where a strong majority party controls both bodies, which is the case in many African countries.

The power of the purse is strong, and affects accountability agencies in various ways. If accountability agencies depend on the executive for their *budgets* this affects their effectiveness as well as independence. It is thus important to consider both the *adequacy* and the *security* of their funds: Whether they have a guaranteed budget, and if not, who approves it, how independently the funds are administered, and the extent to which additional funding can be secured from donors.

In addition to the financial resources, other ‘assets’ should also be taken into account and particularly what may be termed *jurisprudential resources*. These include training of judges; law reports regularly reporting significant judgments; library resources; computers; and internet facilities. Access to foreign judgements, not least from other countries in the region, may be an important resource for local judges. The indicators of structural independence are summed up in table 2.

Table 2. Indicators of structural independence

- d) powers and jurisdiction
 - scope of authority
 - strength of decisions
- e) appointment procedures
 - procedures of nomination and appointment
 - bodies involved (judicial council?)
 - background of judges
- f) terms and conditions of tenure
- g) budgets
- h) jurisprudential resources

While *structural conditions* are important it must be noted that these are neither necessary nor sufficient conditions for judicial independence and effective functioning of judiciaries. Institutionalisation of courts as accountability institutions (and agents of social transformation) also depends on other factors, the personal capacity, will and integrity of judges, the nature of the legal culture, the nature of civil society and the political culture in society.

Imagine that the Zambian president blatantly contravened the rulings of the Court of Appeal and systematically harassed 'troublesome' judges on the bench, like Robert Mugabe has done in Zimbabwe – who (if anyone) would come out in support of the judiciary? The political opposition? The business community? Ordinary people? The donors?

To be effective, and able to withstand attacks on their authority, courts depend on support from politically relevant groups in society. It is thus important in this analysis to seek to assess their *legitimacy*, and develop suitable indicators to identify whether there is significant social support for the courts, and how firm this is. Eventually, this could also help us to understand better the conditions under which the necessary legitimacy is generated, and which strategies are the most promising.

Public opinion polls may give indications of the levels of public support, both regarding public awareness and support. It is also important to look at how these bodies are portrayed

in the media, both the independent media and the government controlled press. Interviews with central stakeholders (legal and political academics, civil society activists, the legal community, members of various political parties, and of the press, the business community, donors) can also provide very useful information.

The courts rely on a working relationship with the government – unless respected by those in power their decisions are not implemented. Beyond executive compliance with adverse decisions, which is already discussed, government rhetoric may be an indicator of the legitimacy of the accountability institutions with the ruling elite.

In many new democracies the external/foreign support for the courts play an important role (and is in some cases stronger than the domestic constituency). How important is this in Zambia – and is the effect only positive? Some have argued that donor support may be a double-edged sword, making the courts vulnerable to accusations of being agents of foreign/neo-colonial forces (Again, the developments in Zimbabwe sound a warning in this regard and shows the importance of trying to assess to what extent this donor embrace may add to the courts politicisation, compromising their 'home grown' legitimacy).

The perhaps most important factor impacting on how courts operate is, however, judges' perceptions of what their own role should be (conceptions of appropriateness). To their conception of what is an appropriate way for them to seek to hold the government to account, of how various rights should be handled in court (for example with regards to social rights; and of what is possible. This is in turn related to the legal culture (for example with regard to judicial review powers and when it is proper for the courts to defer to the parliamentary majority). This can perhaps best be investigated through semi-structured interviews with judges and members of the legal community, as well as representatives of the political community and civil society organisations. Other important sources of data will be judgments and other material from significant court cases, the formal legal framework, official reports and media statements and debates.

The most important *indicators of institutionalisation* are listed in Table 3.

Table 3. Institutionalisation indicators

- i) perception of own role (legal culture, norms of appropriateness)
- j) legitimacy
 - in political society
 - in civil society
 - international community

The courts and social inclusion of marginalised groups

In most countries the courts have not been important arenas for articulating the concerns of the poor. The court system is generally not accessible to the poor, due to lack of knowledge, high cost, corruption and inadequate legal aid.¹⁷ Those who succeed in

filing their cases often face delays for years, only to find that their concerns are eventually dismissed. Most legal traditions are unaccustomed to handling social rights. The recruitment of judges from the elite, leading a life far removed from the plight of the poor, also influence the operation of the legal system, which as a whole tends to protect vested interests. Public policies aimed at reducing poverty may actually be barred through court action, notwithstanding formal constitutional commitments to social and economic rights.

There are examples of poor groups/NGOs successfully using court action to assert their rights, and of courts consciously promoting the interests of the weakest and most vulnerable. The Supreme Court of India has taken a lead in this regard, transforming itself into a “Supreme Court for Indians.” It has done so without strong backing for social and economic rights in the letter of the constitution. The Indian example has also inspired courts in other developing countries, not least in common law Africa, where a growing number of judges now strive to be socially relevant and see their role as facilitating social transformation – radical change, but in an orderly fashion, based on principles.¹⁸ South Africa is an interesting case where the constitution has provided both a constitutional basis for social rights cases and created a new Constitutional Court with a mandate to make protect these rights.

One of the most interesting cases heard on these matters anywhere, is from South Africa and is known as the *Grootboom* case¹⁹. It concerns the right to housing²⁰ and the right of children to adequate shelter. The case was brought by a group of families with children who had been evicted from a squatter settlement. The South African Constitutional Court did not grant individual legal redress from the state based on the plaintiffs’ social or economic rights. It ruled that not even for children²¹ did the constitutional right to shelter give rise to an individual claim against the state. However, the court ruled that the constitutional obligation of the state to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation” of the right to housing, had not been sufficiently discharged by the housing authorities. In addition to medium- and long-term housing programmes, reasonable schemes for the immediate and short term was needed to provide destitute people with rudimentary shelter. While the Court found that the constitutional right to housing does not constitute a directly enforceable claim on the part of homeless people, its ruling established the right to housing as a justiciable right, placing firm legal obligations on state policy, and on policy implementation as well as design.²²

¹⁸ Author's personal communication with senior judges in Tanzania, South Africa. See also Widner, Jennifer. A. (2001). *Building the Rule of Law*, W.W. Norton & Company.

¹⁹ “*Grootboom and others v Government of the Republic of South Africa and others*”, SACCT 38/00

²⁰ Section 26 provides that (1) everyone has a right to adequate housing; (2) the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right; (3) no one may be evicted from their homes, or have their homes demolished, without a court order made after considering all the relevant circumstances; and (4) no legislation may permit arbitrary evictions.

²¹ This refers to children in the care of their families.

²² In this case an NGO provided high quality legal assistance to the litigants while another NGO, acting as a ‘friend of the court’, provided a brief that much of the judgement rested on.

Lessons from countries with experience of social interest litigation on behalf of poor groups (India, South Africa), as distinct from countries in which the legal system is more hostile to the poor, suggest certain key factors. Information and legal literacy on the part of the poor and their NGOs representatives seem crucial, in particular knowledge of relevant case material and legal reasoning. Lower costs, adequate legal aid schemes, less bureaucratic and less costly court procedures, more lenient criteria of legal standing, are all factors that would be helpful. Similarly, capable courts, adequately equipped, efficient and free from corruption, would greatly enhance the prospects for social rights litigation.

Finally, a very important factor is political will on the part of the government to comply with and implement the rulings of the court.²³ This is closely linked to the legitimacy of the courts – which in turn seems to be linked to the ability of the court to be socially relevant – and not least in Africa.

To build a broad legitimacy-base in the population, "win the hearts and the minds of the people", is a great challenge for courts everywhere. It is a particularly great challenge after a period of authoritarian rule where the courts have been part of the control and punishing apparatus of the state. And in parts of the world where the formal legal system to a large extent is 'received' from the colonial state, and are not taken to reflect the traditions norms of the community. And where state resources are limited, rendering the lower courts in particular, under-resourced. How can the courts in a country like Zambia – where to some extent all these conditions apply – win broad legitimacy among the poor majority? Clearly such confidence builds up/deteriorates over time as a function of the performance of the justice system on various dimensions, and the perhaps most important aspect of this is whether people believe that they can rely on the courts to have their rights (including their social and economic rights) respected (in relation to the government as well as their fellow citizens).

The extent to which this is the case, and the people have faith in the courts, can be assessed through surveys (data from the Afrobarometer 2000, indicate that Zambians have relatively high confidence in their courts compared to other institutions of government) – and their actual performance can be assessed by looking at cases involving the rights of marginalised groups where they won recognition for their claims. One should however also look at the structural and normative factors enabling and preventing the ability of the courts to be relevant, accessible and just for poor people, and to be seen as such. The main access to justice barriers are presented in table 4.

²³ This problem is sometimes framed as 'how to create a culture of constitutionalism' and secure a commitment to self-binding, and lies at the heart of the question of how courts can hold decision-makers accountable. The term *self-binding* refers to a particular understanding of how constitutional commitment works. It is well set out by Jon Elster (1979), who refers to the myth of Ulysses and the Sirens. Ulysses, who knows he will be entranced by the Sirens' song and prone to steer his ship into disaster, binds himself to the mast and orders his crew to keep a steady direction and plugs their ears. In this way he may enjoy the wonderful song but still see clear of the Sirens' dangerous temptation. Similarly, a constitution, as an overriding, long-term commitment made after thorough reflection, should serve as a mechanism of restraint on actions and decisions (legislation and policies), in order not to allow short-term temptation jeopardise crucial long-term goals. The relevant question here is: what mechanisms can ensure that the 'constitutional' commitment by the donors to reduce poverty is not overridden by the temptations represented by domestic businesses, agricultural interests and other sirens.

Table 4: Access to justice barriers

- k) Resource constraints/ practical barriers for potential litigants
 - Costs of court fees
 - Costs of legal assistance
 - Lack of legal aid
 - Geographical distance (time and transport costs)
- l) Mental barriers of litigants
 - Fear
 - Disillusionment, (poor prior experience: delays, corruption, incompetence, bias)
 - Cultural distance ('foreign' legal norms in the formal court system)
- m) Resource constraints/ practical barriers in the legal system
 - Slow process, delay, (due to lack of judicial personnel and/or infrastructure: courtrooms, paper, phones, PCs, recording equipm., trained support staff)
 - Incompetence (due to poor education, training, lack of access to legal material)
 - Petty corruption encouraged by poor remuneration for (lower court) judges/magistrates and police
- c) Mental barriers in the legal system
 - Social background of judges (representativity, ability to comprehend)
 - Legal culture, formalism, bureaucratic procedures
 - Executive mindedness
 - Corruption (personal morals, will)

Why is this framework useful?

There are no quick and easier answers to the problem of how to institutionalise political accountability – which also implies respecting the rights of the marginalised sections of society. There are high hopes for courts to play a constructive role, and in some cases they have done so, but in other cases they have added to the existing problems. What is it that determine how the courts function? The tentative answer informing our approach is that this can be traced both to the institutional and legal framework of the state and to the way this is institutionalised – which in turn depend on economic and cultural factors as well as agency. In other words a complex interaction between a number of factors. In order to come to grips with these issues at all it is necessary to engage in an analytical approach that takes the complexity of the context into account, yet it must have sufficient theoretical strength and clarity to structure and make sense of the findings. We hold that thick description through qualitative methods of data collection and analysis are necessary to understand the processes through which courts (re)define their role, the strategies by which they seek to carve out and secure space for themselves in the political field during and after democratic reforms, and their impact on processes of democratic consolidation and economic transformation. The advantage of doing this within a set framework is that – by doing similar case-studies of courts in other countries, in Africa and elsewhere, it is possible to gain a better understanding of how the function of courts is related to differences in institutional, political and economic conditions. What we suggest is thus to proceed by *comparative case studies based on structured thick description*.

Bibliography:

- Abramovich, V. and Curtis, C. (2002), *Los derechos sociales como derechos exigibles*, Madrid: Trotta.
- Ackerman, Bruce. (1997). "The Rise of World Constitutionalism." *Virginia Law Review* 83: 771.
- Bratton, M. and N. v. d. Walle (1997). *Democratic Experiments in Africa. Regime Transitions in Comparative Perspective*. Cambridge, Cambridge University Press.
- Bukurura, Sufian Hemed (1995) 'Judiciary and Good Governance in Contemporary Tanzania' CMI Report 1995:3, Bergen: Chr. Michelsen Institute.
- Bukurura, Sufian Hemed (2002) *Reflections on Constitutionalism and the Administration of Justice in Namibia 1990-2002*. Windhoek: Out of Africa Publishers.
- Choudhry, S. (1999). "Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation." *Indiana Law Journal* 74: 819-893.
- Cortell, A. P. and S. Peterson (1999). "Altered States: Explaining Domestic Institutional Change." *British Journal of Political Science* 29: 177-203.
- Crisp, B. F. (2000). *Democratic Institutional Design*, Stanford University Press.
- Dollar, R., and Kraay, M. (2000), "Growth is Good for the Poor," *World Bank WPS2587*.
- Domingo, Pilar and R. Sieder (eds) (2001) *Rule of Law in Latin America: The International Promotion of Judicial Reform*. Brookings Inst.
- Doublet, David (1995) *Rett, vitenskap og fornuft : et systemteoretisk perspektiv på den rettslige argumentasjons verdimesseige forutsetninger*. Bergen : Alma Mater.
- Dworkin, R. (1986). *Law's Empire*. Cambridge, Mass., Belknap Press.
- Dworkin, R. (1996). "The Moral Reading of the Constitution." *The New York Review of Books*(21 March): 46-50.
- Dyzenhaus, D. (1996). "The Legitimacy of Legality." *University of Toronto Law Review* 46: 129.
- Dyzenhaus, D. (1997). The Politics of Deference: Judicial Review and Democracy. *The Province of Administrative Law*. M. Taggart. Oxford, Hart Publ.: 279.
- Elster, Jon (1979) *Ulysses and the Sirens*. Cambridge: Cambridge University Press.
- Elster, J. and R. Slagstad, Eds. (1988). *Constitutionalism and Democracy*. Cambridge, Mass, Oslo, Cambridge University Press, Universitetsforlaget.
- Elster, J., C. Offe, et al. (1998). *Institutional Design in Post-Communist Societies : Rebuilding the Ship at Sea*. Cambridge, Cambridge University Press.
- Ely, John Hart (1980), *Democracy and Distrust*, Cambridge: Harvard University Press.
- Fabre, C. (2000), *Social Rights under the Constitution*. Oxford: Oxford University Press.
- Gargarella, R. (2000) *The Scepter of Reason*. Dordrecht: Kluwer.
- Gargarella, R. (2002) *The legal foundations of inequality: the origins of constitutionalism in the Americas, 1776-1860*. Bergen
- Gloppen, S. (2000) *South African Constitutionalism 1994-2000: The Difficult Balancing Act of the Constitutional Court* (Ph.D. thesis, University of Bergen)
- Goodin, R. E., Ed. (1996). *The Theory of Institutional Design*. Cambridge, Cambridge University Press.
- Habermas, J. (1992/96). *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*. Cambridge. Mass., The MIT Press.

- Heper, M., A. Kazancigil, et al., e(ds.) (1997). *Institutions and Democratic Statecraft*. Boulder, Westview
- Haynes, Jeff (2001). *Democracy in the Developing World*. Cambridge: Polity press.
- Huntington, Samuel P (1991). *The Third Wave: Democratization in the Late Twentieth Century*. Norman, Oklahoma: University of Oklahoma Press.
- Kinander, M. (forthcoming). *On the Methodology of Jurisprudence – The Development and Justification of the Court-centered View of Doctrinal Law in Scandinavia*. (Ph.D. thesis. University of Bergen)
- King, G. (1994). "Designing Social Institutions."
- Klug, Heitz. (1997). "Introducing the Devil: An Institutional Analysis of the Power of Constitutional Review." *South African Journal of Human Rights* 13.
- Knight, J. and L. Epstein (1996). "On the Struggle for Judicial Supremacy." *Law & Society Review* 30(1): 87-120.
- Kritz, Neil J (ed.) (1995). *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*. Washington, D.C: United States Institute of Peace Press.
- Kunda, George (1998) "The Zambian Judiciary in the 21st Century", *Zambia Law Journal* 30/29.
- Linz, J, A. Stepan (1996). [*Problems of Democratic Transition and Consolidation*](#). Johns Hopkins Univ. Press
- Luhmann, N. (1992). "Operational Closure and Structural Coupling: The Differentiation of the Legal System." *Cardozo Law Review* 13: 1419.
- Luhmann, N. (1995). *Autopoiesis II. Udvalgte tekster af Niklas Luhmann*. Copenhagen, Politisk revy.
- March, J. and J. Olsen (1996). "Institutional Perspectives on Political Institutions." *Governance* 9(3): 247-264.
- McAdams, James (ed.) (1997). *Transitional Justice and the Rule of Law in New Democracies*. University of Notre Dame Press.
- Mæhle, S. (forthcoming) *Limits for judicial discretion – An Analysis of Judicial Legitimacy* (Ph.D. thesis, University of Bergen).
- Nino, Carlos (1997). *The Constitution of Deliberative Democracy*. New Haven: Yale University Press.
- Nino, Carlos (1990). *The Ethics of Human Rights*, Oxford: Oxford University Press.
- O'Donnell, G.(1999). Horizontal Accountability in New Democracies. In A. Schedler et al. (eds.), *The Self-Restraining State : Power and Accountability in New Democracies*. Boulder, Colo.: Lynne Rienner.
- O'Donnell, Guillermo and Philippe C. Schmitter. (1986). *Transitions from Authoritarian Rule : Tentative Conclusions about Uncertain Democracies*. Baltimore: Johns Hopkins University Press.
- Olsen, J. P. (1998). Institutional Design in Democratic Contexts. *Organizing Organizations*. N. Bruasson and J. P. Olson: 319-349.
- Power, T. and M. Gasiorowski (1997). "Institutional design and democratic consolidation in the Third World." *Comparative Political Studies* 30(2): 123-155.
- Przeworski, A., and Vreeland, M. (2000). "The Effect of IMF Programs on Economic Growth." *Journal of Develop. Economics*, Vol. 62, pp. 385-421.
- Ravaillon, D. (2002). "Inequality and Poverty: Looking Beyond Averages." *World Development*, Unpublished.

- Schedler, Andreas, Larry Diamond and Marc F. Plattner (eds.) (1999). *The Self-Restraining State: Power and Accountability in New Democracies*. Boulder, Colo.: Lynne Rienner Publishers.
- Shapiro, Martin (1981). *Courts: A Comparative and Political Analysis*. Chicago : University of Chicago Press.
- Skaar, Elin (2002). “*Judicial Reform and Human Rights in Latin America*”. (Ph.D thesis University of California, Los Angeles).
- Smithey, S. I. and J. Ishiyama (2000). "Judicious choices: designing courts in postcommunist politics." *Communist and Post-Communist Studies* 33(2): 163-182
- Stotzky, I.(ed.) (1993). *Transition to Democracy in Latin America: The Role of the Judiciary*. Boulder: Westview.
- Sunstein, C. R. (1996). *Legal Reasoning and Political Conflict*. New York, Oxford, Oxford University Press.
- Tate, C. Neal , Torbjorn Vallinder, Eds. (1997). *The Global Expansion of Judicial Power*. New York Univ Press.
- Widner, Jennifer. A. (2001). *Building the Rule of Law*. W.W. Norton & Company.

Summary

The paper addresses the methodological problems concerning how to assess the political role of courts in Zambia - and in new democracies more generally, and suggests a framework within which this can be done. Particular focus is on the accountability function vis-à-vis political authorities. We also raise the issue of the role courts play (positively or negatively) in processes of social integration of marginalised groups. And we ask how we can get a better understanding of the conditions under which courts generate legitimacy for their role and avoid undue politicisation.

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