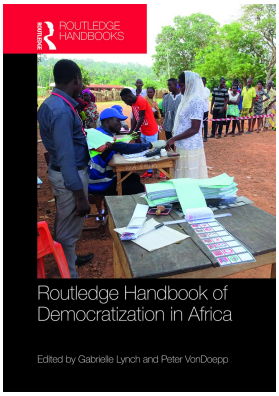


# Routledge Handbook of Democratization in Africa

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## Judicial power

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# 10
# JUDICIAL POWER

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In the early 1990s newly empowered judiciaries became a hallmark of Africa's emerging democratic constitutional orders. Imbued with a sense of optimism, there was hope that independent judiciaries could tame overly powerful executives and undisciplined legislatures. However, is writing powerful courts into new constitutions enough without the will or resources to bring cases to the court, a bench of judges ready and able to give full meaning to that power, or a government willing to respect and comply with the courts' decisions? Nearly thirty years later, what is the record of African judiciaries in promoting democracy in Africa, and how do we understand that role?

While there is consistent evidence across time and space that courts in sub-Saharan Africa are increasingly placed at the center of core political disputes, it is not always clear under what conditions courts are able to support democratic consolidation or prevent democratic backsliding. Indeed, now may be the time to ask whether observers have placed too much hope on African judiciaries as propagators of democracy. As Daly (2017) asks, can we legitimately expect courts to act as "alchemists" who turn the base materials of a new democracy into the gold of a consolidated democracy?

This chapter argues that we cannot distill the role of the judiciary down to either a static negative or positive force. Instead, the judiciary reflects the messiness of Africa's varied hybrid regimes. Assertive courts can help to protect and promote democratization, but they can also be rapidly marginalized or even shut down altogether by threatened political elites; while an array of actors—from activists to incumbent presidents—can look to the courts to further their own agendas. This argument is situated in the broader comparative politics literature on Africa where we know that formal constitutional rules matter, but it is not always clear *how* they matter and how they interact with informal power structures over time. Drawing from a range of empirical examples, this chapter begins by reviewing the paradoxical record of African judiciaries; it then proceeds to a conceptualization of judicial behavior and the varied theoretical explanations of judicial empowerment. From there the chapter turns to judicial historical legacies and their impact on judicial empowerment and democratization today. Finally, the chapter considers the interaction between agency and structure and assesses mechanisms of support outside of the judiciary. Throughout the chapter, the judiciary is assessed contextually in relation to other domestic and international moving parts.

## The mixed record of African judiciaries

One issue to keep in mind as we review the record of African courts is that, as they are asked to operate as a restraint on elites or wade into core political disputes, we see a concomitant judicialization of politics. The judicialization of politics, where courts become a means to address key policy or political controversies (Hirschl 2008), may help to stabilize a nascent democratic regime, but may also undermine the legitimacy of the judiciary. Those judges who boldly strike down acts of overreaching executives may find themselves marginalized, reassigned, blocked from promotion, or removed from the bench. The status of the courts vis-à-vis democracy is not inert, and an assertive court can be undermined in ways that portend the decline of democracy.

Overall, although African judiciaries have unevenly constrained executive overreach, there are pockets of pro-democracy victories. Courts have helped maintain space for other institutions (such as the legislature) and other actors (such as civil society) to agitate for greater accountability and democratic reform. Some examples of politically significant cases are provided below. The decisions range from "mega-politics" questions, such as presidential election disputes (Hirschl 2008, 94), to those concerning civil, political, and socioeconomic rights.

Recent presidential election petitions have embodied the complex pro- and anti-democratic threads running through the judiciary. Courts have ruled on presidential elections in Kenya, Liberia, Ghana, Malawi, Namibia, Sierra Leone, Uganda, Zambia, and Côte d'Ivoire, to name a few (see Azu 2013). However, from this list, only the court in Côte d'Ivoire reversed the electoral outcome, albeit in favor of the incumbent in 2010. In Kenya, courts nullified the August 2017 election and called for a fresh election in October.[1] The overall trend of upholding results partly reflects formal legal constraints, where in many countries a high standard of proof is required to demonstrate a *substantial* altering of results. For example, in Uganda, electoral statutes delineating "substantial effect" language have been relied upon in all three presidential petitions to uphold Museveni's victories (Wandera 2017). Yet this pro-incumbent bent cannot only be explained through technical legal obstacles. Judges have publicly cited extreme external pressure and scrutiny as politicians and voters wait for the judgment to be handed down (Murison 2013). This political pressure is even more pronounced on judicial leadership. Kenya's former Chief Justice Willy Mutunga claimed he had been threatened with "dire consequences" if the courts barred candidate Uhuru Kenyatta—who faced charges at the International Criminal Court for his alleged role in helping organize the country's post-election violence of 2007/08—from contesting the 2013 presidential election (*BBC News* 2013). Low reversal rates of electoral petitions are not unique to Africa, and neither is the accompanying political pressure and scrutiny. However, combined with questions about weak protections for judicial independence, they highlight concerns about the actual autonomy of judges.

Despite the historically high failure rate, presidential election losers keep filing cases. This is meaningful given recent trends in democratic backsliding. It suggests both that some hope of a supportive decision remains and that there is value in bringing attention to corrupt electoral practices; it delegitimizes the victor and may encourage opposition support in the next election cycle. The 2017 Kenyan election judgment will likely increase the number of presidential election petitions—a kind of regional judicial contagion effect. In 2018 presidential election results almost invariably ended up being contested in constitutional court (see, e.g., Cameroon, Madagascar, Zimbabwe, Mali, Sierra Leone). However, in the case of Kenya, it should be further noted that since the 2017 petition a new law was passed that "forbids any court from invalidating election results for non-compliance … if this 'did not substantially affect the result of the election'" (*BBC News* 2017). This illustrates a broader pattern: when courts threaten ruling elites, their formal powers or jurisdiction are often narrowed, or they face harassment and direct

interference (Llanos et al. 2016). Finally, the Kenyan 2017 presidential case also highlights the judicialization of elections; where every aspect—from interpretations of law to procurement contracts—was queried through the courts in the run up to the polls. Petitions on the legality of candidacy are potentially controversial as we see in the 2019 decision of the Senegalese constitutional court barring two major opposition candidates from running due to prior corruption charges – thus effectively paving the way for the incumbent victory (*News 24* 2019).

In contrast, parliamentary election petitioners are frequently successful (see Gloppen, Gargarella, and Skaar 2004) leading to an increasing number of such cases. In the 2007 Nigerian elections, for example, the "number of petitions … reached 1250 … the highest number in the country's history and more than double the 527 petitions lodged in respect of the 2003 elections" (Enweremadu 2011,128), and many of the results were partially or fully overturned. Studying Uganda's experience, Murison (2013) finds that post-2011, a number of parliamentary electoral petitions were upheld and MPs removed from their seats, including a number of high-profile politicians. The tangible differences between judicial decision-making vis-à-vis the executive versus the legislature is evidenced in two 2018 decisions from the Ugandan Constitutional Court. The Court upheld the removal of age limits for the presidency, but struck down an attempt to extend parliamentary terms from five years to seven years. As one judge noted, "Once the principle is set that Parliament has a right to amend any Article of the Constitution, simply by voting 'yes', there would be no limit to their demands" (Kakuru 2018, 419).

Moving away from election petitions, judiciaries have also been asked to adjudicate cases related to the conduct of political parties and procedural irregularities within the legislature. Take, for example, the issue of party switching. Goeke and Hartmann (2011) find that twenty-six out of forty-five African countries prohibit changing party affiliations in parliament. Yet, despite laws prohibiting party switching, it continues across the continent and many related cases have come before the courts. Witness, for example, Benin in 2001, where the court declared a new law that banned party switching as unconstitutional because it violated freedom of opinion and expression. Similarly, the Constitutional Court of the Central African Republic ruled that an MP represented the electorate and not the party (Goeke and Hartmann 2011, 271). Section 65 of Malawi's 1994 constitution prohibited party switching to any party represented in parliament. The law was amended in 2001 broadening the scope of the provision to include any organization that was political in nature. Shortly thereafter, the courts declared the amended version to be unconstitutional and reinstated the original version (Ellett 2013). These cases often have partisan political overtones, which create challenges in upholding judicial legitimacy and independence.

African courts have also ruled on a number of important constitutional matters regarding freedom of expression.[2] These cases exhibit the ongoing impact of colonial legacies; despite the constitutional protection of freedom of expression, colonial-era penal statutes offer the potential for severe chilling effects on free speech. For example, in a recent Kenyan case, *Okota v. Attorney General* (2017),[3] the Court concluded that invoking criminal charges was "clearly excessive and patently disproportionate" in matters of defamation when a civil remedy could be pursued. Uganda, Zambia, South Africa, and Sierra Leone continue to uphold criminal defamation statutes, and it remains to be seen whether a ripple effect will spill from the judgments in Kenya, Zimbabwe (2016), and Lesotho (2018) that found criminal defamation statutes unconstitutional.

Finally, it is noteworthy that most new constitutions in Africa contain expansive clauses on the rights of women, children, and minority groups and in regards to second-generation socioeconomic rights. Public interest litigation has advanced the rights of women[4] and there have been a number of socioeconomic landmark cases, particularly in South Africa, concerning the right to housing, the right to healthcare, the right to water, and others (see Klug 2000; Roux 2016). These cases may not be obviously politically significant, but to the degree that the court

is able to pressure the government to realize these aspirational rights, the greater the likelihood of a citizenry poised for critical engagement in democratic governance. Even where we do not yet see a robust jurisprudence of socioeconomic rights, the courts are well positioned to give meaning to the constitutional provisions moving forward (see Gloppen and Kanyongolo 2007).

This sampling of judgments illustrates the wide variety of roles played by the judiciary in resolving political disputes and setting social norms. While it may be the case that a court is unwilling to force a presidential election rerun, they may simultaneously be willing to claw back colonial-era repressive statutes that impinge on constitutional civil and political liberties. It could be argued that this less politically sensational role is more significant in pushing democratization forward. This further highlights the delicate balancing act judges have to perform in an era of judicialization. Bold decisions may heighten the insecurities of leaders, which in turn may undermine judicial independence.

Beyond this, recent patterns suggest that the symbolic value of the judiciary continues to be politically powerful, for both the regime and its opponents. As seen in the Kenyan election petitions, while opposition leader Raila Odinga chose not to challenge the results in 2007 via the legal system, in 2013 and 2017 he changed tack and approached the courts. It may not always be necessary for pro-liberal rights petitioners to "win" a case in order to strengthen democracy. And while high-profile election petitions have largely been unsuccessful, the option of seeking recourse through the courts has, in certain cases, been the key holding wall between democratic survival and democratic breakdown or violence. In this sense, large-scale attacks on judicial independence, court packing, or the creation of new constitutional courts (as in Zambia) may be evidence of significant democratic backsliding. Or, as we see in the Constitutional Court of Burundi's endorsement of the new constitution extending presidential term limits (2018), judges can sometimes be fully captured by the regime.

## Perspectives on the empowerment of African courts

In a judicialized political climate, courts often act as both democratic ally and foe. How do we understand this variation in judicial support for democracy? As an initial step, and drawing from my own research, I suggest that we move away from a narrow focus on *negative* conceptualizations of independence towards a positive concept of judicial e*mpowerment*. Negative conceptualizations focus on the extent to which judiciaries enjoy freedom *from* interference. While this is important, it focuses disproportionately on the political and institutional conditions that limit encroachment on court authority by political actors. Less attention is devoted to judges themselves and why they might undertake actions against sitting governments. In focusing on judicial empowerment, my concern is with the factors that contribute to assertive decision-making *and* determine judges' ability to resist interference. Here judicial power and judicial independence are two intertwined concepts: independence *to* make decisions and independence *from* interference (see Rios-Figueroa 2006). This framework echoes Kapiszewski and Taylor's (2008) work, which finds that one useful way to conceptualize judicial power is by distinguishing between *potential* and *active* power.

The discussion that follows reviews different theoretical approaches to the status and behavior of judiciaries and takes some steps to identify factors that transform potential judicial power into active power. With respect to the former, I highlight different schools of thought, each of which offers important insight into judicial empowerment. However, the ability of the judiciary to give positive, substantive meaning to judicial independence—to convert potential power into active judicial power—is contingent on several different external and internal factors. Internally, this includes the degree to which the judiciary has insulated itself from political pressure; the internal institutional structure and leadership, and a critical mass of judges

for whom a generous interpretation of their judicial power holds greater sway than short-term political expediencies (Ellett 2013). Externally, judicial power relies on political actors choosing not to interfere in judicial decision-making and complying with judgments.

### *External accounts: formal rules and political strategy*

External accounts focus largely on negative dimensions of judicial independence, essentially considering the extent to which judges enjoy freedom from interference and manipulation. From this perspective, judicial power is dependent on those political actors who have the authority to undermine judicial power, and their willingness to do so. Part of this reflects the specific configuration of constitutional and other legal rules regarding inter-branch relations. This includes rules on appointments to courts, judicial budgets, and judges' security of tenure. To the extent that such rules effectively insulate the courts, the odds of independent and empowered judiciaries increase. This concern is reflected in the measures taken to enhance judicial autonomy in Kenya's 2010 constitution (see VonDoepp 2018).

Yet attention to formal rules only offers partial insight, and other scholars suggest that the actions of elites vis-à-vis the courts reflects less the legal setting than their strategic political considerations. One leading approach is the electoral market model, which posits that courts can offer a type of "insurance policy" that will protect political elites as they seek to maintain their influence even when out of power. Dispersed and pluralized political systems, especially those with high electoral competition, create incentives for incumbents to respect judicial independence, as this can provide protections against overreaching governments who may occupy power in the future (Ramseyer 1994; Chavez 2003; Ginsburg 2003).

However, as shown in VonDoepp and Ellett (2011), these models have fared poorly when applied to African contexts. In neopatrimonial contexts the logic of the electoral market insurance model can be reversed, wherein competitive elections combined with neopatrimonial practices create an insecure environment that prioritizes short-term political calculations. The judiciary subsequently becomes more vulnerable to institutional attacks, manipulation and possible partisan capture (VonDoepp 2009; VonDoepp and Ellett 2011). As Widner (2003, 43) points out, party competition in Africa may not be a necessary or sufficient condition for an independent court system, as reflected in the fact that the average length of tenure for chief justices across the subcontinent has actually decreased under multipartyism (Ellett 2017). This reminds us that at best multipartyism may simply create a "bulwark against the dismantling of such courts" (Widner 2003, 43), without necessarily strengthening judicial independence.

While such external accounts offer some perspective on the empowerment of courts, it needs to be remembered that the focus is on political actors and the incentives they face when managing judicial power. In this sense, we obtain partial insight into why courts witness more interference in some contexts than others. But this offers an incomplete view. On the one hand, this only considers why the courts might or might not enjoy *potential* (as opposed to undertaking *active*) power. On other hand, it leaves out the role of judges themselves as purposive actors in the story of judicial empowerment. Thus, we need to view the courts less as passive objects whose independence reflects the strategic goals of elites and consider internal factors.

### *Internal accounts: judicial strategy and norms*

Internal accounts bring attention to the role of judges themselves in shaping judicial power. Here the focus shifts to examine the extent to which judges *act* to assert power, a key component of

judicial empowerment. One leading perspective in this regard posits that judges act strategically, adapting to the political environment in response to different incentives to variously support or oppose those holding power in other branches. Helmke's (2002) research on Argentina's courts demonstrates that courts will engage in "strategic defection"—once a weak government looks as if it is going to lose power, the judiciary will attempt to distance itself through anti-government rulings. VonDoepp (2006) uses this framework to account for judicial assertiveness in Malawi and Zambia. While affirming Helmke's perspective, he also suggests that fluid political environments may give judges incentives to embrace positions of neutrality vis-à-vis incumbents. Judges want neither to support government, nor be labeled "anti-government," but such a situation can still motivate some level of assertiveness vis-à-vis the government. A case that may fit this strategic model is the South African Constitutional Court. Roux (2016) notes how the Court moved from being a close ally of the African National Congress (ANC) during the democratic transition (see also Klug 2000), to strategically deciding cases to expand the reach of South Africa's constitution without threatening the hegemonic status of the ANC. This has entailed towing a delicate line between establishing its "legal legitimacy," while simultaneously upholding its "institutional security" (Roux 2016).

More broadly, the pattern in election cases detailed above suggests that courts act strategically. Lower stakes parliamentary disputes offer a way for the courts to assert their legal authority without jeopardizing the incumbent's grip on power. They may also increase public perceptions of judicial independence, which is important for building institutional legitimacy. While courts continue to exhibit deference to the executive in big cases, they may still be etching out the protection and expansion of rights in smaller, less politically threatening cases.

The behavior of judges reflects more than pure strategic calculations, however. Internal rules matter, as do the ways that judges interpret and negotiate those rules. Take the issue of access to courts, where judges have bent towards a strict or narrow interpretation of *locus standi*—legal standing—to bring a complaint. This is an easy and perhaps strategic way to dismiss cases before they are even heard. In Malawi, Tanzania, and Zambia, for example, cases are routinely dismissed on technical grounds rather than substantive merit (Ellett 2012; Gloppen and Kanyongolo 2007). This is in striking comparison to Benin, where you can write a letter to the court to commence a case (Rotman 2004). Here it is difficult to parse the strategic elements of judicial decision-making apart from institutional culture. Legal scholars often complain that African judges exhibit "timidity" in using their judicial powers to support rights-based democratization. This timidity is reflected in the mobilization of technical rules and narrow interpretations of judicial power (see, for example, Fombad 2011; Peter 1997; Prempeh 1999, 2006a). This reminds us that formal protections and authority are necessary but not sufficient for African judiciaries to actively push democracy forward. Agency and structure have to align.

With this in mind, we would do well to consider the role of informal procedures and norms in shaping judicial action. Rational choice approaches tend to downplay internal institutional culture as shaped by the historical development of the judiciary (Ellett 2013; Hilbink 2007; Kapiszewski 2012). Yet the extent to which the potential power of the courts is activated in defense of democratic norms may hinge on such cultural dimensions. Hilbink (2012), for instance, argues that judges may hold certain "professional role conceptions" that help to promote judicial empowerment; while others, such as the norm of "institutional apoliticism" that operated in Chile in under Pinochet for example, which may curtail it. In the African context, Gloppen (2003), Widner (2001), and VonDoepp (2006) echo Hilbink's findings using the concept of strategic apoliticism to account for judicial deference. Yet they extend beyond this to suggest that that historical institutional norms can be strategically mobilized as befits circumstances. In this vein, Gloppen (2003), for example, finds that Zambian judges have strategically taken on an

"apolitical" role due to the highly politicized nature of the cases they received: the non-political judge thus becomes a "norm of appropriateness."

These different perspectives offer key insights on the role of courts in democracies. The externalist accounts are especially effective in highlighting the conditions and factors that might shape negative dimensions of judicial independence; while the internal accounts help us to understand the forces that shape the willingness and capacities of judges to assert their authority. Yet a deeper understanding of judicial empowerment demands that we go further. Two pathways are herein suggested. One possibility is to investigate the historical legacies that shape the character of institutions today. In my diachronic study of Tanzania, Malawi, and Uganda (Ellett 2013), I found that although neopatrimonialism and judicial interference was consistent across cases, judicial empowerment varied. The judiciary in Uganda, for instance, retained a willingness to assert its power even when faced with aggressive political interference. Judicial empowerment in Uganda is therefore best explained through reference to the specific historical pathways and the institutional reframing of courts at critical junctures. These critical junctures shape the internal dynamics of the institutions, which in turn strengthen or weaken the ability of the courts to resist interference and maintain decision-making autonomy.

A second route to deeper understanding concerns the need to explore judges' behavior in the leadership and management of the judiciary. In her longitudinal study of the courts and the chief justice in Tanzania, Widner (2001) demonstrates that even in a political system continuously dominated by the hegemonic *Chama Cha Mapinduzi* (CCM), judicial elites are able to operate beyond the bench and reach out to the political leadership to build institutional authority. This account positions judges as actors strategically building their institutional power and influence over time. Beyond this, senior judges are sometimes forced to protect judicial autonomy by resisting political interference outside their courthouses. In other words, to protect themselves and rally support, judges must reconfigure traditional notions of judicial behavior and become explicitly political actors. This may entail engaging in "off-bench" activities (Trochev and Ellett 2014) and harnessing support networks. Historical legacies, institutional leadership, and off-bench behavior are reviewed in the final two sections below.

## Towards a historical understanding of judicial power

The footprints of colonialism, authoritarianism, and transitions to multipartyism are reflected most prominently in the way in which courts and law are used arbitrarily and instrumentally by elites, as well as by the ongoing weak protections for judicial independence in the face of powerful executives. Under colonialism, de facto judicial power was located in the hands of colonial officers, rather than formal constitutional provisions. Moreover, the governor had power of veto and could rule through decree. Thus the combination of arbitrary judicial power in the hands of the few and a pluralistic legal system created an arrangement subject to the whims of the political regime, rather than the formal strictures of a constitutional order—what Chanock (1985) describes as the "arbitrary nature of law." Under the colonial regime the administrative state was king and judicial power was more symbolic than substantive; it mirrored the political order and limited judicial power (Akech 2013, 354; Ellett 2012). At independence weak institutionalization of the courts, combined with unprofessional judges and few indigenous lawyers, created a weak base upon which to build a powerful judiciary (Ellett 2016; Massoud 2013). As Ekeh (2004, 33) argues, independence was less a transformation of the political-legal order than a "process of transferring ownership of the state."

Law did not disappear under authoritarian rule (see Tate 1993), but rather became an instrument of control, thus marking a continuity from colonialism. And rather than formal

restructuring of the judiciary, the most pressing concern at independence was "deracialization" (Mamdani 1996, 136). However, postcolonial courts were more than mere "kangaroo courts." In this vein, Shen-Bayh (2018) investigates how postcolonial regimes dealt with the complex challenges of internal threats from rivals. In analyzing seven postcolonial African autocracies, she finds that "insider threats" were more likely to be dealt with through the courts, whereas "outsider threats" were dealt with through extra-judicial means. Court trials create powerful narratives around the nature of an internal threat in times of political stress. One of the reasons the judiciary could be mobilized strategically was the broad palate of colonial-era statutes on hand. Courts operated within a byzantine code of outdated and repressive colonial-era law where, for example, broad preventive detention statutes could be a powerful instrument of repression for the state. In instances where the judiciary demonstrated too much independence, judicial power was reassigned to parallel jurisdictions—for example, to traditional institutions (Malawi), to parallel quasi-judicial structures (Tanzania), or to the military (Nigeria, Uganda)—through increased arbitrary scope and usage of court martials (Ellett 2013).

As courts came into the democratic era, legal and constitutional conditions for a more assertive role appeared to improve. Francophone Africa witnessed an expansion of judicial power with the introduction of constitutional courts/councils with new major differences in tenure and appointment and abstract judicial review (Böckenförde 2016). In Anglophone Africa not all judicial institutions were new in form, but their new robust review powers, combined with a "generous bill of rights" (Prempeh 2006a), marked a notable expansion of *potential* judicial power. Yet these formal structural changes—the adjustment of jurisdiction, appointment powers, and appellate procedures (Horowitz 2009)—required a new mindset for African judges, many of whom had a long career sitting on authoritarian-era benches. There therefore needed to be an accompanying shift away from a "jurisprudence of executive supremacy" to a new "jurisprudence of constitutionalism" (Prempeh 1999). In addition, courts continued to suffer from "[f]ewer financial, material and human resources" and were "stained by a history of oppressive authoritarian rule or by the use of the law … as a means of economic predation" (Tamanaha 2011, 2–3). These factors, combined with legacies around the political instrumentality of the law, made the realization of an empowered judiciary in the 1990s difficult.

Despite these challenges, transitions to multipartyism in the early 1990s was overwhelmingly a critical break from the past. Given the "newness" of some of the courts, it could be argued, as Scheppele (2005, 34) has about the former Soviet world, that the judiciary actually commands more legitimacy and support than either the executive or the legislature; symbolically standing apart from the brutal authoritarian politics of the past. In many cases courts have used these new powers and legitimacy to assume a central role in shaping the trajectory of post-Cold War politics (Issacharoff 2017, 9). There have been many democratic victories through civil and political rights cases, the claw-back of oppressive colonial-era criminal statutes, and the use of the courts as a forum to play out electoral disputes, thereby acting as a form of institutional containment against autocratic encroachment. Yet the institutional legacies of the past still remain, and perhaps the strongest of these is the instrumentality of law and courts as a tool of political oppression or a kind of window-dressing of democratic legitimacy. Judges and their allies still have to fight to maintain their power. The powers and jurisdictions of courts, appointment bodies, and court leaders are still being constrained and judiciaries are still being reconfigured. For example, Zambia (2016) and Zimbabwe (2014) created stand-alone constitutional courts with the power of first and final instance for constitutional matters, including presidential election petitions. Appointments to these new courts have been highly politicized; they are headed by a separate court president and have both, at time of publication, remained loyal to their respective regimes,

upholding the 2016 presidential election results in Zambia by dismissing on a technicality, as well as the election of President Mnangagwa in Zimbabwe in 2018.

## Thinking about judges, off-bench activities, and informal networks

Attention to historical, political, and legal legacies are an important analytic tool as we trace the pathways towards judicial empowerment today. Moving away from these broader, slow-moving macro-historical forces, this section considers the role of agency: the power and influence of both judges and other supporting legal actors and networks outside the court. The concern is with how individual and collective agency operates with the historical and structural forces outlined above.

The dominant political science approach to understanding judges' role in judicial empowerment focuses on what judges do or not do *on* the bench (Trochev and Ellett 2014). Yet across the continent, the increased judicialization of politics and ongoing political crises necessitates a more dynamic role for the judge both on and *off* the bench. As captured by Prempeh (2006b, 602):

> What may be inappropriate conduct for a judge in a politically competitive, mature democracy with a rights-assertive public may not be improper or problematic in a less-than-open political system, where public demand for courts is low. In the latter setting, judges might risk even greater social irrelevance if they remain wedded to a passive conception of the judicial role, expecting legal change to come principally through episodic litigation or the unlikely initiative of an intransigent political class.

The role of chief justices may be especially critical in this regard. The office of the chief justice has expanded its administrative responsibilities and political visibility since the 1990s (Leakey 2012), suggesting that their role may be all the more central in the cultivation of legitimacy. Chief justices' proximity to political power renders them simultaneously vulnerable and powerful—they may act as conduits for executive interference, or heroic defenders of independence. Widner's (2001) account of Chief Justice Nyalali's leadership in Tanzania demonstrates how one individual was able to convince the CCM leadership that the rule of law should be reestablished. Later Nyalali worked to cultivate the broader legitimacy of the judiciary via public outreach, writing articles in newspapers and appearing on the radio to educate the public on the work of the court.

Beyond public outreach, senior judges are sometimes forced to protect judicial autonomy by resisting political interference outside the courthouses. Under certain crisis conditions, judges may go beyond their traditional institutional insulation by bargaining, lobbying, campaigning, and protesting. In other words, judges must reconfigure traditional notions of judicial behavior and become explicitly political actors "off-bench" (Trochev and Ellett 2014). Uganda provides a powerful example of a judiciary where judges courted allies and resisted pressure to align with the executive (Trochev and Ellett 2014; Twinomugisha 2009) when, in 2007, they joined lawyers in a total strike of the court system protesting political interference.

In order to be effective, judges must often seek the support of allies. Judicial support networks may be formal, embedded in the legal complex (i.e., national law societies); or they can be informal and grounded in economic ties, kinship ties, or political interests. The study of informal networks and judicial empowerment and independence is still underdeveloped (Dressel, Sanchez-Urribarri, and Stroh 2017). One reason is that informal networks are challenging to identify, and their causal connections to judicial behavior and empowerment is difficult

to trace (Stroh 2016). One potential approach is to isolate and hone in on the activities and networks of judicial leadership.

Regional and international support networks for judges and lawyers are particularly important in the context of sub-Saharan Africa, whether it is the *AfricaLii* project providing free access to legal information, or the Southern Africa Chief Justices Forum (SACF) where judicial exchange and continuing legal education are promoted. SACF has also worked with the International Commission of Jurists (ICJ) and other bodies to engage in fact-finding missions in instances where judges have been persecuted or unfairly dismissed. Strategic litigation and international fact-finding missions do not happen in a vacuum. Regional and international efforts to pursue strategic litigation are often the result of what Finnemore and Sikkink (1998) refer to as international "norm cascade," where states adopt norms in response to international pressure, even when there may be no domestic consensus on the issue. Consider, for example, the harmonization of death penalty regimes in southern and eastern Africa since 2000 (Novak 2012) and emergent trends in cross-citing both regional court judgments and other domestic court decisions (Daly and Wiebusch 2018). This suggests, moreover, that we cannot contain our analyses of domestic courts within the state. Courts are connected beyond the boundaries of the sovereign state through international law, regional courts, regional and international professional bodies, and civil society and lawyer activists; our research has to be reframed accordingly. As Slaughter (1997, 187) noted two decades ago, "[j]udges are building a global community of law." Slaughter continues that judges' common enterprise is to protect their professional identity from direct political influence; in turn these emerging legal epistemic communities become powerful tools in shaping judicial decision-making and empowerment.

In sum, there are a range of strategies through which judges help to enhance their judicial power: through positive decision-making and signaling; through formation of off-bench strategic alliances; through formation of a collegial and courageous judicial culture; through proactive and, where needed, defensive judicial leadership; by being willing to go beyond the legal technicalities of cases; and through supporting the appointment and promotion of a wide range of judges with varied experiences (Ellett 2013, 206–8).

## Conclusion

Despite a long period of academic neglect, it is now clear that African judiciaries matter politically in unprecedented ways, especially in their potential to shape nascent democratic orders. For this reason, we need sharper understandings of their empowerment; analysis that transects and transcends democratic and authoritarian regimes. Robust constitutional provisions to protect judicial independence are necessary—particularly in regards to judicial appointments—but they are not sufficient for judicial empowerment. Rather, we need to turn our attention to the broader constellation of factors that contribute to assertive decision-making and determine judges' ability to resist interference. In the discussion above, I have attempted to illuminate several of the key factors that demand consideration; most notably historical institutional legacies, the formation of strategic alliances for judges, strong judicial leadership, and regional and international connections. We cannot untangle the sequencing of judicial independence and democratic development. But we do know that an autonomous judiciary is the lynchpin of political accountability and rule of law.

Looking forward, future research needs to expand beyond the "high politics" of the highest-level courts. We need to direct our attention to the entire legal system. This includes magistrates' courts, local courts, and religious courts. There are many unanswered research questions about the role these lower courts play in broader dynamics of democratization. The role of courts in

mega-politics cases in constitutional courts is only one piece of a complex puzzle. Extending beyond the apex court may also reveal the critical informal networks that buttress judicial empowerment through illuminating career pathways, key allies, and strategic relationships between judges and political and economic elites. We should also expand beyond our narrow focus on judges. The legal complex is growing and becoming more dynamic. Just like judges and the courts, lawyers can play both important pro- and anti-democratic roles—from bringing public litigation cases to facilitating the abuse of power (Manji 2012). The number of lawyers entering the marketplace continues to rapidly increase and an unprecedentedly high number of women are now entering the legal profession. Gender and judging in Africa remains an understudied phenomenon, despite the fact that the continent is surging ahead globally in terms of gender equality at the highest levels (see Bauer and Dawuni 2015; Dawuni and Kuenyehia 2017). These changes in the legal complex will surely have implications for the role of the judiciary in democratization.

To conclude, in order to understand the role of African courts in democratization it is important to study them as both a political actor and as an arena for political contestation. Courts may act strategically in maintaining their power through limiting their antagonization of the regime in high-stakes political cases. Although presidential election cases may have little chance of succeeding, the court provides a forum to air serious political conflict, and judges may send a signal of "not now," but "come back later." Over time as judicial power expands and tempers executive power, judges will likely be constrained in response. These ebbs and flows of judicial power may cycle rapidly over time. As Ziblatt (2006, 333) suggests, "Any slice of a single "political regime" at a particular moment in time may be constituted by institutions and rules that function according to diverse and possibly conflicting logics." It is clear that politics in Africa is judicialized and we will continue to see the courts both supporting and undermining democracy across regimes. Courts may be useful tools of regime oppression *and* important sites of political resistance. Moving forward, scholars must embrace this dynamic fluidity and understand that the court may simultaneously be operating as both democratic ally and foe.

## Notes

1 Supreme Court of Kenya Election Petition No. 1 of 2017.
2 For example: in Zambia *People v Kasonkomona* (2013), and *Chipenzi v The People* (2014); in Zimbabwe *Mutambara v AG & Another* (2015); and in Uganda *Charles Onyango Obbo and Another v The Attorney General* (2004).
3 In 2016, the petitioners were charged under Section 194 of the Kenyan Penal Code, which regulates defamatory speech. Following an analysis of comparative and international jurisprudence, Justice Mativo found that the offence of criminal defamation was not reasonably justifiable in a democratic society and declared Section 194 unconstitutional.
4 See, for example, the Botswana female inheritance case *Mmusi and Others v Ramantele and Another* (2012).

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