

# Western Constitutionalism and African Nationbuilding: The Anglophonic East African Experience

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During the past thirty years there has been a rapid acceleration in the birth rate of nations of peoples as the Third World have demanded that colonial powers remove themselves.<sup>1</sup> The desire of the new nations to acquire instant partnership in technological society has been intense. Nations composed of fragmented tribes and cultures, not yet indicated on maps or included in textbooks, with names and regulations still strange to their own lands, have emerged as voting participants in the world decisions of the United Nations. The birthing process has frequently been laborious; even where it has occurred with ease, there have been severe postpartum difficulties.<sup>2</sup>

In conjunction with the creation of the newly independent countries, written constitutions were prepared. In anglophonic Africa the constitutions were modeled after the Westminster principles of parliamentary government. Many of the constitutions are also similar to that of the United States and to the ideals expressed in the unwritten "constitution" of Great Britain.<sup>3</sup> But while the initial written constitutions reflected western ideals, the manner of their implementation reflects the legacy of the complex and diverse traditions of Africa. The African experience may indicate the noncolonial value patterns of the fu-

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1. See generally L. KESTELOOT, *INTELLECTUAL ORIGINS OF THE AFRICAN REVOLUTION* (1972); A. OBOTE, *THE COMMON MAN'S CHARTER* (1969) [hereinafter cited as OBOTE].

2. See J. MAQUET, *AFRICANITY* 116-26 (1972).

3. See Morris & Read, *Uganda*, in 13 *THE BRITISH COMMONWEALTH: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTIONS* 87-124 (G. Keeton ed. 1966) [hereinafter cited as Morris & Read]; Baldwin, *A Constitutional Comparison: Mexico, the United States and Uganda*, 10 *CAL. WEST. L. REV.* 82 (1973) [hereinafter cited as Baldwin, *A Constitutional Comparison*]; Ghai, *Constitutions and the Political Order in East Africa*, 21 *INT'L & COMP. L.Q.* 403, 411-12 (1972) [hereinafter cited as Ghai].

ture. For, generally, the African constitutions have only worked where they have been flexible enough to serve the process of nationbuilding under a strong ruling power.

Unfortunately, what is good for the party in power has not always been good for the nation. The East African countries have in practice all but abolished the Westminster parliamentary form of government; in its place an all-powerful presidency has emerged. It is only pragmatic constitutions serving the ever changing needs of an African ruler that have had any hope of survival.

This paper will examine the relevance of the Westminster principles as articulated in the anglophonic African independence constitutions to the functioning of the newly emerged countries. The Constitution of Uganda will be the primary focus;<sup>4</sup> the Constitution of the United States will serve as a baseline. The paper will discuss the problems of gaining and retaining the national unity required for a stable nation and the role of the constitution in this drama. It is possible that past development and present struggles under the U.S. Constitution can provide insights that may facilitate the development of stability in new countries. However, the complex problems facing Third World nations may necessitate remedies unfamiliar to western constitutional forms of government. Constitutionalism has been considered by many scholars to be a tool to insure political stability, national togetherness and personal liberties. To date, this tool has not been adequate for these new nations.

### The Colonial Background

Although contact with external forces had long preceded the establishment of full colonial rule, prior to the twentieth century the African continent, especially the area south of the Sahara and north of the Limpopo River, had little exposure to the industrial revolution and its implications. The twentieth century may be divided into three components for purposes of examining the African experience of developmental change.

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4. The author has chosen to focus on Uganda for the following reasons: 1. Uganda is one of the first nations to achieve a national flavor in its constitution. 2. During the initial reign of President Milton Obote, Uganda appeared to demonstrate great promise of achieving the Westminster dream of constitutional government; then it completely negated that achievement with the sweeping elimination of a constitutional form of government by the succeeding president, Idi Amin, former chief of defense. Uganda thus became the first East African nation to abandon constitutional rule. 3. The author lived in Uganda and worked with the Uganda Constitution prior to General Amin's assumption of power.

The first third of the century saw the introduction of a mercantile, commercial economy and a stratified, pluralistic society.<sup>5</sup> However, the rural population remained on the extreme periphery of these changes. The second third of the century witnessed the buildup, and later the dismantling, of the colonial political empire. Continued expansion of the frontiers of commercial economic activity facilitated the movement of population into the periphery of modern sociocultural influences.<sup>6</sup> The last third of the century, beginning with the late 1960's, witnessed accession to independence.

In order to achieve a more balanced and integrated economic, political and social structure, the transformation of African society had to be carefully planned so that all segments of the population would come to accept the new order.<sup>7</sup> The challenge posed by independence was whether, given the political experience achieved and the pressures generated during the previous periods, planned efforts could be successful in facilitating self-sustaining growth. A further challenge was—and is—whether planned development can occur in a context of social equality and political stability as articulated in the constitutions of the various African nations.

In Africa, as in other parts of the Third World, development, planned or unplanned, is occurring rapidly. A conglomeration of predominantly subsistence-based rural societies is being invaded and replaced by non-agrarian, urbanized, national communities.<sup>8</sup> Commercial developments in agriculture, and the growth of large urban areas offering a wide range of modern services, have caused migration from rural areas to the towns and cities. In the years immediately following independence, a population settled and employed in cities and towns was thought a necessary concomitant of economic development and cultural change. Urban areas are the sites for many of the most productive

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5. See generally THE POLITICAL ECONOMY OF DEVELOPMENT (N. Uphoff & W. Ilchman eds. 1972); Seidman, *Law and Economic Development in Independent, English-Speaking, Sub-Saharan Africa*, 1966 WIS. L. REV. 999.

6. See INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, THE ECONOMIC DEVELOPMENT OF UGANDA 5-36 (1962). See generally Okigbo, *Independence and the Problem of Economic Growth*, in ECONOMIC TRANSITION IN AFRICA 323 (M. Herskovits & M. Horwitz eds. 1964).

7. See Miller, *The Rural African Party: Political Participation in Tanzania*, in THE POLITICAL ECONOMY OF DEVELOPMENT 425 (N. Uphoff & W. Ilchman eds. 1972); Morse, *The Economics of African Socialism*, in AFRICAN SOCIALISM 35 (C.W.H. Friedland & C.G. Rosberg ed. 1964); REPORT OF THE COMMISSION OF INQUIRY (Gov't Printer, Nairobi, 1971); ECONOMIC PROGRESS AND PROBLEMS, 24 AFRICA 41 (1973).

8. See generally A. MABOGUNJE, *URBANIZATION IN NIGERIA* (1968); P. VAN DEN BERGHE, *AFRICA, SOCIAL PROBLEMS OF CHANGE AND CONFLICT* (1965).

kinds of economic activity and are an essential locus for specialized enterprise and services. They are also the areas in which political change, unrest, and ferment occur.

In an urban environment there are increased opportunities for individual initiative and choice. Urban family patterns, child-rearing practices, and social groupings attune to life in a heterogeneous and flexible community, and urban life reflects less strongly than its rural counterpart the culture base from which the inhabitants come.<sup>9</sup> Urban centers are seen as the hinges of development, confronting local peoples and customs with the wider world, generating simultaneously new expectations and the means of their satisfaction through economic, political and social change.

Many African nations, however, have only one major city of any size or importance,<sup>10</sup> while the remainder of these nations continues to be rural. Efforts by the newly independent governments to achieve a modern technological society through reliance upon foreign aid (and the implied corollary of urbanization) served to destroy rather than promote a sense of nationhood. Consequently, many African countries today have abandoned the policy of rapid urbanization which they pursued upon achieving nationhood, and give priority in current and proposed planning to rural development. However, the rural areas are where the problems of communications and factionalism are greatest.<sup>11</sup>

At independence in anglophonic countries, constitutions patterned after western principles were adopted and announced as the source to which these countries could look for political stability and for protection of individual liberties.<sup>12</sup> Yet the independence constitutions of most anglophonic countries were designed to cope with an already urbanized community.<sup>13</sup> The constitutions failed to recognize the needs of a rural population;<sup>14</sup> yet the rural population retained most of the customs and heritage uniting the particular region. The new constitutions indicated a belief that reliance upon traditions was incompatible

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9. See W. HARVEY, *LAW AND SOCIAL CHANGE IN GHANA* (1966).

10. P. ALLEN & A. SEGAL, *THE TRAVELER'S AFRICA: A GUIDE TO THE ENTIRE CONTINENT* (1973).

11. See Verbit, *TANU Builds the Nation*, 81 *YALE L.J.* 334, 338-39 (1971) [hereinafter cited as Verbit]; see generally J. NYERERE, *FREEDOM AND SOCIALISM/UHURU NA UJAMAA* (1968) [hereinafter cited as UJAMAA]; J. NYERERE, *FREEDOM AND UNITY/UHURU NA UMOJA* (1967) [hereinafter cited as UMOJA].

12. See Baldwin, *A Constitutional Comparison*, *supra* note 3.

13. See Verbit, *supra* note 11, at 338-39.

14. See *id.* at 11; R. JAMES & F. KASSAM, *LAW AND ITS ADMINISTRATION IN A ONE PARTY STATE* (1973).

with economic, social and political modernization.<sup>15</sup> Nevertheless, the history and traditions of the people could not be easily altered with the designing of a flag and the pronouncement of nationhood.<sup>16</sup>

Prior to the colonial period the African people possessed independent religious and legal systems. The reigning colonial powers later imposed boundaries for new territories with little or no consideration of territorial imperatives. The "boundaries" arbitrarily divided legal systems and tribal communities. In West Africa, for example, national boundary lines were drawn vertically into the interior according to a coastal territory division among the European seagoing powers. Language barriers and the resultant communication difficulties were inevitably troublesome obstacles to effective government in many of those African nations.<sup>17</sup> In East Africa, tribal villages and tribal languages were split. Six major language groups now exist in the region, each as different from the others as English is from Chinese. Each major group is further subdivided into other languages and dialects. Once it became clear that differences in custom, language and notions of political processes would render parliamentary government unworkable, the realities of the various national problems caused strong individual leaders to emerge as a replacement for constitutional rule.<sup>18</sup> The var-

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15. See generally UJAMAA, *supra* note 11; OBOTE, *supra* note 1; Seidman, *Constitutions in Independent, Anglophonic, Sub-Saharan Africa: Form and Legitimacy*, 1969 Wis. L. Rev. 83.

16. In the cosmopolitan urban centers of Dar es Salaam, Kampala, Nairobi and the like, there is not adequate shelter; there are inadequate employment opportunities; public services are insufficient to meet the constantly growing demands, and the governments, for the most part, do not have the revenue to meet the needs of the people. These inadequacies foment great displeasure. The people find as their root enemy the laws and the constitution of the nation. The result is that the leaders do not have time to allow the new residents the opportunity to democratically arrive at a consensus of will. Consequently, the governments in the various nations achieve nationhood through their own concept of what is good for the particular nation. See *Economic Progress and Problems*, 24 AFRICA 41 (1973); W. HARVEY, *LAW AND SOCIAL CHANGE IN GHANA* (1966). See generally UJAMAA, *supra* note 11; UMOJA, *supra* note 11; Ghai, *supra* note 3, at 417-21.

17. The impact of colonialism may be seen in Senegal and Gambia, two major independent nations which are relatively homogeneous with respect to language and religion, and which were divided by European powers. Senegal was taken by the French, Gambia by the British. Each thus inherited a different language, a different system of laws, a different concept of presidents, a different notion of history, a different administrative and judicial system, and a different analysis of judicial review.

18. President Julius Nyerere of Tanzania has attempted to avoid this result by transferring his charismatic qualities to the governmental structure which he heads, so that the institutions of his government will survive him. See Verbit, *supra* note 11, at 353-57. From readings and observations it would appear to the author that Tanzania is well on its way to achieving the Nyerere goals of nationhood. Unfortunately the goals seem too closely tied to the man and his personal appeal to the people.

ious political systems began placing their hopes for stability in the hands of charismatic leaders.<sup>19</sup>

### A Contrast: The Articulation of National Goals in Post-Colonial America

In the United States and Great Britain it has often been observed that the nations and laws regulating them are a product of consensus and commitment. The political literature of modern western nations in their early years of formation articulates the unifying principles around which the nation and its people would be organized.<sup>20</sup>

In the United States, the unifying goals were articulated in the Declaration of Independence, the Federalist Papers, and the Constitution. In addition to establishing a basis for rebellion, the Declaration of Independence stated the goals around which the colonies united; that is, "to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness."<sup>21</sup> Once these goals were set forth in the declaration, however, the question arose of how the government was to be structured so that they could be attained.

Under the Articles of Confederation the thirteen American states

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19. In 1960, President Nyerere's Tanganyika African National Union party (TANU) won virtually unanimous control of the National Assembly in the first independence government elected in Tanzania. See Verbit, *supra* note 11, at 337. TANU's national movement under Nyerere has continued to strengthen its hold on the political life of the nation. See *id.* at 343-52; H. BIENEN, *TANZANIA: PARTY TRANSFORMATION AND ECONOMIC DEVELOPMENT* (exp. ed. 1970).

This pattern works well where the leader has the support of the strong party in the nation, but it results in confusion and even chaos where leaders clash, as in Uganda where Prime Minister Obote came into conflict with the Kabaka of Buganda and later with his commander-in-chief, Idi Amin. The unifying features in Tanzania developed from the powerful TANU national movement, whose ideals were expounded in the "Arusha Declaration" (reprinted in full in UJAMAA, *supra* note 11, at 231-50). In Uganda once the clash between the Prime Minister and Kabaka was settled by an overthrow of the Kabaka, the nation moved in the direction of Tanzania's development with one party in power and a strong party platform set forth in the COMMON MAN'S CHARTER. The ideas for nationhood developed in both documents have competed for a degree of acceptance on the part of the general population. In Tanzania the struggle continues around the dynamic figure of Julius Nyerere; in Uganda the struggle ended violently. In either case the search for national unity takes place within the context of the supremacy of a political party (TANU) or the supremacy of an individual strongman (General Amin), but not as envisioned in the independence constitutions by a consensus of the population.

20. See, e.g., T. TASWELL-LANGMEAD, *ENGLISH CONSTITUTIONAL HISTORY* (11th ed., T. Plucknett ed. 1960).

21. C. BECKER, *THE DECLARATION OF INDEPENDENCE* 8 (1958).

failed to effectively unify for their mutual needs, benefits and obligations. While the colonial states had been relatively united in the face of a foreign and oppressive power, no specific need for continued unity was immediately apparent when the new government was formulated. Therefore mutual cooperation between states began to evaporate.

The evils of such disunity were articulated in the Federalist Papers. Arguing in favor of the then newly proposed federal constitution, the Federalist Papers pointed to the inability of the government under the articles to raise revenue from the states, to pay for the administration of government and to extinguish the national debt;<sup>22</sup> to the inability to apply sanctions to insure adherence to its laws;<sup>23</sup> to the inability to regulate commerce;<sup>24</sup> to the inability to provide for the national defense;<sup>25</sup> and to the absence of federal judicial power.<sup>26</sup> These defects were all believed to result from the fact that the existing federal government had authority only over the states in their corporate capacities as opposed to direct authority over individual citizens.

After recognizing that the American people were already united by the strongest ties (language, custom, and history),<sup>27</sup> John Jay, in a series of four essays,<sup>28</sup> said that previous experience with a national Congress showed that the majority of the American people accepted the concept that such a body could knowledgeably determine the best interests of the entire nation:

They considered that the Congress was composed of many wise and experienced men. That being convened from different parts of the country, they brought with them and communicated to each other a variety of useful information. That in the course of the time they passed together in enquiring into and discussing the true interests of their country, they must have acquired very accurate knowledge on that head. That they were individually interested in the public liberty and prosperity, and therefore it was not less their inclination, than their duty, to recommend only such measures, as after the most mature deliberation they really thought prudent and advisable.<sup>29</sup>

Such a national consensus would be the best security against hostilities from abroad.<sup>30</sup> Moreover, if the people of America should be

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22. THE FEDERALIST No. 7 (A. Hamilton).

23. THE FEDERALIST No. 21 (A. Hamilton).

24. THE FEDERALIST No. 22 (A. Hamilton).

25. THE FEDERALIST No. 23 (A. Hamilton).

26. THE FEDERALIST No. 22 (A. Hamilton).

27. THE FEDERALIST No. 2 (J. Jay).

28. THE FEDERALIST Nos. 2-5 (J. Jay).

29. THE FEDERALIST No. 2, at 11-12 (J. Cooke ed. 1961) (J. Jay).

30. THE FEDERALIST No. 3 (J. Jay).

divided into a number of nations rather than united under a single federal government,

envy and jealousy would soon extinguish confidence and affection, and the partial interests of each confederacy, instead of the general interests of all America, would be the only objects of their policy and pursuits. Hence like most other *bordering* nations, they would always be either involved in disputes and war, or live in constant apprehension of them.<sup>31</sup>

Madison in the tenth essay began a masterful explanation of how a well-constructed republic tends "to break and control the violence of faction."<sup>32</sup> He described a faction as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."<sup>33</sup> Madison then stated that "[t]here are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects."<sup>34</sup>

Madison favored the latter method because he believed that there were but two equally unsatisfactory methods of removing the causes of faction, by destroying the liberty that is essential to its existence or by giving to every citizen the same opinions, the same passions, and the same interests.<sup>35</sup> Quickly dismissing the first remedy as worse than the disease, Madison showed that the second is as impracticable as the first is unwise.<sup>36</sup>

Having dismissed the possibility of removing the causes of faction, Madison explained how a well-constructed republic could control the adverse effects of factions. Assuming that a faction consisted of less than a majority, he demonstrated that the republican principle which enables the majority to defeat the factional interests would be an effective control.<sup>37</sup> Madison recognized, however, the need of a democratic government to control factions when they encompass a majority which would sacrifice "both the public good and the rights of other citizens" to its ruling passion or interests.<sup>38</sup>

To secure the public good, and private rights, against the danger of such a faction, and at the same time to preserve the spirit and

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31. THE FEDERALIST No. 5, at 24-25 (J. Cooke ed. 1961) (J. Jay).

32. THE FEDERALIST No. 10, at 56 (J. Cooke ed. 1961) (J. Madison).

33. *Id.* at 57.

34. *Id.* at 58.

35. *Id.*

36. *Id.*

37. *Id.* at 60.

38. *Id.* at 60-61.

form of popular government, is then the great object to which our inquiries are directed. . . .<sup>39</sup>

In searching for a means to attain this goal, Madison excluded the possibilities that either moral or religious motives could be relied on for adequate control. "They are not found to be such on the injustice and violence of individuals, and lose their efficacy in proportion to the number combined together, that is, in proportion as their efficacy becomes needful."<sup>40</sup> Neither, he concluded, could pure democracy be a cure since it must decide matters solely on the basis of what is felt by the majority of the whole and since nothing is provided to "check the inducements to sacrifice the weaker party, or an obnoxious individual."<sup>41</sup> Therefore, it was in the design of the proposed republican form of government that he found a solution.<sup>42</sup>

Later essays in the Federalist Papers explain further how the separation of the national government into three functionally distinct branches could help control factions within the federal government. No law infected with factional interest would endanger the republic unless a faction gained total control of all three elements of government. Such a situation would be most unlikely where the members of each branch were elected or selected by different means and therefore developed different independent institutional viewpoints. Such separation in the federal government was therefore intended not to divide the nation, but to unify it.<sup>43</sup>

### Nationhood in Anglophonic East Africa

In anglophonic East Africa the birth of new nations came about in varying ways. Yet in each country the native political force preparing to take over the reins of government had to have the power of a political entity behind it. The initial pragmatic purpose of party formation was therefore to challenge the foreigners who ruled those countries.<sup>44</sup>

Furthermore, as Tanzania's President Julius Nyerere indicates, the western ideal of democratic political parties could be counterproductive in an African setting.<sup>45</sup> He argues that political parties and politi-

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39. *Id.* at 61.

40. *Id.*

41. *Id.*

42. *Id.* at 62-64.

43. See Baldwin, *The United States Supreme Court: A Creative Check of Institutional Misdirection?*, 45 *IND. L.J.* 550 (1970).

44. J. NYERERE, *DEMOCRACY AND THE PARTY SYSTEM* 15 (1961).

cal doctrine have to be tied to the particular nation and to the particular stage of economic and social growth of the people,<sup>46</sup> and he points out that African nations do not have "the long tradition of nationhood nor the strong physical means of national security which older countries take for granted."<sup>47</sup> A handful of people, he notes, "can still put [a] nation into jeopardy and reduce to ashes the efforts of millions."<sup>48</sup> Therefore, he concludes, the concept of a constitution mandating a western form of democratic rule for such a struggling nation is foreign to the practical day-to-day notions of nation building.<sup>49</sup>

President Nyerere argues further that a bill of rights like the one found in the United States Constitution limits advancement, for there is very little he can do to effectuate realistic goals and priorities for his nation under the limitations of a bill of rights. Constitutions, he argues, cannot guarantee individual rights in a developing-nation setting, especially when factionalism is inherent in the composition of the population. To guarantee individual rights would tend to defeat the very purpose for the guarantees by serving to protect those whose object it is to destroy democracy. Furthermore, Nyerere points out that a bill of rights results in grave conflict between the various branches of government, especially the judicial and executive branches.<sup>50</sup> A conflict such as this in an emerging nation is ill-afforded since it may bring down an otherwise stable government; it is a luxury afforded only to developed nations.<sup>51</sup>

The concepts of nation-building articulated by Nyerere and developed in his party's Arusha Declaration are replicated in Uganda. Under the leadership of President A. Milton Obote, Uganda after independence initially moved in the direction of Nyerere's proposal for developing a Third World.

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45. *Id.* at 8-15.

46. *Id.* at 14-16; UJAMAA, *supra* note 11, at 19-22, 37.

47. *Extracts from the Report of the Presidential Commission on the Establishment of a Democratic One Party State*, in ONE PARTY DEMOCRACY 461 (L. Cliffe ed. 1967).

48. *Id.*

49. *See generally* UJAMAA, *supra* note 11; UMOJA, *supra* note 11.

50. *See* Verbit, *supra* note 11, at 358. It is possible, Nyerere notes, to draft a bill of rights in which statements of principle are so hedged with provisions and qualifications that the government retains in large measure the absolute power it had prior to the articulation of the bill of rights. This technique has the effect of divorcing the provisions of the law from the ethical principles on which they should be based. A bill of rights in that form provides little protection for the individual and induces in the citizen a mood of cynicism about the whole process of government. Further, it tends to limit governmental advancement in creative nation-building and create conflict within the government as if it were a viable document for the protection of individual rights.

51. *See* Baldwin, *A Constitutional Comparison*, *supra* note 3, at 95.

## The Articulation of National Goals in Post-Independence Uganda

Uganda's population of approximately ten million people is divided principally into four racial groups—Bantu, Nilotic, Nilo-Hamitic, and Sudanic. Each of these four racial groups has been in turn socially, culturally, and linguistically divided into distinct tribes, kingdoms, clans, and family units.<sup>52</sup> As one Ugandan notes:

Uganda is a political creature of nineteenth century British imperialism and colonialism . . . .

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Before colonization, the areas were occupied by a diversity of ethnic groups, each with its own language, individual cultural, political and social styles and traditions. For at least two centuries most of these ethnic groups had existed as independent societies with their own kinds of political organizations. It is likely that 90 percent of the people of each ethnic group had never spent a day outside their own groups—which means that to a great extent, each group had always existed economically, socially, politically and physically independent from all other groups.<sup>53</sup>

Additionally, the Ugandans are divided by religion and language. It is estimated that just under 50 percent of the Ugandan population is Christian, 6 percent Muslim, and the remainder followers of traditional religions or subscribing to no organized system of religious beliefs. The Christian community is in turn composed of approximately 55 percent Roman Catholics and 45 percent Protestants.<sup>54</sup>

As a result of British colonial rule, English is probably the best-understood language. Luganda, the language of Baganda people, is the vernacular language most often heard, but even its use is restricted to certain areas. Swahili is a second language in some parts of the country, but is not used widely.

The racial, ethnic, political and religious divisions have been a constant source of friction, at times leading to armed hostilities among the people of Uganda. Despite continuous efforts to the contrary, neither a half century of British colonial rule nor a decade of political independence has united the Ugandans. Clearly, the political experience under the military dictatorship of General Idi Amin, whereby Muslim-Sudanic factions are favored at the expense of others, is but

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52. For example, the largest racial group, the Bantu, is composed of four ethnic groups—the Baganda, numbering over three million, the Iteso, the Ankole, and the Basoga, each numbering approximately one million.

53. P. GUKIINA, *UGANDA, A CASE STUDY IN AFRICAN POLITICAL DEVELOPMENT* 14 (1972) [hereinafter cited as GUKIINA].

54. J. MBITI, *AFRICAN RELIGIONS AND PHILOSOPHY* 299-317 (1969).

the most recent example of the critical divisions among the people of Uganda. Thus at first glance, it would seem somewhat presumptuous to point with certainty to any Ugandan document as the articulation of national goals.

Given the nature of most political entities, however, it is unlikely that Uganda will disintegrate into its constituent parts. Moreover, the longer Uganda remains united by political or military force, the greater the likelihood that internal unity will develop from the natural comingling of its people. This process can, however, be retarded or accelerated depending upon the manner in which the national government is organized and the goals it seeks to achieve. Therefore, it is of some importance to see how the Ugandan leadership has cultivated or retarded this synthesis.

The three documents under which the nation of Uganda has attempted to unify are the Independence Constitution of 1962, President Obote's Constitution of 1967, and the *Common Man's Charter*, a socialist manifesto of the Uganda People's Congress. The Independence Constitution, like the American Articles of Confederation, was an unsuccessful attempt to establish a unified nation based upon the existing quasi-independent political units within the national borders. The Kingdom of Buganda and, to a lesser extent, the Kingdoms of Ankole, Bunyoro, and Toro and the Territory of Busoga, were given extensive authority over significant matters of local concern.<sup>55</sup> More importantly, the Kabaka (King) retained his position as the hereditary leader and focal point for unity and loyalty of the highly-centralized Buganda Kingdom. Representing roughly one third of the Ugandan population and occupying one fourth of the country, Buganda's unification under the Kabaka's leadership posed a threat to the national government. This threat was accentuated when the Kabaka of Buganda, Sir Edward Mutesa, was installed as the first president of Uganda.<sup>56</sup>

For one year after independence, the Queen of England, was also the Queen of Uganda, and the executive authority was formally vested in her. Thus Queen Elizabeth remained head of state as constitutional monarch, but acted only on the advice of the Ugandan government. By amendment to the 1962 Constitution the office of the president was established to take over this function. Except for his ability to preside over meetings of the Parliament, the president's power was closely

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55. See Morris & Read, *supra* note 3, at 87-155.

56. See *id.* at 81-83.

analogous to that of the Queen. The real power began to be assumed by the prime minister.<sup>57</sup>

The natural conflict that arose between the Kabaka of Buganda (president of the country) and the prime minister of the national government was inflamed in 1966. In a quick succession of events, Prime Minister A. Milton Obote assumed all governmental powers, declared that the 1962 Constitution and the Parliament were suspended, and put down a military uprising by the Kabaka and the Kingdom of Buganda. In the aftermath, Obote established a unitary form of government based on the use of military and police force.<sup>58</sup>

The Constitution of 1967 was to be an articulation of this new political order. The government was to be functionally divided between three branches of government,<sup>59</sup> limited by constitutionally protected rights and freedoms of the individual.<sup>60</sup> But while ostensibly the 1967 Constitution was to be the supreme law of Uganda, the concentration of power in the office of the presidency jeopardized the continued effectiveness of the Constitution and the other components of government.

The most significant concentration of power in the president was the result of article 21 of the Ugandan Constitution, which empowers the president, acting in accordance with the advice of the cabinet, to declare that a state of emergency exists in Uganda or any part thereof. This power in practice includes the power of the president to suspend all or any part of the Constitution during these periods of emergency.<sup>61</sup>

This power is not limited or controlled in any meaningful way by the Constitution or by the other elements of government. Although the president supposedly acts in accordance with the advice of the cabi-

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57. The 1962 Independence Constitution of Uganda which implemented Westminster principles including a Chief of State, Prime Minister, and Parliament was adopted at the London Constitutional Conference of 1961. That conference also set the schedule for independence. Uganda became independent October 9, 1962; see Morris & Read, *supra* note 3, at 74-81. At present Uganda is under military rule, General Idi Amin having come to power by force of arms in 1971.

58. See generally GUKHINA, *supra* note 53. See also *Uganda v. Commissioner of Prisons, Ex Parte Matovu*, [1966] E. Afr. L.R. 514, 521-24 (Uganda). This case resulted in the new Constitution being drafted by President Obote and approved as the law of the land on September 8, 1967.

59. THE CONST. OF THE REPUBLIC OF UGANDA chs. IV (The Executive), V (Parliament), and VIII (The Judicature) (1967).

60. *Id.* at ch. III (Protection of Fundamental Rights and Freedoms of the Individual). The Kingdom of Buganda and the Kabaka were effectively eliminated by ch. III, art. 8, cl. 3 and ch. VII, art. 81.

61. *Id.* at ch. III, art. 21.

net, article 33 makes it clear that their tenure in office is subject totally to the president's discretion. Moreover, article 79 states that when the president is required by any provision of the Constitution to act in accordance with the advice of any person or authority,<sup>62</sup> the question of whether he has done so cannot be inquired into by any court.<sup>63</sup>

Although article 21 limits the time period within which a state of emergency may exist without approval of the National Assembly,<sup>64</sup> President Obote successfully contended that he could suspend that part of the Constitution so as to extend the state of emergency for as long as he deemed necessary. In addition, the article provides the president with the ability to use preventive detention during a state of emergency.<sup>65</sup> While this power may constitutionally be exercised only by providing the individual with specific grounds for his detention, as well as providing judicial review of those grounds and the opportunity to consult legal counsel, these safeguards have not been given effect in practice. This unlimited power of detention aided President Obote in silencing political opposition.

Another source of presidential power is found in articles 61 and 62, which provide that the president controls the time and place of each annual session of Parliament and may prorogue or dissolve Parliament. Since the Parliament continues for five years from the date of its first sitting unless dissolved,<sup>66</sup> the president could constitutionally prorogue the Parliament at the first sitting of each yearly session for the entire five year period. President Obote used another theory, however, in ridding himself of a bothersome Parliament. By both declaring a state of emergency and dissolving Parliament, he contended that he could constitutionally suspend that portion of article 61<sup>67</sup> which requires a new general election within sixty days of the date of dissolution.

Other sources of power are in article 58, which gives the president an absolute veto over bills passed by Parliament, and article 64, which gives him the power to legislate in any exceptional circumstance when immediate action is necessary. Power also stems from the natural

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62. *Id.*

63. *Id.* at ch. VI, art. 79, cl. 1.

64. *Id.* at ch. III, art. 21, cl. 2. The National Assembly is the legislative arm of the government and together with the president makes up the Parliament. *Id.* at ch. V, arts. 39, 40.

65. *Id.* at ch. III, art. 21, cls. 5, 6. See also *Uganda v. Commissioner of Prisons, Ex Parte Matovu*, [1966] E. Afr. L.R. 514, 521-24 (Uganda).

66. THE CONST. OF THE REPUBLIC OF UGANDA ch. V, art. 62, cl. 3 (1967).

67. *Id.* at ch. V, art. 61, cl. 3.

dominance of the president as the political leader of the ruling party in the National Assembly.

The judicial branch established by the 1967 Constitution was expected to uphold the Constitution and to protect individual rights. Chapter III of the Constitution, however, limits the protection of human rights where such rights conflict with the public interest.<sup>68</sup>

Finally, the demise of a federated system of government increased the power of the national government; thus the power of the national leader was magnified. Nowhere is this more apparent than in article 80, which divides Uganda into eighteen districts whose internal governments are established by Parliament. Nowhere in this list is the Kingdom of Buganda—in its place are four separate and distinct districts of no greater prominence than any other district in Uganda.<sup>69</sup>

The accumulation of all governmental power, first in the hands of President Obote, and presently in the hands of General Amin, has a significance beyond simply the failure of Uganda to establish a democratic and constitutional form of government. Given the existence of a nation, arbitrarily established by a colonial conference without taking into account the lack of internal unity or common purpose necessary for self-adhesion,<sup>70</sup> the development of a dictatorship was a predictable result of tribal disunity and national apathy.

To militate against a one-leader national policy, the Uganda People's Congress under President Obote's leadership adopted the *Common Man's Charter* as the party's platform for the development of "full security, justice, equality, liberty and welfare for all sons and daughters of the Republic of Uganda . . . ."<sup>71</sup> Significantly, it advocated that the economic as well as political power of the nation be vested in the majority of the people.<sup>72</sup> It recognized that in the past the nation's human and material resources had been exploited for the benefit of a small privileged class,<sup>73</sup> but that Uganda could not afford to build two nations within its territorial boundaries, "one rich, educated, African in appearance but mentally foreign, and the other, which constitutes the majority of the population, poor and illiterate."<sup>74</sup>

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68. *Id.* at ch. III, art. 8, cl. 5.

69. *Id.* at ch. VII, art. 80, cl. 1.

70. Even the nation's boundaries were an arbitrary decision by external powers. See A. McEWEN, *INTERNATIONAL BOUNDARIES OF EAST AFRICA* (1971).

71. OBOTE, *supra* note 1, at 2.

72. *Id.* at 16.

73. See *id.* at 12-13.

74. *Id.* at 12.

To develop a more equitable distribution, the *Charter* emphasized the diversification of the economy to make it less dependent on foreign trade, nationalization of private industries, the creation of a cooperative bank catering solely to the peasants in order to induce the development of local industries, and massive education of the people of Uganda in order to allow establishment and operation of industries that would be controlled by the people collectively.<sup>75</sup>

The *Charter's* emphasis on the evils of economic oppression and the means of eliminating it was in sharp contrast to the emphasis in the Declaration of Independence and the Federalist Papers on the evils of and remedies for political suppression. Where the Federalist Papers argued that a unified nation is dependent on the creation of a structurally divided, balanced and limited federal republic, the *Charter* sought to establish national unity through a broad distribution of the nation's wealth. The two different approaches are understandable in view of the distinct colonial experiences of the two nations. Whereas the most visible threat to liberty in colonial America was an unrestrained foreign military and political governing power, in Uganda the most visible threat was the exploitation of the nation's wealth for the benefit of a few. As a direct result, within each nation clear ideas developed as to how the continuance of the respective injustices could be avoided. Ultimately, however, the governmental structure established in Uganda could not overcome tribal, religious and linguistic differences, and the attempt to create a strong unitary government without the benefits of a workable division of governmental powers resulted in a political dictatorship.

### Separation of Powers in Independent Africa

The strong executive emerging in many African states is a contradiction of the independence constitutions. A strong leader often was able to use the independence constitution as an example of continued colonial control by treating the document more as a treaty with a conquering nation than as a politically ideal compact. The rejection of the Westminster parliamentary principles reflected, in part, a desire to return to concepts of native law which the new leadership argued had been all but ignored by the colonial rulers. The history of Uganda presents the best example of the complexity of the problem faced at independence.

Uganda was colonized in the mid-nineteenth century.<sup>76</sup> The

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75. *Id.* at 16-18.

76. See generally A. MOOREHEAD, *THE WHITE NILE* 323-60 (1960).

British, upon arrival in the territory that would be Uganda, found separate African kingdoms operating under complex political and legal institutions. The most powerful kingdom within the territory was that of Buganda,<sup>77</sup> which was placed under British protectorate in 1894. By 1896 the entire region was included under British control.

The British brought with them a common law<sup>78</sup> tradition that by its very nature did not take into account the several centuries of developing legal and political traditions in the new territory.<sup>79</sup> The Kingdom of Buganda had functioned under a constitutional arrangement with executive authority placed in the Kabaka or King, who exercised his authority within an accepted political structure.

[U]nder ordinary circumstances he took one or more of the chiefs into his confidence, and asked their advice, but if this was contrary to his wishes, he disregarded it, and followed his own desires. The details of government were carried on by a mixed body of chiefs, with their King at their head . . . .<sup>80</sup>

The Kabaka had the power to appoint chiefs, declare war and raise taxes.<sup>81</sup> Although the Kabaka was considered the center of government, his decisions were subject to a form of "judicial review." The traditional priests of Buganda, Mandwa, each represented a national god which was invested with supernatural powers.<sup>82</sup> If, for example, a war was contemplated,

[a] messenger sent from the War-god to the King advocating a punitive expedition was often the first step in preparation for war. Chiefs were sent by the King with presents to the gods, to ask their advice as to the conduct of the war and the choice of a leader. The gods would name the person who was to be chosen as general . . . .<sup>83</sup>

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77. See generally J. ROSCOE, *THE BAGANDA* (2d ed. 1966) [hereinafter cited as ROSCOE].

78. UGANDA DEP'T OF STATE PUBLICATION 7958 (Dec. 1967). See Morris & Read, *supra* note 3, at 3-14; Macneil, *Research in East African Law*, 3 E. AFR. L.J. 47, 47-48 (1967) [hereinafter cited as Macneil].

79. See J. Byamugisha, *Introduction to the Law of Uganda* (unpublished thesis in Makerere Univ. Library at Kampala, Uganda, 1970) [hereinafter cited as Byamugisha]. See also Cotran, *The Position of Customary Criminal Law in African Countries*, in EAST AFRICAN LAW AND SOCIAL CHANGE 14 (G. Sawyer ed. 1967). Compare (as to experience with other colonial powers) Woodman, *Some Realism About Customary Law—The West African Experience*, 1969 WIS. L. REV. 128.

80. ROSCOE, *supra* note 77, at 232.

81. *Id.* at 233-34.

82. *Id.* at 271-74.

83. *Id.* at 348. See generally J. SPOKE, *JOURNAL OF THE DISCOVERY OF THE SOURCE OF THE NILE* 262 (reprinted 1908).

The difficulties of the pluralistic society were compounded by the introduction of historical English common law. The methodology of reception varied. It could come through adoption by reference, codification, or specific acts of the English Parliament being implanted into the local law. As Professor Robert Seidman notes:

The most common form of reception . . . was the general reception statute . . . . That statute, of which Ghana's (the earliest) may be taken as an archetype, usually appeared either as local legislation or in the Order-in-Council establishing the colony or protectorate. The Gold Coast Supreme Court Ordinance of 1876 contained the following clause establishing the basic law: "The common law, the doctrines of equity, and the statutes of general application which were in force in England on the date when the colony obtained a local legislature, that is to say, 24th July, 1874, shall be in force within the jurisdiction of this Court." The exceptions to this broad reception statute, however, were far broader than the statute itself. The same statute provided that:

"Nothing in this Ordinance shall deprive the Supreme Court of the right to observe and enforce the observance, or shall deprive any person of the benefit, of any law or custom existing in said Colony and Territories subject to its jurisdiction, such law or custom not being repugnant to natural justice, equity or good conscience nor incompatible either directly or by necessary implication with any enactment of the Colonial Legislature . . . ." (Court Ordinance, 1876, § 19 (Gold Coast))."

Since numerically the persons who could claim the benefit of customary law—the entire African population—far exceeded the European population, in every English-speaking African state the strange anomaly obtained, that the "basic" law—English Law—applied to a miniscule proportion of the population, but the "exceptional" law—customary law—applied to the vast majority.<sup>84</sup>

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84. Seidman, *Law and Economic Development in Independent, English-Speaking, Sub-Saharan Africa*, 1966 WIS. L. REV. 999, 1006-1007 (footnotes omitted). See also Macneil, *supra* note 78. Seidman points out the sharp contrast between the common law and customary law. For example, separate ownership of property was the emerging common law concept whereas ownership of property was connected with actual use under customary law. See 1966 WIS. L. REV. 1005-08. Thus contracts became the mainstay of property rights under the received English law. See *id.* at 1009, 1016-18. However, the received law left out certain aspects of English common law. New concepts of social welfare were imposing restrictions upon the freedom to use property in England. See *id.* at 1008. These concepts, which had been codified during the industrial revolution, were not made a part of the law of Uganda. See *id.* Furthermore, although tribal law was not made a part of the residual law of Uganda, it had to be at least minimally respected by the British Commission when enacting ordinances for Uganda and the courts were to apply it in suits between Africans when it was not contrary to other law or repugnant to natural justice, equity, and good conscience, as interpreted by the English courts. See *id.* at 1007, 1025-26; *Mayambala v. Buganda Gov't* [1962] E. Afr. L.R. 283 (Uganda). See also Veitch, *Civil Defamation in Uganda*, 1960-70, 7 E. AFR. L.J. 39 (1971).

The major difficulty was, and still is, that the tribal law applies only to individual tribes. The task of harmonizing and meshing customary law with the superstructure of imported English constitutionalism appeared insurmountable. Dr. Joseph Byamugisha, a Uganda advocate, argues that by restating and codifying customary law, making sure that it remains separate and distinct from all other laws, the difficulty may be surmounted.<sup>85</sup> However, the result is confusion, as reflected in much of the legislation regulating Uganda. Prior to independence, for example, the British commissioner for each district in the country could make ordinances for the administration of justice, the raising of revenue, and generally for the peace, order and good government of all persons within his region. For all practical purposes it was the commissioner, the Englishman appointed by the colonial power, who made the laws for Uganda. He used several forms.

#### **First, direct application**

The commissioner had the power to apply to Uganda statutes that were in effect in the United Kingdom and India. Commissioners used this power by declaring that under local ordinances certain enumerated statutes would be applicable to Uganda though not locally enacted. Entire statutes were applied with few, if any, modifications. This method of legal import on the local level should not be confused with the general importing clause already referred to which imported to Uganda the English common law, equity, and statutes of general application. This general law was to be applied only to the extent that local circumstances permitted, and gave precedence to tribal law in suits between Africans. However, specially applied statutes under direct application, that is, by virtue of the commissioner's declaration, were not subject to such qualifications and they became the law of the Ugandan protectorate, just as if they had been locally enacted. In the protectorate courts the judges had to look to those statutes to ascertain the scope of the commissioner's declarations and the content of what were now local statutes.<sup>86</sup>

#### **Second, codification of common law**

Some statutes made by the commissioner and his successors were codified versions of the English common law. The commissioner based his legislation on both text and code. He usually took very little

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85. Byamugisha, *supra* note 79.

86. See Morris & Read, *supra* note 3, at 237-40; Byamugisha, *supra* note 79.

care to incorporate local concepts. Dr. Byamugisha argues that a general feature of codification of the common law is that there is a built in pledge to implement common law precedent. Codified law has given the greatest trouble to the courts of Uganda.<sup>87</sup>

### Third, re-enactment of English or Indian statutes

Certain English and Indian statutes were re-enacted and became written law of the protectorate of Uganda. This method was different from direct application in that such re-enacted statutes appeared on the protectorate statute book; however, the purpose and effect was essentially the same as in direct application. Again, very little effort was made to conform to local conditions and, indeed, interpretations were found in decisions of the Indian courts, not the Ugandan courts.<sup>88</sup>

### Fourth, straight innovations

To some extent, the British did try to incorporate local law. Native authorities were legally set up, native courts were established, and the native authorities were given the duty to make such laws as were necessary for the native courts. Much of their work came from native or tribal customary law. In the colonial courts it was applied to African disputes only. In the native courts it was the law of the court.<sup>89</sup> The confusion of incorporating this customary law into a system of common law is apparent. In the colonial courts customary law was subject to a national test. In native courts customary law was not subject to any national test. However, an appeal could be taken from a native court to the colonial court in which case a national test was applied. Colonial administrators could not apply customary law to themselves nor to anyone who was not an African. Even the Africans were allowed to opt out of a customary law court when and if they realized that their case would be in jeopardy.

Because of the weakness of customary law and because of the Africans' distrust of the imported British laws, traditional courts grew up. The traditional courts were distinct from native courts and they were not normally interfered with by the colonial courts. Traditional courts became the people's courts. Thus, by 1962, the legal and judicial system in Uganda was in a most complex state. One point did

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87. See Morris & Read, *supra* note 3, at 241-44.

88. See *id.* at 237-42.

89. See *id.* See generally H. MORRIS & J. READ, *INDIRECT RULE AND THE SEARCH FOR JUSTICE* (1972).

stand out, however; the courts of Uganda at the time of independence were courts that were quite willing to involve themselves in conflicts and the people recognized the willingness of the judges to settle disputes.<sup>90</sup>

The "independence" Uganda received in 1962 was in effect the transfer of political power from a foreign group of rulers to a local group of rulers. By the Uganda (Independence) Order-in-Council 1962, the British in effect gave up active participation in the management of Uganda. It was impossible, however, to completely remove colonial power and influence.

When the Independence Constitution came into effect it was the supreme law of Uganda. But along with the new Independence Constitution came the Judicature Act whose purpose was:

To declare the jurisdiction of the High Court and Subordinate Courts; to apply to Uganda with exceptions adaptations and modifications certain acts of the parliament of the United Kingdom relating to the jurisdiction of courts in similar matters . . .<sup>91</sup>

It also adopted the colonial laws and reasserted the operation of the English common law, English doctrines of equity and the statutes of general application that were in effect before October 9, 1962.<sup>92</sup> The Judicature Act made no mention of customary law; this in effect denied jurisdiction in customary law to courts that had seemingly been people's courts. Independence, however, did achieve a certain breakthrough. The Independence Constitution of Uganda was utilized by the nation builders in Uganda to begin enacting into law many tribal law concepts.

The initial constitution of 1962 was one that paid allegiance to the monarch. At best it could be said to be only a symbol of independence. It did, as Nyerere has argued, provide a measure of legitimacy for the new rulers, but it was not a strong, functioning instrument. The document did not have the force of tradition necessary to implement it, and was seen as a continuance of the western colonialism.<sup>93</sup>

The 1966 overthrow of the government produced a new and truly independent constitution for the Republic of Uganda.<sup>94</sup> However, the second constitution did not satisfy Uganda's legal scholars, at least as far as a course of national action was concerned. President Obote, who took power in 1966, ultimately articulated the planned course of the

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90. See Ghai, *supra* note 3, at 428-29.

91. Judicature Ordinance, 1962. See Morris & Read, *supra* note 3, at 238-44.

92. *Id.* at ch. 2; Byamugisha, *supra* note 79, at 80-81.

93. See generally GUKINA, *supra* note 53.

94. The present Constitution of Uganda was officially adopted September 8, 1967.

nation through the party platform, the *Common Man's Charter*. Much of the legislation following the promulgation of the *Common Man's Charter* brought an up-to-date look to Uganda. With the overthrow of Obote, however, the *Charter* was laid to rest.<sup>95</sup>

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95. The constitutional and political platform concepts of government as articulated in the *Common Man's Charter* ended temporarily in Uganda in 1971 with the military takeover of the nation by General Idi Amin. The takeover produced clear constitutional and transnational violations so basic as to make many human rights concerns of the United Nations pale in comparison. See Sharma & Wooldridge, *Some Legal Questions Arising from the Expulsion of the Ugandan Asians*, 23 INT'L & COMP. L.Q. 397 (1974).

When General Amin came to power he ordered all Asians (descendants of Punjabis, Gujaratis and Goans who settled in Uganda as railway workers, and made their way into the professions and commerce) to report for classification on October 12, 1971; as a result many Asians had their documents and passports taken from them. Sharma & Wooldridge, *supra*, at 397-400.

On August 9, 1972, General Amin issued a decree revoking entry permits and residence permits for most non-citizen Asians. Within a period of ninety days most (approximately 55,000) of the Asian population in Uganda had departed leaving behind abandoned property of every kind. *Uganda, Economic War*, 24 AFRICA 33 (1973). The property was abandoned due to two decrees issued in October, 1972: the first stated in effect that Asians could not transfer immovable property. The second allowed agents to be appointed to sell the property; however, the agents could not in any way frustrate governmental policy, *i.e.*, Africanization of all properties involved in their dealings. Sharma & Wooldridge, *supra*, at 401.

Abandoned property was taken over by Ugandans, mainly soldiers or their relatives (*Uganda, Economic War, supra*), and no reimbursement has ever been paid for the lost property. See Sharma & Wooldridge, *supra*, at 402-03. Although the government established an Abandoned Property Custodian Board, their work was frustrated by the president and the army. *Uganda, Economic War, supra*.

It would seem that the swift expulsion of some 55,000 people without permitting them to take money or personal belongings is a matter that should be aired in the community of nations, particularly in the United Nations, or in the domestic courts of the concerned nation, applying domestic constitutional principles. But although greatly concerned with the plight of humanity in similar circumstances around the world, the General Assembly of the United Nations failed to act on the expulsion of the Asians. Furthermore, the Human Rights Sub-Commission on the Prevention of Discrimination and the Protection of Minorities did not care to put the matter on its agenda. The United Nations thus meekly agreed with the Uganda delegate, Mr. Ibingira, that the matter should be confided to the domestic courts and laws of Uganda. See the well-documented analysis in Sharma & Wooldridge, *supra*, at 404.

Chapter III, art. 13 of the 1967 Constitution, still in operation although under suspension, deals with expropriation of property. Article 13, cl. 1 does not permit a taking of any property except for very limited purposes, none of which would fit the taking from the expelled Asians. Clause 3, however, would permit a taking "in the public interest" of any property. What is "in the public interest" would presumably be determined by the High Court under art. 13, cl. 1(c)(ii), which grants a right of access to the Court where the legality of a taking is in question. No case has been considered by the High Court since "Phase I" of President Amin's economic war on the Asians began in 1971. Within the present political climate it is doubtful whether any redress can be offered by the domestic courts of the country. The fact, however, that the 1967 Constitution remains and that chapter 13 is intact, coupled with a long history of judicial

## Uganda and Judicial Review

An essential ingredient of constitutionalism is the use of the courts to solve constitutional and political issues.<sup>96</sup> Over the years this had become an accepted function of the courts in Uganda, and the tradition was carried over into the era of independence. Thus, the courts have had a strong role in Uganda's government. There are several cases that reflect the courage and commitment of the High Court of Uganda. That court was, as long as the constitution was operating, willing to interpret it even in politically sensitive areas.

The Independence Constitution authorized judicial review of constitutional conflicts by the Uganda High Court.<sup>97</sup> Furthermore, the High Court was to determine the validity of the election of members of the National Assembly.<sup>98</sup> The concept of judicial review was nevertheless subject to executive suspension of the Constitution and to declarations of a state of national emergency.<sup>99</sup> However, short of national emergencies, the High Court was empowered to decide political disputes as well as any other disputes properly presented to it.<sup>100</sup> An analysis of selected High Court decisions will help in understanding the unique role the High Court played prior to the takeover of the government by General Amin.

In *Lyaboga v. Bakasonga*<sup>101</sup> the High Court considered two issues: First, it had to determine whether six members of the Busoga District Council were lawfully elected as specially elected members and whether a seventh member was lawfully Kyabazinga (constitutional head) of Busoga.<sup>102</sup> Second, an injunction was sought to restrain the six defendants from acting as members of the council and to restrain the seventh defendant from exercising any powers and performing any duties as Kyabazinga of Busoga.<sup>103</sup>

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review, means that a change in political climate or leadership could also liberalize access to the courts for the Asians who have lost all in Uganda's effort to return the businesses and professions to Ugandans. The long and rich history of fairness in Uganda and the use of courts to settle disputes cannot be suppressed indefinitely.

96. See Baldwin, *A Constitutional Comparison*, *supra* note 3, at 96-101.

97. THE CONST. OF UGANDA, ch. IX, s. 95 (1962).

98. *Id.* at ch. V, s. 49.

99. *Id.* at ch. III, s. 30.

100. See The Judicature Act, 1967. There are certain areas of dispute that courts traditionally avoid. In the United States, for example, see *Banco Nacional v. Sabbatino*, 376 U.S. 398 (1964) (international relations). See also L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* (1972).

101. [1963] E. Afr. L.R. 57 (Uganda).

102. *Id.* at 59.

103. *Id.*

The District Council of Busoga was empowered by the Second Schedule to the Uganda (Constitution) Order-in-Council 1962, to make provisions for its own membership by passing resolutions.<sup>104</sup> The council had passed a resolution providing that it should consist of eighty-four members comprised of sixty-seven directly elected members, six specially elected members, and eleven hereditary Saza chiefs.<sup>105</sup> In this form the resolution was contrary to section 74 of the order, which required that at least nine-tenths of the members should be elected.<sup>106</sup> Elections to the council were held for sixty-seven elected members, and at a meeting of the council the six defendants were chosen as the specially elected members of the council.<sup>107</sup> The seventh defendant was elected Kyabazinga of Busoga.<sup>108</sup> The council had not passed a resolution as required by section 75(1) of the Order, to make provision for the mode of appointment of the Kyabazinga of Busoga and his tenure of office.<sup>109</sup>

The Court held that the council had never been properly constituted in accordance with the requirements of section 74 and therefore the plaintiff was entitled to a declaration that the first six defendants were not lawfully elected and that the council as constituted was incompetent to elect the Kyabazinga.<sup>110</sup> Having granted the declarations, the Court refused to grant the injunctions.<sup>111</sup> The Court stated that it would have been idle to grant an injunction to restrain the first six defendants from taking part in deliberations of a body which had not been properly constituted and which was consequently incapable of transacting business.<sup>112</sup> The Court went on to say that it was not disposed to grant an injunction to restrain the seventh defendant from exercising any of the powers and duties of the Kyabazinga of Busoga.<sup>113</sup>

It is clear from the reasoning of the Court that the judges were well aware of the fact that they were dealing with a political question. Consequently, instead of giving an order that fresh elections should be held in accordance with section 74 of the Second Schedule of the Uganda Order-in-Council, the Court suggested that the executive out-

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104. *Id.* at 60.

105. *Id.*

106. *Id.*

107. *Id.* at 62.

108. *Id.* at 63.

109. *See id.*

110. *Id.* at 61-64

111. *Id.* at 64.

112. *Id.*

113. *Id.*

line possible steps to take in order to solve the constitutional stalemate.<sup>114</sup> In this way the Court undertook judicial review and decided the issues, but neatly avoided a conflict with the executive. As a result of the decision, the Busoga Validation Act<sup>115</sup> was passed. The act validated the election of the council and hence that of the Kyabazinga.

Another example of the High Court's willingness to interpret complex and basic constitutional issues involved certain of the Kabaka's powers. In *The Attorney General of Uganda v. The Kabaka's Government*,<sup>116</sup> the Uganda government sought a declaration as to the construction of the Uganda Constitution which incorporated an agreement that had been made between the Uganda and Buganda delegations prior to adoption of the Constitution.<sup>117</sup> Upon independence the government of Buganda had retained a great deal of autonomy. One of the agreements entered into between Uganda and the Buganda government dealt with the delegation of the financial responsibilities between the government of Uganda and the Kabaka's government.<sup>118</sup>

Schedule 9 to the Uganda (Independence) Order-in-Council 1962 provided that:

1. [I]n addition to her independent sources of revenue [Buganda's financial requirements] should be provided as follows:

(a) fifty per cent. by assignment of certain revenues raised in Buganda (within minimum yield guaranteed) . . . and

(b) fifty per cent. by an annual statutory contribution from general revenue (not to be reduced without consultation with the Kabaka's Government).

2. At intervals of from three to five years there will be a review of these arrangements, not only to consider the rate of annual statutory contribution, but also to consider—in the light of actual yields—whether there should be any change in the revenues selected for assignment.

. . . .

4. Additional sums which may be required in respect of further services for which the Kabaka's Government assumes financial responsibility will be made available by increasing the amount of the statutory contribution.<sup>119</sup>

The Court examined the language of the Constitution and concluded that the words of paragraph one could be given at least three

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114. *See id.*

115. Busoga (Validation) Act, 1963.

116. [1965] E. Afr. L.R. 393 (Uganda).

117. *Id.* at 395-96.

118. *Id.* at 394-96.

119. *Id.* at 395-96.

widely differing interpretations.<sup>120</sup> Furthermore, it held there were certain ambiguities of expression in paragraphs two and four of the schedule.<sup>121</sup> In consequence of the ambiguities and obscurities, the Court was unable to ascertain the clear meaning of the schedule.<sup>122</sup> As an aid to interpretation, the Uganda government offered as evidence certain letters and records of meetings which were held principally in London in June, 1962, at the time of the Constitutional Conference which preceded the grant of independence to Uganda.<sup>123</sup> The Uganda government argued that it was entitled to rely on these letters and records as documents which demonstrated the history and intent of the financial relationship provisions between the two governments.<sup>124</sup>

The Buganda government countered that the Court could not concern itself with the intent of the schedule, for its task instead was to interpret the intentions of the legislature in making the Independence Order, which had incorporated the schedule. Buganda opposed the admission into evidence of the majority of the documents tendered.<sup>125</sup> The court decided to admit one letter, written prior to the Independence Constitutional Conference of June, 1962, and an appendix to a report of the Constitutional Conference which preceded the Constitution.<sup>126</sup> The Court also admitted such other evidence as was necessary to explain the manner in which block grants to local authorities were calculated and the financial relationship existing between the two governments at all material times.<sup>127</sup> The remaining documents were rejected. The Court held irrelevant the opinions of the draftsman as to the underlying intention of the legislation he had drafted and also held irrelevant the opinions of those who instructed the draftsman.<sup>128</sup>

The Court cited section 107 of the Independence Constitution, which read as follows:

107. (1) The Government of Uganda shall make payments to the Kabaka's Government in accordance with the provisions of the Agreement set out in Schedule 9 to this Constitution.

(2) The amounts required for making payments under this section shall be a charge on the Consolidated Fund.<sup>129</sup>

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120. *Id.* at 396.

121. *Id.*

122. *Id.*

123. *Id.* at 396-97.

124. *Id.*

125. *Id.* at 397.

126. *Id.*

127. *Id.*

128. *Id.* at 399.

129. *Id.* at 400-01.

The Court rejected the view that paragraph one of schedule 9 meant that a calculation had been made of Buganda's financial requirements at the date on which the Independence Order was made and that the sum thus calculated was to be provided by the Uganda government in the manner described in the two subparagraphs of the paragraph in question.<sup>130</sup> The reasoning of the Court was that had such a calculation been made, detailed financial provision for the period commencing on July 1, 1963 (the date on which the antecedent of section 107 of the Independence Constitution came into operation) would have been set forth in express terms in a similar manner to that adopted for the transitional period ending on June 30, 1963.<sup>131</sup>

The Court concluded that the intention underlying section 107 and its dependent schedule was not to alter the method of calculating the amount of aid to be supplied but to effect changes in the method by which that amount of aid would be supplied to Buganda.<sup>132</sup> Furthermore, the judges were of the opinion that the amount to be paid or provided to the defendant under paragraph one of the schedule was not to be calculated for each financial year after section 107 came into operation.<sup>133</sup>

Part of the financial assistance was to be provided by an annual payment from the revenues of the Uganda government but that fact did not mean that an annual calculation was to be made.<sup>134</sup> Paragraph four of the schedule made provision for an increase in the statutory contribution to be made by the Uganda government in the event of the assumption by the Kabaka's government of financial responsibility for further services.<sup>135</sup> Thus if there was to be a review of the whole scheme of assistance afforded to the Kabaka's government and if further costs were to be met under the terms of paragraph four of the schedule the legislature intended that Buganda's financial requirements would be reviewed annually except to such extent as might be necessary for the purpose of paragraph four of the schedule.<sup>136</sup>

The fact that the government of Uganda moved directly into the High Court when a constitutional dispute arose demonstrated the importance of judicial review to the new nation. The Court not only

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130. *Id.* at 402.

131. *Id.*

132. *Id.* at 403.

133. *Id.* at 404.

134. *Id.*

135. *Id.*

136. *Id.*

was called upon to interpret the Constitution but also was asked to referee a confusing and complex governmental problem. This delicate political task was inherited from pre-independence judicial functions.

In 1961 the Colonial High Court had been called upon to interpret the status of the Kingdom of Buganda within the colonial state. The Kingdom of Buganda had won major concessions in the Buganda Agreement of 1900.<sup>137</sup> Buganda thereafter had the status of a quasistate within the colonial protectorate. The question of jurisdiction of the High Court over claims arising in the Kingdom of Buganda was considered in *Matovu v. Kabali*.<sup>138</sup>

This case involved an ordinary agreement to sell land. The plaintiff, Samiwiri Matovu, asked the High Court to require the defendant, Kulanima Kabali, to return the land that Matovu had sold him, alleging that the defendant had failed to make his installment payments and that the contract could therefore be declared void.<sup>139</sup> The defendant objected on jurisdictional grounds, arguing that under the Buganda Courts Ordinance title to the land was to be tried in a Principal Court, so the High Court had no authority to hear the case at this stage.<sup>140</sup> If the case were transferred to a Principal Court, the facts complained of brought customary law and statutory law into direct conflict. The High Court held that it was vested with the ultimate authority to determine title to the land, and that the Principal Court was empowered only to adjudicate whether a caveat that had been placed upon the title by the defendant should be removed.<sup>141</sup> Although a proceeding must be held in the Principal Court before the High Court could grant relief, it was nevertheless the High Court which would be the final arbiter of the conflict.<sup>142</sup>

### Judicial Review and Pragmatic Considerations

As indicated in *Uganda v. The Kabaka's Government* and to some extent in *Matovu v. Kabali*, judicial review of the constitutionality of governmental actions presented perplexing encounters between the various branches of the newly independent government. The encounters brought to the surface complex factors affecting the entire posture of the nation. In practice Uganda has been ruled by strong executives;

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137. See Morris & Read, *supra* note 3, at 15-23.

138. [1962] E. Afr. L.R. 280 (Uganda).

139. *Id.* at 280-81.

140. *Id.*

141. *Id.* at 282.

142. See *id.*

however, as the *Kabaka* case points out, historically the concept of judicial review has been respected, perhaps because of the intimate relationship between the courts and the people of Uganda.

Throughout the long political regime in Uganda the courts, both African and British, have had a great deal of contact with Ugandans. The case of *Uganda v. Commissioner of Prisons, Ex Parte Matovu*<sup>143</sup> reflects the fact that the High Court of Uganda was, as long as a Constitution was operating, willing to interpret it even in a politically complex and sensitive area. The chief justice of the High Court, and author of the opinion, was, interestingly enough, Sir Udo Udoma, a Nigerian contract judge who wanted to Africanize the law of Uganda.

The case arose out of a resolution of the National Assembly in 1966 abolishing the 1962 Constitution and adopting a new Constitution.<sup>144</sup> Before the resolution the president and vice-president of the country had been overthrown in violation of the 1962 Constitution.<sup>145</sup> Their offices were removed and the authority of government transferred to the prime minister with the consent of the cabinet.<sup>146</sup> After the 1966 Constitution was adopted by the National Assembly, a state of public emergency was declared, and the Emergency Powers Regulations of 1966 were enacted.<sup>147</sup> These regulations were detention laws,<sup>148</sup> and Mr. Michael Matovu was one of the government officials detained under them.<sup>149</sup> He argued to the court that the detention powers of the new government were outside constitutional powers; that is, the detention powers were argued to be unconstitutional under the 1966 Constitution. He did not argue the validity of the 1966 Constitution,<sup>150</sup> but the Court raised the issue on its own motion.<sup>151</sup>

The attorney general responded that the Court was not competent to enquire into the validity of the Constitution because the making of a constitution is a political act, and, alternatively, if the Court should undertake to enquire into the validity of the Constitution, it was bound to declare it valid because it was the product of a successful revolution.<sup>152</sup> He argued that the Court only had power to interpret that

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143. [1966] E. Afr. L.R. 514 (Uganda).

144. *Id.* at 524.

145. *See id.* at 523.

146. *Id.*

147. *Id.* at 524.

148. *Id.*

149. *Id.*

150. *Id.* at 518.

151. *Id.* at 527.

152. *Id.*

which was brought before it.<sup>153</sup>

Sir Udo Udoma's opinion is a curious mixture of praise and condemnation of the actions of Dr. Obote, then president of Uganda. The opinion is also a curious counterpart to *Marbury v. Madison*.<sup>154</sup> One might even suggest that Sir Udo patterned his opinion after that of Marshall. Certainly the conditions under which *Ex Parte Matovu* was written presented interesting parallels with those in post-revolutionary America.

Initially Sir Udo accepted the concept of the revolution as a fact.<sup>155</sup> He therefore declared the 1966 Constitution to be valid.<sup>156</sup> He would, at this juncture, seem to have completely undermined the Court's authority. However, it must be noted that the chief justice in making his ruling did not leave the interpretation of the Constitution to the political branch or to the attorney general. Indeed, he went to great pains to insure that the judiciary would make the interpretation, even though the interpretation itself would be one that was politically expedient. The Court ultimately upheld the detention order under the 1966 Constitution.

After having held in his favor, the Court proceeded to scold the attorney general for arguing that this was a political question. The Court pointed out that the attorney general was in error in relying on certain American cases "as supporting the proposition that the issue as to the validity of the Constitution of 1966 was purely a political matter outside the scope of the jurisdiction of this court."<sup>157</sup> Sir Udo distinguished the cases cited by the attorney general, especially *Luther v. Borden*.<sup>158</sup> He noted that *Luther* involved a contest between two competing political powers over which should control the government of Rhode Island. The Court stated that in Uganda there was no such contest because the government of Uganda had no rival, and thus *Luther v. Borden* was inapplicable.<sup>159</sup>

Sir Udo also distinguished *Baker v. Carr*,<sup>160</sup> but in doing so he used important language from *Baker* that supports a doctrine of judicial review, stating that the decision in *Ex Parte Matovu* was, as Justice

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153. *Id.*

154. 5 U.S. (1 Cranch) 137 (1803).

155. [1966] E. Afr. L.R. at 538.

156. *Id.* at 539.

157. *Id.* at 533.

158. 48 U.S. (1 How.) 1 (1849).

159. *Uganda v. Commissioner of Prisons, Ex Parte Matovu*, [1966] E. Afr. L.R. 514, 530-33 (Uganda).

160. 369 U.S. 186 (1962).

Clark said in *Baker*, "in the greatest tradition of this Court."<sup>161</sup> After a lengthy analysis of the coup of 1966 and an analysis of the direction of the then sole political party in Uganda, the chief justice held that the Constitution of 1966 was the supreme law of the land.<sup>162</sup> It became the new legal order, and its effective date was April 14, 1966.<sup>163</sup>

It would have been very easy for the High Court to have dodged the issue as a political question. However, the Ugandan Court, in the tradition of *Marbury*, refused to skirt the difficult issues; and although the conclusion favored the government in power, the Court retained the doctrine of judicial review for the nation. As the new chief executive said at the time of the decision:

[O]n this historic occasion three judges of the High Court on their own motion as a constitutional court questioned the validity of the 1966 Constitution. Apart from their ability to do so, which in itself indicates the freedom of the judiciary to question actions of the executive, there was never an attempt by the executive branch of the government of Uganda to approach the constitutional court or any member of the judiciary to conduct that important constitutional case and to rule upon it in favor of the government.<sup>164</sup>

Perhaps the president would not have been so generous had the decision gone against the government, but the fact remains that the question was brought to the Court to decide, and the chief executive required the attorney general to represent the government in arguments before the High Court.

### Conclusion

The Westminster parliamentary principles coupled with the ideals set forth in the United States Constitution served as a blueprint for independence anglophonic constitutions in East Africa. For several reasons, however, these concepts failed to generate positive responses among the new nations' people and leadership.

First, though the United States Constitution was recognized as an early successful attempt to regulate a modern nation by an original, comprehensive, written charter, the anglophonic East African constitu-

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161. [1966] E. Afr. L.R. at 534, quoting *Baker v. Carr*, 369 U.S. 186, 262 (1962) (Clark, J., concurring).

162. [1966] E. Afr. L.R. at 539.

163. *Id.* The preamble to the 1966 Constitution concludes with the following: "Do hereby resolve on this 8th day of September, 1967, in the name of all the people of Uganda, for ourselves, and our generations yet unborn, that the Government Proposals be adopted, and do constitute and form the Constitution of Uganda which shall come into force the day and year aforesaid." (emphasis added)

164. President A. Milton Obote, *The People Newspaper*, Jan. 23, 1969.

tions tended to be little more than copies of elements from it and the Westminster model, adopted without sufficient attention to the newly-independent states' realistic needs.

Second, the circumstances of independence differed. England had suffered no such birth trauma, and the American constitution was written by the representatives and leaders of a culturally united people who had by force of arms won their independence from a repressive colonial power. In contrast, Uganda's boundaries were established arbitrarily by colonial rule, and encompassed several culturally distinct, and at times warring, nations and kingdoms, who had united momentarily to accept independence from a relatively disinterested foreign power.

Finally, the independence day Ugandan Constitution (and the constitutions of other new nations) was foreign in origin, deriving its initial validity from acts of the British Parliament.

Probably the most important reason for the failure of Westminster parliamentary principles is the complex African concept of nationhood and nationbuilding, which is the primary concern of most African governments. It reflects not only nineteenth-century European and American concepts, but also the ideas of Marx. The African countries became independent at various stages of national development, and were burdened with the social and legal legacy of colonialism. The major demands were thus for social and economic development.

The goals of national self-identity came first. Improvement of the standard of living has taken a subordinate place to transformation away from pluralistic economic, social and legal systems. Thus, with economies at a subsistence level, the people have not looked to constitutions but to the ruling parties' political manifestoes as the locus and philosophical center of national power, for it is these party platforms that address themselves to the real social and economic needs of the people. But, as shown by the fate of the *Common Man's Charter*, manifestoes have fared little better than constitutions as guardians of legality, even though they address the nations' needs and problems more accurately, because they depend so heavily on the men who implement them.

One bulwark that has stood in defense of principle, and which may play that role in Uganda again in the future, has been the judiciary and the tradition of judicial review. Rooted in Ugandan traditions, that institution stands ready to play a guiding role and to nurture national growth along the genuinely African paths envisioned by Obote, Nyerere, and other African leaders. One can hope that in Uganda it will again be given that opportunity.