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# Judicial Independence Under the APRM: From Rhetoric to Reality

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## ABSTRACT

The greatest challenges to good governance in Africa lie at the intersection of two problems: (i) low horizontal and vertical accountability, and (ii) weak constitutionalism. While courts are a critical player at these intersecting fault lines, the role of the judiciary has frequently been understated or marginalised in the African Peer Review Mechanism (APRM). An 'independent judiciary' is only explicitly listed in the APRM as a component of the separation of powers; this narrowing of the role of the judiciary obscures the potential contributions an independent and assertive judiciary can make across *all* major subcategories of 'good political governance'. Beyond conflict resolution, the judiciary is responsible for the protection and promotion of civil, political and socio-economic rights, and should be at the forefront of combatting corruption. There are also important roles for the judiciary to play in relation to policy problems such as land rights and provision of basic services. The far-reaching, intersecting roles of the judiciary in securing good political governance have been underplayed in both the Country Self-Assessment Reports (CSARs) and Country Review Reports (CRRs). Although elements of weak judicial independence are catalogued, concrete action items and benchmarked goals appear meagre and vague at best. The tendency is to focus on negative aspects of judicial independence, which is a necessary but not sufficient condition for an assertive and autonomous judiciary. Identifying the supportive or enabling conditions for judicial assertiveness beyond formal technicalities will enhance the APRM process and offer more detailed substance beyond the aspirational overarching goals and recommendations. In response to these issues, this paper seeks to identify gaps between, and within, the APRM CSARs and CRRs as they relate to judicial independence, protection of rights and separation of powers. The APRM findings from Uganda, Lesotho and Tanzania are analysed in relation to existing knowledge and literature on judicial independence. Ways in which the APRM questionnaire and assessment could be adjusted to broaden analysis and understanding of judicial independence and power are also outlined.

## ABOUT THE AUTHOR

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## ABBREVIATIONS AND ACRONYMS

APRM	African Peer Review Mechanism
CCM	Chama Cha Mapinduzi
CRM	Country Review Mission
CRR	Country Review Report
CSAR	Country Self-Assessment Report
NEPAD	New Partnership for Africa's Development
NPoA	National Programme of Action
NRM	National Resistance Movement
SADC	Southern African Development Community

## INTRODUCTION

During the decade of the African Peer Review Mechanism's (APRM) existence, 34 countries have acceded to it and 17 country reviews have successfully been completed.<sup>1</sup> The APRM assessment takes place across four clusters of governance or 'thematic areas': (i) democracy and political governance; (ii) economic governance and management; (iii) corporate governance; and (iv) socio-economic development. After an initial Country Self-Assessment Report (CSAR) is released, a Country Review Report (CRR) is conducted based on participatory consultation and research. The CSAR is completed by the country under review, while the Country Review Mission (CRM) is an external assessment led by a member of the APRM Panel of Eminent Persons. The two reports are then combined into the CRR, which becomes the final APRM assessment document. Based on the recommendations of the final report, a National Programme of Action (NPOA) is generated. The centrality of the technical term 'governance' sanitises what is an intensely political process. Yet located in the gaps between tepid statements about good political governance are some often searing critiques of the governments undergoing review.

Despite the democratic optimism of the early 1990s, semi-authoritarian states continue to demonstrate a stubborn longevity in sub-Saharan Africa. In 2013, 39% of sub-Saharan Africa was defined as 'partly free' by Freedom House, including two of the cases discussed in this paper: Tanzania and Uganda.<sup>2</sup> A defining characteristic of hybrid or semi-authoritarian regimes is an uneven and inadequate adherence to the rule of law, as further evidenced by the region's poor ranking in the World Justice Project Rule of Law Index.<sup>3</sup> An effective legal system and judiciary are essential to securing both good governance and democracy. In competitive democracies, judiciaries can remove uncertainty from the political environment and help engender credible commitments.<sup>4</sup> Yet the role of the judiciary, and the mechanisms by which judicial independence and power in sub-Saharan Africa are established, have received limited scholarly attention and are typically reduced to a mere technical exercise by policymakers.

Courts may possess constitutionally mandated robust powers of judicial review and reasonable insulation from interference, but the uncertainties of the political environment create a setting that frequently incentivises the abrogation of those formal protections. The APRM places substantial weight on these formal constitutional protections for judicial independence and separation of powers; asking, for example, for assessment of constitutional and legislative provisions or conventions establishing and guaranteeing the separation of powers; and the efficacy of mechanisms (if any) to resolve conflicts between the branches of government.

However, courts cannot simply be understood in negative terms as a restraint on power; rather, they must be understood as part of existing political configurations. Rule of law institutions must be treated as political institutions, fully embedded in the logic of politics. Courts are subject to elite calculations but they also shape their own institutional legitimacy and empowerment. Politics in hybrid regime settings is a complex, intertwining set of formal constitutional rules and informal clientelist logic. Accordingly, for political elites, an independent judiciary can one day be a critical ally and an enemy the next.

Through close analysis of the APRM questionnaire and the three CRRs from Tanzania, Uganda and Lesotho, this paper first identifies common trends and trajectories as related

to rule of law and judicial independence. These findings are then considered in the context of existing research, including this author's own fieldwork conducted between 2007 and 2011. Ultimately, this paper argues that the rule of law and, more specifically, goals related to judicial independence are too broad. Furthermore, there is a tendency to focus on a negative conceptualisation of independence (ie, freedom *from* interference) rather than a positive conceptualisation of judicial empowerment (ie, freedom *to* issue assertive, autonomous judgements).

This narrow conceptualisation and opacity become a source of concern when moving between diagnoses of the problems, particularly as they relate to the separation of powers, and the APRM's recommended policy solutions. Overall, the APRM CASRs and CRRs offer an honest and detailed summary of the major problems, although not always in a way that clearly reveals the overlapping or interconnected nature of the problems. Turning general concerns related to judicial independence into concrete action items is an apparent stumbling block. To be sure, a political culture that does not respect or adhere to separation of powers and constitutional supremacy is a major obstacle to the promotion of judicial independence and democracy. Yet addressing this macro-level concern through concrete action items is much harder. Instead, reconfiguring these problems into smaller, discrete points will provide a more realistic and faster ameliorative approach to securing judicial independence and the rule of law in sub-Saharan Africa.

## JUDICIALISATION OF POLITICS IN AFRICA

An important starting point is to outline the ways in which African courts have become important sites of political action and manoeuvring. Post-1990, what has become clear is the ubiquity of the 'judicialisation' of politics.<sup>5</sup> Courts are at the centre of critical election disputes, corruption cases concerning political elites and judicial review of controversial legislation. Pilar Domingo<sup>6</sup> notes four trends that explain the recent judicialisation of politics. First, judicial reform processes become a common feature of wider state reform. Second, courts receive public attention for a range of reasons, from corruption scandals to judicial review and human rights concerns. Third, law and order and legal accountability are increasingly high on political agendas. Fourth, civil society is more active in pushing its agenda through a rights-based legal framework. It has become commonplace for the outcome of presidential elections to be held in the hands of the courts. Witness, for example, the pivotal role of the courts in the presidential elections of Uganda in 2006, Ghana in 2013, Kenya in 2013 and Malawi in 2014. While legal cases cannot be brought against sitting presidents, many have dealt with challenging corruption scandals pending in court during their tenure. The on-going 'Cashgate' scandal in Malawi, simply by virtue of President Joyce Banda's close association with several defendants, contributed to her political demise. In Zambia the 2009 case brought against former president Frederick Chiluba and the 2013 case brought against former president Rupiah Banda demonstrate that the courts may not be an ally once a president is out of office. Or if an individual is attempting to run for the highest office, the courts can be used as a mechanism for blocking or thwarting that campaign. This was evident in 2006 in the run-up to the presidential election in Uganda when opposition leader Dr Kizza Besigye was arrested and detained on a number of trumped-up charges. This removed him from the political arena

and tarred his candidacy. Electoral politics temporarily shifted to the arena of the courts. This judicialisation of politics can be argued to be positive in that it prevents the collapse of order. It brings a sense of formality and stability to potentially violent political conflicts. However, it also politicises the judiciary, and can result in a serious weakening of judicial legitimacy and rule of law more broadly.

The case for adding weight to the judiciary as a political institution in the APRM is clear. As Turianskyi concludes, '[t]he biggest overall political and governance problem in the countries reviewed is the lack of constitutionalism'.<sup>7</sup> While constitutionalism needs to be entrenched throughout society and the government, the judiciary is the foundational political institution for providing accountability. In order to be a credible source of accountability, the judiciary must be independent and powerful. However, all good things do not always go together; the relationship between multiparty democracy and judicial empowerment is complex. It is not necessarily the case that the judicialisation of politics is evidence of an empowered or independent judiciary. In politically volatile settings, high levels of judicialisation frequently correspond with increased public scrutiny and governmental interference in the courts.<sup>8</sup>

There is evidence of this phenomenon across a range of cases where government interference manifests through a broad spectrum of strategies. It may be direct and coercive, as in the case of the storming of the Ugandan High Court by the presidential paramilitary unit in 2007. It may be a more indirect form of interference through restricting access to the courts or weakening the powers of judicial review as seen in Tanzania in the 1990s. Or it could result in direct attacks on the judges themselves. These could be extra-legal attacks as evidenced in Lesotho, or more formal mechanisms of interference such as the attempted judicial impeachment in Malawi in 2001. Elites in hybrid regimes do not face the same kinds of constraints as elites in true competitive electoral arenas; thus the incentive for protecting judicial independence is lost. Instead, in the presence of political insecurities, generated through competitive elections, African leaders frequently manipulate and interfere with the courts.<sup>9</sup> The centrality of the courts in some of Uganda's recent political crises necessitates a careful consideration of the current obstacles to the enrichment and endurance of judicial independence beyond simply weak separation of powers.

## RULE OF LAW AND JUDICIAL INDEPENDENCE IN THE APRM

The Framework Document of the New Partnership for Africa's Development (NEPAD) provides that democracy and political governance should, among other things, seek to contribute to strengthening the political and administrative structures of African countries in line with the principles of democracy, transparency, accountability, integrity, respect for human rights and the promotion of the rule of law.<sup>10</sup> The 2007 AU Charter on Democracy, Elections and Governance cites governance as requiring 'undertaking regular reforms of the legal and justice systems', and 'improving efficiency and effectiveness of public services and combating corruption'.<sup>11</sup>

The following specific objectives are contained within the democracy and political governance theme of the APRM questionnaire:<sup>12</sup>

- constitutional democracy and the rule of law;
- separation of powers;
- prevention and reduction of intra and inter-state conflicts;
- promotion and protection of civil and political rights;
- ensuring accountable, efficient and effective public service delivery at the national and decentralised levels;
- promotion and protection of the rights of women;
- promotion and protection of the rights of children and young persons; and
- promotion and protection of the rights of vulnerable groups.

The judiciary primarily receives attention within the section on separation of powers. In the APRM questionnaire, the following definition of separation of powers is offered:<sup>13</sup>

Upholding the separation of powers, including the protection of the independence of the judiciary and the fostering of an autonomous and effective parliament are [sic] also critical issues in the governance system. This objective ensures the establishment of a functioning system of separation of powers between the Judiciary, the Legislature and the Executive. The separation of powers evaluates the system of checks and balances within the branches of government. An independent Judiciary gives confidence to individuals, groups and corporate entities, that their rights will be protected by the courts. It also helps to foster the kind of enabling environment that can promote economic growth and the reduction of poverty.

The courts' role in securing credible commitments from individuals to corporate entities stresses a specific aspect of the rule of law. It highlights the importance of formal legal guarantees to ensure a hospitable climate for domestic and foreign direct investment. It does not offer a hierarchy of rights protections nor does it offer a clear link between rights protections (for individuals) and democratisation. Table 1, Appendix A, outlines and highlights questions in the democracy and political governance section of the questionnaire that specifically address judicial independence. While the discrete section devoted to judicial independence is fairly comprehensive and discussed in more detail below, there are certain sections where the judiciary is conspicuously absent; for example, on 'Promotion and Protection of Civil and Political Rights as enshrined in African and International Human Rights Instruments' respondents are asked: 'ii. Describe whether the government respects these rights in practice and whether there are effective tools for their enforcement.' The adoption of judicial review in the early 1990s placed the protection of those rights in the hands of the judiciary. Of course, the judiciary is part of a broader 'legal complex', which includes lawyers, civil society activists and members of the business sector,<sup>14</sup> and it is these actors who will bring cases to the courts. However, first and foremost, the frontlines of the rule of law are strongest when protected by an autonomous and powerful judiciary, particularly in settings with dominant executives and weak parliaments.



## KEY ASPECTS OF CONCEPTUALISING AND MEASURING JUDICIAL INDEPENDENCE AND POWER

While the APRM questionnaire contains a range of questions related to the judiciary and its role in promoting the rule of law (see Table 1, Appendix A), the overall emphasis is on checking the formal protections for judicial independence and the maintenance of, and respect for, the separation of powers. There is scope here to begin to reimagine these core conceptual frameworks in a way that accommodates the day-to-day political and resource-restricted realities on the ground.

In the APRM questionnaire '[c]onstitutional democracy and the rule of law are treated as two separate but related sub-issues'.<sup>15</sup> While this helps maintain a certain level of conceptual clarity, it obfuscates the fact that rule of law is foundational to constitutional democracy. Furthermore, it marginalises the important and potentially broad set of roles the judiciary plays across the APRM indicators.

Some key conceptual issues are addressed below.

### Judicial interference

The questionnaire asks those compiling the CSAR to identify instances in which there were attempted manipulation or actual manipulation of the judiciary (*Objective 2, Question 2.v*). However, the questionnaire does not offer a more specific range of potential strategies of interference. Political elites seek to constrain or interfere with judicial empowerment through a range of strategies; some generate immediate results, while others more subtly undermine authority and independence over time. Direct strategies range from manipulating institutional design, engineering judicial appointments and redirecting the rules of the game. Indirect strategies may include anything from the subtle removal of incentives to use the courts, to the creation of an overall climate of fear through hostile rhetorical interference. While a checklist may not be appropriate, some specific examples would be helpful in pursuit of a more detailed and concrete assessment.

### Judicial empowerment versus independence

The questionnaire does not distinguish between judicial empowerment and judicial independence. This is an important distinction in the scholarly literature on judicial politics and rule of law. There are a number of places where judicial empowerment is addressed: compliance with court rulings, financial autonomy, and effectiveness and accessibility. The formal scope of judicial review is not mentioned. Related to independence, first, it is helpful to divide independence into positive and negative dimensions: judicial independence 'to' make decisions and independence 'from' interference.<sup>16</sup> To be sure, it can be argued that judicial independence is a necessary condition for judicial empowerment, but it is not sufficient. It is, for example, highly possible for *dependent* courts to exhibit judicial power.<sup>17</sup> On the one hand, judicial independence captures the degree of autonomy judges possess from the other branches of government and from parties to the case. On the other hand, it captures internal dimensions of independence – that is, freedom from vertical control within the judicial hierarchy.<sup>18</sup> These internal dimensions of

independence are essential to autonomous decision-making and are not highlighted directly in the questionnaire.

### **Compliance**

If one accepts that capturing judicial power in addition to judicial independence would enrich the APRM studies, then how does one conceptualise ‘power’? Both scholars and policymakers use the concept of judicial power far less frequently than that of judicial independence. Ginsburg captures judicial power by combining judicial decision-making with compliance: ‘[T]he independent input of the court in producing politically significant outcomes that are complied with by other actors.’<sup>19</sup> Finkel frames judicial power by combining independence with authority.<sup>20</sup> Authority is captured both in formal jurisdictional terms and in relation to compliance.<sup>21</sup> Compliance is an essential component in conceptualising judicial power, but it may be necessary to frame the standards regarding compliance in transitional democracies differently, for a variety of reasons. Of course, total and absolute disregard of all decisions indicates a weak judiciary. However, what is more typical in hybrid regime settings is a strategic or selective adherence or default to judicial review decisions – a dynamic grounded in political expediency rather than constitutional principle. Hybrid regimes are characterised by a combination of democratic and authoritarian elements. Courts tend to embody these contradictions both through their uneven decision-making and through the uneven rates of government compliance with their judgements.

The APRM questionnaire mentions compliance twice under the judicial independence question:<sup>22</sup>

- iv. Judicial decisions against governmental authorities and/or private concerns obeyed.
- v. Instances where judicial decisions awarded against government have not been enforced.

The wording in these questions makes it tempting to begin a kind of judicial scorecard. However, a track record of poor compliance could be a reflection of an assertive, independent judiciary and vice versa. This is illustrated in the case of Tanzania discussed below. A great many of the prominent pro-rights protection cases were later nullified through the retroactive amendment of the offending statute rather than compliance. It should be acknowledged that bringing the cases to court in the first place provides a forum for discussion and dissemination of information related to alleged rights violations. Compliance is not simply a zero-sum game. Paying close attention to the content of judgements can reveal carefully coded signs or signals which, in turn, can serve critical functions in terms of diffusing democratic norms. No court in the world has the power to enforce its judgements. The judiciary has neither the power of the purse nor the power of the sword. A lack of respect for judicial authority undermines judicial power and legitimacy. However, there is a greater level of complexity and nuance to be uncovered in individual cases than can just be captured through a scorecard approach.

### **Institutions versus individuals**

It is important to achieve a level of analytic clarity in distinguishing between individual and institutional authority and independence. Elsewhere,<sup>23</sup> this author has identified the

core components of formal institutional judicial authority through outlining the following factors:

- judicial review;
- exclusive authority and established appellate procedures;
- budgetary autonomy and resources;
- judicial security/buildings; and
- clear constitutional provision outlining separation of powers.

Although the APRM assumes the existence of judicial review, it is worth noting that the scope and extent of powers of judicial review may vary substantially. Or, as the case of Tanzania reveals, it may be severely circumscribed by expansive derogation or ‘claw-back’ clauses. The question of exclusive authority is not explicitly addressed but, once again, arises particularly in connection with over-zealous court martials crossing the boundaries of their jurisdiction, as is seen in Uganda.

Adequate tenure and retirement, objective advancement procedures, case assignment, recruitment and removal procedures, and comprehensive ethics codes are critical in securing the individual level of judicial independence. Yet, review of the APRM’s treatment of independence at the level of individual judges reveals a rather formalistic and opaque approach:<sup>24</sup>

- 2.ii. Whether the constitution or any other legislation creates an independent organ (e.g. a Judicial Services Commission) tasked with providing oversight over the judiciary – particularly over appointments and promotions, as well as complaints against judges.

The mere existence of a Judicial Services Commission is not adequate. Appointments, promotion and discipline, as will be shown in the three case studies, are not fully explored in the CSARs or CRRs. Typically, judicial services commissions suffer from the political pathologies of the regime writ large and are filled with executive appointees. Furthermore, they are bestowed with a historically narrow mandate centred on appointment rather than the broader oversight powers often seen in the judicial councils of civil law jurisdictions in Europe and Latin America.

In sum, in order to create and protect their autonomy, courts need actively to give meaning to the formal provisions of judicial independence. As shall become evident below, the review teams in the three cases have offered limited or selective insight into the degree to which formal provisions are rendered meaningful through judicial decision-making. While all three reviews point to very serious flaws in the rule of law and judicial independence, the broad framing of the questionnaire dilutes and muddies the reports, and provides a weak basis for constituting a powerful NPoA.

## CASE STUDIES: UGANDA, LESOTHO AND TANZANIA

The following three case studies provide empirical analysis of the CRRs and CSARs in relation to the judiciary. While this paper does not focus on the shortcomings of the process itself, the differences in terms of the quality and quantity of analysis are

noteworthy. The existing critical literature on the APRM process illustrates the challenges of conceiving and executing an objective and independent review process. In the case of Uganda, for example, the APRM was described by many to be the president's 'pet project'. While this meant the review was successfully pushed through, members of the National Governing Council were seen as National Resistance Movement (NRM) sympathisers.<sup>25</sup> Gruzd captures this situation succinctly:<sup>26</sup>

Undergoing review [. . .] can be messy, haphazard and full of reversals. In practice the APRM is a relatively soft, non-threatening process, with no consequences for non-compliance. It seeks to change the culture of governance slowly, without 'naming and shaming'. But encouraging all to progress from their particular starting points. It has to tread a difficult political line: describing fundamental problems that can be politically unpalatable, without disillusioning or embarrassing its members.

If one accepts that the process is intensely political and the data, findings and methods are, to varying degrees, going to be compromised, this does not mean that there is no value in considering the reports as a source of data. The extensive and detailed CRRs are a remarkably rich source of data and analysis. While the broadly accurate capture of the major problems is not necessarily matched by equally helpful solutions, the document is an important benchmark by which to measure either progress or regression. The real value of the APRM is most likely yet to come in the form of the second country reviews. A second review will only concentrate on key areas of concern, highlight areas of success and provide a new set of benchmarks. A single, stand-alone report is less useful than a recursive, iterative process. In short, it is the process itself that is perhaps most useful. As Gruzd notes, the process has been able to 'widen the democratic space and encourage state and non-state actors to engage meaningfully on a broad range of issues'.<sup>27</sup> A frank acknowledgement of the major challenges to achieving the rule of law sets a framework for continuous monitoring, peer accountability and possible policy solutions.

## **Uganda**

All in all, the practices in Uganda demonstrate that there has developed a new political-constitutional order and a culture of the rule of law, and that of vigorous litigation premised on an independent judiciary.<sup>28</sup>

This congratulatory summary does not provide an accurate portrayal of the many troubling aspects of judicial interference and executive control reviewed in the CSAR. Vigorous litigation on the part of the government and the opposition should be celebrated to the extent that it avoids the use of coercive violence. Yet what the CSAR does not capture is the degree to which the courts became a weapon for both the incumbent regime and the opposition. As the opposition has failed to receive electoral pay-offs over time, it has increasingly tackled President Yoweri Museveni's autocratic behaviour through the courts. In this case neither the opposition nor the government is acting beyond the fundamental boundaries of democracy, but through the judicialisation of politics, seeks to destabilise from within. For the opposition, courts become a venue of last resort in the face of a recalcitrant hegemonic political party.

Of the three cases discussed in this paper, Uganda's justice sector is performing at the lowest level. According to the World Bank Governance Indicators on Rule of Law (on a scale of -2.5 [lowest] – +2.5 [highest]),<sup>29</sup> in 2003 Uganda scored -0.54, in 2008 -0.38, and in 2013 -0.36. It should be noted that this at least shows steady improvement (unlike the cases of Lesotho and Tanzania). In the 2014 World Justice Project Rule of Law Index,<sup>30</sup> (where scores range from 0 [lowest] to 1 [highest]), Uganda scored 0.41, ranking it 15 out of the 18 sub-Saharan African countries surveyed. The highest ranked was Botswana, the lowest Zimbabwe. These numeric indicators are rather blunt instruments of analysis. They are an aggregate measure that combines many variables and values that may be in tension with one another. In the case of Uganda, the story is one of contradictions; contradictions that make sense within the particular dynamics of a hybrid regime setting: one moment it makes sense to obey the democratic rules, at another it does not.

The Ugandan CSAR notes some specific cases to illustrate the independence of the judiciary. *In re Ssemogerere*<sup>31</sup> is featured prominently. This was a series of cases concerning a constitutionally mandated referendum on the transition to a multiparty system. Opposition politicians were rewarded with several court victories in regard to the unconstitutional passage of referendum-related legislation. Museveni was most infuriated with the ultimate decision of the Constitutional Court to overturn the Referendum Act, thus nullifying the referendum itself and jeopardising the constitutional standing of his regime. The CSAR notes the following:<sup>32</sup>

Although this verdict constrained the relationship between the Judiciary and both the Legislature and Executive, it illustrated both judicial independence, and the ability for the individual to obtain legal recourse in a Ugandan court of law, even in a case involving both the Executive and Legislature.

What is disconcerting about this broad conclusion is that it refers to a very specific point in time and implicitly assumes that this continues to be accurate. This author has argued that the four years in which these cases were filed and heard, 1999–2003, marked the climax of judicial power in the post-1995 era. Since 2004, the courts have seen a profound and deliberate undermining of their authority by Museveni's regime.<sup>33</sup> The missing piece of this story is that the judiciary faced an immediate backlash in response to its judgement in the *Ssemogerere* case. By 2004, the NRM had convinced the public that the judiciary was an anti-majoritarian institution out of touch with the people.

The issue of reporting on selected judgements in an arbitrary manner is discussed in further detail later in this paper. Both the external reviewers and the government itself selectively cite specific judgements. For example, in the CRR the government's response to the following CSAR statement: 'There is increasing evidence of mounting authoritarianism and rapidly escalating corruption,' was obfuscatory.<sup>34</sup> The government stated in response:<sup>35</sup>

The Constitutional Court has on a number of occasions taken judicial decisions that are not in favour of the government. The government respects all court decisions and where it is not satisfied, appeals are lodged by the Attorney-General in the Supreme Court.

In reality, when the government was dissatisfied with the outcomes of the judicial process, it simply sought to change the constitution and therefore retroactively nullify prior court decisions.

Perhaps the most interesting part of the CSAR are two randomly inserted quotes from interviewees (no context is provided).<sup>36</sup>

Judiciary is fairly independent however there have been instances where the members of the executive have made reckless statements that infringe on the independence of the judiciary. Statements that question the integrity of judges and also declaring 'no go areas' for the judiciary are not healthy (Joseph Omodo Lyanga, Chief Magistrate/D/Registrar High Court Arua/West Nile region).

The existing institutional and legal framework is significantly in favour of the independence of the judiciary. However practices like outright interference, aggression, and appointment of partisan individuals as judicial officers by the Executive, have greatly undermined the independence of the judiciary (Col (Rtd) Dr. Kizza Besigye, President of FDC).

These two quotations are dropped into the text without any context or discussion. Yet it is these two standalone quotes that capture the serious threats to judicial autonomy and independence in Uganda. Beyond the famous 2007 storming of the High Court,<sup>37</sup> little attention is paid to the high level of hostility experienced by the Ugandan judiciary over the last decade. In recent years the Ugandan judiciary has endured some of the worst attacks in its history. These have ranged from direct interference with the discharging of judicial duties, and public disparagement and criticism of individual judges, to the outright defiance of court orders. The public has a very low opinion of the judiciary, as later noted in the CSAR under 'perceptions of corruption': the Uganda judiciary was named as the second most corrupt institution after the police.<sup>38</sup>

The Uganda CRR is more critical than the CSAR and opens with a strongly worded statement:<sup>39</sup>

After an extended period of political liberalisation, which resulted in the strengthening of Parliament, the judiciary, watchdog agencies such as the Inspector-General of Government (IGG) and a free media, Uganda is in danger of slipping back into a period of neo-patrimonial rule. The apparent militarisation of society has not helped the democratic cause, while democratic gains from the decentralisation process are in serious danger of being eroded.

Given the strong opening statements, it is somewhat surprising that the remaining discussion of the judiciary really only covers two areas: (i) the clash over spheres of authority with the military courts; and (ii) the expansive resource-related issues and the concomitant weak administrative independence.

As the opening statement notes, there are broad concerns regarding the militarisation of Uganda; the judiciary is simply part of that broader trend. The CRR states: 'As the judiciary exists in parallel with the expansive military courts, disputes have inevitably arisen over how justice is administered and dispensed by the two parallel systems.'<sup>40</sup> Therefore, recommendations are that the 'military court system needs to be streamlined with the judiciary. In this regard, the military courts martial system has to be harmonised

with the courts of judicature to avoid disputes between the two.<sup>41</sup> This is confusing, because both are sovereign with clear, non-competing jurisdictions. The matter needs to be clearly explicated and adhered to. This theme of confusing and overlapping zones of authority within Uganda's legal institutional structure is highlighted in relation to public attitudes. The CRR notes weak public knowledge and understanding of the judiciary and the justice sector. It claims, for example, that many Ugandans do not understand that the police and the judiciary are two separate institutions.<sup>42</sup>

One potential area of threat that does receive significant attention is the question of financial and administrative autonomy. In its concluding section, the CSAR states: '[T]here is need to implement the constitutional provisions that call for the administrative costs of the Judiciary to be obtained from the Consolidated Fund. This is in addition to the Judiciary's being self-accounting.'<sup>43</sup> The impact of underfunding the judiciary can be felt at the level of infrastructure (the Supreme Court and the Court of Appeal have long been located in rented facilities), and individual judge and support staff salaries, and manifests in insurmountable case backlogs. The CRR picks up on this theme and there is extensive detail on the under-resourcing of the judiciary.

'The Justice Law and Order Section institutions are extremely under-resourced in terms of human resources, physical space and financial resources [ . . . ] The Supreme Court, for instance, has been unable to hear constitutional appeals for close on two years now since the demise of one of the justices and the retirement of another.'<sup>44</sup> The current Supreme Court bench is less than half of the required quorum. During the interactive session with the judiciary, the CRM learnt that Parliament had approved that the number of High Court judges be increased from 30 to 50, the Court of Appeal from eight to 15, and the Supreme Court from seven to 11. It is of interest to note that Museveni appointed only 16 judicial officers, leaving untouched the vacant positions of the Supreme Court; the only court in the system that has failed to hear cases because of a lack of a quorum.<sup>45</sup>

The CRM was made aware that while the judiciary and legislature were administratively and functionally independent, they were not financially autonomous. The executive uses its control and disbursement of resources to the judiciary and the legislature as a veiled method of exerting influence on the execution of their constitutional mandate; for instance, resources for the judiciary do not come directly from the Consolidated Fund through Parliament, as the constitution stipulates, but through the Ministry of Justice and Constitutional Affairs. This also means that the judiciary is not self-accounting, as anticipated by the constitution.<sup>46</sup>

In contrast, the track record of the recently established Commercial Court is far superior in every aspect. This is in large part due to substantial donor support. However, as the CRR notes, the overwhelming dependence of the Commercial Court on donor funding, which has contributed in part to its success, may, paradoxically, become its weakness. If donor funding is frozen or reduced, it cannot automatically be assumed that the government will step in. Moreover, donor funding may place budget restrictions or establish a set of priorities that are externally driven rather than internally demanded.

The question of resources as an abstract threat to judicial independence is rendered in stark relief when one turns to the extreme case backlog in Uganda. For example, buried in the CSAR, in a section under 3.6.2 Transparent System of Recruitment, Training, Promotion, Management and Evaluation of Civil Servants, the CSAR notes: '[T]he existing

Judicial officers have the capacity to handle 9 000 cases a year, but there are over 18 000 awaiting justice in prisons alone.<sup>47</sup>

The CRR conclusions are admirable in their scope and do reach to the critical deficits regarding the rule of law in Uganda. However, operationalising these recommendations is a challenge. For example: ‘Promote a culture of respect for the Constitution, constitutionalism and the rule of law and ensure an effective balance of power and checks and balances between the executive, the judiciary and the legislature.’<sup>48</sup> This cannot be imposed artificially but, instead, has to be nurtured organically over time. The follow-up suggestion: ‘Develop a constitutional and institutional framework and mechanism for managing disputes between the executive, judiciary and legislature’,<sup>49</sup> is puzzling in the context of a constitutional democracy. The constitution is supreme and the judiciary, through power of judicial review, is the ultimate arbiter of disputes and guardian of the constitution. The proposed creation of a mechanism for periodic consultations between the three arms of government should not imply anything other than constitutional supremacy. The final recommendations are related to increasing financial resources and reducing donor dependence:<sup>50</sup>

- Ensure the independence of the judiciary by eliminating undue political influence and providing the courts of judicature with requisite resources for the judiciary to carry out its mandate effectively.
- Reduce the overwhelming donor dependence of the judiciary, as it has implications for judicial independence and national sovereignty.
- As a matter of urgency, provide adequate financial resources for building the Supreme Court, which is a national edifice. Every effort must be made to ensure that the financing of the building is from domestic resources and not foreign aid.

The major conclusion in the CRR is perplexing: ‘The problem is not that there are conflicts between and in these institutions in Uganda but rather there are no mechanisms for their resolution’ beyond ‘the sheer goodwill of their heads to resolve such problems through consensus.’<sup>51</sup> As previously discussed, this position appears to violate the basic principles of constitutional supremacy. It further presupposes that lack of respect for separation of powers is shared equally across all three branches, when in reality the most serious problems lie with the legislature and, even more egregiously, the executive. There are members of the legislature who erroneously believe they continue to reside in an era of parliamentary supremacy. This is coupled with an executive who only selectively adheres to court decisions in the interests of expediency, and who maintains a climate of hostility and disrespect towards the judiciary. The only real solution would therefore appear to be regime change and a renewed commitment to multiparty democracy within an institutional framework grounded in constitutional supremacy.

## **Lesotho**

Lesotho has not released its CSAR. Therefore, only the CRR will be reviewed and discussed in this section. However, the CRR is a combination of the self-assessment report and the findings of the external review commission, and the CRR does regularly refer to the CSAR



throughout the report. That said, Lesotho's CRR is notably shorter and less detailed than that of Uganda and Tanzania.

Of the three cases discussed in this paper, the Lesotho rule of law sector is generally perceived to be performing at a superior level to that of Uganda and Tanzania. The World Bank Governance Indicators: Rule of Law score Lesotho at -0.01 in 2003, -0.26 in 2008 and most recently, 0.26 in 2013. However, like Tanzania, this indicates a decline over a 10-year period. This decline is captured in the APRM CRR, but as a reflection of broader political instabilities rather than a problem specific to the judiciary.

The CCR summary highlights these broader challenges facing Lesotho's fragile democracy:<sup>52</sup>

- intraparty and interparty tensions;
- dominant executive and a weak Parliament;
- uneven and incomplete decentralisation; and
- lack of accountability and weak efficacy in implementing public policy (including a backlog of judicial reform bills).

Three years later, the first two concerns are front and centre as Lesotho struggles with a shaky coalition government, a suspended Parliament and an alleged attempted coup. As the Southern African Development Community (SADC) and President Jacob Zuma of South Africa seek to step in and negotiate a peaceful settlement, Lesotho begins to look like a 10<sup>th</sup> province of South Africa.

The particular concerns of the Lesotho CRR are reflected in specific benchmarks that have now been reached. Administrative reform has taken place, the judiciary has increased the size of the bench and the code of conduct has become statutory. Yet restricted resources continue to hamper the development of judicial independence; for example, the Judicial Administration Act<sup>53</sup> was finally passed after an EU rule of law project attached the bill as a conditionality to funding. The major sections of the bill include autonomous administration of the judiciary, the creation of a Chief Accounting Officer, promulgation of Ethical Principles for the Judiciary and the creation of a Judicial Inspectorate. The Judicial Inspectorate (ie, members appointed from Parliament; the Attorney-General's office; the Law Society; the Ministry of Finance and the police) shall inspect the courts, issue reports and investigate complaints. The Ministry of Justice, Human Rights and Rehabilitation shall be the Secretariat for the Judicial Inspectorate. Moving from promulgation of the bill to the actual institutional realisation, particularly in the light of the major leadership crisis facing the judiciary,<sup>54</sup> is a major leap. Moreover, there are risks that the judicial inspectorate may become a weapon of interference in judicial independence rather than a source of judicial accountability.

As regards rights promotion in Lesotho, the CRR finds issues with the efficiency of the judiciary: '[I]t was brought to the attention of the CRM that the backlog in the judicial system surpasses the six-month period referred to in the CSAR and that this backlog is closer to 24 months.'<sup>55</sup> This can be directly linked to poor resources – both human and infrastructural. The leadership crisis has also distracted attention away from addressing core functional issues such as case backlogs. The CRR puts significant weight on the effects of poor morale within the judiciary and relates this to poor performance.

The CRR speaks in frank terms about the climate of distrust in Lesotho which, in turn, severely undermines the separation of powers.<sup>56</sup>

The judiciary appears to be quite professional and independent in its case decision making. However, the CRM found that there is mutual distrust between the executive and the judiciary. It appears that the executive doubts the political allegiances of the judiciary, whereas the latter fears executive encroachment in its functioning and suspects deliberate attempts to frustrate proposed reforms aimed at greater autonomy of the judiciary. The capacity of the courts to dispense justice is undermined by human-capacity shortages in the face of increased litigation. The fact that there is no dedicated Constitutional Court means that High Court judges also have to staff that court, which further stretches their capacities. Conditions of service of the judges are reported to be unfavourable and deteriorating, which puts a dampener on morale. The independence of the judiciary is also reported to be compromised by the lack of transparency in appointments to the bench.

Based on fieldwork conducted by the author in Lesotho in 2011, similar conclusions were reached. The low morale of the judges was marked in contrast to those working in other sub-Saharan African countries. The government's response to this section of the report sheds some light on why morale is so low – there is no agreement on whether a problem actually exists in the first place.<sup>57</sup>

The truth of the matter is that when compared to those of equivalent officers in the three arms of government, judges enjoy some of the best conditions of service in the Lesotho public service. The benefits of the judges include subsidised accommodation, telephones, electricity and water, good remuneration by local standards, decent vehicles for transportation (Mercedes Benz) and good pensions, which are not enjoyed by other strata of the public service. Their retirement age is 75 years while for other strata of public service it is 60 years. It is therefore far from the truth that the service conditions of judges are unfavourable and deteriorating.

The government response is a non sequitur. The conditions of service outside the judges' workplace are only one issue, while the conditions within the workplace relate to whether or not all judges have a complete set of law reports, a full-time research assistant, and fully functional technology and support. Conflating these two aspects appears to be a political manoeuvre designed to discredit the judges and delegitimise the judiciary rather than engage in constructive dialogue on the nature and causes of the problem.

Finally, the conclusions and recommendations in the Lesotho report are similar to those of the Uganda report. Suggesting that the political culture should change is wistful and not entirely helpful. It further demonstrates that the judiciary cannot be protected and reformed as a separate unit, but only as part of broader political–structural change.

CRM consultations with the judiciary revealed that although it is formally independent under the constitution, in reality it is not. The executive should cherish and proclaim publicly the importance of judicial independence as a cornerstone of the rule of law and a just society in which no one is above the law. This would build public respect for judges and magistrates and the judgements they deliver.<sup>58</sup>

While the question of building a culture of respect for judicial independence is straightforward, the solutions are far more complex. These solutions involve the government, the public, the international community and the judges themselves. One important aspect overlooked in the report is the fact that the Court of Appeal is staffed almost entirely with ex-patriate judges shipped in for the three ad hoc sessions held each year. This merely serves to reinforce the already cavernous gap between the public and political elites.<sup>59</sup>

Another understated facet of the APRM report is corruption. Corruption is mentioned throughout but, again, solutions to the problem are complex, particularly in a society as small as Lesotho. In an interview the author conducted in 2011, one individual captured the relationship between politics and judicial independence in the following way:<sup>60</sup>

Lesotho is a typical case of the political parties, or the political party in government, through a remote control, destabilising the judiciary [ . . . ] [W]e find that destabilisation comes from within the judiciary, from the Court of Appeal, and from the cabinet. Right now the cabinet of Lesotho is divided into two, the factions. These factions in the cabinet are overflowing into the judiciary [ . . . ] Lesotho's politicisation is so extreme that people are now classified according to whether they are for or against the government. The morale in the public service is the lowest. The public service is rattled with corruption, even right from the prime minister's office. So judicial independence is not something that is limited within the parameters of the judiciary.'

The judiciary is embedded in a complex web of political, social and economic ties. These systemic problems far outweigh the minor indiscretions of individual judges. However, they are the hardest to tackle. The overlapping nature of the discrete sections of the APRM questionnaire renders the full scope of the problem clearly.

## **Tanzania**

Tanzania's is the most recent APRM report to be released. The self-assessment was completed in 2009, but due to a delay in undertaking the country review, was updated in 2011. The CRR was released in 2013.

According to the World Bank Governance Indicators on Rule of Law, in 2003 Tanzania scored -0.29, in 2008 -0.34 and most recently, in 2013, -0.50. This indicates a quite significant backslide in perceptions of rule of law. Over the same time period, Tanzania's Freedom House ratings marginally improved. According to the World Justice Project Rule of Law Index 2014, (on a scale of 0 to 1) Tanzania was scored at 0.47. This gave the country a regional ranking of seven out of 18 sub-Saharan countries surveyed.

The general conclusions and findings of the APRM echo the slide in rule of law perceptions identified in the World Bank Governance Indicator scores. Tanzania's CSAR is by far the most lengthy of the three case studies and also the most critical. It concludes that 'on the whole there is still a long way to go before one can confidently and objectively believe that there is adequate respect for the rule of law in Tanzania'.<sup>61</sup> The judiciary is discussed extensively, including core concepts such as rule of law and judicial independence. While several landmark cases are highlighted, many are now more than 20 years old.

In the initial executive summary the following general conclusions related to judicial independence in Tanzania are drawn:<sup>62</sup>

- Tendency by the Parliament and the Executive to limit the courts [sic] powers.
- Likely abuse of discretionary powers by the Executive.
- Courts' decisions are sometimes rendered invalid by the Government through Parliament by amending the constitution or legislation to maintain the unconstitutional laws and virtually the status quo.
- Growing mob justice significant threat to rule of law.
- Limitations on Human Rights in the Bill of Rights.
- Catalogue of the Bill of Rights not adequately conforming to international instruments of human rights.
- Vesting the original jurisdiction on human rights violation in the High Court of Tanzania seriously impedes accessibility to justice by victims.
- Fusion of Executive and Parliament complicates the functioning of the doctrine of separation of powers.
- Relatively excessive Powers of the Executive.
- Inadequate compliance with the Principles of Separation of Powers.
- Shortcomings in Implementation of the Concept of Independence of the Judiciary.

This list is by far the most comprehensive and critical of the three case studies. In fact, it is so negative, it appears that the obstacles towards realisation of the rule of law are almost insurmountable. A series of discrete technical interventions cannot begin to tackle these challenges. Instead, a wholesale political transformation and a new constitution are required. The report does not explicitly spell this out, but the primary causal factor is the hegemonic single-party democracy, where one party – the Chama Cha Mapinduzi (CCM) – has been in power since independence. There are many places where CCM dominance is implicitly addressed, for example: 'The effectiveness of parliamentary oversight is seriously undermined by the over-representation of the ruling party in Parliament and in the House of Representatives. The plurality electoral system should be replaced by proportional representation or a mixed electoral system.'<sup>63</sup> Despite the transition to multipartyism, the CCM has retained the 1977 constitution and has failed to update many ancient and problematic colonial era statutes.

The report details problems of accessibility. These are due to poor resources, a paucity of courts and judges distributed around the country, the expense of hiring a lawyer, and the difficulties inherent in constituting a panel of three High Court judges in constitutional cases.<sup>64</sup> These issues can be tackled at a basic resource level and a legal procedural level.

The frank recommendations of the CSAR focus on the non-compliance with court orders, decisions by the executive and its agencies, and the erosion of separation of powers. Simply stating that the 'Executive should develop a culture of accepting and respecting court orders' is an ambitious goal, given the historical context.<sup>65</sup> The question then becomes whether that culture of compliance can be developed within the existing institutional infrastructure. Or does it require a radical revision of government institutions and a less restrictive political culture? The new draft constitution proposes some radical changes. The judiciary would now operate under a federal structure with a Supreme Court and Court of Appeal. The Supreme Court would be the court of first

instance for presidential election petitions and matters concerning the union between mainland Tanzania and Zanzibar. There would be a powerful Judicial Service Commission and a clear statement on judicial independence. While these are substantial, substantive proposals, to date the passage of a new constitution is stalled.

The CRR aligns closely with the CSAR. The strongest concerns articulated in the CRR centred on the weak separation of powers and lack of respect for judicial authority and independence. Stakeholder meetings conducted by the CSAR team noted a number of instances where the judiciary was pitted against the executive. Further, in the CRR regional and district commissioners were identified as most likely to violate court orders:<sup>66</sup>

[T]he CRM notes with concern the serious implications for the rule of law of the following observations from its stakeholder meetings across the United Republic of Tanzania. During such meetings in Dar es Salaam, many speakers alleged that court judgments on the eligibility of independent candidates to run for elections had, on a number of instances (such as the Rev. Mtikila cases), pitted the judiciary against the executive and the legislature.

Perhaps what is most striking about the Tanzania reports is the clarity with which the nature of the problems is laid out. This presents an interesting case within the wider context of the peer review process. Moving from this detailed, substantive and highly critical report to the Heads of State Forum of the APRM, one is able to observe the dilution effect in the process. In the summary laid out to the heads of state, the judiciary is not mentioned and the only items that tangentially touch the judiciary are ‘[c]learly redefining the role of the state’ and ‘[m]anaging political and social change’.<sup>67</sup>

Early efforts in the 1990s by certain individual judges to uphold the bill of rights and separation of powers have been unravelled by weak government compliance with court rulings. Furthermore, patterns of retrospectively nullifying judgements; perpetuating the myth of parliamentary sovereignty while simultaneously appointing judges with suspect qualifications; creating parallel judicial structures; tolerating high levels of judicial corruption; and an increasingly worrisome pattern of behaviour by the police serve to weaken the support structures for rule of law. While legal elites and opposition political elites deride these developments, the public continues to support the CCM regime and apparently harbours a degree of antipathy towards the judiciary, which is perceived to be remote, elitist and corrupt. CCM strategies of interference have been long term and of low intensity, but this strategy has been more effective in restricting judicial independence in comparison to Lesotho or Uganda.<sup>68</sup> The constitution appears to be a malleable instrument in the hands of the government: a constitution without constitutionalism; perhaps a forewarning to those who see the new draft constitution as a democratic panacea.

## LESSONS FROM THE APRM AND RECOMMENDATIONS

### Limitations of the APRM questionnaire

The questionnaire, while providing a consistent and helpful framework across country reviews, also splinters potentially useful information into disparate sections. The Uganda

CSAR is archetypal in this regard. The discussion of the judiciary under the section 'Judicial Independence', while making some balanced remarks, is far from comprehensive in its treatment. While simply doing a search for the word 'judiciary' throughout the report, it becomes clear that there are major issues of central importance to judicial independence that are buried under minor sub-headings; for example, questions of judicial appointments are raised in a section on public sector personnel much later in the report.

The major conceptual flaw in the questionnaire is the formalistic emphasis on separation of powers. This then creates a situation where the emphasis is on negative conceptualisation of judicial independence rather than on judicial empowerment. The Ugandan report makes reference to a vigorous culture of litigation, and this is a critical point. The judiciary is a dependent institution and must wait for cases to come to it. Cases will come only if there is a vigorous and organised private legal sector, and a legal sector that works with civil society groups. These are the essential building blocks from which to empower the judiciary. Moreover, a well-respected law school that produces excellent lawyers will produce a pool of candidates for top judicial positions. Moreover, a vibrant private legal sector provides an important buffer between the judiciary and the government. Judges – through choice and due to the conventional norms of judicial behaviour – rarely advocate for themselves off the bench. Law societies can become potentially powerful allies in standing up to aggressive, overreaching executives. In short, situating analysis of the judiciary within the broader legal complex provides a clearer picture of the challenges and possible ameliorative interventions.

### **Narrowing questions and identifying 'best practices'**

Carefully defined questions related to specific facets of judicial power and independence are more helpful than, for example, general statements regarding 'respect for separation of powers'. One example of a narrowly conceived topic or question is where the review committees are asked to discuss '[i]nstances of recent contentious electoral cases and how they were resolved by the courts'.<sup>69</sup> This is a particularly interesting topic across the three case studies in this paper.

In the case of Uganda the Supreme Court was in the spotlight in both the 2001 and 2006 presidential elections. The judges literally held the results in their hands. While taking a middle position, admitting irregularities but claiming these were not significant enough to change the results, the incumbent Museveni retained power. Under the Ugandan constitution, petitioners have only 30 days to file their evidence. The mandated 30 days to file an election petition is simply not enough time to collect evidence and affidavits at the national level in a country as big as Uganda.<sup>70</sup> It has more recently been revealed that the judges were under tremendous pressure to reach a decision favourable to Museveni.<sup>71</sup> Yet interestingly, the prompt handling of the 2006 election petition is mentioned by the country review mission in the section 'practices worthy of emulation':<sup>72</sup>

Despite its resource constraints, the judiciary made an extraordinary effort to handle election petitions promptly following the first-ever multiparty elections of 2006. The entire backlog of election petitions was completed within a period of two months by the Supreme Court.

However, earlier in the report the country review mission noted:<sup>73</sup>

The CRM learnt that the judiciary is also tasked with handling election petitions. Elections often result in numerous complaints being brought before the Electoral Commission by various stakeholders. If the Commission is unable to resolve a complaint satisfactorily, it is referred to the Supreme Court. During the interactive session with the members of the judiciary, the CRM was informed that it usually takes up to about five years for election petitions to be resolved. This, in part, is due to the lack of resources at the disposal of the Court.

Delay in dealing with election petitions has triggered post-election conflicts in numerous African countries. It is imperative that election results be announced in a timely manner and that election petitions be dealt with in good time so that the key players develop confidence in the electoral system and the judiciary. It is against this backdrop that the CRM was impressed with the promptness with which the judiciary in Uganda had handled petitions within two months after the 2006 general election. The CRM considers this a best practice that other African states should emulate if they are to forestall the possibility of post-election disputes escalating into political violence.<sup>74</sup>

At the heads of state forum to discuss the Uganda report, Lesotho's Prime Minister, Pakalitha Mosisili, requested more information on the prompt handling of presidential election petitions in Uganda. More specifically, the prime minister asked how the judiciary had managed to handle election petitions so expeditiously; and what would happen to the president-elect during the intervening period. Given the contentious nature of Lesotho's politics, it is not surprising that this should generate interest on the part of Lesotho's prime minister.

In the case of Tanzania, the presidential election results may not be challenged under the 1977 constitution. The CRR recommended that the 1977 constitution should be reviewed and the courts be given the necessary jurisdiction to adjudicate cases concerning the National Electoral Commission, and to create a law allowing candidates to challenge presidential results in court. The draft constitution accommodates this under the new Supreme Court jurisdiction.

In sum, this rather narrow, yet important, topic generated specific examples and very specific recommendations in the CRRs. Capturing this narrower segment of a bigger picture on judicial independence is more accurate and breathes life into abstract terms and definitions such as 'separation of powers'.

### **Standards of evidence: Modifying claims of judicial independence**

The primary means of ascertaining the status of judicial independence is through mapping patterns of judicial decision-making. Both the Uganda and Lesotho reports make claims of independent judicial decision-making through referencing a very small number of 'notable' decisions. In contrast, the Tanzania CSAR uses a small number of notable decisions – many of which are now quite dated – to illustrate weaknesses in judicial independence.

These arbitrarily selected cases do not provide a solid basis upon which to extrapolate general conclusions regarding the contemporary state of the judiciary over a decade later.

The Lesotho CRR summarises this kind of reporting through a synopsis of the Lesotho CSAR on judicial independence:<sup>75</sup>

The CSAR states that the independence of the judiciary has been demonstrated in its decision making. For instance, it is stated that the judiciary is not pressured into supporting the government of the day. Several cases are cited that involved decisions against the government: one involved the Law Society of Lesotho challenge of the prime minister's appointment of an acting judge in contravention of the Human Rights Act; another concerned a ruling against the executive in a case involving the latter's revocation of leases; a third entailed the judiciary upholding the independence of court martial; and a fourth affirmed the constitutionality of assigning magistrates to district administration.

Again, this appears to be an exaggerated extrapolation of the facts. Alternatives could involve presenting a more balanced view of pro- versus anti-government decisions. In general, this approach does not provide great dividends in measuring the degree of judicial independence or empowerment. This scorecard analysis hides important nuance and oversimplifies the complexity of the actual cases. Moreover, in many cases the 'judiciary' needs to be disaggregated into its component parts; for example, the Tanzanian High Court has rendered several bold decisions that have challenged the government; but the Court of Appeal has often overturned the decisions in a pattern of executive–legislative deference, assuming a far more cautious and conservative stance.

At a minimum, reference should be made to any existing secondary literature, or the CRM should carry out a careful and more methodical review of judicial decision-making. Easy access to decisions through the Southern Africa Legal Information Institute database,<sup>76</sup> for example, renders this a feasible proposition.

### **A trade-off between discrete technical reform targets and general concerns**

In the case of Lesotho, the discrete targets with regard to reform of the judiciary have either been reached or substantial progress has been made. Of significance here is the passage of the Administration of the Judiciary Act of 2011. This is an important milestone for the Lesotho judiciary. Yet moving from legislation to implementation and then positive impact is a much longer process. When drafting the recommendations, it may be important to consider the trade-offs between setting smaller achievable targets, on the one hand, while downplaying or overlooking the major structural and political issues, on the other. It would seem that the ideal would be to strive towards a balance between the two and, even more importantly, an explicit linkage of the two. In the case of the 2011 Judiciary Act, a seemingly innocuous bill on administration made significant gains in improving the separation of powers by making the judiciary financially and administratively autonomous from the Ministry of Finance. Moreover, the bill contained provisions for new levels of oversight and checks on judicial decision-making and behaviour. It should be remembered that judicial accountability is the other side of the coin to judicial independence.



### **Representation on APRM Country Review Commissions**

While the emphasis of this paper has been on the products of the review process rather than the mechanics of the process, it is noteworthy that in none of the three case studies was a member of the judiciary represented on the National Governing Council (the internal APRM organising and oversight body). In Uganda a member of the Law Society was represented but not the judiciary, and in Lesotho neither lawyers nor judges were represented. Ensuring representation of the judiciary on the Country Review Commission is an easy step towards foregrounding the critical importance of this institution in securing democracy and good political governance. Furthermore, it may aid in the implementation of APRM recommendations after the NPoA has been released.

### **The legal complex**

A missing piece of the puzzle across all three cases is the broader importance of the entire legal complex.<sup>77</sup> The legal complex refers to a structured set of relationships across a broad range of legal occupations, from lawyer to civil servant, from law professor to judge. The Ugandan Law Society has been a stalwart supporter of the judiciary in the face of increasingly hostile attacks by Museveni's NRM government. In Tanzania the Tanganyika Law Society has been vocal in its support of the judiciary. There are three notable trends worthy of mention here. First, as insecure political elites seek to maintain control in the post-1990 multiparty era, the persistence of law societies as a voice of opposition has endured despite increased restrictive pressure on civil society as a whole. Second, expansion in the size and greater professionalisation of law societies over the past 20 years have augmented their voice and impact. Third, there are patterns of increased activism by law societies during times of political uncertainty or increased autocratic behaviour by governments. As regards the relationship between legal scholars and the courts, there is a multitude of roles for law professors in terms of providing potential personnel for the bench – a practice common in francophone African constitutional courts, for example. Legal scholars may act as a mechanism for translating and disseminating important court judgements and are, of course, on the front lines in training future lawyers and judges. In short, the legal complex is an important support and accountability structure for the judiciary. While some of these issues are buried in other parts of the APRM reports, outside of discussions on the judiciary, mapping out the explicit connections across the legal complex paints a richer picture.

### **Peer review and pressure across the legal community**

There is considerable scope to expand the notion of peer review and potentially even peer pressure in respect of judicial independence and the APRM. Already judges and lawyers are actively sharing and communicating through regional and international professional bodies. They may share details on the relative merits of judges' retirement packages or on new case management systems. What is suggested here is that peer review at the broad level of the entire report may be too ambitious. It merely serves to dilute the process to the point at which it loses its teeth. If one considers an intermediate level of peer review below the heads of state level, more concrete outcomes could be achieved; for

example, an APRM chief justices forum for those countries that have already undertaken review could be helpful in terms of identifying and sharing best practices, improving communication, prioritising knowledge development and inculcating a learning culture.<sup>78</sup> However, it would also aid in mobilising the broader legal complex in support of courts in countries that are undergoing particularly egregious attacks on judicial independence. This level of peer review could be organised between the APRM Secretariat and some of the regional professional bodies, such as the SADC Lawyers Association, the SADC Chief Justices Forum or the African Women Judges Association. Existing professional meetings and opportunities are currently dominated by the big international bodies such as the Commonwealth Magistrates and Judges Association or the International Bar Association and while valuable, they should not eclipse the importance of regional legal professional bodies. Connecting the work of the APRM to regional legal bodies holds great potential.

## CONCLUSION

The central argument of this paper is that the scope and scale of the APRM reports are so vast that the essential critiques become distilled to the point at which they are toothless. This is exemplified by vague descriptions of weak separation of powers and poor government compliance with judicial decision making. The real ‘bite’ lies in responding to more concrete questions and in identifying specific empirical trends over time. The challenge is how to become more specific without losing the overarching and interlocking framework that ties issues and policies together.

In terms of broad trends and trajectories of the rule of law and judicial independence, the three cases reviewed in this paper illustrate broad commonalities across time and space. Financial and administrative autonomy continue to present a significant obstacle to the realisation of judicial independence. All three countries have recently created commercial courts (although not Lesotho at the time of the APRM), which are thriving across the board. However, all have been heavily promoted and funded by donors, therefore rendering them vulnerable to budget cuts looking forward.

The second observed commonality was weaknesses in the judicial appointment process. Surprisingly, however, neither the CSARs nor the CRRs were able to offer substantive insight into the nature and cause of the problem. This is an oversight that should not be taken lightly. Vague accusations of impropriety in appointments, politicisation of appointments and improperly constituted judicial services commissions are not strong enough to generate discrete actionable items. There has been substantial reform in the area of judicial appointments across the continent; of note here are South Africa and Kenya. These innovative and more transparent systems are being tested and can potentially become part of the APRM ‘best practices’ recommendations.

Finally, each case had a story to tell about a time when the judiciary handed down independent, assertive decisions; where judges had stood up to recalcitrant executives and legislatures. Yet each of the three cases, to varying degrees, decry the weak respect for separation of powers. Each case presents a very different story in terms of the timelines of events and the frequency of anti-government decisions. This lends credence to arguments that judicial empowerment is a non-linear process, subject to setbacks and stagnation. Piecing together timelines or a trajectory will greatly enhance the analysis of the APRM,

rather than an ad hoc selection of particular events or judgements. To that end, it remains essential to stay committed to the second and even third round reviews that loom on the horizon.

It is clear that important work is being carried out through the peer review process. However, during the fieldwork conducted with the judiciaries in Uganda, Tanzania and Lesotho at various times between 2006 and 2012, it is noteworthy that at no point did any interviewee spontaneously reference the APRM. Moving towards a model in which the comprehensive range of issues covered in the APRM also ties together other existing interventions and programming is critical. Good governance programmes that promote democracy and strengthen the rule of law are now ubiquitous across the continent. Assessing their strengths, weaknesses and – perhaps even more problematic – unnecessary overlap and repetitions, would simultaneously raise the profile of the APRM and critically examine the impact of these efforts. Essential to this process is ensuring a commitment to domestication of the process, although this is not always easily achieved.<sup>79</sup> Creating a mid-level tier of peer review, as suggested above, could go some distance towards familiarising the entire legal community with the process, outcomes and goals of the APRM.

## APPENDIX A

**Table 1: Conceptualisation of the judiciary in the APRM questionnaire**

Objective	Question	Indicator
1. Entrenching constitutional democracy and the rule of law	1. Does the political system as practised in your country allow for free and fair competition for power and the promotion of democratic governance?	v. Instances of recent contentious electoral cases and how they were resolved by the courts.
	2. What weight do provisions establishing the rule of law and the supremacy of the constitution carry in practice?	iv. The accessibility (geographically and financially) of adjudication bodies such as courts and various forms of alternative dispute resolution mechanisms. v. The effectiveness of institutions tasked with enforcing legal provisions that establish the rule of law and affirm the supremacy of the constitution.
2. Upholding the separation, checks and balance of powers	1. Does the constitution provide for the separation of powers between the executive, the legislative and the judicial branches of government?	i. Constitutional and legislative provisions or conventions establishing and guaranteeing the separation of powers. ii. The efficacy of mechanisms (if any) to resolve conflicts between the branches of government.
	2. To what extent is the judiciary independent?	i. Whether the constitution or any other legislation provides adequate protections for the independence of the judiciary. ii. Whether the constitution or any other legislation creates an independent organ (eg, a judicial services commission) tasked with providing oversight over the judiciary – particularly over appointments and promotions, as well as complaints against judges. iii. Whether judges are appointed, promoted and dismissed in a fair and unbiased manner. iv. Judicial decisions against governmental authorities and/or private concerns obeyed. v. Instances where judicial decisions awarded against government have not been enforced, or instances in which there were attempted or actual attempts to manipulate the judiciary. vi. Existence of financial independence of the judiciary, in terms of resource allocation free of encumbrances by the executive. vii. Any other relevant circumstances.

Objective	Question	Indicator
4. Promotion and protection of civil and political rights as enshrined in African and international human rights instruments	2. What steps have been taken to facilitate due process and equal access to justice for all?	<p>i. Assess whether prosecutors are independent of political control and influence in practice.</p> <p>ii. Assess whether defendants have an effective right to independent, competent counsel.</p> <p>iii. Describe, where applicable, instances where an independent counsel is provided to a defendant at public expense if he/she cannot afford his/her own.</p> <p>iv. Describe the accessibility of courts and other dispute adjudication mechanisms.</p> <p>v. Describe the effectiveness of legal aid mechanisms and other structures designed to assist the indigent to obtain access to the legal system.</p>
5. Ensuring accountable, efficient and effective public service delivery at the national and decentralised levels	3. What efforts, if any, have been made to empower local or rural communities through the devolution or decentralisation of political power, judicial authority or financial resources?	<p>i. The effectiveness of the current system of devolution of power to local authorities. Describe whether it enhances or hinders service delivery and whether or not it promotes greater accountability between government and citizens.</p> <p>ii. Whether traditional authorities are consulted or in any way incorporated into the system of government at the local level, and does the incorporation of traditional authorities enhance or hinder accountability or service delivery at the local government level.</p>
6. Promotion and protection of the rights of women	2. What measures have been put in place to enhance the role of women in the democratic process and in the governance of your country?	<p>ii. Evidence of the number and percentage of women appointed over the past 5 years to decision-making positions, including the number of women elected to the parliament, the executive, the judiciary and local authorities.</p>

Source: APRM, *Revised Country Self-Assessment Questionnaire for the African Peer Review Mechanism, Democracy and Political Governance*, 2012, chapter 3, <http://aprm-au.org/document/revised-aprm-questionnaire>, accessed 16 August 2014

## ENDNOTES

- 1 The countries that have acceded are Algeria, Angola, Benin, Burkina Faso, Cameroon, Chad, Djibouti, Egypt, Ethiopia, Equatorial Guinea, Gabon, Ghana, Congo-Brazzaville, Kenya, Lesotho, Liberia, Mali, Malawi, Mauritania, Mauritius, Mozambique, Niger, Nigeria, Rwanda, São Tomé & Príncipe, Senegal, Sierra Leone, South Africa, Sudan, Tanzania, Togo, Tunisia, Uganda and Zambia. Those that have successfully completed reviews are Ghana, Rwanda,

- Kenya, South Africa, Algeria, Benin, Uganda, Nigeria, Burkina Faso, Mali, Mozambique, Lesotho, Mauritius, Ethiopia, Sierra Leone, Zambia and Tanzania.
- 2 Freedom House, 'Freedom in the World Database', 2014, <http://www.freedomhouse.org/report/sub-saharan-africa-fact-sheet#.VBdMb0t3Ydu>, accessed 20 August 2014.
  - 3 World Justice Project, 'Rule of Law in Sub-Saharan Africa', blog, 2012, <http://worldjusticeproject.org/blog/index-data-spotlight-rule-law-sub-saharan-africa>, accessed 20 August 2014.
  - 4 North DC & B Weingast, 'Constitutions and commitment: The evolution of institutional governing public choice in seventeenth-century England', *The Journal of Economic History*, 49, 4, 1989, pp. 803–32.
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  - 6 Domingo P, 'Judicialization of politics or politicization of the judiciary: Recent trends in Latin America', *Democratization*, 11, 1, 2004, pp. 104–26.
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  - 8 See Von Doepp P & R Ellett, 'Reworking strategic models of executive-judicial relations: Insights from new African democracies', *Comparative Politics*, 43, 2, 2011, pp. 147–65.
  - 9 *Ibid.* See also Popova M, *Politicized Justice in Emerging Democracies*. New York: Cambridge University Press, 2012.
  - 10 NEPAD (New Partnership for Africa's Development), NEPAD Framing Document 2001, [http://www.nepad.org/system/files/NEPAD%20Framework%20\(English\).pdf](http://www.nepad.org/system/files/NEPAD%20Framework%20(English).pdf), accessed 16 August 2014.
  - 11 African Union, Charter on Democracy, Governance and Elections, Political, Economic and Social Governance, chapter 9, article 27, [http://www.ipu.org/idd-E/afr\\_charter.pdf](http://www.ipu.org/idd-E/afr_charter.pdf), accessed 30 October 2014.
  - 12 APRM (African Peer Review Mechanism), *Revised Country Self-Assessment Questionnaire for the African Peer Review Mechanism*, July 2012, <http://aprm-au.org/document/revised-aprm-questionnaire>, accessed 16 August 2014 (hereinafter 'Revised Questionnaire').
  - 13 *Ibid.*, p. 16.
  - 14 The term 'legal complex' was coined by Terence Halliday *et al.* See, for example, Halliday TC, Karpik L & MM Feeley (eds), *Fighting for Political Freedom: Comparative Studies of the Legal Complex and Political Change*. Oxford: Hart, 2007.
  - 15 APRM, Revised Questionnaire, *op. cit.*
  - 16 See, for example, Rios-Figueroa J, 'Judicial Independence: Definition, Measurement, and Its Effects on Corruption; An Analysis of Latin America', unpublished PhD thesis, New York University, Graduate School of Arts and Science, 2006.
  - 17 See, for example, Toharia JJ, 'Judicial independence in an authoritarian regime: The case of contemporary Spain', *Law and Society Review*, 9, 3, 1975, pp. 475–96.
  - 18 Kapiszewski D & MM Taylor, 'Doing courts justice? Studying judicial politics in Latin America', *Perspectives on Politics*, 6, 4, 2008, p. 749.
  - 19 Ginsburg T, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. New York: Cambridge University Press, 2003, p. 252.

- 20 Finkel J, *Judicial Reform as Political Insurance: Argentina, Peru, and Mexico in the 1990s*. South Bend: University of Notre Dame Press, 2008.
- 21 *Ibid.*
- 22 APRM, Revised Questionnaire, *op. cit.*
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- 27 Gruzd S, 'The African Peer Review Mechanism: Development Lessons from Africa's Remarkable Governance Assessment System', Research Report 15. Johannesburg: SAIIA, January 2014, p. 18.
- 28 APRM, *Uganda APRM Country Self-Assessment Report*, 2007, p. 116, <http://www.aprmtoolkit.saiia.org.za/uganda>, accessed 17 August 2014 (hereinafter *Uganda CSAR*).
- 29 The World Bank rule of law measure captures perceptions of the extent to which agents have confidence in, and abide by, the rule of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence. See World Bank, Worldwide Governance Indicators, database, 2014, <http://info.worldbank.org/governance/wgi/index.aspx#doc>, accessed 2 September 2014.
- 30 'Rule of law' is defined by the World Justice Project as a system in which the following four universal principles are upheld:
- The government and its officials and agents as well as individuals and private entities are accountable under the law.
  - The laws are clear, publicised, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property.
  - The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient.
  - Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.
- See World Justice Project, 'What is the Rule of Law?', <http://worldjusticeproject.org/what-rule-law>, accessed 2 September 2014.
- 31 *Paul K Ssemogerere and Ors v Attorney General* (Constitutional Appeal No. 1 of 2002); *Attorney General v Paul K. Ssemogerere and Anor* (Constitutional Appeal No. 3 of 2004); *Paul K. Ssemogerere and Anor v Attorney General* (Civil Application No. 5 of 2001); *Attorney General v Paul K. Ssemogerere and Anor* (Constitutional Appeal No. 3 of 2004); *Attorney General v Paul K. Ssemogerere and Ors* (Constitutional Application No. 2 of 2004).
- 32 APRM, *Uganda CSAR*, *op. cit.*, p. 115.
- 33 Ellett R, *op. cit.* 2013.
- 34 APRM Secretariat, *Uganda APRM Country Review Report*, January 2009, p. 26, <http://www.africa-platform.org/sites/default/files/resources/Uganda%20Country%20Report.pdf>, accessed 18 August 2014 (hereinafter *Uganda CRR*).
- 35 *Ibid.*, p. 304.
- 36 APRM, *Uganda CSAR*, *op. cit.*, p. 115.

- 37 In the lead-up to the 2006 presidential elections, the government attempted to control opposition candidate Dr Kizza Besigye through the judiciary, filing rape and treason charges against him in the High Court. However, given the court's mixed record of decision-making, the president knew that it could not be relied upon to make the 'right decisions'. As a result, Museveni also went around the courts (by simultaneously filing charges with the general court martial) and ultimately chose to assault the courts when in 2005 and 2007 the president's antiterrorism commando unit entered the court buildings and seized prisoners who had been released on bail.
- 38 APRM, *Uganda CSAR*, *op. cit.*, p. 142.
- 39 APRM, *Uganda CRR*, *op. cit.*, p. 37.
- 40 *Ibid.*, p. 42.
- 41 *Ibid.*, p. 70.
- 42 *Ibid.*, p. 84.
- 43 *Ibid.*, p. 124.
- 44 The Justice Law and Order Section institutions are extremely under-resourced in terms of human resources, physical space and financial resources. In 2008 it was reported that the Supreme Court had been unable to hear constitutional appeals for two years, due to a lack of quorum. See Muyita S & Y Mugerwa, 'Ssekandi sends judges list back to President Museveni', *Daily Monitor*, 22 February 2008, <http://www.monitor.co.ug/News/Education/-/688336/729690/-/10eh6pe/-/index.html>.
- 45 *Ibid.*, pp. 78–79.
- 46 *Ibid.*, p. 83.
- 47 *Uganda CSAR*, *op. cit.*, p. 133.
- 48 *Uganda CRR*, *op. cit.*, p. 88.
- 49 *Ibid.*
- 50 *Ibid.*
- 51 Tindifa S & BM Luutu, *op. cit.*, p. 28.
- 52 APRM Secretariat, *APRM Country Report Kingdom of Lesotho*, 2010, p. 5, <http://www.aprmtreekit.saiia.org.za/lesotho>, accessed 14 August 2014 (hereinafter Lesotho CRR).
- 53 Act 16 of 2011, Supplement No. 1 to *Gazette No 57 of 29 July 2011*.
- 54 See International Court of Justice, *Leadership Crisis in the Lesotho Judiciary*, report, <http://www.icj.org/icj-report-the-crisis-in-judicial-leadership-in-the-kingdom-of-lesotho/>, accessed 14 August 2014; see also Ellett R, *Politics of Judicial Independence in Lesotho*. Johannesburg: Freedom House Southern Africa, 2012, <http://www.freedomhouse.org/report/special-reports/politics-judicial-independence-lesotho#.VBIXOkt3Yds>, accessed 2 September 2014.
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- 58 *Ibid.*, p. 225.
- 59 Ellett R, 2012, *op. cit.*
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- 62 *Ibid.*, pp. xvii–xviii.
- 63 *Ibid.*, p. 657.



- 64 *Ibid.*, p. 521.
- 65 *Ibid.*, pp. 657–58.
- 66 APRM, *Tanzania CRR*, 2012, p. 55.
- 67 APRM, *Report of the 18<sup>th</sup> African Peer Review Summit*, Addis Ababa, Ethiopia, 25–26 January 2013, <http://aprm-sl.org/press-room/>, accessed 20 August 2014.
- 68 Ellett R, 2013, *op. cit.*
- 69 APRM, *Revised Country Self-Assessment Questionnaire for the African Peer Review Mechanism, Democracy and Political Governance*, 2012, chapter 3, <http://aprm-au.org/document/revised-aprm-questionnaire>, accessed 16 August 2014.
- 70 *Ibid.*, p. 183.
- 71 *Ibid.*, p. 184.
- 72 APRM, *Uganda CRR*, *op. cit.*, p. xiv.
- 73 *Ibid.*
- 74 *Ibid.*, p. 85.
- 75 *Ibid.*, p. 72.
- 76 The Southern African Legal Information Institute (SAFLII) provides a comprehensive set of legal materials from 16 countries in Southern and Eastern Africa: SAFLII, website, <http://www.saflii.org>.
- 77 Halliday TC, Karpik L & MM Feeley, *Fates of Political Liberalism in the British Post-Colony. The Politics of the Legal Complex*. Cambridge, UK: Cambridge University Press, 2012.
- 78 See Gruzd S, 2014, *op. cit.*, p. 50.
- 79 See Reitmaier A, 'Funding African Governance Institutions and Processes: Insights and Lessons', Occasional Paper, 177. Johannesburg: SAIIA, February 2014.

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