

Chapter 2: The appropriateness of constitutional review as a tool for the realisation of human rights

1. Introduction

Since the Second World War, human rights have been elevated to a higher law status both in international and national law. Human rights occupy so much of the public discourse that they have become ‘the dominant faith of our time’.¹ They provide a ‘global critical standard for domestic political institutions’.² There is a general consensus that government power should be exercised bearing in mind the limits embodied in human rights. The rights-based approach, which sets the realisation of human rights as the backbone of social, economic, legal and political development, has become the dominant development paradigm.³ Since the adoption of the Universal Declaration of Human Rights (Universal Declaration) on 10 December 1948, human rights instruments have proliferated at the international and regional levels.⁴ Almost all domestic constitutions in Africa and beyond entrench some or most of the rights in the international bill of rights.⁵ The Ethiopia Constitution recognises a generous list of rights. The main challenge is not the lack of human rights guarantees but their realisation.⁶

As indicated in Chapter 1, most constitutions around the world have established a system of constitutional review to ensure that laws and executive decisions comply with human rights and other constitutional requirements. This Chapter aims to demonstrate the potential role of domestic constitutional review in the realisation of human rights. Following Charles Epp,⁷ the Chapter identifies three basic normative and institutional preconditions that determine the success of constitutional rights litigation in any country, namely, (1) justiciable constitutional rights, (2) an independent constitutional

¹ D Beatty ‘The forms and limits of constitutional interpretation’ (2001) 49 *American Journal of Comparative Law* 79, 79 observing that especially after the fall of the Berlin Wall ‘there was virtually a revolution of rights’; L Henkin *The age of rights* (1990) ix observing that ‘human rights is the idea of our time, the only political-moral idea that has received universal acceptance’.

² C Beitz *The idea of human rights* (2006) xi observing that ‘the language of human rights has become the common idiom of social criticism in global politics’.

³ J Mertus *The United Nations and human rights: A guide for a new era* (2009) 25.

⁴ For a list of international human rights instruments, both hard and soft, visit ‘International law’ <http://www2.ohchr.org/english/law/> (accessed 10 December 2011). The normative and institutional framework for human rights has become functional in Europe, the Americas, and Africa.

⁵ For a comparative overview of the constitutional recognition of human rights in African countries, see C Heyns and W Kagoungo ‘Constitutional human rights law in Africa’ (2006) 22 *South African Journal on Human Rights* 673.

⁶ However, despite the expansion of the human rights catalogue, due to its dynamism, the system remains substantively incomprehensive. Viljoen observes that ‘the international human rights system is a labyrinth of complexity and fragmentation, yet remains substantively under-inclusive’ – see F Viljoen ‘Contemporary challenges to international human rights law and the role of human rights education’ (2011) 44 *De Jure* 206, 209.

⁷ C Epp *The rights revolution: Lawyers, activists, and supreme courts in comparative perspective* (1998).

adjudicator, and (3) organised and capable litigants. The existence of these conditions as well their potential success is largely influenced by popular rights-awareness and the political and legal context. The political environment also influences whether decisions of constitutional adjudicators will be complied with. This Chapter elaborates on the three conditions and provides the foundation for the subsequent chapters. It also identifies the common challenges and limitations that militate against an easy resort to constitutional litigation as the sole or primary tool for the realisation of human rights.

Although the role of constitutional adjudication in democratic states is less controversial, its role in states that are not fully democratic is debatable. With a view to demonstrate that constitutional review has the potential to contribute to the realisation of human rights even in countries that are not fully democratic, the Chapter discusses selected constitutional rights cases in some African countries – Ghana, Uganda and Malawi. Although the political environment influences the potential of realising human rights through constitutional review, it does not necessarily follow that constitutional review can only be relevant and effective in established democracies. The last part concludes the Chapter.

2. The potential role of constitutional review in the realisation of human rights

Litigation is fundamental to building international justice and is becoming an increasingly attractive tool for human rights movements throughout the world.⁸

There are several mechanisms that can help to ensure the realisation of constitutional rights. Legislative measures give effect to constitutional provisions and represent an important step toward building a state and system of government based on the sacrosanct ideals of human rights and rule of law. The legal recognition of rights is, however, only the beginning. Educational and awareness creation campaigns and continuous advocacy and social mobilisation are imperative for the effectiveness and sustainability of any human rights system. Most of the measures are and should be taken by the primary duty-bearers, the political actors – the legislature and executive. However, the primary duty-bearers may not always deliver, more exactly, deliver satisfactorily.

Constitutional human rights provisions are deliberately broad, often ambiguous, at times contradictory and inevitably incomplete.⁹ There is always to be a difference on the interpretation and exact level of

⁸ 'Introduction' in 'Litigating human rights: Promise v. perils' (2000) 2 *Human Rights Dialogue* 1 (Carnegie Council on Ethics and International Affairs).

compliance with constitutional rights obligations and, therefore, a functional need for a neutral and independent arbiter to resolve disagreements as they arise.¹⁰ Advancing human rights norms and their enforcement unequivocally necessitates the judicial elucidation of the content of the rights.¹¹ Constitutional review is necessary to expound the meanings, implications and consequences of constitutional provisions. It provides a neutral and independent forum where complainants unsatisfied with the human rights performance of the legislature and executive and other constitutionally bound actors may launch their complaints. Moore observes that '[d]omestic litigation offers a potentially powerful tool to challenge rights violations, to expose the repressive nature of the governing system, and/or to generate public attention and awareness'.¹² The constitutionalisation of rights and the establishment of constitutional review have 'the potential to plant the seeds of change'.¹³

In addition to the enforcement of traditional civil and political rights, social movements have resorted to litigation to achieve broad issues of social justice. Constitutional litigation 'uniquely reveals ways in which law-making and, by extension, legal practices generally, are and/or could be a medium for accomplishing justice'.¹⁴ On top of receiving a favourable judicial remedy (the direct outcome of litigation), court victories reinforce and ignite social mobilisation and enhance publicity thereby creating greater rights-awareness and facilitating compliance with human rights.¹⁵ Court victories also have the potential to legitimise the causes a social movement represents.¹⁶ Kingsbury observes that 'litigation, along with the political and media activity that accompanies it, creates expectations, channels concerns, structures community organization, and even moulds people's sense of identity'.¹⁷ As such, litigation has

⁹ J Brudney 'Recalibrating federal judicial independence' (2003) 64 *Ohio State Law Journal* 173, 175 observing that 'constitutional language is often imprecise or inconclusive, and the circumstances of its application often unanticipated or unforeseeable by its authors'.

¹⁰ S Hampshire *Justice is conflict* (1999) 34 observing that 'there will always be a plurality of different and incompatible conceptions of the good and there cannot be a single comprehensive and consistent theory of human virtue'.

¹¹ V Jaichand 'Public interest litigation strategies for advancing human rights in domestic systems of law' (2004) 1 *SUR International Journal on Human Rights* 127, 127.

¹² D Moore 'Safeguarding civil society in politically complex environments' (2007) 9 *International Journal of Not-for-Profit Law* 3, 19.

¹³ R Hirschl *Towards juristocracy: The origins and consequence of the new constitutionalism* (2004) 14 – 15. However, Hirschl questions the capacity of judicial review to advance notions of egalitarian notions of distributive justice through the enforcement of socio-economic rights. Schwartz similarly observes that constitutional courts can 'help to maintain, nurture, and perhaps even to strengthen' human rights – H Schwartz *The struggle for constitutional justice in Post-Communist Europe* (2000) 248.

¹⁴ K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146, 147.

¹⁵ 'Interview with Ndubisi Obiorah' in 'Litigating human rights: Promise v. perils' (2000) 2 *Human Rights Dialogue* 22 (Carnegie Council on Ethics and International Affairs).

¹⁶ D Nejaime 'Winning through losing' (2010-2011) 96 *Iowa Law Review* 941, 944.

¹⁷ B Kingsbury 'Representation in human rights litigation' in 'Litigating human rights: Promise v. perils' (n 15 above) 4. It should be noted that litigation can have similar effects even when the decision has not been complied with and even when the case was lost. Simmons observes that although litigation cannot force compliance, it can 'raise the political costs of government resistance' – B Simmons *Mobilizing for human rights: International law in domestic politics* (2009) 14.

been used not just to resolve controversies between individual litigants but broadly as a political strategy to shape public policy.¹⁸ Historical experiences from the US particularly in relation to racial and sex discrimination, and recent experiences from India in relation to socio-economic rights protection¹⁹ and South Africa in relation to the protection of the rights of sexual minorities²⁰ demonstrate the potential constitutional litigation holds in ensuring the realisation of human rights particularly of minorities and other marginalised groups that lie at the periphery of mainstream politics.²¹ Experiences around the world demonstrate that constitutional review forms part of the panacea to tackling human rights abuses, particularly to challenge systematic repression that is based on laws, policies and practices.

The focus on litigation should not be understood as portending that litigation is the only, or even the primary, tool for vindicating human rights. Reliance on political action is necessary to create a favourable climate for successful constitutional litigation as well as the eventual implementation of judicial outcomes.²² However, political support to human rights may not always be present as most constitutional cases challenge the *status quo* and existing legal and political conceptions, values, and practice. It is when the political process is the cause of violations, or is unresponsive or sluggish to respond to demands for change that constitutional litigation becomes the only viable alternative.²³ Sometimes, litigation becomes ‘the best of a series of not very good alternatives’.²⁴

¹⁸ R Cowan ‘Women’s rights through litigation: An examination of the American Civil Liberties Union women’s rights project, 1971-1976’ (1976-1977) 8 *Columbia Human Rights Law Journal* 373, 375.

¹⁹ Despite the fact that socio-economic rights are declared non-justiciable in the 1950 Indian Constitution, the activism of the Indian Supreme Court has created an exemplary and transformational jurisprudence on socio-economic rights – P Bhagwati ‘Judicial activism and public interest litigation’ (1984-1985) 23 *Columbian Journal of Transnational Law* 561. In the words of Scott and Macklem, the Court achieved this ‘against the constitutional grain of India’s Constitution’ – C Scott and P Macklem ‘Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution’ (1992-1993) 141 *University of Pennsylvania Law Review* 1, 117.

²⁰ It has been indicated that the constitutional jurisprudence on sexual orientation in South Africa is richer than that on any other prohibited ground of unfair discrimination – for a discussion of constitutional cases on sexual orientation in South Africa, see I Currie and J de Waal *The bill of rights handbook* (2005) 25, and S Woolman *et al Constitutional law of South Africa* (2007) 35-64 – 35-69.

²¹ For a discussion of the role of domestic courts in Africa in applying international human rights law and generally in ensuring the realisation of human rights, see M Killander (ed) *International law and domestic human rights litigation in Africa* (2010).

²² J Lobel ‘Losers, fools and prophets: Justice as struggle’ (1994-1995) 80 *Cornell Law Review* 1331, 1332.

²³ T Keck ‘Beyond backlash: Assessing the impact of judicial decisions on LGBT rights’ (2009) 43 *Law and Society Review* 151, 175 – 182.

²⁴ A Sarat ‘Going to courts: Access, autonomy, and the contradictions of liberal legality’ in D Kairys (ed) *The politics of law: A progressive critique* (1998) 99.

Nevertheless, litigation is, and must be seen as, complementary to, and not a replacement for, other strategies in the ‘human rights box’.²⁵ Prempeh notes that ‘judicial enforcement of rights and constitutional norms is indeed an important component of any credible system of constitutionalism’;²⁶ he, however, warns that excessive reliance on and faith in ‘juridical constitutionalism’ and judicial review without addressing inherent defects in the structure and distribution of power in African states imposes a colossal burden on private litigants and the judiciary. It is ‘fruitless and even dangerous to look to the courts for the first and last word on any matter concerning the vindication of fundamental societal values’.²⁷ Litigation must be seen within the wide spectrum of strategies that can be relied on to ensure the realisation of human rights.²⁸ It is and should be considered as part of a multidimensional advocacy and mobilisation strategy.²⁹ Litigation and the law are clearly not the sole answers. The resort to litigation often involves strategic choices particularly on divisive social, economic and political issues with broad human rights implications. It should be accompanied by relentless advocacy as well as the use of the democratic space, especially where legal, institutional, or social reform is imperative.

Litigation may not always result in decisions favourable to human rights. Even when there is an independent constitutional adjudicator, human rights litigants can lose cases. A losing case may set an unfavourable precedent applicable in future cases. Also just like winning a constitutional case has the potential to legitimise the cause of winners,³⁰ losing cases have the potential to lend symbolic legitimacy to the policy choices and practices of a government.³¹ Courts have the potential to provide ‘moral weight and legal justification’ to oppressive government policies ‘through the veneer of “legal”

²⁵ C Menkel-Meadow ‘When litigation is not the only way: Consensus building and mediation as public interest lawyering’ (2002) 10 *Journal of Law and Policy* 37 exploring how processes other than litigation can serve the public interest as well as, if not better than, litigation. See also ‘Introduction’ (n 8 above); Cowan (n 18 above) noting that ‘pressure on the courts to advance particular public policy does not occur in isolation from related activities in other political arenas. Courts are affected by, and in turn affect, these other activities’.

²⁶ H Prempeh ‘*Marbury* in Africa: Judicial review and the challenges of constitutionalism in contemporary Africa’ (2005-2006) 80 *Tulane Law Review* 1239, 1244 observing that when judicial review is ‘relied upon to be the only countervailing power within the state, and thus when the burden of sustaining constitutionalism rests primarily on its “weak” shoulders, the judiciary cannot achieve much’. He calls for an equal emphasis on confronting structural constitutionalism ‘consisting in the installation of credible checks and balances between the political branches (parliament and executive), strong and independent agencies of horizontal accountability, and meaningful devolution of power to the local level’ – 1294 – 1295.

²⁷ Scott and Macklem (n 19 above) 6 & 7.

²⁸ Lobel (n 22 above) 1333 noting that ‘[l]itigation is but one means to aid political and social movements and to nurture a culture of constitutional struggle’.

²⁹ S Gløppen ‘Courts and social transformation: An analytical framework’ in R Gargarella *et al* (eds) *Courts and social transformation in new democracies: An institutional voice for the poor?* (2006) 46

³⁰ Nejaime (n 16 above) 944.

³¹ S Matsui ‘A comment upon the role of the judiciary in Japan’ (1988) 35 *Osaka University Law Review* 17, 21; J Mondak ‘Policy legitimacy and the Supreme Court: The sources and contexts of legitimation’ (1994) 47 *Political Research Quarterly* 675, 690. See also T Roux ‘Legitimizing transformation: Political resource allocation in the South African Constitutional Court’ (2003) 10 *Democratization* 92.

judgments'.³² Litigants should, therefore, be wary of the potential symbolic legitimacy that judicial decisions can confer on government decisions before embarking on litigation. A confirmation by a constitutional adjudicator that a particular government decision is in line with the constitution can also blunt any possibility of advocacy for reform within the democratic process. A government that has won a court case has a stronger bargaining power and, therefore, little motivation to reconsider or otherwise compromise on its decisions.

Moreover, history is replete with cases where progressive government measures were hampered by constitutional rights litigation.³³ The spawning of human rights groups has not necessarily weakened the emergence and strength of other interest groups.³⁴ Such other groups may use the constitutional sword to undermine human rights guarantees or challenge human-rights friendly measures. As such, this Chapter does not categorically conclude that constitutional review always favours human rights.³⁵ The success of constitutional rights litigation depends on several factors including the independence and ideological orientation of the organs in charge of constitutional review, the existence of capable and organised groups with the resources to engage in strategic and repeated litigation, and the state policy on the matter (political context).

In addition to potentially adverse constitutional decisions, favourable constitutional determinations may provoke political and or social backlash – a situation whereby the human rights of winners in judicial proceedings are undermined by political decisions and conservative social movements.³⁶ Amendment of

³² Al-Haq 'Legitimising the illegitimate? The Israeli High Court of Justice and the Occupied Palestinian Territory' http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0CDwQFjAD&url=http%3A%2F%2Fwww.alhaq.org%2Fpublications%2Fpublications-index%3Ftask%3Dcallelement%26format%3Draw%26item_id%3D95%26element%3D304e4493-dc32-44fa-8c5b-57c4d7b529c1%26method%3Ddownload&ei=xkdwT56iEoO4hAfagbG8Bw&usg=AFQjCNFU7n6-aW_j_KiNyHC8AxmxEpjB8Q&sig2=Mvzs9VoNu_xbKeGo1m4ghg (accessed 26 March 2012).

³³ The US Supreme Court has, for instance, invalidated laws and policies designed to end discrimination against coloured people in the US. In *Scott v Sandford*, 60 US 393 (1856), the Court observed that African Americans 'had for more than a century ... been regarded as beings of inferior order, they had not rights which the white man was bound to respect'. For an account of race and litigation in the US, see B Schmidt, Jr 'Principle and prejudice: The Supreme Court and race in the progressive era – Part I: The heyday of Jim Crow' (1982) 82 *Columbia Law Review* 444; B Schmidt, Jr 'Principle and prejudice: The Supreme Court and race in the progressive era – Part 2: The "Peonage Cases"' (1982) 82 *Columbia Law Review* 646; and B Schmidt, Jr 'Principle and prejudice: The Supreme Court and race in the progressive era – Part 3: Black disfranchisement from the KKK to the Grandfather Clause' (1982) 82 *Columbia Law Review* 835; D Kommers and J Finn *American constitutional law: Essays, cases and comparative notes* (1998) 726.

³⁴ For a discussion on how conservative groups have resorted to courts in the US context, see J Heinz *et al* 'Lawyers for conservative causes: Clients, ideology and social distance' (2003) 37 *Law and Society Review* 5.

³⁵ M Wrong *It's our turn to eat: The story of a Kenyan whistle blower* (2009) 268 observing that political elites can and do 'use the legal system to strangle criticism'.

³⁶ M Klarman '*Brown and Lawrence* (and *Goodridge*)' (2005) 104 *Michigan Law Review* 431, 453 observing that progressive judicial decisions can have 'unpredictable, and occasionally perverse, consequences'. See also L Krieger 'Afterword: Socio-legal backlash' (2000) 21 *Berkeley Journal of Employment and Labor Law* 476, 477 observing that 'backlash tends to emerge when

constitutional provisions that provided the basis for a judicial determination of rights have been used to reverse court decisions reaffirming, for instance, gay rights in the US.³⁷ In Zimbabwe, several constitutional amendments have been introduced to reverse the decisions of the Supreme Court.³⁸ For instance, Amendment No 17 reversed the decision in *Chirwa v Registrar General*,³⁹ which invalidated vague restrictions on the freedom of persons to leave Zimbabwe. Concerning Singapore, as well, given the relatively easy constitutional amendment procedure – a mere two-third majority vote where one party continues to dominate the parliament – Silverstein observes that ‘the Singapore government has become enamoured of the option of constitutional amendment as a means of responding to any hint of an aggressive judiciary’.⁴⁰

These examples illustrate the potential vulnerability of constitutional litigation to sharp social and political axes. Human rights litigants should, therefore, consider the consequences of losing cases, including in the form of setting unfavourable precedents, as well as potential political and social backlash that might accompany favourable constitutional decisions. However, this precaution does not detract from the fact that constitutional litigation offers an important forum to ensure the realisation of human rights. Indeed, despite the challenges and historical low-points, independent constitutional adjudicators are regarded as the guardians of human rights and democracy.⁴¹ However, the success of constitutional litigation depends on the fulfilment of certain minimum normative and institutional framework.

3. Minimum conditions for the success of constitutional review in the realisation of rights

Constitutional review is an important tool to ensure the realisation of human rights. However, the fact that constitutional review has been more successful in some states than in others indicates that there

the application of a transformative legal regime generates outcomes that diverge too sharply from entrenched norms and institutions to which influential segments of the relevant population retain strong, conscious allegiance’.

³⁷ For such instances in the LGBTI rights litigation in the US, see Keck (n 23 above).

³⁸ See Zimbabwe Lawyers for Human Rights ‘Amendments to the Constitution of Zimbabwe: A constant assault on democracy and constitutionalism’ <http://www1.umn.edu/humanrts/research/constitution%20statement-sunday%20mirror.pdf> (accessed 10 January 2011).

³⁹ 1993 (1) ZLR 291 (S).

⁴⁰ G Silverstein ‘Singapore: The exception that proves the rule’ in T Ginsburg and T Moustafa (eds) *Rule by law: The politics of courts in authoritarian regimes* (2008) 81.

⁴¹ G Casper ‘Guardians of the Constitution’ (1979-1980) 53 *Southern California Law Review* 773.

are certain minimum preconditions for its success. Relying on Charles Epp,⁴² this section discusses the main normative and institutional prerequisites that determine the success of constitutional review. The success of constitutional rights litigation requires as a minimum the existence of (1) justiciable rights, (2) an independent constitutional adjudicator, and (3) organised litigants with the resources to engage in repeated and strategic litigation. By ensuring the continuous flow of constitutional complaints to the constitutional adjudicator, organised litigants provide the necessary litigation support structure.

These three factors relate to the normative and institutional aspects of constitutional review. However, the existence of the three preconditions as well as the prospect of success of constitutional review can be influenced to a large extent by the political and legal context and culture in a particular country. The political context can either facilitate or hamper the existence of the three preconditions and the potential success of constitutional review. Formal commitment towards constitutionalism and human rights determines the willingness of political actors to set up the necessary legal, institutional and other arrangements for the effective and efficient operation of constitutional adjudication and adherence to constitutional pronouncements. All the preconditions may only be realised if the political organs are formally committed to constitutional rights and constitutionalism. Political commitment commences with the adoption of justiciable constitutional rights. The establishment of an independent and competent entity with the power of constitutional review is an important political step. Indeed, given the potential of constitutional review to restrain the activities of political actors, only politicians sympathetic towards human rights and other constitutional limits may be expected to establish an independent constitutional adjudication system. The creation of favourable legal platforms for the recognition and operation of organised interest groups, which provide the support structure for constitutional litigation, also depends on legislative and other framework established by the political branches of a government. Formal political commitment precedes the establishment of the three preconditions for the success of constitutional review.

Most importantly, even if a constitutional adjudicator is formally independent, dominant politicians and political groups may influence its decisions in their favour. And even when a constitutional adjudicator hands down decisions against the dominant political group, the implementation of such constitutional decisions requires political action. The political organs may simply overturn adverse decisions or ignore them. The relevance of constitutional review is undermined if there are no safeguards to insulate the constitutional adjudicator from political pressure and no mechanisms to ensure that the executive and

⁴² Epp (n 7 above).

the legislature have the motivation to comply with decisions of constitutional adjudicators empowered to interpret and apply constitutional rights and the values that underlie constitutionalism. Constitutional adjudicators have neither the sword nor the purse to implement their own decisions. According to Lobel,

... traditional public interest litigation relies on political action to create favorable climate for court victory and to implement that victory. Politics is ... a necessary predicate to the courtroom drama.⁴³

Failure to enforce judicial decisions or non-compliance constitutes an affront to the independence of constitutional adjudicators.⁴⁴ Indeed, constitutional decisions will be nothing but futile ignominy if the political branches were to brush aside such judgments. Factors such as the power balance between competing political forces – whether or not there is absolute dominance of one political group – and the prevailing political culture towards constitutionalism determine the effectiveness of a formally strong and independent constitutional review system.⁴⁵ For instance, constitutional amendments – even when entered according to constitutionally established procedures – that reverse unfavourable judicial decisions demonstrate political insolence toward the judiciary and undermine judicial independence.⁴⁶

The politico-legal environment undoubtedly affects the existence of the preconditions that determine the success of constitutional review and whether decisions of a constitutional adjudicator will be complied with. In addition, on a balance of probabilities, a formally independent constitutional review system is more likely to succeed in democratic countries than in non-democratic ones. More often than not, formally independent constitutional adjudicators in authoritarian states lack independence in practice. Also authoritarian states are unlikely to tolerate the existence and operation of litigation support structures. Nevertheless, political commitment may not always result from proactive measures of the political branches. Consistent and relentless pressure from the judicial branch, CSOs, human rights advocates, the media and other domestic and international actors can play a significant role in

⁴³ Lobel (n 22 above) 1332.

⁴⁴ K Rosenn 'The protection of judicial independence in Latin America' (1987) 19 *University of Miami Inter-American Law Review* 1, 30 observing that 'refusal of the executive to enforce judicial decisions that it does not agree with seriously undermines the independence of the judiciary'. See also J Widner and D Scher 'Building judicial independence in semi-democracies: Uganda and Zimbabwe' in Ginsburg and Moustafa (n 40 above) 235.

⁴⁵ Gloppen (n 29 above) 55.

⁴⁶ Constitutional amendment procedures have been used to reverse judicial pronouncements in democratic (e.g. United States) as well as undemocratic (e.g. Zimbabwe) states. On the use of constitutional amendments to reverse judicial decisions in the US, see Keck (n 23 above). However, this does not mean that judicial decisions may not in any case be reversed through constitutionally established procedures. Constitutional amendments may indeed be necessary and desirable to ameliorate the generally fixed and rigid nature of judicial decisions. For instance, the Thirteenth and Fourteenth Constitutional amendments in the US abolishing slavery reversed the decision of the Supreme Court upholding slavery in the *Dred Scott* case. However, political branches should not frustrate the judicial branch and the constitutional arrangement by simply denying effect to decisions of courts at the expense of rights, often of the minority.

shaping political behaviour and mainstreaming political commitment and a culture of constitutionalism.⁴⁷ Indeed, constitutional litigation can help ‘inspire political action’.⁴⁸ Constitutionalism may only be fostered if the judiciary, CSOs, interest groups, and other actors committed to human rights, democracy and good governance act concertedly in reprimanding the political branches when off-course and legitimising political action when constitutionally defensible. The presence or absence of political commitment to the value of a constitutional review system and its potential (adverse) outcomes affects the success or failure of constitutional review in ensuring the realisation of human rights. In turn, the existence of an independent constitutional adjudicator and organised strategic litigants (litigation support structures) helps to foster political commitment and a culture of constitutionalism.

3.1. Justiciable constitutional rights

The first logical precondition that determines the success of constitutional rights litigation is, of course, whether or not there are laws which recognise human rights that serve as critical standards against which legislative and executive measures are to be tested.⁴⁹ This consists in constitutionalising ‘natural’ human rights. Constitutionalisation confers on rights a status higher than ordinary law. The presence or absence of justiciable rights guarantees determines ‘the extent of judicial policy making on rights’.⁵⁰ Obviously, litigation can be significant only if the rights are justiciable in the sense that the beneficiaries should be allowed to invoke the rights in courts or other judicial organs whenever aggrieved by the decisions of the entities that are bound to comply with the rights.⁵¹ By restricting the catalogue of rights that are justiciable, constitutions can limit constitutional claims against the state.⁵² If there is no

⁴⁷ Epp (n 7 above) 9 observing that ‘there are limits to the social changes produced by judicial rulings, and those rulings depend on the support from government officials and on private parties having the capability to use them well. But judicial rulings may be used to great effect by rights organisers’. Moore notes the tenacity of civil society not only to survive oppressive regimes, but also to dramatically transform society and regimes – Moore (n 12 above) 4.

⁴⁸ Lobel (n 22 above) 1332 observing that ‘[l]itigation may serve to legitimate a political movement, to publicize the issues raised by that movement, and perhaps to spur political action’. According to Lobel, inspiring political action is one of the primary goals of strategic litigation – cases that are instituted by public interest litigants even when the prospect of success is slim.

⁴⁹ In addition to serving as the basis for constitutional review and supporting litigation, the constitutional entrenchment of human rights creates expectations of compliance that can spark political mobilisation and effect elite-initiated agenda. Simmons identifies similar effects that flow from human rights treaty ratifications – Simmons (n 17 above) Chapter 4.

⁵⁰ Epp (n 7 above) 12. Epp further observes that constitutional guarantees provide the necessary ‘rallying symbols for social movements and may provide the footholds for lawyers’ arguments and foundations of judicial decisions’ – 5.

⁵¹ The duty bearer is often the state (vertical application). However, in some domestic systems even private entities may be required to comply with human rights guarantees (horizontal application). The distinction is irrelevant at the supranational level as failure by the state to ensure compliance with human rights breeds international responsibility due to the existence of a duty to protect.

⁵² It should be noted that some creative judiciaries have innovated mechanisms to use justiciable rights to enforce non-justiciable rights. In India, for instance, the Supreme Court has interpreted civil and political rights, mainly the right to life, to

instrument guaranteeing rights, or if the guaranteed rights are mere guiding principles beyond the ambit of judicial scrutiny, litigation will have little or no role in ensuring the realisation of human rights. The existence of justiciable rights, therefore, determines whether there is a potential for constitutional review.⁵³ However, although the existence of justiciable constitutional rights is mostly necessary for the success of constitutional litigation, it is clearly not sufficient. The mere existence of justiciable constitutional rights does not lead to the success of constitutional review. Epp aptly observes that ‘the fate of a bill of rights depends on forces outside of it’.⁵⁴

It should also be noted that the fact that human rights have not been granted a constitutional status does not necessarily undermine the role of human rights litigation. Some countries, such as England and New Zealand, have chosen to guarantee human rights in ordinary legislation. The power of English courts to declare laws incompatible with human rights, which triggers political action, and the duty of the courts of New Zealand to as far as possible interpret all laws in line with human rights enhance the importance of litigation.⁵⁵ In addition, rights recognised in subordinate legislation provide standards to test the compatibility of executive action with human rights. Nevertheless, constitutionalising rights and, as a result, granting them a higher law status fosters the importance of constitutional litigation to the realisation of human rights, as it entails the invalidation of laws, and not just executive action or inaction, that violate constitutional rights.

3.2. An independent, impartial and activist constitutional adjudicator

The existence of justiciable constitutional rights implies that there is an institutional structure – a constitutional adjudicator – that receives complaints against allegations of violations of these rights. Constitutional review requires a constitutional adjudicator that has the power to test government decisions against constitutional standards. Constitutional adjudicators are important because they ultimately decide rights claims.⁵⁶ Abstract constitutional rights provisions must be given effect through

enforce socio-economic rights which are recognized as non-justiciable Directive Principles of State Policy. As such, even when a right is not recognized as justiciable, constitutional adjudicators can find a way to enforce it. See P Bhagwati ‘Judicial activism and public interest litigation’ (1984-1985) 23 *Columbian Journal of Transnational Law* 561, and Circle of Rights ‘Economic, social and cultural rights activism: A training resource: Justiciability of ESC rights – the Indian experience’ <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/justiciability.htm> (accessed 28 May 2012). However, even in India, it is because there are some justiciable rights that the Supreme Court was able to indirectly enforce other non-justiciable rights.

⁵³ B Harris ‘Judicial review, justiciability and the prerogative of mercy’ (2003) 62 *Cambridge Law Journal* 631, 631.

⁵⁴ Epp (n 7 above) 13.

⁵⁵ See S Gardbaum ‘Reassessing the new Commonwealth model of constitutionalism’ (2010) 8 *International Journal of Constitutional Law* 167, 205 concluding that the new models of constitutionalism ushered in the UK and New Zealand, where rights have not been conferred a higher law status, have been ‘moderately successful’ in protecting rights.

⁵⁶ Epp (n 7 above) 14 observing that ‘rights revolutions undoubtedly cannot happen without rights-supporting judges’.

constitutional interpretation. A constitutional review system can only be successful if the constitutional adjudicator is institutionally independent from the organs it is supposed to monitor.⁵⁷ The nature of human rights as principles independent of whoever is in power requires that the organ in charge of ensuring their realisation should also be independent. Constitutional rights litigation may only succeed if there is an autonomous and independent adjudicator capable of controlling the constitutionality of legislative and executive acts or omissions.⁵⁸ Only an entity beyond the control of political organs can fairly be expected to enforce constitutional constraints on these political organs. Independence, particularly from direct political pressure, is a necessary precondition that enables constitutional adjudicators to meaningfully check political power.⁵⁹ In addition to institutional autonomy, the personal independence and impartiality of the members of the constitutional adjudicator should be guaranteed.⁶⁰

An independent adjudicator 'stands at the symbolic centre of those legal systems committed to liberal values'.⁶¹ According to the UN Special Rapporteur on the Independence of Judges and Lawyers, judicial independence is 'a core component of democracy, the rule of law and good governance'.⁶² Independence requires that constitutional decisions are taken fairly and impartially solely based on the law and facts presented, 'not according to whim, prejudice, or fear, the dictates of the legislature or executive, or the latest opinion poll'.⁶³ Judicial independence refers to the degree to which judges decide cases 'free from the coercion, blandishments, interference, or threats from governmental

⁵⁷ UN Human Rights Committee, General Comment no 32, CCPR/C/GC/32 (2007) para 21 observing that constitutional adjudicators should 'appear to a reasonable observer to be impartial'. For a detailed understanding of judicial independence, see S Burbank 'What do we mean by "judicial independence"?' (2003) 64 *Ohio State Law Journal* 323.

⁵⁸ A Carias *Constitutional protection of human rights in Latin America: A comparative study of amparo proceedings* (2009) 87.

⁵⁹ Epp (n 7 above) 11.

⁶⁰ Despite their interrelatedness, it is possible to identify some conceptual differences between 'independence' and 'impartiality'. Independence relates to the absence of improper or inappropriate interference or influence in the conduct of judicial affairs from an external source, in particular from the political organs. Independence essentially requires that judges are the authors of their own views. On the other hand, impartiality denotes neutrality and objectivity, the absence of favour, prejudice or bias on the part of judges towards the parties or the matter under consideration. An organ is not independent if some other organ influences what it does; a person is impartial if his decision is influenced by his interest in the case or his relationship to any of the parties – see generally O Fiss 'The limits of judicial independence' (1992) 25 *University of Miami Inter-American Law Review* 57, 58; A succinct summary of the distinction between 'independence' and 'impartiality' was provided by the Canadian Supreme Court. The Court observed that 'impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "independent", however, connotes not only the state of mind or attitude in the actual exercise of the judicial functions, but a status or relationship with others, particularly to the Executive Branch of government, that rests on the objective conditions or guarantees' – *R v Valente* [1985] 2 S.C.R. 673, 23 C.C.C. (3d) 193 (Can. 1985), at 201–202. See also *Apitz Barbera et al v Venezuela*, (ser. C) No. 24 (Inter American Court of Human Rights 2008) paras 55 and 56; and *Piersack v Belgium*, application no 8692/79 (ECtHR 1982), para 26 – 30. The main focus of this article is the independence of constitutional adjudicators from the political branches.

⁶¹ Sarat (n 24 above) 97.

⁶² Report of the Special Rapporteur on the Independence of Judges and Lawyers, A/HRC/14/26, 25 (March 2010) para 17.

⁶³ S Abrahamson 'Keynote Address: Thorny issues and slippery slopes: Perspectives on judicial independence' (2003) 64 *Ohio State Law Journal* 3, 3; M Shapiro *Courts: A comparative and political analysis* (1981) 1 – 8.

authorities or private citizens'.⁶⁴ It represents freedom from partisan influence in each and every case.⁶⁵ Judicial independence sometimes means making unpopular decisions, 'whether unpopular with the legislative or executive branch, the public, or judicial colleagues'.⁶⁶

Independent courts are believed to be 'forceful mechanisms for the defense of constitutionalism and justice', and in the absence of independence, constitutional adjudicators will easily be manipulated 'from questioning the illegal or arbitrary acts of state actors'.⁶⁷ A constitutional adjudicator and its members should, therefore, be institutionally insulated particularly from the political actors. Only an organ beyond the control of the political actors can reasonably be expected to effectively patrol the activities of political organs. Constitutional adjudicators may, therefore, not consist of political officers who represent the interests of voters or particular political groups. There should be a clear constitutional or legislative requirement that the entity and its members be independent and impartial. Such a legal requirement should be corroborated with specific mechanisms that ensure that the entity is indeed independent and impartial. This is often done through guarantees of appropriate nomination and appointment, transfer and dismissal requirements and procedures (judicial tenure) as well as a degree of stability and logistical and financial protection against outside pressure and harassment.⁶⁸

The independence of the judiciary does not imply that judges are absolutely absolved from accountability. Judicial independence does not mean that a judge is free to shoot 'in any direction he or she wishes'.⁶⁹ Judicial independence and accountability 'are not discrete concepts at war with one another, but rather complementary concepts that can and should be regarded as allies'.⁷⁰ There are several mechanisms and arrangements that help to ensure that judges account for their judgments. First, judges must decide cases based on law and facts presented before them. Judges should also provide reasoned decisions which are subject to the possibility of appeal to a higher court – with the

⁶⁴ Rosenn (n 44 above) 7. See also the Bangalore Principles of Judicial Conduct (2002), principle 1.

⁶⁵ Widner and Scher (n 44 above) 235.

⁶⁶ Abrahamson (n 63 above) 4.

⁶⁷ C Larkins 'Judicial independence and democratization: A theoretical and conceptual analysis' (1996) 44 *The American Journal of Comparative Law* 605, 606.

⁶⁸ See the Basic Principles on the Independence of the judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Milan from 26 August to 6 September 1985 and endorsed by UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

⁶⁹ Abrahamson (n 63 above) 4.

⁷⁰ Burbank (n 57 above) 330 – 332.

exception of decisions of the highest court.⁷¹ The fact that judicial proceedings are open to anyone including mainly the media and other interest groups is another essential accountability mechanism.⁷² Open proceedings create an environment where courts and judges are judged. Comments on judicial decisions by the media, politicians and authors and scholars of diverse backgrounds and orientation provide sufficient incentive for judges to remain within their legitimate terrain. Moreover, there are often procedures in domestic constitutions and legislation, although more rigorous than the rules that apply to other civil servants with a view to protect judicial independence, through which judges may be removed, transferred, disciplined or held accountable in any other way. Judicial independence does not, therefore, reject potential judicial fallibility. Judicial administration councils which govern judicial appointment, dismissal, transfer and discipline are often established to ensure a depoliticised delicate balance between judicial independence and accountability.⁷³

A rather controversial characteristic is the need to have a creative and activist constitutional adjudicator that provides robust meaning to constitutional rights. Judicial activism refers to the progressive understanding of freedom, democracy and equality.⁷⁴ Activist courts prefer interpretive approaches that are innovative, purpose-oriented and rights-friendly to originalism, literalism and undue deference to existing principles or precedence.⁷⁵ Judicial activism goes beyond merely exercising judicial review.⁷⁶ An activist court responds and adapts to changes to fulfil its role in ensuring social, political and economic

⁷¹ A Lever 'Democracy and judicial review: Are they really incompatible' (2009) 7 *Perspectives on Politics* 805, 811 observing that revealing the reasoning behind a judgment fosters 'accountability as well as political participation'.

⁷² F Michelman *Brennan and democracy* (1999) 59 observing that the duty to give reasons which are subject to public scrutiny contributes to the democratic accountability and legitimacy of courts.

⁷³ See N Garoupa and T Ginsburg 'Guarding the guardians: Judicial councils and judicial independence' (2009) 57 *American Journal of Comparative Law* 103.

⁷⁴ D Kairys 'Introduction' in Kairys (n 24 above) 10. In *Brown v Board of Education of Topeka*, 347 US 483 (1954), for instance, the US Supreme Court ruled that the establishment of separate schools for different races was unconstitutional. In *Minister of Health and Others v Treatment Action Campaign and Others* (2002) 5 SA 721 (CC); 5 July 2002, the South African Constitutional Court ordered the government to, among others, extend the availability of Nevirapine to all hospitals and clinics. In *New Patriotic Front v Ghana Broadcasting Corporation* [1993-1994] 2 GLR 354, the Supreme Court of Ghana ruled that opposition groups should be given access to public media to express their views on the budget statements of the government.

⁷⁵ Activism includes: the willingness to hear matters prior to the exhaustion of other remedies; allowing standing even in the absence of a close personal interest; a relaxed attitude to precedent to the extent of ignoring it; and a broad and 'generous' interpretation of rights – P Lenta 'Judicial restraint and overreach' (2004) 20 *South African Journal on Human Rights* 544, 547; Kmiec adds to the list: invalidating arguably constitutional actions of other branches; departure from accepted interpretative methodology; judicial legislation; and result-oriented judging – K Kmiec 'The origin and current meanings of "judicial activism"' (2004) 92 *California Law Review* 1442. For a discussion of the transformational role of adjudication and courts, see Klare (n 14 above) arguing that the pursuit of transformation projects through adjudication is not, in principle, inconsistent with interpretative fidelity of judges.

⁷⁶ E Chemerinsky 'The price of asking the wrong question: An essay on constitutional scholarship and judicial review' (1984) 62 *Texas Law Review* 1207, 1207 – 1210.

justice.⁷⁷ Activist judges do not merely accentuate ‘the elements of pure and formal logic’ as inanimate ‘mouth[s] of the court’.⁷⁸ Judicial activism has the potential to rewrite constitutional law.⁷⁹ Constitutional adjudicators should not disconnect the transformative aspirations of constitutions through conservative legal culture.⁸⁰ It should be noted that an entity need not rule against the government all the time to be considered activist. In fact, rulings in favour of a government may be as activist.⁸¹ The level of activism of a court determines the extent to which constitutional rights will be given a robust and creative meaning. The more competent and independent a constitutional adjudicator is the more likely for it to also become activist.

Judicial activism is controversial as what is progressive to one may not be considered as such by others. It essentially lies in ‘the eye of the beholder’,⁸² changing faces depending on one’s vantage point. Kairys observes that ‘judicial activism is not consistently liberal, and judicial restraint is not consistently conservative’.⁸³ Indeed, an entity considered activist today might be criticised for being regressive by the same individuals or entities that praised it. Often, activism is seen to depend solely on the particular judicial outcome different interest groups preach for. For instance, a religious group might consider rulings that allow gay marriage to be regressive activism, while LGBT and other liberal groups eulogise it for protecting minority groups. Nevertheless, in addition to the outcome of a case, the reasoning or approach to constitutional interpretation, such as deviation from existing precedent, also reflects judicial activism.

In sum, the effectiveness of constitutional rights litigation to a large extent depends on the independence, capacity, and activism of the entities established to ensure compliance with constitutional rights.⁸⁴ Often, an independent judiciary or a constitutional court represents such an institution. An ‘independent judiciary with judicial review power’ is one of the principal structures designed to promote constitutionalism.⁸⁵ In the absence of a constitutional adjudicator beyond the

⁷⁷ W Friedmann *Law in a changing society* (1959) ix.

⁷⁸ M Cappelletti *The judicial process in comparative perspective* (1989) 9.

⁷⁹ Epp (n 7 above) 24 observing that ‘leading justices on the [US] Supreme Court created a revolution in constitutional law’.

⁸⁰ Klare (n 14 above) 151.

⁸¹ Such is the case when, for instance, courts reject constitutional challenges to pro-poor government measures by other interest groups.

⁸² Lenta, for instance, notes that the concepts of activism and restraint are ‘fluid and contested’ – Lenta (n 75 above) 547. Rosenn similarly observes that ‘[j]udicial independence tends to be lauded by liberals and decried by conservatives when the decisions follow a liberal bent; conversely, judicial independence tends to be deplored by the liberals and praised by conservatives when the decisions take a conservative tack’ – Rosenn (n 44 above) 8.

⁸³ Kairys (n 74 above) 7.

⁸⁴ M Seplveda *et al Human rights reference handbook* (2004) 489 – 508.

⁸⁵ M Jain *Indian constitutional law* (1994).

control and influence of political actors, constitutional review will not be able to ensure compliance with constitutional restraints. The full realisation of human rights requires the existence of an independent, competent and arguably activist constitutional adjudicator.

3.3. Informed, capable and organised litigants: Litigation support structures

The existence of justiciable rights and an independent and activist constitutional adjudicator are crucial but not sufficient conditions for the success of constitutional rights litigation. A constitutional review system will only be relevant if there are organised claimants that actively lodge constitutional complaints before the constitutional adjudicator.⁸⁶ Constitutional complaints are ‘the lifeblood and enabling prerequisites of judicial review’.⁸⁷ Constitutional complaints are necessary to set constitutional adjudicators in motion. In the absence of constitutional complaints, constitutional adjudicators will become silent spectators. The success of constitutional adjudication depends on the fact that those whose rights have been violated are able to articulate their concerns and voice their rights as legal claims, or have someone do so on their behalf.⁸⁸

Whether or not constitutional review can lead to successful legal and social change depends on the awareness, ability and resources of the poor and other marginalised groups who are often the victims of systematic violations.⁸⁹ The social, educational and economic context determines the extent to which individual victims of violations might lodge constitutional complaints.⁹⁰ Beyond individual complainants, the success of constitutional litigation largely depends on the extent to which human rights advocates, CSOs, opposition parties and the media actively resort to it. It depends on the existence of a consistent and organised demand for rights. Organised groups provide the expertise, organisation, resources and consistency necessary for the success of constitutional litigation in bringing about progressive and

⁸⁶ See generally, Epp (n 7 above).

⁸⁷ E Ip ‘Constitutional review as political investment: Evidence from Singapore and Taiwan’ (2011) 18, Institute of Law, Economics and Policy, Political Economy Working Paper No 2
<http://instituteleap.org/Documents/Constitutional%20Review%20as%20Political%20Investment%20-%20Evidence%20from%20Singapore%20and%20Taiwan.pdf> (accessed 7 March 2012).

⁸⁸ Gloppen (n 29 above) 46. The existence of constitutional rights can create a popular rights culture which in turn creates a rights-demanding citizenry necessary for successful human rights litigation – 15 – 17 observing that ‘surely the growing attention paid by supreme courts to rights claims would not have developed in the absence of the concept of “rights” or the extension of that concept to areas of life previously untouched by it. Protection of women’s rights, for example, depended in part on a growing recognition that gender discrimination is a problem’.

⁸⁹ Gloppen (n 29 above) 35.

⁹⁰ S Susman ‘Distant voices in the courts of India: Transformation of standing in public interest litigation’ (1994/1995) 13 *Wisconsin International Law Journal* 57, 63; N Barber ‘Prelude to separation of powers’ (2001) 60 *Cambridge Law Journal* 59, 77.

incremental legal and social changes.⁹¹ Organised litigants are important not only to bring cases to courts but also to enhance the implementation of judicially declared rights. They constitute the principal ‘support structures for legal mobilisation’.⁹² Experiences from several countries indicate that the major architectures behind successful constitutional rights litigation are CSOs and social movements.⁹³

The participation of CSOs in constitutional litigation can take three distinct but related forms. First, CSOs and social movements can provide legal assistance to those willing but unable to pursue constitutional cases for several reasons – provision of legal assistance. The role of CSOs in providing legal aid services to needy victims of human rights violations is common knowledge and is not discussed in great detail in this section. Secondly, they can, when the rules of standing allow it, institute public interest litigation in relation to matters relevant to the general public. Thirdly, CSOs can participate in constitutional litigation through *amicus curiae* procedures.

Public interest lawyering⁹⁴ plays a significant role in ensuring that disadvantaged groups benefit from constitutional rights, and that courts do not become the domains of a privileged few.⁹⁵ It ensures that a court does not merely become ‘an arena of legal quibbling for men with long purses’.⁹⁶ Almost all the major constitutional decisions in the US, such as on racial desegregation, rights of sexual minorities and

⁹¹ Epp (n 7 above) 18 – 19 observing that ‘successful rights litigation usually consumes resources beyond the reach of individual plaintiffs – resources that can be provided only by an ongoing support structure. The judicial process is time-consuming, expensive, and arcane; ordinary individuals typically do not have the time, money, or expertise necessary to support a long-running lawsuit through several levels of the judicial system. ... Moreover, successful rights litigation depends on a steady stream of rights cases that press toward shared goals, for changes in constitutional law typically occur in small increments. A support structure can provide the consistent support that is needed to move case after case through the courts’; see also C Epp ‘External pressure and the Supreme Court’s agenda’ in C Clayton and H Gillman (eds) *Supreme Court decision-making: New institutionalist approaches* (1999) 261 observing that constitutional litigation depends on interest groups that provide ‘institutional mechanisms that overcome cost barriers to individuals and plaintiffs’.

⁹² Epp (n 7 above) 8 observing that ‘the presence and strength of a support structure for legal mobilisation enhances the information, experience, skill and resources of rights claimants and thus likely affects the implementation of judicial decisions on rights’.

⁹³ Epp (n 7 above). See also N Tate and T Vallinder *The global expansion of judicial power* (1995) observing that interest groups and political organisations around the world increasingly resort to courts.

⁹⁴ Public interest litigation/lawyering refers to the practice of lawyers seeking to precipitate legal and social change through court ordered decisions with a view to reform legal rules, enforce existing laws, and articulate public norms – A Chayes ‘The role of the judge in public law litigation’ (1976) 89 *Harvard Law Review* 1281.

⁹⁵ CSOs and other organised groups particularly dominate supra-national rights litigation, especially in the African Commission on Human and Peoples’ Rights – see generally N Mbelle ‘The role of non-governmental organisations and national human rights institutions at the African Commission’ in M Evans and R Murray *The African Charter on Human and Peoples’ Rights: The system in practice, 1986-2006* (2008). The active role of NGOs in the African system has been enhanced by the robust standing regime before the African Commission which allows anyone to institute a communication – see generally F Viljoen ‘Communications under the African Charter: Procedure and admissibility’ in M Evans and R Murray (eds) *The African Charter on Human and Peoples’ Rights: The system in practice, 1986-2006* (2008).

⁹⁶ *Kesavnanda Bharathi v State of Kerala* (1973) 4 S.C.C. 225 at 947.

women's rights, were litigated by organised social groups.⁹⁷ The historical role of the American Civil Liberties Union in the advancement of human rights in the US would not have been as multihued without its frequent resort to constitutional litigation.⁹⁸ The history of litigation during and after apartheid South Africa also demonstrates that the vibrancy of CSOs determines to a large extent the success of constitutional rights litigation.⁹⁹ South African CSOs played a paramount role in the transition to democracy and the framing of the content of the current Constitution.¹⁰⁰ In the context of post-apartheid South Africa, Jagwanth observes that 'the majority of the cases decided by the [Constitutional] Court which have made an impact on the lives of disadvantaged South Africans have been brought by organized interest groups, and it is rare to find suits brought by individual litigants in this regard'.¹⁰¹ Reliance on public interest litigation to effect legal and social change, therefore, depends to a large extent on the effective and efficient intervention of CSOs to put forward grievances concerning constitutional rights.

However, strict standing rules may constrain the active involvement of CSOs in constitutional litigation in the public interest. Standing rules determine access to constitutional justice and 'the grip of constitutional rules on public behaviour'.¹⁰² Traditional 'vested interest' standing requirements highly stultify access to judicial bodies, especially of the underprivileged. Obiagwu and Odinkalu, for instance, identified the strict rules of standing as the major legal constraints on the protection of human rights in Nigeria.¹⁰³ Access to courts is a quintessential element of an independent judiciary.¹⁰⁴ Sarat notes that

⁹⁷ Epp (n 7 above) 21 observing that litigation support groups 'organised, financed, and provided legal counsel for many of the most important civil rights and liberties cases to reach the United States Supreme Court'.

⁹⁸ The ACLU has litigation as one of its principal strategies and has been involved in several controversial cases. The ACLU has appeared before the US Supreme Court more than any other organisations except the US Department of Justice – 'About the ACLU' <http://www.aclu.org/courts> (accessed 28 September 2012). On how the ACLU has influenced the jurisprudence and understanding of free speech in the US, see D Rabban 'The Free Speech League, the ACLU, and changing conceptions of free speech in American history' (1992) 45 *Stanford Law Review* 47; see also 'American Civil Liberties Union' http://www.newworldencyclopedia.org/entry/American_Civil_Liberties_Union (accessed 2 December 2010) – noting that 'lawsuits brought by the ACLU have been influential in the development of US constitutional law'

⁹⁹ It is sarcastically noted that one of the best legacies of apartheid in South Africa is the evolution of a strong and vibrant civil society.

¹⁰⁰ See generally S Jagwanth 'Democracy, civil society and the South African Constitution: Some challenges' (2003) (Management of Social Transformations (MOST), Discussion Paper 65 <http://unesdoc.unesco.org/images/0012/001295/129557e.pdf> (accessed 5 January 2011).

¹⁰¹ Jagwanth (n 100 above) 15 – 16.

¹⁰² S Kay 'Standing to raise constitutional issues: Comparative perspectives' in S Kay (ed) *Standing to raise constitutional issues: Comparative perspectives* (2005) 1.

¹⁰³ C Obiagwu and C Odinkalu 'Combating legacies of colonialism and militarism' in A An Na' im (ed) *Human rights in African constitutions: Realising the promise for ourselves* (2003) 233.

¹⁰⁴ A Bedner 'An elementary approach to the rule of law' (2010) 2 *Hague Journal of the Rule of Law* 48, 69 observing that '[i]f they are to be effective, judiciaries must not only be independent but also accessible'.

‘autonomy [of courts] without accessibility would produce an arid, scholastic irrelevance’.¹⁰⁵ Standing rules should not, therefore, be too strict to exclude legitimate claims against human rights violations. The rules should rather be designed to ensure efficiency,¹⁰⁶ and not to exclude complaints against violation of rights depending on the identity of the claimant. Standing rules should only aim at excluding undesirable meddling busybodies and not genuine litigants merely for the sake of having to adjudicate fewer cases. Procedural rules should, therefore, be drafted to be flexible enough to permit adjustments in the face of substantive concerns while at the same time ensuring regularity, uniformity and predictability.¹⁰⁷

Not all claimants are willing and able to litigate. Whenever the immediate effects of a particular action or omission are not felt, individuals have little interest in litigation. Individuals may not be interested in the outcome of a case especially when the potential benefits of the outcomes of litigation are widely diffused, but nevertheless important for society as a whole, such as cases relating to environmental pollution.¹⁰⁸ One way, although only a partial solution, to solve the problem is to allow public interest litigants to institute court action in such instances.¹⁰⁹ There is a progression internationally towards the adoption of flexible standing rules to ensure that violations of constitutional rights are remedied without undue emphasis on the identity of the claimant.¹¹⁰ Public interest litigation is particularly allowed where a case deals with a matter of interest to a wider segment of the population.¹¹¹ However, mere legislative changes in the rules governing standing, without a strong tradition of public interest lawyering, do not necessarily enhance resort to litigation.¹¹² Liberal standing rules will only be relevant if CSOs and organised human rights advocates actively seek judicial intervention in the public interest.

¹⁰⁵ Sarat (n 24 above) 97.

¹⁰⁶ One of the major challenges against opening up standing rules is the possibility of litigation explosion that might result in courts becoming ‘hopelessly overloaded’ – C Murray ‘Litigating in the public interest: Intervention and the amicus curiae’ (1994) 10 *South African Journal on Human Rights* 240, 241.

¹⁰⁷ M Minow ‘Politics and procedure’ in Kairys (n 24 above) 86 & 97.

¹⁰⁸ Barber (n 90 above) 78. Barber gives as an example: a television station which broadcasts violent movies may have caused tangible harm to many people without any one of those persons having sufficient interest to bring a case before the courts.

¹⁰⁹ This is in no way the only solution – E Elhauge ‘Does interest group theory justify more intrusive judicial review?’ (1991) 101 *Yale Law Journal* 32. Elhauge argues that weak interest groups in society will also have a weak force before courts. Hence, merely opening up standing rules may not necessarily bring about the desired result in relation to constitutional litigation.

¹¹⁰ See generally Kay (n 102 above).

¹¹¹ In purely individual cases, on the other hand, there is often a requirement to prove some kind of direct interest in the action or omission challenged – a state may not expose and address a private dispute when the parties are not willing to admit their differences – Barber (n 90 above) 75.

¹¹² Prempeh (n 26 above) 1297. Prempeh criticises lawyers in common law African countries for failing to exploit the liberalisation of standing rules. He notes that ‘private attorney generals’, individuals or organisations that litigate in the public interest, are absent in these countries.

Amicus curiae procedures provide another important avenue for CSOs and human rights advocates to engage in constitutional rights litigation in the public interest. *Amicus* intervention has become an important public interest lawyering strategy.¹¹³ Traditionally, the submission of *amicus* briefs was considered as an offer of assistance from a neutral, disinterested by-stander who wishes to genuinely help a court in arriving at the right decision.¹¹⁴ In modern times, however, interest groups join cases as *amicus curiae* not merely to assist courts but to advocate for particular causes or views – *amicus curiae* intervention has become a formidable tool for advocacy.¹¹⁵ CSOs and human rights advocates should, therefore, actively seek to join human rights cases as *amicus curiae*. Admitting *amicus curiae* briefs is beneficial to the judicial process as well as the *amicus*.

Tobias observes that allowing *amicus* intervention for public interest litigants improves the judicial decision-making process by providing background and relevant information which enables courts to make decisions confident of their social, legal and factual context and consequences.¹¹⁶ Loux similarly notes that the intervention of interest groups should be welcomed by courts as '[w]ithout the participation of pressure groups in litigation, the decisions of the judiciary could suffer from the paucity of fact and argument that may be presented by individual parties to a particular piece of litigation'.¹¹⁷ In addition to their instrumentality in providing relevant legal and factual information to courts, thereby enhancing the accuracy of judicial decisions, the submission of *amicus* briefs fosters 'democratic input to the judicial area'.¹¹⁸ Because extensive *amicus curiae* participation broadens the range of parties and

¹¹³ For a discussion of the influence of *amicus curiae* briefs on the US Supreme Court, see J Kearney & T Merrill 'The influence of *amicus curiae* briefs on the Supreme Court' (1999-2000) 148 *University of Pennsylvania Law Review* 743, 744. Kearney and Merrill observe that *amicus curiae* briefs are submitted in up to 85% of the cases before the US Supreme Court.

¹¹⁴ S Krislov 'The *amicus curiae* brief: From friendship to advocacy' (1962-1963) 72 *Yale Law Journal* 694, 695 describing the traditional role of the *amicus* as 'one of oral "Shepardizing," the bringing up of cases not known to the judge'; E Angell 'The *amicus curiae*: American development of English institutions' (1967) 16 *International and Comparative Law Quarterly* 1017, 1017 observing that the *amicus* was 'originally a bystander who, without any direct interest in the litigation, intervened on his own initiative to make suggestion to the court on matters of fact and law within his own knowledge'.

¹¹⁵ L Re 'The *amicus curiae* brief: Access to the courts for public interest associations' (1983-1984) 14 *Melbourne University Law Review* 522, 525 observing that 'the device [*amicus*] is increasingly moving from neutral 'friend' of the court to one of the partisanship: the submissions tendered are clearly in support of one or the other of the contending parties'; also see Krislov (n 114 above). For Robbins, *amici* have become 'false friends' – J Robbins 'False friends: *Amicus curiae* and procedural discretion in WTO appeals under the hot-rolled lead/asbestos doctrine' (2003) 44 *Harvard International Law Journal* 317.

¹¹⁶ P Collins, Jr 'Friends of the court: Examining the influence of *amicus curiae* participation in the U.S. Supreme Court litigation' (2004) 38 *Law and Society Review* 807 observing that the success of *amicus* intervention depends on the information they present before the courts; C Tobias 'Standing to intervene' (1991) *Wisconsin Law Review* 415, 419. See also Kearney and Merrill (n 113 above) 745 observing that lawyers and judges believe that *amicus curiae* submissions are moderately supportive.

¹¹⁷ A Loux 'Losing the battle, winning the war: Litigation strategy and pressure group organization in the era of incorporation' (2000) 11 *The King's College Law Journal* 90, 92.

¹¹⁸ P Collins, Jr *Friends of the Supreme Court: Interest groups and judicial decision making* (2008) 3.

interests represented, it furthers democratic and constitutional values and has the effect of ameliorating the democratic legitimacy deficit that particularly haunts judicial policy-making¹¹⁹

Although the *amicus curiae* procedure was originally conceived from the perspective of benefitting courts, it also has inherent advantages to the *amici* – the persons or entities that submit amicus briefs. The *amicus curiae* procedure provides opportunities for *amici* to advance their interests and perceptions of ‘good’ law and society by influencing the outcomes of judicial proceedings. Although the exact extent is uncertain and confusion still reigns,¹²⁰ *amicus curiae* submissions have been shown to influence the decisions of judges, and, therefore, judicial outcomes.¹²¹ The *amicus curiae* procedure is also a less-expensive way of advancing interests and views through courts.¹²² Also often the rules applicable to intervene as *amicus* are less strict than the requirements to stand as a principal party to a case or as an interested third party intervenor.¹²³ Amicus procedures, therefore, provide efficient ways of shaping the legal and policy outcomes of judicial decisions on important social, economic and political issues. As a result, *amicus curiae* briefs have become attractive tools for organised groups to advance particular outlooks and interests through courts.

In summary, constitutional litigation can be successful only if there is an organised demand for it in the form of constitutional complaints. A constitutional adjudicator needs constitutional complaints to be set in motion. Independent constitutional adjudicators in turn play a significant role in creating demand for rights through their decisions.¹²⁴ Given courts in most countries are not empowered to consider a constitutional case on their own initiative, the existence of a culture of reliance on courts is necessary for the success of constitutional litigation. Organised groups represent individuals who wish to challenge government decisions, file cases in the public interest and intervene as *amicus curiae* with a view to ensure compliance with constitutional requirements. They provide the prerequisite litigation support

¹¹⁹ R Garcia ‘A democratic theory of amicus advocacy’ (2008) 35 *Florida State University Law Review* 315.

¹²⁰ P Collins, Jr *Friends of the Supreme Court: Interest groups and judicial decision making* (2008) 6 – 10 showing why there is confusion and disagreement as to whether *amicus curiae* submissions actually influence judicial outcomes in the US context.

¹²¹ P Collins, Jr and W Martinek ‘Judges and friends: The influence of *amicus curiae* on U.S. Court of Appeals’, Paper prepared for delivery at the 69th Annual meeting of the Midwest Political Science Association, Chicago, Illinois, March 31 – April 3 2011 <http://www.psci.unt.edu/~pmcollins/Collins%20Martinek%20MPSA%202011.pdf> (accessed 15 March 23012) observing that ‘liberal amicus briefs increase the chances that moderately conservative and conservative judges will cast a liberal vote. Conservative amicus briefs enhance the probability that moderate judges and conservative judges will cast a conservative vote’.

¹²² Angell (n 114 above) 1023 observing that ‘the expenses incurred by one who appears as a friend of the court are trifling; no court fee of any motion, no costs assessed against the amicus who ends up on the losing side’.

¹²³ Tobias (n 116 above) 415 observing that, in the context of Canada, the law ‘does not require that intervention applicants possess standing to sue’.

¹²⁴ T Ginsburg ‘The global spread of constitutional review’ in K Whittington *et al* (eds) *Law and politics* (2008) 90.

structure for the success of constitutional litigation.¹²⁵ The ability of a formally independent constitutional review system to ensure the realisation of justiciable rights largely depends on a continuous demand for judicial intervention from CSOs and organised human rights advocates.

4. Comparative experiences in constitutional review in selected African countries

The success of a constitutional review system to a large extent depends on the political and legal context. The political context essentially relates to the nature of government, broadly the democratic or undemocratic character of the governing regime.¹²⁶ By mainly drawing from experiences in democratic states such as the US, India and South Africa, it was indicated above that constitutional review can play a significant role in the realisation of human rights.¹²⁷ Democratic competition facilitates the creation of the necessary conditions for successful constitutional review. Constitutional adjudicators are likely to be independent in practice in democracies. Also litigation support structures are likely to be more vibrant and effective in democratic countries than in intolerant authoritarian states. However, democracy is not the only or even a sufficient determinant of the success of constitutional review. Even in countries that are not fully democratic, the potential role of constitutional adjudication in ensuring the realisation of human rights cannot be overlooked, especially in relation to cases that are not politically sensitive.¹²⁸ Clearly, the socio-political and economic context influences judicial behaviour, but is not in itself indicative of how judicial behaviour or tendencies will develop.¹²⁹ Judicial review is not inherently a force for either progressive change or the preservation of an unjust status quo. Wise observes that constitutional review is a powerful instrument that can be used to perpetuate the power of established political elites, yet 'it is also a powerful instrument that can serve to protect the politically weak, the electorally disadvantaged, and minorities subject to discrimination from abuse in violation of the constitution'.¹³⁰

¹²⁵ C Epp 'Do bills of rights matter? The Canadian Charter of Rights and Freedoms' (1996) 90 *American Political Science Review* 765.

¹²⁶ Countries considered 'not free' by Freedom House broadly correspond to undemocratic states, and countries rated 'free' are democratic. Countries categorised as 'partly free' fall in between the two – see Chapter 1, footnote 52.

¹²⁷ M Shapiro 'The success of judicial review and democracy' in M Shapiro and A Stone Sweet *On law, politics and judicialization* (2002) 161 observing that 'no state without considerable claims to democracy does have successful judicial review'.

¹²⁸ T Ginsburg and T Moustafa 'Introduction' in Ginsburg & Moustafa (n 40 above) 2.

¹²⁹ P Domingo 'Introduction' in Gargarella *et al* (n 29 above) 4.

¹³⁰ M Wise 'Judicial review and its politicization in Central America: Guatemala, Costa Rica, and constitutional limits on presidential candidates' (2010) 2 *Santa Clara Journal of International Law* 145, 147.

Despite the prevalent view that constitutional review can only succeed in democratic states,¹³¹ several studies in the last decades have demonstrated that formally independent constitutional adjudicators can also protect rights even in authoritarian regimes.¹³² The assumption that democracy is a necessary precondition for an independent and relatively activist constitutional review system has increasingly been challenged.¹³³ Constitutional adjudicators in all kinds of states, including authoritarian states, decide issues of enormous social, economic and political significance. Hirschl concludes that the ‘reliance on courts and judicial means to address core political controversies that often define and divide whole polities knows no democratic/authoritarian borders’.¹³⁴ The potential role of formally independent constitutional adjudicators in ensuring the realisation of human rights cannot, therefore, be overruled even in stable authoritarian states, provided the three preconditions for successful constitutional review exist. In short, democracy is good for, but does not categorically determine, the success or failure of constitutional review in ensuring the realisation of human rights.

This section discusses the experiences in three selected African countries – Ghana, Malawi, and Uganda – to demonstrate the potential contributions of constitutional review in the realisation of human rights even in countries that are not fully democratic. This is done through summarising the facts in selected cases on politically sensitive issues and, where information is available, the subsequent compliance with, or defiance of, judicial decisions.¹³⁵ In the *Freedom in the World Index* issued annually by Freedom House, Uganda has been classified as ‘partly free’ since 1995; Malawi was classified as ‘free’ between 1994 and 1999 and as ‘partly free’ since 1999; Ethiopia was classified as ‘partly free’ between 1995 and 2010; in 2011, Ethiopia was classified as ‘not free’; Ghana was classified as ‘partly free’ from 1992-1996, and as ‘free’ since 1997.¹³⁶ However, the cases selected from Ghana were decided during the beginning of the democratic transition in the early 1990s when it was classified as ‘partly free’, given that the current level of democratic governance in Ghana cannot be compared to what obtains in Ethiopia. The

¹³¹ Shapiro, for instance, observes that ‘no state without considerable claims to democracy does have successful judicial review’ – Shapiro (n 127 above) 161.

¹³² See, for instance, T Moustafa *The struggle for constitutional power: Law, politics, and economic development in Egypt* (2007); G Helmke *Courts under constraints: Judges, generals and presidents in Argentina* (2005).

¹³³ G Helmke and F Rosenbluth ‘Regimes and the rule of law: Judicial independence in comparative perspective’ (2009) 12 *Annual Review of Political Science* 345.

¹³⁴ R Hirschl *Constitutional theocracy* (2010) 248.

¹³⁵ The choice of cases is motivated by several factors including the finding of violation of human rights – which partly demonstrates judicial assertiveness – leading to invalidation of a sensitive law or executive action. Accessibility of information about the cases in these countries also partly motivated the choice.

¹³⁶ For the Freedom House ratings from 1973-2011, visit <http://www.freedomhouse.org/report-types/freedom-world> (accessed 4 June 2012). The ratings provided for the four countries here start from the date when the current Constitution of the respective countries was adopted. For instance, because the Ethiopian Constitution entered into force in 1995, the ratings start from 1995.

similarity in the Freedom House categorisation of the states considered here allows for the drawing of conclusions from the experiences of countries with comparable political contexts. Moreover, Ethiopia, Ghana, Uganda and Malawi adopted their current constitutions during the first half of the 1990s. The constitutions and the constitutional review systems in these countries have existed and operated for almost the same period of time.

The experiences in the three countries indicate that, where a constitution establishes an independent constitutional adjudicator, constitutional review has the potential to constrain government power. The experience also demonstrates that the existence of a formally independent constitutional adjudicator encourages organised litigants to challenge government decisions whenever the opportunity arises.

It should be noted that all the three selected countries follow the common law legal system. Ethiopia on the other hand is a civil law country. The author was unable to use a civil law African country as a case study due to language constraints. It is submitted that, if the three preconditions for successful constitutional review identified above exist, constitutional adjudicators in any country can contribute to the realisation of human rights. Indeed, experiences in civil law countries in Latin America, such as Brazil, indicate that the success of constitutional review is not automatically determined by the legal system in a particular country.¹³⁷ If the three preconditions identified in this Chapter exist, the impact of legal culture on constitutional review dwindles.

Admittedly, although the focus of this thesis is the normative and institutional framework, the political and legal environment has the potential to influence the extent to which constitutional adjudicators can contribute to the realisation of human rights. The fact that constitutional review has been modestly successful in the three selected countries does not necessarily imply that, had the Ethiopian Constitution established a formally independent constitutional adjudicator, constitutional review would have recorded the same or comparable levels of human rights protection. Historical, cultural, political, and other factors peculiar to Ethiopia can undermine the potential of an otherwise good constitutional

¹³⁷ See generally A Carias *Constitutional protection of human rights in Latin America: A comparative study of amparo proceedings* (2009). The Supreme Court of Brazil is arguably one of the most active judiciaries in the world. However, see M Killander and H Adjolahoun 'International law and domestic human rights litigation in Africa: An introduction' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 4. The authors observe that courts in traditionally monist civil law countries in Africa have been slow in applying international human rights law compared to traditionally dualist common law countries. Legal culture can particularly influence the approach of constitutional judges towards constitutional interpretation.

review system.¹³⁸ Legal tradition can influence judicial attitude, interpretative approaches as well as the culture of reliance on constitutional litigation.

4.1. Experiences from Ghana

Ghana is currently considered as one of the icons of African democracy, a beacon of hope.¹³⁹ The visit in 2009 by President Barack Obama is a nominal attestation to the significant democratic success the country has enjoyed in recent years.¹⁴⁰ Freedom House classified Ghana as 'partly free' from 1992-1996, and 'free' from 1997-2011.¹⁴¹ The progress towards constitutionalism and democracy in Ghana has been 'quiet but remarkable'.¹⁴² Ghana has passed the true test of democracy by witnessing a peaceful transfer of power through elections to an opposition party for the first time in Ghanaian history in the December 2000 elections, and later in 2009 when the party of John Kufuor, the incumbent, lost the elections.

Ghana was the first Sub-Saharan African colony to attain its independence on 6 March 1957. The adoption of the Constitution in 1960 created the first Ghanaian Republic. Ghana has since then witnessed five *coup d'états* – 1966, 1969, 1972, 1979, and 1981, and three democratic constitutions establishing the first three Ghanaian Republics – of 1960, 1969, 1979.¹⁴³ The last *coup d'état* in 1981 facilitated the coming into power of the Provisional National Defence Council (PNDC) which left Ghana under the leadership of Jerry Rawlings until 1992. The constitutional history of Ghana between independence and 1992 was chequered with military dictatorships. The constitutional and democratic experiences during this period were, as a result, short-lived. A democratic Constitution was adopted in

¹³⁸ In terms of culture, for instance, traditional legal theories in Ethiopia conceive government as omnipotent and god-sent. There is an understanding that government cannot be sued or otherwise challenged and that only a future government can undo what a previous government has done. Two old Ethiopian adages, '*semay ayitarus nigus ayikeses*' (roughly 'you cannot plough the sky nor sue a government'), and 'the sun that comes up tomorrow will be our sun; the government that rules tomorrow will be our government' clearly capture popular conceptions of law and political power. The person or group in power is understood to have an almost absolute power, and courts are understood as being part of and as instruments at the service of political governors.

¹³⁹ The Economist describes Ghana as 'the most successful democracies in Sub-Saharan Africa' – The Economist Intelligence Unit 'Democracy Index 2010: Democracy in retreat' 18 http://www.eiu.com/Handlers/WhitepaperHandler.ashx?fi=Democracy_Index_2010_Web.pdf&mode=wp (accessed 12 December 2011).

¹⁴⁰ According to the BBC, Obama chose to visit Ghana because of Ghana's 'strong democratic record' – A Harding 'Obama speaks of hopes for Africa' BBC 11 July 2009 <http://news.bbc.co.uk/2/hi/8145762.stm> (accessed 9 February 2011).

¹⁴¹ For the Freedom House ratings from 1973-2011, visit <http://www.freedomhouse.org/report-types/freedom-world> (accessed 4 June 2012).

¹⁴² Prempeh (n 26 above) 1288.

¹⁴³ S Bimpong-Buta *The role of the Supreme Court in the development of constitutional law in Ghana* (2007) 25. For a discussion of the constitutional history of Ghana, see 23 – 33.

1992 under the auspices of the last military regime headed by Rawlings.¹⁴⁴ The 1992 Constitution brought into being the Fourth Ghanaian Republic. This Constitution guarantees human rights and democratic values and ushered in the process of democratisation.

Following a peaceful transition towards multi-party democracy, the PNDC government was replaced in 1993 by a democratically elected party, the National Democratic Congress (NDC) led by Rawlings. Although the influence of the wave of democratisation in the 1990's following the fall of the Berlin Wall should not be overlooked, the 1992 Constitution was intended to avoid future *coup d'états*, dictatorial governments and a one-party state. Rawlings left power after serving two terms as prescribed in the Constitution.¹⁴⁵ From the narratives thus far, it transpires that Ghana has progressed democratically over time. It appears from the following discussions that Ghanaian courts, particularly the Supreme Court, have actively played their role in strengthening constitutional democratic values and practice.¹⁴⁶

The story of constitutional human rights litigation in post-colonial Ghana is not consistently positive. Indeed, it started with a huge blow to the development of human rights. The first notable occasion where the role of the judiciary in fostering constitutionalism and constitutional rights was tested was in the *re Akoto*¹⁴⁷ case in 1961, during the First Republic. The case involved a writ of *habeas corpus* against the detention of the applicants based on grounds, *inter alia*, of unconstitutionality of the law based on which they were arrested.¹⁴⁸ The 1960 Constitution of Ghana did not explicitly guarantee a justiciable bill of rights. The constitutional challenge was based on article 13 of the Constitution which enshrined some fundamental rights as part of the solemn declaration that the President of the Nation had to make upon assumption of power. According to article 13(1) the President must, immediately after assumption of office, make the following solemn declaration:

¹⁴⁴ For a detailed account of the process of adoption of the 1992 Constitution, see K Afari-Djan *The making of the Fourth Republican Constitution* (1995).

¹⁴⁵ 'The Fourth Republic: The 1992 Constitution' http://www.modernghana.com/GhanaHome/ghana/government.asp?menu_id=6andsub_menu_id=13andmenu_id2=0ands=b (accessed 28 June 2011).

¹⁴⁶ Ghanaian courts, particularly the Supreme Court, have nurtured, promoted and asserted the constitutional democratic system of government – Bimpong-Buta (n 143 above) 28. This section does not provide an assessment of the transformational role of the Ghanaian judiciary. It rather discusses some cases that were resolved during the beginning of the transition to constitutional democracy that reflect the distinctive contribution of the Ghanaian Supreme Court in facilitating the transition to an established constitutional democracy by enforcing constitutional rights.

¹⁴⁷ *Re Akoto* [1961] 2 GLR 523, SC.

¹⁴⁸ The Preventive Detention Act no 17 of 1958.

That subject to such restrictions as may be necessary for preserving public order, morality or health, no person should be deprived of freedom of religion or speech, of the right to move and assemble without hindrance or of the right of access to courts.

The Supreme Court delivered one of the most criticised judgments in Ghanaian constitutional law history.¹⁴⁹ The Court ruled that the solemn declaration did not create judicially enforceable obligations. It held that

... the [solemn] declaration merely represents the goal which every President must pledge himself to attempt to achieve. The declarations however impose on every President a moral obligation, and provide a political yardstick by which the conduct of the Head of State can be measured by the electorate. The people's remedy for any departure from the principles of the declaration is through the use of the ballot box, and not through the courts.¹⁵⁰

Because of the absence of provisions explicitly guaranteeing justiciable human rights, the Supreme Court held that the solemn declaration was non-justiciable, and, hence, did not impose judicially enforceable obligations. The decision has been criticised even by the post-1992 Supreme Court for undermining the political and constitutional development of Ghana. Any other outcome in the case, the post-1992 Supreme Court observed, would have definitely curved the course of history where 'respect for individual rights and rule of law might very well have been entrenched in our land'.¹⁵¹

The 1992 Constitution corrected the fissure that led to the *Re Akoto* judgment, namely, the absence of a justiciable bill of rights. Under the 1992 Constitution, judicial power is exclusively vested in the courts.¹⁵² The High Court of Ghana has the jurisdiction to receive complaints alleging violation of fundamental human rights and freedoms enshrined under Chapter 5 of the Constitution, subject to appeal to the Court of Appeal and the Supreme Court.¹⁵³ There is no doubt that the current Constitution clearly guarantees justiciable human rights. The Constitution also vests the power of constitutional review in the courts.

Encouraged by this change and conscious of its role in enforcing the Constitution and in the transition towards constitutional democracy, the Ghanaian Supreme Court rendered some judgments with serious

¹⁴⁹ Bimpong-Buta (n 143 above) 350 – 356.

¹⁵⁰ *Re Akoto* [1961] 2 GLR 523, 535. This case incidentally confirms that the existence of justiciable constitutional rights is a necessary precondition for the success of rights-based constitutional review.

¹⁵¹ *Amidu v President Kufuor* [2001-2002] SC GLR 86.

¹⁵² The Constitution of the Republic of Ghana (1992), article 125(1).

¹⁵³ Constitution of Ghana, articles 33(1), 130(1) and 140(2). However, the High Court, and every other lower court, must refer questions of constitutional interpretation or enforcement and questions of whether an enactment was made in excess of the powers conferred on Parliament to the Supreme Court (article 130(2)).

political implications. The government has cemented the efforts of the Court by adhering to judicial decisions, despite at times criticising the Court for orchestrating a ‘judicial *coup d’état*’.¹⁵⁴

In 1993, the Ghanaian Supreme Court decided one of the most controversial cases which involved a challenge against the decision of the post-1992 government to establish 31 December as a public holiday to commemorate the overthrow of a previously legally constituted government on 31 December 1981.¹⁵⁵ The complainants argued that the financing of this day as a public holiday from public funds was inconsistent with and in contravention of the letter and spirit of the 1992 Constitution. Quite expectedly, the primary defence of the government was that the issue in contest was a non-justiciable political matter. It was rather, the government submitted, more appropriate for determination by the executive or the electorate through the legislature. The Court rejected the argument.¹⁵⁶

The Constitution itself is essentially a political document. Almost every matter of interpretation or enforcement which may arise from it is bound to be political, or at least to have a political dimension.

The Court also refused to rely on the ‘political question’ doctrine developed by the US Supreme Court:¹⁵⁷

What we have is a written Constitution, 1992 to be interpreted and enforced, with the result that in Ghana, courts and tribunals much lower in the hierarchy than the Supreme Court may lawfully decide cases which may involve ‘political questions’.

The Court further reaffirmed that the Constitution, and not Parliament, was supreme. The right of Parliament to enact laws was, therefore, not unlimited. As such, the determination of a public holiday cannot be completely left to policy choices but must be within the parameters of parliamentary powers set by the Constitution:¹⁵⁸

Parliament now has no uncontrolled right to pass laws on public holidays, any more than it has to declare a ‘one party’ state, or make a party leader President for life or crown him emperor. As the fundamental or basic law, the Constitution, 1992 controls all legislation and determines their validity. It is for the courts, as the guardians of legality, to ensure that all the agencies of the State keep within their lawful bounds.

¹⁵⁴ Prempeh (n 26 above). The Chief Justice of Ghana observes that the Supreme Court ‘has remarkably contributed to the promotion and protection of civil and political rights in Ghana’ – Chief Justice Mrs Justice Georgina Wood ‘Protecting human rights and improving access to justice in Ghana’ Speech delivered at the New York University African house, 8 February 2011 http://www.judicial.gov.gh/index.php?option=com_content&task=view&id=254&Itemid=152 (accessed 8 February 2012).

¹⁵⁵ *New Patriotic Party v Attorney-General* [1993-1994] 2 SC GLR 35, (the *December 31st Case*). The government in power after the 1992 Constitution (the Rawlings Government) orchestrated the *coup d’état* on 31 December 1981. For a detailed discussion of the case, see Bimpong-Buta (n 143 above) 115, 131, 133 – 134, 144 – 148, 220 – 223.

¹⁵⁶ *December 31st Case*, 65.

¹⁵⁷ *December 31st Case*, 65. However, the exact stance of the Court on the political question doctrine is very controversial and unsettled as witnessed in subsequent cases – see Bimpong-Buta (n 143 above) 109 – 136.

¹⁵⁸ *December 31st Case*, 130.

The Court concluded that the decision to celebrate an unconstitutional overthrow of a previously constitutionally constituted government was unconstitutional and against the spirit of the 1992 Constitution, which was intended to bring an end to unconstitutional changes of government.

In another controversial case decided in 1993, the Supreme Court upheld the right to freedom of expression and access to publicly funded media in favour of opposition political parties.¹⁵⁹ The complaint was against the Ghana Broadcasting Corporation (GBC) for refusing the New Patriotic Front (NPF), the main opposition political party at that time, to access the GBC to react to the statement on radio and television of the then Minister of Finance in defence of the 1993 Budget Statement of the Government of Ghana. The complainant applied to the GBC, the body established by law to control radio and television broadcasting, to be given time to air their views about the same budget statement. The GBC refused. In the Supreme Court, the plaintiff argued that the Constitution imposed a duty on the GBC to afford the plaintiff fair opportunities and facilities for presentation of its views, especially when divergent from the views of the government. Articles 55(11) and 163 of the Constitution provided the normative basis for the action.¹⁶⁰

The Court unanimously ruled that the GBC should afford a fair opportunity and equal access to its facilities to the applicant within two weeks of the date of the order to enable the complainant to present its views. It held that the GBC did not have unlimited discretion in that regard. The views of the Court on the importance of free competition and divergent views in a democratic state deserve a long quote:¹⁶¹

The free exchange of views is necessary to give the electorate an opportunity to assess the performance of the government in power as against the potential of an opposition in the wilderness. It keeps a government on its toes and gives the neutral, apolitical citizen an opportunity to make up his mind either to consign the disenchanted noises he hears around, to mere rabid ranting that proceed from electoral defeat or give it the evocative distinction of demonstrating the quality that unfortunately missed the boat through bad electoral judgment, and therefore deserving of a second chance at the next ballot. In a truly democratic environment, this testing ground is a *sine qua non* to the survival of a free pluralistic society.

It further noted that

¹⁵⁹ *New Patriotic Front v Ghana Broadcasting Corporation* [1993-1994] 2 GLR 354. For further discussion of the case see, Bimpong-Buta (n 143 above) 428 – 430.

¹⁶⁰ Article 55(11) provides: The State shall provide fair opportunity to all political parties to present their programmes to the public by ensuring equal access to the state-owned media; article 163 provides: All state-owned media shall afford fair opportunities and facilities for the presentation of divergent views and dissenting opinions.

¹⁶¹ *New Patriotic Front v Ghana Broadcasting Corporation* [1993-1994] 2 GLR 354, 366.

... a denial of opportunity for the expression of opposing views, inherent in a democracy, would amount to moves which may culminate in the creation of a monolithic government which is one step removed from a one-party government. There is a historical precedent of such a retrogressive descent.¹⁶²

The Supreme Court, therefore, reaffirmed the mandatory and judicially enforceable duty of state-owned or funded media to provide fair opportunities and facilities for opposition parties to present divergent views.

These two decisions of the Supreme Court of Ghana clearly reflect the assertive role played by the Court to claim jurisdiction to adjudicate even the most politically sensitive cases right at the inception of the transition to constitutional democracy. Despite stern criticism of the judgments as illegitimate expansion of judicial power, the government of Ghana complied with the decisions of the Supreme Court in both judgments. Today, 31 December is not a public holiday in Ghana. The GBC granted the NPF time to present its views. The vigour of the Court has been complemented by political commitment towards constitutionalism.

In summary, the Supreme Court of Ghana has contributed its role in the evolution of the country towards a full-fledged democratic order ushered in the 1992 Constitution. It has proved to be a formidable force in ensuring the realisation of constitutional rights and the transition to constitutional democracy. As a result, opposition political parties, CSOs and individuals actively resort to the Supreme Court whenever aggrieved by the measures taken by the government.¹⁶³

4.2. Experiences from Uganda

Perhaps a very good contemporary comparator to Ethiopia is Uganda. Both countries have had a comparable democratic trajectory. Freedom House classified both Uganda and Ethiopia as 'partly free' from since 2002, with more or less similar ratings as Ethiopia, except for 2011 during which Ethiopia regressed to 'not free'. Just like Prime Minister Meles Zenawi in Ethiopia, President Ywori Museveni has been leading the country since the overthrow of the previous dictatorial regime in Uganda.¹⁶⁴ Both countries have thus been led by one head of government since their democratic constitutions were adopted in 1995. They can both be described as dominant party systems where a single political party

¹⁶² As above, 368 – 369.

¹⁶³ The two cases discussed here were instituted by the main opposition political party at the time, the New Patriotic Front. A cursory look at the many decisions of the Supreme Court reveals the range of actors that bring constitutional cases before the Supreme Court. For an extensive discussion of the role of the Ghanaian Supreme Court in the realization of human rights and generally development of constitutional law, see Bimpong-Buta (n 143 above).

¹⁶⁴ Zenawi served as the Ethiopian head of government between 1991 and 2012; Museveni has been leading Uganda since 1986.

dominates the political space. There are no term limits for the position of the head of government in Ethiopia and the term limit on the office of the President in Uganda were scrapped in 2005 through a constitutional amendment to enable Museveni to run for presidency without limits. Both leaders were seen in the 1990s as the new breed of leaders hoped to change the political and economic destiny of their respective countries, but now criticised for stifling independent voices including particularly opposition political activities and the media.¹⁶⁵

When it comes to the role of constitutional review in the realisation of human rights, Ethiopia lags far behind Uganda. Jurisdiction on matters involving constitutional interpretation in Uganda lies with the Court of Appeal (sitting as a Constitutional Court) subject to appeal to the Supreme Court.¹⁶⁶ Based on their power of constitutional review, the Constitutional Court and the Supreme Court of Uganda have on several occasions invalidated laws and executive decisions that can reasonably be considered to be politically sensitive.

In a judgment in January 2004, the Ugandan Supreme Court invalidated a proposed amendment to the Constitution for failure to comply with the provisions governing constitutional amendment.¹⁶⁷ The proposed amendment sought to reverse a previous decision of the Constitutional Court which invalidated a law that denied access to parliamentary documents to accused persons, because it unreasonably restricted the right to fair trial. The constitutional amendment was intended to give constitutional status to the legal provision which was invalidated by the Constitutional Court. The Court ruled that the amendment amended the explicitly listed articles. It also ruled that they amended some other provisions indirectly – ‘amendment by infection’. The Constitution required a referendum and a two-third parliamentary majority support to amend the provisions that were amended indirectly. Since no referendum was held, the indirect amendment was deemed to be unconstitutional.

In a landmark judgment in February 2004, the Supreme Court upheld a constitutional challenge, based on the constitutional right to freedom of expression and the press, against the crime of ‘publication of false news’.¹⁶⁸ The appellants were journalists who were charged with the offence of ‘publication of

¹⁶⁵ R Dibia and S Rashid ‘The politics in Uganda’ in R Dibia (ed) *The politics and policies of Sub-Saharan Africa* (2001) 180 – 181. See also ‘New generation of African leaders’ http://en.wikipedia.org/wiki/New_generation_of_African_leaders (accessed 31 October 2011).

¹⁶⁶ Constitution of the Republic of Uganda (1995), articles 132(3) & 137. Where any question as to the interpretation of the Constitution arises in any proceedings in a court of law other than a field court martial, such court should refer the question to the constitutional court for final decision (article 137(5)).

¹⁶⁷ *Ssemogerere and others v Attorney General*, constitutional appeal no 1 of 2002, Supreme Court of Uganda (29 January 2004).

¹⁶⁸ *Obbo and Mwenda v Attorney General*, constitutional appeal no 2 of 2002, Supreme Court of Uganda (11 February 2004).

false news’ after writing a newspaper article entitled ‘Kabila paid Uganda in gold, says report’. The Court held that the crime of ‘publication of false news’ ‘lacked sufficient guidance on what is, and what is not, safe to publish, and consequently placed the intending publisher, particularly the media, in a dilemma’.¹⁶⁹ Given the importance of the media in any democracy, the Court concluded that the limitation on freedom of the press in the form of the crime of ‘publication of false news’ was not justifiable in a free and democratic society as required by the Ugandan Constitution. In similar vein, a constitutional challenge to the crime of sedition was upheld by the Constitutional Court as the government did not adduce evidence to show that the restriction on freedom of expression that the crime of sedition entails was justifiable in a free and democratic society.¹⁷⁰ The charges against the journalists based on the crime of publication of false news and sedition were consequently dropped.

Perhaps one of the most sensitive and controversial judgments in Uganda’s recent history was the decision of the Constitutional Court that invalidated the Referendum (Political Systems) Act, 2000, as well as the referendum which was conducted based on this law.¹⁷¹ The referendum was organised to decide whether Uganda would continue to be ruled under the Movement Political System – a purported no-party system – or whether multiparty democracy would be introduced. The Constitution required that the referendum should be conducted one year after legislation authorising such a referendum was enacted. The one year period was intended to enable the people of Uganda to ‘freely canvass for public support for a political system of their choice’.¹⁷² However, the referendum on the choice of the political system was conducted less than a month after the Referendum Act was enacted. The Act was made effective retroactively to have taken effect one year earlier than the date of publication – the date of entry into force of the law was backdated with a view to comply with the constitutional requirement. In its 2004 judgment, the Court ruled that the backdating of the legislation denied the people of Uganda the opportunity to canvass for support toward an informed choice of the political system they wished for. The Court also held that the Referendum Act had the effect of indirectly amending the Constitution without following the proper constitutional amendment procedures. The Court, therefore, invalidated not only the Referendum Act but also, retrospectively, the outcome of the referendum.¹⁷³

¹⁶⁹ As above 31.

¹⁷⁰ *Mwenda and The Eastern African Media Institute (U) Ltd v Attorney General*, constitutional petition nos 12 of 2005 and 3 of 2006, Constitutional Court of Uganda (25 August 2010).

¹⁷¹ *Ssemogerere and Olum v Attorney General*, constitutional petition 3 of 2000, Constitutional Court of Uganda (25 June 2004).

¹⁷² Ugandan Constitution, article 271(2).

¹⁷³ The outcome of the referendum had favoured the Movement Political System and rejected a proposal to introduce a multi-party system. Museveni was the principal proponent of the Movement Political System.

The decision of the Constitutional Court created a huge uproar in the government. President Museveni launched a scathing attack on the judiciary accusing members of the Constitutional Court of usurping peoples' power and being opposition sympathisers.¹⁷⁴ He declared on national television that '[t]he government will not allow any authority, including the courts, to usurp people's power in any way. We shall not accept this. It will not happen. This is absurd and unacceptable'.¹⁷⁵ In June 2004, the government also mobilised its supporters to protest the ruling and the judiciary. The supporters demonstrated and called on government to dismiss or take disciplinary measures against the judges.

On appeal, although the Supreme Court upheld the decision of the Constitutional Court to declare the Referendum Act invalid, it reversed the ruling of the Constitutional Court that invalidated the outcome of the referendum.¹⁷⁶ The Supreme Court held that the absence of a law – Political Organisations Law – allowing political parties to campaign prior to the referendum did not necessarily significantly taint the validity of the referendum. It also ruled that there was no evidence that sufficiently proved that the referendum was not free and fair. The Supreme Court further observed that 'the circumstances warranted the exercise of the court's discretion to decline granting the declaration [invalidating the outcome of the referendum]'.¹⁷⁷

In yet another very controversial case in 2006, the invasion by security forces of the High Court to prevent the release on bail of a group of accused persons – which included twice presidential candidate Kizza Besigye – and the subsequent criminal proceedings in the General Court Martial against them on charges based on the same facts were found to be in violation of the Constitution.¹⁷⁸ The Constitutional

¹⁷⁴ M Kirya 'The independence and accountability of the judiciary in Uganda: Opportunities and challenges' http://www.kituoachakatiba.org/index2.php?option=com_docman&task=doc_view&gid=369&Itemid=36 (accessed 8 February 2012).

¹⁷⁵ Cited in Kirya (n 174 above).

¹⁷⁶ *Attorney General v Ssemogerere and Olum*, appeal no 3 of 2004, Supreme Court of Uganda (2 September 2004).

¹⁷⁷ In his separate opinion, Justice Mulenga identifies several factors that he considered were pertinent to justify refraining from invalidating the outcome of the referendum, even if the referendum was found not to be free and fair: 'The pertinent circumstances were that the respondents' petition, which had pre-emptively challenged the referendum, was not tried and concluded until four years after it was filed. Meanwhile the referendum was held in which the majority of the electorate voted in favour of the movement political system and the system was duly adopted. The following year, Presidential and Parliamentary elections were conducted in accordance with that system. Later the same was done in respect of local governments, and generally the political affairs of the state were for more than four years conducted on the basis of that system. A declaration that the referendum was null and void would in all probability nullify not only the referendum but also all that had been done in consequence of its result. Needless to say, that would have created political and constitutional instability and uncertainty, unproportional [sic] to the benefit the country would have derived from such remedy. In our view those were compelling circumstances, where the court would judicially exercise its discretion to refrain from granting the declaration'.

¹⁷⁸ *Uganda Law Society v Attorney General*, constitutional petition no 18 of 2005, Constitutional Court of Uganda (January 2006). The sequence of events was as follows: the accused persons were in prison pending trial in the High Court on charges of treason and concealment of treason. On 16 November 2005, 22 of the accused persons appeared before the Kampala High

Court held that the acts violated the right to fair trial and the prohibition of double jeopardy of the accused. On appeal, the Supreme Court upheld the decision of the Constitutional Court.¹⁷⁹ Besigye and some of the co-accused were released from prison subsequently after some legal wrangling. However, the ruling was not complied with fully. Despite the ruling, most of the accused persons were released long after the decision, and one of the arrested, a brother of Besigye, died in prison.¹⁸⁰

The Constitutional Court and the Supreme Court have also protected the rights of women,¹⁸¹ and the right to bail, including of those who are tried by military courts.¹⁸² Clearly, Ugandan courts have contributed their share of responsibility in the realisation of constitutional rights. They have demonstrated their willingness and ability to discharge their constitutional authority and duty to protect constitutional rights. Encouraged by this judicial record of protecting rights, members of opposition political parties, CSOs, human rights advocates and journalists have on several occasions sought judicial intervention to challenge laws and other government decisions.

4.3. Experiences from Malawi

The 1994 Constitution of Malawi formally dissolved the one-party dictatorial regime and laid down the pillars of a multi-party democratic state. This Constitution sets out the values, aspirations and parameters of operation of the Malawian State. It ushered in a new era based on constitutionalism, human rights and democratic governance. Since the transition to constitutional democracy, Malawi has

Court for bail hearings. The Court granted the accused persons conditional bail. Before the accused persons could be released from custody, however, a group of heavily armed security agents invaded the High Court premises and interrupted the processing of release papers. As a result, the accused persons were returned to Luzira prison instead of being released. On 17 November 2005, they were taken to the General Court Martial where they were jointly charged with the offences of terrorism and unlawful possession of firearms based on the same facts. For a detailed narration of how the case unfolded, see Widner and Scher (n 44 above) 238 – 248. Widner and Scher indicate that the courts largely stood their ground. The efforts of the courts were complemented significantly by the out of court activities of the Ugandan Law Society, Ugandan Human Rights Commission and newspapers, and donors and other international actors.

¹⁷⁹ *Attorney General v Uganda Law Society*, constitutional appeal no 1 of 2006, Supreme Court of Uganda (20 January 2009).

¹⁸⁰ 16 of the accused took the case to the East African Community Court of Justice (EACJ) to challenge the refusal of the government of Uganda with the decision of the courts. The EACJ ruled that the refusal to respect the court order violated the independence of the judiciary. See *Katabazi and Others v Secretary-General of the East African Community and Another* (2007) AHRLR 119 (EAC 2007) para 49.

¹⁸¹ *Uganda Association of Women Lawyers and Others v Attorney General*, constitutional petition no 2 of 2003, Constitutional Court of Uganda (10 March 2004) on the right to equality of both sexes in relation to divorce.

¹⁸² *Attorney General v Joseph Tumushabe*, constitutional appeal no 3 of 2005, Supreme Court of Uganda (9 July 2008).

achieved significant political progress in ‘institutionalizing democratic freedoms and promoting and protecting human rights’.¹⁸³ Freedom House classified Malawi as ‘partly free’ from 2002 – 2011.¹⁸⁴

The role of Malawian courts in the democratisation process prior to the enactment of the 1994 Constitution was rather limited and ineffective primarily due to ‘the narrow mandate of the court, restrictive laws, lack of guarantees for human rights and the repressive political climate’.¹⁸⁵ Their role was further constrained by the fact that the previous Constitution of 1966 did not specifically guarantee justiciable human rights. However, since the adoption of the 1994 Constitution, Malawian courts have been playing an increasingly robust role in the realisation of human rights.¹⁸⁶ The 1994 Constitution empowers the High Court, subject to appeal to the Supreme Court of Appeal, to ‘review any law and any action or decision of the Government for conformity with the Constitution’.¹⁸⁷ On this basis, constitutional review ‘has been used effectively to reverse government decisions made at various levels’.¹⁸⁸ This section looks at selected cases related to constitutional rights that were decided by Malawian courts.

In a case decided in 2002,¹⁸⁹ in his speech during a rally on 28 May 2002, the then President of the Republic of Malawi, Bakili Muluzi, banned all forms of demonstration for or against a proposed constitutional amendment to scrap presidential two-terms-limit. He also ordered the Minister of Home Affairs, the Inspector General of Police and the Army Commander ‘to deal’ with anyone violating his

¹⁸³ United National Development Programme: Malawi

http://www.undp.org.mw/index.php?option=com_programme&view=democratic%20governance&task=project&area=project%20area&id=3&58930effcf1f629ed28c9ca6846cfdcd=hzmynhin (accessed 9 February 2012).

¹⁸⁴ The ratings from 2002-2011 are available at <http://www.freedomhouse.org/report/freedom-world/2002/malawi> (accessed 4 June 2012).

¹⁸⁵ Justice L Chikopa (High Court of Malawi) ‘The role of the judiciary in promoting constitutionalism, democracy, economic growth and development in Sub-Saharan Africa: The Malawi experience’ (2007) presented at The stakeholders’ conference on constitutional adjudication in Sub-Saharan Africa, Bagamoyo, Tanzania 5 – 9 June 2007 <http://www.kas.de/rspssa/de/events/26377/> (accessed 28 June 2011).

¹⁸⁶ K Van Donge ‘Kamuzu’s legacy: The democratisation of Malawi’ (1995) 94 *African Affairs* 375; and Chikopa (n 185 above). Chikopa cites several cases where the courts were actively involved during the 1993 referendum process, which was intended to decide whether Malawi was to become a multi-party democratic state: in *Nkhwazi v Referendum Commission* (1993) the High Court reversed the Referendum Commission’s decision barring members of the army from voting; in *National Consultative Council v Attorney General* (1994) the High Court restrained the police from operating permanent roadblocks; in *Aaron Longwe v Attorney General* (1993) the High Court set aside a police order banning certain persons from speaking at public rallies; in *Mhone v Attorney General* (1993) the High Court set aside a police order banning arrested or detained persons from meeting their lawyers without the permission of the Inspector General of Police.

¹⁸⁷ Constitution of the Republic of Malawi (1994), sections 104(2) & 108.

¹⁸⁸ Open Society Foundation ‘Malawi: Justice Sector and the rule of law’ (2006) 55 (A review by AfriMAP and Open Society Institute for Southern Africa) (written and researched by F Kanyongolo).

http://www.sarpn.org.za/documents/d0002236/Malawi_Justice_Kanyongolo_2006.pdf (accessed 25 October 2010).

¹⁸⁹ *Malawi Law Society, Episcopal Conference of Malawi and Malawi Council of Churches et al v The State et al*, High Court, Civil Cause 78 of 2002 (22 October 2002).

directive on the ban.¹⁹⁰ The applicants challenged the ban arguing that it constituted a violation of the rights to freedom of association, assembly and demonstration, expression, conscience and opinion and other political rights as enshrined in the 1994 Constitution.

The High Court noted that the directive to 'deal' with demonstrations was dangerously vague and wide with negative connotations and that the President needed to be clear in his directives. However, the Court observed that constitutional rights are not absolute trumps and may be limited in order to ensure peaceful human interaction. There was disagreement between the parties on whether the directive constituted an acceptable limitation under the Constitution. Section 42(2) outlines the clause that governs the justifiable limitation of rights:

No restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than prescribed by law, which are reasonable, recognised by international human rights standards and necessary in an open and democratic society.

The applicants contended that any possible limitation must fail as it was not 'prescribed by law', which renders the consideration of reasonableness and necessity immaterial. The Court observed that it was not clear in what capacity – whether as a Head of State or as a head of his political party – the President made the directives. It held that

... if he made the directive as Head of Government, he would subsequently have initiated legislation which would have been passed on to Parliament to become law. In the absence of any evidence to the contrary, at law, it would be that the President made the directives as a politician.

The Court concluded that the President did not have the power to make laws that restrict fundamental rights. That power belongs to the Parliament, which may not, under the Constitution, delegate legislative powers that substantially and significantly affect the fundamental rights and freedoms recognised in the Constitution. Hence, the directive of the President at a political rally to limit such rights did not amount to law. The limitation was, therefore, not justifiable.

The ruling of the Court was not complied with fully. The President was reported to have vowed to ignore the injunction as 'irresponsible and insensitive' and pledged to 'instruct both the army and police that demonstrations should not take place for the sake of 'peace and stability'.¹⁹¹ In fact, Amnesty International reported that the President was serious about his vows as the police subsequently

¹⁹⁰ As above, 2.

¹⁹¹ 'Muluzi and judiciary clash over third term', *BBC News* 4 June 2002 <http://news.bbc.co.uk/1/hi/world/africa/2024844.stm> (accessed 25 October 2010). The BBC reported that students were prevented from conducting anti-third-term amendments.

dispersed anti-third-term demonstrations.¹⁹² A delegation of the International Bar Association also disparaged the government for non-compliance with court orders that are labelled ‘politically unpopular’ including the case discussed.¹⁹³

In another case decided in 1998, the Supreme Court of Appeal declared illegal and unconstitutional a decision of Parliament to suspend (1) salaries of some members of the Malawian Parliament, and (2) state funding of some political parties who boycotted parliamentary proceedings and walked out of Parliament after protesting the parliamentary understanding of the purpose and interpretation of the constitutional provision governing floor-crossing.¹⁹⁴ The Court ruled that payment of salary to members of parliament as enshrined in the Constitution did not depend on attendance. It held that the State has an unqualified constitutional duty to provide funds to political parties that have secured more than one-tenth of the national vote in any parliamentary elections to enable such parties to have sufficient funds to be able to continue to meaningfully represent their constituency. The Court held that there was no express provision ‘either in the Constitution or any statute, or in the Standing Orders [of Parliament] for that matter, which sanctions the suspension of salaries of Members of Parliament or the suspension of State funding to political parties’.¹⁹⁵ The government complied with the decision.

Also, in a case decided in 1999,¹⁹⁶ the High Court ruled that the fact that the Malawi Broadcasting Corporation (MBC) provided live coverage only to rallies addressed by the presidential candidate of the ruling party on the run up to the 1999 elections constituted discrimination against other presidential candidates in violation of section 20 of the Constitution and other laws which require that all political parties should be given equal or equitable access to media coverage.

These examples indicate that Malawian courts have demonstrated their willingness to assert their role as the ultimate arbiters of constitutional disputes eking out the challenges. However, government compliance with the decisions of courts has been inconsistent. Compliance has generally depended on the ‘subject matter in question’ with government defying orders especially when it stands to ‘lose politically’.¹⁹⁷ Despite compliance challenges, the courts have shown courage in fearlessly declaring

¹⁹² Amnesty International ‘Report 2003: Malawi’ cited in Open Society Foundation (n 188 above).

¹⁹³ International Bar Association ‘Report of visit to Malawi’ (London 2002) 81 <http://ibanet.org/images/downloads/HRIIMalawiReport.pdf> (accessed 25 October 2010); Open Society Foundation (n 188 above).

¹⁹⁴ *Attorney General v SG Masauli*, Supreme Court of Appeal, MSCA, civil appeal no 28 of 1998 (25 August 1998).

¹⁹⁵ As above.

¹⁹⁶ *Kafumba and Others v The Electoral Commission and Another* (Misc. Cause 35 of 1999) (6 October 1999).

¹⁹⁷ Open Society Foundation (n 188 above) 53. The document identifies several reports that accused government of defying court orders. In February 2006, for instance, the government reportedly ignored a court order that ‘required it to restore the

certain politically sensitive government decisions unconstitutional. It has been suggested that personal criminal liability of government officials who instigate or encourage non-compliance for contempt of court may contribute to reducing instances of defiance of court orders.¹⁹⁸

Malawian courts have shown encouraging interest and commitment in upholding the Constitution in instances where unconstitutional behaviour was challenged. They have played their role in restraining legislative and executive excess detrimental to opposition political parties and other critical voices.¹⁹⁹ The inconsistency in the level of compliance calls for measures to address the challenge. It does not in any way indicate that constitutional review has failed or that its contribution has been insignificant. A concerted action by all stakeholders including the judiciary, the media, civil society, academics and other domestic and international actors can contribute towards improving the immediate and ultimate impact of and compliance with judicial decisions against the government.²⁰⁰

In conclusion, in the countries considered, the power of constitutional review lies with courts whose independence is constitutionally guaranteed. The constitutional adjudicators have demonstrated their willingness to enforce justiciable human rights guarantees and other constitutional restraints. The courts in these countries have clearly contributed to the realisation of human rights and the democratisation process. Although the courts may not have consistently favoured human rights claims, they have upheld constitutional standards in what can be considered politically sensitive cases.²⁰¹ This possibility has encouraged opposition political parties, the media, CSOs and other aggrieved parties to resort to courts to defend their rights and ensure compliance with constitutional limits on power. In the absence of an independent constitutional adjudicator, individuals and interest groups would have been reluctant to

security and other entitlements of the vice-president after these had been withdrawn on the grounds that the vice-president had by implication resigned from his position' – *The State v The President and Others*, Malawi High Court, Miscellaneous Civil Cause 22 of 2006. On 23 June 2003, 'the government defied a court order when it decided to deport to the United States five persons suspected of links with terrorism' regardless of a court injunction to block the deportation.

¹⁹⁸ Open Society Foundation (n 188 above).

¹⁹⁹ 'Malawi' in L Van de Vijver (ed) *The judicial institution in Southern Africa: A comparative study of common law jurisdictions* (2006) 90 – 91 observing that 'the judiciary is seen in most cases to stand firm in the face of pressure'. However, there are criticisms that Malawian courts, especially the Supreme Court of Appeal, do at times bow down to political pressure – see H Meinhardt and N Patel *Malawi's process of democratic transition* (2003) 22 observing that in certain instances 'the Supreme Court, out of political expedience, overturned rulings of the High Court which were in line with the Constitution'.

²⁰⁰ For a discussion of the role of civil society in the enhancement of democratic development in Malawi, see O Mwalubunju 'Civil society' in N Patel and L Svasand *Government and politics in Malawi* (2007).

²⁰¹ It should be noted that, even when judicial decisions have not been complied with, winning a court case has its own intrinsic advantages. As noted earlier in this Chapter, court victories have indirect or ancillary benefits, such as legitimating and publicising a cause, inspiring political mobilisation and awareness creation. These indirect outcomes are as important as the direct outcome, the specific remedies granted. Sometimes, the indirect outcomes may even be more significant than the direct outcome – M McCann *Rights at work: Pay equality reform and the politics of legal mobilization* (1994) 10 observing that legal mobilization helps to 'building a movement, generating public support for new rights claims, and providing leverage to supplement other political tactics'.

invest their time and resources in constitutional litigation. In short, the cursory discussion of the experiences in constitutional litigation of human rights in the selected countries reveals the existence of the minimum preconditions that determine the success of constitutional review in all the three countries. Despite some differences in the political realities in these countries, the existence of the preconditions has visibly contributed to the encouraging role of the courts in ensuring the realisation of human rights. Political commitment in these countries may not have been ideal, considering the inconsistency in the level of compliance with constitutional decisions. This inconsistency does not in any way undermine the contribution of independent constitutional adjudicators in ensuring the realisation of constitutional rights.

5. Limitations of and challenges to employing litigation

It has been argued that constitutional litigation has the potential to play a role in the realisation of human rights even in countries that are not fully democratic. Nevertheless, even when all the main preconditions for the success of human rights litigation as discussed in section 3 above exist, there are certain limitations of and challenges to employing litigation as a strategy to ensure the realisation of human rights. The existence of such limitations and challenges necessitates a sparing resort to litigation and the need to employ other alternative and complementary mechanisms such as lobbying within the democratic process. The limitations do not in any way suggest that constitutional litigation is an impotent strategy. Quite to the contrary, litigation does present colossal opportunities to ensure the realisation of human rights and facilitate legal and, at times, social change. The limitations are identified with a view to help explore ways of circumventing them while benefitting from the advantages litigation offers. It should be noted that these limitations apply to constitutional litigation as well as other forms of litigation involving human rights.

5.1. Litigation is cost and time inefficient

One of the main criticisms of resorting to litigation is the fact that it is costly and time-consuming. Litigation costs can often be beyond the means and capacities of most beneficiaries of human rights.²⁰² Litigation has been criticised because it diverts resources from other potentially more productive

²⁰² J Cassels 'Judicial activism and the public interest litigation in India: Attempting the impossible?' (1989) 37 *American Journal of Comparative Law* 495, 496 noting that costs of litigation militate against litigation strategies.

advocacy strategies.²⁰³ The materially costly nature of litigation can create a situation whereby access to justice only benefits the haves.²⁰⁴ It can take years, with accompanying unbearable economic and psychological costs, before judicial proceedings are finalised. Interest groups should, therefore, generally avoid resorting to litigation as the first resort. Resort to constitutional litigation should generally be limited to the absolute minimum.

However, the costly and time-consuming nature of litigation may not justify completely avoiding resort to litigation. It should rather induce the innovation of subtle ways of subverting the expenses such as via, *inter alia*, public interest litigation, and *amicus curiae* intervention. In any case, even other alternative mechanisms such as lobbying for change within the democratic process may cost even more and tend to be equally time-consuming. In addition, sometimes the democratic process does not simply respond adequately to advocacy initiatives.²⁰⁵ In such cases, litigation becomes the only alternative.

5.2. Courts depend on others to be set in motion

Another major limitation of constitutional review is the fact that most legal systems do not empower courts to be seized of a constitutional case on their own motion without the request or application of others. The principle of juridical passivity requires that courts and other judicial bodies may not act *suo moto*. Unlike the executive and legislature, courts 'can only answer a question asked by another protagonist in the juridical system'.²⁰⁶ Simply stated, courts cannot determine or select their agenda.

²⁰³ M McCann and H Silverstein 'Rethinking law's allurements: A relational analysis of social movement lawyers in the United States' in A Sarat and S Scheingold (eds) *Cause lawyering: political commitments and professional responsibilities* (1998) 261–292.

²⁰⁴ The model of litigation courts adopt can also impact the role courts can play in the realisation of the human rights of all, particularly the disadvantaged. In the context of socio-economic rights litigation in Brazil, for instance, the focus on individual rather than collective rights litigation has meant that mainly the middle-class, and not the needy lower socio-economic classes, have been able to benefit from the burgeoning right to health litigation. This has worsened, rather than improved, health inequities – see O Ferraz 'The right to health in the courts of Brazil: Worsening health inequities?' (2009) 11 *Health and Human Rights Journal* 33, 38 – 41. In India, as well, there have been criticisms that the mitigation of the problems of the poor, which underlay the liberalisation of *locus standi* in the 1970s, has increasingly been defeated. Rajamani, for instance, observes that three decades after, 'it is the problems of the middle-class ... that are most likely to be viewed sympathetically by the Courts' – L Rajamani 'Public interest environmental litigation in India: Exploring issues of access, participation, equity, effectiveness and sustainability' (2007) 19 *Journal of Environmental Law* 293, 303. See also M Galanter 'Why the "haves" come out ahead: Speculations on the limits of legal change' (1975-1976) 9 *Law and Society Review* 95, 103 observing that traditionally, litigation, which treats the poor and the rich according to the same legal propositions, generally benefits the haves and repeat-players (litigants). Socio-economic rights litigation, in as much as these rights primarily benefit the have-nots, need more civil society engagement than other rights that primarily benefit capable claimants.

²⁰⁵ In the context of LGBT rights litigation in South Africa, for instance, the resort to courts was in reaction to the delay and reluctance of the parliament to respond to advocacy initiatives within the democratic process.

²⁰⁶ P Pasquino 'Constitutional adjudication and democracy. Comparative perspectives: USA, France, Italy' (1998) 11 *Ratio Juris* 38, 46; A Mikva 'How well does Congress support and defend the Constitution?' (1983) 61 *North Carolina Law Review* 587, 606 observing that 'the judiciary is the one branch that is not able to set its own agenda'; R Heffner (ed) Alexis de Tocqueville:

Their agenda is rather determined by the demand side – the submission of constitutional complaints. This is in line with the long standing legal principle that ‘no one may be a judge in their own case’. Judges may not sit in a case they have instituted.

The inability of a court to act by itself can be a major limitation especially in countries where access to courts is a challenge, such as where public interest litigation is not recognised and standing rules are strictly based on direct injury. The problem is particularly acute as victims or claimants may not always become interested in the outcome of a particular proceeding, or may not have the necessary awareness, time and resources to embark on litigation. In some cases, claimants may avoid to resort to courts for fear of reprisal due to unequal power relationships between the victim and the violator.²⁰⁷ The diffused nature of the impacts of human rights violations often leads to the lack of interest on the part of the primary victims in the potential outcomes of litigation.

This limitation may be circumvented by relaxing access or standing rules to allow organised CSOs and human rights advocates to institute action on behalf of indigent claimants and in relation to cases that do not attract private action because of the diffused impact of violations on society, rather than specifically on an individual or a group. The provision of legal aid also helps to ameliorate resource constraints on access to justice. The ‘epistolary jurisdiction’ created by the Indian Supreme Court, where complaints may be instituted through letters addressed to the Court or its members and even based on newspaper articles, provides another innovative alternative.²⁰⁸ Moreover, some states have established procedures that entitle the highest courts to act *suo moto* in certain circumstances, particularly in cases concerning the potential unconstitutionality of laws.²⁰⁹

Democracy in America (2001) 73 observing that ‘rights must be contested in order to warrant the interference of a tribunal; and an action must be brought before the decision of a judge can be had’.

²⁰⁷ Barber (n 90 above) 77.

²⁰⁸ The Indian Supreme Court has been considered as the most active and most creative judiciary in the world – Cassels (n 202 above) 498.

²⁰⁹ Benin’s Constitutional Court, for instance, can act on its own motion to determine the constitutionality of laws and regulations that threaten fundamental rights – Constitution of Benin, article 121(2). Rotman identifies this feature as a peculiar and commendable feature of Benin’s Constitutional Court – see A Rotman ‘Benin’s Constitutional Court: An institutional model for guaranteeing human rights’ (2004) 17 *Harvard Human Rights Journal* 281, 292.

5.3. Litigation is reactive and contentious

Litigation is generally reactive in that it comes to salvage the situation only after a violation has occurred. It does not generally prevent violations of human rights.²¹⁰ This creates a situation whereby victims may not always be reinstated to the situation that existed prior to the violation. Remedies may not always fully redress the violation. Moreover, litigation is a contentious procedure which almost always results in a winner and a loser or even at times both or all losers. Win-win scenarios in judicial pronouncements are at best, if any, scanty. This is mainly because the level of participation of litigants in the ultimate decision making is not ideal and their control of or influence on the outcome is none or minimal at best. The level of participation in judicial proceedings is low particularly compared to other alternative dispute resolution mechanisms such as mediation, consensus building and arbitration that often produce win-win scenarios.²¹¹ Political compromise may also produce results that satisfy a relatively larger number of individuals than judicial decisions. This calls for the need to employ all the strategies complementarily and avoid overreliance on litigation as the sole or primary strategy.

5.4. Difficulty of reversing judgments

Litigation is also criticised for producing rigid outcomes that are hard to reverse.²¹² The problem is particularly acute in states that follow the principle of *stare decisis*. There is an understanding in such states that judges are authorised and generally bound to follow a precedent, even when the precedent is not the best possible constitutional interpretation.²¹³ Unlike the political arena, litigation does not allow political engagement and compromise. Litigation often generates fixed judgments based on the applicable law. Such fixed, generally unchangeable stances are rare in the political field. Of course, courts may reverse, or rather 'rectify', their own decisions over time. However, such instances are rare compared to political resolutions that are modified and adapted regularly. The irreversible nature of

²¹⁰ However, it should be noted that judicial pronouncements can have deterrent effect on future individual and state behaviour, in a sense preventing violations. Moreover, in some states, there is a procedure whereby legislation may be challenged before it is given effect – a priori judicial review – in which case litigation becomes preventive. Note also that applications in courts for injunction orders against acts that are potentially incongruent with constitutional rights prevent violations. In the international and regional human rights systems, as well, the issuance of preventive/special/interim measures to stop, for instance, execution of death convicts provides a good example of the preventive role of litigation.

²¹¹ See generally Menkel-Meadow (n 25 above).

²¹² The final decisions of the highest judicial organ may be reversed often only through constitutional amendment, and in rare circumstances by a subsequent judicial decision.

²¹³ See generally R Fallon 'Legitimacy and the constitution' (2004-2005) 118 *Harvard Law Review* 1787, 1821; M Paulsen 'Abrogating *stare decisis* by statute: May Congress remove the precedential effect of *Roe and Casey*?' (2000) 109 *Yale Law Journal* 1535, 1538; T Lee '*Stare decisis* in historical perspective: From the founding era to the Rehnquist Court' (1999) 52 *Vanderbilt Law Review* 647.

judicial determinations is particularly deplorable in cases that involve value determination on sensitive social, economic and political issues.

Hence, when courts pass judgment on issues upon which there is reasonable public disagreement, they might be imposing fixed social, economic or political policies over a society that is naturally evolving. Abraham Lincoln's reflections in his 1861 inaugural address embody this concern:²¹⁴

I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to the suit, as to the object of that suit, while they are also entitled to the very high respect and consideration, in all parallel cases, by all other departments of government. ... [A]t the same time, the candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased to be their own rulers, having to that extent, practically resigned their government, in the hands of that imminent tribunal.

Bickel similarly cautioned that 'the tendency of a common and easy resort to this great function [of judicial review] . . . is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility'.²¹⁵ The finality of judicial decisions, unlike political decisions, creates a fixed stance on some value judgments, and the principle of precedence ensures the continuous application of such decisions no matter how bad they are. There is, therefore, need for courts to subtly adapt their decisions with current developments in the social and human rights field.

In summary, constitutional litigation must be seen as part of a wider collective advocacy strategy to advance legal and social change and rearrange power relations within the state and society. Resort to constitutional litigation should not weaken or otherwise discourage social mobilisation and advocacy and other forms of collective action.²¹⁶ Constitutional litigants should have in mind the limits of law and courts in effecting social and political change.²¹⁷ Litigants should also strategically consider in advance the undesirable precedent that losing cases can set and their potential to legitimise and reinforce unjust systems and practices.

²¹⁴ Quoted in D Kommers and J Finn *American constitutional law: Essays, cases, and comparative notes* (1998) 729 – 730. The statement was in reaction to the decision of the Supreme Court in *Scott v Sandford* 60 US How 393 (1856) where the Court held that Congress could not interfere with the slave trade because doing so would infringe upon the property rights of slave owners.

²¹⁵ A Bickel *The least dangerous branch* (1986) 147.

²¹⁶ Litigation has been criticised as it might discourage collective action – M McCann *Taking reform seriously: Perspectives on public interest liberalism* (1986) 200.

²¹⁷ For a discussion on whether litigation can, directly or indirectly, bring about or facilitate social change, see Nejaime (n 16 above) 948 *et seq*; C Albiston 'The dark side of litigation as a social movement strategy' (2011) 96 *Iowa Law Review Bulletin* 61.

6. Conclusion

This Chapter reaffirms that constitutional litigation offers significant opportunities for the realisation of human rights. However, constitutional litigation does not always lead to outcomes favourable to human rights. The Chapter, therefore, enters a call of caution as losing cases may provide symbolic legitimacy to unacceptable government decisions and serve personal or regime interests.²¹⁸ Even when winning a court case is likely, the possibility of social and political backlash requires a sparing resort to constitutional litigation, generally as a last resort and complementary to other strategies in the political struggle.²¹⁹ Constitutional review should not be considered as an end itself. It rather sets the foundation for and reinforces advocacy strategies and future litigation initiatives, if necessary.

The success of constitutional review in any country broadly requires the existence of justiciable rights, independent constitutional adjudicators, and vibrant litigation support structures, particularly organised groups such as CSOs, human rights advocates, and opposition groups. In the absence of justiciable rights, courts will lack the basis to invalidate government decisions. Even when a constitution guarantees justiciable rights, the organ in charge of constitutional review might be made under the control of the organs it is designed to control – political organs. And even when there are justiciable rights and a formally independent constitutional adjudicator, rights-holders might not actively resort to constitutional litigation for different reasons. Constitutional review has the potential to ensure the realisation of human rights only when all the three preconditions exist. The existence of one generally facilitates the emergence and strength of others. For instance, if a constitution guarantees justiciable rights and establishes an independent constitutional adjudicator, individuals and organised groups will likely resort to constitutional review to challenge the state. The politico-legal context influences the existence of the three factors and therefore the potential success of constitutional review in ensuring the realisation of human rights.

It should be noted that this chapter presents the basic minimum normative and institutional conditions that determine the success of constitutional review in ensuring the realisation of human rights. The existence of these conditions does not necessarily guarantee the success of constitutional review. Even

²¹⁸ Indeed, most courts in Africa have in the past been ‘passive instruments of legitimating authoritarian regimes’ – N Udombana ‘Interpreting rights globally: Courts and constitutional rights in emerging democracies’ (2005) *African Human Rights Law Journal* 47, 68. According to Scheingold, ‘rights, like the law itself, do cut both ways – serving at some times and under some circumstances to reinforce privilege and at other times to provide the cutting edge of change’ – S Scheingold ‘constitutional rights and social change’ in M McCann and G Houseman (eds) *Judging the Constitution: Critical essays on judicial lawmaking* (1989) 76.

²¹⁹ McCann (n 201 above) 292. The other more traditional strategies for social change include education and awareness creation campaigns, advocacy within the democratic process and social mobilization. Litigation complements these strategies.

when there are justiciable rights, an independent constitutional adjudicator and organised human rights groups that actively resort to litigation, constitutional review might fail for reasons beyond the scope of this work. However, the lack of one of these basic conditions makes the success of constitutional review in ensuring the realisation of human rights difficult, if not impossible.

Experiences from Ghana, Uganda and Malawi indicate that independent constitutional adjudicators can play a role, despite enormous legal and political challenges, in ensuring the realisation of human rights and controlling legislative and executive excesses. To the extent the courts in the discussed countries have been able to render relatively important decisions, constitutional review has been successful not only in ensuring the realisation of human rights but also in the wider goal of transition to constitutional democracy. In all the countries considered, in addition to the normative basis provided by justiciable human rights guarantees, courts whose independence is constitutionally guaranteed have the final say on constitutional disputes. Because of the existence of an independent constitutional review system, which boosts the prospect of success, CSOs, human rights advocates, opposition parties and members of the media have actively resorted to constitutional litigation. The encouraging role of constitutional review in these counties is partly attributable to the existence of the necessary normative and institutional framework.

The Ethiopian Constitution establishes the necessary normative basis for rights-based constitutional adjudication. Despite this, the contribution of constitutional review to the realisation of rights has been insignificant. The normative basis, although important, is not sufficient to determine the success of constitutional litigation. It is argued in the subsequent chapters that the absence of an independent constitutional review system and, as a result, the reticence of opposition parties, CSOs, the media and other human rights advocates to resort to constitutional litigation have limited the potential contribution of constitutional adjudication in ensuring the realisation of human rights. The subsequent chapters identify and analyse the main factors that have contributed to the insignificant contribution of constitutional review in Ethiopia. The chapters particularly assess the (non)existence of an independent constitutional adjudicator anchoring Ethiopian constitutionalism and the reluctance of CSOs, human rights advocates and opposition groups to resort to the constitutional review system to challenge the state.