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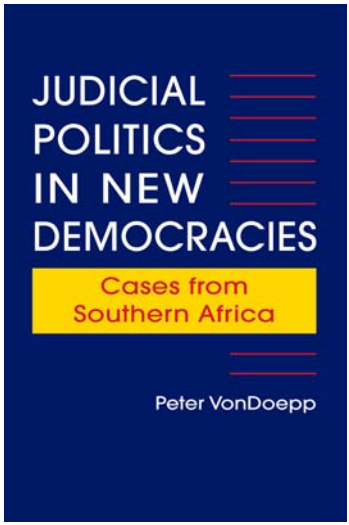
Judicial Politics in New Democracies: Cases from Southern Africa

Peter VonDoepp



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Democracy and Judicial Autonomy: Investigating the Southern African Cases

It requires neither enormous reading nor deep reflection to understand the importance of judicial institutions for new and emerging democracies. Much as democracy is associated with electoral contestation and universal rights to suffrage, its operation depends substantially on constitutionalism and the rule of law. Vibrant and autonomous judiciaries are central means to these ends. By virtue of their potential to help check governmental abuses of power and uphold individual rights, they represent key ingredients for democratic consolidation.

This book examines judicial politics in three of southern Africa's new democracies: Malawi, Zambia, and Namibia. My primary focus concerns the extent to which judiciaries in these countries have maintained some level of autonomy within their political systems. Autonomous judicial institutions generally witness limited interference from political actors and can exercise their authority without fear of retribution from them. Whereas judiciaries in some contexts enjoy such situations, in others they become targets of manipulation as powerholders attempt to influence their operations or undermine their authority. My goal in this book is to explore whether leaders in these new democracies have respected or undermined judicial autonomy, understand the reasons they have behaved as they have, and examine how judiciaries have responded in light of such actions by other powerholders.

In focusing primarily on the actions of leaders toward the courts, I operate from a perspective that sees judicial development as shaped largely, though not exclusively, by the choices of powerholders in the legislative and executive branches. This does not mean that I consider judicial officers unimportant to such development. It merely reflects the view that the power and status of judiciaries rests on political foundations. The political considerations of other actors with respect to the judiciary significantly condition the extent of autonomy

the institution enjoys. The central task is to illuminate why key powerholders have behaved as they have toward the courts.

As will become evident, the experiences of judiciaries in these three southern African countries have varied. Both among these countries and within them, over time, powerholders have taken different approaches to these institutions. In some contexts, leaders have allowed judiciaries to operate relatively unimpeded; in others, they have attempted to openly interfere with the bench; while in others they have sought to manipulate the judiciary via more subtle and clandestine means. Judicial behavior—in particular the extent to which judges have challenged the interests of the executive in their rulings—has similarly varied, partially as a reflection of these different approaches.

In accounting for the variations in the choices and actions of leaders, I draw from, but also seek to add to, a leading theoretical framework in the study of judicial politics labeled the strategic approach. Consistent with this approach, I maintain that leaders' approaches and actions toward the courts have reflected strategic calculations about the utility of those institutions as well as the specific capabilities leaders possess with respect to them. Also consistent with this approach, I maintain that these calculations and capabilities are informed by political realities and factors.

However, the southern African cases offer reformulations of this framework in two key ways. First, they highlight the limitations of the predominant view, associated with "thin" strategic models, that leaders' choices are shaped principally by the nature of the electoral market and party system in which they are situated. In situations of dispersed political power and high levels of electoral uncertainty, leaders are understood to have incentives to respect and foster judicial autonomy. Conversely, where power is concentrated and electoral uncertainty low, leaders are believed to have both the incentives and the means to corral those institutions. As the southern African cases vary in terms of such objective political conditions, the investigation here enables specific comparative tests of these propositions. As will be seen, the experiences of the courts in the southern African cases only poorly correspond to such expectations. Patterns within the electoral market and party system do not account for the character and style of government interference with judiciaries in these societies.

Second, in light of the shortcomings of such approaches, the southern African cases bring attention to *other* types of factors that deserve attention when seeking to account for government choices with respect to the judiciary. Three stand out as important. The first concerns the extent to which political questions have been effectively "judicialized." The cases indicate that where the courts obtain a central role in deciding political issues, they are more likely to witness interference from political actors affected by their decisions in cases. The second factor involves the actions of judges and how their behav-

ior affects the kind of interventions the judiciary encounters at the hands of political leaders. Of special importance are the kinds of signals that judges send to government about their willingness to interfere with executive priorities. In the countries examined, government interference with the bench has been more typical when the courts have signaled a propensity to undermine the interests of the executive. This is especially true where such signaling has been combined with high levels of judicialization.

Finally, the case studies suggest that the nature of the larger political system informs the experience of the judiciary. Of special importance is the extent to which leaders are situated in environments characterized by state weakness and neopatrimonial tendencies. Leaders in such contexts face distinct and powerful incentives to interfere with the courts. Yet their ability to manipulate the courts in a manner similar to leaders in other contexts is limited. As a result, they tend to intervene in the courts in determined, but nonetheless unique, ways that are suited to the peculiarities of their political environment.

The southern Africa cases thus present key challenges for existing frameworks and important lessons about the factors and conditions affecting judicial development in new democracies. As judiciaries are a centrally important, but understudied, element of democratic rule, such insights deserve consideration from those concerned with the fate of emerging African democracies, as well as those interested in comparative judicial politics more generally.

Democracy, the Rule of Law, and Judiciaries in Africa

The 1990s witnessed dramatic changes in the political landscape of Africa. Whereas the previous three decades had been characterized by various forms of authoritarian rule, by the middle of the 1990s many African countries were formally experimenting with democratic forms of governance. To be sure, as Michael Bratton and Nicolas van de Walle demonstrate, some of these democratic experiments were more far-reaching than others (1997: 120). Nonetheless, full-fledged democratic experiments were underway in a sizeable number of African countries, representing a definitive democratic trend on a continent long considered hostile to such forms of rule.

The onset of democratic rule in many African countries brought new significance to judicial institutions, in both theoretical and practical terms. At a practical level, some processes of political transition brought court institutions directly into the political arena, as judges were forced to adjudicate disputes between democratic movements and the incumbents they sought to replace. The cases of Zambia and Malawi discussed in this book provide examples. Beyond this, many of the political transitions of the early 1990s entailed not only returns to democracy, but also efforts to reestablish constitutional governance

and the rule of law. This often took the specific form of pressing for and sometimes negotiating constitutional changes that decreased executive powers and increased civil liberties and rights. Such returns to constitutionalism—both in spirit and in reality—necessarily catapulted judicial institutions to more prominent roles than they had occupied under single party and other types of authoritarian regimes.[1] Posttransition disputes concerning inter-branch relations, the scope of executive authority, and the precise meaning of civil liberties found their way into the courts, rendering them far more significant players in the political process than they had been in previous eras.

Just as judiciaries were playing a more prominent role on the ground in African democracies, so too did they begin to occupy a more substantial place in the literature concerned with democracy and patterns of regime development. As attention turned away from the dynamics of transition to issues of democratic consolidation and survival, scholars increasingly focused on the importance of the rule of law as a necessary accompaniment to democratic rule (see Carothers 1998; Linz and Stepan 1996; and Bill-Chavez 2004). Much of this was prompted by a need to correct the excessive emphasis placed on elections as *the* essential institution of democracy, at the expense of attention to other key issues. While elections were important, many argued, without the rule of law or a Rechtsstaat wherein government actions were guided by codified laws, corruption, clientelism, and abuses of power would undermine democracy (Diamond 1999: 111). Judiciaries were never far removed from such discussions as they represented the central mechanism through which the rule of law could be enforced.

The experiences of new democracies have further illuminated the importance of judiciaries. By the mid-to-late 1990s the inadequacies and shortcomings of many erstwhile democratic regimes were all too apparent. Rather than "consolidation," posttransition experiences were increasingly characterized by the emergence of hollow democracies and/or hybrid regimes. These included "illiberal democracies" that failed to protect the basic rights and liberties of citizens; "delegative democracies" that concentrated power in the hands of single executives who could rule unencumbered by other institutions; or "competitive authoritarian" regimes wherein authoritarian incumbents retained power while maintaining the facade of democratic and constitutional governance.[2] These regimes were very unlikely to perform in a manner that cultivated legitimacy for democracy. Perhaps more importantly, they were quite susceptible to gradual authoritarian reversals or "slow death" at the hands of incumbents seeking to maintain their positions of power and privilege.[3]

Such tendencies have been quite apparent in many of Africa's new democracies. Presidential dominance of the political order has remained a central feature of political life (van de Walle 2002: 69) and long-standing tradi-

tions of patrimonial and big-man politics seem to bode poorly for undoing such patterns (Schatzberg 2001). Although democratic rights and civil liberties obtained new emphasis in political and social discourses on the ground (Gyimah-Boadi 1999), governments remained willing to curtail those rights and liberties, as seen in attacks on the free press that occurred early on in some new democracies.[4] And manipulation of electoral processes by incumbents in several countries has undermined both the reality and legitimacy of democratic rule.[5]

Much as judiciaries are central to the development of the rule of law at an abstract level, they also embody mechanisms to deal with these kinds of tangible problems in democratic development. Judiciaries have the potential to serve as a, if not *the*, key mechanism of horizontal accountability. To the extent that they maintain some level of independence, they can temper some of the excessive presidentialism that undermines liberal democracy and contributes to the emergence of hybrid regimes. This is most apparent when they restrain executive behavior ensuring that the exercise of authority remains within the bounds of the law. They can also play important roles in solidifying individual rights vis-à-vis the state. This includes upholding citizens' rights to association, free expression and due process, as well as rights against unlawful detention or loss of property at the hands of the state. As Diamond and Domingo argue, judicial activities in this regard are especially important in cultivating legitimacy for democratic orders (Diamond 1999: 47; Domingo 1999: 153). Many observers in Africa have, of course, recognized this and highlighted the important role that judiciaries need to play in cultivating "rights cultures" within political systems.[6]

That judiciaries have had highly constructive roles to play in Africa's new democracies seems obvious enough. Whether they can play such roles in promoting accountability, civil rights, and the rule of law more generally is, of course, an entirely different issue. In some respects, the situation in these new democracies would seem to bode well for judicial authority. Constitutions have obtained new prominence and judicial authority and independence are often enshrined in those documents.[7] Moreover, international norms and tendencies have also elevated the place and status of judicial institutions (Epp 1998).

At the same time, judiciaries need to enjoy some level of autonomy if they are going to effectively play these roles. That is, they need to operate in an environment where their authority is respected and they remain relatively free from gross interference. The problem is that judiciaries face inherent weaknesses and represent likely targets of manipulation and subversion at the hands of other political actors. They lack the majoritarian mandates and key resources enjoyed by executives and legislatures. Moreover, they necessarily represent a threat to powerholders in those branches as they can interfere with

policy initiatives and political goals. For these reasons, assaults on judicial autonomy and authority are likely. This would seem especially so in African contexts where the rule of law has traditionally been weak in the face of personal rule and patrimonial governance that elevates the status and power of individual leaders over and above institutions. While the need for autonomous judiciaries is thus high in new African democracies, the emergence of such institutions faces real challenges.

Questions, Cases, and Methods

My primary goal in this book is to illuminate and explain why governments in Malawi, Zambia, and Namibia have taken the paths they have with judicial institutions. That is, how do we account for the varied experiences of judiciaries in terms of the extent and type of interventions they have faced at the hands of powerholders? At a secondary level, I explore how judiciaries have responded, behaviorally, in the context of such interventions. Yet the primary task is to highlight whether and how judicial autonomy has been undermined and to account for the varied paths observed in these three southern African democracies. In so doing, the book aims to investigate existing approaches to the study of judicial politics and offer new insights about factors and conditions affecting the course of judicial development in new democracies.

By design, the analysis in this book undertakes this task through case-intensive comparative techniques. I examine and compare patterns of government behavior with respect to the courts among these countries, and within them over time, toward the end of discerning the key factors and conditions that account for the experiences of judiciaries. In certain key respects, the cases chosen for this study were well suited to this objective. On one level, these three countries are relatively similar in certain general respects, allowing for some level of "control" over factors that might shape judicial development. All three of these countries emerged as new democracies in the early 1990s, and all have faced the challenges of consolidating the rule of law, solidifying individual rights, and promoting horizontal accountability that are common to many new democracies. Beyond this, all three countries have operated under English "common law," in contrast to a "civil law," framework.[8] In principle, this means that judges are afforded greater latitude in "making law" (Widner 2001: 77–78), although some have questioned whether the distinction is that critical in practice today (Domingo 2004: 106). Finally, in all three countries, basic institutional structures of the courts are the same. Supreme courts, constituting the top rung of the judicial ladder, represent final courts of appeal. Beneath these are high courts, where most political cases originate in these

countries.[9] These two top levels of the judicial system, the supreme and high courts, represent the central foci of this study.

Yet there are important differences operating as well, some that could affect the experiences of courts at the hands of powerholders in these countries. Drawing from existing theory, several of these differences were hypothesized in the original design of the study to do just that. Certain others emerged as relevant in the course of the actual research and analysis. For one, different political legacies characterize these countries. Namibia emerged as a newly independent democratic country in 1990 from colonial and apartheid rule, during which the judiciary, although part of that system, enjoyed a level of autonomy that allowed it to check some of the abuses of the government. Zambia's prior regime entailed the relatively soft authoritarianism of Kenneth Kaunda's single-party system. Although the judiciary was subservient to the party and the president, it nonetheless retained substantial authority and at times tempered the excesses of the regime, especially with regard to infringements of individual rights. Finally, Malawi's new democracy carried the baggage of a brutal authoritarian system overseen by President for Life Kamuzu Banda. Prior to 1993, dissent and political pluralism were ruthlessly repressed and the courts, while retaining high levels of probity and competence, were removed from any meaningful role in the political system.

In addition, these countries have varied with respect to the nature of the party system and electoral uncertainty operating during the democratic era. As indicated, leading theoretical frameworks, most notably those associated with what are termed thin strategic models, view such factors as determinative in shaping executive choices with respect to the courts.[10] Namibia has witnessed single-party dominance, under the highly disciplined South West Africa People's Organization (SWAPO) party, and been characterized by low levels of uncertainty. Zambia was characterized by the initial dominance of a single undisciplined party that subsequently fractured, contributing to reasonably high levels of uncertainty within the country's electoral politics. Malawi has represented the most dramatic case of power dispersion in the party system and degree of electoral uncertainty. No single party has ever had more than 65 percent of legislative seats, divided government has been relatively frequent, and elections have been highly competitive between different candidates.

Finally, these countries have varied in terms of state strength and the degree to which neopatrimonial tendencies have manifested themselves. Malawi and Zambia have represented classic weak states that have been highly donor dependent and lacking in organizational capacity. Moreover, both have exhibited neopatrimonial tendencies in the democratic era. Big men have remained at the center of political life, while institutions have been secondary. Corruption has been more apparent and clientelism has remained

a prime basis of political loyalties. And leaders have operated in insecure situations in contexts of palace intrigue and threats to their tenure in office. By contrast, Namibia represents one of the stronger states in Africa in terms of capacity and legitimacy. And while certain neopatrimonial tendencies have operated in the political system, they are not as apparent as they are in Malawi and Zambia. For example, leaders' holds on power have been relatively secure and the ruling SWAPO party has institutionalized and created some predictability in political life.

The analysis in this book is dedicated to illuminating the extent to which these, and other, kinds of factors have shaped the experiences of judiciaries in the three countries. Two techniques underpin the analysis. The first is within-case process tracing toward the end of unearthing the key factors and causal mechanisms behind those experiences. Intensive case studies of judicial politics in each of these countries examine patterns of interaction between powerholders and the courts, and evaluate those patterns in light of larger theoretical concerns. The analysis allows investigation of the utility of existing approaches to the study of judicial politics and reveals novel insights about the variables that affect the choices and behaviors of governments vis-à-vis judicial institutions. In this respect, the case studies serve the classic purpose of both testing theory and generating new theory (see Eckstein 1975 or Gerring 2004).

The second technique entails explicit comparative analysis toward the end of further investigating and illuminating theoretical claims. As I indicate above, conditions and factors hypothesized to affect government approaches and behaviors toward the courts vary among these countries. They also vary within them over time. Comparative analysis allows us to determine which of these plays the more central and determinative role in shaping the experience of the courts at the hands of powerholders. I undertake this analysis, in the first place, in the course of the case studies, as I illuminate differences within and between these countries and highlight the consequences for patterns of government interference with the judiciary. In the second place, in the final chapter, I offer a more systematic and refined comparative analysis of the experiences of the courts in these countries over time. Drawing from and summarizing material presented in the case studies, I present explicit tests of the leading thin strategic theoretical framework against an alternative model derived from the case analyses. The insights, as I have suggested, raise questions about the generalizability of the thin framework and confirm the importance of the factors emphasized in the study.

The material and data informing the study was obtained primarily, though by no means exclusively, during fieldwork in these countries conducted between 2001 and 2006. Four separate trips to southern Africa allowed me to visit each of these countries for a minimum of two and a half

months each. During these stays, but also through work conducted by research assistants in my absence, I undertook three different types of research activities. The first entailed a close analysis of the public record concerning judicial politics in these countries. This exercise allowed me to examine the narrative of judicial relations with other political actors and, particularly, the nature of interventions that representatives of other branches had undertaken with respect to judiciaries. It also enabled me to obtain reports of cases and decisions that have been before the judiciary, offering a deeper perspective on the cases and their significance than might be gleaned from a simple reading of the decision. My sources for this included government documents (such as parliamentary records and official statements by governing officials) and press reports on judicial issues.

The second activity entailed interviews and discussions with key elites who observed and played a part in judicial politics in these countries—most notably, lawyers, government officials, opposition politicians, and judges themselves. In each country, a minimum of twenty different individuals were interviewed at least once. Many of these persons were interviewed second and third times on repeated visits to countries, while a select few became central discussion partners in the course of the research. The goal of these interchanges at the most basic level was to obtain richer perspectives and information about judicial relations with other branches and individuals since the start of the democratic era. This included their views of press stories and accounts of interactions that were not described in newspapers. Beyond this, I used these interviews to obtain elite perspectives on the key analytical issues of concern, in effect allowing individuals to offer their own perspective on why government-judiciary relations followed the patterns they did.

It deserves mention that certain of the material gained from these activities, especially discussions with key elites, presented a unique challenge. One theme that I will raise in this book concerns the use by executives (or their agents) of clandestine and informal exchanges in their efforts to manage judicial institutions. By their very nature, such exchanges take place behind closed doors or at least out of direct public view. Reference to them sometimes emerges in news reports, but for legal reasons reporters are quite hesitant to make claims that cannot be irrefutably substantiated. More often, they are detailed in informal accounts, either by the participants of such interchanges or by those who have intimate knowledge of "the system." This makes it quite difficult to document these and confirm beyond a reasonable doubt that they have occurred. Yet, as anyone who has studied politics in weak states with high levels of corruption and personalized exchanges knows well, the tentative evidence of such informal exchanges cannot be ignored.

This point was driven home to me in my conversations with one Malawian lawyer in 2001. After I suggested that it appeared that the current administration

had been quite restrained in its interference with the judiciary, he advised me that I was seeing only part of the picture. Plenty of interference, he alleged, had occurred in the form of clandestine conversations, such as late-night phone calls between judges and the executive or in the provision of material goods to judges in exchange for their support of the executive. My subsequent efforts to examine such matters revealed a number of off-the-record and informal accounts of such types of interchanges. While some documentary evidence did exist, it was relatively sparse. Nonetheless, because such stories of corruption, patronage, and off-the-record conversations represent a potentially critical part of the story, I have included them, along with other material, as evidence to support the empirical and theoretical claims advanced.

This said, I have exercised considerable caution in my use of such material. Specific stories or accounts are included only if they were corroborated by at least two, and preferably three, well-placed individuals in separate interviews. Further, general references to informal contacts and exchanges are only included to the extent that they represent a key element of the informal transcript concerning the courts. For example, in the chapter on Namibia, I make no reference to such issues. This does not mean that no claims were made about them during my research, only that they emerged infrequently and were rarely corroborated. This was in stark contrast to accounts of judicial-executive interactions in Zambia and Malawi, which frequently contained specific stories of them. In all instances where such stories are included in the case studies that follow, I specify that they represent allegations or claims, with the implication that they cannot be irrefutably asserted as fact.

My third and final research activity involved examination of high and supreme court decisions, with particular attention to those in politically significant cases (i.e., involving the government or key political actors). This allowed me to examine whether and how judicial decisionmaking shaped executive actions toward the judiciary. It also allowed me to examine whether and how judicial behavior and, in particular, judicial assertiveness toward other branches, changed in light of actions by powerful political actors.

Key Arguments and Overview

My presentation proceeds as follows. In Chapter 2, I offer a theoretical overview of the key concepts and analytical frameworks employed in this study. I begin by discussing the concept of judicial autonomy as it relates to the larger concept of judicial independence and as empirically understood in this book. I offer a simple conceptualization of judicial autonomy, suggesting that it refers to the extent to which judiciaries have been able to exist and function without

interference from the government or other powerful political actors. This then serves as the basis for the study's focus on the choices and actions of powerholders with respect to judicial institutions; that is, whether and how leaders respect, undermine, or manipulate judiciaries.

I then examine how the literature has approached the key analytical question that underpins this study: How do we make sense of the actions that powerholders take toward judicial institutions? Here I offer an overview of strategic approaches that have been used to address this issue. Scholars employing these approaches emphasize the role of powerholders' utilitarian considerations with respect to the judiciary, as well as their relative capabilities to interfere with and manipulate those institutions. Leaders' strategic calculations and capabilities with respect to the judiciary derive substantially from the political circumstances in which they find themselves. Political factors thus determine the choices and actions of leaders toward judiciaries and ultimately the extent of autonomy those institutions enjoy.

A central distinction exists among scholars who employ such approaches. On one side are those who employ highly parsimonious thin models. As mentioned, these scholars tend to see leader choices and interventions with respect to the courts as a function of a narrow set of political variables, especially the level of uncertainty in the electoral market and the degree of power dispersion in the party system. There are, however, substantial limitations to such thin models. For one, they tend to have a very narrow view of the factors that affect the calculations and capabilities of leaders. They also fail to acknowledge how larger systemic and regime-level properties can affect the operation of theorized relationships. One corrective is provided by scholars who employ what Ran Hirschl (2004) describes as "thicker" models. These bring attention to a wider array of factors that affect the strategic calculations and capabilities of leaders with respect to judicial institutions.

I similarly argue that we need a broader view of the relevant conditions and factors than is afforded in some of the more parsimonious models. The southern African cases illuminate the importance of three factors that are substantially overlooked by such models. The first concerns the extent to which political questions in the country have been effectively judicialized. By this, I refer to the increased placement of key political questions into the hands of the judiciary, often in ways that put the judiciary into potential conflict with powerholders in the legislative and executive branches. Thin strategic models tend to assume that executive interest in the court, and hence their inclinations to either respect or undermine judicial institutions, operates without reference to the kinds of issues that courts are asked to determine. Intuitively, however, we would expect that government interests regarding the court vary with the extent of judicialization. When courts decide key political issues,

they place themselves on the radar of more powerful political actors their decisions affect. This increases the chances that leaders will attempt to undermine their autonomy.

The second factor concerns the ways that judges themselves shape the course of judicial development. Through their decisions in cases, as well as via their broader engagements with key groups and actors within the political system, judges can shape and inform choices that powerholders make with respect to judiciaries. In so doing, they necessarily play a role in determining the level of autonomy they enjoy. Of special importance is the extent to which the courts signal a willingness to interfere with and undermine executive interests. Where they do, they increase the threat that they present to government and become likely targets of interference.

The final factor involves the ways that larger systemic-level features shape the nature of government relations with judicial institutions. The key issue I bring attention to in this respect is the state weakness and neopatrimonial tendencies that have tended to operate in postcolonial African systems. The reason that such features are important lies in the way that they shape the strategic considerations of leaders with respect to judicial institutions. Neopatrimonial politics tends to amplify leaders' interests in controlling judicial institutions. Within such contexts, leaders place high priority on maximizing and preserving power, and accordingly need to corral institutions and actors that stand in the way of such goals. However, despite such interests in controlling judiciaries, leaders in weak state and neopatrimonial contexts are limited in the extent to which they can rely on conventional techniques to rein in the power of the courts. As a partial result, they have relied on other techniques to manage judicial power. These include making use of the informal relations characteristic of neopatrimonial settings and using state and nonstate agents to entice or scare judges to support leader aims. While this may buy them some level of influence over the judiciary, and even undermine the status of the bench in the eyes of potential court supporters, it can also leave the judiciary with enough power and autonomy to play a meaningful role in challenging executives seeking to maximize and aggrandize power.

The case studies draw these issues out more completely. In Chapter 3, I begin with an investigation of the experience of the judiciary in Zambia under the democratically elected administrations of Frederick Chiluba and Levy Mwanawasa. The case suggests, in the first place, that judges themselves have played an important part in shaping leaders' interests with respect to the courts and the actions that those leaders have taken. Of special importance were the kinds of signals they sent regarding their willingness to interfere with the executive's basic political objectives. As political life became increasingly judicialized in Zambia, court decisions indicating that the judiciary might undermine those objectives prompted government efforts to corral and curtail

judicial power. Indeed, such signaling appears to have played a more significant role than the apparent level of electoral uncertainty in the system. As such, the case also raises questions about the ability of thin strategic models to effectively account for executive judicial relations in such contexts. Beyond this, the context of state weakness and neopatrimonial politics affected judicial politics in the country. Owing to these features of the political system, certain techniques of judicial control have been less available to Zambia's executives. However, the context of neopatrimonial politics also presented unique opportunities for leaders seeking to control or render docile judiciaries. In particular, the concentration of power in the hands of executives and the existence of informal networks of political exchange opened up avenues to influence the judiciary through indirect and sometimes clandestine means. While this contributed to the overall passivity of the bench vis-à-vis executives, the courts still retained institutional power that they remained willing to exercise as political conditions permitted.

The Malawian case described in Chapter 4 offers parallels to the Zambian, while generating separate insights as well. Even more starkly than the Zambian case, the Malawian offers a clear challenge to thin strategic approaches. Despite high levels of electoral uncertainty and wide power distribution, executives aggressively interfered with and sought to undermine judicial independence. The effort to account for both the impulse and styles of intervention employed by Malawi's executives brings attention to all three of the factors highlighted above. As they operated in a neopatrimonial context, Malawi's leaders faced high interests in reining in judicial institutions that might interfere with their goals of maintaining and maximizing power. These became especially acute in the context of, first, the judicialization of central political questions and, second, signals from Malawi's judges that they were not disposed to support the government in their decisions. As executives sought to intervene with the courts, however, they faced real constraints issuing from the weak state and neopatrimonial environment in which they operated. In particular, both court-purging and court-packing strategies proved less viable. In turn, like their Zambian counterparts, they relied on techniques of control more suited to their political environment. Efforts to manage the courts focused on targeting judges at an individual level, as powerholders relied on alleged informal interchanges, public badgering, and threats to entice or scare judges into supporting executive aims. In the end, these failed to effectively rein in the courts, as judges came to be characterized, on the one hand, by high levels of assertiveness vis-à-vis the government and, on the other hand, politicization that undermined the institution's image as a neutral arbiter of political disputes.

The experience of the Namibian judiciary, discussed in Chapter 5, has been quite different from that of the courts in Malawi and Zambia, thus providing a

key comparative case to support the study's theoretical claims. On the one hand, the Namibian case offers the clearest refutation of thin strategic approaches. In view of those approaches, political conditions in the country should have prompted efforts to undermine the independence of the courts. But, to date, that has not emerged. On the other hand, in its comparison with the Malawian and Zambian cases, the Namibian case highlights the importance of both neopatrimonial politics and judicialization as central factors shaping the experience of judiciaries. Neither of these have been central features of the Namibian political environment. As a result, Namibia's leaders have not been as threatened by judicial institutions and have developed little interest in undermining the courts' power. This helps to account for a general pattern of restraint and responsible government behavior with respect to the courts. Finally, the Namibian case reveals most clearly the ways that judges, through their broader interactions within the political system, can shape the course of government-judicial relations to benefit judicial autonomy.

Chapter 6 offers further comparative reflection and analysis of the key theoretical issues. Drawing from the case studies, I offer a more systematic account of the differences among the cases in terms of the extent and type of interference that judiciaries have encountered from governments. I then comparatively examine these differences in light of several factors theorized to affect government-judicial relations. This provides an even clearer refutation of the thin strategic approaches. Beyond this, it more effectively demonstrates the importance of the key factors emphasized in the case studies. In countries characterized by state weakness and neopatrimonial politics, leaders face powerful incentives to intervene in the courts, but also constraints on their ability to do so. This leads to unique patterns of judicial manipulation in these polities. Furthermore, leaders' choices and actions with respect to the courts reflect the status and behavior of those institutions. High levels of judicialization and court signaling that judges are unwilling to defer to executive interests in their rulings represent threats to leaders. It is in such contexts that interference with the courts is especially likely.

Notes

1. As Stone-Sweet (2000) points out, constitutionalization necessarily facilitates a greater role by judiciaries.

2. On these concepts, see Diamond (1999: 42), Zakarias (1997), O'Donnell (1994), and Levitsky and Way (2002).

3. See Schedler (1998).

4. The Zambian case offers examples. See Simon (2005).

5. See Villalón and VonDoepp (2005), which includes several case studies revealing such instances.

6. See, for example, Chanda (1992).

7. Gyimah-Boadi (1999); see also papers delivered at the Symposium on the Constitution and Constitutionalism, June 22, 2002, Blantyre, Malawi.

8. Namibia has also been influenced by the Roman-Dutch tradition, which is associated with the "civil law" framework.

9. As of 2003, Malawi has begun using panels of judges who sit as "constitutional courts." The decisions of these panels are still subject to appeal to the Supreme Court.

10. See Ramseyer (1994) and Bill-Chavez (2003, 2004). The notion of thin models borrows from Hirschl (2004).