HUMAN RIGHTS AND PUBLIC INTEREST LITIGATION IN EAST AFRICA: A BIRD’S EYE VIEW

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ABSTRACT

Despite the growing use of public interest litigation (PIL) as a mechanism for pursuing the goals of social justice and enhanced democratic constitutionalism, there is scant comparative analysis of the phenomenon among the three East African countries of Kenya, Tanzania, and Uganda. In tandem with the regional East African Court of Justice (EACJ) to which all three countries are members, PIL is growing at a significant pace and has the potential to impact the structures of governance, accountability, and equality in the region. This Article analyzes the manner in which this type of litigation has grown, and assesses the extent to which it has affected socioeconomic and political conditions in the region. Using the analogy of cement and its unique properties, the examination is conducted against the backdrop of the constitutional developments that have taken place in East Africa over the last twenty years, starting with the promulgation of a new constitution for Uganda in 1995 (aging cement), considering the 2010 ‘transformative constitution’ in Kenya (setting cement), and engaging with the current debate over the introduction of a new constitutional instrument in Tanzania, where the cement is undergoing a “remixing.” Does PIL offer a serious and sustainable antidote to the three countries’ experiences of authoritarian rule, judicial lethargy, and community marginalization?

I. INTRODUCTION

Public interest litigation (PIL)—or the use of court action to pursue the goals of social justice1—has become a subject of

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increased concern and considerable academic debate in recent years. Indeed, the global focus on the phenomenon has not escaped the three East African countries of Kenya, Tanzania, and Uganda, where PIL has been increasingly deployed as an important tool for the promotion and protection of human rights and democratic constitutionalism. However, despite the deep cultural, historical, and political links between the three countries, and even though such litigation has become a prominent tool which activists and academics use to advance human rights in the region, there is little in-depth analysis considering the phenomenon from a comparative perspective. Likewise, a critical appraisal of the implications of the fourteen-year-old East African Court of Justice (EACJ)’s jurisprudence—which has emerged as a prominent forum for PIL in the region—is virtually absent.

In light of these omissions, this Article provides a bird’s-eye view to the state of PIL in the three aforementioned countries, as well as within the EACJ. It tests several hypotheses which have been offered as the rationale for PIL. The first theory states that PIL improves access to justice for marginal and vulnerable communities. The second posits that PIL develops the overall state of legal protection in a country by eliminating bad law and fostering legal review. A third hypothesis is that PIL raises awareness and debate about a particular issue of general public concern, while also helping to reduce political tension and resolve social conflict. Finally, in light of all the above, it is asserted that PIL acts as a mechanism of empowerment, voice, and accountability. In the succinct words of Frederick Jjuuko, as follows:


Public interest litigation has the potential to combine the virtues of political action with legal processes. It can conscientize and mobilize people to recognize and actively fight for their rights and interests and thereby strengthen civil society and a sense of shared and collective interests and destiny. Such a process can reveal the multifaceted nature of these problems by showing the interconnectedness between economic, political and legal issues and their ramifications.\(^6\)

Such claims beg the critical question: Does PIL actually represent citizen-driven claims of agency, or an example of lawyers reasserting hegemonic forms of micro-governance and monopoly over the expression of the law? In other words, is PIL a mechanism for the empowerment of the people, or the further enrichment and social entrenchment of lawyers? Central to such an examination is consideration of the broader question of whether or not constitutional reform of the kind that East Africa has recently experienced fundamentally improves the overall observation and protection of human rights.\(^7\)

In this regard, it is especially important to listen to different voices speaking out on these issues, with a particular focus on the articulation of vulnerable communities’ interests, such as indigenous peoples, the poor, women, sexual minorities, and people with disabilities. Who is articulating these interests? What standpoint are they adopting and which strategies—other than PIL—are they using to pursue their goals of social emancipation? How much has PIL actually transformed their conditions?

Aside from an examination of the abundant case law, research for this Article involved in-depth interviews with a cross-section of lawyers, litigants, judges, and academics in the region, augmented by a critical reading of the PIL literature and case law from diverse countries such as South Africa, the United States, and India.\(^8\)

Against this background, Part II summarizes the historical evolution of such litigation in East Africa. Part III considers the shift from strict restrictions on rights of access to the courts, to what can be described as the ‘busy body’ mechanisms that are in place today, demonstrating how those changes have impacted the PIL arena.

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\(^8\) See, e.g., Francis Xavier Rathinam & A.V. Raja, Courts as Regulators: Public Interest Litigation in India, 16 ENV’T & DEV. ECON. 199, 201(2011).
Part IV looks at the experience of each of the three East African countries under examination, while Part V considers the challenges that still confront change and progress in litigation to advance social justice.

II. THE EVOLUTION OF PUBLIC INTEREST LITIGATION

The dominant view of PIL focuses on issues of particular importance to the community at large, a major section of the public or disenfranchised minorities. As is evident from its name, public interest litigation is defined as court action seeking remedies aimed at a broader public good, as opposed to the specific interests of the individual litigant(s). The outcome of such litigation is deemed important in that it is likely to impact not only the individual litigant filing suit, but also a larger cross-section of society. PIL therefore has wide ramifications for the public at large, even if initiated by a single individual. Such cases have the effect of altering the law, indeed sometimes even declaring a law incompatible with the constitution, and thereby reinforcing or protecting the rights of the wider populace. Common cases of this nature generally focus on the freedoms of expression, association, and participation, but also extend to the rights of discrete groups such as women, minorities (social and sexual), and on group or collective rights (e.g. the right to a healthy environment). Increasingly in East Africa, the focus is shifting to economic, social, and cultural rights, although in India and South Africa—countries with a much more engaged practice of such litigation—this category of rights has been front and center of the struggle. Before reviewing the East African situation, a brief overview of PIL in other countries is necessary.

A. PIL in the United States, India, and South Africa: A Brief Synopsis

The United States, India, and South Africa stand out in the evolution of PIL as a distinctive form of adjudication; this unique status justifies the particular attention they are accorded in the comparative constitutional courts literature. In the United States, the crucible for the changes wrought by such litigation was provided by the civil rights struggles of the 1950s and 1960s, commencing with the famous case *Brown v. Board of Education of Topeka*,9 in which the U.S. Supreme Court struck down public school segrega-

tion as an unconstitutional denial of Equal Protection under law. According to Helen Hershkoff, as follows:

*Brown* provided inspiration to a generation of lawyers who saw law as a source of liberation as well as transformation for marginalized groups. Courts, mostly federal but state as well, became involved in a broad range of social issues, including voting and apportionment, contraception and abortion, employment and housing discrimination, environmental regulation, and prison conditions.  

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The goal of such litigation was, in the words of Abram Chayes, to emphasize the needs and interests of groups long excluded from conventional majoritarian politics.  

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In other words, while traditional political action via voting and related democratic engagement in the legislature could be one avenue for change, such litigation illuminated the limitations on the effectiveness of those methods for protecting the rights of the most marginal or dispossessed members of society.

However, litigation of this nature in the United States had a long history before *Brown*, dating back to the late-nineteenth and early-twentieth century struggles against petty bigotry and racial intolerance (segregation), institutionalized discrimination (biased juries, voting rights denials), and even violence—enshrined most graphically in the vigilante practice of lynching.  

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Contrary to popular perception, *Brown* represented the culmination of a long line of legal struggles, rather than its commencement. Nevertheless, *Brown* provided a defining moment not simply in its attack on discrimination in one of the most crucial features of the body politic, but also in the methodologies it used to do so. The civil rights struggles in the U.S. courts which followed *Brown* thus employed many of the tactics first deployed in the case, such as the use of sociological and psychological studies to highlight the negative impacts of legal inequality. *Brown* opened the floodgates of public interest litigation which exploded in the United States in the 1960s.

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12. Some examples of important public interest cases preceding *Brown* include the Civil Rights Cases, 109 U.S. 3 (1883) (challenging the refusal to lodge blacks in public and quasi-public facilities) and Hirabayashi v. United States, 320 U.S. 81 (1943) (questioning whether authority delegated to military authorities discriminated against Japanese Americans in violation of the fifth amendment). Also, a chronicle of the life and times of Thurgood Marshall, the first African-American U.S. Supreme Court justice, demonstrates that such cases were pursued even before the turn of the 20th century. See Juan Williams, *Thurgood Marshall: An American Revolutionary* xiv (2000) (noting the city of Baltimore had pushed for civil rights since the Civil War).
1970s, but a trickle had existed long before that landmark case was decided.\textsuperscript{13}

India stands as the country in which public interest litigation found its most dramatic expression within the context of an ex-colony in the Global South. In contrast to the U.S. experience, where the direction for change came mainly from civil society organizations such as the National Association for the Advancement of Colored People (NAACP), and sympathetic philanthropies such as the Ford Foundation, the Indian initiative was originally largely court-led. Civil society and social movements then followed the lead. Having been the first of Britain’s colonies to achieve independence in 1947, India became a framework in which many experiments of the Common Law in a colonial context were carried out, especially in the areas of procedure and evidence. India’s courts were thus very much steeped in the English tradition: procedurally, in the substantive law, and even in the manner and deportment of its judges and advocates—from the gown, to the wig, to the language of the court. Aspects of this heritage were seriously challenged, most noticeably starting in the 1970s.\textsuperscript{14} The reason for the challenge and the response of the courts is traceable to a variety of reasons, but primarily stemmed from a sense of shame within the courts for having done so little to stem Prime Minister Indira Gandhi’s political emergency experienced from 1975 to 1977.\textsuperscript{15} As a highpoint of this judicial neglect, the Indian Supreme Court held in \textit{A.D.M Sabalpur v. Shiv Rant Shukla}\textsuperscript{16} that preventative detention laws were immune from judicial review.

\textsuperscript{13} For a critique of the American variant of PIL, see Uprenda Baxi, \textit{Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India}, \textit{4 Third World Legal Stud.} 107, 109–11 (1985).

\textsuperscript{14} Of course, some earlier decisions of the court had given inklings of this “judicial activism,” but it was only in the late 1970s that it was recognized as a movement. For example, see, the cases of Golak Nath v. State of Punjab, (1967) S.C.R. (2) 762 (India) and the famous Kesavnanda Bharativ v. State of Kerala, (1973) 4 S.C.C. 225 (India), which bequeathed the country the “Basic Structure” doctrine and stipulated that there are certain key elements of the constitution that cannot be altered by parliament, including the supremacy of the constitution, the fundamental rights provisions, and the federal structure of government.

\textsuperscript{15} The emergency was declared in a bid to stem an upsurge in political unrest, and gave the prime minister authority to rule by decree. Elections were suspended and civil liberties were curtailed, which lead to the detention of political opponents and censorship of the Press. \textit{See} Arun K. Thiruvengadam, \textit{Revisiting the Role of the Judiciary in Plural Societies} (1987): \textit{A Quarter Century Retrospective on Public Interest Litigation in India and the Global South}, \textit{in Comparative Constitutionalism in South Asia} 347–56 (2013).

Following the Gandhi emergency and an appraisal of the damage done to the psyche and fabric of the nation, the Indian Supreme Court rearticulated its vision, from a court in which elite causes predominated, to a forum where the “meek and the lowly” could find justice. It thus radically reformulated its procedures for receiving petitions, removing the formality of structured plaints and allowing—in the Judges Appointment and Transfer case—for a court suit to be initiated by a mere letter, especially for persons unable to approach the court on account of poverty, disability, or social or economic disadvantage. This opened the way to what is now known as its epistolary jurisdiction. The court also did away with the strict rules of locus standi, developed new mechanisms for gathering evidence and data, and employed different modes of enforcing its decisions. Investigative commissions and inquiries formed part of the arsenal of remedies it developed. In this way, Indian judges gave new meaning to the idea of an ‘activist’ Bench.

Of considerable importance to the PIL debate was the work by the Indian Supreme Court turning what were non-justiciable provisions of the constitution—concerning health, education, and the right to food among others—into justiciable rights which could be claimed against the state. However, its most radical intervention consisted of reading into the right to life various aspects of the concept that were not immediately apparent from an initial interpretation of the provision. Via its expanded reading of locus standi and the Bill of Rights provisions of the Constitution, the Supreme Court used its power to protect working women from sexual harassment, preserve ecological balance, and control pollution of the River Ganges. While there has been considerable debate about the ultimate impact of the court’s interventions in achieving comprehensive structural reform and more specifically in eradicating

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17. The pioneer case in this respect was Maneka Gandhi v. Union of India, (1978) S.C.R. (2) 621 (India).
19. See Thiruvengadam, supra note 15.
20. Locus standi refers to the “legal capacity to institute proceedings and is used interchangeably with terms like ‘standing’ or ‘title to sue.’” See S.M. Thio, Locus Standi and Judicial Review 1 (1971).
poverty,\textsuperscript{24} there is no doubt that the decisions of the Indian Supreme Court provided new insight into the ways in which lifeless provisions on paper could be transformed into meaningful entitlements for litigants who would not otherwise find access to justice through the traditional legal framework.\textsuperscript{25}

Turning to the African context, it is somewhat paradoxical that, despite grievances in the pre-independence era focusing on a wide range of human rights violations, courts of the 1960s through 1990s were not particularly active in the arena of PIL. This does not mean that attempts were not made to seek judicial enforcement of human rights. However, such efforts did not find a very receptive treatment by the courts of law, largely because of the highly authoritarian nature of the regimes in many countries such as Nigeria, the Sudan, and Egypt.\textsuperscript{26} Even after what can be described as the “second liberation”—the move from single-party and military dictatorships to multiparty arrangements that occurred around the continent in the early-1990s—the record has not been a particularly edifying one.\textsuperscript{27} Indeed, it was mainly in post-liberation South Africa that this form of litigation found its most developed expression, although PIL was a feature of the judicial landscape during apartheid as well.\textsuperscript{28} For example, cases like \textit{Rikhotso} challenged the Urban Areas Act for placing impediments in the way of black Africans seeking to remain in the white urban areas, while \textit{Komani} secured the rights of wives and children to cohabit with employees in urban areas.\textsuperscript{29} The combination of the early work of groups like the Legal Resources Foundation (LRF)

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\item \textsuperscript{25} See Ashok H. Desai & S. Muralidhar, \textit{Public Interest Litigation: Potential and Problems, in Supreme but Not Infallible: Essays in Honour of the Supreme Court of India} 159, 183 (2000).
\item \textsuperscript{29} See Elizabeth Nkibande, Justice, Constitutional Court of S. Afr., The Experience of the South African Constitutional Court and Public Interest Litigation as a Tool of Social
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and the stark features of socioeconomic deprivation embedded in the *apartheid* system combined to produce a constitution in 1994, which sought to radically transform the landscape of economic and social rights adjudication in the country.\(^{30}\) Thus, South Africa’s constitution contained a comprehensive bill of rights incorporating not only the more traditional civil and political rights, but also justiciable economic and social rights within the main body of the instrument.

Early decisions of the South African Constitutional Court seemed to indicate a judiciary willing to tackle some of the most serious issues facing a wide cross-section of the previously marginalized and dispossessed section of society—the black African majority.\(^{31}\) In other words, the court immediately became an integral participant in the post-apartheid transformative agenda.\(^{32}\) Thus, in a series of cases starting with *Sobramoney v. Minister of Health, Kwazulu-Natal*,\(^{33}\) the constitutional court signified its willingness to give serious judicial scrutiny to right-to-health claims made against the state, and to give credence to a debate about state resources and their allocation. Although ultimately, the court did not find that there was a right to kidney dialysis on demand for seriously ill patients, the case signified a willingness to not take state protestations about resources on face value, but to critically engage such arguments.

Similarly, in the *Minister of Health v. Treatment Action Campaign*,\(^{34}\) the court ordered the government to reduce the risk of mother-to-child transmission of HIV by making anti-retroviral drugs available in the public health sector, and to take reasonable steps to extend testing and counseling facilities at public hospitals and clinics. The famous housing/shelter case of *Government of the Republic of South Africa v. Grootboom*\(^{35}\) involved a challenge by a homeless community to the refusal by a local municipality to provide them with tempo-
Citing to provisions in the Bill of Rights relating to housing and shelter, the court held that the failure by the state to provide temporary shelter violated its obligation to “take reasonable and other measures within its available resources” to provide access to adequate housing, and accordingly declared the housing program unconstitutional as-applied in the municipal area in question. With decisions such as these, along with others on the death penalty, procedural rights, and the rights of women in a variety of situations, the South African Constitutional Court sealed its reputation as one that was devoted to a different reading of the judicial function.

With the twentieth anniversary of the South African Constitution approaching, reflections on the jurisprudence of the South African Constitutional Court have been much more critical. Critics have contended that the court defers excessively to the executive and the legislature, that its remedies have been lacking in effect, and that there has been a failure to make a serious dent on the conditions of poverty and of growing inequality in the country. Nevertheless, the court’s decisions clearly changed the narrative on these issues.

This background provides a comparative insight into the situations in countries which have inspired the developing situation in East Africa.

B. An Early History of PIL in East Africa

Turning to the situation in East Africa, it is necessary to begin with some historical appreciation of the terms “public” and “interest,” because they have neither been static nor uncontested within the political economy of the three countries under examination. Indeed, the different uses to which the terms have been put reflect the evolution of the use of the law as an instrument of both oppres-


37. Id.; Roux, supra note 32, at 95.

38. See S. v. Makwanyane & Another 1995 (3) SA 391 (CC) (S. Afr.).


sion and of liberation. Thus, “public interest” in the colonial era was rooted in the “defense-of-the-realm” notion, and in a range of structural conditions which ensured that the judiciaries of the era were an integral part of the oppressive apparatus of the state.42

Here, the interests of the state and those of society were deemed one and the same, despite the fact that a colonial regime of governance had been forcefully superimposed over pre-existing indigenous structures.43 In the words of Peter Ekeh, “[the] agents of European imperialism came to Africa with the supposition that African states belonged to their rulers.”44 This contradiction manifested itself in what could be regarded as one of the earliest public interest cases in East Africa, concerning the appropriation of the Rift Valley lands of the Maasai in the then-Kenyan colony.45 Thus, the 1912 case of Ol le Njogo & 7 Others v. The Honorable Attorney General & 20 Ors.46 sought to nullify what were patently fraudulent treaties that had led to the loss of Maasai ancestral land to the early British settlers. However, the court denied locus standi to both the paramount chief and to the Maasai people. Adding insult to injury, the court relied on a Privy Council case to declare the following:

It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which this court cannot enter. It is sufficient to say that even if a wrong has been done, it is a wrong which no Municipal Court of Justice can afford a remedy.47

This same rationale informed the Reception Clause of the orders-in-council, which applied English Common Law to the three countries under examination. Included was a provision stipulating that “Native Law” would apply only insofar as it was not repugnant to (colonial) justice and morality.48 Any action deemed

42. For an interesting analysis of these conditions, see Steven B. Pfeiffer, The Role of the Judiciary in the Constitutional Systems of East Africa, 16 J. MODERN AFR. STUD. 33, 33–36 (1978).
44. Id. at 31.
45. A useful collection of cases concerning indigenous peoples can be found in ALBERT KWOKWO BARUME, LAND RIGHTS OF INDIGENOUS PEOPLES IN AFRICA (2010).
47. See id. at 80.
in opposition to the public interest would draw swift judicial condemnation. Given the nature of the colonial system in existence, obviously the public interest under concern excluded the majority of the public.\textsuperscript{49}

Such ironic readings of the law nevertheless resulted, because the judiciary viewed itself much more as an appendage to the goals of achieving colonial (in)justice than as a bastion for the protection of the indigenous population. This perception was compounded by the deference of these courts to the parliament, which, in the absence of a written constitution, could effectively pass any law with scant threat of judicial challenge.\textsuperscript{50} Judges of this era were—to employ the oft-cited words of Lord Justice Atkin—“more executive minded than the executive.”\textsuperscript{51} In a powerful dissent seeking to mark distance from his fellow judges in both content and direction in a decision addressing whether the discretion of a government minister could be challenged by a person detained without trial, the learned judge declared the following:

[In England], amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.\textsuperscript{52}

\textsuperscript{49} For further comment on the colonial context of judicial power, see Rachel Ellett, Pathways to Judicial Power in Transitional States: Perspectives from African Courts 31–40 (2013) (“The politicisation of judicial power in sub-Saharan Africa is firmly entrenched in the roots of colonialism. The construction of law in colonial Africa was not a project centered on justice or rights. Rather, it was fundamental to the explicit accumulation of political and economic power through marginalisation, oppression and, ultimately, violence. Law simultaneously provided a superficial veneer of formality and legitimacy and a means of controlling the colonial state. The transplanting of common law courts and the subsequent restatement of customary law was an intensely ideological project.”) Id. at 31.

\textsuperscript{50} The idea of Parliamentary Supremacy has a long history, reinforced at various stages and adopted by most Commonwealth countries, even though they had written constitutions. See, e.g., Pickin v. British Railway Bd., [1974] A.C. 765 (H.L.) 789 (appeal taken from Eng. C.A.); see also Akinola Aguda, The Judge in Developing Countries, Nigerian Institute of Advanced Legal Studies, University of Lagos Occasional Paper No. 6 of 1981, at 5–6. In the United Kingdom, despite the introduction of a Bill of Rights, it is a doctrine that still holds considerable sway. See Lord Irvine of Lairg, Parliamentary Sovereignty and Judicial Independence: Keynote Address, in PARLIAMENTARY SUPREMACY AND JUDICIAL INDEPENDENCE: A COMMONWEALTH APPROACH 31 (1999).

\textsuperscript{51} Liversidge v. Anderson, [1942] A.C. 206 (H.L.) 244.

\textsuperscript{52} Id.
Despite pursuing different models of ideological and socioeconomic ordering, the dominant post-independence era ethos in all three East African countries gave primacy of place to the idea of national/public security. In such an environment, the state was reified as the embodiment of the interests of the public. Such context witnessed the justifications for detention-without-trial, executive excess, and judicial reluctance to overturn legislation that was patently unconstitutional, if indeed the courts were not simply barred from reviewing a matter. Thus, PIL actions were invariably rare, or when pursued summarily snuffed out by courts of law with little interest in protecting those oppressed or marginalized by the system. This period witnessed the rise of the “era of technicalities,” where substantive constitutional or human rights issues either rarely saw the light of day, or were quickly and summarily dealt with.

Courts were also unduly submissive to the executive. For example, in the Kenyan case of Wangaari Mathai v. Kenya Times Media Trust Ltd., in which the plaintiff sought to stop the construction of a multi-story building in the iconic Uhuru Park in Nairobi, Justice N. Dugdale ruled that matters of public interest could only be litigated by the attorney general, effectively ensuring that cases challenging the status quo would be stillborn. Reflecting on the situation in Uganda, Frederick Ssempebwa condemned the early post-independence courts of refraining from “adjudicating on questions relating to matters political.” “On the other hand, they provided judicial connivance to political adventurers and coup makers, whose subjugation of the people has been held to be the main reason for legitimacy.”

In the early period after independence, the Tanzanian courts were rarely called upon to adjudicate similarly sensitive matters—perhaps because of the absence of a written Bill of Rights in their

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Nevertheless, a serving chief justice found nothing wrong in suggesting that there was no problem with a judicial officer, “if he wishes,” becoming a member of TANU, which at the time was the only political party allowed to operate in the country.59

While the courts’ positions may appear to stand at some variance to the aspirations that ushered in political freedoms, it is necessary to understand that for several years after independence, the courts continued to be dominated by foreign expatriate judges.60 Secondly, although there had been a “change in the guard” from colonialism to those in charge of the independent state, neither the structures in place nor the ideologies espoused about matters such as the separation of powers or the rule of law underwent significant evolution from the colonial era—even though both Tanzania and Uganda dabbled with the socialist ideology. Lastly, for even the few indigenous judges who made it into the courts, their training had invariably been in the United Kingdom or India.61 They were consequently steeped in English jurisprudence and the norms and principles of English Common Law, with all its strictures of stare decisis (the doctrine of precedent), supremacy of parliament (even when there were written constitutions), and the subordination of the judicial power to the other two arms of government.62 All of this was compounded by a positivist approach and a focus on blackletter doctrine, as opposed to a broader conception of justice.63 “This is what the law is!” courts were heard to declare, while expressing no view on what it ought to be or why the black letter of the law was so out of sync with any basic notion of social justice. Correspondingly, no other principle had as strong an influence on the limits on access to the courts than that of locus standi (i.e. the standing to bring a case in a court of law).


59. Aguda, supra note 50, at 33 (quoting then-Chief Justice P. Telford Georges).

60. Aguda, supra note 50, at 6–7.

61. Although the courts are now renowned for their PIL jurisprudence, this was not always the case. See Upendra Baxi, Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India, 4 Third World Legal Stud. 107, 107 (1985).


63. For a more detailed analysis of the influence of ideological forms of legal reasoning on the colonial judicial mind, see J. Oluka-Onyango, Judicial Power and Constitutionalism in Uganda 5 (1995).
were the implications of the *locus standi* doctrine on impeding access to justice?

### III. From *Locus Standi* to ‘Busy-Body’ Litigation

Central to the development of progressive judicial interventions is the degree to which the courts are accessible to the general populace for issues other than those that may affect them directly and individually. While the executive and legislative branches in a democracy are key actors in pushing forward progressive changes in society, many issues of major social importance—discrimination, enhanced political participation, and freedom of expression, for example—only find legal development when courts are compelled to make pronouncements on them. It therefore follows that if access to the courts is in the first instance limited, such progress is likewise restricted and partial. Historically, all three East African countries adopted a narrow approach to the issue of standing (*locus standi*) or the right to bring an action in court. Deriving from the English Common Law, litigants who brought an issue to court had to prove a direct connection to the subject matter under contention. In other words, unless one could prove an intimate link to the issue in dispute, they would not receive an audience with the court. Not only did the *locus standi* requirement severely limit access and litigation of broad social significance, it also confirmed the image of the judiciary as an institution of out-of-touch and unreachable individuals. While *locus standi* was only one of a host of other English legal doctrines deployed in the East African courts of law, it was perhaps the most debilitating, as it knocked out a litigant even before an opportunity to hear the substance of his or her plea. “I can’t see you” was the refrain of the courts to litigants who they felt had no place appearing before them. The doctrine also reflected a patent gender bias. Thus, women were discriminated against in the application of customary law within the mainstream courts, as demonstrated in the infamous case of *R v. Amkeyo*, in which Chief Justice Hamilton refused to recognize the wife in a customary marriage.

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Despite the strict application of the doctrine in East African courts, a shift in this perspective in the English Common Law occurred during the late 1970s, a shift exemplified by Lord Diplock’s judgment in *Ex parte National Federation of Self-Employed and Small Businesses Ltd.*, as follows:

[I]t would be . . . a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the courts to vindicate the rule of law and get the unlawful conduct stopped.

England was nevertheless quite late in adjusting the law to address social pressure. Earlier developments in the expansion of access to justice via relaxation of standing rules, resulting in a veritable explosion in PIL, occurred first in the United States, then in India, to mention only two of the most prominent early exponents of the idea.

Despite the limitations of the *locus standi* principle enshrined in the inherited law, cases involving constitutional and human rights issues nevertheless found their way into the courts in East Africa. Early PIL cases mainly focused on civil and political rights, and were concerned with elemental questions such as the rights to free expression, association, and assembly (especially with regard to issues of political space and participation). This is largely because early East African post-independence constitutions hardly mentioned economic, social, and cultural rights, thereby severely limiting litigation on this category of rights and freedoms.

Among the most famous cases of the era dealing with a major political issue—the very legitimacy of the constitution—was the Ugandan case of *ex parte Matovu*. The final decision upheld the validity of what was dubbed the “Pigeon-hole” constitution, and effectively provided legal cover for military *coup d’etat*. However, the court adopted a progressive position on the question of access. Asked to dismiss the case on several preliminary grounds including standing, then-Chief Justice Sir Udo Udoma agreed that the application was “indeed defective,” and that the court would have been

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justified in holding there to be no application properly before it. In other words, the case was ideal for dismissal simply on the technicalities. The title and heading of the application was defective, no respondent was named against whom the writ was sought, the applicant appeared to be in some doubt as to who was actually detaining him and against whom the writ ought to issue, and the affidavits were not accompanied by proper documents—a defect so fundamental said the court “as to be almost incurable.” To compound matters, applicant counsel’s affidavit was “bad in law and should have been struck out.” Indeed, the court declared that on examining the papers, their first reaction was to “send back the case to the judge with a direction that the matter be struck off as we were of the opinion that there was no application for a writ of habeas corpus properly before him.”

One can imagine the broad smile of approval on the Attorney General’s face as the court gave this run-down of myriad procedural errors, any one of which should have led to the collapse of the whole case. Instead, the court observed as follows:

On further reflection, however, bearing in mind the facts that the application as presented was not objected to by counsel who had appeared for the state; and that the liberty of a Citizen of Uganda was involved; and that considerable importance was attached to the questions of law under reference since they involved the interpretation of the Constitution of Uganda; we decided, in the interests of justice, to jettison formalism to the winds and to overlook the several deficiencies in the application, and thereupon proceeded to the determination of the issues referred to us.

Although the Attorney General eventually defeated the petition and Matovu’s case gave judicial sanction and negative precedent to the extra-constitutional usurpation of power, it paradoxically provided the foundation in Uganda for a gradual movement away from the swift dismissal of significant constitutional cases on flimsy technical grounds. The “jettison formalism” mantra continued to crop up in subsequent judicial decisions.

70. Id. at 519–20.
71. Id. at 521.
72. Id.
73. For example, see E.F. Ssempebwa v. Att’y Gen., [1989] and Maj. Gen. David Tinyefuza v. Att’y Gen., [1997] U.G.C.C. 3, 13 (Uganda), in which Manyindo, DCJ stated, “In my opinion it would be highly improper to deny him a hearing on technical or procedural grounds. I would even go further and say that even where the respondent objects to the petition as in this case, the matter should proceed to trial on the merits unless it does not disclose a cause of action at all. This Court should readily apply the provision of Article 126(2)(c) of the Constitution in a case like this and administer substantive justice without
Similar cases debunking technicalities gradually found their way into the jurisprudence of all three of the East African countries. Today, there is widespread acceptance (especially among lawyers) of the fact that PIL has become a settled feature of contemporary jurisprudence from the individual countries through to the regional level at the EACJ, and even beyond, with a few cases reaching the African Commission, and one even being decided at the African court. Despite PIL’s perception as a lawyer-dominated arena, much of the litigation is driven by non-lawyer, public-spirited individuals such as the Reverend Christopher Mtikila in Tanzania, Andrew Okiya Omtatah Okoitiin Kenya, and Andrew Mwenda and Muwanga Kivumbi in Uganda. There are also several public interest lawyers, such as Issa Shivji and Ringo Tenga in Tanzania; Ladislaus Rwakafuzi and Isaac Ssemakadde in Uganda; and Pheroze Nowrojee, Z.K. Ongoya, and a host of others in Kenya, who are behind the PIL movement in the individual countries. Several non-governmental actors including the women lawyers associations, the law societies, and prominent human rights groups have also been key in litigating issues of major concern to their different constituencies. Notwithstanding the increased litigation over women’s human rights, the PIL arena in all three countries is still unfortunately a largely male-dominated one, reflective of the wider structural limitations that affect the legal profession at large.


76. Indeed, the Court’s first judgment came from Tanzania, which is quite fitting given that it is headquartered in Arusha, Tanzania. See Tanganyika Law Society and Another; Mtikila v. Tanz., Apps. 9/2011, 11/2011 (joined), (June 13, 2011), ¶¶ 106.1, 107.2.

77. See Christopher Mtikila v. AG, Misc. Cause No. 10 of 2005 (HC) at 3.
ties), and 137 (on the interpretative jurisdiction of the Court of Appeal). Article 43 is especially important, because it defines what “public interest” is not—stating that it excludes political persecution, detention without trial, and the catch-all phrase: “[A]ny limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.”\(^78\) The Article’s main thrust is to mark distance from the great deal of abuse and misuse to which the term was subjected during Uganda’s recent history. Similarly, PIL in Kenya has a fairly long history despite meeting several obstacles,\(^79\) but has found new impetus under the 2010 Constitution.\(^80\) The courts in Tanzania have not waited for a new constitution before applying some of the principles developed by their brethren and sistren in the other two countries, albeit with mixed results.\(^81\) After some initial inertia, the EACJ is developing a fairly robust human rights and social justice jurisprudence, based on the public interest cases filed with the sub-regional court.\(^82\) In sum, PIL in East Africa has come of age, and is developing as a prominent arena from which one can discern the direction of social and political struggles in the region.

IV. Contemporary Public Interest Struggles: Country-Specific and Regional Dimensions

Despite what can be described as a coming of age of public interest litigation in East Africa, the terms “public” and “interest” are still under serious contestation, harkening back to the early days of independence and even prior. This arises from the fact that the executive and legislative (parliamentary) arms of the state are almost invariably the focus of attention in such litigation, especially when the issues at stake involve human rights, democratic governance, and environmental, social, and political accountability. The contestation is especially apparent in those situations where the state wantonly violates human rights, stubbornly persists in their

\(^78\) Uganda Const., art. 43 (1995).


\(^81\) See discussion infra Part IV.

\(^82\) See discussion infra Part IV.
violation, and then puts up a vigorous but hypocritical defense to claims being made for the assertion of even the most basic human rights, such as freedom of expression, employment rights, or the protection of maternal health care. But problems also arise when the violator is a non-state actor—social organizations such as the family, religious bodies, educational institutions, business entities such as multinational corporations, or elusive players like rebel movements.83

Part of the problem with the focus of PIL cases against the state relates to the adversarial character of litigation employed in Common Law systems. Suits are brought against the attorney general, as chief legal representative of the executive and legislative arms of the government, who most often reads his84 remit—with the rare exception—as a charge to vigorously defend the state without concession, even with the weakest of briefs.85 Contrast this position to that found in the United States, which has a civil rights division located within the Office of the Attorney General, specifically devoted to ensuring that the civic rights of especially vulnerable individuals and communities are addressed and protected.86 Hence, in many landmark public interest cases in the United States, the civil rights division joins the litigant in pursuing justice, in contrast to defeating it and thereby defending injustice. For example, in the recent shooting of the unarmed African-American youth Michael Brown in the Missouri city of Ferguson, Attorney General Eric Holder was at the forefront of promising a federal investigation after a state grand jury failed to indict a police officer for killing an unarmed African-American youth.87

Indian PIL has long articulated a different vision of how such cases should operate, and the role of the government lawyer in assisting the court’s execution of its constitutional mandate. The

83. In a Ugandan case involving a suit against the National Resistance Army (NRA) after it took power but regarding a matter from when it was still in the “bush,” the court held that the group lacked a legal personality due to its status as a rebel movement. See Ontario Ltd. v. Crispus Kiyonga & Ors., [1992] 1 K.A.L.R. 14 (Uganda).
84. No woman has ever been Attorney General in any of the three countries.
following words of Justice Bhagwati in Bandhua Mukti Morcha v. Union of India are apposite:

We have on more occasions than one said that public interest litigation is not in the nature of adversary litigation but it is a challenge and an opportunity to the government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice which is the signature tune of our Constitution. The Government and its officers must welcome public interest litigation, because it would provide them an occasion to examine whether the poor and the downtrodden are getting their social and economic entitlements or whether they are continuing to remain victims of deception and exploitation at the hands of strong and powerful sections of the community and whether social and economic justice has become a meaningful reality for them or it has remained merely a teasing illusion and a promise of unreality, so that in case the complaint in the public interest litigation is found to be true, they can discharge of the constitutional obligation root out exploitation and injustice and ensure to the weaker sections their rights and entitlements.

The above scenario invariably raises the question: which public is the East African state working for when it persists in violating these rights, and which justifies its action with a vigorous defense when sued for their protection? Public interest from this perspective represents a subversion of the original idea, and signifies a divorce between the public and the state. Fortunately, today the judiciary in all three countries is not invariably on the side of the executive or the legislature, but often condemns executive excess, overturns oppressive legislation, and refuses to sanction state-authorized actions which violate the rights of vulnerable minorities. Also, via the mechanism of judicial review, numerous lower-profile cases, which focus more narrowly on the exercise of administrative power, have been decided. Aside from the constitutional law in which PIL cases predominate, a number of cases find their way into critical attention through other areas of legal discipline, such as laws on domestic relations or the criminal law, concerning especially the legality and breadth of penal sanctions, the validity of arrests, and conditions in detention.

89. Id. at 182–83.
90. See Bank of Uganda v. Banco Arabe Espanol (Supreme Court Civ. App. No. 1/2001) (noting that while cases may arise where the Court must defend State interests, the instant case involved only straightforward debt and did not present such a situation).
But what is the current situation in each of the three countries, and in the East African Court of Justice? Perhaps the analogy of cement will provide a better understanding of the status of constitutional reform in each country, and its relationship to litigation filed in the public interest. At the time of writing this Article, Tanzania is embroiled in a fierce debate over the promulgation of a new constitution. The country can therefore be described as still in the mixing or re-mixing cement stage of constitutional development. Notwithstanding the limited nature of its 1977 constitution and restrictive *locus standi* provisions that are now the focus of reform, the Tanzanian judiciary has historically taken on many cases that have addressed issues of human rights and causes concerned with social justice. Nevertheless—particularly during the one-party era—the judiciary played a fine balancing act according to the following by Ellett:

> [T]rying to measure when to speak out and when to keep quiet. 
> The courts abided by a strict sense of legality, hearing only those cases that had a legal point to be heard. Perhaps the Tanzanian judiciary did not compromise itself in a legal sense, but the entrenchment of the one-party state did result in its limited relevance.92

Kenya adopted a new instrument in 2010, which radically altered the framework of litigation and the pursuit of social justice goals after decades of single-party repression and judicial subservience; it is thus analogous to setting cement. The Kenyan judiciary had become so disrespected that it underwent not one—but two—radical “surgeries” in a bid to eradicate its erstwhile connections to corruption, executive bias, and sheer incompetence, and especially its lack of independence and collapsed public confidence in its capacity to deliver even a modicum of untainted justice.93


Uganda’s 1995 constitution is nearly twenty years old, and emerged against the backdrop of several years of civil instability and political turmoil.94 The instrument opened up new avenues for improved access to justice in significant ways, and although initial responses to the early case law condemned the judiciary as conservative and non-activist,95 the situation has since changed. This has led to a marked rise in the number of PIL cases,96 making the description of aging cement most appropriate to the situation in Uganda.97

The EACJ was established in 1999, and commenced full operation in 2001.98 Although the court does not have an explicit mandate to directly address human rights issues, it has recently carved out this jurisprudence in interesting and dynamic ways, veritably molding the cement as it maneuvers its way around the volatile politics of the region. The following sections of this Article provide a deeper overview to the situation of PIL in each of the three countries and the regional court under examination.

A. The Case of Tanzania: “Hata Mbuyu Ulianza Kama Mchicha”99

The issue of PIL in Tanzania assumes heightened significance within the context of the ongoing and contentious debate over a new constitution.100 As such, PIL is critically important in the

95. See GEORGE WILLIAM MUGWANYA, HUMAN RIGHTS IN AFRICA: ENHANCING HUMAN RIGHTS THROUGH THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM 78 (2003).
96. See generally Mbazira, supra note 1, at 46–54.
99. Quotation from an October 2013 interview with Advocate Ringo Tenga and translated from the Kiswahili as “Even the mighty baobab started life as a little seed.” Tenga was reflecting on the growth of PIL in Tanzania since the Barabaig/Maasai cases in the 1980s.
debates about access to justice, women’s human rights, the protection of economic, social, and cultural rights, and the structure and improved independence of the judiciary. However, Tanzania has a fertile history of active PIL on the basis of the existing 1977 constitution and 1984 Bill of Rights, although the results have not always been particularly edifying.101

Among the first of the early victories were those concerning the land rights of the pastoral Barabaig and the Maasai filed in the 1980s. In *Mulbadaw Village Council & 67 Others v. National Agricultural and Food Corporation (NAFCO)*,102 the high court ruled that the village council held the rights over the disputed lands, and that the petitioners were thus entitled to compensation for the defendant company’s destruction of crops and property. However, in a dramatic turn-around, the court of appeal reversed the decision on the patently technical grounds of *locus standi.*103 In a case of *déjà vu,* the same happened to a group of Maasai seeking a similar remedy from displacement,104 with the high court ruling in favor of the plaintiffs while the Court of Appeal reversed the decision.105 According to Barume, “in general terms, the Tanzanian judiciary has not provided the protection it should to indigenous peoples’ land rights. There have been few attempts of positive decisions by a very limited number of Tanzanian judges, whose decisions have been systematically overturned in Appeal.”106

To shift the lens a little, a positive example of women’s human rights litigation is presented by *Ephraim v. Holaria Pastory and*
Another. Concerned with the contentious issue of inheritance rights in customary law, the case turned on whether a woman could inherit land from her deceased father if bequeathed to her in a will. Citing an old Haya custom that barred women from either inheriting or selling land, members of the clan went to court seeking a prohibition of the sale. While the primary court agreed with the clan, both the district and the high court declared that the custom was discriminatory. The relatively progressive position of the Tanzanian courts regarding women’s human rights was matched by a similar posture on cases pursuing environmental rights. In contrast, although trade unions mounted a series of legal challenges against the privatization of public property in the 1990s, they were not successful in their endeavors to prevent the sales.

A revived spate of public interest cases were litigated in the early 1990s, in the aftermath of the return to a multi-party political dispensation. Fortunately, they were met by judges like Chief Justice Samatta, and puisne judges Mwalusanya and Lugakingira, who began to gain a reputation for both independence and courage. Thus, in the case of Vidyadhar Girdharal Chavda v. The Director of Immigration Services, Justice Samatta was of the following view:

Except to autocrats, it must be intolerable that, in a democratic society like ours, it should be impotent to grant a temporary injunction in favour of an individual who complains of unwarranted or oppressive use of statutory powers by a government minister or official. It should be perfectly clear, I think, that this court can halt the bulldozer of the State before it squashes the right of an individual, company or society.

The most famous of the early cases is Rev. Christopher Mtikila & 3 Others v. Republic, which challenged the constitutional prohibition against independent candidates standing for elections, and the requirement for a police permit to hold a political rally under

107. See generally High Court of Tanz. at Mwanza Civ. App. No. 70 of 1989, Mwalusanya J. (1990) LRC (CONST) 75 (Tanz.) (“This appeal is about women’s rights under our Bill of Rights.”).

108. See Abdi Athumani & 9 Others v. the District Comm’r of Tunduru District & Others, Misc. Civil Case Nos. 2 & 3 of 1987 (Tanz.); Festo Balegele and 749 Others v. Dar es Salaam City Council, Civil Case No. 90 of 1991, High Court of Tanzania (Rubana, J.) (Tanz.).


111. See Shivji and Majamba, supra note 57, at 6.

the Police Force Ordinance. Mtikila argued that these violated the right to participate in public affairs, and the freedom of association, respectively. Although Tanzania had two years earlier ceased to be a single-party state, the suit represented a tremendous psychological contestation to the dominant-party ideology that remained pervasive. In response, the government sought recourse in its traditional refuge, the *locus standi* technicality. As if reading his script from the 1966 judgment of Udo Udoma on *locus standi* in *ex parte Matovu*, Justice Lugakingira stated as follows:

> [I]f there should spring up a public-spirited individual [who] seek[s] the Court’s intervention against legislation or actions that pervert the Constitution, the Court, as guardian and trustee of the Constitution and what it stands for, is under an obligation to rise up to the occasion and grant him standing. The present petitioner is such an individual.\footnote{113}{Id. at 7.}

True to his writ as “guardian of the Constitution,” Lugakingira declared that the bar to independent candidates was unconstitutional. Expounding further on the place of public interest litigation within the extant legal regime, the judge went on to observe that “every person in Tanzania is vested with a double capacity,”\footnote{114}{Id.} namely as an individual and as a member of the community, thereby equipping the individual with double standing to sue.

The court found the principles of public interest litigation expressed in the Constitution of Tanzania by vesting in every person the capacity of an individual by virtue of Articles 12 to 24 of the constitution and the capacity of a member of the community by virtue of Articles 25 to 28 of the constitution.\footnote{115}{Id. at 7–8.}

But as if the very clear words of the judge were falling on deaf ears, the response of the state was to steer through the Eleventh Amendment to the constitution of Tanzania, effectively overturning the judgment.

Since the 1990s, several additional cases have been filed in the Tanzanian courts seeking to enhance the interests of the public in varying ways.\footnote{116}{See, e.g., Julius Ishengoma Francis Ndyanabo v. Att’y Gen., Civil App. No. 64 of 2011, (Court of Appeal at Dar es Salaam, 2004) (Tanz.) (Seeking to reduce or eliminate the cost of filing a case in order to promote equal access to justice); Helen Kijo-Bisimba, *Public Interest Litigation: The Case of Tanzania*, paper presented at the International Governance Alliance (iGA)/Judicial Studies Institute (JTI), Nairobi (Mar. 27, 2014) (strategic dialogue on using PIL to deliver democracy and social transformation in East Africa).} While there has generally been a marked progression of judgments that have sought to expand the arena of civic
and social freedoms, there have also been a number of setbacks, such as the case of Lujuna Shubi Ballonzi, Senior v. Registered Trustees of Chama cha Mapinduzi,\(^{117}\) which sought to recover monies which were alleged to have been illegally collected by the ruling party, even from non-members. Once again, the court sought recourse in technical matters regarding the failure of the plaintiffs to follow the rules regarding the filing of a representative suit. In spite of the occasional setbacks, civil society in Tanzania has not been unduly daunted in filing cases of public interest, including several around election-related matters, corruption in government, and protection of the environment.

Most recently, a precedent-setting case charged that Prime Minister Mizengo Pinda had violated the constitution during a parliamentary question time by allegedly calling on the Police to use “unproportional [sic], excessive and unreasonable force” against protesters in the streets.\(^{118}\) Expectedly, the attorney general on behalf of the respondent raised several preliminary objections, among them the issue of \textit{locus standi} and whether the court had the authority to review the matter in light of the immunities enjoyed by parliament and its members. Answering the second of these objections in the affirmative as follows, the court did not shirk its duty in holding that it did have the power:

Back home in Tanzania, we have clear constitutional and statutory provisions that provide for privileges and immunities for MPs. We also have provisions in the form of Standing Orders which regulate the conduct of affairs in Parliament and lay down procedures for channeling grievances in regard to what an MP does during proceedings in the National Assembly. The constitutional provision (Article 100 (2)), however, as we have seen, is not absolute. It is possible, under our law, to institute proceedings challenging MP’s acts and/or omissions while in Parliament, notwithstanding the immunity.\(^{119}\)

However, on the first objection—the question of the petitioners’ standing—the court held that, as corporate bodies, the petitioners could not sue; this was a prerogative of only natural persons.\(^{120}\)

\(^{117}\) Lujuna Shubi Ballonzi, Senior v. Registered Trustees of Chama Cha Mapinduzi, (1996) T.L.R. 203 (Tanz.).


\(^{119}\) \textit{Id.} at 16.

\(^{120}\) “[B]ecause the nature of the injury complained of cannot be suffered by juristic, legal or corporate bodies but by individuals . . . Any individual who desired to take action against the 1st respondent’s utterances had the opportunity of doing so under that rule.” \textit{Id.} at 27. The case highlighted some of the problems with the existing Tanzanian constitution; in both Kenya and Uganda, suits can be brought by either juristic or natural persons.
Although the case was dismissed without consideration of the merits, the public interest generated around it—as well as what was regarded as the sheer audacity in bringing it against a prominent political personality such as the prime minister—boosted public confidence that civil society was playing its designated watch-dog role. According to one commentator, “when people learn they are being taken to court, they start to behave.” Given the manner in which the state responded to the case, it is clear that it had an impact in the corridors of the executive.

Two features of the Tanzanian experience are noteworthy in obtaining a full understanding of the evolution of public interest litigation in the country. First, the individual judges of the high court in Tanzania demonstrated more liberal and independent leanings than those on the court of appeal. In other words, the drive for judicial change often came from below—from the high court and not from the higher bench, the court of appeal—with the latter sometimes acting as a barrier to progressive change on the ground. Despite not having had a constitution that could be described as overly liberal, the individual judges of the high court nevertheless found their way through to give remedies they thought appropriate in the circumstances. In other words, they successfully expanded rights without necessarily enjoying the benefit of a progressive constitutional or human rights-framework. Those efforts were nevertheless rewarded by a slap on the wrist from the members of the superior bench. Now with the debate on the new constitution underway, most judges have expressed sympathy for the more activist approach of the high court bench, in contrast to the less enthusiastic court of appeal. There was a near-unanimous view of a need to do away with courts’ over-fixation on arcane technicalities.

Second, the Tanzanian government effectively reversed or negated many of the decisions of the courts on several occasions. This was done either by pushing through constitutional amendments that invalidated or overturned lower decisions, or by simply ignoring the edicts that had been communicated by the courts. Thus, Siri Gloppen has observed that Tanzanian judges “rarely put down their foot when government officials fail to comply with their

However, the two petitioners should have anticipated and worked to avoid this objection, given that it had been raised in two earlier cases. See Legal and Human Rights Centre and Others v. Att’y Gen., Misc. Civil Cause No. 77 (the “Takrima Bribery” case and the Nyamuma cases).

121. See ELLETT, supra note 92, at 129–30.
mandate and the constitutional rules guiding their exercise of power.”122

It is perhaps for the above reason that the executive in Tanzania has passed legislation which both restricted access in cases involving human rights issues, and simultaneously attempted to constrain the hands of the courts in issuing fulsome judgments. Such was the case with the Government Proceedings (Amendment) Act123 that introduced a notice period of not less than ninety days in which to sue the government, while the Basic Rights and Duties Enforcement Act of the same year put in place more obstacles.124 Of course, such government reactions raise another dimension—the question of state impunity—to which we shall return later in this Article.

B. Post-2010 Kenya in the Aftermath of Judicial “Surgeries”

Kenya is in the “wet cement” stage of constitutional development, having fought to introduce a revamped constitution since the early 1990s,125 and only succeeding two decades later, after considerable political angst and extensive social turmoil.126 The promulgation of a new constitution in 2010 has—among other innovations—dramatically projected economic, social, and cultural rights to new prominence in the region, as well as reinvigorated a judiciary that had basically gone to the dogs.127 On the issue of PIL, the new Chief Justice Willy Mutunga said as follows:

Let me again remind you that our constitution specifically mandates public interest litigation. Our appointment process is precisely designed to give us independence of the executive and the legislature so that we can if necessary “force other institutions of governance to do what they are supposed to do.” We can only pray that we have the moral stature, the legal skills and the courage to do what we are directed to do.128

Few statements of such forceful rendering of a judicial mandate have been recorded in the history of judicial pronouncements, and

122. Gloppen, supra note 92, at 118.
123. The Government Proceedings Act, No. 30 of 1994, Cap. 5 (Tanz.).
128. Id. at 23.
it will be necessary to return to an examination of how the Kenyan judiciary’s approach to PIL under the new constitution has played out. Nevertheless, it must not be forgotten that there is a fairly extensive pre-2010 history of active PIL in Kenya, although for some time more progress was made via ordinary judicial review than through constitutional or human rights jurisprudence. Hence, in cases like Wangaari Mathai v. Kenya Times Media Trust Ltd., the *locus standi* doctrine was raised as a preliminary objection that quickly disposed of the case. However, in Maina Kamanda & Another v. Nairobi City Council and Another, the court allowed rate-payers to proceed against the council and the chairman of the City Commission, relying on Lord Diplock’s holding in the IRC decision, *supra*. In Republic of Kenya v. Amos Karuga Karatu, Justice Makhandia vigourously asserted that “[a] prosecution mounted in breach of the law is a violation of the rights of the accused and is therefore a nullity.” Nevertheless, such bold and condemnatory statements from the courts during the Kenyatta-I, Moi, and Kibaki eras were few and far between.

Since 2010, the Kenyan judiciary has been armed with a new mandate via a more transparent mechanism of appointment, and buttressed by reformulated conditions of tenure. It has thus been trying to play catch-up as well as to leap-frog over its counterparts in Tanzania and Uganda in carving out a distinct role as an engine for meeting new jurisprudential heights in terms of human rights, social justice, and democracy-related litigation. Despite a hiccup with a controversial decision on the 2012 presidential election petition that drew considerable criticism from scholars and activists,

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129. See, e.g., M.O. Makoloo et al., *Public Interest Environmental Litigation In Kenya: Prospects and Challenges* 13 (ILEG 2007).


131. HCCC No. 5403, in United Nations Environment Program, *Compendium of Judicial Decisions on Matters Related to Environment*, Vol. 1 (Dec. 1998) 15, at 15–18. The applicant unsuccessfully went to court complaining that then-Chief Justice Cockar had attained the constitutional retirement age and should no longer hold office in the judiciary. The application was dismissed because the court found that the applicant must show sufficient personal interest in a matter before bringing suit. Additionally, the personal interest must be greater than the interest of the rest of the public.


the courts have kept active with a steady stream of cases filed by a civil society that is perhaps the most active in the region. These include cases on the right to housing, the right to health and access to medicines, on the despicable practice of detaining patients in hospital for failing to pay hospital fees, and a case concerning the detention of Tuberculosis (TB) patients in prison. Sexual minorities have also been active with cases about the rights of so-called “hermaphrodites intersexual” prisoners, and a case that was concerned with the denial of registration of an LGBTI organization, and another on transgender rights.

An early decision that drew civil society disapproval and demonstrated the mixed level of internalization of the basic principles in the 2010 constitution by the bench concerned the gender-related provisions in the instrument, with the majority in the Supreme Court ruling that the prescription on seats for women in parliament and the senate was not a matter for immediate implementation. Although the majority declined to follow what seemed like an obvious prescription, the dissenting judgment of Chief Justice Mutunga gives some indication of the activist strains vying for supremacy in the post-2010 bench. Declarating that “parliament by its silence cannot deprive the women of this country the right to equal representation,” the judge stated the following:

135. See Allen Maleche, Address at the PILAC Conference on Legal Education and Public Interest Lawyering in East Africa: The Case of University Based Legal Aid Clinics, Public Interest Litigation in Kenya: The New Constitutional Context (Feb. 5–6, 2014).


I see no reason a constitution that decrees non-discrimination would discriminate against women running for Parliament and the Senate. I see no constitutional basis for discrimination among women themselves as the consequence of the progressive realization of the two-thirds gender principle would entail. A constitution does not subvert itself. Deciding that women vying for county representation have rights under [the] constitution while their counterparts vying for Parliament and the Senate are discriminated against would result in that unconstitutional position. This article read with the provisions of Articles 27(4), 27(8) and 81(b) make it abundantly clear that the two-thirds gender principle has to be immediately realized.144

Numerous other cases have tested the new parameters of the constitution, and also the mettle of the judges in addressing the extent to which the instrument has actually introduced radical change to the Kenyan body politik. What can be said about the nature of the litigation is that it demonstrates the resilience of Kenyan civil society, and its determination to breathe life into the black letter of the new constitution. However, it is also reflective of the continued social and political fissures that erupted with such vicious consequences in the aftermath of the 2007 election, and remain unresolved even following the election of Uhuru Kenyatta as president in 2013. Additionally, with a great deal of the litigation focusing on economic, social, and cultural rights, the Kenyan courts have both opened a new chapter on the justiciability debate surrounding human rights in the region, and thrown down the gauntlet to their reluctant brethren and sistren in Uganda and Tanzania to take up the challenge.145

Furthermore, the direct incorporation of international law into the constitution has brought forth a whole new dynamic, which has serious implications for the domestic application of custom, treaty, and state practice, and thus for the articulation of social justice and

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144. Id. ¶ 11.5 (Mutunga, C.J., dissenting).

145. Needless to say, some are critical of the way in which Kenyan courts handle litigation relating to economic, social, and cultural rights. Arwa states that a number of limitations affect the recent litigation in Kenyan courts, including the following:

(a) [h]ostile judicial attitude towards human rights litigation; (b) [t]he culture of judicial conservatism and deference to executive decisions; (c) [j]udicial tendency to copy the emerging socio-economic rights jurisprudence in South Africa; (d) [n]on-availability of the requisite procedural framework for the enforcement of socio-economic rights; (e) [l]ack of exposure to international human rights law; (f) [l]imited access to relevant international human rights documents; and (g) [l]ack of adequate case reporting.

democratic causes within the domestic arena. Reflecting this change, a judge ruled that Sudanese President Omar el Bashir—an indictee of the International Criminal Court—would be served with an arrest warrant should he venture to Kenya, on account of obligations laid down in the Rome Statute.

Finally, it is important to flag the point that while there was much initial excitement over the new constitution and a post-authoritarian honeymoon that lasted for a short time, tensions were not long in emerging between the executive and the legislature, on the one hand, and the judiciary on the other. In other words, not everybody—least of all Kenyan parliamentarians—read the 2010 constitution in the same way Mutunga does. In part, these anxieties have been generated by the belief that the latter has become too activist, but they also reflect a struggle pitting forces that have committed themselves to reform against entrenched bureaucratic interests that were fairly well ensconced in the ancien régimes. No doubt, that battle will manifest itself in different ways during the course of the next several years.

C. PIL in Uganda: Old Wine, New Bottles, or the Reverse?

Uganda could best be described as being in the “old cement” stage, where the 1995 constitution approaches twenty years of existence and there is considerable belief that PIL is a useful and necessary tool in the struggle for progressive democratic change. Ironically—or perhaps unsurprisingly given its history—Uganda is home to the earliest PIL cases in the region, dating back to the early days of independence in the 1960s. Particularly on the question of technicalities, the courts had developed a fairly progressive regime. But the use of such litigation has been uneven, including the period during Idi Amin’s military regime (1971–1979), in which major parts of the constitution were suspended and the courts rendered comatose. The case of P.K. Ssemogerere and A.L.

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149. See Kirunda, supra note 73, at 15–18, 31.

150. For a chronicle of the state of the judiciary over this period, see OLOKA-ONYANGO; supra note 63, at 19–21.
Kayiira v. E. Rugumayo and E.F. Ssempebwa, which challenged the removal of President Y.K. Lule and was decided in 1980, witnessed a revival of the attempt to challenge the unconstitutional removal of governments as Matovu had done, but was likewise unsuccessful.

A change in the wind appeared to be blowing across the country following Yoweri Museveni’s 1986 takeover of power after a five-year civil war. With the case of E.F. Ssempebwa v. AG, Justice Arthur Oder provided a forceful opinion on the need for constitutional fidelity, for the state to scrupulously uphold human rights, and for the government to always respect its own legal regimes, especially after it has amended them. The beginnings of a fundamental change appeared to be truly within sight, but were dashed when the government introduced legislation to effectively overturn the ruling. Nevertheless, in the situation of Uganda at the time—where the fate of brave judges in previous regimes had been much worse—such a response must be registered as a fairly significant improvement.

In the aftermath of enactment of the 1995 constitution, the judiciary registered both important advances in dealing with public interest cases as it did setbacks, but regardless, a significant body of case law has steadily built up. After overcoming an initial ambivalence over the question of technicalities, the court found its voice in cases such as Major General David Tinyefuza v. AG, Uganda Association of Women Lawyers & 5 Others v. AG, and finally in a
series of cases around the challenge to the referendum on whether Uganda should return to a multiparty system of government or retain the movement.159 In Charles Onyango Obbo & Andrew Muenda v. The Attorney General,160 Justice Mulenga gave an expansive reading of freedom of expression within the context of media rights, and the permissible limitations to the right as not being “confined to categories, such as correct opinions, sound ideas or truthful information.”161

A string of cases decided on the right to a healthy environment confirmed the liberal approach of the bench to the issue of access,162 while several decisions positively affected the rights of women including the FIDA case (supra, on rights in divorce), LAW-U v. AG (No. 1)163 (on succession laws), LAW-U v. AG (No. 2),164 (on female genital mutilation), and Mifumi (U) Ltd. & 12 Others v. AG & Another165 (on so-called “bride-price,” and its refund in divorce). Although a divorce case, the Supreme Court in Julius Rwabunimi v. Hope Bahimbisomwe166 took the opportunity to clarify not only on the provision of equality in the constitution, but also on the position of religion in Ugandan constitutional law, as follows:

First, it is important to note that Uganda is a secular state, which is not governed by Canon law, but by the Constitution, statutory law, case law as developed from common law and doctrines of equity, principles of justice, equity and good conscience. Customary law is also applicable in some areas of personal law, provided it meets the Constitutional standard set out in Article 32(2) of the Constitution of Uganda, 1995. Given the secular

159. See Ellett, supra note 92, at 143-48.
161. Id. at 10.
nature of this country, it was again not proper, for the learned Justices of Appeal, to base their judicial decision on religious marital vows . . . In my view, Article 31(1)(b) of the Constitution of Uganda (1995) restates the constitutional prohibition of non-discrimination on the basis of sex which is enshrined in Articles 21 and 33 of the Constitution of Uganda (1995), in as far as it relates to marriage.167

Despite what can be described as a fairly progressive jurisprudence, the results of PIL in Uganda can be considered mixed at best—and problematic at worst. Although the voice of the judiciary over this period grew in confidence, some of its decisions did not have a marked impact on the body politik, either because the state defied them and reintroduced legislation to thwart the decision,168 or because the courts themselves were not very clear in terms of the remedies they stipulated. Finally, the Ugandan courts have been very weak in addressing economic, social, and cultural rights.169 In part this is a structural problem—aside from the rights to work and education, the Bill of Rights of the 1995 constitution is bereft of this category of rights—but it is also a reflection of the failure to grasp that such rights are, in fact, justiciable. In the two cases where the issue has arisen, the courts have failed to rise to the mark, in both a case on the right to education,170 and in the more recent CEHURD& 3 Others v. AG,171 which sought to address the issue of maternal health care and the failure of the government to provide adequate facilities in public hospitals. Indeed, the constitutional court made matters worse by declaring, as follows, that the case raised a political question, and was thus beyond the purview of their jurisdiction:

167. Id. at 19–20.
168. For example, in Muwanga Kivumbi v. Att’y Gen., the Constitutional Court ruled unconstitutional the requirement for a police permit to hold public rallies. The government retorted by passing the Public Order and Management Bill (POMB), which effectively reintroduced the section. See J OLOKA-ONYANGO, REVIEWING CHAPTER FOUR OF THE 1995 CONSTITUTION: TOWARDS THE PROGRESSIVE REFORM OF HUMAN RIGHTS AND DEMOCRATIC FREEDOMS IN UGANDA 31–32 (2013).
Much as it may be true that government has not allocated enough resources to the health sector and in particular the maternal health care services, this court is, with guidance from the above discussions reluctant to determine the questions raised in this petition. The Executive has the political and legal responsibility to determine, formulate and implement polices of Government, for inter-alia, the good governance of Uganda. This duty is a preserve of the Executive and no person or body has the power to determine, formulate and implement these polices except in the Executive. This court has no power to determine or enforce its jurisdiction on matters that require analysis of the health sector government policies, make a review of some and let on, their implementation. If this Court determines the issues raised in the petition, it will be substituting its discretion for that of the executive granted to it by law.172

The above decision might reflect a degree of confusion regarding the role of the court both in the interpretation of such provisions of the constitution, as well as of the range of possible remedies that can be made on a social right of this nature. Remedies could range from a declaration of unconstitutionality, to more affirmative or positive remedies, such as the structural interdict after the fashion of the South African Constitutional Court and Human Rights Commission.173

We shall return to an examination of the implications of this decision on the wider separation-of-powers question, but by way of conclusion, we can make several observations about the state of PIL in post-1995 Uganda. First, the case law falls into three broad categories: those which expanded the arena of democratic rights and social protections and freedoms; those which retained or buttressed the status quo; and those which marked a considerable setback to the struggle to open up the parameters of democratic organization and expression in the country. There are also cases that expanded the space, but did not go far enough.174 In contrast to its East African counterparts, the response of the Ugandan executive to court decisions has ranged from benign and condescending intolerance, to rage, intimidation, and direct violent


confrontation.\textsuperscript{175} Two examples of the latter suffice to demonstrate the point: the first being the government response to the successful challenge to the Referendum Act in 1999, and the second in its reaction to the case of bail given by the high court to treason suspects affiliated with long-time political rival and former presidential candidate Col. Kizza Besigye. With regard to the former, the president took to national television, condemned the judges as fit to only try chicken thieves, and organized a public protest which paraded the streets of Kampala and ended at the high court.\textsuperscript{176}

The state’s reaction to the latter was more dramatic and menacing. The case involved charges of treason against Besigye and members of the shadowy rebel People’s Redemption Army (PRA).\textsuperscript{177} Just as Justice Lugayizi announced the release of the accused persons on bail, the court was surrounded by a paramilitary troop—known as the Black Mamba Urban Hit Squad—which re-arrested the freed suspects and whisked them off to an unknown destination. For several days the country was gripped by a crisis as the courts commenced a go-slow strike, the Uganda Law Society instituted a protest, and the general public looked on with horror.\textsuperscript{178} The impasse was eventually resolved with a half-hearted “apology” by President Museveni.

Aside from the overt militarization of its politics represented by the Black Mamba situation, Uganda has also been bedeviled by other of its old historical demons. The general operations of the courts have limped along in the first instance because of chronically low levels of financing. Secondly, the judiciary has suffered on account of a lackluster commitment by the executive to making the necessary judicial appointments, with vacancies remaining unfilled for several months at a time, thereby stalling work through the length and breadth of the institution.\textsuperscript{179} But there is also a


\textsuperscript{176} See \textsc{Ellett}, supra note 49, at 147–49.

\textsuperscript{177} For a comprehensive examination of the case, along with the circumstances in which it was filed, see Ronald Naluwairo, The Trials and Tribulations of Rtd. Col. Dr. Kiiza Besigye & 22 Others, HURIPEC (Oct. 2006), http://www.huripec.mak.ac.ug/pdfs/Besigye_trials_1.pdf.


\textsuperscript{179} The executive also refused to establish a tribunal to consider the case of a judge found to have been struck off the register of solicitors in England, where he practiced
political facet to what may appear on the face of it to be simply bureaucratic inertia. This was represented by President Museveni’s attempt to re-appoint retired Chief Justice Benjamin Odoki to the position, despite the fact that he had passed the retirement age of seventy years mandated in the constitution. Unsurprisingly, the constitutional court declared such a move unconstitutional.\textsuperscript{180} Needless to say, the saga held the judiciary in ransom and without effective leadership for the two-year duration of the impasse. But what added insult to injury is the fact that the attorney general has lodged an appeal against the constitutional court decision, demonstrating a dogged and macabre disdain for public opinion, and for the constitutional provision on the independence of the judiciary. Quite clearly, the issue at stake here is not simply a preference for one candidate over another, but the very essence of the executive’s view of its relationship to the judiciary and to the wider public. We shall return to a more critical consideration of this point after a look at how PIL has played itself out at the regional level.

D. \textit{The East African Court of Justice (EACJ): Pushing PIL(s) from “Above”}

Since its revival at the end of the last millennium,\textsuperscript{181} the goals of the East African Community have been to foster the free movement of people and goods, economic integration, and political union among the member states.\textsuperscript{182} At fourteen years of age, the EACJ could be described as being in the “drying cement” stage of development.\textsuperscript{183} Created as the judicial arm of the organization, its main function is to interpret and apply the provisions of the

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\begin{itemize}
\item[181.] The first community only lasted from 1967 to 1977, having built on the consolidated trading bloc set up under the colonial administration. Political, economic, and ideological differences led to the demise of the institution in the late 1970s. Maria Nassali, \textit{The East African Community and the Struggle for Constitutionalism: Challenges and Prospects, in CONSTITUTIONALISM IN E. AFR.: PROGRESS, CHALLENGES AND PROSPECTS IN} 2000\textit{45–61 (2000).}
\end{itemize}
\end{footnotesize}
Treaty on East African Cooperation (the Treaty), and have such other original, appellate, human rights, and other jurisdiction as will be determined by the Council of Ministers at a suitable subsequent date. Although drafted in May 2005, the council has never adopted a protocol extending the court’s jurisdiction, primarily for reasons of sovereignty. Coupled with the fact that the court does not have competence to hear individual complaints of alleged violations of human rights law, this would appear to create a legal limbo.

In light of these limitations, the court was initially dismissed as inconsequential to the struggle for improved democratization in the region, but fairly ingeniously found a way around this structure and evolved to become a critical site for PIL actions in the region. First, in relation to preliminary challenges on *locus standi*, the court has consistently held that “individuals and legal persons have access to the court under Article 30 of the Treaty, which is a basic right to the regional justice mechanism enabling the peoples to ‘participate in protecting the integrity of the Treaty.’” Thus, in the case of *Katabazi v. Secretary General of the East African Community*, the EACJ was petitioned to determine the lawfulness of the detention of Ugandan prisoners. The court conceded that “jurisdiction with respect to human rights requires a determination of the Council and a conclusion of a protocol to

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187. *See generally* John Eudes Ruhangisa, Registrar, E. Afr. Ct. of Justice, *The East African Court of Justice: Ten Years of Operation (Achievements and Challenges)* (Nov. 1–2, 2011) (explaining how since its establishment in 2001, the East African Court of Justice has played an important role in establishing and ensuring that rule of law is upheld in Uganda).

188. *Id. at* 19.

that effect. Both of those steps have not been taken. It follows, therefore, that this Court may not adjudicate on disputes concerning violation of human rights per se.” Nevertheless, the court also determined that despite this lacuna, “it will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the reference includes allegation of human rights violation.” While the EACJ did not evaluate the claims within a human rights framework, it found that the respondent had violated the principle of the rule of law, and consequently contravened the Treaty.191 The net effect was the same—a round condemnation of the Ugandan government for patently illegal actions.

Encouraged by this decision, the EACJ has increasingly become an institution of recourse by civil society activists, who either have encountered roadblocks in the domestic arena, or believe that a regional approach to the issue will produce faster and/or more secure results.192 Moreover, unlike other regional commissions and courts which require the exhaustion of domestic remedies before they can be seized of a particular matter,193 the provisions on access to the EACJ do not mandate such a condition.194 although the court applies strict time limits.195 Thus, in making a finding in Rugumba’s case that the Government of Rwanda had illegally detained the applicant’s brother, the court declared the following:

[W]here issues in contest are criminal in nature and the action complained of is continuous (such as detention), it would be against the principles known to the rule of Law to dismiss the complaint on the basis of strict mathematical computation of

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191. Article 6(d) of the establishing treaty lists the fundamental principles which are intended to guide the institution as “good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights.” EAC Treaty, supra note 184, art. 6(d) (emphasis added).

192. Under Rule 66 of the court’s Rules of Procedure, a decision of the court must be rendered within sixty (60) days. See Ruhangisa, supra note 188, at 5–6.


time. We must also add that it is patently clear to us that the Applicant only filed this Reference when she realized that the Republic of Rwanda had failed or refused to provide any remedy for the alleged violation and she cannot now be penalized on the basis of the inaction of a Partner State.196

After Katabazi opened the door, the court has decided several public interest cases, rapped the Council of Ministers over the slow pace of adopting a protocol on the human rights jurisdiction of the court,197 and found violations of the good governance and rule of law provisions of the Treaty.198 In June 2014, the court ruled that the proposal by the Government of Tanzania to build an asphalt highway across the Serengeti National Park was unlawful.199 The court issued an injunction restraining further action on the matter, as it infringed multiple articles of the Treaty including Article 5(3)(c).200 In the words of the court:

This Reference raises issues that are today the subject of wide debate across the world, including: environmental protection, sustainable development, environmental rule of law and the role of the State in policy formulation in matters relating to the environment and natural resources. In addition, the role of the Court in balancing its interpretative jurisdiction against the needs of ensuring that Partner States are not unduly hindered in their developmental programs has come to the fore. All these issues must however be looked at from the one common thread running through the Reference viz., the need to protect the Serengeti ecosystem for the sake of future generations, and whether the road project has potential for inflicting irreparable damage to the environment. The damage will be irreversible and we have already ruled on that subject based on the evidence before us and no more.201

Such bold decisions have vindicated those activists who viewed
the court as an arena in which genuine justice could be sought and
realized. However, the possibility of a remodeling of the institu-
tion is not remote, especially because of the capricious nature of
the Heads of State Summit (comprising the presidents of the five
member states of the Community) that ultimately controls its pace,
range, and development. Unfortunately, there is precedent: in a
peak of disgust at an earlier decision of the court, the summit
responded by pushing through amendments to the treaty designed
to reduce the security of tenure for the judges of the court. Further
south, the Southern African Development Community (SADC) suspended its Court of Justice following decisions that it
felt over-stepped the bounds. Hence, the drying cement analogy
applied to the EACJ is most apt not only with respect to the grow-
ing jurisprudence of the institution, but also in relation to the pos-
sible threats to its very existence that increased activism can bring;
drying cement can easily be scraped away. Being a regional body
it rides a fine line between ensuring adherence to its founding
charter and promoting the principles thereon, and running
aground on the choppy waters of state sovereignty and political
interest.

V. CONFRONTING THE ELEPHANT IN THE ROOM:
THE QUESTION OF STRUCTURAL TRANSFORMATION AND ITS
MYRIAD CHALLENGES

The preceding analysis has given a very broad flavor of how the
phenomenon of PIL has evolved and developed over the last sev-
eral years in the three East African countries as well as the regional
level. In this respect, it is quite easy to agree with Karen Kong that
the effective development of public interest litigation requires a

No. 1 of 2006, at 22 (Mar. 30, 2006), in which the Court held Kenya’s election rules and
actual process to be the antithesis of an election, because the rules deemed the nine
elected in order to circumvent an express Treaty provision. See Ruhangisa, supra note 188,
at 13.
203. See Gathii, supra note 4, at 268–71; Ruhangisa, supra note 188, at 15–16. Neverthe-
less, this did not stop the court from observing that such measures offended the spirit and
and 3 Others, Ref. No. 1 of 2007, at 42 (EACJ).
204. See Merran Hulse, Silencing a Supranational Court: The Rise and Fall of the SADC
Tribunal, E-INT’L REL. (Oct. 25, 2012), http://www.e-ir.info/2012/10/25/silencing-a-supra-
robust civil society, skilled lawyers, an adept judiciary, and activist judges who are “willing to loosen traditional adversarial procedural rules of litigation and to allow non-governmental organizations and individuals to bring their controversial public interest issues to the courts”. All of these have been present to some extent in the countries surveyed in this study—but such a statement is still something of a cliché. The more critical question that arises from this analysis is: to what extent has the experience of PIL engendered or fostered structural transformation with respect to the lived experiences of the individuals, groups, and institutions targeted by this kind of litigation? Looking only at civil society, skilled lawyers, and the judiciary is a little like navel-gazing. Beyond the legal community, what impact is this kind of litigation engendering? We begin to offer some tentative answers to that question in the following section, starting with the state itself.

A. Law, Governance, and the State

As ex-colonies that have faced significant challenges in addressing the twin legacies of authoritarian colonial dominance and dysfunctional post-independence regimes of governance, it is understandable that the countries of East Africa have struggled in trying to find appropriately responsive legal systems. However, Schauer points out, as follows, that such a struggle is not an easy one:

[A]lthough the desire to start afresh is a characteristic mode of (winning) revolutionaries, starting legally afresh has rarely occurred. Or, to put it more precisely, even in those societies in which there have been revolutionary political and economic and social changes, the legal changes have often been quite a bit less revolutionary.

In the East African context, both the examples of Kenya and Uganda are illustrative of this point, given the dramatic histories that have accompanied their respective post-colonial development. With respect to the latter, in the aftermath of the 1986 removal of the military dictatorship, President Museveni promised a fundamental change, extending to threats to both overhaul the legal regime and the judicial apparatus that he found in place and

206. See Kong, supra note 2, at 328.
replace them with “popular justice.”208 Today, the notion of popular justice has more or less disappeared, while the judicial structures of operation have changed little, and in some instances even decayed.209 The radical surgeries in Kenya were also designed to transform not simply the degree of access to justice, but also its very character. However, in a recent speech reflecting on two years in office, Chief Justice Mutunga alluded to subsisting problems not only with the institution, but more importantly with the structural conditions under which it operates.210 Attempts to introduce cultural changes such as in the attire of the judges (no wigs), the language of the court (“Judge” replacing “My Lord”), and in stripping down many of the time-honored hierarchies within and outside of the institution have been only partially successful.211

Through the debate on a new constitution, Tanzania is finally addressing its complex legacy of Socialism and Ujamaa, but it is questionable whether the justice apparatus in the country will undergo significant change, if the draft constitution’s judiciary provisions are any indication. Again, Schauer’s conclusion is relevant here: “although such inclinations towards the wholesale replacement of legal institutions and legal systems plainly exist, it is almost as plain that the manifestations of those inclinations have not transpired.”212 In other words, the extent of legal institutional change in substantially transitioning societies has been less than the degree of political, economic, and social institutional transformation.

Against such a background, PIL has provided a different and potentially empowering route for affecting legal change in the state. As has been demonstrated from the limited sampling conducted in this study, there is no doubt that the three East African states are being compelled to do away with retrogressive legislation, to reduce the conditions of repression faced by historical minorities, increase their respect for the environment, and to progressively ensure more equitable conditions in gender relations.

209. According to Frederick Jjuuko, this reflects the trajectory of Uganda since independence: it started with the ‘Age of Innocence,’ moved to the ‘Age of Hope,’ and is currently mired in an ‘Age of Institutional Decay.’ See F.W. Jjuuko, Prof., Makerere Univ., Public Interest Litigation Over the Years in Uganda 5 (Mar. 27, 2014).
211. In this respect, the Mutunga court drew inspiration from the South African experiment. See DRUCILLA CORNELL, KARIN VAN MARLE, & ALBIE SACHS, ALBIE SACHS AND TRANSFORMATION IN SOUTH AFRICA xi–xii (2014).
yet all three governments still exhibit a high degree of executive impunity, they are not shy to shift goal-posts after a court decision has been rendered against them, they often fail to enforce judicial pronouncements that they do not like, and the looming scepter of (negative) constitutional amendments—in both Kenya and Uganda—all point to legislative and executive chaffing at the robust assertion of judicial power. In the case of the latter, the reaction of the state can border on the homicidal.

In sum, old habits die hard, starting with the casual nonchalance often exhibited by all three governments towards the issues that form the subject matter of PIL cases. This attitude is evident from the initial responses, to delaying the court process as it moves along, to failing to act appropriately on court orders. Access to information (especially that in the possession of the state) is often difficult to secure, even where there are laws in place to ensure that the public should be enabled to access needed information. There is a particular problem in the enforcement of PIL judgments, especially when they are of a declaratory nature; what happens after the declaration of unconstitutionality has been made? Even when declared unconstitutional, legislation is not reviewed to conform with judgments passed, or in worst-case scenarios—such as with the Public Order and Management Act in Uganda or the Eleventh Amendment in Tanzania—the state simply reintroduces the impugned legislation. In many instances, court declarations are not followed through with law reform or amendment, which means that the status quo for many actors (police, prisons officers, local government officials, etc.) does not change and they continue to persist in the unconstitutional actions that have been outlawed. In the case of Uganda, the situation has been described as one of institutional decay.214

213. In the case of Kenya, see Yash Pal Gai, Battering of the Constitution, PAMBAZUKA News (June 12, 2014), http://www.pamazuka.net/en/category.php/comment/92096; see also Muthoni Wanyeki, Katiba is Four; Should we Rejoice or Mourn? E. AFR. (Aug. 30, 2014), http://www.thecastafarian.co.ke/OpEd/comment/Constitution-is-four-should-we-rejoice-or-mourn--/434750/2435302/-/14kln62e/-/index.html (lamenting that “[e]ach little clawback seems innocuous on its own. But all the little clawbacks add up. Our Katiba is being chipped away at. Soon we will have nothing left except its form, depleted of any substance.”).

214. See F. W. Jjuuko, supra note 209, at 5. The fact that PIL actions also lead to intra-State, or executive vs. legislative tensions, certainly indicates a problem for the institutions in Uganda. In fact, tensions have grown to such an extent that the latter has begun to push for independent legal representation, arguing that the attorney general invariably represented the latter as opposed to the former, while the interests of the two can diverge. In a recent interview—citing the example of Kenya, Malawi, and Zimbabwe—the speaker of Uganda’s parliament expressed reservations about both the executive appointing a clerk
Despite all the above, there is a need to look beyond just the case or the implementation of the decisions of the courts. As Siri Gloppen states, in the following, we need to consider:

[The] broader impact of the litigation process on social policy, directly and through influencing public discourses on social rights and the development of jurisprudence nationally and internationally. The systemic impact of public interest litigation is not necessarily directly related to its success in court, the litigation process may also indirectly impact on public discourse and policy.\(^{215}\)

Viewed from this perspective, there is some hope that the state in East Africa will undergo transformation, gradual though this may be.

B. *Transformative Justice and the Functioning of the Courts of Law*

The impact of PIL on the courts in countries like South Africa and India has been well documented; in the case of East Africa, the assessment is just beginning and the reflections here can therefore only be regarded as preliminary. While part of the jury may still be out for deliberation, a number of broad observations can nevertheless be made.

The first is that PIL has definitely impacted both the corporate character of the judicial institutions in each country, as well as on individual judges. Certainly, the movement on technicalities across the courts in the region is reflective of courts battling with delivering justice, as opposed to simply concentrating on the stale rendition of the black letter of the law.\(^{216}\) In some of the individual judgments, one can see those members of the bench who are impatient with the existing status quo and urge change in every sentence of their opinions. Others are content to go with the flow, and there are also the consistent resisters, steeped in the jurisprudence of their law school learning or so enamored of British custom and common law traditions as to be incapable of substituting it to parliament, and the attorney general handling parliament’s legal matters. See Moses Walubiri, *Speaker Kadaga: I Can Stand for Presidency*, New Vision (Aug. 29, 2014), http://www.newvision.co.ug/news/659214-speaker-kadaga-i-can-stand-for-presidency.html.


216. At the meeting in Tanzania, judges were of one voice regarding the need to discard technicalities, including the stringent rules on *locus standi*: “Let us go the Uganda way!” one of them declared in a meeting held to discuss the state of PIL in Tanzania. See Barrett, supra note 87.
with anything else. There are also those who are simply lacking in courage, competence, or simple care.

Needless to say, there is still not a full judicial appreciation of the relevance and nature of PIL, even among those members of the Bench who are intellectually sound and willing to learn. Orwa claims that even with respect to Kenya’s new bench, which was quite brutally sieved through the mechanism of a public scrutiny of their credentials and integrity and charged with the oversight of a constitution replete with justiciable economic, social, and cultural rights, “a culture of cynicism, conservatism and deference to the decisions of the executive organs of government still persists.217 Hence, in the jurisprudence we see the re-emergence of doctrines that would appear to have been long dead and buried,218 the award of costs against petitioners in PIL cases when none should have been made, and a degree of impatience and exasperation against the persistent PIL litigators. There are even some indications of bias or moral turpitude.219

But PIL cases also reflect certain distinctions from other types of litigation, and it is important not to lose sight of these. First, such cases generally require far more time than other cases, and can thus suffer from flailing support from the litigants (petitioner fatigue). Some cases are also confronted by what can only be described as judicial stalling over contentious matters,220 and delay in rendering judgments, as well as an implicit prioritization of certain cases over others. In Uganda, despite a large backlog of undecided cases filed years ago, highly sensitive political cases seem able to leapfrog the queue.221 Kijo-Bisimba pointed out that Tanzanian Prime Minister Pinda’s case appeared to have been

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219. As stated by Kenyan Chief Justice Mutunga: “Even after going through a constitutionally mandated vetting process, which has taken longer than any of us expected, we are still confronted by allegations of corruption.” See Mutunga, supra note 210, at 2.


A Bird’s Eye View of Public Interest Litigation

adjudicated on a fast track and compared it to the case brought by Mwanakahisi Publishers challenging the draconian Newspaper Act of 1976, which has taken nearly five years. This review of some of the PIL cases that have been decided demonstrate that they run the danger of being hijacked and ultimately distorted; sometimes the hijackers can be the courts themselves, which through a misreading of the actual intent of the litigation, may give a judgment that only advances the struggle halfway or even sets it back. While such misreading may be accidental, it can also be retraced to the absence of a clear ideological framework within which the courts in East Africa have situated themselves. Indeed, only the new Kenyan judiciary has explicitly articulated a concrete description of its corporate ideological position—that of transformative constitutionalism à la the South African model—although there are certainly still differences over what exactly that means.

With the exception of cases concerning the environment—which lie in a special category of rights—litigation over economic, social, and cultural rights (ESCRs) is still very new, with Kenya taking the lead in this regard. However, such litigation is both problematic and unclear in Uganda and Tanzania. Although ESCRs cases are on the increase, there appears to be a divorce from their connection to civil and political rights. In other words, there is no reflection on the interconnectedness, interdependence, and mutuality of all categories of rights, and like their civil and political rights counterparts, even ESCRs are essentially concerned with issues of good governance and sound political order. Failure to see these links was apparent in the Kenyan case of Kabui Mwai. The court started off by making the valid observation that “[t]he realisation of socio-economic rights means the realization of the conditions of the poor and less-advantaged and the beginning of a

222. See Kijo-Bisimba, supra note 116, at 6.
223. See, e.g., Mifumi, supra note 85.
225. See CEHURD v. Att’y Gen., Const. Petition No. 16 of 2011 (Const. Ct. of Uganda at Kampala, June 5, 2012) (Uganda) (finding that non provision of essential maternal health commodities in government health facilities is a political question); Dimanche v. Makerere Univ., Const. Petition No. 1 of 2003 (Const. Ct. of Uganda, Kampala, Sept. 24, 2003) (finding that Makerere’s scheduling of classes and examinations on days of religious observance is not a substantial unconstitutional burden and dismissed the petition).
generation that is free from socio-economic need.”226 But then the court went on to state as follows:

One of the obstacles to the realisation of this objective however is limited resources on the part of the Government. The available resources are not adequate to facilitate the immediate provision of socio-economic goods and services to everyone on demand as individual rights. There has to be a holistic approach to providing socio-economic goods and services that focus beyond the individual. Socio-economic rights are by their very nature ideologically loaded. The realization of these rights involves the making of ideological challenges which, among others, impact on the nature of the country’s economic system. This is because these rights engender positive obligations and have budgetary implications which require making political choices. In our view, a public body should be given appropriate leeway in determining the best way of meeting its constitutional obligations.227

Failing to appreciate the link between the two categories of rights as the Mwai court evidently did is basically a failure to see the “forest for the trees,” and ultimately will stunt the growth of this area of jurisprudence.228 In a sense, it is a classic abdication of a court’s duty to ensure that ESCRs are enforced in the manner envisaged under the new constitution.

Aside from issues internal to the judicial institution itself, PIL dramatically brings into bold relief the inherent separation-of-powers tensions when grafted onto a context calling for an activist bench, as the new East African constitutions have done; how far, exactly, can judges go?229 At one extreme, is the Mutunga doc-

226. Kabui Mwai v. Kenya Nat’l Examination Council, (2011) K.L.R.6 (H.C.K.) (Kenya). According to Arwa, the constitutional court appears to be making three fundamental pronouncements on the process of developing this kind of jurisprudence: (1) don’t focus on individual rights but on the impact of a decision for all citizens; (2) available resources are inadequate to facilitate the immediate provision of socio-economic goods and services; and (3) the adjudication of socio-economic conflicts should more appropriately be left to the executive and the legislature. See Arwa, supra note 145, at 428.


228. As Frans Viljoen pointed out regarding the Endorois case, the African Commission “found a violation of this right [to development], highlighting the added benefit of the right to development in serving as a bridge between socio-economic and ‘civil and political’ rights. In this case, a violation of the right to development was found in relation to both the substantive outcome of a development project undertaken by the government of Kenya, and a procedural violation in respect of a lack of consultation with (or obtaining informed consent from) the affected community prior to the implementation of the development programme.” Frans Viljoen, From a Cat into a Lion? An Overview of the Progress and Challenges of the African Human Rights System at the African Commission’s 25 Year Mark, 17 L. DEMOCRACY & DEV. 298, 304 (2013).

trine, which basically stipulates no (or minimal) limits to the exercise of judicial power. However, in the Kenyan presidential election petition, the Supreme Court *en banc* was more cautious. When called upon to exercise judicial restraint in considering whether or not to nullify the process, they responded with the following:

> Without as yet deciding the main question in the contest, we express the opinion that, in the special circumstances of this case, an insightful judicial approach is essential. There may be an unlimited number of ways in which such an approach is to guide the Court. But the fundamental one, in our opinion, is fidelity to the terms of the Constitution, and of such other law as objectively reflects the intent and purpose of the Constitution.

Fear of clashing with the executive is an underlying and ever-present concern in many PIL cases. This explains the re-emergence of the political question doctrine in the *CEHURD* case in Uganda reviewed above. Despite the surprise expressed by activists and some scholars over its resurfacing in a maternal health care case, the doctrine has a long pedigree reaching back to *ex parte Matovu*, but later reiterated by Justice Kanyeihamba in *Tinyefuza*, as follows:

> [T]he rule appears to be that Courts have no jurisdiction over matters which are within the Constitution and legal powers of the legislature or the executive. Even in cases, where Courts feel obliged to intervene and review legislative measures of the legislature or administrative decisions of the executive when challenged on the grounds that the rights or freedoms of individuals are clearly infringed or threatened, they do so sparingly and with the greatest of reluctance.

Although largely accepted and repeated *ad nauseum* by several courts throughout East Africa, this reading of the position is sim-

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231. *Id.*


234. *See, e.g.*, the constitutional court decision in Brigadier Henry Tumukunde v. Att’y Gen. & Electoral Comm’n, Const. Pet. No. 6 of 2005, at XX (Const. Ct. of Uganda at Kampala, July 28, 2010) (Uganda), where the majority of the bench stated as follows: *even when constitutional rights are asserted, some questions are too political for the courts to give legal answers. This ‘political question’ doctrine is another way of saying that over certain issues, the Constitution commits complete discretion to the other branches. No matter how justiciable the claim seems—the parties have been injured, they have standing, the cause is ripe for appeal, it will not*
ply wrong. This is the “ghost” of *Ex Parte Matovu* described in previous publications, and it represents the dark side to that famous case—the side which sanctioned the extra-legal usurpation of power.\(^{235}\) For example, in *Miria Matembe & 3 Others v. AG*, the constitutional court declined to intervene during enactment of a bill due to concerns it would have been premature. The one dissenting voice—that of Justice Alice Mpagi-Bahegeine—had an illuminating take on the issue, arguing that there could conceivably be instances where courts could intervene even at such an early stage.\(^{236}\) Citing Kanyeihamba but offering a different take on the issue, the learned judge stated the following:

> In this regard, therefore, I would have no hesitation in rejecting his submission, that this court is intent on prohibiting Parliament from executing its constitutional functions. It is well established that the constitutional platform is to be shared between the three institutional organs of Government—Parliament, the Executive and the Judiciary in that order though each has its own field of operation and exercises its powers independently. This court is acutely aware that it should refrain from trespassing into areas not demarcated for it by the Constitution and

be moot before the decision is rendered, the claim is clearly based on a constitutional provision, the courts will dismiss it because they are the wrong place to take the grievance.


\(^{235}\) *J. Oloka-Onyango, Expunging the Ghost of ex parte Matovu: Challenges Facing the Ugandan Judiciary in the 1995 Constitution, Makerere L. Soc’y* 141, 142 (1996). The ghost was not confined to Uganda. Former Kenyan Chief Justice Sir Charles Newbold stated as follows:

> The courts derive a considerable amount of authority, and perhaps . . . the acceptance of their authority from their independence of the executive, from their disassociation from matters political. In a democracy . . . the determination of matters political . . . rests ultimately with the will of the people through the ballot box. For that purpose the people elect the executive and the legislature, and it is on these two branches . . . that the primary responsibility rests. The third branch . . . the Judiciary – is not elected and should not seek to interfere in a sphere which is outside the true function of the judges.


\(^{236}\) Other jurisdictions have dealt with the same issue. For example, the South African case of *Doctors for Life* 2006 (6) SA 416 (CC) at ¶¶ 67, 69 (S. Afr.) asked whether it was competent for the constitutional court to issue declaratory relief in respect of parliamentary proceedings before parliament had concluded its deliberations on a bill. The court gave a fairly circumscribed answer.
should only intervene in the clearest of cases calling for intervention to determine the constitutionality or legality of an action, where agents of Government have exceeded their powers or acted unjustly.237

The dissent emphasized the crucial role of the judiciary in protecting the constitution under a Constitutional Republican system. Ultimately, this latter position is a more fulsome reading of the role of courts in tackling executive excess, legislative caprice, and community intemperance. Indeed, this is precisely what all three countries’ exercises in “post-liberation” reform and amendment were designed to do. Judicial intervention cannot be reserved for clear infringements or concrete threats to rights and freedoms, but must apply more broadly to situations exhibiting an excessive exercise of power.

Of course, comparisons may be made to jurisdictions such as India and South Africa, which have made great strides in PIL litigation. On the other hand, India has never had a coup d’etat or paramilitary forces raid its high court premises, nor has a chief justice been abducted in broad daylight from his chambers and murdered in cold blood. The Indian courts have enjoyed much more independence than their Kenyan counterparts in the period of President Moi, or even in socialist Nyerere’s Tanzania. Similarly, South African courts are free to operate as they currently do because of the end of apartheid, and the ANC government is loath to be associated with such an abject historical disaster. Although these are indeed valid concerns, they exemplify why East African courts must be more stringent when dealing with executive and legislative excess, in order to underscore the point that such negative reactions will never again be countenanced. Until the courts adopt this posture, then in the midst of arms the law in East Africa will truly fall silent.238

C. Public Interest Lawyers and Spirited Litigants

Although a great deal of operational capacity has been created in PIL across East Africa, there is still a surprising paucity of specialized PIL lawyers in all three countries, coupled with a lack of tech-


238. See generally Asma Jilani v. Gov’t of Punjab, (1972) 24 PLD (SC) 139 (Pak.) (declaring that executives cannot use martial law to violate constitutional norms and values).
technical expertise even among their top ranks. Many have never done an academic or practical course in PIL, but have instead just learnt on the job. Not many law schools in the region’s several universities teach the subject, with the exception of Makerere, which set up a new center exclusively devoted to the area only two years ago. Consequently, the area is monopolized by a handful of lawyers. This has created a “prima donna” or “diva” syndrome in this field of litigation.

Paradoxically, as PIL grows in scope and prominence, it will without doubt attract more actors. Of course, this means that lawyers and NGO careerists seeking self-aggrandizement may begin to bring such cases for selfish reasons or simply to make a quick buck. As Upendra Baxi states, for many lawyers, the ideological questions are a distant second to the more material benefits that may come from a case: “[e]minent ‘public interest’ lawyers see no role-conflict in appearing one day vigourously arguing for transparency in governance and the next day in indulging in spectacular forensic displays aimed at the protection of the rights of people in high places charged with corruption!” PIL lawyers in East Africa are often very busy, very complicated, very expensive, and/or very elusive. A few of them have filed petitions to appropriate PIL for corporate gain, political advantage, or personal benefit. Frivolous and vexatious suits—some of them masquerading as PIL, but essentially feeding egos and retrogressive agendas—threaten to stifle the innovation and enthusiasm of this most powerful instrument of legal change. For example, the Constitutional Court of Uganda dismissed the petition in *Jude Mbabaali v. AG* as being a disguised election matter, which should follow the usual procedure for the resolution of such disputes rather than being decided by the judiciary. In the words of Justice Eldad Mwangusya, as follows, the case was:

[A]n Electoral Petition disguised as a Constitutional Petition . . . . This Court should not be turned into a Court for hearing cases where it is merely required to make findings of fact and legal positions that are obvious and straightforward as opposed to those that require constitutional interpretation. This Court should not condone the practice of litigants jumping from courts with jurisdiction to try matters within their jurisdiction to


seek reliefs in the Constitutional Court whose jurisdiction . . . is limited.241

A growing area of disguised PIL cases has emerged from public officials charged with criminal offences related to administrative vice, abuse of office, and corruption. The ploy is to claim that some aspect of the prosecution—or the totality of the proceedings—raises matters of a constitutional nature, thereby necessitating interpretation and delaying or even derailing the criminal trial.

Finally, there is the disturbing issue of lawyer’s costs or fees in PIL cases. The traditional view is that they follow the cause; in other words, the winning party will receive litigation costs. However, most courts decline to award any costs in PIL. Some commentators have argued that this acts as a disincentive to bringing such cases, since they often require significant resources—both directly in order to hire skilled lawyers, and indirectly to cover the required research and affiliated outlays. The concern is that as the profession grows, few lawyers will remain willing to take on what are typically pro bono cases with no monetary reward. That position is debatable.

However, two disturbing developments have recently emerged with respect to costs in public interest cases. The first occurs when the court awards costs in favor of petitioner’s counsel, but the award is so unreasonably high as to raise serious questions regarding the court’s integrity—not to mention the motives of the petitioner and counsel in bringing the case. For example, in an important case seeking an interpretation from the constitutional court about parliamentary powers to pass a vote of censure against the prime minister and cabinet ministers, the petitioner was awarded thirteen billion Uganda shillings. At today’s rates that is the equivalent of five million U.S. dollars!242

To make matters worse, that award has been used as a benchmark for more recent cases. The lawyers in the recent petition on the Anti-Homosexuality Act actually argued that, given the extensive research involved and the large number of petitioners in the case, they anticipated an award equal to or greater than that cited


above.\textsuperscript{243} As aptly stated by Justice A.S. Anand of India, “[c]are has to be taken to see that PIL essentially remains public interest litigation and is not allowed to degenerate into becoming political interest litigation or private inquisitiveness litigation.”\textsuperscript{244} In such a context, both subversive and unusual attempts to use the law to achieve social justice goals need to be welcomed and encouraged. An example is found in the case of Uganda’s “Barefoot “Lawyers,\textsuperscript{245} a grassroots organization which gives legal aid and assistance to indigent clients utilizing the ubiquitous mobile phone technology and social media such as Facebook and Skype. Perhaps this model could be extended to the arena of PIL.

The second disturbing issue occurs when an award of costs is made against the PIL petitioners, who are usually human rights groups. For example, a Tanzanian court ordered costs against the Legal and Human Rights Centre and two others in the Dowans case.\textsuperscript{246} Costs were awarded against the petitioners as if to punish them, even though the case was dismissed on a preliminary objection and never reached consideration of the merits. Of course, a denial of costs can be made in order to punish counsel for conduct considered unprofessional.\textsuperscript{247} Overall, much progress remains to be achieved with respect to improving both the conditions within which PIL lawyers operate, and in terms of establishing and promoting best practices in the area.

D. The Broader Community

Ultimately, PIL is intended to transform the lives of ordinary people on the ground, and this must invariably include ordinary


\textsuperscript{246} See Kijo-Bisimba, supra note 116, at 6.

\textsuperscript{247} For example, in the case of Hon. Gerald Kafureeka Karuhanga v. Att’y Gen., Const. Pet. No. 0039 of 2013, [2014] UGCC, available at http://www.ulii.org/ug/judgment/constitutional-court/2014/13), Justice Remmy Kasule made the following observation: “Lastly, on the issue of costs, I have already expressed my disapproval of the conduct of the Petitioner and the team of his lawyers who walked away from Court, just because they did not agree with the decision of the Court to proceed with the hearing of the petition. I, by reason thereof, refuse to award any costs to the Petitioner and his team of lawyers.”
citizens and non-citizens such as refugees, immigrants, and undocumented workers. Community impact and empowerment is the ultimate goal—especially with respect to public awareness—and with a particular focus on the rights of women, indigenous persons, sexual minorities, and persons with disabilities. These are the groups and individuals who primarily face the negative effects of structural violence, endemic discrimination, and social marginalization. Although speaking specifically about the CEHURD decision, Dennison points out, as follows, that there could be an adverse consequence to over-liberalizing the arena of public interest litigation:

Given the actual and proxy presence of comparatively well-resourced, non-Ugandan actors with ideological objectives in Uganda, the potential social and political impact of public interest litigation is substantial. A progressively encouraging judicial result in CEHURD could incite a flood of public interest litigation initiatives reflecting the ideologies of whoever funds the litigation.248

PIL runs the danger of being caught up by what are deemed the “sexy” causes or cases, driven by a particular NGO’s output for a donor grant cycle. So-called development partners too—for a variety of reasons ranging from strategic interest to genuine concern—may be willing to fund PIL actions, but only on certain terms and conditions. Ultimately, this can lead to what has been described as the “NGO-ization” or the depoliticization of social struggles. Such interventions will undermine the autonomy of the petitioner(s), and more importantly, of the particular human rights struggle. In other words, external agendas may be foisted onto struggles which need to be local and indigenous. Needless to say, PIL cannot be insular and introverted, and will often have to find recourse in Universalist notions of equality, non-discrimination, and equal protection. This will allow it to secure full protection for vulnerable and threatened minorities, despite often-vociferous opposition from the dominant actors in society, who are quick to draw the cultural-relativist or religious card. Appealing to the universal will therefore not always be free from controversy, which leads to this Article’s final observation on the structural and ideological aspects of pursuing PIL: the question of social reaction.

248. Dennison, supra note 218, at 16.
E. Backlash and Associated Reactions

While many PIL cases are welcomed and supported by the public—given that the public ultimately benefits—there are times when the reaction is hostile. Such reactions become particularly problematic when the state and society speak from the same page on an issue, but in a manner that diminishes, rather than expands, the parameters of social and economic justice. This is the case with controversial and/or populist social issues, especially those involving sexuality—such as the rights of sex workers, the question of abortion, and how to deal with pornography. The biggest contestation occurs over the rights of minorities, especially social and sexual minorities, but also manifests in broader questions relating to culture and belief. Cultural relativism thus raises its head in bold relief in debates over the appropriate subjects of PIL. Thus, in a recent Ugandan case in which a number of LGBTI activists challenged the action of a minister who arbitrarily closed their workshop by claiming they were engaged in the promotion of homosexuality, the court unabashedly found, as follows, that the Minister had done so in the “public interest”:

My reading of the above provisions—i.e. Article 43 of the Constitution defining the term ‘public interest’—persuades me that it recognizes that the exercise of individual rights can be validly restricted in the interest of the wider public as long as the restriction does not amount to political persecution and is justifiable, acceptable in a democratic society. Whereas the applicants were exercising their rights of expression, association, assembly etc., in so doing, they were promoting prohibited acts (homosexuality) which amounted to action prejudicial to public interest. Promotion of morals is widely recognized as a legitimate exercise of public interest which can justify restrictions.249

Here we see a number of things at play, not least of which is the judge’s clear derision for a practice with which he disagreed. The above judgment was obviously influenced by the furor over the Anti-Homosexuality Act, which had just been signed into law a few months prior. Interestingly, the facts on which the case turned took place in February 2012—well before the Act came into force—although the debate over the bill had been raging for several years. Secondly, the penal code provision on “acts against the order of nature,” which was the focal point of the judge’s claim that the applicants were promoting homosexuality, outlaws the

physical act but not its so-called promotion. Regardless of the judge’s obviously negative view on homosexuality, his decision clearly returns us to the colonial and early post-colonial reading of the notion of public interest, as exemplified in the following:

In my ruling I have endeavored to come to conclusions that while the applicants enjoyed the rights they cited, they had an obligation to exercise them in accordance with the law. I have also concluded that in exercising their rights they participated in promoting homosexual practices which are offences against morality. This perpetuation of illegality was unlawful and prejudicial to public interest. The limitation on the applicants’ rights was thus effected in the public interest specifically to protect moral values. The limitation fitted well within the scope of valid restrictions under Article 43 of the Constitution. Since the applicants did not on a balance of probabilities prove any unlawful infringement of their rights, they are not entitled to any compensation. They cannot benefit from an illegality (emphasis added).250

The judge’s views find wide support within the broader Ugandan public. In a recent newspaper article written about those who challenged the Anti-homosexuality Act,251 one journalist stated “[f]rankly . . . that self-styled group of so-called prominent Ugandans can go hang. Most of us know that they are just publicity seeking, self-indulgent and egoistic individuals who don’t give a toss about our culture and dignity.” In recent elections to the Uganda Law Society, the Christian Lawyers’ fraternity actively mobilized against their colleagues involved in the petition against the Anti-Homosexuality Act.252 Quite clearly, such actions represent only the tip of a much more protracted struggle to come.

VI. CONCLUSION: A FEW POINTERS FOR THE FUTURE

The basic conclusion of this study is that public interest litigation is likely to become all the more relevant in the future of the three East African countries surveyed, and at the EACJ, for several reasons.

First, the residue of inherited problematic laws dating back to the colonial era (many, but not all, of which are penal) will require legal challenges. Secondly, PIL will increase in importance because of growing government impunity—a marked trend in all three East African countries, as well as on the social (inter-community) front. Third, there is a need to secure accountability for

250. Id.
actions by state actors and by proxies within the wider community in order to protect the vulnerable. Finally, PIL will increase because there is a dire need to develop non-adversarial constitutional litigation.  

From a broader perspective, PIL has the potential to become a site of considerable contestation with various effects. For example, it is likely to elevate courts beyond the role of mere arbitrator, effectively descending into the arena of policy formulation and legislation—what has been described as legislators by stealth or subterfuge. In other words, there is a fear of judges really making law. Thus, serious consideration must be given to the suitability of courts as arenas of social change, and the possible depoliticization of social struggles which this may entail. Another effect is related to the continued threat of a backlash against judicial activism, manifest in Kenya in several standoffs between the judiciary and parliament since the enactment of the 2010 constitution. This was also seen earlier in Uganda with the violent reactions of the executive and more recently the public reaction to the Ugandan Constitutional Court decision in the challenge to the Anti-Homosexuality Act. The recent debacle over the rights of women in polygynous marriages that took place in Kenya demonstrates that the ensuing battle over social justice for disadvantaged minorities is bound to be a long and protracted one. 

Negotiation of the separation of powers argument is bound to become more complex as the passing of unconstitutional legislation will invite even more judicial intervention, as legislators get more desperate and frustrated at the actions of the courts. PIL may be understood as presenting not just a challenge to the state, but as an opportunity for constitutional dialogue within the arms of government so that the executive or legislature are empowered to respond to decisions that may not reflect the values of the ordinary populace.


The battlefronts are also bound to change; new forms of media and politics will entail a different approach to achieving social change, which supplements the achievements made through PIL in the courts. There will hence be a need to move to a new level of innovation in terms of seeking the full enforcement of judgments, in order to tackle the inordinately high levels of impunity that appear manifest. Very few of the jurisdictions have regular law reviews and updates, reflecting judicial pronouncements that have altered the status quo.

The final question is how useful is the constitution (and especially its bill of rights) as the focal point in the struggle for fundamental and enduring social and political change in ex-colonial African countries? This is obviously a very large question that cannot be answered in a study of this size, but points to the possibility that East Africa’s human rights advocates might have been a little naive to believe that constitutional reform would be the panacea to end all the problems of authoritarian rule and social inequality. While in East Africa, we have marked some distance from the position described by the late Professor Okoth Ogendo of having “constitutions without constitutionalism,” it is quite clear that we may have constitutions with only minimum constitutionalism. The denominator, in other words, is not very high. Public interest litigation needs to be deployed in order for us to move a notch higher and to finally secure both adherence to the letter of the constitution, as well as a full commitment to its spirit.
