Decolonising Jurisprudence: Public Interest Standing in New Constitutional Orders

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This chapter examines the liberalisation of public interest standing in post-colonial common law settings. The value of public interest standing is well known and its potential instrumental effects are of particular import in countries with extensive socio-economic problems. This piece considers a further justification for instituting public interest standing in developing countries: its role in the proliferation of 'indigenous' constitutional jurisprudence that assists in the maturation and diffusion of a new constitutional order. The argument is in two parts. Part I identifies unifying patterns of relaxation in three East African countries (Kenya, Tanzania, and Uganda). It links the liberalisation of standing rules in these countries to earlier developments in India, where widening access to the courts was deemed necessary 'having regard to the peculiar socio-economic conditions prevailing in the country where there is considerable poverty, illiteracy and ignorance obstructing and impeding accessibility to the judicial process'.[1] This part will demonstrate how the three countries under examination have borrowed this sociological motivation for such a trend, indicating that there is a coherence of approach amongst post-colonial common law states that face similar socio-economic challenges.

Part II examines the results of public interest litigation generated by the liberalisation of standing rules by focusing more squarely on the impact of this trajectory in Kenya. Kenya's recent journey to constitutional reform had several false starts.[2] The protracted process began under the second President of independent Kenya, Daniel Arap Moi. In the 1990s there was a re-introduction of multi-party politics, a resurgence of civil society that had long been dormant, and the creation of a legislative roadmap for constitutional reform.[3] Concurrently, both the courts and legislature began incrementally to broaden standing, capturing the interests of under- or unrepresented persons, and even in some cases creating new categories of interests, thereby articulating new avenues of rights protection. Therefore, while patterns of liberalisation in certain post-colonial settings have aligned, increasing access to courts gives rise to diverse, and jurisdiction-specific results. This argument is further exhibited by a tour of the new constitutional dispensation of Kenya. The 2010 Constitution of Kenya, a document enriched with a new Bill of Rights and permeated with international law standards, constitutionally cements broad rules on standing. The chapter argues that this specifically encourages litigation, providing fertile ground for the development of constitutional rights jurisprudence that is

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[1] *People's Union for Democratic Rights and Others v Union of India and Others* AIR 1982 1473, 1478.

[2] Since gaining independence from Britain in December 1963, the Republic of Kenya has had three draft and three realised constitutions: Constitution of the Republic of Kenya 1963 ('Independence Constitution'); Constitution of the Republic of Kenya (as amended by the Constitution of Kenya Act 1969, No 5 of 1969); Draft Constitution of Kenya 2004 ('Bomas Draft'); Proposed Constitution of Kenya 2005 ('Wako Draft'); Proposed Constitution of Kenya 2010; and Constitution of Kenya 2010.

[3] GR Murunga and SW Nasong'o (eds), *Kenya: The Struggle for Democracy* (London, Zed Books 2007); D Throup and C Hornsby, *Multi-Party Politics in Kenya: The Kenyatta and Moi States and the Triumph of the System in the 1992 Election* (Oxford, James Currey, 1998); The Constitution of Kenya Review Act 1997, No 13 of 1997.

'robust, indigenous, patriotic and progressive'[4] which in turn allows the new constitutional order to be diffused and entrenched. There is, then, observable unity in the liberalisation of standing rules in post-colonial East African countries. This, however, ultimately fosters the development and entrenchment of jurisdiction-specific systems of constitutional law, as evidenced by the distillation of the new Kenyan Constitution.

I. PUBLIC INTEREST STANDING IN THE POST-COLONIAL COMMON LAW WORLD

The focus of this chapter is the expansion of the rule of *locus standi* to include public interest standing. A strict conception of public interest litigation is that which is solely based on standing 'in the public interest', meaning that the litigant bringing the action has no direct connection to the alleged interest that has been infringed. Cases to this effect will be analysed in this paper. However, to enrich the argument, other cases that are not based exclusively in the public interest will also be analysed, as these nonetheless add to the corpus of 'public interest law' that is encouraged by relaxed rules on standing. These include third party standing actions and collective actions that are instituted to promote social change, and to represent the under-represented and minorities. Such proceedings are often advanced with the aid of public interest lawyers, such as Civil Society Organisations (CSOs), activists, or Non-Governmental Organisations (NGOs), and the actions are 'directed at altering some aspect of the social, economic, and political status quo'.[5] The Indian Supreme Court has stated the difference between traditional adjudication and public interest litigation as follows:

> In a public interest litigation, unlike traditional dispute resolution mechanisms, there is no determination or adjudication of individual rights. While in the ordinary conventional adjudications the party structure is merely bi-polar … and the remedy is essentially linked to and limited by the logic of the array of the parties, in a public interest action the proceedings cut across and transcend these traditional forms and inhibitions. The compulsions for the judicial innovation of the technique of a public interest action is the constitutional promise of a social and economic transformation to usher in an egalitarian social order and a welfare State. Effective solutions to the problems peculiar to this transformation are not available in the traditional judicial system. The proceedings in a public interest litigation are, therefore, intended to vindicate and effectuate the public interest by prevention of violation of the rights, constitutional or statutory, of sizeable segments of society, which owing to poverty, ignorance, social and economic disadvantages cannot themselves assert—and quite often are not even aware of—those rights. The technique of public interest litigation serves to provide an effective remedy to enforce these group-rights and interests.[6]

The value of public interest litigation, then, is to protect the rights and interests of many, and the non-traditional nature of the dispute affords courts the power to remedy more than a single wrong, advancing broader societal change through their judgments. This expansion of standing in order to capture the interests of the under- or unrepresented is by no means a new phenomenon. Neither is it particular to post-colonial countries.[7] This part will navigate some of the developments in standing in the common law world, before underlining the notable

[4] Supreme Court of Kenya, *Judiciary Transformation Framework 2012–2016*, 11 www.judiciary.go.ke/portal/assets/downloads/reports/Judiciary's%20Tranformation%20Framework-fv.pdf.
[5] A Sarat and S Scheingold, 'Cause Lawyering and the Reproduction of Professional Authority: An Introduction' in A Sarat and S Scheingold (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities* (Oxford, OUP, 1998) 3, 4. See also Note, 'The New Public Interest Lawyers' (1970) 79 *Yale Law Journal* 1069.
[6] *Sheela Barse v Union of India and Others* 1988 AIR 2211.
[7] K Groenendijk, 'Litigation, Politics and Publicity: Public Interest Law or How to Share the Burden of Change' (1985) 14 *Anglo American Law Review* 337. Groenendijk outlines the relaxation of rules on standing in the Netherlands.

departure of India from the trend, and underlining the parallels in the development of the rule in three East African states.

A. India and the Judicial Development of Public Interest Standing

Traditionally, standing requires a party to demonstrate sufficient connection to the harm for which they are instituting proceedings. In English law, the requirement that applicants for judicial review must prove 'sufficient interest'[8] in a matter in order to have standing has been interpreted somewhat inconsistently,[9] though over the decades the courts' approach to it has generally been increasingly liberal.[10] To a limited but growing degree, it seems that the English courts will find standing where matters of public importance are raised, though standing has never expressly been allowed solely in the public interest. Courts will generally endeavour to construe standing by finding some 'sufficient interest', even if that interest is grounded in the expertise of a pressure group, CSO or NGO.[11] In Canada, public interest standing to protect fundamental rights evolved through three cases that pre-date the Canadian Charter of Rights and Freedoms enshrined under the 1982 Canadian Constitution.[12] A post-Charter case summarises a three-part test for public interest standing:

> First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or, if not, does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the court?[13]

Through the incremental relaxation of the rule in English law, and the creation of public interest standing in Canadian law, the courts still search for some continuity with the traditional strict rules. In English law, finding standing for pressure groups has rested on their relative expertise in a matter, or whether a portion of their membership is directly affected, thereby constructing some connection to the substance of the challenge. For example, in *R v Inspectorate of Pollution ex parte Greenpeace*, Greenpeace sought judicial review of a decision to grant applications to British Nuclear Fuels plc to discharge radioactive waste at its premises in Sellafield, Cumbria. Otton J noted that '[t]he fact that there are 400,000 supporters in the United Kingdom carries less weight than the fact that 2,500 of them come from the Cumbria region', thereby interpreting Greenpeace as legitimate representatives of directly affected parties.[14] In both jurisdictions, a broadened approach to standing has crystallised where there was no person sufficiently directly affected to bring the suit.[15] Therefore, the judicial relaxation

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[8] Senior Courts Act 1981, s 31(3).

[9] In *Arsenal Football Club v Ende* [1979] AC 1, the House of Lords held that a ratepayer had 'sufficient interest' to challenge the under-valuation of another property in the same area. *cf R v Inland Revenue Commissioners ex parte National Federation of Self-Employed Small Businesses Ltd* [1982] AC 617 (the 'Fleet Street Casuals' case).

[10] In *R v Her Majesty's Treasury ex parte Smedley* [1985] QB 657, the claimant had standing to bring to the attention of the Court of Appeal questions over the legality of payments by the Treasury to the European Community, given the seriousness and urgency of the claim. See also *R v Secretary of State for Foreign Affairs ex parte Rees-Mogg* [1994] QB 552.

[11] *R v Inspectorate of Pollution ex parte Greenpeace (No 2)* [1994] 4 All ER 329. See also: *R v Secretary of State for Social Services, ex parte Child Action Poverty Group* [1990] 2 QB 540; *cf R v Secretary of State for the Environment ex parte Rose Theatre Trust* [1990] 1 QB 504.

[12] *Thorson v Canada (Attorney General)* [1975] 1 SCR 138; *MacNeil v Nova Scotia (Board of Censors)* [1976] 2 SCR 265; and *Canada (Minister of Justice) v Borowski* [1981] 2 SCR 575.

[13] *Canadian Council of Churches v Canada (Minister of Employment and Immigration)* [1992] 1 SCR 236.

[14] *R v Inspectorate of Pollution ex parte Greenpeace* (n 11) 350.

[15] *Thorson v Canada (Attorney General)* (n 12) (the case concerned the constitutional validity of the Official Languages Act, which was neither regulatory nor penal, but merely declaratory) and *R v Secretary of State for Foreign and Commonwealth Affairs ex parte World Development Movement Ltd* [1995] 1 WLR 386.

of public interest standing has been formulated with reference to the original strict application of the rule.

Elsewhere in the common law world, rather than searching to reconcile liberalised *locus standi* with the existing rules, public interest standing has been judicially developed in a manner that completely departs from the traditional position. As the remaining portion of this part will show, public interest litigation is generally much wider in substance in post-colonial settings. Public interest standing plays a far more vital role than merely in instances where there is no identifiable person or group of persons directly aggrieved or harmed. Indeed, the square focus of the trend towards relaxation of rules of standing in the post-colonial world has been to facilitate the defence of the vulnerable in general. It is concerned with furthering socio-economic change, tackling fundamental societal inequalities, and giving a platform and a voice to the marginalised and disadvantaged.

India is the leading and paradigmatic example of judicial jettisoning of standing limitations.[16] Though the Constitution of India does not contain a clause relating to standing, the courts' initial strict approach[17] has been gradually relaxed, and the courts have found broad standing rights *suo motu*. In *Fertilizer Corporation Kamgar Union v Union of India*[18] the Supreme Court tentatively set the stage for a new, much broader view of standing, moving beyond habeas corpus or relator action petitions.[19] Chandrachud CJ, in the majority, opined that 'in an appropriate case, it may become necessary in the changing awareness of legal rights and social obligations to take a broader view of the question of *locus* to initiate a proceeding'.[20] The concurring opinion of Krishna Iver and Bhagwati JJ noted that Chandrachud CJ's approach 'with its fascinating expansionism, is of strategic significance, viewed in the perspective of Third World jurisprudence'.[21] The Justices recognised the necessity of departing from the Anglo-American legal tradition to meet the demands of development, and that '*locus standi* must be liberalised to meet the challenges of the times'.[22] In so doing, the Justices specifically underline the sociological motivation behind relaxing the rules on standing. In a country facing such challenges as India, slackening standing rules is a mechanism that enables the courts to monitor and ensure public accountability, while also affording effective access to justice—an important requirement in a country with such rampant socio-economic inequality and poverty.

By 1982 the Supreme Court of India altogether dismissed a traditional approach to the rules on standing, spearheaded by Bhagwati J of the very same concurring opinion discussed above, in *SP Gupta v President of India and Others*.[23] The case concerned the 1975 state of emergency declared in India by Prime Minister Indira Gandhi, which suspended virtually all civil and political rights.[24] Judges who objected were transferred to different locations. In this case, the Court awarded standing to advocates who had filed petitions reviewing those

[16] See, eg: U Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' (1985) 4 *Third World Legal Studies* 107; PP Craig and SL Deshpande, 'Rights, Autonomy and Process: Public Interest Litigation in India' (1989) 9 *OJLS* 356; and J Cassels, 'Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?' (1989) 37 *American Journal of Comparative Law* 495.

[17] See *Chiranjit Lal Chowdhuri v Union of India and Others* 1951 AIR 41, where it was held that only one whose rights had been directly affected by a law could approach the Court to question the constitutionality of said law.

[18] *Fertilizer Corporation Kamgar Union, Sindri and Others v Union of India and Others* 1981 AIR 344.

[19] See *Sunil Batra v Delhi Administration and Others* 1978 AIR 1675 and *Hussainara Khatoon and Others v Home Secretary, State of Bihar* 1979 AIR 1369.

[20] *Fertilizer Corporation Kamgar Union* (n 18).

[21] ibid (concurring opinion of Krishna Iver and Bhagwati JJ).

[22] ibid. This attitude of the Supreme Court had been developing for some time. In *Bar Council of Maharashtra v MV Dabholkar* 1976 AIR 242, Krishna Iyer VR observed that '[t]raditionally … we search for individual persons aggrieved. But a new class of litigation—public interest litigation— … emerges … [i]n a developing country like ours'. See also *Municipal Council, Ratlam v Shri Vardhichand and Others* 1980 AIR 1622.

[23] *SP Gupta v President of India and Others* AIR 1982 149.

[24] Emergency Proclamation of June 25, 1975.

transfers. Bhagwati J found that the advocates had standing, for they were 'vitally interested in the maintenance of a fearless and an independent Judiciary'.[25] Bhagwati J took the opportunity to settle that:

> Where the weaker sections of the community are concerned … who are helpless victims of an exploitative society and who do not have easy access to justice … The Court would … unhesitatingly and without the slightest qualms of conscience cast aside the technical rules of procedure … and treat the letter of the public minded individual as a writ petition and act upon it. Today a vast revolution is taking place in the judicial process; the theatre of the law is fast changing and the problems of the poor are coming to the forefront.[26]

Here Bhagwati J carried further the tone set in *Fertilizer Corporation Kamagar Union v Union of India*, that relaxing *locus standi* and allowing for public interest litigation was paramount in order to foster social justice and bring about socio-economic change, for individual rights under Part III of the Constitution were meaningless 'unless accompanied by the social rights necessary to make them effective and really accessible to all'.[27]

The creation of public interest litigation by the Indian Supreme Court in the 1980s has since been used to permit bystander standing, securing a court platform for such voiceless groups as migrant labourers,[28] bonded labourers,[29] and children.[30] The model of public interest litigation has birthed a flood of social action jurisprudence that has seen the courts charge the state with positive obligations to effect economic, social and cultural rights (ESC rights).[31] The Indian Supreme Court has specifically invoked a need to create public interest standing that departs from the Anglo-American tradition in order to respond to the distinctive socio-economic challenges that India faces. Bhagwati J publicly stated that the US model of public interest litigation is 'not a model that can be transplanted to developing countries like India'.[32] Indeed, the US model, not unlike the English and Canadian tradition, limits such actions to allow representation to those seeking to defend interests that do not attach to groups, such as environmentalism.[33] This is not unusual: across the world, and particularly for the interests of this paper, in many African states, protection of environmental interests has predicated trends to broaden standing.[34] Some states have followed the trajectory of India, however, by widening access to the courts to not simply deal in matters where there is no discernable person

[25] *SP Gupta* (n 23) (pinpoint citation unavailable).
[26] ibid (pinpoint citation unavailable).
[27] ibid (pinpoint citation unavailable).
[28] *People's Union for Democratic Rights* (n 1).
[29] *Bandhua Mukti Morcha v Union of India and Others* 1984 AIR 802.
[30] *Lakshmi Kant Pandey v Union of India* 1984 AIR 469.
[31] See *Olga Tellis and Others v Bombay Municipal Corporation and Others* 1986 AIR 180 on the right to livelihood and the right to work; *Vishaka and Others v State of Rajasthan and Others* [1997] INSC 665 on the working rights of women; and *Consumer Education and Research Centre and Others v Union of India and Others* [1995] 1995 AIR 922 on the right to health. It is well recorded that the doctrine of public interest standing in India has been a victim of its own success. The courts have an astronomical backlog of more than 30 million cases, many of which will be litigants seeking to enforce social rights. This has led to the creation of a Social Justice Bench of the Supreme Court to tackle delays on issues of pressing social need. See GN Gill and S Luthra, 'The Social Justice Bench of the Supreme Court of India: A New Development' [2016] *Public Law* 392; and A Khanna, 'Public Interest Litigation: The Interminable Wait for Justice' *Down To Earth* (15 August 1992).
[32] PN Bhagwati, 'Judicial Activism and Public Interest Litigation' (1984–85) 23 *Columbia Journal of Transnational Law* 561, 569.
[33] JP Dwyer, 'Contentiousness and Cooperation in Environmental Regulation' (1987) 35 *American Journal of Comparative Law* 809.
[34] LJ Kotzé and AR Paterson (eds), *The Role of the Judiciary in Environmental Governance: Comparative Perspectives* (Alphen aan den Rijn, Kluwer Law International, 2009); EP Amechi, 'Strengthening Environmental Public Interest Litigation through Citizen Suits in Nigeria: Learning from the South African Environmental Jurisprudential Development' (2015) 23 *African Journal of International and Comparative Law* 383.

aggrieved, but also to enable the courts to respond to the most pressing matters of social concern in their jurisdiction, by allowing any litigant with an interest in upholding the constitution standing.

B. India's Legacy: Unifying Approaches to Standing in East Africa

The influence that India's approach to public interest litigation has had on East Africa is palpable, and is evidenced both by some express citation of Indian jurisprudence, and by the invocation of strikingly similar justifications for liberalising standing requirements. In three East African states—Kenya, Tanzania, and Uganda—relaxation of standing followed a very similar trajectory. In each state, the judiciary slackened standing requirements in order to protect the right to a healthy environment. As noted above, this is not an unusual starting point. What is noteworthy is that in all three countries this has given rise to further judicial slackening in order to protect fundamental rights and freedoms.

Prior to the promulgation of a new constitutional order in Kenya in 2010, the use of public interest litigation in order to secure fundamental rights compliance was not widespread. The now repealed Constitution of Kenya 1969 made no explicit provision for standing in the public interest, granting standing where a contravention related to a petitioner personally, or where a contravention related to a detainee.[35] Under the Moi regime in the late 1980s and early 1990s the approach of the courts was to deny *locus standi* to a private individual who sought to sue in the public interest, unless the applicant could prove that they had sustained a personal injury as a result of the public wrong. This has been viewed by some as a tactic by judges wishing to remain in favour with Moi by stifling opposition politics and voices in the wake of the reintroduction of multi-party politics,[36] and is clearly demonstrated through the decision of Dugdale J—infamous for repressing constitutional litigation at the preliminary objection stage—in *Maathai v Kenya Times Media Trust Ltd*.[37] The applicant sought a temporary injunction restraining the defendant from constructing new headquarters for the ruling Kenya African National Union (KANU) party on Uhuru Park in Nairobi. Dugdale J mechanistically applied the narrow English common law position found in *Gouriet v Union of Post Office Workers*, that 'private rights can be asserted by individuals, but, … public rights can only be asserted by the Attorney-General as representing the public',[38] and dismissed the application.[39] This automatous application of the rule that only the Attorney General may bring an action in the public interest was commonplace.[40] The continued adherence to older principles of English law was the norm long after independence was achieved in many African states, given the continued dominance of foreign judges, or indigenous judges who had completed training in the United Kingdom or India.[41] Further, the independence Constitutions of East African states

[35] Constitution of the Republic of Kenya 1969 (repealed), s 84(1): if 'any of the provisions of Section 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress'.

[36] M Mutua, 'Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya' (2001) 23 *Human Rights Quarterly* 96; P Kameri-Mbote and M Akech, 'Kenya: Justice Sector and the Rule of Law, A Review by AfriMAP and the Open Society Initiative for Eastern Africa' (March 2011) 36, available at www.opensocietyfoundations.org/sites/default/files/kenya-justice-law-20110315.pdf.

[37] *Maathai v Kenya Times Media Trust Ltd* [1989] eKLR.

[38] *Gouriet v Union of Post Office Workers and Others* [1978] AC 435, 477.

[39] *Maathai* (n 37) (pinpoint citation unavailable).

[40] See also *Jaramogi Oginga Odinga and Three Others v Zachariah Richard Chesoni and The Attorney General* [1992] eKLR; *Wangari Maathai and Two Others v City Council of Nairobi and Two Others* (1994) 1 KLR.

[41] A Aguda, 'The Judge in Developing Countries', Nigerian Institute of Advanced Legal Studies, University of Lagos Occasional Paper No 6 (1980) 6–7.

entrenched the English common law approach in many ways.[42] There were, however, notable deviations from this position. For example, in *Kamanda and Another v Nairobi City Council and Another*,[43] Akiwumi J found that Nairobi residents, as ratepayers, had sufficient interest to challenge a public body in court where they contribute to their expenses, relying upon *R v Greater London Council ex parte Blackburn*.[44] The judgment then went one step further, by explicitly endorsing the approach of Lord Diplock in *R v Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Businesses Ltd*,[45] that '[i]t would … be a grave lacuna in our system of public law if a pressure group … 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 court to vindicate the rule of law and get the unlawful conduct stopped'.[46]

A liberal construction of *locus standi* was statutorily conferred on individuals to enforce environmental rights through the Environment Management and Coordination Act (EMCA) 1999.[47] Section 111 reads: '(2) For the avoidance of doubt, it shall not be necessary for a plaintiff under this section to show that he has a right or interest in the property, environment or land alleged to have been or likely to be harmed'. Waki J has since opined that 'the ogre of *locus standi*, which for a long time shackled Courts of Law, must be tamed. Happily, it was expressly tamed by Parliament in the … Environmental Management and Co-ordination Act'.[48] By the early 2000s there was also some evidence of judicial relaxation of the rule in relation to Constitution and rights enforcement,[49] though this approach was not commonplace amongst all judges.[50] The law on standing has since been settled by the new Constitution of Kenya, which provides that every person has the right to approach the court where a right or fundamental freedom contained in the Bill of Rights has been violated, and that such proceedings may be brought by a person acting in the public interest, thereby enshrining the procedural novelties of the EMCA into the Constitution and extending their application to the protection and enforcement of the Constitution.[51]

Tanzania's Constitution allows a broad standing clause, stipulating that 'every person has the right, in accordance with the procedure provided by law, to take legal action to ensure the protection of this Constitution and the laws of the land',[52] implicitly setting the scene for a relaxed approach to standing, though it does not explicitly expand on the matter of whether such legal action can be instigated in the public interest.

Nonetheless, a mixed approach to public interest standing has developed in the case law, with headway being made in the area of environmental law even earlier than in Kenya. In

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[42] YP Ghai and JPWB McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present* (Oxford, OUP, 1970) 374–80; see more generally R Ellet, *Pathways to Judicial Power in Transitional States: Perspectives from African Courts* (London, Routledge, 2013).

[43] *Maina Kamanda and Another v Nairobi City Council and Another* (1992) 1 KLR. See also *Niaz Mohamed Jan Mohamed v Commissioner of Lands and Four Others* [1996] eKLR, where Waki J rejected the rule that only the Attorney General can sue in the public interest.

[44] *R v Greater London Council ex parte Blackburn* [1976] 1 WLR 550.

[45] *R v Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Businesses Ltd* (n 9).

[46] ibid 644; *Maina Kamanda* (n 43) (pinpoint citation unavailable).

[47] Environment Management and Coordination Act (EMCA) 1999 (Cap 387) (Kenya).

[48] *Insurance Company of East Africa v Attorney General and Three Others* [2001] eKLR (pinpoint citation unavailable).

[49] In *Ruturi and Another v Minister of Finance and Another* [2001] 1 EA 253, 263, it was held by the High Court sitting as a constitutional court that 'as part of a reasonable, fair and just procedure to uphold the constitutional guarantees, the right of access to justice entails a liberal approach to the question of *locus standi*'.

[50] See *Law Society of Kenya v Commissioner of Lands and Two Others* [2001] eKLR.

[51] Constitution of Kenya 2010, Art 22. This standing provision is mirrored in Art 258, 'Enforcement of this Constitution', which empowers every person to institute court proceedings where the Constitution has allegedly been contravened.

[52] Constitution of the United Republic of Tanzania 1977, Art 26(2).

1988, in spite of the fact that at the time there was no provision in Tanzanian law, statutory or otherwise, for the right to a 'clean and healthy environment', the High Court found that the dumping and burning of waste on a refuse site close to residential area where plaintiffs resided, posed a danger to life.[53] In 1991, applying the previous case, the High Court of Tanzania granted standing to 795 plaintiffs who were challenging the respondent's use of a residential area as a refuse dumping site.[54]

The Tanzanian courts also judicially relaxed standing rules where fundamental rights were at stake in the groundbreaking decision of *Christopher Mtikila v Attorney General.*[55] The petitioner, a 'human rights campaigner-cum-political activist', contended that a number of constitutional and legislative amendments curtailed his constitutional rights to participation in national public affairs and to freedom of association. In granting the applicant public interest standing, Lugakingira J carefully studied the swell of public interest litigation in India and Canada in the 1980s. The judgment made important pronouncements on the necessity of public interest litigation in relation to the country's socio-economic conditions, in a manner very reminiscent of the jurisprudence liberalising the rule in India, and explicitly referenced the development of public interest litigation in India and Canada. Declaring a bar on independent candidates for election unconstitutional, it was held that:

> The relevance of public interest litigation in Tanzania cannot be over-emphasized. Having regard to our socio-economic conditions, this development promises more hope to our people than any other strategy currently in place. First of all, illiteracy is still rampant … By reason of this illiteracy a greater part of the population is unaware of their rights, let alone how the same can be realised. Secondly, Tanzanians are massively poor … Public interest litigation is a sophisticated mechanism which requires professional handling. By reason of limited resources the vast majority of our people cannot afford to engage lawyers … Other factors could be listed but perhaps the most painful of all is that over the years since independence Tanzanians have developed a culture of apathy and silence. This, in large measure, is a product of institutionalised mono-party politics which in its repressive dimension, like detention without trial, supped up initiative and guts … Given all these … circumstances, if there should spring up a public-spirited individual … 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.[56]

Just as in Kenya before the matter was settled by a new Constitution, however, the courts continue to oscillate on the matter of public interest standing.[57] The right to a 'clean, safe and healthy environment' was finally legislatively protected in an Environmental Management Act in 2004, though the legislation makes no provision waiving the requirement to show direct harm or interest, unlike its Kenyan counterpart.[58]

The Ugandan constitutional framework for access to the courts, like the new Kenyan provisions, directly provides for third party standing, affording that '[a]ny person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been

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[53] *Joseph D Kessy and Others v The City Council of Dar es Salaam*, Civil Case No 299 of 1988 (Unreported). See also 'The Right to a Clean and Satisfactory Environment' in C Maina Peter, *Human Rights in Tanzania: Selected Cases and Materials* (Cologne, Rüdiger Köppe Verlag, 1997) 149. It is not uncommon for the right to a clean and healthy environment to be connected to the right to life. For example, the Supreme Court of Nepal recognised that 'environmental conservation is indirectly related with life of the human being': *Suray Prasad Sharma Dhungel v Godavari Marble Industries and Others* Writ Petition No 35 of the year 2049 (1992) (pinpoint citation unavailable).

[54] *Festo Balegele and 794 others v Dar es Salaam City Council*, Misc Civil Cause No 90 of 1991 (Unreported).

[55] *Christopher Mtikila v Attorney General*, Civil Case No 5 of 1993 (Unreported).

[56] ibid (pinpoint citation unavailable).

[57] See *Southern Region Development Authority (SRDA) v Attorney General and Three Others*, 1997 (Unreported); but *cf Felix Joseph Mavika et al v The Dar es Salaam City Council*, Civil Case No 316 of 2000 (Unreported).

[58] Environmental Management Act 2004, Act No 20 of 2004, Art 4(1).

infringed or threatened, is entitled to apply to a competent court for redress which may include compensation … [a]ny person or organisation may bring an action against the violation of another person's or group's human rights'.[59] In the field of environmental protection, the 1995 National Environment Act 'empowers any person to apply for an environmental restoration order even though such person is not suffering any harm and has no interest in the land in issue'.[60] Notably, the 1995 Ugandan Constitution explicitly provides for the right to a 'clean and healthy environment'.[61] In spite of these rather liberal provisions, the courts were initially reluctant to find standing in the public interest.[62] However, in *The Environmental Action Network v Attorney General*, the High Court granted standing to an NGO seeking protection of the rights to a clean and healthy environment and to life (Article 22 of the Constitution of Uganda) in the public interest.[63] The High Court specifically invoked the reasoning of Lugakingira J in the Tanzanian *Mtikila* case in order to buttress its claim that in the arena of fundamental rights protection, technical procedural rules should not be a barrier to standing. The Ugandan High Court has therefore used environmental cases to follow the Tanzanian precedent in *Mtikila* and to cement a liberal approach to public interest standing, both in order to protect environmental rights, and fundamental rights more generally, for to say that the Ugandan constitution 'does not recognize the existence of needy and oppressed persons and therefore cannot allow actions of public interest groups to be brought on their behalf is to demean the Constitution'.[64]

As in public interest standing developments in the western world, then, there has been a tendency toward a relaxed approach in environmental rights cases in East Africa. It is of particular significance to afford protection to the environment in East Africa, where terrain is endowed with natural resources that are enriched with forests, minerals, lakes, rivers, wildlife and fisheries. In such nations there is a tendency toward policies that promote economic development at all costs, and degradation and exploitation of this range of natural resources is a real and present threat that judiciaries and governments are grappling to account for.[65] The trend in the west has been to substantiate similar judicial relaxation by attempting to reconcile it with the traditional restrictions on standing.[66] Rather than search for jurisprudential continuity in the rules on standing, however, the courts of these three East African states have utilised its relaxation in environmental matters as a stepping-stone to a general broadening of access to courts, even where liberal environmental standing has been legislatively arranged. There is an obvious coherence in approach among the three judiciaries, and this is clearly underpinned by the very same socio-economic drivers that gave rise to the birth of public interest standing in India. We see, then, that in the case studies advanced here, there are parallels both in development and justification of public interest standing, which is evidenced by a high degree of transnational judicial dialogue between the four jurisdictions.[67] As in India, the East African courts have broken away from a traditional standing framework following the

[59] Constitution of the Republic of Uganda 1995, Arts 50(1) and (2).
[60] National Environment Act, Cap 153, s 71.
[61] Constitution of the Republic of Uganda 1995, Art 39.
[62] See *James Rwanyarare and Another v Attorney General* [1997] UGCC 1, where the court averred that '[w]e cannot accept the argument … that any spirited person can represent any group of persons without their knowledge or consent' (pinpoint citation unavailable).
[63] *The Environmental Action Network v Attorney General and Another*, Misc Application No 39 of 2001 (Unreported).
[64] *British American Tobacco Ltd v The Environmental Action Network*, Misc Application No 27 of 2003 (Unreported) (pinpoint citation unavailable).
[65] P Kameri-Mbote and C Odote, 'Courts as Champions of Sustainable Development: Lessons from East Africa' (2009) 10 *Sustainable Development Law and Policy* 31.
[66] See n 15 above.
[67] A Slaughter, 'Judicial Globalization' (2000) 40 *Virginia Journal of International Law* 1003.

same pattern, and by invoking a desire to provide tailored solutions that respond to the socio-economic challenges of each jurisdiction. As such, in India, public interest standing is required to foster social justice in a rampantly unequal society; in Tanzania, to challenge a repressive state; in Uganda, to represent the needy and oppressed.

II. PUBLIC INTEREST STANDING IN KENYA: THE RESULTS

This part will study the impact that the liberalisation of standing has had in Kenya, both prior to, and after the promulgation of a new Constitution in 2010. This trend crystallised in conjunction with the acceleration of constitutional reform efforts in Kenya. The narrow approach to standing was maintained in an era of repression provided by both the regimes of Moi and independence President Jomo Kenyatta, under which a multitude of CSOs, academics, intellectuals and human rights activists were incarcerated.[68] Throughout the 1990s, there was strong agitation for constitutional reform, a resurgent civil society, and a reluctant reintroduction to multi-party politics under Moi, which to a large extent was influenced by international pressure.[69] In this socio-political environment, broadened rules on standing were legislatively framed for environmental rights. The multi-party general election of 2002 was underscored by active agitations for constitutional reform, something that formed the basis of victorious Mwai Kibaki's ticket. The courts were alive to the fact that the results of the general election ushered in an era where citizens felt they could actively petition for their rights without fear of reprisal. The High Court of Kenya, sitting as a constitutional court, in *Ruturi v Minister of Finance*, cemented this:

> In … public interest litigation … the procedural trappings and restrictions, the pre-conditions of being an aggrieved person and other similar technical objections cannot bar the jurisdiction of the court, or let justice bleed at the altar of technicality … We state a firm conviction, that as part of a reasonable, fair and just procedure to uphold the constitutional guarantees, the right of access to justice entails a liberal approach to the question of *locus standi*. Accordingly, in constitutional questions, human rights cases, public interest litigation and class actions, the ordinary Anglo-Saxon jurisprudence, that an action can be brought only by a person to whom legal injury is caused, must be departed from … We must … do justice according to the law in the context of our socio-cultural environment.[70]

Just as in the *Mtikila* case of Tanzania, this line of jurisprudential rationale is remarkably resonant of the Indian Supreme Court's approach to the rule. This has resulted in standing requirements in Kenya being jettisoned both by legislation in environmental cases (as advanced above), and by the courts in public interest matters, in particular where questions of constitutional validity or human rights infringements arise. This part will elucidate how under the old constitutional dispensation, the introduction of public interest standing garnered remarkable, though not widespread, results that have seen the courts seize the opportunity to nurture its own approach to rights and constitutional protection. The chapter will then conclude with an overview of the function of public interest standing in the new constitutional order promulgated in 2010. It will be seen that constitutionally entrenching broad access to courts,

[68] W Mutunga, *Constitution-making from the Middle: Civil Society and Transitional Politics in Kenya, 1992–1997* (Nairobi/Harare, Sareat/Mwengo, 1999); W Mutunga, 'The 2010 Constitution of Kenya: Its Vision of A New Bench-Bar Relationship' in YP Ghai and J Cottrell Ghai (eds), *The Legal Profession and The New Constitutional Order in Kenya* (Nairobi, Strathmore University Press, 2014) 59.

[69] M Akech and P Kameri-Mbote, 'Kenyan Courts and the Politics of the Rule of Law in the Post-Authoritarian State from 1991–2010' (2012) 18(2) *East African Journal of Peace and Human Rights* 357, 372.

[70] *Ruturi* (n 49) 262–63; see also *Khelef Khalifa El Busaidy v Commissioner of Lands and Two Others* [2002] eKLR.

in conjunction with inserting international law as a valid source of law in the new constitutional order, is acting as a vehicle to promote a transformation of Kenyan law.

A. Judicial Review of Constitutional Reform: Constitutional Litigation in the Public Interest

Following the 1997 general elections, the Kenyan Parliament passed a legislative roadmap for constitutional reform, and created the Constitution of Kenya Review Commission.[71] The Commission wrote a draft Constitution—the 'Bomas Draft'—that was approved at a National Constitutional Conference (NCC) in April 2003. In the public interest case of *Timothy Njoya v Attorney General*, the court was tasked with determining the constitutionality of Parliament's power to pass a new Constitution enacted at the NCC on the grounds that to do so circumvented the Kenyan people's right to a referendum on any new constitution.[72] *Njoya* ultimately saw the Constitutional Review Act declared unconstitutional, because the repealed Constitution only provided for Parliament to amend the existing constitution. Further, Ringera J found that the constituent power of the people conferred on them a right to vote in a referendum on any new constitution.[73]

This judicial intervention in the constitutional reform process came at a time when it had reached political deadlock,[74] and by compelling the need for a referendum, made a bold step towards adopting a culture of constitutionalism that has at times been overwhelmingly lacking in the Kenyan judiciary.[75] The judgment was groundbreaking in approach and coverage, ultimately concluding that a national referendum on any new constitutional document was compulsory in order for the Kenyan people to exercise their constituent power.[76] Though the court boldly cited international law provisions raised by the applicants,[77] Ringera J reached his conclusions about the people's right to a referendum with no regard paid to the potential protection of this right in international human rights instruments.[78] Instead, the Court considered the particular value that a referendum would have in a 'multi-ethnic society such as [Kenya] which is still struggling towards a sense of common nationality and unity of purpose, [where] it is important that all tribes should participate in the process of constitution-making so that they can all own the Constitution which will be the glue binding them together'.[79] This recalls the distinctive challenges Kenya faces in finding a cohesive national identity: in the most multi-ethnic state in the world, its political history has seen ethnicity politicised with

[71] Constitution of Kenya Review Act 1997, No 13 of 1997.
[72] *Njoya and Others v Attorney General and Others* (2004) AHRLR 157.
[73] ibid [32].
[74] E Kramon and DN Posner, 'Kenya's New Constitution' (2011) 22(2) *Journal of Democracy* 89.
[75] The Commission of Enquiry on Post-Election Violence, set up in the wake of the 2007–08 post-election violence, highlighted that the Kenyan judiciary had 'acquired the notoriety of losing the confidence and trust of those it must serve because of the perception that it is not independent as an institution': Report of the Commission of Inquiry on Post-Election Violence, CIPEV Report, www.knchr.org/Portals/0/Reports/Waki_Report.pdf, 460.
[76] The impact of the judicial intervention was to effectively stall the reform process. As such, the case is a huge source of contestation in Kenyan politics, and many civil society actors view the petition as a vexatious attempt to block a draft that had been constructed with many consultations. It is no secret that President Kibaki's party, the National Rainbow Coalition (NARC), opposed the Bomas Draft's provisions on devolution and dilution of executive power: Kramon and Posner (n 74) 91–92.
[77] Prior to the enactment of the 2010 Constitution, the courts emphasised the primacy of domestic law over international law, and would not directly apply international legal provisions. See *Okunda v Republic* [1970] EA 453; and *Mary Rono v Jane Rono and Another* [2005] eKLR.
[78] It would not have been a stretch for Ringera J to appeal to rights of participation contained in, for example, the Universal Declaration of Human Rights 1948, Art 21; International Covenant on Civil and Political Rights 1966, Art 25; African Charter on Human and Peoples' Rights 1981, Art 13.
[79] *Njoya* (n 72) [43].

bloody and devastating results, and given the ethnically fuelled post-election violence that occurred in the wake of the 2007 elections, Ringera J's statement here proved almost prophetic. On 4 August 2010, in the wake of bloodshed that resulted in a reported 1,220 civilian deaths, and the recounted internal displacement of around 350,000 persons,[80] the Kenyan people ushered in a new Constitution by referendum, as prescribed by this judgment.

By virtue of public interest litigation, the courts were able to subject the exercise of constitution-making to judicial review, and, by doing so found new rights for Kenyans in a way that 'accorded itself *proprio motu* constituent force', as Thornhill puts it.[81] Broadened public interest standing has afforded an environment whereby the Kenyan courts can and have discerned a distinctly Kenyan answer to a Kenyan question: the matter of public participation in the Kenyan constitutional reform process.

B. Public Interest Litigation and Rights Protection

The Kenyan courts' incremental relaxation of the rules on standing mirrors the general trend in African courts towards allowing access to courts where there has been a violation of fundamental rights and freedoms.[82] Rights litigation in Kenya was sparing until such developments, and the courts were likely to be deferential towards state policy, invoking a position of interpretive restraint.[83] However, the frequency of human rights litigation before the Kenyan courts tangibly increased in tandem with the progression of constitutional reform and the widening of standing. Even before the promulgation of a new constitutional order, this was beginning to give rise to the development of tailored and locally sensitive jurisprudence.

In *Rangal Lemeiguran and Others v Attorney General and Others*,[84] the applicants approached the court as representatives of the Il Chamus, a small and distinct community of 25–30,000 people. The applicants sought declarations that their rights to political representation were effectively denied by virtue of the makeup of the constituency boundary, and wished to be considered a 'special interest group' for the purposes of parliamentary representation, as a result of their status as a minority and indigenous group. At a time where the prevailing position in Kenyan law was that international law provisions were not a valid source of law without incorporation,[85] the three-judge constitutional bench invoked the International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries, No 169 (1989), amongst other unincorporated international provisions, in order to find that '[r]epresentation is a clear constitutional recognition of a positive right of the minority—to participate in the State's political process and to influence State policies'.[86] Where previously, the courts have remained very reluctant to recognise the indigenous status of communities,[87] this bench found that the community qualified for special interest representation before Parliament as a result of their indigeneity. It challenged the historical

[80] International Criminal Court, *Request for Authorisation of an Investigation Pursuant to Article 15: Situation in the Republic of Kenya*, ICC-01/09-3, Office of the Prosecutor, 26 November 2009, [56].
[81] C Thornhill, 'The Mutation of International Law in Contemporary Constitutions: Thinking Sociologically about Political Constitutionalism' (2016) 79 *MLR* 207, 236.
[82] See *Attorney-General v Dow* 1992 BLR 119; and *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General and Others* 1993 (1) ZLR 242.
[83] JB Ojwang and JA Otieno-Odek, 'The Judiciary in Sensitive Areas of Public Law: Emerging Approaches to Human Rights Litigation in Kenya' (1988) 35 *Netherlands International Law Review* 29.
[84] *Rangal Lemeiguran and Others v Attorney General and Others* [2006] eKLR.
[85] See n 77 above.
[86] *Rangal Lemeiguran* (n 84) (pinpoint citation unavailable).
[87] See *Kemai and Others v Attorney General and Others* (2006) KLR 1 (E & L) 326.

inaccuracy that all 42 Kenyan tribes are indigenous,[88] distinguishing between Kenyan communities 'having a strong attachment to their culture as opposed to the homogenous ones who have adapted to change with very little attachment to the old ways. The other distinguishing trait is that the indigenous ones are generally minorities'.[89] The court therefore invoked a definition of indigeneity that was cogent at the local, regional, and international level.[90] Once again, the courts have been able to address potentially divisive social issues in a nuanced manner by virtue of broadened court access. This interventionist and rights-oriented approach of the courts, while certainly gaining traction, was not however widespread before the promulgation of the new Constitution.[91]

C. Kenya After 2010

The 2010 Constitution of Kenya ushered in profound changes to the legal and political structure of the country, restoring a Senate as an upper house of Parliament, introducing a two-tier devolution system, and initiating an overhaul of the judiciary. A wide-ranging Bill of Rights (Chapter Four), including extensive protection of social and economic rights (Article 43), is twinned with provisions for the direct diffusion of international law into the domestic legal order.[92] The new document settled the position on public interest standing, with Article 22 requiring that every person has the right to approach the court for the enforcement of the Bill of Rights in the public interest, while Article 258 affords every person the right to institute court proceedings in the public interest alleging contraventions or possible future contraventions of the constitution.[93] The Kenyan Court of Appeal has settled that these provisions are the country's standard guide for standing, highlighting that the 'time is now

[88] In pre-independence Kenya, the Colonial administration configured districts by affording positions in the local government structure to the dominant ethnic community in each area. District councils were therefore 'tribal', and many Kenyans constituted themselves as a 'tribe' in order to secure themselves land within a district. Groups that were not officially attached to land in this way were not recognised. This led to the long held myth that Kenya is made up of 42 tribes, 41 being those identifiable through districts, and the 42nd including all others who were not. In reality, Kenya is far more ethnically diverse than this. See BA Ogot, *History as Destiny and History as Knowledge: Being Reflections on the Problems of Historicity and Historiography* (Kisumu, Anyange Press Ltd, 2005) 290; and Z Abubakar, 'Memory, Identity and Pluralism in Kenya's Constitution Building Process' in YP Ghai and J Cottrell Ghai (eds), *Ethnicity, Nationhood and Pluralism: Kenyan Perspectives* (Ottawa/Nairobi, Global Centre for Pluralism/Katiba Institute, 2013) 21, 30–31.

[89] *Rangal Lemeiguran* (n 84) (pinpoint citation unavailable).

[90] The African Commission has made plane that in the context of Africa, recognition of indigenous status in relation to aboriginality is no longer appropriate. Characteristics of indigenous peoples in Africa are those with a culture and way of life that differs markedly from the dominant society, and suffer from marginalisation. This aligns with the evolution of indigenous status at international level. See African Commission on Human and Peoples' Rights, Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, (Twenty-Eighth Ordinary Session, 2003), DOC/OS (XXXIV)/345, 58-64.

[91] See *Paul Mungai Kimani and Others v Attorney General and Others* [2010] eKLR.

[92] Art 2(5) ensures that '[t]he general rules of international law shall form part of the law of Kenya', while Art 2(6) stipulates that '[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya': Constitution of Kenya 2010.

[93] Art 22: '(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—A person acting on behalf of another person who cannot act in their own name; a person acting as a member of, or in the interest of, a group or class of persons; a person acting in the public interest; or an association acting in the interest of one or more of its members'. Art 258: '(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention. (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—a person acting on behalf of another person who cannot act in their own name; a person acting as a member of, or in the interest of, a group or class of persons; a person acting in the public interest; or an association acting in the interest of one or more of its members'.

propitious at this stage of our constitutional development where we can state as was stated by the Supreme Court of India in the case of *SP Gupta* … "It is only by liberalizing the rule of *locus standi* that it is possible to effectively police the corridors of power and prevent violations of law"'.[94] New legal orders constitutionally protecting broad court access in this manner is not a new or unusual phenomenon. The *locus classicus* is the 1991 Constitution of Colombia, which explicitly states that anyone with a 'collective right' can sue to protect it, and a 1998 piece of legislation authorised categories of person, including individuals and NGOs, who could approach to the court in the public interest.[95] The Botswana Constitution allows any person who alleges a violation of fundamental rights and freedoms protected by the constitution to apply to the High Court for redress.[96] The Constitution of Nepal goes further, affording both the Supreme Court and the High Court power to issue orders to protect fundamental and legal rights in actions of 'public interest or concern'.[97] The provision for the enforcement of rights in the Kenyan constitution is remarkably similar to its counterpart in the 1996 South African Constitution.[98] In Kenya, these provisions have precipitated a flurry of social rights cases. The Constitution has opened the gates for public interest and representative litigants to approach the courts on behalf of those who are left wanting of socio-economic means to do so themselves. In so doing, the Kenyan courts regularly invoke the reasoning and jurisprudence of the courts of South Africa and India, while also capitalising on the new place of international law in the Kenyan constitutional order, and the advanced Bill of Rights provisions in the new Constitution.

A flood of cases since 2010 have invoked the new constitutional provisions on economic and social rights, along with international law standards of protection, in order to uphold rights. A number of state-sponsored forcible eviction cases follow the same pattern: the petitioners, appearing in a class action or public interest suit, represent residents of informal settlements that have been ordered to vacate the premises with little or no notice, and if they do not respond quickly enough, are forcibly removed with inhumane tactics by the state. For instance, in *Susan Waithera Kariuki v Town Clerk of Nairobi City Council*, the petitioners were served notice to vacate within 24 hours, and upon expiry of this period, the respondents employed administration police officers to destroy the structures, leaving the petitioners no choice but to put up temporary structures on the same, now uninhabitable, land.[99] In *Ibrahim Sangor Osman v Minister of State for Provincial Administration and Internal Security*, the petitioners were violently evicted from their homes on Christmas Eve, which they had occupied since the 1940s, with officers resorting to tear gas and other violent methods to clear the land, with no written notice.[100] Regularly, the courts find violations of the right to fair administrative action (Article 47), rights to water and sanitation, to accessible and adequate housing, and to

[94] *Mumo Matemu v Trusted Society of Human Rights Alliance and Others* [2013] eKLR [31].
[95] Constitution of Colombia 1991; Law 472 (1998), Art 88.
[96] Constitution of Botswana 1966 (rev 2005), Art 18(1), applied in *Dow* (n 82) which held that an injured person can also 'protect the rights of the public' (155).
[97] Constitution of Nepal 2015, Arts 133(2) and 144(1). This replicates earlier provisions in the Constitution of the Kingdom of Nepal, 1990, Art 88(2).
[98] Constitution of the Republic of South Africa 1996, Art 38 holds that '[t]he persons who may approach the court are—(a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members'. This is perhaps no surprise, given that much of the work of the Constitution of Kenya Review Commission went to great strides to comparatively review other jurisdictions, and the Committee of Experts on Constitutional Review contained a South African scholar, Professor Christina Murray. See *The Final Report of the Constitution of Kenya Review Commission* (2005) available at katibainstitute.org/Archives/images/CKRC%20Final%20Report.pdf.
[99] *Susan Waithera Kariuki and Others v Town Clerk of Nairobi City Council and Others* [2011] eKLR.
[100] *Ibrahim Sangor Osman and Others v Minister of State for Provincial Administration and Internal Security and Others* [2011] eKLR.

health (Article 43), to information (Article 35) and to life (Article 26) under the Kenyan Constitution.[101] Invoking international standards of protection, the courts award damages and order structural remedies, compelling state respondents to engage with petitioners, and create state policies towards evictions that correspond with the United Nations Basic Principles and Guidelines on Development-Based Eviction and Displacement (2007).[102] The Kenyan High Court has even gone as far as to hand down structural remedies, creating court-administered monitoring mechanisms for its judgments.[103] This approach is directly influenced by similar mechanisms that the courts have employed in South Africa and Colombia. The Judiciary Training Institute has designed training exercises and visits for judges that study the approaches of the South African and Colombian courts to structural remedies for the enforcement of socio-economic rights.[104] Public interest litigation, then, grounded in rights provisions laden with international law standards, has allowed the Kenyan courts the platform to deliver social justice, while also, as this next part will show, to nurture and cultivate its own jurisprudence, in the wake of an overhauled judiciary.[105]

D. Decolonising Jurisprudence: Transforming Kenyan Law

The new 2010 Constitution ushered in an era of judicial reform that ensured its independence and accountability in several ways.[106] The colonial legacy left the judiciary a weak institution, and a conservative or restrained approach to judicial interpretation dominated the post-independence era. The courts were highly unwilling to hold the executive or the legislature to account.[107] In the constitutional reform process, and in response to the dearth of public confidence in the institution, the bench was subject to an extensive vetting procedure.[108] This overhaul of the judiciary is twinned with a greater readiness on the part of judges to hold public institutions to account. The Judiciary Training Institute published a Judiciary Transformation Framework that trains Kenyan judges to produce jurisprudence that is 'robust, indigenous,

[101] By recognising that forcible evictions violate petitioners' 'right to dignity, life and security': *Satrose Ayuma and Others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme and Others* [2011] eKLR, the Kenyan jurisprudence falls in line with South African protectionist court attitudes in eviction cases: *Olivia Road v City of Johannesburg and Others* 2008 (3) SA 208.

[102] The former UN Special Rapporteur on the Rights to Housing, Miloon Kothari, has even filed submissions in a public interest case of this kind: *Satrose Ayuma* (n 100). See also *June Seventeenth Enterprises Ltd v Kenya Airport Authority and Others* [2014] eKLR; *Micro and Small Businesses Association of Kenya—Mombasa Branch v Mombasa County Government and Others* [2014] eKLR.

[103] *Mitu-Bell Welfare Society v Attorney General and Two Others* [2013] eKLR: this leading case has regrettably been overturned by the Court of Appeal, awaiting Supreme Court ruling: *Kenya Airports Authority v Mitu-Bell Welfare Society and Two Others* [2016] eKLR.

[104] 'Socio-Economic and Health Rights: East Africa Judicial Training' (training manual, hard copy on file with author). See also 'Closing Remarks by the Deputy Chief Justice Hon Kalpana Rawal, SC, Deputy President of the Supreme Court of Kenya at the Seminar on Socio-Economic and Cultural Rights Jurisprudence for Judicial Officers in East Africa' (Judiciary Training Institute, Nairobi, 21 November 2013) judiciary.go.ke/portal/assets/files/DCJ%20speeches/DCJ%20SPEECH%20SOCIO-ECONOMIC%20AND%20CULTURAL%20RIGHTS%20JURISPRUDENCE%20FOR%20JUDICIAL%20OFFICERS%20IN%20EAST%20AFRICA.pdf.

[105] It should be noted that lack of compliance in these cases is endemic. For example, in many cases the state respondents do not bother to acknowledge the cases against them, by not filing responses to the petitions or taking part in the legal proceedings. See *Susan Waithera Kariuki* (n 98), and *Ibrahim Sangor Osman* (n 99).

[106] Constitution of Kenya 2010, Arts 160–65.

[107] *Gibson Kamau Kuria v Attorney General*, Misc App No 279 of 1985; *Joseph Maina Mbacha v Attorney General*, Misc App No 356 of 1989; *Republic v Judicial Commission of Inquiry into the Goldenberg Affair ex parte George Saitoti* [2006] eKLR.

[108] Judges and Magistrates Vetting Board, 'Vetting of Judges and Magistrates in Kenya: Final Report' (2016).

patriotic and progressive'.[109] This is a vision that has been repeatedly espoused both judicially and extra-judicially by the out-going Chief Justice Willy Mutunga.[110]

The courts, having directly invoked the transformative power of broadening the rule on standing,[111] have also connected how social justice cases can give rise to 'decolonizing jurisprudence'.[112] In extra-judicial comment, and in the wake of the introduction of international law into the Kenyan legal order, the Chief Justice has cautioned against the mechanistic application of foreign or international law.[113] There was already burgeoning evidence of the Kenyan courts' ability to use public interest litigation to proliferate 'indigenous' solutions to Kenyan problems prior to the realisation of a new constitutional order, as this chapter has shown. There are also indicators that this continues with the fortification of broad standing, and reinforcement of international law, in the new legal order. For instance, in the case *of Joseph Letuya v Attorney General*, the Court followed the remarkable pre-2010 judgment of *Rangal Lemeiguran and Others v Attorney General and Others* discussed above.[114] Where previously the courts have declined to recognise the special status of the Ogiek forest dwelling community,[115] here the allocation of public land parcels was held to violate the group's right to life, dignity and attendant economic and social rights by virtue of their special status an indigenous and minority group. The courts, giving square attention to the potentially incendiary issue of allocation of land for enjoyment by indigenous populations in Kenya, have maintained a distinctly Kenyan approach to the highly complex and jurisdiction-specific issue. They have even managed to tease out and dismiss cases where an indigenous claim is used as a ruse to grab land.[116]

The transformative potential of a constitutional document through realisation of socio-economic rights has long been championed in South Africa.[117] The textual design of the 2010 Kenyan Constitution, in particular the Bill of Rights and the inclusion of socio-economic rights, emulates international law and provisions of the 1996 Constitution of South Africa, and international and foreign law had a huge influence on the drafting of the Kenyan Constitution.[118] The desire to achieve social justice that alleviates the conditions of the poor and the marginalised, by increasing access to courts and providing that socio-economic rights are justiciable, has strong roots in India, South Africa and Colombia. Kenya is replicating this method by allowing public interest litigation to flourish and by utilising its internationally derived constitutional rights provisions. The many international and foreign influences on Kenya's constitutional design and interpretation, however, do not give rise to formulaic citation

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[109] Supreme Court of Kenya, *Judiciary Transformation Framework 2012–2016*, 11 www.judiciary.go.ke/portal/assets/downloads/reports/Judiciary's%20Tranformation%20Framework-fv.pdf.

[110] For example, Mutunga CJ has labelled the Judiciary Training Institute 'the nerve centre of a robust, indigenous and patriotic jurisprudence', speaking at the launch of the publication of ICJ Kenya's Judicial Watch Report Series Vol 10 at Serena Hotel, Nairobi, Kenya, 22 March 2012.

[111] *Mumo Matemu* (n 93).

[112] *Jasbir Singh Rai and Others v Tarlochan Singh Rai and Others* [2013] eKLR, [91] (Mutunga CJ).

[113] Chief Justice Willy Mutunga, speaking at Ending Impunity Symposium, Riara University, Nairobi, 28/29 April 2015. I am grateful to the Kenya Section of the International Commission of Jurists, with whom I interned in April to June 2015, for making my attendance at this symposium possible. See also W Mutunga, 'Kenya: A New Constitution' *Socialist Lawyer: Magazine of the Haldane Society* (October 2013) 20.

[114] *Joseph Letuya and Others v Attorney General and others* [2014] eKLR; *Rangal Lemeiguran* (n 84).

[115] *Kemai* (n 87).

[116] *Simion Swakey Ole Kaapei and Others v Commissioner of Lands and Others* [2014] eKLR.

[117] KE Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

[118] NW Orago, 'Socio-Economic Rights and the Potential for Structural Reforms: A Comparative Perspective on the Interpretation of the Socio-Economic Rights in the Constitution of Kenya, 2010' in M Mbondenyi, E Asaala, T Kabau and A Waris (eds), *Human Rights and Democratic Governance in Kenya: A Post-2007 Appraisal* (Pretoria, Pretoria University Law Press, 2015) 39.

of foreign legal precedent, for 'the process of international influence has changed from *reception* to *dialogue*'.[119] Public interest litigation, then, can be viewed as a mechanism for cultivating both 'transformative' and 'decolonising' jurisprudence. In Kenya, it is beginning to provide a platform for the judiciary to create 'indigenous' case law under the new constitutional order, enabling the courts to respond to the particular challenges that the nation faces, just as it has in other jurisdictions. Both the judicial and extra-judicial pronouncements calling for the proliferation of such jurisprudence, coupled with constitutionally-entrenched provisions for broad standing, shows that the emerging policy of the first post-2010 judiciary has been to actively encourage people to approach the court, in a bid to revitalise the legitimacy of the judiciary. An upsurge in litigation is required in order for a new constitutional order to be both propagated and given life, embedding the new constitution in society.[120] It is, however, early days for Kenya. The judiciary since 2010 has instituted a progressive programme, both in training and practice, but is a long way from achieving the kind of institutionalised approach to social action public interest litigation that we can see in, for example, Colombia.[121] There still remain instances where the reformed Kenyan institution declines to answer key constitutional questions,[122] and with Mutunga CJ having left office in June 2016, it remains to be seen whether his successor, David Maraga, will share his vision.

III. CONCLUSION

This chapter has shown that there is a trend towards liberalised standing rules in post-colonial common law settings. The central explanation for its judicial relaxation is quite clear: it arises in the pursuit of a reformist agenda. As evidenced by the more detailed study of Kenya, it occurs in tandem with popular pressure for change.[123] This explanation extends to the mushrooming of 'cause lawyering' that we have seen across the globe, where litigation becomes the primary technique for political agitation and social reform initiation.[124] This has been made possible largely by the phenomenon of judicial activism that has prised open access to the courts.[125] The case study of Kenya demonstrates how the crystallisation of broad standing in a constitutional order infused with international law and social rights language, does not necessarily result in an unimaginative reproduction of global rights application. Rather, the provisions enable the rights in question to go through a process of localisation, responding to and being transformed by local socio-political pressures.[126] For the most part, the legal subjects in question attach their claims to internationally derived standards of

[119] C L'Heureux-Dubé, 'The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court' (1998) 34 *Tulsa Law Journal* 15, 17.
[120] W Mutunga, 'Human Rights States and Societies: A Reflection From Kenya' (2015) 2 *Transnational Human Rights Review* 63.
[121] C Rodríguez-Garavito, 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America' (2010–11) 89 *Texas Law Review* 1669.
[122] See *International Centre for Policy and Conflict and Others v Attorney-General and Others* [2013] eKLR; and *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR.
[123] In an ambitious empirical analysis of 204 countries, Ginsburg and Versteeg found that the principal driving factor behind greater judicial review has been as a response to endogenous factors arising from the domestic political environment: T Ginsburg and M Versteeg, 'Why Do Countries Adopt Constitutional Review?' (2014) 30 *Journal of Law, Economics and Organization* 587.
[124] S Ellmann, 'Cause Lawyering in the Third World' in A Sarat and S Scheingold (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities* (Oxford, OUP, 1998) 349, 361.
[125] C Neal Tate and T Vallinder (eds), *The Global Expansion of Judicial Power* (New York, New York University Press, 1995); R Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge MA, Harvard University Press, 2004).
[126] DM Brinks, V Gauri and K Shen, 'Social Rights Constitutionalism: Negotiating the Tension between the Universal and the Particular' (2015) 11 *Annual Review of Law and Social Science* 289.

protection. That does not, however, mean that there is an obvious global case law on such matters, mimicking the same results in each jurisdiction. In fact, the Kenyan case study tentatively demonstrates that national and sub-national actors (judges and litigants) use internationally set standards to buttress more nuanced and locally sensitive solutions. Although the increasing linkage between domestic law and global law exists, as evidenced through the utilisation of international law, this does not necessarily mean that the domestic legal system is 'de-nationalised'. In fact, the use of public interest litigation invoking international norms creates space for domestic legal actors to craft native solutions bolstered by the transformative potential of international law. The role of international and foreign law is, therefore, not 'an imperialist Trojan Horse … but a contested terrain'.[127] The internationalisation, or transnationalisation, of domestic constitutional law in Kenya, which has seen the borrowing of public interest standing mechanisms from other jurisdictions, and the entrenchment of international values, operates in a way that enhances domestic constitutionalism,[128] by affording the judiciary the optimum environment to cultivate law that is 'robust, indigenous, patriotic and progressive'.[129]

[127] M Mamdani, 'Social Movements and Constitutionalism in the African Context' CBR working paper, No 2 (1989) 6.

[128] CM Fombad, 'Internationalization of Constitutional Law and Constitutionalism in Africa' (2012) 60 *American Journal of Comparative Law* 439.

[129] Supreme Court of Kenya, *Judiciary Transformation Framework 2012–2016*, 11 www.judiciary.go.ke/portal/assets/downloads/reports/Judiciary's%20Tranformation%20Framework-fv.pdf.