When Courts Do Politics

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Public Interest Law and Litigation in East Africa

By

J. Oloka-Onyango

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To those who led the struggle
for Public Interest Law in East Africa:
Abu Mayanja, Oki Ooko Ombaka, and Issa G. Shivji

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ACRONYMS

AB	After-the-bush
ACHPR	African Commission on Human and People's Rights
ACtHPR	African Court on Human and People's Rights
ADR	Alternative Dispute Resolution
AE	Amka Empowerment
AG	Attorney General
AHA	Anti-Homosexuality Act
AHB	Anti-Homosexuality Bill
AIDs	Acquired immune-deficiency Syndrome
ANC	African National Congress
ASP	Afro-Shirazi Party
AU	African Union
BAWATA	Baraza la Wanawake Tanzania
BG	Blue Girls
CA	Constituent Assembly
CAR	Central African Republic
CCM	Chama cha Mapinduzi
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
CEHURD	Centre for Health Human Rights & Development
CEMERIDE	Centre for Minority Rights Development
CHADEMA	Chama Cha Demokrasia na Maendeleo
CIPEV	Commission of Inquiry on Post-Election Violence
CMI	Chieftaincy of Military Intelligence
COIC	Committee on Implementation of the Constitution
CORD	Coalition for Reforms and Democracy
CP	Conservative Party
CPRs	Civil and Political Rights
CRC	Constitutional Review Commission
CSCHRCL	Civil Society Coalition on Human Rights and Constitutional Law
CT	Customary Tenure
CUF	Civic United Front
DP	Democratic Party
DPP	Director of Public Prosecutions

DRC	Democratic Republic of Congo
EAC	East African Community
EACA	East African Court of Appeal
EACJ	East African Court of Justice
EALA	East African Legislative Assembly
EC	Electoral Commission
ECK	Electoral Commission of Kenya
ECOWAS	Economic Community of West African States
EDR	Election Dispute Resolution
EMB	Election Management Board
EMCA	Environmental Management and Coordination Act
EOC	Equal Opportunities Commission
ESCRs	Economic, Social and Cultural Rights
EU	European Union
EVM	Electronic voting machine
FDC	Forum for Democratic Change
FGM	Female genital mutilation
GALCK	Gay and Lesbian Coalition of Kenya
GCM	General Court Martial
GDP	Gross Domestic Product
GNU	Government of National Unity
HIV	Human immune virus
HRAPF	Human Rights Awareness and Promotion Forum
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDS	Institute of Development Studies
IEBC	Independent Electoral and Boundaries Commission
ILO	International Labour Organization
IMF	International Monetary Fund
IREC	Independent Review Commission
ISER	Initiative for Social and Economic Rights
KADU	Kenya African Democratic Union
KANU	Kenya African National Union
KHRC	Kenya Human Rights Commission

KIPE	Kisumu Initiative for Positive Empowerment
KPA	Kenya Ports Authority
KPU	Kenya People's Union
KY	Kabaka Yekka
LC	Local Council
LDU	Local Defence Unit
LEAT	Lawyer's Environmental Action Trust
LGBT	Lesbian, gay, bisexual and transgender
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
LGBTIQ	Lesbian, gay, bisexual, transgender, intersex, and questioning
LHRC	Legal and Human Rights Centre
LL.B	Bachelor of Laws
LMA	Law of Marriage Act
LRA	Lord's Resistance Army
MP	Member of Parliament
NAACP	National Association for the Advancement of Colored People
NAFCO	National Agricultural and Food Corporation
NAPE	National Association of Professional Environmentalists
NARC	National Rainbow Coalition
NATO	North Atlantic Treaty Organization
NCA	Ngorongoro Conservation Area
NEMA	National Environment Management Authority
NGO	Non-governmental organization
NRA	National Resistance Army
NRC	National Resistance Council
NRM	National Resistance Movement
OC	Officer-in-Charge
OAG	Office of the Attorney General
OAU	Organization of African Unity
ODM	Orange Democratic Movement
PET	Post-election 'trauma'
PIL	Public interest litigation
PLI	Public Law Institute
PNU	Party of National Union
PQD	Political Question Doctrine
PRA	Peoples Resistance Army
PSAs	Production sharing agreements
QC	Queens Counsel
R2P	Responsibility to Protect
SADC	Southern African Development Community
SID	Society for International Development

SMUG	Sexual Minorities—Uganda
SSRN	Social Science Research Network
SVS	Saviour-victim-Savages
TANU	Tanganyika African National Union
TARAFO	Tanzania Rainbow Forum
TAZARA	Tanzania Zambia Railway Authority
TEA	Transgender Education and Advocacy
TEAN	The Environmental Action Network
TK	Traditional Knowledge
TLS	Tanganyika Law Society
TPDF	Tanzanian People's Defence Forces
TRC	Truth and Reconciliation Commission
UCC	Uganda Constitutional Commission
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
ULS	Uganda Law Society
UN	United Nations
UNLF	Uganda National Liberation Front
UNSC	United Nations Security Council
UPC	Uganda People's Congress
UPDF	Uganda Peoples Defence Forces
UPE	Universal Primary Education

PREFACE AND ACKNOWLEDGEMENTS

On October 14, 2013, I met Dr. John Ruhangisa, at the time Registrar of the East African Court of Justice (EACJ) in Arusha, Tanzania. It was a cool, bright-skied morning, and we discussed all manner of issues relating to the public interest litigation that had become a prominent feature of his court—and a central part of the research for this book. Following the interview, we walked out together into the dazzling sunshine and I turned on my phone. The time was eleven o'clock. I found several missed calls from my brother, Simon, and knew they could mean only one thing; my ailing father, Bernard Onyango had died. This book is primarily dedicated to his memory and to my mother, Lucy Kahambo Onyango, for without them there would literally not be a "me." And I don't mean that in the obvious way of conception, but as an indication of how much they influenced what I have become and of the positive values they sought to instill, albeit not always successfully.

The journey towards completion of this book has been a protracted one. It was conceived as part of a much more narrow and modest objective, namely, to bring the experience and lessons of public interest litigation (PIL) in East Africa to a wider audience. Two years earlier I had co-founded the Public Interest Law Clinic (PILAC) at the School of Law, Makerere University. It was one of my last administrative functions as Director of the Human Rights & Peace Centre (HURIPEC). Before that I had been directly and indirectly involved in numerous cases of a public interest nature over the years and was struck by the way this area of litigation was developing without much theoretical conceptualization of either PIL's meaning or its impact on the development of jurisprudence in wider East African society. All over the region, new frontiers in the implementation of Human Rights and Constitutional Law were being scaled, albeit with scant analysis or documentation. I felt that it was a story that needed to be explored, amplified, and recorded for posterity.

Freed from the administrative chores that had been the bane of my life for the last decade, I approached the Ford Foundation for a grant in order to "stimulate some interest and debate around the subject of PIL in East Africa." The Foundation Representative in Nairobi, Maurice Makoloo, enthusiastically embraced the idea, and together with Program Officer Monica Aleman-Cunningham pushed to have the project supported. As an

institutional "home" for my musings I turned to the International Governance Alliance (iGA), headed by the indefatigable Maria Nassali, who provided logistical support for the research tours I undertook, both in the East African region and to South Africa. Maria also provided the administrative back-up that a pan-regional research undertaking of this kind invariably requires. But more importantly, iGA pushed for a twofold reconceptualization of the project from its primary academic focus to embrace a more hands-on activist anchoring. Thus, we arranged for several country convenings at which the findings of the research were disseminated to a wide audience of judges, activists, scholars, PIL-clients, litigators, and the broader civil society. The result was an iGA Working Paper entitled *Human Rights and Public Interest Litigation in East Africa: A Bird's Eye View.*

I am grateful for all the commentary I received and especially that which came from the members of the Judiciary—including Chief Justices Willy Mutunga of Kenya, Mohamed Chande Othman of Tanzania, and Ag. Chief Justice Steven Kavuma of Uganda, and the three iGA Board members, led by Chris Maina Peter, Solomy Balungi Bbossa, and Frederick W. Jjuuko. I thank Kenneth Kakuru for his fascinating anecdotal history of how public interest litigation came to Uganda—although his claim that the phenomenon was born because somebody dared to smoke a cigar outside the Principal Judge's chamber should be taken with a pinch of salt! Martin Nsibirwa and Frans Viljoen of the Centre for Human Rights at the University of Pretoria were exceptionally helpful in connecting me to the public interest law fraternity in South Africa. Patricia Kameri-Mbote—Dean of Law at the University of Nairobi—not only linked me up to two fabulous research assistants, she also plied me with a wide range of critical materials on the situation in Kenya.

The project might have ended with the iGA working paper, but in the middle of my sabbatical I won a Fulbright fellowship which took me to the George Washington University (GWU) School of Law in the U.S. My hosts in Washington DC—Susan Karamanian, Ralph Steinhardt, and Silena Davis—provided a most conducive atmosphere in which I could work and interact with all manner of individuals—students, staff, and visitors. While there, I discovered there was a great deal of interest in the recently-decided case in which I had led nine petitioners to successfully challenge the Anti-homosexuality Act (AHA). As a result, what was supposed to be reclusive and solitary in-stack research between GWU and the Library of Congress turned into a series of public lectures, in-class presentations, brown-bag luncheons, and other exchanges around the

issue. The outcome of these interactions is an article in the *George Washington International Law Review*.

I am also grateful to Lambda-Law, the International Human Rights Law Society (HRLS), and Jane Schaffner, as well as Stella Mukasa and the group at the International Centre for Research on Women (ICRW) for their useful commentary. During the World Bank's Law, Justice, and Development (LJD) week, I was asked to present a paper on Law and Poverty—which provided the framework for chapter 5 of this book. I also met with the Bank's Gay and Lesbian Association (GLOBE), where discussions were both vigourous and illuminating; my thanks goes to Nightingale Rukuba-Ngaiza and Nick Menzies, who facilitated this meeting. Penny Andrews and Stephen Ellmann made it possible for me to attend the conference on Twenty Years of South African Constitutionalism in New York, which greatly helped with the comparative dimensions of the work.

The last chapters of the book were put together in the tranquil vineyards of the Stellenbosch Institute for Advanced Studies (STIAS) in South Africa, where Hendrik Geyer and the community of fellows in residence provided a most stimulating, convivial and engaging opportunity for deeper reflection. Lastly—and by no stretch of the imagination, least—I'm supremely grateful to the Institute for African Development (IAD) at Cornell University, headed by Director Muna Ndulo who, upon hearing my initial ideas, enthusiastically agreed to publish the book. Evangeline Ray, Managing Editor at IAD, was a thorough, gracious, and patient editor of the manuscript and a superb liaison with Cambridge Scholars Publishing.

Other intellectuals, activists, students, and friends—too numerous to list here— have provided either direct commentary or inspirational support for this book. Research assistance was provided by Smith Otieno, Francis Kariuki, Thuto Hlalele, Harold Sungusia, Rosemary Karoro, and Brian Kibirango. The community of public interest lawyers, activists, litigants, and supporters who were variously interviewed for and quoted in this study are also thanked for their indulgence and assistance. As has always been the case, this book would not have been possible without the constant intellectual, moral and spiritual support of my better half and main partner-in-crime Sylvia Tamale and her two deputies, Kwame Sobukwe Ayepa and Samora Okech Sanga.

—J. Oloka-Onyango
June 2015

INTRODUCTION

ABOUT COURTS, POLITICS, AND EAST AFRICA

Will he? Won't he? Will he? Won't he? Oh My God; he just did! And so ended two months of high tension and intense speculation over whether Ugandan President Yoweri Kaguta Museveni would sign the Anti-homosexuality Bill (AHB) passed by Parliament in a hurried pre-Christmas session on December 20, 2013. Few recent stories out of Uganda have captured more attention—domestically or on the international scene—than the publicity surrounding what was dubbed the "Kill-the-Gays" Bill in reference to the proposed law's prescription of the death penalty for certain homosexual offences. Among other things, the contest over the proposed law represented a dramatic transfer to Ugandan soil of the "culture wars" hitherto fought in far-off countries (Hunter 1992).

Under Ugandan law, President Museveni could have done one of three things in relation to the bill: he could have sent it back to the Speaker of the House, pointing out issues that he felt needed to be revisited; or he could have let the deadline for signature lapse, permitting the bill to become law without presidential assent, signifying his moral or political objection to the law but recognizing Parliament as the ultimate authority on the matter. The third option was to sign the bill, which he eventually did. Why he chose to sign it (and the dramatic fashion in which he did so) is a story for another day, but the entry into force of the law meant that there were few options left: the Act could be allowed to remain on the statute books and be implemented with all its draconian implications for the rights of sexual minorities in particular and for the Ugandan public in general; or the law could be challenged in court. We did so.

From its shiny blue aluminium-tiled exterior, Twed Towers in Kampala looks nothing like a typical court of law. But on the fourth floor of the building, the Ugandan Court of Appeal sits in majestic supervision over petitions brought by all and sundry seeking an interpretation of the Constitution. On a muggy, late July morning, I joined a phalanx of co-petitioners, black-robed lawyers, enthusiastic supporters, and equally vehement opponents to have the wig-covered court listen to our challenge to

the Anti-homosexuality Act (AHA).[1] As a response to one of the most controversial laws to have been passed in Uganda's recent legislative history, the hearing brought together a wide cross-section of contemporary Ugandan society drawn from all sides of the social and political spectrum.

Priests and pastors prayed in loud and condemnatory rhythm: "May the blood of Jesus Christ prevent you from winning this case." Pious followers joined along in silent prayer to the Almighty: "Aay-men!" Journalists from all over the world ringed the small chamber with massive booms, microphones, and cameras jostling for space with anxious students and all manner of curious onlookers eager to hear the sharp ring of history. Politicians—ruling party, independent, and opposition—waited with bated breath to learn whether by passing the law Parliament had done "the right thing."

While this book is certainly about the dynamics and implications of challenging a law through court action, it is about much more. For most people, there is a belief that judges are insulated from the wave and waft of that "dirty game" called politics. According to this view, courts and politics—like oil and water—do not mix. Courts are institutions in which justice is supposedly produced in accordance with transparent legal rules and norms (the "Rule of Law") that apply at all times, in all places, and equally to all people—hence the notion that justice is "blind" (Miller 2009, 2). Such a statement is obviously ambiguous. Justice is meant to be blind not simply to material influence, but also to the pressure of politics. Unlike politics, justice is not about who gets what, when, where, and why. That is also why such a premium is placed on the doctrine of the independence of the Judiciary.

But as the scene I described above illustrates, in cases of public interest litigation politics is never far away from the judges' chambers. Consequently, it is not only the parties immediately concerned with the petition who watch keenly for the gains and losses that may result from a court ruling. Such matters will invariably become the concern of the broader public. Because the issues in public interest litigation have typically been the subject of intense social, cultural, or political contestation in other arenas before they reached court, it is simply unrealistic to expect them to have been shorn of these dynamics once they arrive at the Bench. In his classic text on judicial politics, *The Politics of the Judiciary,* Professor John Griffith states,

[1] See *Prof. J. Oloka-Onyango & 9 Others v. Attorney General,* Constitutional Petition No. 8 of 2014.

> neither impartiality nor independence necessarily involves neutrality. Judges are part of the machinery of authority within the State and as such cannot avoid the making of political decisions. What is important is to know the bases on which these decisions are made (Griffith 1991, 272).

The Marxist-Leninist proposition underlines the point that the law is part of the superstructure and is generated by the economic base on which it is constructed. Seen from this perspective, law is a tool that is designed mainly to protect the interests of dominant socioeconomic groups and hence cannot avoid the broad brush of politics. Thus, even an issue that may appear apolitical on its face can raise dust on account of its challenge to the dominance of a particular section of society or to sensitivities lurking below the surface. Legal realists—drawing in part on the Marxian tradition—will also say that what the courts decide is dictated by the political, social, and moral predilections of individual judges. Judges are, according to the theory of attitudinalism, simply politicians sitting behind a Bench (Dorf 2006). Attacking this theory as too simplistic, proponents of the New Institutionalism theory assert that institutional context and factors are far more important than the politics of individual judges (Suchman and Edelman 1996).

A quick survey around the world demonstrates a wide range of ways in which courts relate to and are affected by politics. First, there is the mode of selection of judges. At the furthest extreme are those few countries that employ the mechanism of an election. Some of them—most prominently Japan, Switzerland, and several states in the U.S.—even conduct partisan balloting where the political party of the judge-candidate is made very clear to all and sundry. Most countries have not followed this model, perhaps in fear of what this may say about the price or prejudice of "elected" justice. The majority prefer a more staid or temperate method befitting the sobriety expected to come with occupancy of a chair where impartiality is the chief currency in circulation. But such "staid" methods have the tendency to reproduce privilege and status, and to preserve the status quo as opposed to transforming an institution that should be a broad reflection of society. Thus, English courts—even in the wake of reforms that have witnessed a reduction in the influence of the Law "Lords"—are still very much dominated by white, male members of the largely conservative upper-middle and upper classes, mostly excluding those who "deviate from conventional legal and judicial norms" (Epp 1998, 127).

Today, even the most stoic defenders of an impartial Judiciary would hesitate to claim that courts have nothing to do with politics. If that were indeed the case, then the selection of individuals to occupy the higher judicial Benches would be as inconsequential a matter as which barber cuts,

braids, or perms the president's hair. These matters are important precisely because they are intrinsically political. In other words, we need to accept what Alexander Bickel has called the "shock of recognition"—to realize that the process of judging is both incompatible with and yet inextricably involved in politics (Bickel 1965, 133). The question to ask is not whether courts are engaged in politics, but rather what kind of politics courts are engaged in.

What Kind of Politics?

Nonetheless, answering the question—what kind of politics is at play in the courts?—is by no means straight-forward (Ngugi 2007, 3–4). It depends first upon how the word "politics" is defined, as the word "political" has myriad meanings (Tamanaha 2012). In the United States—partly on account of the very public nature of the hearings for new Supreme Court Justices and the care that presidents of both parties take in selecting their nominees—the partisan hues of the process are evident right from the beginning (Greenburg 2008). Given the profusion of highly charged social and political issues—such as abortion, affirmative action, capital punishment, religion, and sexual orientation—that invariably find their way into the judicial system, the court has evolved to become a particularly sensitive focal point for political battles that have been fought and lost elsewhere. Even in England, which makes a grand show of the political insulation of its Judiciary, it is quite clear that the process of judicial selection is deeply embedded within the "waft and wave" of political machinery (Griffith 1997, 20–22). Thus, it is a shock and yet no real surprise that the first woman appointed to the English Supreme Court assumed office only in 2013. This in a Judiciary that has been in existence for over a thousand years!

With the exception of the appointment of Chief Justice Willy Mutunga in Kenya, the nomination and appointment process of judges in East African countries is generally much less public and hence less obviously political. However, the inordinate delay in appointing a new Chief Justice in Uganda—resulting in a court challenge to the president's attempt to reappoint the incumbent[2]—illustrated that irrespective of the mode of selection, political issues will always be present in such a process.

The mechanics of appointment and vetting of judges is only one part of the picture. Central to an examination of the place of politics in relation to

[2] See *Gerald Karuhanga v. Attorney General,* Constitutional Petition No.0039 of 2013.

the operation of the Judiciary is the manner in which the organs of government relate to one another. Classical Separation of Powers theory holds not only that there are only three arms of government—the Executive, the Legislature, and the Judiciary—but also that the divisions between the three are sealed and impermeable. Under this functional and formalistic theory of the doctrine, the Executive branch is concerned only with the design of policy and implementation of legislation. Laws are generated by the Legislature. The Judiciary simply interprets the law. Judges, according to this formulation, definitely do not make law, and by similar token should steer clear of making comments on, let alone deciding issues to do with politics. Judges should just "judge."

Obviously such a prescription is no longer tenable for two reasons. First, for post-colonial countries such as those in East Africa, there is the colonial legacy in which the Judiciary evolved as an integral part of and remained very closely related to the Executive. Part of the independence struggle has been by courts—pushed in no small measure by civil society—to gain distance from this legacy. Secondly, the operations of modern government have moved very far away from the classic and formulaic separation-of-powers articulation. The separation of governmental power that operates today is a far cry from that which was articulated by Montesquieu—a formulation that could be said to belong to the realm of mythology. It is not as rigid as it was initially designed to be, and each branch of government makes "political" choices and decisions. Bylaws and public regulations are made every day by Cabinet ministers and other public servants; committees of Parliament are conferred with judicial-like powers and perform quasi-judicial tasks; and for their part, courts carry out several administrative functions.

By declaring a law invalid, a court is invariably "making" new law, regardless of how strenuously the learned judges avoid saying so (Gomez 1993, 93). At a minimum the law is being "adjusted" from what it was before. Despite the disavowals of the court, such "adjustment" may sometimes have radical implications for the social or political order (Baxi 1980). Justice Bhagwati of the Indian Supreme Court was more honest than most on the Bench when he stated, "every constitutional question concerns the allocation and exercise of governmental power and no constitutional question can, therefore, fail to be political."[3]

And where does the classical formulation of Separation of Powers place constitutionally-created bodies such as the Human Rights Commissions, independent prosecutor agencies, or anti-corruption and election-supervisory bodies, all of which exercise a hybrid of all three kinds of

[3] The Dissolution Case, 3 SC Indian Supreme Court at 660.

governmental power? What happens when you have an intra-agency conflict, such as between Parliament and the Executive or between, e.g., the Executive and one of the constitutionally-established agencies or commissions? All considered, it becomes quite obvious that courts are not insulated from the political process, nor is it possible in this day and age for them to be so.

There is yet another dimension to this phenomenon. The relationship among the three arms of government is also affected by what has been called the "judicialization of politics" (Yepes 2007) or what Ran Hirschl refers to as the discernible movement towards a "juristocracy" (Hirschl 2004). Matters that used to be monopolized and decided through channels that excluded the Judiciary are increasingly being referred to courts of law for resolution either through constitutional provisions or in ordinary legislation. Bills of rights today are much more detailed and expansive than they traditionally were, outlining many more rights and also opening space for the creation of additional ones. Article 45 of the 1995 Constitution of Uganda specifies that "the rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this chapter shall not be regarded as excluding others not specifically mentioned."[4]

But even with these elaborations, the room for conflicting interpretation is still vast given the broad and general manner in which constitutional and human rights instruments are typically couched: What does "freedom of association" actually mean? How about the "right to privacy"? And how do you define a "democratic society"? In such a context judges are invariably forced to dive into and negotiate the political waters in which these rights swim.

To cap it all, modern formulations that directly give courts the power to interpret the compatibility of legislation with the constitution—the classic function of judicial review—have ensured that the last vestiges of the traditional political isolation of the courts have been effectively removed. Although courts can still run, it is no longer possible to completely hide as the citizenry increasingly demand third-party interventions to resolve problems the political class has failed to address. In an early analysis of this issue, Radhika Coomaraswamy stated:

> Standing between individual citizens and the wielders of power, the Judiciary has become the ultimate, and yet unwilling, arbiter in the arena of democratic politics. This sudden thrust onto the centre stage has made judging a difficult and complex exercise…. The Court often finds that it

[4] See also Article 19(3)(b) of the Constitution of Kenya, 2010.

> has moral responsibility without the necessary safeguards of institutional integrity (Coomaraswamy 1987, 1).

The shift in the perceived role of the courts of law has extended even to areas previously deemed off-limits. For example, many countries typically excluded presidential elections from determination by the Judiciary. This effectively meant that the only way an elected Head of State could be removed (aside from *coup d'etat* or assassination) was at the next election or via a vote of no confidence in the interim. Both of these were decidedly non-judicial actions. Today, numerous countries around the world have transferred the power to adjudicate the election of a president to the judicial arm of the State. Kenya in 2013, and Uganda in 2001, 2006, and most recently in 2016 transferred disputes over the results of presidential elections to a court of law for settlement. The judicialization of politics has correspondingly meant that many social and political actors have begun to formulate their demands in legal and judicial terms (Von Doepp 2009).

Finally, a parallel development has taken place within the international arena with what Maxine Kamari Clarke refers to as the "tribunalization" of international conflicts (Clarke 2010). The term refers to the increasing trend toward transferring a diverse array of conflicts to international courts for resolution, starting with those in the former Yugoslavia and Rwanda, progressing through a range of hybrid arrangements including those reached in Sierra Leone, Lebanon, and Cambodia, and culminating in the 1998 establishment of the International Criminal Court (ICC). The countries of East Africa have been particularly impacted by this expansion in international judicial power.

The Essence of Constitutional Supremacy

All the above developments underscore a particularly important point, especially with respect to countries that were formerly British colonies or protectorates, such as those in East Africa: they illustrate the movement from a doctrine of parliamentary supremacy, under which the Legislature could do literally anything without question, to that of constitutional supremacy. What exactly does "constitutional supremacy" entail? In sum it means the following:

1) All organs of the state—including the Executive, the Legislature and the Judiciary—are bound by the Constitution, at least on the face of it;
2) A system of mutual checks and balances, rather than outright separation between the organs of government, is in operation, leading to

a certain degree of uncertainty and even tension in the relationships between them; and

3) The judicial branch has oversight of the exercise of state power, especially the power of review as laid down in the constitutional instrument.

This last power—the power of interpretation of the constitution—is an inherently political activity. Nevertheless, in using that power, courts must decide whether to pursue a course known as judicial "activism" or hold themselves back in a posture of its opposite, otherwise known as judicial "restraint."

Being vested with the power to determine whether a particular action taken by other arms of the state accords with the constitution, the Judiciary is able not only to act as umpire but also to determine what measures of reward or punishment will be extended to the parties in the event of a breach. Most importantly, the power of oversight marks a shift in context from relative certainty to some degree of indeterminacy. Such indeterminacy will vary in accordance with the history, political economy, and culture of governmental activity in each country. Ultimately, outcomes will also depend upon the extent to which organs of the state, particularly the Executive and the military, are subordinate to coercive power—and whether there is in place a culture of respect for civilian authority. While rewards are always welcome, unduly harsh or objectionable sanctions or punishments can lead to a backlash against the Judiciary. Indeed, there is no guarantee that an activist Judiciary will always make decisions that uphold and enhance the protection of fundamental human rights, or more broadly protect and support the general public good (Ngugi 2007, 3–4).

In light of the above observations, discerning the "political" in operations of the courts can be done in any number of ways. For example, a comprehensive examination of where the judges come from, what they did before they came to the Bench, and how they got there could be revealing. In the case of judges who have moved up through the ranks of the Judiciary, one could gain insight by looking at their decisions in the lower courts before being appointed as compared to decisions made after appointment. For those drawn from Academia, a review of their published work where available would serve the same purpose. Such an exercise would be aimed at establishing the judge's ideological position on various matters, or what is called "judicial politics." However, there is no guarantee that any judicial appointee will remain true to his or her expected ideological moorings or loyal to the appointing authority. The stories of judicial "mavericks" abound.

Numerous factors, ranging from the issues that come before the court to judges' individual beliefs and experiences, as well as the influence of a host of extraneous factors—including public opinion and the nature of the Executive which is in place—impact the way a judge arrives at any particular decision. It is not unusual for a previously conservative individual to become a liberal—or vice versa—once they have climbed onto the Bench. The same applies to "pro-government" or "anti-establishment" individuals. It is also generally a fact that courts at the higher levels consist of more than one judge, implying that decisions of these courts would need to be viewed as a corporatist expression of individual judges' views, accompanied by a dissection of individual judgments, especially where you have a very strong or distinctive dissenting opinion. To cap it all, while some judges are fairly consistent with their opinions, there are also many nonconformist judges who swing from one end of the spectrum of possible decision-making to the other. One final word on this issue is necessary. The constitutionalization of rights and what can be described as the documentary empowerment of the Judiciary is but a first step. The fact is that the three arms of the state are in constant struggle, in some cases latent and benign, in others open and even violent. Nowhere are these tensions on more open display than in relation to the phenomenon of public interest litigation.

Public Interest Lawyering and Litigation in East Africa

Drawing on the links between politics and judicial intervention described above, this book primarily focuses on the mechanism of public interest litigation (PIL) as the prism through which we assess how politics in courts is "done" in East Africa. Insofar as the geopolitical focus of the book is concerned, "East Africa" refers to Kenya, Tanzania, and Uganda. It excludes Burundi and Rwanda primarily because of the different sociolegal and political heritage and distinct judicial links and practices experienced by these states. In addition, public interest litigation is far less developed in the two Francophone countries than in their Anglophone counterparts. The study also excludes South Sudan, for which the experience of political independence is simply too short to make any meaningful comparative conclusions. Beyond the historical ties—Kenya and Uganda for example were once administered as a single entity by the British—the legal regime and professions in all three countries are closely linked. The apex court of the three, the East African Court of Appeal, was established in 1902 and remained in place until 1977. During that time it decided hundreds of cases that still provide useful common authority to the courts in

all three countries (Kakuli 2004, 36–38; Katende and Kanyeihamba 1973). When legal education was localized, it was situated at the University of Dar es Salaam, and all three countries sent students there to study for the Bachelor of Laws (LL.B) degree at the Faculty of Law, established in 1961.

Comparative studies of the three countries are common, but much more as anthologies rather than as thematic, scholarly, in-depth examinations of particular phenomena. With respect to PIL, the major work primarily consists of reports from non-governmental agencies. In sum, there are no in-depth, critical, scholarly examinations of how public interest litigation has impacted the general body politic of the three East African countries.

Why public interest litigation? Taken broadly, PIL refers to court action that seeks to secure the human and constitutional rights of a significantly disadvantaged or marginalized individual or group. It is a mechanism that has been utilized to challenge legislation, arbitrary State action, or even violations by private individuals that have public implications, such as ethnic or gender-based discrimination. Such legal action can be used in tandem with broader social and political movements directed at change or to encourage alliances that result in political action (Hershkoff and McCutcheon 2000, 283). The underlying goal is to foster broad social impact and change. According to Frederick Jjuuko:

> 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 (Jjuuko 2004, 102).

PIL has been described as the expression of politics through "other means" (Abel 1995) because this route is often chosen when traditional channels of direct political action aimed at achieving social or political change, namely voting or legislative action, have been closed off or blocked. While the expression "politics by other means" was initially used specifically in relation to challenging the institution of apartheid in South Africa, it is clear that politics through "normal means" is not always possible—even in countries that are ostensibly democracies. The use of courts to achieve political goals through litigation is thus an action still very much in use, whether or not fundamental change results from such intervention.

A number of additional observations can be made about the nature of PIL in the twenty-first century. First, there is a wide range of issues that can become the focus of such litigation. Courts have enabled the concept to extend "beyond the restricting requirement of the existence of some proprietary interest of a public character" (Thio 1971, 140). Therefore, public interest law today does not describe a particular body of law or a specific legal or academic field. Issues ranging from employment or gender-based discrimination to protection of the environment, worker's compensation, or unfair forms of taxation can all form the focus of legal struggle under this form of litigation. Hence, PIL describes both the nature of the issues and the class of persons being represented in such action.

Second, public interest lawyers do not generally represent powerful economic interests, choosing instead to be advocates for otherwise underrepresented individuals. PIL generally focuses on issues of particular concern to the community at large, to a major section of the public, or to a recognizable but marginalized minority. The outcome of such litigation is deemed important in that it is likely to impact not only the individual complainant bringing suit, but also a larger cross-section of society. In this respect it is a kind of legal aid, although PIL has an interest broader than just the grievance of the particular individual who is being assisted. As Richard Abel points out, "the clientele of legal aid does not lend itself to organization, and … the offer of legal assistance actually may undermine collective action" (Abel 1985, 497). On the other hand, precisely because PIL is ultimately aimed at the collective and not simply for individual benefit or empowerment, it has powerful potential for organizing those affected by a particular law or government action and for ultimately fostering social change. It is in focusing on the collective that PIL crosses over from the purely personal to become political.

Thirdly, PIL is generally targeted at failures or omissions on the part of the State to meet obligations, such as access to adequate health care, rights to and within education, and other forms of service delivery that are fairly well stipulated either in the constitution or in ordinary law. To borrow from Mario Gomez, public interest litigation is part of "a reaction to the failure of the political elite…to improve substantially the conditions of underdevelopment and poverty" (Gomez 1993, 7). Finally, given that states are only one of numerous other potential human rights violators or inhibitors, PIL is also increasingly focused on actors or agents—family, clan, community, and even corporations—that may be directly responsible for the violation.

Despite what can be touted as its most positive attributes, PIL is a particular form of social action with a heavy focus on courts of law as the

means for seeking realization of human rights. Invariably, there are limitations in such a strategy. Stuart Wilson cautions that rights fought for via PIL "come with a lot of baggage" primarily because they are generally understood to be a set of purely legal claims (Wilson 2014). This places too much reliance on institutions for enforcement of claims that may be too weak or compromised to deliver meaningful social change:

> It is no good asking an elite judge, through elite lawyers, to do something truly egalitarian. His (and it is still usually his) class and other social prejudices will interfere. Even if they don't, strong traditions of judicial restraint will. At best, a transformative political claim will be wrung through the legal system and emerge as a much diminished legal right. That right will then be virtually impossible to enforce, because all the institutions of enforcement are operated by the very interests that the judgment is meant to curb. Rights also require a stable bureaucracy that respects the rule of law, and an independent Judiciary. These cannot always be guaranteed (Wilson 2014).

There are several other facets to the argument that PIL may not ultimately reinforce or foster the public good. Charges have been made that PIL is an elite project that steers the Judiciary away from its traditional functions and into arenas where it has neither the competence nor capacity to do much good. Some have argued that PIL presents an over-inflated vision of the possibilities of social change through court-dominated legal action (Rosenberg 1971, 70–71). There are also claims that using courts to achieve goals that are essentially political in nature lacks the necessary legitimacy to ensure that there is social buy-in of such interventions. According to this argument, court-made law is ultimately not sustainable. As Handmaker argues, "public interest litigation represents a confrontational expression of civic agency that is, generally speaking, more limited in scope than cooperative interactions (such as advising a policy-making process) but potentially has great value in elaborating a state-created structure" (Handmaker 2011, 71). Attention to these and other critiques will be an enduring feature of the subsequent analysis in this book.

The Structure of the Book

This book is divided into seven chapters. Because it lies at the core of determining whether a matter will see the light of day, the critical question of who has a right to bring a case to court is addressed in the first chapter. The chapter considers the issue of access to courts of law and explores the historical, socioeconomic, and political questions that have influenced the evolution of the *locus standi* doctrine, otherwise translated as the right to

be heard in a court of law. The chapter retraces the roots of the doctrine, contrasts the traditional African approach to pre-colonial systems of adjudication, and then considers the impact of the Common Law legacy on the realization of justice in the colonies. That legacy was incorporated into the various Orders-in-Council and their infamous "reception clauses," which provided the legal basis for the colonial system of governance that was established.

Chapter 2 considers the application of *locus standi* within the post-colonial East African context and examines the extent to which courts in the early years of independence modified, adapted, or retained key elements of the doctrine. It also examines the impact these actions have had on attempts to pursue the protection of rights and uphold democratic constitutionalism. The chapter also looks at the Political Question Doctrine (PQD) as one of the main mechanisms used by the Judiciary to shield itself from engaging in matters regarded as too political or controversial. That doctrine has had a marked impact on the manner in which East African courts have made their decisions on matters of public interest, and it continues to exert significant influence on the courts today.

Beyond the question of standing is of course the manner in which the courts actually handle the issues they agree to consider. Thus, chapter 3 introduces and examines the evolution and development of the public interest litigation phenomenon as it first surfaced in jurisdictions elsewhere—specifically the United States, India, and South Africa—before turning to an in-depth examination of the East African experience.

Chapter 4 considers the gendered manner in which women and sexual minorities have been traditionally excluded from engagement with and benefitting from the political economy of the justice system and how they have fought back against such exclusion. There is particular focus on how the treatment of women has played itself out in the courts of law. The chapter considers the ways in which justice in East Africa has been gendered, particularly through the preference given to dominant, patriarchal forces and institutions. Also considered is the impact on women of the processes of judging on issues both personal (family relations, cultural practices, and inheritance), and political (representation, inclusion, and participation). The chapter concludes by examining the gendered manner in which the law and courts have dealt with the issue of sexual minorities.

Chapter 5 moves the focus of the book to an examination of how public interest litigation has been deployed to address economic, social, and cultural rights (ESCRs) against the wider backdrop of the relationship between law and poverty. It asks and attempts to answer the question: "what have courts got to do" with such issues?

Chapter 6 examines the process of adjudicating disputes over presidential elections. Although not traditionally regarded as public interest litigation, presidential elections, this book argues, are crucial to the welfare and interest of the public, especially given the manner in which presidential politics has affected governance and social transformation in all the countries of the region. In other words, court action on presidential elections—although invariably instituted by the losing party—should be taken as a *sui generis* specie of public interest litigation. Noting that courts have traditionally been insulated from making decisions over this most controversial of political acts, the chapter examines the repercussions now that the power to review such elections has been given to the courts in both Kenya and Uganda. A similar mechanism of judicial oversight has been proposed in Tanzania.

Chapter 7 consists of concluding reflections.