

Article

Expanding Standing to Develop Democracy: Third-Party Public Interest Standing as a Tool for Emerging Democracies

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INTRODUCTION

The 1990s marked the beginning of a constitutional proliferation throughout sub-Saharan Africa in a process that continues today.¹ These newer constitutions were written in an attempt to usher in an era of democratization on the continent. In many of these nations, the move from authoritarianism to democracy was spurred, in part, by the discontent of a politically excluded citizenry.² The new constitutions reflected this and were celebrated for their written commitment to individual rights and a democratically accountable government. More recently, however, scholars have called into question the effectiveness of these new constitutions. Some charge that they are really just “shams” or ornamental documents that serve to consolidate power among political elites,³ fail to create a meaningful democratic system, and persist in disempowering non-elites and commonly marginalized populations. The new governments, although democratic on paper, maintain political inequality and perpetuate the de facto disenfranchisement of non-elites and historically marginalized groups. In particular, women across the continent have long been marginalized and continue to face great barriers to meaningfully participate in their country’s political and constitutional dialogue. Largely ignored by their executive and parliament and lacking the means to assert their rights themselves in court, these women are unable to exercise their constitutional rights, rendering these rights meaningless.

Yet, in some African nations, a new standing doctrine, sometimes even provided for in these “sham” constitutions, is providing the opportunity for women to overcome their marginalization. This new doctrine of third-party public interest standing permits a third party or bystander litigant to assert

1. Since 1990, a large majority of sub-Saharan African constitutions have been rewritten, including Angola (2010), Benin (1990), Burkina Faso (1991), Burundi (2005), Cape Verde (1992), Chad (1996), Comoros (2001), the Democratic Republic of the Congo (2006), the Republic of the Congo (2002), Cote d’Ivoire (2000), Djibouti (1992), Equatorial Guinea (1991), Eritrea (1997), Ethiopia (1995), Gabon (1991), Gambia (1996), Ghana (1992), Guinea (2010), Kenya (2010), Lesotho (1993), Madagascar (2010), Mali (1992, currently suspended as a result of the 2012 coup), Mauritania (1991), Mozambique (2004), Namibia (1990), Niger (2010), Nigeria (1999), Rwanda (2003), Senegal (2001), Sierra Leone (1991), South Africa (1996), Swaziland (2005), Togo (1992), Uganda (1995), and Zimbabwe (2013). A number of these and other African constitutions have also been amended, sometimes substantially, multiple times. Sudan is operating under an interim constitution adopted in 2005. INTERIM CONSTITUTION OF SOUTHERN SUDAN (2005). When South Sudan gained independence in 2011, it ratified its constitution. TRANSITIONAL CONSTITUTION OF THE REPUBLIC OF SOUTH SUDAN (2011). In addition, the Central African Republic and Tanzania have drafted new constitutions awaiting approval, and Somalia and Zambia are undergoing constitution-making processes. Peter Adamu, *Hichilema Presents Constitution Roadmap*, ZAMBIA REP. (Jan. 12 2015), <http://zambiareports.com/2015/01/12/hichilema-presents-constitution-roadmap>; *Central African Republic Council Adopts New Constitution*, REUTERS AFR. (Aug. 31, 2015), <http://af.reuters.com/article/centralAfricanRepublicNews/idAFL5N1164W620150831>; *Tanzania Delays Referendum on Constitution*, REUTERS (Apr. 2, 2015), <http://www.voanews.com/content/tanzania-delays-constitution-referendum/2705034.html>; *Constitutional Reform in Somalia*, INT’L DEV. LAW ORG., <http://www.idlo.int/what-we-do/initiatives/constitutional-reform-somalia-0>.

2. See 5 BEN NWABUEZE, CONSTITUTIONAL DEMOCRACY IN AFRICA 49 (2004). This discontent is one of several international and internal forces pressuring African states to move towards democracy. *Id.* at 27-67.

3. David S. Law & Mila Versteeg, *Sham Constitutions*, 101 CALIF. L. REV. 863 (2013). The authors find that the African continent is home to five of the ten nations in the sham constitution “hall of fame”: Nigeria, Eritrea, Sudan, Ethiopia, and the Democratic Republic of the Congo. *Id.* at 899 tbl.4.

constitutional rights on behalf of other individuals or groups. Dissimilar to a class action litigant, the third-party public interest litigant does not suffer the injury of the alleged violation but is permitted to litigate the constitutional violation, whether as the sole petitioner or in addition to other direct or indirect plaintiffs. This third-party public interest standing doctrine has been embraced by a growing number of nations, either through common law development by judges or as explicitly memorialized in the constitutional text. I argue that this doctrine carves out a political opportunity for the disempowered and ultimately propels societies toward democracy, overcoming the stymying efforts of the politically powerful.

Uganda and Kenya provide excellent examples of nations in which third-party public interest standing allows women's groups to develop a political presence for women, even as the traditional democratic entry points remain closed to them. Since 1990, each nation has developed a new constitution with extensive rights provisions,⁴ yet each also has a history of an executive that hoards power and a system that protects government elites.⁵ Although each nation has very active women members of parliament who have achieved some successes, such as outlawing female genital mutilation, the parliaments themselves are relatively unresponsive to women's concerns on other crucial issues, such as ensuring equality in family law and property law and dismantling extremely discriminatory norms perpetuated in the name of "tradition" or "custom." Significantly, each nation, in its constitution, has created an opportunity for women's interests to be represented by public interest groups via third-party public interest standing. Women's groups in each nation have begun using third-party public interest standing to give otherwise marginalized women the opportunity to participate in democratic discourse.

Although it creates an important judicial space allowing disempowered groups to participate in political discourse, the concept of third-party standing challenges traditional Western-rooted theories of democracy and constitutionalism. These perspectives suggest that third-party standing lacks democratic legitimacy because (1) expanding standing inappropriately expands the reach of the judiciary and threatens the separation of powers and (2) third-party plaintiffs cannot present the most authentic voice for those on whose behalf they are speaking. However, these perspectives do not take into account the sociopolitical realities of countries like Kenya and Uganda, where marginalized voices go unheard in the absence of special measures. The recent experiences of women's groups using third-party public interest standing demonstrate how the practice can further—not undermine—rule of law and

4. Kenya's most recent constitution, which went into effect in 2010, was developed and adopted in the wake of the 2007-2008 post-election ethnic violence and contains twenty-six articles relating to human rights. CONSTITUTION arts. 26-51 (2010) (Kenya). Uganda's constitution was adopted in 1995 and is one of the longest in the world. Aili Mari Tripp, *The Politics of Constitution Making in Uganda*, in U.S. INST. OF PEACE, FRAMING THE STATE IN TIMES OF TRANSITION 158, 161 (Laurel E. Miller ed., 2010). In a 2006 survey of the written constitutions of the fifty-three African countries existing at the time, Uganda came out on top, tied with the Democratic Republic of the Congo, as recognizing the greatest number of human rights. Christof Heyns & Waruguru Kaguongo, *Constitutional Human Rights Law in Africa*, 22 S. AFR. J. HUM. RTS. 673, 716-17 tbl.2 (2006).

5. See discussion *infra* Parts III.A.2, III.B.2.

constitutional goals by bringing issues faced by marginalized groups into the democratic dialogue.

This is not to challenge the democratic form altogether but to emphasize a larger point: the sociopolitical circumstances of fragile democracies such as Kenya and Uganda require approaches to protection of the constitution and promotion of rule of law that are not widely accepted in traditional Western theories. Although third-party standing allows only for an indirect form of access to courts, it provides an entry point into the democratic system that is otherwise closed in these communities. I argue that political expediency requires this form of indirect representation in court, with the hope that, once they have gained a foothold in political discourse, marginalized groups will gain the ability to speak for themselves. Additionally, Western views on standing and judicial restraint assume a responsive elected government. However, in a politically closed system, accessing the system through the judiciary becomes one of the few viable means by which to participate. In this respect, by permitting an entry point via the judiciary, third-party public interest standing not only serves constitutional (or rights-based) ends but also enhances democracy.

This Article is the first to argue that, under certain conditions, third-party public interest standing will enhance constitutional rights and democracy in emerging democracies. Much of the current legal scholarship on third-party standing in the United States relates to environmental litigation.⁶ With respect to individual rights, the scholarship generally considers the expansion of standing in larger, more established democracies,⁷ or only incidentally when analyzing public interest litigation more generally.⁸ This Article seeks to add to rule of law scholarship and practice by shifting the discussion to emerging democracies, where the doctrine's impact on democracy will respond to more urgent needs.

In Part I of this Article, I provide a brief background on the move toward constitutional democracy in Africa and the shortcomings of some of the current governments, especially with respect to protecting women's rights. In Part II, I provide an overview of the theoretical underpinnings of standing as well as the various modern-day approaches to standing globally. In this Part, I also discuss

6. See, e.g., Robin Kundis Craig, *Removing "The Cloak of a Standing Injury": Pollution Regulation, Public Health, and Private Risk in the Injury-in-Fact Analysis*, 29 CARDOZO L. REV. 149 (2007); Daniel Farber, *A Place-Based Theory of Standing*, 55 UCLA L. REV. 1505 (2008); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992).

7. This doctrine of third-party public interest standing has been examined, to the extent that it has been permitted, in both the U.S. federal and state governments, as well as in countries like the United Kingdom, Canada, and India, which have developed broad public interest exceptions to the traditional standing requirement. See Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM. J. COMP. L. 495 (1989); Gwendolyn McKee, *Standing on a Spectrum: Third Party Standing in the United States, Canada, and Australia*, 16 BARRY L. REV. 115 (2011); Susan D. Susman, *Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation*, 13 WIS. INT'L L.J. 57 (1994).

8. See, e.g., CHRISTOPHER Mbazira, PUBLIC INTEREST LITIGATION AND JUDICIAL ACTIVISM IN UGANDA: IMPROVING THE ENFORCEMENT OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS (2009); Surya Deva, *Public Interest Litigation in India: A Critical Review*, 1 CIV. JUST. Q. 19 (2009).

the development of third-party public interest standing in those jurisdictions where it has been most influential, particularly India. In Part III, I examine third-party public interest standing specifically in the socioeconomic and political contexts of Uganda and Kenya. Examining the lack of availability and responsiveness of other political channels to women, I argue that this form of standing allows women—and, accordingly, other marginalized populations or groups—greater access to the political conversation. In Part IV, I respond to the theoretical objections to the democratic legitimacy of third-party public interest standing and argue that the political realities of the Ugandan and Kenyan democracies require such a doctrine. In Part V, I propose that because public interest standing creates an important judicial space allowing for discursive empowerment of dispossessed groups, it should be strongly considered as a component of rule of law constitutional reforms not just in the modern African state but also in other similarly situated democracies.

I. CONSTITUTIONALISM IN SUB-SAHARAN AFRICA

Africa's first constitutional moment accompanied the continent-wide independence movement in the 1950s and 1960s, leading to postcolonial governments that were largely authoritarian. Prior to the new constitutional moment beginning in 1990, forty-two African nations, including Uganda and Kenya, were under authoritarian rule.⁹ External and internal pressures pushed many of these nations to move to a democratic system, spurring the current constitutional proliferation.¹⁰ Under these new constitutions, many of these governments have moved towards a tripartite system constrained by separation of powers.¹¹

Even as the new constitutionalism moved the continent towards a democratic form, many African nations have effectively dispossessed certain groups, preventing them from asserting their own constitutional rights. The modern African constitution provides for separation of powers and delineates a number of guaranteed rights,¹² but political reality has not kept pace: power remains concentrated in the executive,¹³ and political elites fail to give life to

9. See NWABUEZE, *supra* note 2, at 193-94.

10. See *id.* at 27-67.

11. For example, the constitutions of Botswana, Kenya, Rwanda, South Africa, Tanzania, and Uganda each provide for a legislative, executive, and judicial branch of government, each branch with powers authorized and restricted by the applicable constitution. CONSTITUTION arts. 30-107 (1966, amended 2006) (Bots.); CONSTITUTION arts. 93-170 (2010) (Kenya); CONST. OF THE REP. OF RWANDA art. 60 (2003); S. AFR. CONST. arts 42-102, 165-180 (1996); CONST. OF THE UNITED REP. OF TANZ., Cap. 2, arts. 33-83 & 107A-113A (1977); CONST. OF THE REP. OF UGANDA arts. 77-110 & 126-141 (1995); see Charles Manga Fombad, *The Separation of Powers and Constitutionalism in Africa: The Case of Botswana*, 25 B.C. THIRD WORLD L.J. 301, 341 (2005); Judge Phineas M. Mojapelo, *The Doctrine of Separation of Powers (A South African Perspective)*, 26 ADVOCATE 38-44 (Apr. 2013), <http://www.sabar.co.za/law-journals/2013/april/2013-april-vol026-no1-pp37-46.pdf>.

12. See Charles Fombad, *Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa*, 55 AM. J. COMP. L. 1, 13 (2007).

13. See Charles Fombad, *Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects*, 59 BUFF. L. REV. 1007, 1024 (2011) (drawing from examples in Francophone and Lusophone Africa and asserting that “[o]ne of the major problems that

constitutionally guaranteed rights. The political makeup of the postdemocracy government remained unchanged from the predemocracy government in many nations, including in Uganda and Kenya.¹⁴ Many of the carefully enumerated rights go unenforced and unprotected. Even foundational rights such as the right to vote are undermined by the machinations of political elites.¹⁵ The politically dispossessed remain dispossessed, with limited means of representing and advocating their interests in the political system.

Women have unfortunately suffered this dispossession throughout and after the constitutional transition in many African states. Specific to women, a growing number of countries explicitly provide for legislative or constitutional measures to improve gender imbalances in political participation,¹⁶ and a large number of them have constitutional guarantees of sex equality.¹⁷ The increasing numbers of women in public life have had a positive effect. For example, after anti-female genital mutilation and anti-trafficking gained steam as global movements, African parliaments passed robust legislation abolishing the two practices.¹⁸ However, many sex-discriminatory laws and policies remain on the books, and women's access to justice remains poor. Importantly, legal discrimination in the areas of family law and property law persists, in some ways creating greater harm than female genital mutilation and trafficking ever could. Without rights in divorce and access to property, many women are unable to leave abusive marriages, dependent on men for their economic well-being, and otherwise not empowered to leave harmful situations. Empowerment depends heavily on family and property laws.

Of course, women are not the only groups at risk. Constitutional promises extend to other groups who similarly experience violations of rights. Indigenous groups throughout the continent have faced encroachments on their rights, especially their land rights.¹⁹ Minority ethnic groups have similarly

was not addressed by the post-1990 constitutional reforms was the issue of African absolutism, caused by the concentration and centralization of power in one man, the president, and in one institution, the presidency, and the abuses of powers that go with this"); H. Kwasi Prempeh, *Africa's "Constitutionalism Revival": False Start or New Dawn?*, 5 INT'L J. CONST. L. 469, 497-99 (2007).

14. See NWABUEZE, *supra* note 2, at 189.

15. See Fombad, *supra* note 12, at 3-5.

16. For example, in addition to Uganda and Kenya, legislatures in Burundi, Rwanda, and Zimbabwe are subject to a constitutionally mandated sex-based quota. LA CONSTITUTION DE BURUNDI art. 164 (2005); CONST. OF THE REP. OF RWANDA arts. 9(4), 76, 82 (2003); CONST. OF ZIM. art. 124(1)(b) (2013). Other nations require a minimum number of candidates to be women. Currently, twenty-eight countries in Africa have either legislatively or constitutionally mandated quotas in either candidates or elected seats for the legislative branch. *Global Database of Quotas for Women*, QUOTA PROJECT, <http://www.quotaproject.org/uid/search.cfm> (last visited Oct. 14, 2015).

17. Nearly every new constitution on the African continent, if not all, has at least one provision providing for equality under the law or freedom from discrimination, including the ones listed *supra* note 16. LA CONSTITUTION DE BURUNDI arts. 13, 19 (2005); CONST. OF THE REP. OF RWANDA art. 9(4) (2003); CONST. OF ZIM. art. 56 (2013).

18. As of 2008, eighteen African nations had already adopted legislation criminalizing female genital mutilation. *Female Genital Mutilations: Legal Prohibitions Worldwide*, CTR. FOR REPROD. RTS. (Dec. 11, 2008), <http://reproductiverights.org/document/female-genital-mutilation-fgm-legal-prohibitions-worldwide>.

19. See Aparna Polavarapu, *Reconciling Indigenous and Women's Rights to Land in Sub-Saharan Africa*, 42 GA. J. INT'L & COMP. L. 96, 99 (2013).

faced mistreatment.²⁰ The need for finding ways to protect the exercise of constitutional rights and freedoms extends to numerous subpopulations on the African continent.

Despite these drawbacks, African constitutions have incorporated novel approaches that reflect their own history and population,²¹ which may also provide an important pathway to empowerment in spite of the democratic and constitutional underperformance by government institutions. Third-party public interest standing is one such example that deviates from more traditional Western approaches to separation of powers and judicial authority. It is this expanded standing doctrine, which remains unaccepted by much—but not all—of the West, that has created opportunities for the dispossessed to assert a political presence and for countries like Uganda and Kenya to move towards enhanced democracy and rule of law.

II. JUDICIAL THEORY AND THE EXPANSION OF STANDING

The question of whether the doctrine of third-party public interest standing should be embraced in democracies such as Uganda and Kenya is firmly situated in constitutional and rule of law theories relating to judicial space. At the most basic level, democracies must consider whether courts should even review legislation. Determining whether to embrace judicial review requires, among other things, determining which branch has the burden of ensuring the legitimacy of legislation and government action. The question of when to grant standing to request constitutional review of legislation is an outgrowth of this analysis. Expansion of standing extends the judiciary's reach, potentially increases the number of constitutional questions arriving before the bench, and permits a greater number of actors to participate in constitutional discussions, thereby creating a greater number of opportunities for political disruption. Yet it also potentially extends the sphere of constitutional protection and strengthens the check against government excess and constitutional violations.

The predominant theories of judicial space, constitutionalism, and rule of law have Western roots. Uganda and Kenya, as well as their neighbors on the African continent, other former colonies around the world, and nations simply looking to build or strengthen democratic forms of government, have been

20. Many of the marginalized ethnic minorities in Africa are the indigenous groups facing land threats, but other ethnic minorities face threats such as hate speech, hate crimes, police violence, and suppression of their freedoms of religion and expression, among others. Brilliant Mhlanga et al., *Africa, in* MINORITY RIGHTS GRP. INT'L, STATE OF THE WORLD'S MINORITIES AND INDIGENOUS PEOPLES 51, 51-82 (2014).

21. For example, aside from third-party public interest standing, many African constitutions recognize customary land tenure and explicitly seek to balance cultural and tribal norms with constitutional rights. *E.g.*, CONSTITUTION (2010) (Kenya) (Articles 61 and 63 refer to communal lands, and Articles 44 and 45 refer to the balancing of cultural rights generally and in the context of marriage); CONST. OF THE REP. OF NAMIBIA (1998) (Article 102 refers to communal lands, and Article 19 refers to the balancing of cultural rights); S. AFR. CONST., 1996 (Article 25 acknowledges community tenure, and Articles 31, 39, and 211(3) refer to the balancing of cultural rights); CONST. OF THE REP. OF UGANDA (1995) (Article 237(3) recognizes customary land tenure, and Article 37 refers to the balancing of cultural rights).

heavily influenced by some of the key democratic players in the West. While it is generally acknowledged that simply transplanting Western democratic models is not the most effective way to build a new society, threads of what has worked in the West are woven into new democracies. Colonial governments have left their legacies in the modern African state and other former colonies. In particular, the British and French had a sizeable colonial footprint and inspired the governmental models in their former colonies. In addition, twentieth-century American intervention, undergoing a number of permutations including democracy assistance and, more currently, rule of law promotion, has established the American model's substantial influence on modern democratic development. Global approaches to judicial review and standing largely reflect this Western influence.

Even as many nations remain consistent with Western models, others are developing their own models. Among these, a doctrine of expanded standing is emerging, particularly in developing nations. In Part I.A below, I review some of the theoretical underpinnings of standing by examining the development of judicial review and how the institution was designed to prevent excessive judicial interference. In Part I.B, I review the variety of national²² approaches to standing globally, and finally, in Part I.C, I discuss the emergence of third-party standing, which has developed both via judicial doctrine and constitutional codification.

A. *Theoretical Underpinnings of Standing*

Standing doctrines exist in order to limit the type of claimant able to assert a claim in court. Such restrictions are often justified by the democratic and constitutional goals of protecting the separation of powers by maintaining some minimum level of judicial restraint.²³ Standing and judicial review are mutually entangled because both raise similar questions regarding how far a court can reach into the legislative realm.²⁴ The institution of judicial review is often subject to the charge that it permits the judiciary to act impermissibly as a legislator. Thus, in many parliamentary democracies, judicial review was initially prohibited. Where judicial review became an accepted institution, the burden of protecting against interference with the legislative function fell to rules limiting the exercise of judicial review, including by limiting citizens' access to judicial review. Accordingly, standing requirements are designed, in part, to prevent judges from acting as legislators *too often*.

There is an important distinction between judicial review of legislation and judicial review of administrative action. European nations, though initially

22. In some nations, including federalist nations, such as the United States, a national approach to standing is not necessarily reflective of the approaches taken by courts of political subdivisions, such as the individual states in the United States.

23. Standing requirements are also sometimes justified for prudential and other reasons. See Bradford C. Mank, *Judge Posner's "Practical" Theory of Standing: Closer to Justice Breyer's Approach to Standing than to Justice Scalia's*, 50 HOUS. L. REV. 71, 76 (2012).

24. As I discuss *infra* Part IV, third-party public interest standing raises additional questions of legitimacy by virtue of the fact that a third party is speaking for another person.

balking at the idea of permitting judicial review of legislation, have long permitted judicial review of actions taken by civil servants, such as agency or ministry officials. In many civil law European systems, administrative courts ensure that government officials are behaving in line with the constitution or constitutional-level legislation. In the United Kingdom, “judicial review” typically refers to judicial examination of actions taken by government officials.²⁵ Thus, as actors accountable to law, officials are subject to judicial review. The judicial review of legislation, however, was initially—and, in some places, still is—subject to great resistance. Western viewpoints on judicial review, it must be noted, are hardly monolithic. Admittedly, there is a great diversity of views within juridical and scholarly communities, but what I refer to as the “dominant” or “prevailing” views are the ones that control existing policy on the matter.

Montesquieu’s eighteenth century conceptualization of the separation of powers did not permit any judicial interference with the political branches, providing only for a judicial branch that was subsidiary to the other two branches.²⁶ This model appealed to post-Revolution French thinkers, whose attitudes towards judges were quite hostile. In France, judges were viewed not as guarantors of individual rights but instead as actors who perpetuated inequality and supported rights violations.²⁷ The responsibility of assessing constitutionality and protecting individual rights thus fell to Parliament,²⁸ whose role was understood as substantiating the will of the people via legislation,²⁹ an idea attributed to Rousseau’s social contract theory.³⁰ Continental European parliamentary supremacies also rejected judicial review.³¹

In the meantime, the United Kingdom headed towards its own parliamentary supremacy irrespective of the events of the French Revolution³² and continues to be relatively stalwart in comparison to many of its European

25. *Judicial Review and Costs*, U.K. MINISTRY JUST. (July 14, 2015), <https://www.justice.gov.uk/courts/rcj-rolls-building/administrative-court/applying-for-judicial-review>.

26. See 1 CHARLES LOUIS DE SECONDAT, BARON DE MONTESQUIEU, *THE COMPLETE WORKS OF M. DE MONTESQUIEU* bk. XI, at 198-212 (London, T. Evans & Davis, 1777). In describing the legislative, executive, and judicial powers, Montesquieu writes, “Of the three powers abovementioned, the judiciary is, in some measure, next to nothing: there remain, therefore, only two . . .” *Id.* at 204.

27. This hostility arose from the behavior of pre-Revolution French courts, which consistently acted in favor of the nobility, rejected legal reform, and perpetuated class and social inequality. Louis M. Aucoin, *Judicial Review in France: Access of the Individual Under French and European Law in the Aftermath of France’s Rejection of Bicentennial Reform*, 15 B.C. INT’L & COMP. L. REV. 443, 446-47 (1992).

28. See *id.* at 447. In fact, the 1791 Constitution explicitly prohibited judicial review. 1791 CONST. ch. 5 (Fr.).

29. See Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 713 (2001).

30. See Alec Stone Sweet, *Why Europe Rejected American Judicial Review—and Why It May Not Matter*, 101 MICH. L. REV. 2744, 2746 (2003).

31. See Alec Stone Sweet, *Constitutional Courts and Parliamentary Democracy*, 25 W. EUR. POL. 77, 78 (2002).

32. By the 1700s, while France was heading towards revolution, the powers of the British monarch had already been limited by an elected Parliament—a condition set in motion by the first iteration of the Magna Carta in 1215. MAGNA CARTA (1215), reprinted in CHRISTOPHER PETER LATIMER, *CIVIL LIBERTIES AND THE STATE* 3 (2011).

neighbors. Currently, the British system permits only a weak form of judicial review, allowing judges to declare incompatible and refuse to apply any primary legislation violating the European Convention of Human Rights.³³ Although these judicial declarations of incompatibility may be overridden or ignored by Parliament, the move remains controversial, as some opponents continue to argue that it is an attempt to interfere with Parliament, the elected, accountable, and representative body that holds the democratic mandate.³⁴

On the European continent, judicial review eventually became accepted by a number of nations, although it remained important that the judiciary as a whole not be granted too much power.³⁵ Hans Kelsen's constitutional court, initially created in Austria, spread across Europe after World War II. These constitutional courts protect the separation of powers and assuage the fear of judicial tyranny by creating a special and exclusive constitutional space for judicial review.³⁶ Ordinary judges are excluded from exercising judicial review, and constitutional court judges are excluded from exercising the functions of the ordinary judiciary.³⁷

Insofar as members of constitutional courts are legislating by exercising judicial review, theorists distinguish between negative and positive legislating, suggesting that as long as judges only perform the former, they are sufficiently respecting the separation of powers.³⁸ The original ideal form limited judicial overreach by limiting review to abstract review initiated by political parties prior to the promulgation of the law.³⁹ Under this form of review, only political offices—those who had some democratic mandate—can initiate review, and review can only be exercised before a bill actually became law. The inviolability of legislative action is thus preserved, and the process of reviewing legislation was still checked by the political branches. Later, inspired by the American institution of judicial review, several constitutional courts embraced a form of concrete review.

33. The Human Rights Act, which incorporates the human rights set out in the European Convention of Human Rights, to which the United Kingdom is a party, directs judges to construe any primary legislation in a manner that is consistent with the Convention. The groundbreaking provision, section 4, allows courts to make a formal declaration of incompatibility if it is impossible to construe the legislation such that it does not conflict with the Convention. This stops short of American-style judicial review, however, in that the Act does not give courts the power to invalidate the offending legislation and a formal declaration of incompatibility does not require Parliament to remove the offending legislation from the books. At the same time, the Act prohibits courts from acting in a manner inconsistent with the Convention, thus preventing them from applying incompatible legislation. Human Rights Act, 1998, c. 42, §§ 3-4 (U.K.).

34. To mitigate controversy when the Human Rights Act was enacted, the government went out of its way to assure the public that it was implemented for pragmatic reasons and that it remained committed to a parliamentary supremacy. *Rights Brought Home: The Human Rights Bill*, 1997, HOME OFFICE, CM 3782, ¶¶ 1.15-19, 2.13 (U.K.), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights.pdf. Still, years later it remains controversial. *European Court of Human Rights 'risk to UK sovereignty'*, BBC (Dec. 28, 2013), <http://www.bbc.com/news/uk-politics-25535327>.

35. See Stone Sweet, *supra* note 30, at 2766.

36. See *id.* at 2769-70.

37. See *id.*

38. See Stone Sweet, *supra* note 31, at 81-82 (arguing that the move toward positive legislative power would transform judges into “super legislators”).

39. See Stone Sweet, *supra* note 30, at 2770.

On the other hand, in the U.S. federal courts, abstract review of legislation, albeit initiated by individuals, has been rejected on the grounds that it permits judicial overreach. In the United States, where any court has the authority to exercise judicial review, the Supreme Court has become the last arbiter of constitutionality and the system has often been characterized as a “judicial supremacy.” Although this argument sometimes overstates the diminishing constitutional analysis undertaken by the political branches, it does accurately locate the essence of constitutional review in the judiciary. Despite this power, the notion of judicial restraint is an important directive in the United States and is used to justify some of the restrictions on standing, including those requiring a plaintiff with a concrete injury.⁴⁰ With some exceptions, the U.S. Supreme Court has repeatedly refused to grant standing to noninjured plaintiffs, somewhat recently ruling that doing so would give courts a legislative function: vindicating the public interest.⁴¹

Interestingly, just as the trend in Europe is moving towards stronger and more expansive judicial review, in the United States, scholars have begun to question the merits of judicial review. In addition to making claims of overactive judges and judicial activism, some American constitutional theorists have challenged the institution of judicial review altogether, suggesting that the political branches may be more suited to assess the constitutionality of legislation.⁴²

B. *The Spectrum of Approaches to Standing*

Judicial review is now a global phenomenon. While there are certainly nations that maintain the traditional parliamentary supremacy evident in earlier French governments and in the United Kingdom, some form of review is becoming increasingly popular. Many democracies that initially embraced parliamentary supremacy have moved toward an American model, instituting concrete judicial review to protect enumerated rights.⁴³

Among those nations that permit judicial review of legislation, there are a wide variety of rules regulating the types of courts that may engage in judicial review, the types of cases in which courts may interpret the constitutionality of legislation, and the types of plaintiffs or petitioners that may request judicial review. Of course, one thing all judicial review systems must have in common is the existence of a document or group of documents articulating justiciable (as defined by the applicable legal system) norms⁴⁴ against which to review

40. See Mank, *supra* note 23, at 78.

41. See *id.* at 75 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)).

42. See, e.g., Jeremy Waldron, Essay, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

43. See Gardbaum, *supra* note 29, at 714-15.

44. The question of what types of rights are justiciable versus nonjusticiable has been the subject of much scholarly debate, with the controversy centering on economic and social rights. Brian Ray, *Polycentrism, Political Mobilization, and the Promise of Socioeconomic Rights*, 45 STAN. J. INT'L L. 151, 151-53 (2009). However, an increasing number of nations are incorporating such rights into their constitutions. Leaders in this area are India and South Africa, whose courts have adjudicated many claims asserting social, economic, and cultural rights, which many other jurisdictions consider to be

legislation. This may include constitutional and semiconstitutional documents⁴⁵ or human rights documents that are understood by the domestic legal system as requiring compliance of domestic laws.⁴⁶ Judicial review may fall under the jurisdiction of a single constitutional court (concentrated review),⁴⁷ any of the courts in a judicial system (diffuse review),⁴⁸ or some combination thereof.⁴⁹ These courts may embrace the doctrine of *stare decisis*, differ as to their rules regarding *a priori* or *a posteriori* review, and may permit abstract review, concrete review, or both. Nation-states must also decide who has standing or who may refer constitutional questions to the appropriate court. Although standing is typically a common law term, I use it in this Article to refer loosely to the right to institute constitutional proceedings in court.

On the restrictive end of the constitutional standing spectrum are those systems that limit constitutional review to requests from certain political offices. On the African continent, Algeria, Tunisia, Morocco, and Cameroon, nations with French roots and distinct constitutional courts, fall into this category. Algeria's Constitutional Council is only authorized to perform review initiated by the President, the President of the National Assembly or the President of the Council of Nation.⁵⁰ Likewise, Tunisia⁵¹ and Cameroon⁵² authorize only leaders in government or majority groups within government to refer matters to their respective constitutional bodies. In Europe, Bulgaria⁵³ and Estonia⁵⁴ similarly limit proposals of constitutional review to political offices.

nonjusticiable.

45. Israel, for example, has a Basic Law, which is identified by the Venice Commission as having a "semi-constitutional rank," due to its position at the top of the hierarchy of norms. *Study on Individual Access to Constitutional Justice*, EUR. COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION) 9 (Jan. 27, 2011), [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)039rev-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-e) [hereinafter *Study on Individual Access*].

46. For example, the United Kingdom does not have a written constitution, but according to the U.K. Human Rights Act 1998, courts are empowered to declare any primary legislation incompatible with the European Convention on Human Rights. Human Rights Act, 1998, c. 42, § 4(4) (U.K.).

47. The concentrated review model was developed by Hans Kelsen, author of the 1920 Austrian constitution. Under this model, a special court is given jurisdiction over constitutional review. In countries that have adopted this model, the special court often exists outside of the ordinary court system, occupying a distinct constitutional space. John E. Ferejohn, *Constitutional Review in the Global Context*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 49, 51-54 (2002). In a study of its member and observer states, the Venice Commission identified many more concentrated review systems than diffuse review systems. *Study on Individual Access*, *supra* note 45, at 12-13.

48. Diffuse review systems allow individuals to assert constitutional claims in all levels of the court system. See *Study on Individual Access*, *supra* note 45, at 11.

49. *Id.* at 13 (citing Portugal as an example).

50. CONST. art. 166 (1989, amended 1996) (Alg.), www.conseil-constitutionnel.dz/Const89-9.htm ("The Constitutional Council is called upon by the President of the Republic, the President of the People's National Assembly or by the President of the Council of Nation.").

51. CONST. art. 72 (2014) (Tunis.).

52. Matters may be referred by the president of Cameroon, the presidents of either the National Assembly or Senate, or one-third of the members of the National Assembly or Senate. CONST. 1972, amended 1996, arts. 46, 47(1)-(2) (Cameroon). In cases challenging "the regularity" of presidential and parliamentary elections or referendum operations, parties permitted to refer matters also include candidates, political parties that participated in the election, or persons acting as government agents at the election. *Id.* art. 48(3).

53. CONST. art. 150 (1991) (Bulg.).

54. Law on Constitutional Review Court Procedure art. 6, 1993 (Est.).

France, which in the past firmly opposed judicial review, has now liberalized access to constitutional review, permitting abstract review of legislation upon referral by political institutions⁵⁵ as well as concrete review upon referral by ordinary judges. After recent constitutional reforms went into effect in 2010, parties before an ordinary court gained the power to petition the court to refer a constitutional question to the *Conseil Constitutionnel*.⁵⁶ But it is ultimately the judge's decision whether to refer the question to the *Conseil d'Etat* or the *Cour de Cassation*, which then makes a decision whether to refer the question to the *Conseil Constitutionnel*.⁵⁷ Similar systems exist in Italy⁵⁸ and Lithuania.⁵⁹

Occupying a space farther along the spectrum are those nations that provide direct access to constitutional courts to persons who experience an injury as a result of a constitutional violation. In continental Europe, many of these nations also provide certain political institutions access to constitutional courts. Austria's Constitutional Court, for example, may pronounce the unconstitutionality of federal or state law upon application by courts, a state government, one-third of the National Council's members, one-third of the Federal Council's members, or any other applicant who can assert direct infringement of his or her rights.⁶⁰ Similar systems exist in Albania,⁶¹ Azerbaijan,⁶² Czech Republic,⁶³ Germany,⁶⁴ and Latvia.⁶⁵ As of January 1, 2012, Hungary, which formerly recognized public interest standing, restricted the availability of constitutional complaints to political offices and complainants who could demonstrate personal injury.⁶⁶ In Latin America, Venezuela⁶⁷ and Costa Rica⁶⁸ similarly permit complainants to file *writs of*

55. CONST. art. 61 (1958) (Fr.).

56. *Id.* art. 61-1.

57. *Id.*

58. *The Italian Constitutional Court*, CORTE COSTITUZIONALE 28-30 (Oct. 2012), http://www.cortecostituzionale.it/documenti/download/pdf/Cc_Checoca_2013_UK.pdf.

59. CONST. arts. 106, 110 (1992) (Lith.); Law on the Constitutional Court of the Republic of Lithuania, Law No. I-67, art. 65, Feb. 3, 1993, <http://www.lrkt.lt/en/about-the-court/legal-information/the-law-on-the-constitutional-court/193>.

60. BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION] BGBl. No. 1/1930, as last amended by Bundesverfassungsgesetz [BVG] BGBl. I No. 2/2008, art. 140(1) (Austria).

61. The President, Prime Minister, one-fifth of the deputies, the head of High State Control, or any court may file a petition with the Constitutional Court without alleging a personal injury. The constitution also permits the People's Advocate, organs of local government, religious institutions, political parties "and other organizations," and individuals to petition the court if they can provide a personal interest. CONST. art. 134, 1998, as amended 2007 (Alb.).

62. The Law of the Azerbaijan Republic on Constitutional Court, Law No. 561-IIQ, arts. 31-34, Dec. 23, 2003, <http://www.constcourt.gov.az/laws/22> (Azer.).

63. The Czech Republic permits only those suffering direct injury to petition the Constitutional Court. Constitutional Court Act, Law No. 182/1993, June 16, 1993 (amended 2012), § 72, http://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/prilohy/Constitutional_court_act.pdf, (Czech).

64. GRUNDGESETZ FÜR DIE BUNDESREPUBLIC DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. 93(1) (Ger).

65. Constitutional Court Law, June 14, 1996 (amended 2013), § 17(1) (Lat.), <http://www.satv.tiesa.gov.lv/?lang=2&mid=9>.

66. *Competence*, CONSTITUTIONAL CT. HUNG., <http://www.mkab.hu/constitutional-court/about-the-constitutional-court/competence>.

67. Allan R. Brewer-Carias, *The Amparo Proceeding in Venezuela: Constitutional Litigation*

amparo only with respect to personal, concrete harms, with limited exceptions. In Asia, both Japan⁶⁹ and South Korea,⁷⁰ jurisdictions that draw from civil law traditions yet provide for incidental review in their court systems, permit any litigant who can assert an injury to institute constitutional proceedings.

In the common law tradition, the United States⁷¹ and Ireland⁷² are examples of nations that permit constitutional review if initiated by an injured party and generally prohibit third-party standing. However, in both jurisdictions, some exceptions have been developed to the general prohibition against third-party standing. In the United States, the federal judiciary⁷³ has granted specific *jus tertii* exceptions when the injured party was unable to sue,⁷⁴ when the injured party was highly unlikely to be able to sue and there was an identifiable relationship between the plaintiff and the third party,⁷⁵ or in other limited circumstances, although scholars have argued that these are simply different versions of first-party standing.⁷⁶ At the same time, standing has not been granted in cases of generalized grievances, meaning that plaintiffs without direct injury, who sue solely as concerned citizens, are not granted standing.⁷⁷ Ireland has a similar standing exception, with its courts allowing standing for third parties when the affected individual is not in a position to adequately assert the claim or it is unlikely that anyone else would bring the claim.⁷⁸

C. *The Development of Third-Party Public Interest Standing*

More expansive approaches to standing have developed in both civil law

and *Procedural Protection of Constitutional Rights and Guarantees*, 49 DUQ. L. REV. 161, 167-71 (2011).

68. Olman A. Rodriguez L., *The Costa Rican Constitutional Jurisdiction*, 49 DUQ. L. REV. 243, 278-83 (2011).

69. *Replies to the Questionnaire on the Execution of Constitutional Review Decisions*, EUR. COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION) 88 (Nov. 27, 2000), [http://www.venice.coe.int/webforms/documents/?pdf=CDL\(2000\)089-bil](http://www.venice.coe.int/webforms/documents/?pdf=CDL(2000)089-bil).

70. The Constitutional Court Act, Act. No. 4017, art. 68, Apr. 5, 2011 (S. Kor.), http://ri.ccourt.go.kr/eng/ccourt/files/docs/news/The_Constitutional_Court_Act.pdf.

71. In the United States, this rule is referenced in various opinions. *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992) (“But the ‘injury in fact’ test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.”); *Barrows v. Jackson*, 346 U.S. 249, 255 (1953) (“Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party.”). Here, I refer only to U.S. federal jurisdiction, not to various state-specific standing doctrines.

72. *Cahill v. Sutton*, [1980] IR 269, 275 (Ir.).

73. This Article’s emphasis on national-level constitutionality implicates, in the United States, federal standards of justiciability. However, it is worth noting that state courts, when adjudicating on matters of state constitutionality, are not limited to the Article III “Case or Controversy” requirement of the U.S. Constitution and often do permit third-party taxpayer standing. Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking Judicial Function*, 114 HARV. L. REV. 1833, 1852-59 (2001).

74. *Barrows*, 346 U.S.

75. *Singleton v. Wulff*, 428 U.S. 106 (1976).

76. *See, e.g.*, Richard H. Fallon Jr., *As-Applied and Facial Challenges and Third Party Standing*, 113 HARV. L. REV. 1321 (2000); Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277 (1984).

77. ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 91 (5th ed. 2007).

78. *See, e.g.*, *Digital Rights Ireland Ltd. v. Minister for Comm’n*, [2010] 3 IR 251 (H. Ct. (Ir.)).

and common law jurisdictions, although many still eye such developments suspiciously. Third-party standing—the ability of a petitioner to challenge an action or a statute because of its impact on parties who are not the petitioner—has been described with a variety of terms: *actio popularis*, *jus tertii*, next friends, third-party standing, and public interest standing. While the permission of third-party standing seems relatively recent, there are questions as to whether a true form of *actio popularis*—one in which any third party could go to court on behalf of another—existed under Roman law.⁷⁹ The latter half of the twentieth century has seen dramatic development of third-party standing in certain key jurisdictions, in the form of what I term third-party public interest standing.

Academic discussions often analyze third-party public interest standing as a symptom of public interest litigation, as the former is often a key element in the latter in some jurisdictions. The term “public interest litigation” has referred to any number of actions in which plaintiffs are litigating in the “public interest,” against either public or private party defendants.⁸⁰ In its more radical forms, especially as it has been explored in India and South Africa, public interest litigation has involved judges’ crafting of equitable and/or creative remedies as well as their continuous monitoring of implementation of judicial orders.⁸¹ In these jurisdictions, the availability of third-party public interest standing is an important component of public interest litigation.

Perhaps the most notorious judicially developed third-party public interest standing doctrine is the doctrine developed by the Indian Supreme Court. India’s courts began developing their understanding of public interest litigation in the 1970s, developing (or discarding, as the case may be) procedural rules for public interest cases, and implementing creative remedies, some that engaged the court’s participation even after adjudication. From the earliest of these cases, the Indian courts began loosening the standing requirements for litigants. In 1976, the Indian Supreme Court opened the door to relaxed standing rules when it noted that it would not reject a claim in the community interest based solely on lack of *locus standi*.⁸² In later cases, Indian courts accepted as petitions a letter from an inmate alleging that another inmate was suffering torture at the hands of a warden,⁸³ a letter from two university professors on behalf of inmates in Agra,⁸⁴ and letters from journalists complaining against the destruction of slum dwellings.⁸⁵ In a case in which a

79. *Actio popularis* may have been a means of raising slaves’ rights in courts. Alfred P. Rubin, *Actio Popularis, Jus Cogens, and Offenses Erga Omnes?*, 35 *NEW ENG. L. REV.* 265, 268 (2001). Others argue that it was a very limited action and that there was no general acceptance of *actio popularis* under Roman law. Peter P. Mercer, *The Citizen’s Right To Sue in the Public Interest: The Roman Actio Popularis Revisited*, 21 *U.W. ONT. L. REV.* 89, 97-102 (1983).

80. Litigation in the “public interest” has covered, for example, issues of civil rights, environmental protection, workers’ rights, and presidential appointments.

81. CHRISTOPHER MBAZIRA, *PUBLIC INTEREST LITIGATION AND JUDICIAL ACTIVISM IN UGANDA: IMPROVING THE ENFORCEMENT OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 26 (2009).

82. *Maharaj Singh v. State of Uttar Pradesh*, (1976) 1 SCR 1072, 1072.

83. *Sunil Batra v. Delhi Admin.*, (1980) 2 SCR 557, 557.

84. *Upendra Baxi v. State of Uttar Pradesh*, AIR 1987 SC 191, 191.

85. *Olga Tellis v. Bombay Mun. Corp.*, (1985) 2 SCR Supl. 51, 51.

group of workers challenged the sale of a fertilizer factory in which they had no ownership interest, the Indian Supreme Court stated:

In simple terms, locus standi must be liberalised to meet the challenges of the times. *Ubi just ibi remedium* [sic] must be enlarged to embrace all interests of public-minded citizens or organisations with serious concern for conservation of public resources and the direction and correction of public power so as to promote justice⁸⁶

As much as the Indian Supreme Court has liberalized standing doctrines, it has also lamented the misuse of public interest standing, refusing to grant standing in cases where the petitioner was deemed not to have “clean hands.”⁸⁷ The court would later sum up the various holdings as follows:

It is thus clear that only a person acting bona fide and having sufficient interest in the proceeding of [public interest litigation] will alone have a locus standi and can approach the Court to wipe out the tears of the poor and needy, suffering from violation of their fundamental rights, but not a person for personal gain or private profit or political motive or any oblique consideration.⁸⁸

India is one of the most notorious examples of courts utilizing relaxed standing requirements, but it is among a growing number of nations. In continental Europe, both Croatia and Greece have authorized public interest standing via legislative action. Croatia’s Constitutional Act explicitly states, “Every individual or legal person has the right to propose the institution of proceedings to review the constitutionality of the law and . . . other regulations.”⁸⁹ Greece similarly permits such standing, although any applicant lodging a constitutional claim—within the administrative court system—must be able to claim a connection with his or her “external or internal legality.”⁹⁰

In other common law jurisdictions, third-party public interest standing has been developed by judiciaries or expressly provided in the constitution. Courts in Canada and Tanzania have interpreted their constitutions as permitting third-party public interest standing. In Canada, courts have discretion to grant or deny public interest standing to a third party based on the seriousness of the issue, whether the plaintiff has a genuine interest in the issue, and whether there is no other effective and reasonable means of bringing the case to court.⁹¹ However, as a result of its Westminster-style approach to

86. Fertilizer Corp. Kamgar v. Union of India, (1981) 2 SCR 52.

87. Ramsharan Autyanuprasi v. Union of India, (1989) 3 SCR Supl. 870, 877 (India) (dismissing the petition because it was not in the public interest but a means of achieving a personal goal); Jasbhai Motibhai Desai v. Roshan Kumar, (1976) 3 SCR 58 (India) (dismissing the petition and finding it to be merely masquerading as a public interest petition).

88. Janata Dal v. H.S. Chowdhary, (1992) 1 SCR Supl. 226, ¶ 109 (India).

89. The Constitutional Act on the Constitutional Court of the Republic of Croatia, *Norodne Novine*, No. 49/2002, art. 38, ¶ 1(1), http://www.usud.hr/default.aspx?Show=ustavni_zakon_o_ustavnom_sudu&m1=27&m2=49&Lang=en.

90. Georgios Ziamos, *National Report: Review of Administrative Acts by the Administrative First Instance Courts and Courts of Appeal*, ASSOCIATION INTERNATIONALE DES HAUTES JURIDICTIONS ADMINISTRATIVES, <http://www.aihja.org/images/users/1/files/greece.en.pdf> (last visited Oct. 24, 2015). In this report, the Greek government refers to this form of standing as a “quasi ‘action popularis’ in favour of the citizens,” although it may be referring only to claims that affect the rights to health and life. *Id.*

91. Canada (Att’y Gen.) v. Downtown Eastside Sex Workers United Against Violence in Soc’y, [2012] 2 S.C.R. 524 (Can.); Canadian Council of Churches v. Canada, [1992] 1 S.C.R. 236, 253

government, Canadian judicial decisions may be set aside by ordinary legislation.⁹² A Tanzania high court⁹³ has read the Tanzanian constitution as permitting public interest standing when the petition regarding a public good is “bona fide” and if a judicial remedy is available.⁹⁴ Tanzania is currently undergoing a new constitutional review process, and the current draft constitution has language that, although ambiguous, may continue to be interpreted by its judiciary as permitting third-party public interest standing.⁹⁵

Additionally, a growing number of nations are entrenching the right to third-party standing in their constitutions. In addition to Uganda and Kenya, Ghana,⁹⁶ the Gambia,⁹⁷ South Africa,⁹⁸ and Nepal⁹⁹ explicitly permit third-party public interest standing in their constitutional documents. As African states continue to rewrite their constitutions, the trend on the continent appears to be a growing acceptance of third-party public interest standing.

III. THIRD-PARTY PUBLIC INTEREST STANDING IN UGANDA AND KENYA

Kenya and Uganda serve as examples of how third-party public interest standing can create space for rights groups to give voice to the concerns of women, a long-marginalized population. Both nations’ constitutions provide for the typical equality rights of freedom from discrimination and the right to equal protection. They also take important steps forward in their own way. Reminiscent of the Convention on the Elimination of All Forms of Discrimination Against Women, the Ugandan constitution explicitly notes that equality rights apply with respect to marriage and dissolution of marriage and also contains an entire additional provision enumerating the ways in which

(Can.). The standard set out by the Supreme Court in *Canadian Council of Churches* seemed to indicate that the successful third-party complainant must demonstrate that there was no possibility that an injured party was likely to institute a similar proceeding. However, in *Downtown Eastside Sex Workers*, the Court of Appeal for British Columbia interpreted this standard as requiring only a showing that the third-party proceeding was a reasonable and effective means, rather than that there was no other reasonable and effective means. The Supreme Court of Canada unanimously dismissed the appeal. *Downtown Eastside Sex Workers*, [2012] 2 S.C.R. 524.

92. See Janet L. Hiebert, *Rethinking How a Bill of Rights Functions*, in *COMPARATIVE CONSTITUTIONAL LAW* 298, 300 (Tom Ginsburg & Rosalind Dixon eds., 2011).

93. In Tanzania, the high court is not the highest court in the land. However, the court of appeals has not yet addressed the issue of standing in the public interest, and the high court case cited below remains good law.

94. *Mtikila v. Att’y Gen.*, Civil Case No. 5 (1993) (Tanz.) (unreported).

95. DRAFT CONST. art. 52(4)(b) (2013) (Tanz.) (“[A] suit demanding constitutional rights in accordance with the provisions of this article may be in filed in court by . . . a person who represents a person who cannot represent himself in accordance with the law . . .”). Under this provision, the issue will turn on how courts interpret what constitutes an inability to represent oneself in accordance with the law.

96. CONST. art. 2(1) (1992) (Ghana).

97. CONST. art. 5(1) (1997) (Gam.).

98. S. AFR. CONST. art. 38 (1996) (“Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are . . . anyone acting in the public interest . . .”).

99. Nepal’s current constitution, effective as of September 20, 2015, maintains the permission of third-party public interest standing that was set out in its interim constitution, which had been operative from 2007 to 2015. NEPAL CONST. art. 133(1) (2015); NEPAL INTERIM CONST. art. 107(1) (2007).

women must be protected, calling out, in particular, harmful customs and practices. The Kenyan constitution not only contains some limitations to its equality provisions but also requires equality in marriage, directs the state to consider the needs of women in undertaking law and policy, and requires that government organs set aside a minimum number of seats for women. In spite of these constitutional protections, women's rights continue to be violated by state actors and legislation.

An examination of both nations supports the argument that third-party public interest standing can be an important means of overcoming obstacles to participation in the democratic discourse. The executives of both countries are unwilling to actively protect and uphold the rights of women. The parliaments, although comprising a higher percentage of women than many Western nations, have failed to abolish or amend legislation that denies women their basic rights. The judiciaries remain inaccessible for many individual women seeking to litigate their cases, particularly for those women hit the hardest by rights violations. Costs to finances, time, and social capital are effective blockers of women seeking to assert their rights in court.

In each country, the political system has failed to create much in the way of change, instead perpetuating discriminatory laws, policies, and practices. In response, women's groups have utilized third-party public interest standing as a means of bringing sex-discriminatory laws to the judiciary. As with most rights campaigns, this strategic litigation is only one part of a multilevel advocacy strategy, but an important one nonetheless, given the executive and legislative branches' disregard for women's constitutional rights and the difficulties of injured parties making their way to courts. The change may not be immediate, but the increased ability to engage with a historically obstinate political system is significant.

A. *Uganda*

1. *Constitutional Rights and Constitutional Violations*

Uganda's constitution contains twenty-two different rights provisions,¹⁰⁰ of which four make specific reference to women or gender equality.¹⁰¹ The 1995 constitution expressly grants the rights to equality and freedom from discrimination, providing that "[a]ll persons are equal before and under the law," "shall enjoy equal protection of the law," and "shall not be discriminated against on the ground of sex" or other bases.¹⁰² In addition to the general equality guarantee, the constitution guarantees equal rights entering into,

100. CONST. arts. 21-42 (1995) (Uganda).

101. *Id.* arts. 21 ("Equality and freedom from discrimination"), 32 ("Affirmative action in favour of marginalised groups"), 31 ("Rights of the family"), 33 ("Rights of women").

102. *Id.* art. 21(1)-(2):

(1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.

(2) Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

during, and at the dissolution of marriage¹⁰³ and contains an entire article reminding the government to take particular notice of the rights of women, noting that “[l]aws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this Constitution.”¹⁰⁴ The constitution also contains typical limitations language¹⁰⁵ and a right to culture,¹⁰⁶ although it is clear from Article 33 that culture does not serve as an excuse to undermine the rights of women.

In spite of the constitutional protections afforded to women, Parliament has continued to permit facially discriminatory laws to remain on the books. The Divorce Code, Succession Law, and Penal Code each explicitly grant women fewer rights than men. These laws set different standards of divorce for men and women,¹⁰⁷ different rules of inheritance for men and women,¹⁰⁸ and different standards of criminality of adultery for men and women.¹⁰⁹ In addition, practices such as widow inheritance and wife sharing continue to exist.¹¹⁰ Women also struggle with harms created by new legislation. The recent Anti-Pornography Act, though seemingly neutral on its face, has created circumstances encouraging acts of mob violence against women considered to

103. *Id.* art. 31. This provision provides in paragraph (1) that “[m]en and women of the age of eighteen years and above have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and at its dissolution” and in paragraph (2) that Parliament must enact laws to protect the rights of widows and widowers.

104. *Id.* art. 33(6). Article 33 states, in full:

- (1) Women shall be accorded full and equal dignity of the person with men.
- (2) The State shall provide the facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement.
- (3) The State shall protect women and their rights, taking into account their unique status and natural maternal functions in society.
- (4) Women shall have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities.
- (5) Without prejudice to article 32 of this Constitution, women shall have the right to affirmative action for the purpose of redressing the imbalances created by history, tradition or custom.
- (6) Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this Constitution.

105. *Id.* art. 43.

106. *Id.* art. 37 (“Every person has a right as applicable to belong to, enjoy, practise, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others.”).

107. The Divorce Act Cap. 249, § 4 (1904) (Uganda). While a husband is permitted to file for divorce upon a showing that his wife has committed adultery, a wife must show that her husband was guilty of “(i) incestuous adultery; (ii) bigamy with adultery; (iii) marriage with another woman with adultery; (iv) rape, sodomy or bestiality; (v) adultery coupled with cruelty; or (vi) adultery coupled with desertion, without reasonable excuse.” On the other hand, a wife is able to divorce her husband if he changed his religion, whereas a husband does not have that right. *Id.*

108. The Succession Act Cap. 162, § 27 (1906) (Uganda). Under intestate succession, widows can inherit only fifteen percent of marital property, and women are unable to inherit their fathers’ property. *Id.*

109. The Penal Code Act Cap. 106, § 150A (1950) (Uganda). The crime of adultery is committed by any man who has sexual intercourse with a married woman and by any married woman who has sexual intercourse with a man who is not her husband. Thus, a married man who has had sexual intercourse with an unmarried woman has not committed adultery. *Id.*

110. *Women’s Rights in Uganda: Gaps Between Policy and Practice*, INT’L FED’N FOR HUMAN RIGHTS (FIDH) 16 (2011), <https://www.fidh.org/IMG/pdf/uganda582afinal.pdf>.

be too scantily clad.¹¹¹

Several draft bills designed to remedy a number of these issues have been put before Parliament, yet Parliament has failed to act. Versions of a proposed marriage and divorce bill which would consolidate the laws of marriage and prohibit many—but not all—of the offending practices have been sitting in Parliament for over forty years, seeing only bursts of action that have failed to result in enactment. Some of the protections in this bill were watered down to make it more palatable to members of Parliament, yet it still failed to gain traction. In early 2013, it was once again put before Parliament and, after many heated debates surrounding many women’s rights provisions, has once again been set aside.¹¹² Similarly, a Domestic Relations Bill was considered by Parliament since 2003 but failed to go anywhere. Finally, in 2009, the more controversial provisions were removed to appease the opposition, and a truncated version called the Domestic Violence Act was enacted in 2010.¹¹³

2. *Inaction of the Political Branches*

The executive and legislative branches have not exhibited any willingness to give effect to women’s rights, despite the increasing number of women in government. The Ugandan government has been praised for the high percentage of women in Parliament,¹¹⁴ and President Yoweri Museveni has notably appointed women to several high-profile civil service positions. A woman, the Honorable Rebecca Kadaga, currently holds the position of speaker of Parliament. Women in Parliament have organized themselves well enough to form the Ugandan Women Parliamentary Association (UWOPA), which has identified a number of gender-related objectives, including “to engender legislative issues and processes in parliament so as to address the gender gap in all legislations.”¹¹⁵

UWOPA has had some key successes on the legislative front but has been unable to create legislative change in areas that would address the crucial areas of sex inequality, such as family law. Although some parliamentarians have been vigorous and vocal in their support of women’s issues, many women and men parliamentarians choose not to support unpopular but key gender equality measures.¹¹⁶ On UWOPA’s agenda is the Domestic Relations Bill, identified as a top priority. Yet, as noted, this particular bill, designed to equalize marital relations between men and women, has been a non-starter in the Ugandan

111. *Rule by Law: Discriminatory Legislation and Legitimized Abuses in Uganda* 17-18, AMNESTY INT’L (2014), <http://www.amnestyusa.org/sites/default/files/afr59062014en.pdf>.

112. Moses Walubiri, *Uganda: NRM Caucus Votes Against Marriage Bill*, NEW VISION (Apr. 8, 2013), <http://allafrica.com/stories/201304090086.html>.

113. FIDH, *supra* note 110, at 11.

114. In 2013, women held thirty-five percent of Uganda’s parliamentary seats. *Proportion of Seats Held by Women in National Parliaments*, WORLD BANK, <http://data.worldbank.org/indicator/SG.GEN.PARL.ZS> (last visited Oct. 14, 2015).

115. *Uganda Women’s Parliamentary Association (UWOPA)*, PARLIAMENT OF THE REPUBLIC OF UGANDA, <http://www.parliament.go.ug/new/index.php/members-of-parliament/parliamentary-fora/uganda-womens-parliamentary-association-uwopa> (last visited Oct. 14, 2015).

116. Anne Marie Geotz, *No Shortcuts to Power: Constraints on Women’s Political Effectiveness in Uganda*, 40 J. MOD. AFR. STUD. 549, 565 (2002).

Parliament.

Of additional cause for concern is the current executive and parliamentary response to criticism, opposition, and rights advocacy. The government is currently restricting expression and public assembly via police action and legislation¹¹⁷ and is seeking to increase control over NGO activities.¹¹⁸ The government's neglect of women's issues takes on a new, more insidious dimension as the political branches seek to actively close off means of participating in political dialogue.

3. *Barriers to Accessing Courts*

Permitting direct representation of individual women in courts does not cure the lack of responsiveness of the political branches. In the best of circumstances, years may go by before the right test case comes along with a direct plaintiff. Finding the right test case becomes even more difficult when litigants face multiple barriers to access.

The barriers to access in Uganda are well-documented. Litigation can be prohibitively expensive in terms of both money and time. For women living outside of cities, getting to court may require costly and time-consuming travel. A constitutional question may find itself before the constitutional court in one of two ways. First, a public-spirited petitioner may directly file a complaint with the court of appeal, sitting as the Constitutional Court.¹¹⁹ Second, a lower court may, if it finds itself grappling with a constitutional question while adjudicating a particular claim, refer questions of constitutional nature to the Constitutional Court.¹²⁰ In terms of time and money, the first option is already difficult given the Constitutional Court's location in Kampala. This alone removes the possibility of direct constitutional litigation for the average Ugandan citizen, for whom travel to and from the capital city for the entire length of a proceeding is prohibitively expensive.

Additionally, working her way up through the ordinary courts is not always the best or fastest option for an injured party. The loss of time means time away from subsistence or income-generating activities. Travel again becomes an issue if the case needs to be appealed before a constitutional question will be addressed. Although new High Courts have been created to increase access to justice in all of Uganda, injured parties may be as far as 150 kilometers from the nearest High Court.¹²¹ Victims of sexual assault have

117. Ugandan police have arrested political opponents, halted protests, and shut down media outlets if they were used as platforms to criticize the ruling party. In addition, the Public Order Management Act, passed in 2013, grants the police broad powers to limit public meetings for the protection of the "public interest" and seems to be a continuation of the larger campaign to silence the political opposition and critics of the government. AMNESTY INT'L, *supra* note 111, at 12-17 & n.41.

118. *Id.* at 21.

119. CONST. art. 137(1) (1995) (Uganda) ("Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court.").

120. *Id.* art. 137(5).

121. *Value for Money Audit Report on Disposing of Cases in the Judiciary*, OFFICE OF AUDITOR GEN. 2 (2011) (Uganda), <http://www.judicature.go.ug/files/downloads/1305698769Disposing%20of%20Cases%20in%20the%20Judiciary.pdf>.

reported that they are asked to pay for police costs relating to the investigation and, sometimes, even for transporting the perpetrator.¹²² Although some NGOs have some funds set aside to support litigants, they are often able to pay only a subset of costs, and even then only to some of their indigent clients.¹²³ Additionally, realistically supporting litigants requires paying for not just transportation but also daily subsistence costs and childcare.¹²⁴ Women tend to have difficulty attending court because they are often solely responsible for childcare and meal preparation.¹²⁵ Social service infrastructure does not exist, something that already requires workarounds from courts. Magistrate courts, for example, try not to imprison mothers with young children to avoid having to imprison the children, who have nowhere else to go, as well.¹²⁶

Women also face social barriers. In some areas, male police and judicial officers are uninterested in addressing problems facing women.¹²⁷ In addition, community and customary norms are especially powerful in areas where traditional systems continue to influence daily life, more often outside urban centers. Women seeking to challenge these norms, especially in areas related to family and property law, face stigma and backlash.

Stigma is an enormously powerful behavior modifier. Amnesty International, in a 2010 study, discovered that in cases of sexual violence, women choose not to report the incident to anyone, in part due to fear of the community reaction.¹²⁸ Both in Uganda and throughout the African continent, where land is owned under customary tenure, or life is still lived under customary rules, attempting to fight against such norms can carry severe and negative consequences. Especially in rural areas, where women's income-generating activities are largely tied to crop cultivation, women are economically dependent upon their marital or natal households. Openly defying custom poses a real risk of violence or impoverishment for not just the defiant community member but also immediate family members, including children.¹²⁹

Being a plaintiff requires a willingness to be public about the complaint,

122. *I Can't Afford Justice: Violence Against Women in Uganda Continues Unchecked and Unpunished*, AMNESTY INT'L 39-40 (2010), <https://www.amnesty.org/download/Documents/36000/afr590012010en.pdf>.

123. Interview with Stella Biwaga, Program Manager, FIDA-Uganda, in Kampala, Uganda (June 23, 2015); Interview with Dorah Mafabi, Head of Mission, Avocats Sans Frontières/Uganda, in Kampala, Uganda (July 1, 2015); Interview with a legal services attorney, in Kampala, Uganda (July 1, 2015).

124. Interview with Dorah Mafabi, *supra* note 123 (noting the loss of earnings for a day spent in court).

125. Interview with Richard Mafabi, Chief Magistrate, Bugunda Road Court, in Kampala, Uganda (July 3, 2015); Interview with Sam Wairagala, Advisor (M&E), JLOS Secretariat, in Kampala, Uganda (June 24, 2015).

126. In one prison I visited in 2015, there were fifty-two children residing in prison with their mothers because they had no other options for care.

127. FIDH, *supra* note 110, at 15.

128. AMNESTY INT'L, *supra* note 122, at 35.

129. For example, one woman who recently attempted to assert her right to use family land was brutally beaten, raped, and ultimately killed by her grandson. This type of story is commonly heard and experienced by women's legal service providers working in Uganda anywhere outside of Kampala. Interview with Judith Nakalembe, Coordinator/Legal Officer at UWONET, in Kamuli, Uganda (July 8, 2015).

potentially subjecting plaintiffs to loss of social capital throughout the litigation process. Anonymity, used in the United States for parties considered vulnerable,¹³⁰ is unrealistic when addressing legalized discrimination that runs deep into family networks and tribal relations. Anything tied to economic or social empowerment in Africa—not just for women but also for tribal or ethnic minorities—is often tied to land or other natural resources, which always involves the community.

Still, legal service providers do find themselves with clients seeking to fight back against family or clan norms. However, pursuing an issue in the lower courts is quite different from becoming the face of an issue throughout the country. In addition, maintaining litigation, even in magistrate's courts, is quite difficult, as litigants on both sides lack the time and money to permit the efficient administration of justice.¹³¹ The phenomenon of litigants dropping out of lawsuits is not uncommon¹³² and can ultimately prevent pursuit of a ruling that can address systemic problems. When NGOs and other advocacy groups are able to serve as first petitioners in a case, they can bear the brunt of the work, time lost, and other costs, while minimizing the risk that loss of commitment on the part of other petitioners will prematurely end the suit.

4. *Use of Third-Party Public Interest Standing*

NGOs and civil society organizations can fill this gap by using their own financial and legal resources to file public interest claims to advance women's rights. The Ugandan constitution, adopted in 1995 after a six-year participatory constitution-making process, contains heavily enhanced rights-enforcement provisions.¹³³ Third-party public interest standing is now permitted in Articles

130. Without further data, I am unconvinced that even in the United States, anonymizing parties to a suit would insulate them from risk.

131. Court backlog is an enormous problem in both magistrate courts and high courts in Uganda. Many judicial officers note that a key cause of this backlog is the inability of parties or witnesses to appear on set court dates, requiring repeat adjournments. Some litigants I have interviewed have even noted that they have taken breaks of several years before continuing litigation, while they gathered money and adjusted their life circumstances to permit additional travel to and time in court.

132. Interview with Richard Mafabi, *supra* note 125; Interview with Maria Busuulwa, Senior Legal Associate, Foundation for Human Rights Initiative, in Kampala, Uganda (June 25, 2015).

133. The 1995 constitution was drafted with a view towards legitimizing the National Resistance Movement (NRM) government after the human rights abuses and oppression of the Amin and Obote II regimes. Tripp, *supra* note 4, at 161. The Constitutional Commission, created in 1989, counted among its eight guiding principles the directive to “guarantee and effectively enforce respect for the dignity, equality and human rights.” GOV'T OF THE REPUBLIC OF UGANDA, THE REPORT OF THE UGANDA CONSTITUTIONAL COMMISSION: ANALYSIS AND RECOMMENDATIONS 7 (UPPC, Entebbe 1993) [hereinafter UGCC REPORT]. The constitution-making process was open to public participation, as a result of which the Constitutional Commission received at least 25,547 submissions of views. Tripp, *supra* note 4, at 163. The Commission reported a general consensus among these views as to the inclusion of fundamental rights and “effective mechanisms to protect them.” UGCC REPORT, *supra*, at 10. In addition, the Commission found that the prior constitution did not effectively provide for or enforce human rights. *Id.* at 89. It was presumably these sentiments that informed the development of such a robust set of rights, along with an open-ended mechanism for enforcing them in court. Interestingly, these provisions were not subject to great controversy during the constitution-making process. Of greater concern for the powerful was the push for Uganda to be a single-party state. The entire constitution-making process was heavily controlled by the NRM, and the 1995 constitution ultimately supported a single-party state, which changed only in 2005, with some question as to whether Uganda is now a multiparty state in name only. Tripp, *supra* note 4, at 162-63; Olive Eytaru,

50 and 137 of the constitution. Article 50(1) states, “Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation.”¹³⁴ The right of any person, and not just the aggrieved person, to bring public interest claims is granted again in Article 137(3), which allows any person to institute a claim with the Constitutional Court alleging that any act of Parliament is in violation of the constitution.¹³⁵ This public right to defend the constitution is emphasized in Article 3(4), which states:

(4) All citizens of Uganda shall have the right and duty at all times—

(a) to defend this Constitution, and in particular, to resist any person or group of persons seeking to overthrow the established constitutional order; and

(b) to do all in their power to restore this Constitution after it has been suspended, overthrown, abrogated or amended contrary to its provisions.¹³⁶

Although some Ugandan courts were initially resistant to this expanded notion of standing, arguing that Article 50 required injury in fact despite its expansive language, the Ugandan judiciary eventually came to accept the grant of third-party public interest standing to natural and legal persons.¹³⁷

The availability of third-party public interest standing allows women’s groups in Uganda to use strategic litigation to give voice to women’s interests under the constitution when Parliament will not. In a 2004 case, Law and Advocacy for Women in Uganda (LAW-U), a legal advocacy organization dedicated to advancing women’s rights in Uganda, with five other petitioners, challenged discriminatory provisions of the Divorce Act, resulting in a decision declaring that courts should construe all such provisions in a gender-equal manner.¹³⁸ In 2006, LAW-U successfully challenged some of the sex-discriminatory provisions of the Succession Act and Penal Code.¹³⁹ In 2007, LAW-U also successfully challenged the continuing customary practice of female genital mutilation.¹⁴⁰ In August 2015, MIFUMI, a women’s NGO,

Multiparty Politics Failing in Uganda, Says New Report, DAILY MONITOR (Jan. 16, 2014), <http://www.monitor.co.ug/News/National/Multiparty-politics-failing-in-Uganda--says-new-report/-/688334/2147596/-/8pk8c7/-/index.html>. The 1995 constitution thus served to entrench the NRM party and Museveni’s own presidency, which in 2015 is in its twenty-ninth year. It is perhaps this entrenchment of power that explains political elites’ seeming lack of concern with the adoption of constitutional language on accountability and human rights.

134. CONST. art. 50(1) (1995) (Uganda).

135. *Id.* art. 137(3) (“A person who alleges that—(a) an Act of Parliament or any other law or anything in or done under the authority of any law; or (b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate.”).

136. *Id.* art. 3(4).

137. MBAZIRA, *supra* note 81, at 46.

138. Uganda Ass’n of Women Lawyers v. Att’y Gen., (2004) UGCC 1, <http://www.ulii.org/ug/judgment/constitutional-court/2004/1>.

139. Law & Advoc. for Women in Uganda v. Att’y Gen., (2007) UGCC 1, <http://www.ulii.org/ug/judgment/constitutional-court/2007/1>.

140. Law & Advoc. for Women in Uganda v. Att’y Gen., (2010) UGCC 4, <http://www.ulii.org/ug/judgment/constitutional-court/2010/4>. This lawsuit perhaps may not have been so controversial or groundbreaking. International pressure had been mounting for decades against female genital mutilation (FGM), and countries across sub-Saharan Africa were embracing anti-FGM legislation, perhaps in part

claimed a huge victory in front of the Uganda Supreme Court. Although it did not succeed on all grounds, MIFUMI, acting as the lead appellant-petitioner, secured a judgment finding that requiring a refund of bride price in order to secure a divorce is unconstitutional.¹⁴¹ This judgment is groundbreaking in large part because it seeks to dismantle an aspect of a very entrenched customary practice and Parliament had avoided addressing this issue via the Marriage and Divorce Bill for years.

While increasing the opportunities for women's rights issues to be heard by the court, the impact on the judiciary appears to be minimal. Based on the number of decisions produced by the Ugandan Constitutional Court, 111 in fifteen years,¹⁴² the court does not seem to be in danger of being overburdened just yet. Additionally, because the organizations filing petitions are legally literate, they are able to submit legally meaningful arguments to the court and thus protect the court's time. Permitting institutions to litigate public interest cases on behalf of groups in the population at least ensures that the litigant is experienced, keenly aware of the issues, and often has the support and expertise necessary to adequately advocate the matter.

Judicial decisions requiring legislative change may also draw additional participants, including various government ministries, into the conversation. Advocacy groups themselves can take advantage of the litigation to develop the national conversation and engage other political actors. Constitutional cases are of such importance that the media tend to report on the outcome, increasing the number of participants in the dialogue.¹⁴³ Through this engagement, women's voices are increasingly heard in the political system.

This form of litigation certainly cannot be described as a cure-all for women's concerns. Even where judgments have struck down unconstitutional laws or called upon Parliament and the executive to act in some way, the political branches can be extremely noncompliant. For example, as a result of the Succession Act decision, the Ministry of Justice directed the Uganda Law Reform Commission to revise the Succession Act,¹⁴⁴ and the National Land Policy of 2011 recommends that the Succession Act be amended.¹⁴⁵ However,

because it is relatively easy to villainize, is practiced by non-mainstream groups, and can be held up as an example of progress. Immediately prior to the entry of judgment in this lawsuit, the Prohibition of Female Genital Mutilation Act was enacted in March 2010.

141. MIFUMI v. Att'y Gen., (2015) UGSC 13, <http://www.ulii.org/ug/judgment/supreme-court/2015/13>.

142. A list of the Constitutional Court decisions can be found at *Constitutional Court*, UGANDA LEGAL INFO. INST., <http://www.ulii.org/ug/judgment/constitutional-court>.

143. For example, the recent bride price ruling was reported not just in the Ugandan media but also throughout Africa and the world. See, e.g., Gillian Nantume, *You Can't Have Your Cows Back. What Next?*, DAILY MONITOR (Aug. 15, 2015), <http://www.monitor.co.ug/Magazines/Full-Woman/You-now-cant-have-your-cows-back----What-next-/689842/2833046/-/100prkd/-/index.html>; Morgan Winsor, *Uganda's Bride Price Ruling Marks Women's Rights Milestone, But Clashes with Customary Laws*, INT'L BUS. TIMES (Aug. 20, 2015), <http://www.ibtimes.com/ugandas-bride-price-ruling-marks-womens-rights-milestone-clashes-customary-laws-2059128>. The tremendous reporting is due to the fact that this issue is one of the more salient ones in Uganda, and the more salient issues are usually the ones that involve greater parliamentary and executive pushback.

144. FIDH, *supra* note 110, at 8.

145. *The Uganda National Land Policy*, MINISTRY OF LANDS, HOUSING & URBAN DEV. 27 (Mar. 2011), <http://library.health.go.ug/publications/leadership-and-governance-governance/policy>

while an amendment purporting to remedy some of the inequalities in the Succession Act was drafted in 2011, it still awaits parliamentary action. Additionally, though the judgment of the court allows women to obtain more favorable judgments in lower courts, other sex-discriminatory provisions of the law continue to be applied. Similarly, though judicial officers must now read the offending provisions of the Divorce Act in a gender-neutral fashion, new divorce legislation is unable to get through Parliament. President Museveni has been vocal in his displeasure with the judiciary, at one time announcing that the “major work for the judges is to settle chicken and goat theft cases but not determining the country’s destiny.”¹⁴⁶ Yet what women’s groups have been able to do with this tool is to engage both the judiciary and the executive, via the attorney general, in a discussion on women’s rights.

B. Kenya

1. *Constitutional Rights and Constitutional Violations*

Kenya’s constitution, just as Uganda’s, provides for equal protection and non-discrimination for women,¹⁴⁷ although Kenya does allow for the limitation of the equality rights “to the extent necessary for the application of Muslim Law before the Kadhis’ courts . . . in matters relating to personal status, marriage, divorce and inheritance.”¹⁴⁸ Article 27(8) of the constitution provides that in order to implement gender equality, “the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.”¹⁴⁹ Other articles remind “[s]tate organs . . . to address the needs of vulnerable groups within society, including women”¹⁵⁰ and direct the National Assembly to reserve forty-seven out of 290 seats for women,¹⁵¹ the Senate to reserve sixteen out of sixty-eight seats for women,¹⁵² and the Judicial Service Commission to consider the promotion of gender equality in its appointment of judges.¹⁵³

Women’s advocates have made some headway on important issues such as prohibiting domestic violence in its various forms, but rights violations persist in areas relating to marriage and property. The Law of Succession Act, for example, excludes Muslim women and women living on agricultural lands from statutory provisions requiring equality between men and women in intestate succession, subjecting them instead to laws giving them fewer rights

-documents/uganda-national-land-policy-final.

146. Busingye Kabumba, *The 1995 Uganda Constitution Is Nothing but an Illusory Law*, DAILY MONITOR (Sept. 23, 2012), <http://www.monitor.co.ug/Magazines/ThoughtIdeas/-/689844/1515206/-/d86khg/-/index.html>.

147. CONSTITUTION art. 27(1)-(4) (2010) (Kenya).

148. *Id.* art. 24(4).

149. *Id.* art. 27(8).

150. *Id.* art. 21(3).

151. *Id.* art. 97.

152. *Id.* art. 98.

153. *Id.* art. 172(2)(b).

to inherit property.¹⁵⁴ The law also grants widows fewer rights than widowers with respect to inherited marital property¹⁵⁵ and prioritizes fathers over mothers with respect to the inheritance of a child's estate.¹⁵⁶

As in Uganda, newer laws also perpetuate discrimination against women. The passage of the Matrimonial Property Act is a particularly telling example. Although the initial version of the Act provided spouses with equal rights to marital property upon divorce or dissolution, the version that passed now requires that a woman prove she contributed to acquisition of property in order to assert any rights to marital property.¹⁵⁷ Twenty-eight of the thirty-four women members of Parliament opposed the legislation, but it passed with otherwise overwhelming support.¹⁵⁸

2. *Inaction of the Political Branches*

Despite the fanfare accompanying the passage of the new constitution, Kenya suffers from an executive who is seemingly hostile to the constitution and a parliament apathetic to it. The executive has historically refused to operate within the confines of its constitutional authority, often appointing ministers at will, while failing to consult with Parliament. Despite the increased number of women Members of Parliament, who have developed a strong women's rights agenda,¹⁵⁹ Parliament remains largely disinclined to remedy the sex-discriminatory legislation. As Open Society Foundations have noted, "MPs have demonstrated a particular proclivity to enact laws that seem to only secure their parochial interests, and not the interests of the general public."¹⁶⁰

In 2014, women made up nineteen percent of Kenya's Parliament. Yet, while women parliamentarians have spearheaded efforts to pass legislation addressing underserved women's issues and have even succeeded in certain areas, they have struggled to push some of the more controversial but crucial legislation needed to create meaningful empowerment for women. These controversial laws again typically fall in the areas of family law and property

154. Law of Succession Act Cap. 160 § 2(3), 32-33 (2008) (Kenya). Section 2(3) of the Act provides that the Act does not apply to testate or intestate succession of any person who is a Muslim at the time of his or her death. Instead, Islamic law is applied. Sections 32 and 33 of the Act provide that the portions of the Act relating to intestacy do not apply to lands and livestock in twelve enumerated districts, where the customary law of inheritance is instead applied. *Id.* §§ 32-33.

155. The law provides that widows can lose their interest in inherited property upon remarriage but does not subject widowers to a similar condition. *Id.* §§ 35(1), 35(5), 36(1).

156. *Id.* § 39(1).

157. Matrimonial Property Act, No. 49 KENYA GAZETTE SUPPLEMENT No. 183 § 7 (2013).

158. John Ngirachu, *MPs Pass Contentious Matrimonial Property Bill*, DAILY NATION (Nov. 12, 2013), <http://www.nation.co.ke/news/politics/Matrimonial-Property-Bill-Marriage-MPs/-/1064/2070632/-/f0xxhvz/-/index.html>.

159. FIDA-Kenya, which has a strong women's rights agenda, includes among its members women parliamentarians. In addition, Kenyan women members of Parliament have developed their own caucus, the Kenya Women Parliamentary Association Organisation, with the goal of improving gender parity in Kenyan political offices. *About Us*, KENYA WOMEN PARLIAMENTARY ASS'N, http://www.kewopa.org/?page_id=7 (last visited Oct. 14, 2015).

160. Patricia Kameri Mbote & Migai Akech, *Kenya: Justice Sector and the Rule of Law*, OPEN SOC'Y FOUND. 69 (Mar. 2011), <http://www.opensocietyfoundations.org/sites/default/files/kenya-justice-law-20110315.pdf>.

law. Successes are hard to come by and are often offset by losses. The debate over the Protection Against Domestic Violence Bill of 2013 is extremely telling. Though a version of it was passed in 2015, after tremendous advocacy,¹⁶¹ the 2013 bill was the subject of highly gendered debate. The bill called for the criminalization of domestic violence, including the extremely harmful practices such as widow inheritance, widow cleansing, and virginity testing.¹⁶² However, it was subject to arguments that it would attempt to police private matters, while other more pressing matters were being ignored.¹⁶³ While this Act eventually passed, other new legislation entrenches discrimination against women. For example, both the Matrimonial Property Act¹⁶⁴ and the Marriage Act of 2014¹⁶⁵ limit, and in some cases take away, women's rights at the dissolution of and during marriage. The former effectively denies many women access to marital property, and the latter removes a woman's right to object to her husband taking on additional wives.¹⁶⁶

3. *Barriers to Accessing Courts*

The same barriers to access that exist in Uganda exist in Kenya. Women in Kenya do not have adequate access to courts, and litigants often have to travel long distances to access courts.¹⁶⁷ It can sometimes be a two-day journey just to physically reach the appropriate magistrate court.¹⁶⁸ Some women must secure male chaperones because those who travel without male chaperones are looked down upon in the community.¹⁶⁹ When women are seeking to assert their rights in contravention of custom, the risk of social stigma and loss of social capital is great.¹⁷⁰ Finding a chaperone in those circumstances is likely even more difficult. As in Uganda and other African nations with agricultural economies and mostly rural populations, loss of community support can be

161. John Chigiti, *Kenya: New Domestic Violence Law Protects the Family*, STAR (May 20, 2015), <http://allafrica.com/stories/201505201065.html>.

162. The Protection Against Domestic Violence Bill, No. 28 KENYA GAZETTE SUPPLEMENT No. 136 § 3 (2013).

163. See Judy Thongori, *MPs Trivialising Debate About the Family and Domestic Violence*, STANDARD MEDIA (Aug. 24, 2014), <http://www.standardmedia.co.ke/article/2000132435/mps-trivialising-debate-about-the-family-and-domestic-violence>.

164. See discussion *supra* notes 157-158.

165. The Marriage Act of 2014 confirms the practice of polygamy but removes the requirement that a husband obtain permission from existing wives before marrying another one. *SOAWR Strongly Condemns Discriminatory Kenyan Legislation*, SOLIDARITY FOR AFR. WOMEN'S RTS. (Apr. 11, 2014), [http://www1.chr.up.ac.za/images/files/news/news_2014/FINAL%20SOAWR%20Statement%20re%20Discriminatory%20Kenyan%20Legislation%20\(ENG\).pdf](http://www1.chr.up.ac.za/images/files/news/news_2014/FINAL%20SOAWR%20Statement%20re%20Discriminatory%20Kenyan%20Legislation%20(ENG).pdf).

166. *Id.*

167. MBOTE & AKECH, *supra* note 160, at 157.

168. Bonita Ayuka & Tanja Chopra, *The Illusion of Inclusion: Women's Access to Rights in Northern Kenya*, WORLD BANK 1 (2008), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2014/08/01/000333037_20140801141152/Rendered/PDF/898180J4P0rese00Box385287B00PUBLIC0.pdf.

169. *Id.* at 12.

170. See, e.g., *Double Standards: Women's Property Rights Violations in Kenya*, HUM. RTS. WATCH 41 (2003), <http://www.hrw.org/reports/2003/kenya0303/kenya0303.pdf>.

economically devastating.¹⁷¹ Inadequate court complexes and a general lack of judges throughout the country exacerbate the problem of access.¹⁷² Additionally, a lack of legal literacy¹⁷³ means that many Kenyans do not understand their rights or when they are being violated.

Financial costs can also be prohibitive. Many people in Kenya consider court fees to be prohibitively expensive,¹⁷⁴ and petitioners similarly suffer from litigation fatigue. Access to advocates is also limited, as most pro bono services are provided by nongovernmental organizations, which do not have countrywide presence. In fact, the need for legal services is so high that FIDA-Kenya has begun a program to teach litigants how to represent themselves.¹⁷⁵ Costs of travel and reduced income during the period of the hearing can also be prohibitive, especially given the length of proceedings. A 2004 study shows that civil litigation could take anywhere between two to six years to resolve.¹⁷⁶

4. *Use of Third-Party Public Interest Standing*

Kenya's constitutional endorsement of public interest litigation is more nascent than Uganda's, but in at least some cases Kenyan courts had permitted third-party public interest standing before Kenya's most recent constitution was adopted. In a case relating to the voting rights of prisoners, a Kenyan high court spoke negatively of the injury-in-fact requirement, asserting that "[t]he issue of *locus standi* has shackled public law litigants for a long time."¹⁷⁷ Granting standing to the director of a human rights organization seeking to enforce the rights of prisoners in Kenya, the court further stated that "[a]ccessibility to injustice is fundamental to rendering the Constitution legitimate. In this sense, a broad approach to *locus standi* is required to fulfill the Constitutional Court's mandate to uphold the constitution. This would ensure that constitutional rights enjoy the full measure of protection to which they are entitled."¹⁷⁸

The grant of third-party public interest standing was initially included in the failed 2005 proposed constitution produced by the Constitution of Kenya Review Commission¹⁷⁹ and was retained in the Harmonized Draft Constitution produced by the Committee of Experts on Constitutional Review in 2009¹⁸⁰ and the final 2010 constitution. The constitutional review process was heavily influenced by civil society¹⁸¹ and encouraged participatory review from the

171. See discussion *supra* Part III.A.3.

172. MBOTE & AKECH, *supra* note 160, at 157-58.

173. *Id.* at 156.

174. *Id.* at 158.

175. *Id.* at 159.

176. *Id.* at 169.

177. *Kanyua v. Att'y Gen.* (2010) eKLR 1 (Kenya).

178. *Id.* at 12. Standing was granted on the basis that the petitioner was the officer of an organization that "champions the interests of the public in matters concerning human rights of the poor and marginalized such as prisoners . . ." *Id.* at 13.

179. The Proposed New Constitution of Kenya, KENYA GAZETTE SUPPLEMENT No. 63, art. 32(2)(d) (2005).

180. HARMONIZED DRAFT CONSTITUTION art. 31(2)(d) (2009) (Kenya).

181. *The Final Report of the Constitution of Kenya Review Commission*, CONSTITUTION OF KENYA REV. COMMISSION 38 (2005), <http://mlgi.org.za/resources/local-government-database/by>

population.¹⁸² In its final report, the Commission noted that “the people” sought “more effective machinery for protecting their rights.”¹⁸³ Accordingly, the Commission recommended that the “[enforcement] provision envisage the development of a form of litigation which emphasizes substantial justice over formal requirements, where human rights are at stake.”¹⁸⁴ It is likely that this sentiment gave rise to the third-party public interest standing provision in subsequent drafts of the constitution.¹⁸⁵

Article 22 of Kenya’s 2010 constitution thus institutionalized petitioners’ right to *locus standi* without experiencing direct harm, and even before a violation occurs if a threat of violation is evident.¹⁸⁶

(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 . . .

(c) a person acting in the public interest¹⁸⁷

Although the open-ended grant of standing has existed for only a short period of time, rights groups began litigating in the public interest immediately after the 2010 constitution went into effect, leading to some important judicial activity. In 2011, FIDA-K filed a lawsuit challenging the Judicial Service Commission’s recommendation to appoint five men and two women to Supreme Court justice positions, alleging that it was in violation of Article 27(8) of the Constitution.¹⁸⁸ The High Court struck down the petition, holding that it was the legislature, not the Judicial Service Commission, that was bound by 27(8).¹⁸⁹ Per the court, “Article 27 imposes no duty on the part of the Government other than the requirement to progressively take legislative and other measures to implement the said principle.”¹⁹⁰ Additional litigation, however, produced better results.

Subsequent judicial opinions regarding presidential appointments denounced the *FIDA-K* decision and have held the President accountable for his disregard for the constitution. The Centre for Rights and Education Awareness (CREAW), along with several other rights organizations,¹⁹¹ filed

-country/kenya/commission-reports/Main%20report%20CKRC%202005.pdf.

182. *Id.* at 48.

183. *Id.* at 112-13.

184. *Id.* at 121.

185. Why political elites accepted this provision is another matter. It is plausible that given the history of impunity for their actions, they felt unthreatened by more robust rights and enforcement provisions.

186. This reading of Article 22 is supported not just by the plain meaning of the text but also by the Supreme Court. *Coal. For Reform & Democracy v. Republic of Kenya*, [2014] eKLR ¶ 129 (Kenya), <http://www.kenyalaw.org/caselaw/cases/view/104799>.

187. CONSTITUTION art. 22(1)-(2) (2010) (Kenya).

188. *Fed’n of Women Lawyers Kenya (FIDA-K) v. Att’y Gen.*, [2011] eKLR (Kenya), http://kenyalaw.org/Downloads_FreeCases/83092.pdf.

189. *Id.*

190. *Id.*

191. The other petitioners include Caucus for Women’s Leadership, Women in Law and Development in Africa, Development through Media, Coalition of Violence Against Women, Young

and won a lawsuit challenging the President's appointment of County Commissioners as being both *ultra vires* of the constitution and, even if properly within the president's authority, a violation of Article 27(8) of the constitution.¹⁹² With respect to the gender-equality provisions, the court was clear in its disagreement with *FIDA-K*, stating that 27(8) was not subject to progressive realization and that the government must show why it cannot meet the requirements of 27(8) in order to avoid abrogating the constitution.¹⁹³ Similar results were achieved in a 2011 case relating to the appointment of the Chief Justice, Attorney General, Director of Public Prosecutions, and Controller of Budget.¹⁹⁴ Importantly, the President withdrew the nominations—albeit angrily—in light of these decisions.

Due to the seeming intractability of the political branches, women's groups have found themselves continuously using public interest litigation to protect the integrity of Article 27(8). In 2012, the Attorney General in Kenya sought and failed to convince the Kenyan Supreme Court that the requirements of 27(8), in conjunction with 81(b), require progressive realization.¹⁹⁵ Several rights organizations, including CREAW and FIDA-K, submitted amicus briefs. In its opinion, the Supreme Court set a deadline of August 27, 2015, for legislative measures to achieve the constitution's gender proportion requirements.¹⁹⁶ In May 2015, a bill was introduced in the National Assembly to delay implementation of Articles 27(8) and 81(b),¹⁹⁷ leading to vocal objection from women Members of Parliament and the Kenya Women Parliamentary Association (KEWOPA).¹⁹⁸ CREAW, joined by KEWOPA, responded immediately by successfully suing the Attorney General and the Constitutional Implementation Commission for failing to develop constitutionally required affirmative action legislation in a timely manner.¹⁹⁹ This judgment, issued two months before the legislative deadline, included a declaration of a threat of a constitutional violation as well as an order of mandamus requiring the Attorney General and the CIC to prepare implementing legislation for Parliament by August 5, 2015.²⁰⁰ Although the legislation was delivered to Parliament, the Parliament failed to enact it prior to

Women Leadership Institute, and International Centre for Policy & Conflict. Centre for Rights Education & Awareness (CREAW) v. Att'y Gen., [2012] eKLR (Kenya), http://www.kenyalaw.org/Downloads_FreeCases/87046.pdf.

192. *Id.*

193. *Id.*

194. Centre for Rights Education & Awareness (CREAW) v. Att'y Gen., [2011] eKLR (Kenya), http://www.kenyalaw.org/Downloads_FreeCases/162011.pdf.

195. In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, [2012] eKLR ¶ 52 (Kenya), <http://kenyalaw.org/caselaw/cases/view/85286>.

196. *Id.* (asserting “we are of the majority opinion that *legislative measures for giving effect to the one-third-to-two-thirds gender principle . . . should be taken by 27 August, 2015*”).

197. The Two-Third General Rule Laws (Amendment) Bill, No. 20 (2015), KENYA GAZETTE SUPPLEMENT No. 52, http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2015/Two-ThirdGenderRuleLaws_Amendment_Bill2015.pdf.

198. David Mwere, *Kenya: Women MPs Threaten Suit Over Gender Rule*, THE STAR (May 6, 2015), <http://allafrica.com/stories/201505061148.html>.

199. Centre for Rights Education & Awareness (CREAW) v. Att'y Gen., [2015] eKLR ¶ 113 (Kenya), <http://kenyalaw.org/caselaw/view/111102>.

200. *Id.*

its own August 27 deadline, with leaders arguing that there was inadequate time for discussion and debate.²⁰¹

Continued flouting of constitutional affirmative action requirements has meant that a great deal of public interest litigation under Article 22 focuses purely on implementation of articles like 27(8). Still, women's organizations have expressed a desire to expand their public interest litigation program, and at least some non-quota-related lawsuits have been filed. FIDA-K was able to leverage a victory simply by filing a lawsuit challenging section 38 of the Sexual Offenses Act, which attached financial liability to complainants if the accused was acquitted.²⁰² In response to the filing, the Attorney General drafted an amendment repealing the offending language. FIDA-K also has ongoing litigation challenging discriminatory inheritance laws and practices and the lack of protection for internally displaced persons.²⁰³

While the use of public interest standing in Kenya is still quite new, rights organizations have been fervently making use of the doctrine. The level of governmental compliance with court decisions, however, is less than perfect. Thus far, the government has repeatedly refused to give effect to at least some provisions of the constitution, in spite of court decisions. On the other hand, the process of litigating is forcing discussion of constitutional issues by those political elites who had previously been able to ignore them. In addition, media attention garnered by constitutional lawsuits adds visibility to these issues and expands the discussion.²⁰⁴ Attorneys with FIDA-K have noted that an additional value of public interest standing is that it allows FIDA-K to serve as first petitioner on a case and continue the litigation even if individual co-petitioners—often women who suffer the harm of the constitutional violation and who are able to provide detailed, factual affidavits—suffer fatigue and drop out.²⁰⁵ Upon being granted standing, NGOs like FIDA-K are able to use their own financial and legal resources to push this type of litigation to completion.

IV. IS THIRD-PARTY STANDING DEMOCRATICALLY LEGITIMATE?

Of course, use of such an open standing doctrine is open to criticisms relating to the legitimacy of the doctrine and efficacy of implementation. The democratic legitimacy of third-party public interest standing is called into question in two ways, relating to the nature of democratic participation and of the judiciary. First, this form of standing dramatically loosens the restraints on

201. See Justin Muturi, *Parliament Cannot Shoulder Blame for Delayed Laws*, CAPITALFM (Aug. 31, 2015), <http://www.capitalfm.co.ke/eblog/2015/08/31/parliament-cannot-shoulder-blame-for-delayed-laws>.

202. *Access to Justice Programmes*, FIDA-KENYA, <http://fidakenya.org/?q=Access-to-Justice-Programmes> (last visited Nov. 14, 2015).

203. *Id.*

204. For example, several news stories have cited the various lawsuits (or threats of lawsuit) relating to the affirmative action requirements of the constitution. See, e.g., Chris Mandi, *Kenya: Implementation of Two Thirds Gender Rule Will Protect Women*, STAR (May 16, 2015), <http://allafrica.com/stories/201505180224.html>; Mwere, *supra* note 198.

205. Telephone Interview with Christine Kungu & Daffline Sure, Attorneys at FIDA-Kenya (Nov. 7, 2012).

the judiciary and thus requires revisiting the separation of powers analysis. Permitting third parties to assert harms on behalf of others subjects the judiciary to charges that it is improperly exercising powers that should only be afforded to democratically elected legislatures. Second, new issues arise by virtue of the fact that this doctrine permits third parties to act as plaintiffs. Third-party litigants are vulnerable to charges that they institute suboptimal or vexatious litigation. Perhaps more importantly, they run the risk of oppressing the very people to whom they intend to give voice, requiring that any such third-party litigation be entered into with care and caution.

A. *The Permissible Contours of Judicial Space*

The expansion of standing to include third-party constitutional claims raises questions of judicial restraint. The breadth of access to constitutional courts ranges widely across the globe, corresponding with the local views on what is considered appropriate judicial behavior in a democracy, which may range from extreme judicial restraint to extreme judicial activism.²⁰⁶ At one end of the spectrum is the notion that constitutional interpretation does not belong in the bailiwick of the judiciary and instead belongs in the hands of representatives publicly endorsed via free and fair elections. A less conservative view supports judicial review, provided that the judiciary takes pains to exercise restraint. Limiting standing to injury-in-fact claims prevents the judiciary from exercising too much power, the fear being that if the judiciary agrees to hear abstract cases about what a law may do, the judiciary is essentially taking on a role more suited for a publicly elected body. Slightly more liberal is the third-party public interest standing I describe, which permits the judiciary to hear abstract cases to examine the constitutionality of legislation. On the far liberal end of the spectrum is the view that judiciaries have a moral imperative to be activist,²⁰⁷ by not only expanding the standing doctrine but also adjudicating cases relating to socioeconomic rights²⁰⁸ and providing remedies creating positive obligations for other governmental bodies.²⁰⁹ Public interest standing is often discussed as a component of the more liberal judicial activism seen in India and South Africa²¹⁰ and is thus bundled with discussions of whether the judiciary is overreaching in attempting to implement socioeconomic rights and enforce creative remedies.²¹¹ On its

206. See discussion *supra* Part II.

207. P.N. Bhagwati, *The Role of the Judiciary in the Democratic Process: Balancing Activism and Judicial Restraint*, 18 COMMONWEALTH L. BULL. 1262 (1992).

208. *E.g.*, *Gov't of the Republic of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.).

209. *E.g.*, *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) at para. 135(2)-(3) (S. Afr.).

210. See, *e.g.*, Siri Gloppen, *Public Interest Litigation, Social Rights, and Social Policy*, in INCLUSIVE STATES: SOCIAL POLICY AND STRUCTURAL INEQUALITIES 347 (Anis A. Dani & Arjan de Hanne eds., 2008).

211. Susan Susman, in her article about public interest standing in Indian courts, briefly discusses the separation-of-powers question. However, though her article maintains a narrow focus on standing, the separation-of-powers discussion encompasses more than just standing, touching on the other liberties taken by the Indian court. It thus does not address the question of how the mere expansion of standing fits within the separation-of-powers doctrine. Susman, *supra* note 7, at 79-80.

own, however, the standing question is tied only to a sliver of the spectrum of views on judicial space, subject to the question of whether the judiciary is the appropriate interpreter of constitutionality and, if so, for what types of complaints and plaintiffs.

In the case of Uganda and Kenya, one could argue that the court can appropriately hear *a posteriori* claims from third parties because the constitution permits it. However, there is still the question of whether the constitution *should* permit such a thing. The separation-of-powers doctrine is strongly associated with modern constitutionalism²¹² and is considered a key component of a successful democracy.²¹³ From this perspective, a constitution that permits something potentially violative of the separation of powers is necessarily suspect.

Although it would be simple to fall back on Western constitutional theory to test my arguments, especially given the Western influences on the structure of the modern African democracy, Western theories are not entirely applicable to fragile and emerging democracies. Despite some overlapping history, developing a constitutional standing doctrine based on British skepticism of judicial review, or American and European uneasy acceptance of the same, is inappropriate in these emerging democracies.

1. *The Separation-of-Powers Difficulty*

In the context of the separation of powers, the arguments for limited standing in judicial review cases as well as the arguments against judicial review altogether raise the same concerns. Both arguments emphasize the competition between the judiciary and the legislature. Just as the judiciary is able to consider the constitutionality of legislation after it is enacted, so too can a legislature consider the same during the drafting process.²¹⁴ Abstract review of legislation, then, should already be a function undertaken by the legislature, either explicitly via committee or implicitly via the deliberative legislative process. In the parliamentary democracies modeled after the United Kingdom, this type of rights review is already done before a bill is introduced in Parliament.²¹⁵ Given the countermajoritarian nature of the judiciary and the electoral mandate of the legislature, the abstract review required by third-party public interest standing thus undermines the will of the legislature and, thus, the public.²¹⁶

Arguments against the entire institution of judicial review similarly reference the lack of representativeness of the judiciary, asserting that the

212. EOIN CAROLAN, *THE NEW SEPARATION OF POWERS: A THEORY FOR THE MODERN STATE* 1 (2009); Fombad, *supra* note 13, at 1014.

213. Fombad, *supra* note 11, at 341.

214. JURGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 241 (William Rehg trans., 1996) (1992); Waldron, *supra* note 42.

215. Hiebert, *supra* note 92, at 307.

216. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-17 (1962); HABERMAS, *supra* note 214, at 241; Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

constitutionality of legislation is best assessed by the political branches selected via free and fair elections.²¹⁷ These arguments suggest that courts are not more likely to produce constitutionally correct outcomes than legislatures.²¹⁸ Additionally, absent such an advantage, there is no acceptable justification for permitting a nonelected, elite group of men and women to make judgments of constitutional interpretation over a large, freely elected body.²¹⁹ The legislature, a multimember body whose members must repeatedly stand for election, is traditionally considered the best-suited to eliminate powerful bias among government officials, although it is debatable whether this is true in any nation, including in the United States, where wealthy and powerful lobbies are able to exert a disproportionate amount of influence in the capital. The trust in political branches relies on assumptions about their representative nature, which is undermined when parliamentarians negotiate to achieve legislative and policy ends, rather than considering moral and constitutional norms.²²⁰

2. *The Application of Theory to Uganda and Kenya*

In Uganda and Kenya, arguments for limited judicial review fail because they do not reflect the historical and current political relationships between the citizenry and their leaders. These arguments presuppose a functioning and, more importantly, *responsive* legislative branch.²²¹ Jeremy Waldron, in his case against judicial review, relies on four key assumptions to make his argument that judges are no better than legislatures at producing constitutionally positive outcomes: first, that the society's democratic institutions are "in reasonably good working order"; second, that the judicial institutions are also in reasonably good order and are nonrepresentative; third, that there is "a commitment on the part of most members of society and most of its officials to the idea of individual and minority rights"; and, fourth, that there exists within the society a "good faith disagreement about rights."²²² Unfortunately, at least two of these assumptions do not hold in all nations, especially in fragile democracies.²²³

Many governments in sub-Saharan Africa, Uganda and Kenya included, suffer from elite capture and nonresponsive legislatures.²²⁴ The overwhelming

217. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (2000); Waldron, *supra* note 42.

218. Waldron, *supra* note 42, at 1376-86.

219. *Id.* at 1386-95.

220. BICKEL, *supra* note 216, at 18; HABERMAS, *supra* note 214, at 241; J. MITCHEL PICKERILL, *CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM* (2004).

221. Waldron, for example, rests his argument on the assumption that the society in question has "a set of legislative institutions . . . that are in reasonably good shape so far as these democratic values of equality and fairness are concerned." Waldron, *supra* note 42, at 1389.

222. *Id.* at 1360.

223. In addition, I remain unconvinced that his assumptions and conclusions realistically apply in the United States.

224. Fombad, *supra* note 13, at 1023-26; Prempeh, *supra* note 13, at 497-98. The accusation that legislatures are not responsive to the needs of certain groups is not limited to sub-Saharan Africa. Many in the United States, for example, debate whether the legislative bodies are far too easily controlled by big-money interests. Nadia Urbinati & Mark Warren, *The Concept of Representation in*

power of the executive in these countries undermines their democratic structures. In these and other relatively new or fragile democracies, legislative bodies often find themselves under the thumb of the executive.²²⁵ These governments have demonstrated very little commitment to rights. The rights disputes in Kenya and Uganda rarely concern nuanced questions of the content of a right; rather, they concern the complete failure to respect a constitutional right. Not only is judicial review necessary, but also access to the judiciary for constitutional claims must be expansive and inclusive. Theories of democracy and constitutionalism must accordingly be based on the realities of a powerful executive, a credible fear of a governmental backslide to authoritarian or military rule, and an effectively nonrepresentative parliament. In states such as these, where effective engagement with the political system is not available via electoral politics, marginalized groups—or their representatives—must seek out other avenues of engagement.

Using courts to further national dialogue is not a new concept. Rights groups often search for the right test cases to bring issues before high-level courts, and rights campaigns are often multipronged efforts that may emphasize impact litigation accompanied by media campaigns and lobbying. Third-party public interest standing becomes necessary when attorneys generally fail to advocate in court for the public interest and when the barriers to access to litigation are so great that they effectively prevent meaningful direct engagement with the courts and access to justice. Kenya's High Court, in a case adjudicated prior to the passage of the 2010 constitution, raised similar justifications for the expansion of standing rules, arguing that "the precondition of being an aggrieved person and other similar technical objections, cannot bar the jurisdiction of the court, or let justice bleed on the altar of technicality."²²⁶ What is an important and passionate discussion about separation of powers and democratic legitimacy to scholars may be utterly inaccessible when the reality is that the most theoretically "democratically legitimate" approach leads to pervasive inequality and de facto disenfranchisement of certain groups.

Additionally, third-party public interest standing does not necessarily create a greater legislative role for the court than would exist under a system of judicial review requiring injury in fact. Although such an expansion would increase the number of admissible constitutional claims submitted to the court, it would not necessarily require any legislative activity beyond the striking down of unconstitutional laws. In Uganda and Kenya, many of these cases are, in substance, cases that require nothing more than interpretation of the constitution and applying those limits to legislation and acts of Parliament and the executive branch.²²⁷ The judiciary may still reject claims that are political

Contemporary Democratic Theory, 11 ANN. REV. POL. SCI. 387, 407 (2008); Jennifer Bendery, *Missing in Action: Congress Ignores America's Poverty Crisis*, HUFFINGTON POST (Apr. 8, 2013), http://www.huffingtonpost.com/2013/04/08/congress-poverty_n_3000459.html.

225. Prempeh, *supra* note 13, at 497-98.

226. *Albert Ruturi v. Minister of Finance*, Misc. Civ. App. No. 908 of 2001 (Kenya).

227. The Indian and South African courts have been very activist, in the sense that they have not only relaxed procedural rules relating to court access but also created a number of remedies considered well beyond the traditional role of courts. In South Africa, for example, the Constitutional

questions or otherwise nonjusticiable. Abstract cases do not force judges to imagine outcomes of legislation, and judicial doctrine can easily pare cases that would require such speculation. In fact, the cases tackled by the Ugandan and Kenyan courts address very clear discrimination on the face of the law, creating no more a legitimacy problem than judicial review of concrete constitutional questions.

B. *The Ability of Injured Parties To Engage with the System*

A central assumption in my argument is that a court engaged in constitutional review must grant standing to public-spirited third parties because marginalized groups are often unable to use the democratic political system to their advantage. Admittedly, there is something seemingly undemocratic in allowing third parties to interact with a court on behalf of the injured party.²²⁸ In a theoretical world, the more democratically “pure” method would involve only direct interaction between affected parties and government institutions. When those government institutions are courts, the potential pragmatic and philosophical harms of the indirect arrangement can arise in three different ways. First, allowing third parties to seek remedies for harms they have not experienced can result in a dilution of the claim and the granting of remedies that are undesirable to the affected parties. This is tied to an important tenet of more conservative standing doctrine, which states that injured parties are best suited to present their own claims. Second, there is the fundamental contradiction of attempting to protect the rights of those with no voice by speaking for them, rather than giving them ability to speak. Speaking on behalf of others in such a manner may in fact perpetuate their disempowerment. Third, and relatedly, third parties who are not closely connected to the injured party may raise numerous claims that are unimportant to or not prioritized by the injured parties, thus creating vexatious litigation. In spite of these concerns, in light of the lack of entry points for many women—often those women who are suffering the greatest harm—to effectively advocate for themselves in the formal political system, third-party public interest standing can be a meaningful second-best alternative. This is especially true when the groups instituting public interest proceedings have direct experience and expertise regarding the issues facing these women. Such organizations can effectively represent the needs of their constituencies and often are better positioned to navigate the court system, which can result in not only better outcomes but also a narrative that more effectively develops the relevant political conversation. A carefully crafted judicial standard to test for a

Court ordered the government to, among other things, make the antiretroviral drug Nevirapene available throughout the country and to “[t]ake reasonable measures to extend the testing and counseling facilities at hospitals and clinics.” *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) at para. 135(3)(d) (S. Afr.). While this certainly would raise separation-of-powers issues due to the court taking actions that would be deemed “positive legislative actions,” this is also an example of activism that goes well beyond the relaxation of procedural rules.

228. This could be an issue even where the third-party plaintiff is merely lead petitioner alongside other direct plaintiffs. An institutional third-party plaintiff will often have greater resources and legal awareness, allowing it to seize control of the litigation.

democratically legitimate third-party litigant in judicial review cases can mitigate these concerns, while also ensuring more effective representation.

1. *The Problem of the Best Plaintiff*

Both within and outside the legal field, speaking for others has been recognized as problematic because “where one speaks from affects the meaning and truth of what one says, and thus one cannot assume an ability to transcend one’s location.”²²⁹ In terms of accessing courts, this idea is expressed in the traditional belief that direct engagement with the judiciary is the best way to ensure that a party is able to seek meaningful relief for his or her own grievances. This argument is well articulated by the U.S. Supreme Court, which noted:

[I]t may be that, in fact, the holders of those rights either do not wish to assert them or will be able to enjoy them regardless of whether the in court litigant is successful or not . . . [and] third parties themselves usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them.²³⁰

Theoretically, overly permissive standing requirements could allow third parties to misstate claims or advocate for relief that is undesirable to injured parties. However, this theory relies on the underlying assumption that if plaintiffs truly needed relief, then they would find a way to get to court. Additionally, it fails to account for the possibility of not just effective but potentially improved outcomes when litigation is helmed by a third-party plaintiff.

Relying on rural women or other dispossessed groups to “care enough” to take on the burdens of litigation unfairly assumes that they are situated well enough within the democratic process to do so. In Uganda and Kenya, many women lack entry into these so-called democratic processes.

The reality is that injured parties who are also members of marginalized groups do not have adequate entry to interact directly with the judicial system. Even in wealthier nations, access to justice is not a reality for the poor.²³¹ In Uganda and Kenya, the effect of these costs is egregious, because the argument over rights is not about nuance but about whether rights are being granted at all.

The most extreme costs in these two nations are not necessarily financial. Instituting litigation comes with costs to a litigant’s pocketbook, time, and social capital; a litigant without much of the first two and a high dependence on the last has a very clear incentive to avoid litigation. Choosing to litigate means choosing to pay a lawyer or finding a pro bono attorney, which entails giving

229. Linda Alcoff, *The Problem of Speaking for Others*, 20 CULTURAL CRITIQUE 5, 6-7 (1991-1992).

230. *Singleton v. Wulff*, 428 U.S. 106, 114-15 (1976). The court ultimately found that third-party standing was permitted in this case because the litigant had a relationship with the injured parties, and the injured parties were unlikely to institute proceedings on their own.

231. In the United States, for example, a large proportion of poor and middle-income individuals have unmet legal needs. *E.g.*, Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1785 n.1 (2001) (collecting sources).

up days of income, paying for transportation, and potentially ruffling feathers within community networks. In the cases instituted on behalf of women in Uganda and Kenya, the subject matter often relates to issues of custom. Openly fighting custom can be an economically dangerous endeavor for women living in rural communities, where ties to kinship are key to accessing property.²³² Even if a disadvantaged litigant is willing to take on the costs, she still must face the other difficulties attendant to filing a constitutional lawsuit. She must understand that her constitutional rights have been violated and that she has a justiciable cause of action. This level of legal literacy alone is not readily accessible to the average person, much less so when legal advice is not available. Marshaling the necessary legal resources to develop a sophisticated winning argument is often out of reach for many disadvantaged litigants.²³³

A culture of fighting for constitutional rights may also not yet be cultivated in nations where rights have historically been ignored by government. Unlike in Western nations like the United States, there is less of a culture of going to formal courts to cure harms. Years of elite capture in government, a problem throughout the African continent, and single-party politics can create or perpetuate a culture of silence when fundamental rights are being violated, necessitating openness to public interest litigation and permissive standing rules. This is precisely the reasoning Tanzania's High Court used when it permitted a third party to file a claim in the public interest:

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. . . . 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 even where they were aware of the infringement of their rights and the perversion of the Constitution. 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 institutionalized mono-party politics which in its repressive dimension, like detention without trial, sapped up initiative and guts.²³⁴

Allowing third parties to litigate, especially in a political environment with a nonresponsive parliament and disinterested executive, thus becomes an important and necessary means for adding the voices of disempowered groups to political and constitutional conversations.

As a practical matter, rights-based NGOs and civil society organizations, the ones often instituting public interest proceedings, may in fact be better plaintiffs, as they are positioned to litigate these constitutional matters in a sophisticated manner.²³⁵ In Uganda and Kenya, organizations like LAW-U,

232. Polavarapu, *supra* note 19, at 111-19.

233. See Siri Gloppen, *Public Interest Litigation, Social Rights and Social Policy* (World Bank Conference, Working Paper, 2005), <http://siteresources.worldbank.org/INTRANETSOCIALDEVELOPMENT/Resources/Gloppen.rev.3.pdf>.

234. *Mtikila v. Att'y Gen.*, Civil Case No. 5 of 1993 (Tanz.) (unreported), <https://www.elaw.org/system/files/tz.mtikila.doc> (last visited Oct. 14, 2015).

235. Even U.S. Supreme Court Justice Antonin Scalia, who has criticized the notion of public interest standing on separation-of-powers grounds, has conceded that “[o]ften the very best adversaries

FIDA-K, and MIFUMI are able to effectively present the issues in a way that single respondents may not be. In multiple lawsuits, these organizations have been able to draw from their own fact-finding research as well as sophisticated analyses of constitutional and international human rights law. Pulling together data from multiple women, these organizations have been able to develop and present the whole of the problematic nature of certain laws, rather than one small violation. Additionally, in countries where repugnancy laws²³⁶ are still in force, direct litigation does not necessarily raise the constitutional issue. Lower courts can use the repugnancy test to avoid applying discriminatory laws, often with inconsistent results, instead of measuring the laws against the constitution. The result is a patchwork system of justice in which discriminatory law is sometimes applied and sometimes not.²³⁷ Women's rights organizations are willing to spend resources fighting for the constitutional judgment, developing litigation strategies and legal arguments that further the overall goals of improving women's rights at a more categorical level.

2. *Speaking on Behalf of Others*

Speaking on behalf of injured parties may also disempower the injured parties. An ideal remedy for politically disempowered groups is the creation of space in which said groups can engage directly with the political system, equalizing the terrain of political discourse. A remedy of third-party representation, on the other hand, may serve to further oppress the already disempowered and delay the moment when effective and direct political engagement becomes possible. Unchecked, the result may be the claim once leveled against Western anthropologists: "a conversation . . . of the white man with the white man about the primitive-nature man . . ." ²³⁸ To the disenfranchised, urban-based NGOs and civil society organizations may hold great similarity to the white man in this context. Such organizations are accountable to their (often white and Western) donors and are populated by highly educated legal service providers, who are already set apart from their beneficiaries by the privilege accompanying their high level of education.²³⁹

When women's human rights legal organizations speak for women, they must be careful not to simply represent privileged women suppressing all other

are national organizations such as the NAACP or the American Civil Liberties Union that have a keen interest in the abstract question at issue in the case, but no 'concrete injury in fact' whatever." Scalia, *supra* note 216, at 891.

236. The repugnancy test, a remnant from British colonial rule, allows judges to refuse to apply customary law if it is repugnant to principles of justice and morality. In both Kenya and Uganda, the repugnancy test is codified. Judicature Act, (2012) Cap. 8 § 3(2) (Kenya); Judicature Act, (1996) Cap. 13 § 15(1) (Uganda).

237. In lower courts, when repugnancy tests are applied and judges refuse to apply a law in certain circumstances, the law found to be repugnant stays on the books. Such a decision will not have precedential value, leading to the patchwork system of justice.

238. Alcoff, *supra* note 229, at 6 (quoting TRINH T. MINH-HA, WOMAN, NATIVE, OTHER: WRITING POSTCOLONIALITY AND FEMINISM 65, 67 (1989)).

239. In sub-Saharan Africa, rural women can experience great disenfranchisement from formal systems of justice, whereas urban, educated women participate more easily in formal or Western-style systems. Polavarapu, *supra* note 19, at 109-10.

women. When a speaker makes a claim, both the speaker's social location and the discursive content of the speech affect how listeners receive the claim.²⁴⁰ Highly educated women lawyers who have embraced modern African life and speak the language of Western statutory law may be perceived as speaking truth; on the other hand, rural women, uneducated women, or other categories of women who do not speak the language of the law or the West may be disregarded because they are not perceived to be knowledgeable or capable of understanding the truth. Yet because third-party representatives embrace the Western language of law, the language of the colonizer, to speak on behalf of the disempowered, they mimic a form of oppression.²⁴¹

The social location of a speaker is as important as the content of the speech, in that the location of a speaker inherently colors the message being conveyed. This may, in turn, change the nuance of the messages. Third-party plaintiffs who survive on Western funding are accountable to their donors, who have the potential to hold considerable influence over the types of litigation that is pursued or over the actions taken by the organization generally. Even as it is attempting to improve women's rights, an organization may find itself pursuing litigation that is most palatable to its donors, rather than most important to its beneficiaries. By speaking as the voice of women in a nation, these organizations run the risk of minimizing the priorities and needs of more marginalized women while favoring donor priorities.

Still, the need for political effectiveness is an overwhelming concern. If third-party plaintiffs simply did not speak in order to protect the voice and experience of their beneficiaries, those beneficiaries may never be given voice. The benefit of third-party standing in these circumstances is that it creates additional space for issues important to disempowered groups to be heard and considered by government actors. The theoretical spaces already exist for women to speak directly of their own experiences, but the barriers to access effectively silence them in many cases.

Not all instances of speaking for others are disempowering or oppressive.²⁴² Political representatives are authorized to speak on behalf of their constituents via the electoral process. Lawyers are authorized to speak on behalf of their clients. Third-party plaintiffs are not necessarily so authorized and are better described as "self-appointed." Such representation by third-party plaintiffs falls under the larger umbrella of self-appointed representatives, as described in political science literature. Beneficiaries of such representation may include persons outside the electoral constituency of policymakers who are affected by the consequences of those policymakers' decisions, as well as members of the electoral constituency who, as a result of the inadequacies in the system, are not effectively represented by elected representatives.²⁴³ Within

240. Alcott, *supra* note 229, at 13.

241. Alcott suggests that one of the premises implied by the problem of speaking for others is that "[c]ertain contexts and locations are allied with structures of oppression, and certain others are allied with resistance to oppression. Therefore all are not politically equal, and, given that politics is connected to truth, all are not epistemically equal." *Id.* at 15.

242. *See id.* at 8.

243. Laura Montanaro, *The Democratic Legitimacy of Self-Appointed Representatives*, 74 J.

the context of public interest litigation, beneficiaries of third-party self-appointed representation fall in the latter group.

Asserting the legitimacy of third-party representation, when such representation is self-appointed, is impossible under traditional notions of democracy. The traditional source of democratic legitimacy—a mandate from the public via elections—is absent for self-appointed representatives. Their beneficiaries are meant to be those who are electorally disenfranchised, and thus self-appointed representation is, in part, justified by the existence of vacuums of effective democratic representation for the disenfranchised. Borrowing from current political science theory, courts can assess democratic legitimacy by examining the relationships between the self-appointed representative and the intended beneficiaries.

Under this theory, self-appointed representation calls into existence two constituencies: an “authorizing” constituency and an “affected” constituency.²⁴⁴ Democratic representation exists when the affected constituency gains political presence and is able to authorize and hold accountable the self-appointed representative.²⁴⁵ “Surrogate representation” exists when the representative creates political presence for the affected but is not authorized by or held accountable to the affected constituency. This type of representation is “pre-democratic,” as it will ideally allow the affected to become empowered to authorize or hold accountable the representative at a future date.²⁴⁶ Representation is “skewed” or fails if it does not create a political presence for the affected constituency and is not authorized by or held accountable to said constituency.²⁴⁷

In Uganda and Kenya, the constitutional permission of third-party public interest standing creates an opportunity for democratically legitimate and illegitimate plaintiffs. Their constitutions allow any person, whether or not that person has a connection to the affected constituency, to challenge a law as unconstitutional.²⁴⁸ In theory, any person who can put together a legal argument can petition the court, completely ignorant of, or in the worst case, with nefarious intentions towards, the affected constituency. A well-designed judicial doctrine or statutory test²⁴⁹ could mitigate the possibilities of skewed representation but at best ensure surrogate representation.

The women’s groups that have been filing public interest litigation on behalf of women have often worked directly with injured parties and are very familiar with their needs. Allowing women’s groups to continue to advocate in the public interest judicial space will increase accessibility for marginalized women, albeit indirectly. Ensuring that the third-party plaintiff is “bona fide” and will give the affected constituency a political presence can be achieved by

POL. 1094, 1096-97 (2012).

244. *Id.* at 1095.

245. *Id.* at 1103.

246. *Id.* at 1104.

247. *Id.* at 1105.

248. See discussion *supra* Parts III.A.4, III.B.4.

249. In Uganda and Kenya, where both parliaments have a blemished history of rights protection, this doctrine would likely be more beneficial if articulated by the courts.

examining the third party's relationship and history with the affected constituency. Both the Tanzanian²⁵⁰ and Indian²⁵¹ judiciaries, for example, have used the test of whether a plaintiff is "bona fide" to determine whether to grant standing. While I believe the particular elements of such a test should be developed over time based on the types of cases and plaintiffs arriving before the court, I suggest that plaintiffs with a positive relationship with and history of advocating on behalf of the affected constituency are more likely to be informed and motivated to achieve positive results for the affected constituency. This would have the effect of limiting third-party public interest standing largely to institutions rather than individual citizens. In Uganda and Kenya, for example, the women's organizations filing lawsuits have a demonstrated commitment to representing women and serving their needs.²⁵² With the right doctrine in place, persons or organizations that have a mission and history of working with the affected population would be permitted to serve as third-party plaintiffs, but an average person who has no such relationship would not.

This doctrine could also address the concern of continued oppression by allowing third parties to speak for the marginalized. Once members of a beneficiary group are empowered enough to speak on their own, the doctrine could require third-party plaintiffs to "move over" in favor of the authentic voice.²⁵³

For as long as third-party plaintiffs are still needed, however, what courts cannot do is ensure that the authorizing constituency and the affected constituency are the same. The obvious authorizing constituency of the women's rights third-party plaintiffs in Uganda and Kenya are international donors. In fact, human rights organizations throughout the African continent tend to be heavily supported by international funding. Any substantial limitations on outside funding or requirements that beneficiaries fund third-party representatives would remove the possibility of third-party representation altogether,²⁵⁴ as authorization from the affected constituency (women

250. *Mtikila v. Att'y Gen.*, Civil Case No. 5 of 1993 ¶ 30 (Tanz.) (unreported).

251. *Janata Dal v. H.S. Chowdhary*, (1992) 1 SCR Supl. 226 ¶ 64.

252. LAW-U, formed in 1997, states that its mission is "[t]o work for change of laws and practices that discriminate against women in Uganda, as well as to promote and advocate for the enactment of laws that will ensure that women's rights are protected in accordance with the Constitution." Since its inception, it has represented women in courts, advocated for legislative change, and engaged in fact findings to determine the impact of laws and practices on women's lives. *What We Do*, LAW AND ADVOCACY FOR WOMEN IN UGANDA, <http://www.facebook.com/law-and-advocacy-for-women-in-uganda-1506-853302923254> (last visited Oct. 14, 2014). In Kenya, FIDA-K's mission is "[t]he promotion of women's individual and collective power to reclaim their rights in all spheres of life." FIDA-K, established in 1985, is affiliated with a well-known global women's rights organization, The International Federation of Women Lawyers (FIDA). See FIDA KENYA, <http://fidakenya.org> (last visited Nov. 14, 2015).

253. Alcoff notes that when the speech becomes disempowering, then it is important to "move over." However, she cautions against preemptively refusing to speak if the result is that an important contribution to the discussion is lost. Alcoff, *supra* note 229, at 27.

254. Ethiopia, for example, enacted the Charities and Societies Proclamation in 2009, which only permits organizations to work on human rights activities if they receive no more than ten percent of their funding from international sources. This law has been heavily criticized as effectively vitiating the human rights community in Ethiopia. *Ethiopia: The 2009 Charities and Societies Proclamation as a*

negatively impacted by these laws) is unlikely to be financial in nature. On the other hand, affected constituencies may be able to exercise discursive authorization, holding the representative accountable with the threat of exit or voicing disapproval. Exit becomes increasingly available to groups as the number of organizations delivering services to the affected constituencies increases. Third-party plaintiffs may thus ultimately achieve democratic legitimacy, though courts can only guarantee surrogate representation.

3. *Fear of the Vexatious Litigant*

Judicial doctrine to test whether a third-party plaintiff is bona fide also serves an institutional purpose by preventing vexatious litigation. In some nations, abstract review has been used purposefully by politicians seeking to find additional means of exercising a veto.²⁵⁵ In France, minority parties routinely challenge the constitutionality of majority-sponsored legislation.²⁵⁶ A slightly less nefarious concern is that expanding standing or access to courts will dramatically overburden the courts with vexatious or crank litigants.

The European Commission of Democracy through Law (the “Venice Commission”) has advocated against open permission for any citizen to file a constitutional claim, precisely because of the risk of overburdening the courts. This is not a spurious concern. In Croatia, where *actio popularis* is permitted, one person has lodged almost eight hundred constitutional challenges, without asserting a personal injury in a single case.²⁵⁷ Hungary formerly permitted *actio popularis* cases but removed this form of action via a December 2011 law reform, on the grounds that it was overly burdensome to courts.²⁵⁸ The move was supported by the Venice Commission, which emphasized in an opinion addressed to Hungary that *actio popularis* is not a European standard.²⁵⁹ The Commission also raised the concern that Hungarian courts were overburdened, although Hungary itself did not raise caseload as an issue for reform, despite reporting that its courts received an estimated 1,600 cases per year under *actio popularis*.²⁶⁰ The result of this reform is that many important issues now go

Serious Obstacle to the Promotion and Protection of Human Rights in Ethiopia, AMNESTY INT’L (June 11, 2012), <https://www.amnesty.org/download/Documents/16000/afr250072012en.pdf>.

255. ALEC STONE SWEET, *GOVERNING WITH JUDGES* 74-75 (2000).

256. Steven G. Calabresi & Jasmine Owens, *The Origins of Judicial Review* (Northwestern Pub. Law Research Paper No. 14-05, 2014), <http://papers.ssrn.com/abstract=2391457>.

257. *Opinion on the Draft Law on the Constitutional Court of Montenegro*, EUR. COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION) ¶ 51 (Oct. 24, 2008), [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2008\)030-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2008)030-e). The report does not specify how many of these cases were actually heard on the merits.

258. Human Rights Inst., *Courting Controversy: The Impact of the Recent Reforms on the Independence of the Judiciary and the Rule of Law in Hungary*, INT’L BAR ASS’N 45 (Sept. 2012), <http://www.ibanet.org/Document/Default.aspx?DocumentUid=89D4991A-D61F-498A-BD21-0BAFFA6ABF17>.

259. *Opinion on Act CLI of 2011 on the Constitutional Court of Hungary*, EUR. COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION) 12 (June 15-16, 2012), [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2012\)009-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)009-e).

260. *Opinion on Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary*, EUR. COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION) ¶ 59 (Mar. 28, 2011), http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/venice_commission_opinion_614-11/venice_commission_opinion_614-11en.pdf.

unheard. Important rule of law issues heard by Hungary's Constitutional Courts, including cases upholding the limitations on the executive's power, were often heard only because of the permission of *actio popularis*.²⁶¹ In fact, the abolition of *actio popularis* in Hungary was bundled with other reforms that resulted in limiting the independence and efficacy of the judiciary, an effort strongly suspected of being initiated by a powerful executive unhappy with his power being checked by the judiciary.²⁶²

On the other hand, the Indian judiciary, a strong supporter of public interest litigation, has also lamented the overburdening of courts by spurious litigation as well.²⁶³ Even as higher courts have explicitly noted that only bona fide claimants can properly institute public interest litigation, lower courts continue to entertain such claims.²⁶⁴ Overburdening courts can absolutely prevent "worthier" litigation from receiving its due.

However, with a properly shaped doctrine, courts should be able to widen access for important public interest constitutional issues, while still limiting vexatious litigation. Similar doctrines and rules of civil procedure already exist to protect against specious legal techniques.²⁶⁵ Ensuring a "bona fide" third-party litigant with demonstrable interest in the issues being raised, in addition to ensuring a minimum level of democratic legitimacy, can also mitigate the possibility of spurious litigation.

V. THIRD-PARTY PUBLIC INTEREST STANDING AS A TOOL TO ENHANCE DEMOCRACY IN EMERGING DEMOCRACIES

Third-party public interest standing is powerful in emerging democracies because it enables the creation of meaningful political presence for groups that are otherwise barred from participation in the system. The value does not come from judicial outcomes, and I do not in this Article address efficacy concerns, as my argument does not rest on short-term, measurable outcomes such as judicial decisions and immediate legislative compliance. Instead, I argue that the doctrine makes democratic political discourse available to marginalized groups in Uganda and Kenya, thus strengthening the overall democracies. Additionally, the doctrine has the potential to create similar democratic openings in other emerging democracies.

A. *The Value of Third-Party Public Interest Standing in Uganda and Kenya*

Third-party public interest standing is an important means of forcing unpopular but essential women's rights issues into the political dialogue of Kenya and Uganda. As I have already established, in Kenya and Uganda,

261. Human Rights Inst., *supra* note 258, at 45.

262. *See id.*

263. *Kalyaneshwari v. Union of India*, (2011) 3 SCC 287, paras. 25-27 (India); *Janata Dal v. H.S. Chowdhary*, (1992) 4 SCC 305, para. 110 (India).

264. *Kalyaneshwari*, 3 SCC 287, paras. 25-27.

265. For a well-known example, see FED. R. CIV. P. 11.

electoral processes do not yield adequate participatory opportunities for disempowered groups. The example of the women's rights movements in Uganda and Kenya illustrates why the third-party public interest standing is necessary if women's issues are to be included in the political discourse. Women are guaranteed equal rights in these and other new sub-Saharan African constitutions, yet they are still subject to many discriminatory laws and practices, particularly those that impact their ability to attain economic independence. Even as the numbers of women in parliament have increased, discriminatory legislation continues to stay in place. The fear of electoral backlash from women is evidently not enough to push parliament to change laws. Indeed, the same marriage and divorce bill, with provisions that would improve women's treatment by marriage law, has been sitting in Uganda for over forty years.²⁶⁶ While legislative change is the preferred choice in Western constitutional theory, the legislature in each of these two nations has thus far failed to uphold the constitution with respect to certain rather large groups. From the executive branch, the Attorneys General in both Uganda and Kenya have shown little interest in litigating on behalf of the public.

Using third-party public interest standing, rights organizations can use courts to discursively empower women and other disempowered groups. Obstacles to access to courts prevent some of the most vulnerable women, such as rural and poor women, from instituting direct litigation in courts. Even where women are willing to institute claims, petitioner fatigue and resource constraints can lead to litigation drop out. Additionally, an individual petitioner may simply choose to settle for any number of reasons. The permission of third-party standing creates the opportunity for rights organizations to pursue litigation beyond the point where an individual plaintiff may settle or otherwise drop out of litigation in order to seek a more systemic change.

However, public interest standing has value that is not dependent on the judiciary producing the "right" outcomes at all times. Judiciaries have the potential to change over time and become more or less restrictive with rights. Even as the judiciaries have grown more protective of constitutional rights, simply relying on the judiciary to always produce rights-positive outcomes is dangerous. Additionally, government compliance with court decisions is low.²⁶⁷ Instead, the value is in the creation of an opportunity for issues to be heard.

The act of instituting constitutional proceedings forces the dialogue, increasing the number of democratic inputs and strengthening the deliberative nature of democracy. While certain issues may be repeatedly tabled and ignored in parliament, once preliminary admissibility standards are met, the arguments must be heard in the courts. Constitutional judges, attorneys general,

266. See discussion *supra* Part III.A.1.

267. This low level of compliance is tied to the hegemonic nature of the presidency and the general impunity that has long been enjoyed by political elites. For an overview of the scholarly discussion about how and why executives are able to behave as hegemon, see Gedion T. Hessebon, *Some Major Themes in the Study of Constitutionalism and Democracy in Africa*, 7 VIENNA J. ON INT'L CONST. L. 28, 35-38 (2013).

and any applicable government parties, including relevant ministry officials, will review and engage with the complaint. Additionally, constitutional court cases are the subject of more prominent media reporting, bringing the general reading public to the conversation. This dialogue is the entry point for disempowered groups to enter the political realm. When Ugandan and Kenyan constitutional courts make findings of unconstitutionality, dialogue is furthered with parliaments and government ministries, who are directed to re-address the issue by amending or drafting new legislation. Although parliaments in both countries have hesitated to give effect to court decisions, and the executives of both nations have even pushed back against courts, the proceedings instituted by third parties have succeeded in giving the issue greater visibility, generating greater inputs to democratic dialogue and furthering democracy.

B. *The Potential of Third-Party Public Interest Standing in Other Emerging Democracies*

Third-party public interest standing has the potential to similarly strengthen democracy in other fragile or emerging democracies. The overall lack of access to justice for disempowered groups, the continued entrenchment of power in political elites, and the need to create a political presence in constitutional dialogue are characteristics of a number of nations, within and outside the African continent. In an environment with active NGOs and a willing judiciary, similar democratic dialogue can be created.

Versions of this story can be told throughout sub-Saharan Africa as well as around the globe. In sub-Saharan Africa, many nations are still living with “imperial presidents,” legislatures that are under the thumb of the executive, and members of parliament who seek only to preserve their own power.²⁶⁸ The human rights records for women, minorities, and certain ethnic groups are poor, reflecting a need for advocacy.²⁶⁹ In nations outside the African continent, similar charges can be leveled regarding poor human rights records, lack of government accountability, ineffective or resistant political bodies, including legislatures, or other factors giving rise to closed political systems.²⁷⁰

Given the right conditions, third-party public interest standing can create similar democratic access points in these democracies. In extremely

268. These factors are particularly prevalent in a number of sub-Saharan African nations. Observers of the constitutional and democratic state of sub-Saharan Africa repeatedly note and lament the willingness of political leaders to undermine any substantial move toward democracy. MICHAEL BRATTON & NICHOLAS VAN DE WALLE, *DEMOCRATIC EXPERIMENTS IN AFRICA: REGIME TRANSITIONS IN COMPARATIVE PERSPECTIVE* 233 (1997); Fombad, *supra* note 13, at 1023-26; Hessebon, *supra* note 267, at 35-38; Prempeh, *supra* note 13, at 497-98.

269. See HUMAN RIGHTS WATCH, *WORLD REPORT 2014*, at 77-201 (2014).

270. For example, in Human Rights Watch’s *World Report 2014*, Latin American nations were identified as not only having poor rights records but also lacking government accountability. *Id.* at 203-83. Although Latin America has been viewed as having had successful democratic transitions, commentators now lament the rise of some authoritarian presidents as well as the existence of weak, “rubber stamp” legislatures. Fernando Carillo-Florez & Dennis P. Petri, *Quality of Democracy and Parliamentary Reform in Latin America: How Europe Can Help*, INT’L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE 8 (2009), <http://www.idea.int/resources/analysis/loader.cfm?csmodule=security/getfile&pageid=37959>.

authoritarian “democracies,” such an opportunity may not exist. A nation utterly lacking in civil society or a strong pro bono ethic among attorneys is unlikely to have third parties that could effectively take advantage of this type of third-party public interest litigation.²⁷¹ In nations where institutions such as the judiciary are being systematically weakened to reduce checks on the ruling party, an expanded doctrine is also likely to be ineffective. For this doctrine to achieve its potential, the judiciary must be willing and able to tackle these constitutional questions, and there must be an available set of third-party plaintiffs able to file such claims. When these conditions are present, the third-party public interest standing doctrine is compelling.

As countries are writing and rewriting their constitutions, their unique circumstances and dissimilarities from older, Western democracies suggest that drafters should consider novel and non-Western approaches to ensuring constitutional accountability and rule of law. In these democratic systems, what is considered a typical or legitimate democratic approach under traditional democratic and constitutional theories may not be optimal. Disempowered groups suffering de facto disenfranchisement as a result of entrenched political elites, corruption, inequality, or apathy do not have access to the democratic system. Implementing an approach approved by Western theorists in these circumstances simply perpetuates inequality and creates a paper democracy—one that is not a reality for the disempowered. In these systems, third-party public interest standing can enhance and develop democracy in spite of the countermeasures of the political branches of government.

CONCLUSION

Third-party public interest standing can be a democratically legitimate approach to creating access to political discourse and thus creating a more meaningful political presence for disempowered groups. In an ideal system, each group or individual would speak with its own voice and be a meaningful participant in political discussion. However, that is not a reality when power is entrenched among small groups and representative organs are nonresponsive to their constituents. In cases where lawmakers egregiously violate or simply ignore the basic rights of members of the populace, courts could be an appropriate option for those experiencing personal and direct harm. Yet these types of actions remain inaccessible to the dispossessed, who face financial, physical, and social obstacles to access to justice. In these societies, bona fide third parties who are invested in representing the interests of these dispossessed groups are able to discursively empower the dispossessed via constitutional litigation and facilitate a more democratic political discourse.

This form of standing is nontraditional, at least from a Western constitutional perspective, yet it is an important innovation because it allows

271. Despite the evidence of strong rights movements and pro bono organizations in Uganda, Kenya, and Tanzania, Prempeh laments that the continent of Africa in general lacks a pro bono ethic among its attorneys. Prempeh, *supra* note 13, at 503. He thus suggests that litigation is not a meaningful option to protect constitutional rights. *Id.* Insofar as this is true, certainly public interest standing will make no difference in those nations.

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for greater democratic diffusion within Uganda and Kenya as well as in other emerging and fragile democracies. As internal and external pressures push for greater democracy and rule of law in these nations, governments should consider novel approaches to constitutionalism if they are more responsive to the sociopolitical context and history of the nation. Third-party public interest standing is an important tool precisely because it responds to and undermines the pervasive political disempowerment of groups in emerging democracies. By creating an opportunity for discursive empowerment, it enhances the strength of the constitutional democracy and rule of law.