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# African Judicial Review, the Use of Comparative African Jurisprudence, and the Judicialization of Politics

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# AFRICAN JUDICIAL REVIEW, THE USE OF COMPARATIVE AFRICAN JURISPRUDENCE, AND THE JUDICIALIZATION OF POLITICS

JOSEPH M. ISANGA

## INTRODUCTION

*Marbury v. Madison*'s<sup>1</sup> legacy is enjoying a quiet resurgence in sub-Saharan Africa.<sup>2</sup> Since the early 1990s, several sub-Saharan African states have experienced a return to open and competitive politics.<sup>3</sup>

Military regimes, one-party rule, and "life presidents," once the norm in postcolonial Africa, have given way to elected and term-limited presidents and representative parliaments in countries like Nigeria, Ghana, Kenya, Senegal, Mozambique, Zambia, Tanzania, Malawi, Benin, Uganda, and Mali.

As elsewhere in the postauthoritarian world, constitutional reforms have underwritten the tentative democratic gains made in contemporary Africa. One common feature of these reforms has been the empowerment of Africa's judiciaries. Africa's revised constitutions grant designated national courts plenary authority to interpret and enforce the constitution, including, notably, new bills of rights.<sup>4</sup>

Courts are presumed to be above politics<sup>5</sup> and, as such, they can play a huge role in shaping policy and legal developments in ways that optimize legitimacy. This presumption has much to do with the very nature of law in that it tends to be instrumental from a

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1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

2. H. Kwasi Prempeh, *Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa*, 80 TUL. L. REV. 1239, 1240-41 (2006).

3. *Id.*

4. *Id.*

5. See, e.g., Anthony E. Varona, *Politics, Pragmatism and the Court*, 2 GEO. J. GENDER & L. 155, 155 (2001) ("We place our judges and courts atop pedestals far above the political.").

normative perspective.<sup>6</sup> Constitutional courts, in particular, are meant to function as instruments of political legitimacy and stability, and thus can have a significant impact on policy and legal development.<sup>7</sup>

This Article examines African constitutional courts' jurisprudence—that is, jurisprudence of courts that exercise judicial review—and demonstrates the increasing role of sub-Saharan Africa's constitutional courts in the development of policy, a phenomenon commonly referred to as “judicialization of politics” or a country's “judicialization project.”<sup>8</sup> This Article explores the jurisprudence of constitutional courts in select African countries and specifically focuses on the promotion of democracy,<sup>9</sup> respect for human rights,<sup>10</sup> and the rule of law,<sup>11</sup> and presupposes that although judges often take a positivist approach to adjudication, they do impact policy nevertheless.<sup>12</sup>

6. Robert S. Summers, *Pragmatic Instrumentalism: America's Leading Theory of Law*, 5 CORNELL L. F. 15, 15 (1978) (“Pragmatic instrumentalists focus on getting things done through law.”).

7. See, e.g., Cornell W. Clayton, *The Law of Politics: The Supply and Demand Sides of Judicial Policy-Making (Or, Why Be So Positive About the Judicialization of Politics?)*, 65 L. & CONTEMP. PROBS. 69, 80 (2002) (“The Court's decision in *Bush v. Gore* . . . was a one-time, pragmatic intervention into an election . . . . The election had resulted in a statistical dead heat, where at least half the country favored the outcome produced by the Court and even the losing candidate publicly accepted the legitimacy of the Court's decision . . . . [I]t is difficult to see how the Court can be characterized as acting independently of democratic impulses or as untethered from the broader electoral currents of the national political system.”).

8. See generally THE GLOBAL EXPANSION OF JUDICIAL POWER (C. Neal Tate & Torbjörn Vallinder eds., 1995). See also Nico Steytler, *The Judicialization of Namibian Politics*, 9 S. AFR. J. ON HUM. RTS. 477, 484–85 (1993) (“Judicial review of legislation places courts squarely within the legislative process and hence the political arena . . . . They are ‘legislative’ in the sense that they, like legislatures, determine policy issues generally and prospectively . . . . The ‘legislative powers’ of such a court [are] the most unambiguous when the constitutionality of legislation can be raised by way of abstract review. The effects of concrete review of legislation are, however, not necessarily less legislative.”).

9. This Article focuses on democracy because, as post-authoritarian constitutional law scholar H. Kwasi Prempeh notes, the aim of “constitutional reform in Africa has been to bring an end to authoritarian/personal rule. In other words, the democratization of national politics has topped the constitutional reform agenda in Africa. Thus, dislodging and banishing one-party regimes, military rule, and life presidencies have been the main focus of reformers.” Prempeh, *supra* note 2, at 1291.

10. See *id.* at 1292 (“Contemporary constitutional reform in Africa has also been propelled by a need to end human rights abuses and generally improve conditions for rights.”).

11. Courts of judicial review achieve these objectives by placing limits on majoritarian rule and subjecting acts of the legislature and the executive to judicial review. See Steytler, *supra* note 8, at 479.

12. See Jeremy Sarkin, *The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions*, 1 U. PA. J. CONST. L. 176,

The use of judicial review in Africa has been painfully slow, uneven, protracted, and has frustrated many policymakers in Africa and across the world.<sup>13</sup> Despite many years of experimentation with judicial review across Africa, the norm in many countries remains “constitutions without constitutionalism,”<sup>14</sup> where the lack of judicial review has allowed new forms of authoritarianism to arise as regimes seek to extend their stay by abolishing constitutional term limits.<sup>15</sup>

“The 1990s . . . marked a critical high point for constitutionalism, the rule of law, and democracy in Africa . . . a new dawn and the end of an era” of corruption, authoritarianism, dictatorships, and autocracy.<sup>16</sup> Most African constitutions contain provisions that recognize and protect most fundamental human rights and courts have, albeit with some setbacks, tried to guard those constitutional values through judicial review of impugned legislation.<sup>17</sup> In far too many countries, however, judicial review has had a mixed record.<sup>18</sup> Some constitutional courts in the region have been more successful than others.<sup>19</sup> Today, constitutions are a frequent site for

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190 (1998) (“In the past judges attempted to explain their role in the positivist tradition, as declarers of the law and not its makers. However, criticism of the judges has often been predicated on a wider view of the judicial function.”).

13. See Prempeh, *supra* note 2, at 1243 (“In Africa’s postcolonial history, nearly every country has experienced the phenomenon of a formal constitution existing side-by-side with authoritarianism.”).

14. See, e.g., *id.* at 1280 (explaining that in the latter half of the twentieth century, most African constitutions created a false sense of legitimacy as Africa’s leaders did not always adhere to constitutional text, and that, today, some African countries have passed “regressive amendments designed to bring [constitutional] text into conformance with reality”). See generally H.W.O. Okoth-Ogendo, *Constitutions Without Constitutionalism: Reflections on an African Political Paradox*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 65 (Douglas Greenberg et al. eds., 1993).

15. See, e.g., Prempeh, *supra* note 2, at 1246 (“[T]he state in Africa remains highly centralized, presidents continue to wield disproportionate power and resources, parliaments remain functionally weak . . . and ‘winner-take-all’ politics is still the order of the day.”). Prempeh does not ignore states where constitutional term limits have been respected. *Id.* at 1283 (“Term limits have been applied to end the presidential tenure of long-reigning rulers like Ghana’s Rawlings and Kenya’s Moi and of presidential newcomers like Zambia’s Chiluba and Malawi’s Muluzi.”).

16. Charles M. 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, 2 (2007).

17. See generally Part II (comparing judicial review in selected African countries).

18. *Id.*

19. For example, South Africa’s and Namibia’s constitutional courts have been more successful than Uganda’s and Kenya’s constitutional courts. See Part II (comparing judicial review in selected African countries).

social, political, and economic struggle.<sup>20</sup> State functionaries evoke their constitutions to justify the most undemocratic and coercive measures, even as opposition members seek recourse through the very same instruments to advance the cause of enhanced participation, expression, and access.<sup>21</sup>

African politicians tend to selectively abide by judicial decisions and constitutional provisions. One commentator explained this phenomenon as follows:

[I]n any African country at any given time more than one constitution may be in place. The written or textual constitution is also the aspirational constitution. Opposition leaders or elements and the citizens may clamour for the primacy of such constitution. The political incumbency often claims to follow such a constitution—sometimes even to the letter—but that is usually in rhetoric, or at best the leadership selectively abides by certain parts of the written constitution. Where it is obvious that the leadership feels frustrated by certain sections of the constitution and there is pressure or expectation for these to be followed, then amendments are engineered.<sup>22</sup>

In light of the above, one must ask what, if anything, can be done to allow judicial review and constitutionalism to more effectively impact the political process in Africa. This Article argues that to be more effective and legitimate, African judicial review must be more *African*. More African judicial review would better challenge and appeal to political elites.<sup>23</sup> To have a more effective judicialization process in Africa, this Article proposes that courts of judicial review should more frequently<sup>24</sup> engage in comparative trans-Afri-

20. See Joseph Oloka-Onyango, *Constitutionalism, Community and the Prevention of Conflict in Contemporary East Africa*, in CONSTITUTIONAL DEVELOPMENT IN EAST AFRICA FOR YEAR 2001 1 (Joseph Oloka-Onyango ed., 2003).

21. See *id.*

22. KIVUTHA KIBWANA, CONSTITUTIONAL DEVELOPMENT IN KENYA IN 1999 2, available at <http://www.kituoachakatiba.org/sites/default/files/publications/Constitutionalism%20in%20East%20Africa%201999.pdf> [https://perma.cc/C5X7-STE7].

23. This proposition is premised on arguments elaborated later in this Article regarding the need to adopt a trans-African jurisprudence. See Part II and Conclusion.

24. Even the more successful courts of judicial review, such as those in Botswana, Ghana, Malawi, Namibia, and South Africa, have overly relied on non-African jurisprudence to validate their decisions. For example, the South African Constitutional Court relied on non-African jurisprudence to strike down the death penalty. *State v. Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.). While the court did reference Angola's, Mozambique's, and Namibia's jurisprudence, it relied almost exclusively on jurisprudence from international courts and the courts of Canada, England, Germany, Hungary, India, and the United States. *Id.* The court justified its reliance on foreign jurisprudence with Article 35(1) of the South African Constitution, which provides, "In interpreting the provisions of this Chapter [on human rights] a court of law shall . . . where applicable, have regard to public international law applicable to the protection of the rights entrenched in

can jurisprudential judicial review, which would require African courts of judicial review to give priority to decisions that have been rendered by African courts on similar issues.

This Article does not advocate total abandonment of the practice of borrowing from non-African jurisprudence, but for more use of and focus on trans-African jurisprudence. Successful judicial review is not necessarily guaranteed by this approach. However, the case-by-case successes of those countries that engage in trans-African jurisprudence would encourage other countries to engage in comparative judicial review and suggest a starting point from which to do so.

This Article is divided into the following parts. Part I presents the arguments for prioritizing African, as opposed to non-African, jurisprudence for judicial review. Part II provides a survey of African judicial review's general evolution, its major themes and characteristics, and its main objectives to date. The survey focuses on a number of African countries<sup>25</sup> that have conducted judicial review and the extent to which they have been successful in promoting democratic values, respect for human rights, and the rule of law. Part II also provides examples of areas where African judicial review courts could presently engage in (more) comparative trans-African judicial review. The Article finally provides recommendations and concludes.

## I. THE CASE FOR COMPARATIVE AFRICAN JURISPRUDENCE

This Article's central thesis is that homegrown, African jurisprudence lends greater legitimacy and efficacy to the judicialization process in countries that still struggle with judicialization of politics. This Part discusses why African courts will be more effective if judges rely on the jurisprudence of other African states, as opposed to foreign states outside of Africa. Section A discusses why African courts should rely on African jurisprudence. First, African leaders tend to vehemently believe in sovereignty, and the courts rely on these leaders to implement their decisions. Second, African countries are relatively similarly situated, and share a common history

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this Chapter, and may have regard to comparable foreign case law." *Id.* In one instance, the court did cite to the jurisprudence of the Tanzanian Court of Appeal, but in that case the Tanzanian court had held that the death penalty *was* constitutional. *Id.*

25. Despite Africa's differing legal and cultural traditions, many scholars agree that most of Africa has shifted toward adoption of constitutions, which in turn provide for judicial review. See Prempeh, *supra* note 2, at 1241 ("Since the early 1990s, several of sub-Saharan Africa's forty-something states have experienced a return to open and competitive politics.").

and culture. Third, reliance on non-African foreign jurisprudence allows for too much judicial discretion. Section B explores the flaws in Section A's arguments.

A. *Why Should African Courts Rely on Trans-African Jurisprudence?*

1. African Courts, African Leaders, and Sovereignty

First, African leaders believe vehemently in sovereignty and, with sovereignty comes both the right to pass domestic laws untrammelled by external influences and, by extension, the right of the citizenry to have courts that render judgments based solely on those laws.<sup>26</sup> This argument resonates with many African political elites.<sup>27</sup> From the time when African states began to gain political independence,<sup>28</sup> they have been wary of being overly subservient to any form of neocolonialism.<sup>29</sup> The Charter of the Organization of African Unity is replete with references to the need to protect hard-earned political independence.<sup>30</sup> That sentiment has not completely disappeared from statutes<sup>31</sup> or from the rhetoric and praxis of the African Union, especially the African Union's attitude

26. See U.N. Charter art. 2, ¶ 1 (providing that the United Nations is based primarily on the principle of "sovereign equality of all its Members"); see also Constitutive Act of the African Union, OAU Doc. CAB/LEG/23.15 (May 26, 2001) art. 4(a) & (g) (providing that the objectives of the African Union shall be, among other things, to "defend the sovereignty, territorial integrity and independence of its Member States" as well as "non-interference by any Member State in the internal affairs of another").

27. The Constitutive Act of the African Union provides that the regional body exists, inter alia, to "defend the sovereignty, territorial integrity and independence of its Member States." Constitutive Act of the African Union, OAU Doc. CAB/LEG/23.15 (May 26, 2001).

28. See *Member States of the AU*, AFRICAN UNION, <https://au.int/web/en/memberstates> (last visited May 16, 2017) (indicating that African countries began to gain independence in the 1950s and some of them gained independence as recently as 2011) [<https://perma.cc/DF8X-J63X>].

29. The "Pan-Africanist [movement] fought for the liberation of Africa and delivered African people from slavery, colonialism and neo-colonialism." Dir. of Women, Gender and Dev. Directorate, Opening Speech at the 5th Meeting of African Union Ministers Responsible for Gender and Women's Affairs (May 8, 2013).

30. The preamble to the Charter of the Organization of African Unity states that one of the objectives of the Organization of African Unity was to "safeguard and consolidate the hard-won independence as well as the sovereignty and territorial integrity of our states, and to fight against neo-colonialism in all its forms." Charter of the Organization of African Unity pmbL, Sept. 13, 1963, 479 U.N.T.S. 39; African (Banjul) Charter on Human and Peoples' Rights pmbL, Oct. 21, 1986, OAU Doc. CAB/LEG/67/3 ("Reaffirming the pledge they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa.").

31. While there are no explicit references to colonialism in the Constitutive Act of the African Union, its preamble recalls "the heroic struggles waged by our peoples and our countries for political independence, human dignity and economic emancipation." Constitutive Act, *supra* note 27, pmbL.

toward international judicial institutions and their decisions as they relate to Africa. For example, the African Union has been reluctant to view the International Criminal Court's (ICC) decisions as legitimate.<sup>32</sup> At the same time, however, there are signs that African judicial institutions serving roles similar to the ICC's have had better reception on the continent.<sup>33</sup>

This argument should not give a false impression of African parochialism and antiglobalization.<sup>34</sup> Rather, it recognizes that certain inherently legitimate and internationally-recognized local values attach to national sovereignty.<sup>35</sup> The United Nations—which is premised primarily on the recognition of national sovereignty<sup>36</sup>—and various regional human rights-focused judicial institutions (such as the European Court of Human Rights) acknowledge that in certain respects deference to local circumstances and values is both legitimate and preferred.<sup>37</sup> The global order also recognizes the legitimacy of regional arrangements, also an expression of local values.<sup>38</sup>

Similarly, critics argue that comparative judicial review, in general, upends the democratic process. Also called the autonomy argument, critics surmise that the people of each nation should be treated as capable of deciding their destinies, untrammelled by external influences or paternalism.<sup>39</sup> For judicial review to be effective, it should, to the extent possible, be consistent with local sentiment as reflected in a state's constitution, and courts should

32. After the Special African Chamber convicted former President of Chad Hissen Habre of war crimes and crimes against humanity for ordering the killing and torture of thousands of political opponents during his eight-year rule, commentary included statements such as: "The trial was seen as highlighting African countries ability to hold their own trials at a time of growing criticism of the International Criminal Court (ICC) in The Hague, which many on the continent accuse of bias against Africans." See Diadie Ba, *Chad's Ex-leader Habre, Cold War-era Ally of West, Gets Life in Prison for Atrocities*, REUTERS (May 30, 2016), <http://www.reuters.com/article/us-senegal-justice-habre-idUSKCN0YL1DH> [https://perma.cc/5SUH-5TB2].

33. *Id.*

34. See generally Burns H. Weston, Robin Ann Lukes & Kelly M. Hnatt, *Regional Human Rights Regimes: A Comparison and Appraisal*, 20 VAND. J. TRANSNAT'L L. 585 (1987) (arguing analogically that while universalism is good, it needs to be complemented by regionalism).

35. See generally *id.*

36. See U.N. Charter, *supra* note 26.

37. See e.g., *Handyside v. United Kingdom*, App. No. 5493/72, 24 Eur. Ct. H.R. \*1, \*17 (1976) (noting that there is no "uniform European conception of morals," and thus that individual states are best suited to opine on national morals); *S.H. v. Austria*, App. No. 57813/00, Eur. Ct. H.R. \*1, \*34, ¶ 11 (2011) ("Together with the European consensus, the margin of appreciation is thus the other pillar of the Grand Chamber's reasoning.").

38. See *Austria*, Eur. Ct. H.R. at \*33, ¶ 8.

39. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2626–31 (2015) (Scalia, J., dissenting).



have no right to subvert the values of the people as expressed by their representatives in their constitution.<sup>40</sup> This line of argument once led Justice Antonin Scalia of the U.S. Supreme Court to comment that the Supreme Court's legalization of same-sex marriage was a "threat to American democracy."<sup>41</sup> His argument relied on the idea that the people of each country know what is best for them and that they have the right to change course as necessary.<sup>42</sup> By the same token, the people can have their changed views reflected in the legislation adopted by their representatives—and that change is not the province of the courts, unless the legislation exceeds what the Constitution permits.<sup>43</sup> In other words, the democratic will of the people—as expressed in the constitution and laws of a particular state—should always be respected.<sup>44</sup> Borrowing from jurisprudence of other countries would thus subvert the will of the people because the decisions of other countries' courts are informed by foreign values.<sup>45</sup>

African rulers may therefore be wary of jurisprudence from countries critical of Africa; and to be most effective, the courts must work with those rulers. However, many ruling elites and their inner circles will not yield to forces—including the judiciary—that contribute or are perceived to contribute to a diminution of their power.<sup>46</sup> Judicial review is less successful where the executive is not willing to cooperate with the courts to implement judicial deci-

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40. *See id.*

41. *Id.* at 2626.

42. *Id.* at 2626–31.

43. *Id.* at 2627.

44. *Id.*

45. *See id.*

46. The long reigns of many African rulers exemplify the rulers' unyielding natures. Examples of such regimes include those of President Jose Eduardo Dos Santos of Angola, who has been in power since 1979; President Obiang Mbasogo of Equatorial Guinea, who has been in power since 1979; President Paul Biya of Cameroon, who has been in power since 1982; President Yoweri Museveni of Uganda, who has been in power since 1986; President Robert Mugabe of Zimbabwe, who has been in power since 1987; President Omar Al-Bashir of Sudan, who has been in power since 1989; President Idriss Deby of Chad, who has been in power since 1990; President Isaias Afwerki of Eritrea, who has been in power since 1993; President Paul Kagame of Rwanda, who has been in power since 1994; and President Yahya Jammeh of Gambia, who was in power since 1994 but who—despite first conceding to an election defeat, nevertheless refused to quit until the armed forces of the Economic Community of West African States threatened to force him out—only quit on January 21, 2017. *See Top 20 Most Brutal and Ruthless Dictators in Africa*, AFRICAN VAULT, <http://www.africanvault.com/dictators-in-africa/> (last visited May 10, 2017) [<https://perma.cc/EK3Q-GB5G>]; *Profile: Former Gambian President Yahya Jammeh*, BBC (Jan. 22, 2017), <http://www.bbc.com/news/world-africa-24383225> [<https://perma.cc/N3C8-KN4J>].

sions, as is the case in many African countries.<sup>47</sup> As long as courts of judicial review depend on these rulers and their regimes to implement judicial decisions, dependence on non-African jurisprudence remains impractical and potentially frustrating because ruling elites will ignore judicial decisions that are influenced by jurisprudence from countries that those elites perceive as too critical of Africa.<sup>48</sup> Courts' influence thus depends both on their willingness to embrace African jurisprudence and on the cooperation of political actors, leaders, and the other branches of government.<sup>49</sup>

## 2. African Countries Are Relatively Similarly Situated

If courts must appease rulers to be effective, African courts should consider that African leaders find lessons from similarly situated African countries more appealing and persuasive than precedent from non-African states. Courts should thus look to similarly situated African countries for their jurisprudence.

African ruling elites push back against non-African solutions, especially those that derive from more economically developed countries with more advanced systems of democracy and rule of law.<sup>50</sup> Most African countries still struggle economically, and face different challenges regarding the rule of law, democracy, and protection of human rights than their more economically developed and stable (non-African) counterparts.<sup>51</sup>

47. See generally Part II (discussing African regimes unwilling to enforce decisions of courts of judicial review). Steytler, *supra* note 8, at 491 (explaining that for judicial review to be effective, the other branches of government must accept the courts' power).

48. For example, President Robert Mugabe of Zimbabwe remarked, "[Africa has] turned East, where the sun rises, and given our backs to the West, where the sun sets." Andrew Malone, *How China's Taking Over Africa, and Why the West Should be VERY Worried*, THE DAILY MAIL (July 18, 2008), <http://www.dailymail.co.uk/news/worldnews/article-1036105/How-Chinas-taking-Africa-West-VERY-worried.html#> [<https://perma.cc/WR32-K8YV>].

49. Steytler, *supra* note 8, at 491 ("[T]he degree of influence courts may have on policy is dependent on the reaction of those actors in the political process entrusted with the execution of court decisions.").

50. For example, Article 3(d) of the Constitutive Act of the African Union provides that one of the objectives of the African Union is to "[p]romote and defend African common positions on issues of interest to the continent and its peoples." See also H.E. DR. NKOSAZANA DLAMINI ZUMA, WELCOME REMARKS OF THE AFRICAN UNION COMMISSION CHAIRPERSON, H.E. DR. NKOSAZANA DLAMINI ZUMA TO THE EXTRAORDINARY SESSION OF THE ASSEMBLY OF HEADS OF STATE AND GOVERNMENT 4 (stating that the African Union is determined to "seek African solutions to African problems").

51. See Uche Ewelukwa Ofodile, *Trade, Empires, and Subjects – China-Africa Trade: A New Fair Trade Arrangement, or the Third Scramble for Africa?*, 41 VAND. J. TRANSNAT'L L. 505, 537–38 (2008) (noting that many African leaders have found China's self-identification as

Moreover, several African ruling elites also argue that because African societies are still developing economically, they are not in a position to embrace the type of democracy, respect for human rights, or the rule of law that obtains in more developed states.<sup>52</sup> Professor Oloka-Onyango explains, “[T]he struggle over constitutionalism in the [African] region is as much a struggle over ideas, as it is a struggle over resources.”<sup>53</sup> Ruling elites are, however, willing to look at the examples of other similarly situated African countries in the advancement of those values.<sup>54</sup>

Additionally, African countries are more likely to have shared history and culture, as compared with non-African countries. Engagement with foreign jurisprudence ignores the fact that “constitutions emerge out of each nation’s distinctive history,”<sup>55</sup> and that constitutional adjudication thus must be circumscribed by historical contingency to be legitimate.<sup>56</sup> Critics argue that engagement with foreign jurisprudence carries with it the added risk of neglecting to focus on or downplaying the significance of “institu-

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a developing country along with its policy of noninterference in domestic affairs particularly attractive).

52. See *id.*; see also *The Fifth Ministerial Conference of the Forum on China-Africa Cooperation Beijing Action Plan (2013–2015)*, FORUM ON CHINA-AFRICA COOPERATION (July 23, 2012), <http://www.focac.org/eng/dwjbzjjhys/hywj/t954620.htm> (providing that African leaders “reaffirmed respect for the principle of universality of human rights and support for all countries in choosing the path of human rights development in the light of their own national conditions with the priority on the right to development, and oppose politicizing human rights issues and setting double standards”) [<https://perma.cc/H2TV-D5EK>].

53. Oloka-Onyango, *supra* note 20, at 2.

54. See Ofodile, *supra* note 51. For an extreme position on the effects of African leaders’ reliance on the examples of their neighbors, see Malone, *supra* note 48. That said, this line of argument is not necessarily protectionist, nor does it ignore or reject the more global and universalist appeal of constitutional adjudication—it is simply an appeal for a shift in emphasis, recognizing that borrowing more local or regional transnational constitutional jurisprudence might lend more legitimacy to the process. For example, while universal institutions for enforcement of human rights—such as the United Nations Human Rights Council and Human Rights Committee—exist, regional institutions have been more successful. See, e.g., Robert D. Sloane, *Outrelativizing Relativism: A Liberal Defence of the Universality of International Human Rights*, 34 VAND. J. TRANSNAT’L. L. 527, 530 (2001) (discussing the adoption of the Vienna Declaration at the Second World Conference of Human Rights); Weston, *supra* note 34, at 589–90 (1987) (recognizing that human rights instruments and mechanisms are most often developed on the regional level, where countries share common interests, and that regional alliances provide more opportunity to pressure states to sanction violations, and are thus more effective than their global counterparts).

55. Shylashri Shankar, *The Substance of the Constitution: Engaging with Foreign Judgments in India, Sri Lanka, and South Africa*, 2 DREXEL L. REV. 373, 378 (2010).

56. See *id.* at 378–79.

tional details unique to the systems being compared.”<sup>57</sup> The cultural argument is closely related to the historical argument. The Ghanaian Supreme Court summarized the cultural argument in its *Republic v. Tommy Thompson Books, Limited* decision when it reasoned that relying solely on foreign jurisprudence would be inappropriate and contrary to the administration of justice because it would ignore Ghanaian culture.<sup>58</sup>

Thus, although the economical, legal, historical, and cultural circumstances will vary between African countries somewhat, they share many more similarities than with non-African nations, and African courts will therefore best be able to learn from their neighbors’ jurisprudence that similarly engages with these shared circumstances.

### 3. Reliance on Foreign Jurisprudence Allows Rampant Judicial Discretion

Finally, African courts should avoid the temptation of utilizing non-African foreign jurisprudence because it “exacerbates the problem of judicial discretion.”<sup>59</sup> As U.S. Judge Richard Posner argues, “If foreign decisions are freely citable, any judge wanting a supporting citation has only to troll deeply enough in the world’s *corpora juris* to find it.”<sup>60</sup> This Article further explores in Part II the implications of such unrestrained judicial discretion.

#### B. *Flaws in the Africa-Only Approach*

Some of the arguments as to why Africa should rely only on African jurisprudence are admittedly flawed. First, even the staunchest critics admit that there are exceptions to the autonomy argument. Justice Scalia, for example, argued that even if the use of foreign jurisprudence generally runs afoul of democracy, it is not without some redeeming features, and stated that, at the very least, the U.S. Supreme Court should respectfully consider foreign jurisprudence in relation to treaty interpretation as incorporated in national leg-

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57. Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1239 (1999); see, e.g., Andrea Lollini, *Legal Argumentation Based on Foreign Law: An Example from the Case Law of the South African Constitutional Court*, 3 UTRECHT L. REV. 60, 68–71 (2007) (discussing a South African court using Canadian jurisprudence in making a decision about medical marijuana).

58. H. Kwasi Prempeh, *Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa*, 80 TUL. L. REV. 1239, 1240–41 (2006); *Republic v. Tommy Thompson Books, Ltd.*, [1996–97] S. Ct. G.L.R. 804, 849 (Ghana) (Kpegah, J.S.C.).

59. Shankar, *supra* note 55, at 378.

60. Richard A. Posner, *A Political Court*, 119 HARV. L. REV. 31, 86 (2005).

isolation.<sup>61</sup> If international treaties are an inevitable consequence of globalization of ideas, this process should also extend to the “global judicialization of politics.”<sup>62</sup> Accordingly, encouraging comparative trans-African judicial review provides a middle ground that should be more palatable for democracy advocates to the extent that doing so incorporates jurisprudence that is closer to the conditions existing in each African country.<sup>63</sup>

Second, driven to the extreme, the democracy and historical arguments ultimately represent denials of the possibility of objective assessment and rejections of the existence of global or universal standards.<sup>64</sup> If these rejections hold, then globalization and universality of ideas would be impossible.<sup>65</sup>

In regards to cultural and historical contingencies, the existence of universal standards is distinct from the means that nations use to express or achieve those standards.<sup>66</sup> Most judges would be able to distinguish ends or norms from means or the mechanisms expressive of those norms.<sup>67</sup> For example, for practical reasons, it may be

61. See *Olympic Airways v. Husain*, 540 U.S. 644, 660–61 (2003) (Scalia, J., dissenting).

62. Shankar, *supra* note 55, at 377.

63. See generally Burns H. Weston et al., *Regional Human Rights Regimes: A Comparison and Appraisal*, 20 VAND. J. TRANSNAT'L L. 585 (1987); Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 40 (2003) (“The principal advantage of subsidiarity as a structural principle of international human rights law is that it integrates international, domestic, and subnational levels of social order on the basis of a substantive vision of human dignity and freedom, while encouraging and protecting pluralism among them.”).

64. The argument is that universal values that provide a basis for the articulation of human rights do not exist because the concept of human rights is “historically a Western concept,” and so the question that follows is whether, human rights, “given their Western biases, can be said to apply to peoples from non-Western cultures.” Josiah A. M. Cobbah, *African Values and the Human Rights Debate: An African Perspective*, 9 HUM. RTS. Q. 309, 309 (1987).

65. Robert McCorquodale & Richard Fairbrother, *Globalization and Human Rights*, 21 HUM. RTS. Q. 735, 740 (1999) (“International human rights are globalized. They operate beyond all borders and all state mechanisms. They have become part of the discourse in almost all societies, speaking to both the elites and the oppressed, to institutions and to communities. Human rights are both a part of globalization and separate from globalization.”).

66. On the one hand, there is a recognition that human beings are inescapably “cultural beings.” Cobbah, *supra* note 64, at 317. On the other, there is the recognition that cultural expressions of human dignity are no more than an embodiment of values that transcend contingent cultural contexts. *Id.* at 329 (“To begin the hermenetic understanding of human dignity and achieve truly international human rights norms it is imperative that scholars begin in earnest to examine comparatively, specific cultural behavior patterns, specific values, and specific structural features within different cultural systems.”).

67. Some regional human rights courts, for example, are called upon to recognize that “while the international legal framework for the protection of human rights is based on a universal approach, some account is now taken of the diversity of cultures.” McCorquodale & Fairbrother, *supra* note 65, at 741–42 (internal quotation marks omitted).

necessary for a polity to be organized along the lines of federalism<sup>68</sup>—a means that can be historically contingent and based on democratic choice. But human rights themselves, whether autonomy, life, or democracy, are universal legal concepts.<sup>69</sup> From a normative standpoint, courts across national jurisdictions should be able to speak to one another in a language that they understand because of such a universality of norms, regardless of their governmental structure.<sup>70</sup>

The foregoing argument based on universalism is not necessarily opposed to the proposal for African-based foreign jurisprudential engagement because, in addition to the idea that there is a need to respect universal values, the idea of universality must also be complemented by the idea of subsidiarity.<sup>71</sup> Namely, what can be done locally should be done locally. This extends and lends legitimacy to the proposal that African courts that borrow foreign jurisprudence should prefer African-based jurisprudence because doing so is the best way to promote subsidiarity.

From a practical standpoint, reliance on foreign jurisprudence is itself a norm, as nearly every legal system has borrowed from another at some point. For example, many European countries adopted the Napoleonic Code, and the British common law has had great influence on the U.S. legal system.<sup>72</sup> Additionally, Egypt, Japan, and Turkey all replaced their legal systems with European systems in the nineteenth and twentieth centuries.<sup>73</sup>

## II. AFRICAN COMPARATIVE JUDICIAL REVIEW: A CRITICAL ANALYSIS

To illustrate how the arguments in Part I have been applied in the African context, and how those arguments have affected judicialization projects, this Part critically examines the jurisprudence of five representative common law African countries. Beginning with South Africa, which has an extensive judicialization project, this Part discusses examples of African courts that have

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68. Peter H. Schuck, *Federalism*, 38 CASE W. RES. J. INT'L L. 5, 8 (2006-2007) (noting that federalism recognizes an “underlying sociological pluralism or diversity of the civil society in which the political design decisions are being made. One tends to find in federal systems civil societies that are highly pluralistic to begin with, so it should be no surprise that those societies that are economically, sociologically, religiously and culturally diverse would seek to recognize those pre-existing pluralisms and embed them in a political structure designed to preserve them.”).

69. See generally McCorquodale & Fairbrother, *supra* note 65.

70. See generally *id.*

71. See generally Carozza, *supra* note 63.

72. See Shankar, *supra* note 55, at 381.

73. See Robert E. Rodes, Jr., *Of Historical Jurisprudence*, 49 AM. J. JURIS. 165, 168 (2004).

conducted judicial review, and analyzes the extent to which they have been successful in promoting democratic values, respect for human rights, and the rule of law, while also promoting a more African comparative judicial review approach. Some courts, such as those in South Africa, have been moderately successful, while others, such as those in Kenya, Uganda, Tanzania, and Nigeria, have been only slightly successful. Finally, this Part notes the ways in which each country's courts could learn from one another in regard to their judicialization projects.

### A. *South Africa*

South Africa has the largest judicialization project, in part because its constitution provides for the use of foreign law. For example, Article 39(1)(c) of the constitution permits, but does not require, consideration of foreign law in interpreting the bill of rights.<sup>74</sup> This provision thus “confers discretion onto the courts to refer to and utilize these [foreign] legal principles.”<sup>75</sup> South African courts have consistently engaged in comparative judicial review, which indicates that judges understand that comparative review can provide helpful guidance for both legal interpretation and reasoning.<sup>76</sup>

#### 1. South Africa's Reliance on Other African Jurisprudence

To what extent does the South African Constitutional Court cite to jurisprudence from other African courts relative to that of courts outside Africa? South African courts appear to understand that engaging in comparative trans-African judicial review lends legitimacy to the judicialization of politics. For example, in ruling the death penalty unconstitutional, the South African Constitutional Court relied mostly on jurisprudence from outside of Africa, but nonetheless observed:

Section 35 of the Constitution requires us to “promote the values which underlie an open and democratic society based on freedom and equality.” We are thus entitled and obliged to consider the practices of such societies. That exercise shows us that most of the countries which we would naturally include in that category have abolished capital punishment as a penalty for murder, either by legislation or by disuse. These countries

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74. See S. AFR. CONST., 1996 § 39(1)(c) (“When interpreting the Bill of Rights, a court, tribunal or forum . . . may consider foreign law.”); Carozza, *supra* note 63.

75. Sarkin, *supra* note 12, at 184.

76. See *id.* at 196.

include the neighbouring States of Namibia, Angola and Mozambique.<sup>77</sup>

The court went on to note that Section 35(1) of the South African Constitution:

[R]equires this court not only to have regard to public international law and foreign case law, but also to all the dimensions of the evolution of South African law which may help us in our task of promoting freedom and equality. This would require reference not only to what in legal discourse is referred to as “our common law” but also to traditional African jurisprudence.<sup>78</sup>

Even in cases such as the above, it is important to note, as Justice Sachs of the South African Constitutional Court has, that South Africa’s “law reports and legal textbooks contain few references to African sources as part of the general law of the country.”<sup>79</sup> In referring to South African traditional values, Justice Sachs’ argument supports the use of comparative African jurisprudence more broadly, as there are a broad range of areas in which South African traditional law and other African countries’ traditional laws intersect.<sup>80</sup> Indeed, when comparing African attitudes toward the death penalty, Justice Sachs acknowledged that other African states had taken approaches similar to South Africa’s.<sup>81</sup> Further, Justice Sachs noted, “of six countries sharing a frontier with South Africa, only one has carried out executions in recent years (Zimbabwe).”<sup>82</sup>

Despite these similarities, however, the South African Constitutional Court has referenced more non-African jurisprudence than African jurisprudence in its judicial review. This approach appears in several landmark South African cases.<sup>83</sup> Although the South

77. *State v. Makwanyane* 1995 (3) SA 391 (CC) at \*126–27 ¶ 198 (S. Afr.).

78. *Id.* at \*192 ¶ 373. Perhaps “traditional African jurisprudence” is really a reference to South African traditional or customary law. If so, however, it is not much of a stretch to say that by the same token, the court understands the power of reference to other African jurisprudence. *See id.*

79. *Id.* at \*192 ¶ 371.

80. *See id.*

81. *See id.* at \*195 ¶ 378.

82. *Id.* at \*198 ¶ 386.

83. *See e.g.*, *Mohamed v. President of the Republic of S. Afr.* 2001 (3) SA 893 (CC) (citing to *Mackeson v. Minister of Info., Immigration & Tourism* 1980 (1) SA 747 (ZR) at 753–57; *United States v. Burns*, [2001] S.C.R. 283 (Can.); *Kindler v. Canada* (Minister of Justice) [1991] S.C.R. 779 (Can.); *Halm v. Canada* (Minister of Employment and Immigration), [1995] F.C. 331 (Can.)). Beyond these cases, the court did not refer to any African jurisprudence. In several other cases, the court referred solely to non-African jurisprudence. *See, e.g.*, *Kaunda v. President of the Republic of S. Afr.* 2005 (4) SA 235 (CC) (citing, inter alia, *Barcelona Traction Light & Power Co., Ltd. (Belg. v. Spain)*, 1970 ICJ Rep. 3; *The Case of the S.S. Lotus (Fr. v. Turk.)* (1927) PCIJ Series A, No. 10; *R. v. Cook* [1998] S.C.R. 597 (Can.); *Reid v. Covert*, 354 U.S. 1 (1957)).



African Constitutional Court has recognized “different contexts within which other [non-African] constitutions were drafted, the different social structures and milieu existing in those countries as compared with those in [South Africa], and the different historical backgrounds against which the various constitutions came into being,”<sup>84</sup> the court has ultimately disregarded those differences and continued to rely upon non-African decisions.<sup>85</sup>

## 2. The Rise of the South African Constitutional Court

While the South African Constitutional Court may not reference much jurisprudence from other African countries, its jurisprudence has influenced other African courts’ judicial review.<sup>86</sup> Why is that? As compared to other African nations, South Africa exemplifies a politically stable country, with moderate economic and social development.<sup>87</sup> South Africa has been the vanguard of delicate political transitions with the potential for courts to play a critical role in the judicialization of politics—a position that other African countries want to emulate as they navigate their own transitions.<sup>88</sup>

During the South African Constitution’s drafting, a few provisions were deliberately left ambiguous.<sup>89</sup> These ambiguities rendered the court powerful, as the justices were required to use political judgment in ruling on issues related to the ambiguities.<sup>90</sup> For instance, the constitution does not explicitly prohibit the death

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84. Christa Rautenbach, *Muslim Personal Law and the Meaning of Law in the South African and Indian Constitutions*, 2 POTCHEFSTROOM ELEC. L.J. 1, 2 (1999); *Park-Ross v. Director, Office of Serious Economic Offenses*, 1995 (2) SA 148, 160 (CC).

85. In many cases that reference both African and non-African jurisprudence, the South African court references more non-African jurisprudence than African jurisprudence. See *supra* note 83. Beyond these cases, the court did not refer to any African jurisprudence.

86. See, e.g., Parts II.B (jurisprudence of the courts of Kenya) and II.C (jurisprudence of the courts of Uganda).

87. See UNITED NATIONS DEV. PROGRAMME, AFRICA HUMAN DEVELOPMENT REPORT 18 (2016).

88. See, e.g., *Olum v. Att’y Gen.* [1999] UGCC 7 (CC) (Uganda) (noting that the preamble to Uganda’s Constitution recalls “[Uganda’s] history which has been characterised by political and constitutional instability” and making reference to *De Clerk v. Du Plassis* [1990] 6 BLR 124 at 128, in which the South African Constitutional Court stated, “When interpreting the Constitution and more particularly the bill of rights it has to be done against the backdrop of our chequered and repressive history in [the] human rights field.”).

89. HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA’S POLITICAL RECONSTRUCTION 141 (2000).

90. *Id.* at 139, 141.

penalty and is ambiguous about several land-related issues.<sup>91</sup> Perceived as a neutral actor, the South African Constitutional Court has greatly impacted constitutional and political developments in South Africa through its resolution of what would otherwise have been contentious issues.<sup>92</sup> The South African Constitution thus creates an independent judiciary, urging the judges to bring all aspects of South African law in line with constitutional values and giving the judiciary the power to do so.<sup>93</sup>

In light of South Africa's complexities, inevitably the court would seek to both establish a relationship with the South African political settlement stakeholders and protect the confidence entrusted to it by the negotiators as a third party forum for resolving the particularly contentious issues in the settlement.<sup>94</sup> The court's ability to fulfill this role earned it respect and legitimacy not only in South Africa, but also across the rest of Africa.<sup>95</sup> Although the South African Constitutional Court made some mistakes, the court's overall record shows that it has a clear sense of judicial responsibility and subscribes to a remarkably balanced approach in support of the South African political transition.<sup>96</sup> The court has become a model on the African judicial review landscape.<sup>97</sup>

In a number of cases, the South African Constitutional Court acted as a quasi-political organ to resolve vexing policy questions and to fill in gaps that were most assuredly deliberately left in the

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91. See *State v. Makwanyane* 1995 (3) SA 391 (CC) \*13 ¶ 20, \*17 ¶ 25 (S. Afr.) ("Capital punishment was the subject of debate before and during the constitution-making process, and it is clear that the failure to deal specifically in the Constitution with this issue was not accidental. . . . In the constitutional negotiations which followed, the issue was not resolved. . . . The death sentence was, in terms, neither sanctioned nor excluded, and it was left to the Constitutional Court to decide whether the provisions of the pre-constitutional law making the death penalty a competent sentence for murder and other crimes are consistent with . . . the Constitution.").

92. Those issues include the death penalty in post-apartheid South Africa. See *id.*

93. See S. AFR. CONST., 1996, §§ 39, 165–72.

94. See generally KLUG, *supra* note 89.

95. The certification cases were particularly important in establishing the legitimacy and clout of the South African Constitutional Court. See Kate O'Regan, *Human Rights and Democracy—A New Global Debate: Reflections on the First Ten Years of South Africa's Constitutional Court*, 32 INT'L J. LEGAL INFO. 200, 205 (2004). The process of certification granted the court the power to decide whether the new constitutional text adopted by the Constitutional Assembly complied with constitutional principles contained in the interim (1993) constitution. See *id.* The mechanism of certification by an independent third party institution saved the early 1990s political negotiations from premature death. See *id.*

96. See Hugh Corder, *From Separation to Unity: Accommodating Difference in South Africa's Constitutions During the Twentieth Century*, 10 TRANSNAT'L L. & CONTEMP. PROBS. 539, 556 (2000).

97. Other courts are following the example of the South African Constitutional Court by referencing its jurisprudence to a significant degree. See Sections II.B–E.

constitution. Because the South African Constitution was conceived against the backdrop of South Africa's history of apartheid,<sup>98</sup> the constitution is concerned largely with equality—an objective that guides the court in its decisions.<sup>99</sup> According to one scholar, constitutional thinking in post-apartheid South Africa coalesced around the “associated notions of limited government under law, protection for fundamental rights, and the exercise of constitutional review by an independent and impartial judiciary.”<sup>100</sup>

Initially, “opponents of the [apartheid] regime viewed . . . judicial review with a deep mistrust that was born of an . . . executive-minded judicial record in the face of the manifest injustice of apartheid statutes.”<sup>101</sup> The 1993 interim or “transitional” South African Constitution, a long and complex document, tried to assuage those apprehensions, endeavoring to “resolve or reconcile often vehemently conflicting points of view.”<sup>102</sup> It incorporated “constitutional principles” with which the constitution had to be consistent—a written guarantee that no matter who held power, “certain structures, procedures, and interests would be sacrosanct.”<sup>103</sup> In cases including *Premier, Mpumalanga v. Executive Committee, Association of State-Aided Schools, Eastern Transvaal*, the South African Constitutional Court acknowledged that the necessities of the transition would shape constitutional interpretation.<sup>104</sup> As Justice O'Regan stated, “[t]his case highlights the interaction between two constitutional imperatives, both indispensable in this period of transition. The first is the need to eradicate patterns of racial dis-

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98. See *State v. Makwanyane* 1995 (3) SA 391 (CC) at \*21 ¶ 31 (S. Afr.) (“The disparity is not, however, the result of the legislative policy of the new Parliament, but a consequence of the Constitution which brings together again in one country the parts that had been separated under apartheid.”).

99. See Arthur Chaskalson, *From Wickedness to Equality: The Moral Transformation of South African Law*, 1 INT'L J. CONST. L. 590, 600 (2003); Corder, *supra* note 96, at 607 (“The Constitutional Court has been sensitive to the need to treat everyone as equal members of society. This is reflected in its judgments striking down capital punishment, corporal punishment, the criminalizing of sodomy, regulations of the education department that discriminate against foreign employees, immigration regulations that discriminate against unmarried heterosexual and homosexual couples, and an employment policy discriminating against a job applicant because he was HIV positive.”).

100. Corder, *supra* note 96, at 547.

101. *Id.*

102. *Id.* at 550.

103. *Id.* at 551.

104. See *Premier, Mpumalanga v. Exec. Comm., Ass'n of State-Aided Sch., E. Transvaal (Western Cape Case)* 1999 (2) SA 91 (CC) at 95 ¶ 1.

crimination and to address the consequences of past discrimination which persist in our society.”<sup>105</sup>

In South Africa, it was clear to all contesting parties that a continued flexing of muscles would be fruitless. President Mandela, for example, set the tone through his frequently expressed respect for the court’s work. Cases that provide the backdrop in this respect are those in which courts found legislative or executive conduct to be unconstitutional.<sup>106</sup> “President Mandela was conspicuously correct in his dealings with the judiciary, even when its exercise of constitutional review power found his government’s actions wanting.”<sup>107</sup> In contrast, President Mbeki and several officials of the ruling African National Congress (ANC) were less forthcoming in this respect, making critical comments on occasion.<sup>108</sup> Regardless, the judicialization of politics in South Africa had made its imprint on the rest of Africa, evident in the extent to which courts of judicial review in other countries engaged South African jurisprudence.<sup>109</sup>

Thus, several African countries, faced with the need to examine the constitutionality of legislation in their own countries, would find ready-made jurisprudence on a variety of topics—from the death penalty and corporal punishment to same-sex marriage—to apply to their own decisions. The following few pages discuss this impact.

### 3. The Court’s Jurisprudence

Once empowered, South Africa’s Constitutional Court ruled on a variety of topics, thus impacting issues from land rulings to gender rights. This Subsection discusses some of the court’s most impactful jurisprudence.

#### a. Land Rulings

The South African Constitutional Court’s imprimatur was sought on issues pertaining to land, which were of particular interest to a majority of South Africans and a test for President Mandela’s rul-

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105. *Id.*

106. *See, e.g.*, Exec. Council of the W. Cape Legislature v. President of the Republic of S. Afr. 1995 (10) BCLR 1289 (CC) at 1332 ¶ 101.

107. Corder, *supra* note 96, at 556.

108. Hugh Corder, *Judicial Authority in a Changing South Africa*, 24 LEGAL STUD. 253, 266 (2004).

109. For an illustration, see Sections II.B–E (discussing other countries’ jurisprudence).

ing ANC.<sup>110</sup> Land issues, specifically land restitution and land reform, were essential parts of South Africa's transition.<sup>111</sup> The South African Constitution guarantees restitution for land taken after 1913 and the right to legally secure tenure for those whose tenure is insecure as a result of racially discriminatory laws and practices. It also includes a state obligation to enable citizens to gain access to land on an equitable basis.<sup>112</sup> Furthermore, the state is granted a limited exemption from the protective provisions of the property clause so as to empower it to take "legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination."<sup>113</sup>

Despite agreement in the Constituent Assembly, the substantive property clause came before the court as "violating the Constitutional Principles, this giving grounds for denying certification of the Constitution."<sup>114</sup> Two major objections were raised. First, unlike the 1993 South African Interim Constitution, the new clause in the "final" 1996 South African Constitution did "not expressly protect the right to acquire, hold, and dispose of property."<sup>115</sup> Second, "the provisions governing expropriation and the payment of compensation [were deemed] inadequate."<sup>116</sup> The court rejected both arguments.<sup>117</sup> The court's reasoning pivoted on whether the right met the standard of a "universally accepted fundamental right" as required by Constitutional Principle II.<sup>118</sup> The court observed that "[s]ome [countries'] constitutions formulate the right to property simply in a negative way, restraining state interference with property rights," while "[o]ther constitutions express the right in a positive way, entrenching the right to acquire and dispose of property."<sup>119</sup> Accordingly, in light of the provisions of foreign law, the court concluded that "[t]his survey suggests that no universally recognised formulation of the right to property

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110. For a discussion of the African National Congress's struggles in obtaining majority access to land in South Africa, see generally D.L. Carey Miller & Anne Pope, *South African Land Reform*, 44 J. AFR. L. 167 (2000).

111. See KLUG, *supra* note 89, at 131.

112. See S. AFR. CONST., 1996 § 25.

113. *Id.* § 25(8).

114. KLUG, *supra* note 89, at 135.

115. *Ex parte* Chairperson of the Constitutional Assembly: *In re* Certification of the Constitution of the Republic of S. Afr. 1996 (4) SA 744 (CC) at 798 ¶ 70.

116. *Id.*

117. *Id.* at 798 ¶ 72, 799 ¶ 73.

118. *Id.* at 798 ¶¶ 71, 73.

119. *Id.* at 798 ¶ 72.

exists.”<sup>120</sup> In conclusion, the court held that it could not “uphold the argument that, because the formulation adopted is expressed in a negative and not a positive form and because it does not contain an express recognition of the right to acquire and dispose of property, it fails to meet the prescription of [Constitutional Principle] II.”<sup>121</sup>

The court was thus able to use foreign jurisprudence to impact the rapidly changing political landscape of South Africa. With these land cases, judicialization of politics in South Africa had begun and would continue to impact not only South African political discourse, but also judicialization processes elsewhere in Africa.<sup>122</sup>

#### b. The Local Government Transition Act Ruling

On a more overtly political issue, in the *Western Cape Case*,<sup>123</sup> “the court declared Section 16A of the *Local Government Transition Act* 209 of 1993 (LGTA) an unconstitutional delegation of legislative power to the executive.”<sup>124</sup> The LGTA was negotiated as a mechanism to recreate local government before the holding of democratic local government elections.<sup>125</sup> A conflict arose, however, when President Mandela, acting in accordance with amending powers granted to the executive in Section 16A of the LGTA, amended the Act in two ways. His first amendment “transferr[ed] the power to appoint members of local demarcation committees away from provincial government”; the second “limit[ed] the wide powers of local administrators of the Act to make rules relating to the demarcation of local government structures and the division of such structures into wards.”<sup>126</sup>

The South African Constitutional Court was faced with resolving a crisis that “threaten[ed] to prevent the holding of nation-wide

120. *Id.* The court’s survey included: Article 16 of the Belgian Constitution; Article 8(1)(b)(i) of the Botswana Constitution; the Canadian Charter of Rights and Freedoms; Section 73(1) of the Danish Constitution; Article 32 of the Estonian Constitution; Article 14(3) of the German Basic Law; Article 105 of the Hong Kong Basic Law; Article 29 of the Japanese Constitution; Article 16(1) of the Namibian Constitution; Article 14(1) of the Netherlands Constitution; the New Zealand Bill of Rights Act, 1990; Article 62(2) of the Portuguese Constitution; Article 33 of the Spanish Constitution; the Fifth and Fourteenth Amendments of the U.S. Constitution; and Article 16 of the Zimbabwean Constitution.

121. *Id.*

122. For a discussion of this impact, see *infra* Sections II.B–E.

123. *Western Cape Case*, 1995 (10) BCLR at 1318–19 ¶ 64, 1332 ¶ 101, 1340 ¶ 126.

124. KLUG, *supra* note 89, at 148.

125. See Local Government Transition Act 209 of 1993 pmb. (S. Afr.).

126. KLUG, *supra* note 89, at 149.

local government elections and to halt the very process of democratic transition away from apartheid.”<sup>127</sup> Deflecting several other issues, the court focused on the constitutionality of the legislature’s delegation of amending powers to the executive and struck down Mandela’s proclamations and Parliament’s amendment of the LGTA.<sup>128</sup> Opponents of the government hailed the court as “defenders of the Constitution for standing up to the ANC-dominated executive and legislature, and for fulfilling the promise of judicial review.”<sup>129</sup> President Mandela publicly praised the court’s decision, stating, “this judgment is not the first, nor will it be the last, in which the Constitutional Court assists both the government and society to ensure constitutionality and effective governance.”<sup>130</sup>

The court struck down intensely politicized legislation passed by a democratically elected parliament and a highly popular president.<sup>131</sup> In doing so, the court premised its decisions on the idea that the constitution is “a dynamic and living instrument, and [so it] refuse[d] to interpret it in a narrow and legalistic way.”<sup>132</sup> Thus, “[t]he Court’s engagement with these . . . political conflicts . . . demonstrate[d] the potential that that democratic constitutionalism holds for the management and ‘civilizing’ of these irreconcilable differences.”<sup>133</sup>

### c. Education Rulings

The breadth and depth of South Africa’s judicial review extends to the educational field as well. In *Ex parte Gauteng Provincial Legis-*

127. *Id.* at 150.

128. *Id.*

129. *Id.*

130. *Id.*

131. *See id.*

132. Tholakele H. Madala, *Rule Under Apartheid & the Fledgling Democracy in Post-Apartheid S. Afr.: The Role of the Judiciary*, 26 N.C.J. INT’L L. & COM. REG. 743, 763 (2001); *see, e.g.*, *State v. Mhlungu* 1995 (7) BCLR 793 (CC) at 797–98 ¶ 2, 815–16 ¶ 47, 831 ¶ 85 (ordering that a South African constitutional provision denying application of the constitution to matters pending before its promulgation was not to be interpreted as precluding a criminal defendant’s constitutional rights). In *State v. Mhlungu*, the court found that a literal interpretation of the provision “would deny to a substantial group of people the equal protection of fundamental rights.” *Id.* at 810 ¶ 33. To avoid “some very unjust, perhaps even absurd, consequences,” *id.* at 798 ¶ 4, and to enable “large numbers of South African citizens” to enjoy the “expanding human rights guaranteed by Chapter 3 of the Constitution, including the fundamental right to a fair trial,” the court argued that there existed an “international culture of constitutional jurisprudence which has developed to give to constitutional interpretation a purposive and generous focus.” *Id.* at 799–800 ¶ 8. The court then referenced for that proposition supporting jurisprudence from a number of countries, including Australia, England, and Namibia. *Id.* at 800 ¶¶ 8–9.

133. KLUG, *supra* note 89, at 162.

lature: *In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*, one-third of the members of the Gauteng legislature petitioned the speaker of the provincial legislature to refer the Gauteng School Education Bill to the South African Constitutional Court for abstract review.<sup>134</sup> They argued, *inter alia*, that the bill was unconstitutional because it prohibited public schools from using language competence testing as an admission requirement.<sup>135</sup>

The court faced the challenge of balancing attempts to perpetuate racial segregation and demands for cultural preservation.<sup>136</sup> “Upholding the power of the provincial legislature to prohibit language testing as a basis for admission, the Court argued that the prohibition did not infringe ‘two clear constitutional rights: the right to instruction at a public school in the language of their choice and the right to establish schools of their own based on a common culture, language or religion.’”<sup>137</sup> “Writing his concurring opinion in Afrikaans, [Justice] Kriegler . . . forcefully argued that the constitution protects diversity, but not racial discrimination.”<sup>138</sup> Decisions such as this contributed to the significant impact that South African jurisprudence has had across the rest of Africa—other African states have dealt with similar issues and are similarly situated from a geopolitical point of view.

#### d. Provincial Rulings

Across most of Africa, societies are not homogeneous and African states—including their courts—must forge political unity.<sup>139</sup> The South African Constitutional Court has faced this reality and

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134. *Ex parte* Gauteng Provincial Legislature: *In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng Sch. Educ. Bill of 1995* 1996 (3) SA 165 (CC) at 170 ¶ 1.

135. *See id.* at 171–72 ¶ 5.

136. *See* KLUG, *supra* note 89, at 169.

137. *Id.*

138. *Id.*

139. Across Africa, many countries have multiple ethnic groups; the entire continent itself is divided along ethnic, racial, and religious lines. For example, Northern Africa is predominantly Arab and Islamic, while Southern Africa is predominantly black and more heterogeneous from a religious perspective. *See* Max Fisher, *A Revealing Map of the World's Most and Least Ethnically Diverse Countries*, WASH. POST (May 16, 2013), <https://www.washingtonpost.com/news/worldviews/wp/2013/05/16/a-revealing-map-of-the-worlds-most-and-least-ethnically-diverse-countries/> (“African countries are the most diverse.”) [<https://perma.cc/ZW8T-NCGL>]; Rich Morin, *The Most (and Least) Culturally Diverse Countries in the World*, PEW RESEARCH CTR. (July 18, 2013), <http://www.pewresearch.org/fact-tank/2013/07/18/the-most-and-least-culturally-diverse-countries-in-the-world/> [<https://perma.cc/KZ5Z-GNHU>].



set an example for the rest of Africa, most prominently in the *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal* case.

Unlike the ANC, led by President Mandela, and the National Party, led by F.W. de Klerk, both of which promoted political unity, the Inkatha Freedom Party (IFP), which is predominantly representative of KwaZulu-Natal, continued to clamor for regional autonomy, insisting upon having certain areas exclusively within the jurisdiction of provincial legislatures.<sup>140</sup>

In this case, the KwaZulu-Natal objected to the National Education Policy Bill, claiming it “imposed national education policy on the provinces” and thereby “encroached upon the autonomy of the provinces and their executive authority.”<sup>141</sup> The IFP further claimed the “[b]ill could have no application in KwaZulu-Natal because [the province] was in a position to formulate and regulate its own policies.”<sup>142</sup>

Navigating the delicate demarcation line between national and regional powers, the court avoided siding with either the provincial or national authority.<sup>143</sup> Instead, the court noted that unlike U.S. states, South African provinces were not sovereign states.<sup>144</sup> The court resolved to delineate the outer limits of provincial autonomy.<sup>145</sup> Thus, rejecting the attempt to confer legislative and executive authority upon the KwaZulu-Natal province, the South African Constitutional Court held<sup>146</sup> that the KwaZulu-Natal legislature was “under a misapprehension that it enjoyed a relationship of co-supremacy with the national legislature and even the Constitutional Assembly.”<sup>147</sup> For a time, IFP continued to resist the court’s decision by refusing to certify the draft of the final Constitution of South Africa, but ultimately the IFP conceded that the KwaZulu-Natal province was part of greater South Africa.<sup>148</sup> This case provides instruction to many African courts of judicial review when faced with power struggles between central governments and local authorities.<sup>149</sup>

140. See KLUG, *supra* note 89, at 171.

141. *In re National Education Policy Bill No. 83 of 1995* 1996 (3) SA 289, \*5 (CC).

142. *Id.*

143. KLUG, *supra* note 89, at 173.

144. *See id.* at 174.

145. *See id.*

146. *Certification of the Kwazulu-Natal Constitution* 1996 (4) SA 1098.

147. *Id.*

148. *Ex parte Chairperson*, 1996 (4) SA at 782 ¶ 20, 783 ¶ 24.

149. The Constitution of Uganda, for example, provides, “The State shall be guided by the principle of decentralisation and devolution of governmental functions and powers to

### e. The *Makwanyane* Ruling

Although not always followed by other African courts, South Africa's *State v. Makwanyane* has been widely referenced in many other African countries' jurisprudence.<sup>150</sup> *Makwanyane*, which abolished the death penalty in South Africa, fully established judicialization of politics in South Africa as the court thrust itself into the middle of the policy-making process at a time when the general public was not ready to declare the death penalty unconstitutional.<sup>151</sup> The reality in South Africa was that all parties to the South African transition saw that there was no path to a political settlement if the death penalty remained on the statute books.<sup>152</sup> The court, however, reasoned that the parties understood that the only way forward was political accommodation and compromise, and that the abolition of the death penalty fit with this spirit.<sup>153</sup> Professor Jeremy Sarkin sums the political realities that provided the backdrop for *Makwanyane* as follows:

[A] new constitutional order . . . must be seen to be the result of several factors: the strength of the old order during the negotiat-

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the people at appropriate levels where they can best manage and direct their own affairs." UGANDA CONST., 1995, National Objectives and Directive Principles of State Policy art. II § iii. The Constitutional Court of Uganda has had to deal with many local government issues, such as the claim that local government legislation "limit[ed] the voter's education to the procedure of voting only," contrary to the constitutional provision that the electoral commission had the obligation, inter alia, to "formulate and implement voters educational programmes relating to election." *Id.* art. 61(g); *Ruranca vs. Electoral Comm'n* [2007] UGCC 3 (CC) (Uganda).

150. See, e.g., *Att'y Gen. v. Mtikila*(Uganda), Misc. Civil Cause No. 10 of 2005, [2010] TzCA at 32; *9.Susan Kigula & 416 Ors v Attorney General* (Uganda) (Constitutional Petition No. 6 of 2003); *Salvatori Abuki and Another v Attorney General*(Uganda) (Constitutional Case No. 2 of 1997); *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others*(Namibia) (SA 51/2008) [2009] NASC 17; [2011] 1 BLLR 15 (NmS) ; (2011) 32 ILJ 205 (Nms) (14 December 2009); *Chairperson of the Immigration Selection Board v Frank and Another* (Namibia) (SA8/99 , SA8/99) [2001] NASC 1 (5 March 2001); *Thabang Maketsi and Another v COMPOL and Another*(Lesotho), available at Lesotho Legal Information Institute; *R v. Senyane* (CRI/T/37/97) (Lesotho) available at Legal Information Institute; *Chakuamba and Others v. Attorney General and Others* (Malawi) available at Malawi Legal Information Institute; *Simeon v Attorney General* (Seychelles) available at Seychelles Legal Information Institute; *Mhlanga and Others v Commissioner of Police and Others* (341/07,764/07) (Swaziland) available at Swaziland Legal Information Institute. See generally *State v. Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.).

151. See *id.* at \*59 ¶ 87 ("The question before us, however, is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the Constitution allows the sentence.").

152. See *id.* at \*170 ¶ 307. The court concluded, "It is well accepted that the transitional Constitution is a culmination of a negotiated political settlement." *Id.* The Constitution was a "product of a multiplicity of persons, some of whom took part in the negotiations." *Id.* at \*12 ¶ 18. But, the Constitution did not mention the death penalty.

153. See KLUG, *supra* note 89, at 144.

ing process, the old order's suspicion of the new environment, the adherence of the African National Congress (ANC) to the notion of fundamental rights, and the strong belief . . . that ethnicity and division, ought not be part of a post-apartheid South Africa.<sup>154</sup>

The *Makwanyane* judgment is the centerpiece of South African judicial review not only because of its groundbreaking progressivism, but also because it inspired courts in other countries to courageously examine the extent to which similar issues fared in their own constitutional dispensations. In terms of judicialization of politics, because of this decision, a problem that politicians had failed to agree on was resolved through the courts in a manner that appeared legitimate for the entire polity.

#### f. Economic, Social, and Cultural Rights, and Other Human Rights

The South African Constitutional Court also provided significant resources for other African courts of judicial review in the areas of economic, social, and cultural rights. The incorporation of economic, social, and cultural rights in the South African Constitution was indispensable to the project of dismantling vestiges of apartheid.<sup>155</sup> The right to shelter, for example, can be explained in terms of the attempt to eliminate core aspects of apartheid that relegated African occupation to the periphery of urban life.<sup>156</sup>

In South Africa, economic, social, and cultural rights, such as rights to housing,<sup>157</sup> health care, food, water, social security,<sup>158</sup> and education<sup>159</sup> are incorporated in the Bill of Rights.<sup>160</sup> Despite the incorporation of these rights in the South African Constitution, the court was left to deal with the issue of justiciability of some of these rights,<sup>161</sup> providing the court with more opportunities for judicialization of South African politics. In the *First Certification Judgment*, in which the justiciability of socio-economic rights was at issue, the

154. Jeremy Sarkin, *The Drafting of South Africa's Final Constitution From a Human-Rights Perspective*, 47 AM. J. COMP. L. 67, 68 (1999).

155. See Cass R. Sunstein, *Social and Economic Rights? Lessons From South Africa* 5 (John M. Olin Law & Econ. Working Paper No. 124).

156. See *id.* at 6.

157. See S. AFR. CONST., 1996 § 26.

158. See *id.* § 27.

159. See *id.* § 29.

160. See *id.* §§ 7–39.

161. See, e.g., *Ex parte Chairperson*, 1996 (4) SA at 800 ¶ 78.

court held that such rights “are, at least to some extent, justiciable”<sup>162</sup> and reasoned as follows:

[While] [i]t is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters . . . [,] it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights.<sup>163</sup>

However, the court’s latitude in these matters was circumscribed by the limited resources available to South Africa to implement the decisions, especially in its transitional state. For example, in *Soobramoney v. Minister of Health*, the South African Constitutional Court held that there were limited resources for emergency dialysis for indigent citizens, and noted that the “court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.”<sup>164</sup> The court’s decision in *South Africa v. Grootboom*,<sup>165</sup> in contrast, was more progressive in that it established judicial criteria for advancing the constitutional obligations implied by the guarantee of socio-economic rights.<sup>166</sup> In *Grootboom*, while rejecting the challenge to justiciability of socio-economic rights as having been put to rest through the constitution,<sup>167</sup> the court held that the government should produce a reasonable plan to address the problem of emergency housing faced by the applicants, even if the plan was dictated by available resources.<sup>168</sup> Using similar reasoning, the court also upheld the basic claims of applicants in *Minister of Health v. Treatment Action Campaign*, requiring that the government

162. *Id.*

163. *Id.* at 800 ¶ 77

164. *Soobramoney v. Minister of Health* 1998 (1) SA 765 (CC) at \*17 ¶ 29 (S. Afr.). The court determined that the Constitution “entitle[s] everyone to have access to health care services provided by the state ‘within its available resources.’” *Id.* at \*13 ¶ 22. The court based its decision on § 27(2) of the Constitution which provides: “The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.” S. AFR. CONST., 1996 § 27. In this case, however, the “Department of Health in KwaZulu-Natal does not have sufficient funds to cover the cost of the services which are being provided to the public.” *Soobramoney*, 1998 (1) SA 765 at \*14 ¶ 24. The court added that “[t]hese choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met.” *Id.* at \*17 ¶ 29.

165. 2001 (1) SA 46 (CC).

166. Heinz Klug, *Five Years On: How Relevant Is the Constitution of the New South Africa?* 26 VT. L. REV. 803, 817 (2002).

167. For further discussion, see Daniel Schneider, *The Constitutional Right to Housing in South Africa: The Government of the Republic of South Africa v. Irene Grootboom*, 2 INT’L J. CIV. SOC’Y L. 45, 57 (2004).

168. *See Grootboom*, 2001 (1) SA at \*19 ¶ 21.

address the issue of mother-to-child transmission of human immunodeficiency virus.<sup>169</sup>

Despite all of the above judicial accomplishments in the realm of South African socio-economic rights, some scholars argue that the court has not been entirely successful in the development of socio-economic rights jurisprudence.<sup>170</sup> This claim is relevant to the extent that South African jurisprudence in this area can impact other African courts of judicial review. For example, these scholars argue that the South African Constitutional Court's jurisprudence does not provide for immediate implementation of certain socio-economic rights because it fails to clearly define benchmarks for the attainment of the minimum threshold of those rights.<sup>171</sup> In that respect, the court has not been fully successful in its judicialization of politics.

Although the ANC government began its term with a commitment to a progressive economic policy, unsurprisingly, within the first five years of its rule, unrestrained by the court, the government had pivoted to financial austerity and a minimalist state role.<sup>172</sup> In trying to navigate the tensions of the transitional post-apartheid era, which necessitated that the court appease different stakeholders, the court was not aggressive enough with regard to the advancement of heavily resource-dependent socio-economic rights.

Finally, the court has been a leader in addressing the highly political cultural issues of same-sex marriage and gender rights. In *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, the court held that the criminalization of consenting sexual relations between men as sodomy was unconstitutional.<sup>173</sup> In *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs 2000 (2)* the court held that discrimination against partners in permanent, same-sex relationships was unconstitutional.<sup>174</sup> African

169. *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) at 78 ¶ 8 (S. Afr.). The applicants based their arguments on the state's obligation to provide access to healthcare. See S. AFR. CONST., 1996 § 27.

170. Dennis Davis, *Socio-Economic Rights in South Africa: The Record after Ten Years*, 2 N.Z.J. PUB. INT'L L. 47, 48 (2004).

171. *Id.* at 55.

172. *Id.* at 57–58.

173. *National Coalition for Gay and Lesbian Equality v. Minister of Justice* 1999 (1) SA 6 (CC) at 31–32 (S. Afr.).

174. *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* 2000 (2) SA 1 (CC) ¶¶ 28–30, 88 (S. Afr.); see also *Du Toit v. Minister of Welfare and Population Development* 2003 (2) SA 198 (CC) ¶¶ 25–26; *Satchwell v. President of South Africa* 2002 (6) SA 1 (CC) ¶¶ 22–25 (S. Afr.).

courts appear to be wary of these issues and could draw from the robust South African jurisprudence on these topics to begin a dialogue.

The South African Constitutional Court has struggled with regard to judicialization of politics in areas other than socio-economic and cultural rights, however. In *AZAPO v. President of South Africa*, the issue was whether individuals who committed gross violations of human rights under apartheid would, after receiving amnesty from the Truth and Reconciliation Commission, not only be absolved from future criminal prosecution but also from civil liability.<sup>175</sup> The court unanimously upheld the constitutionality of the statute providing for amnesty, arguing that it was a simple reality that without the compromise on amnesty contained in the “postscript” to the interim constitution there would have been no transition of political power.<sup>176</sup> This decision was dictated primarily by the political climate in the country and the necessities of transition.<sup>177</sup> Many African countries that have political transitions of their own could look to South African jurisprudence in this respect.<sup>178</sup>

The foregoing discussion related to the South African Constitutional Court’s early work. It was progressive and, overall, the government was responsive to the court’s judicialization impact on national policy. However, as the following cases illustrate, the court’s work has suffered some setbacks that are not particularly exemplary for the rest of the continent.

#### 4. South Africa’s Constitutional Court Today

More recently, the South African Constitutional Court has continued to struggle in its judicialization project, as President Zuma has resisted the court. For example, South Africa’s executive branch resisted the court’s order to extradite Sudan’s president to the ICC. In *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development*, the South African government argued that immunities and privileges accorded to visiting heads of state and diplomats under the Vienna Convention on Diplomatic Rela-

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175. 1996 (4) SA 671 (CC) at ¶ 8 (S. Afr.).

176. Corder, *supra* note 108, at 269.

177. This decision has been the focus of a number of criticisms. See, e.g., John Dugard, *Memory and the Spectre of International Justice: A Comment on AZAPO*, 13 S. AFR. J. HUM. RTS. 269 (1997); Darrel Moellendorf, *Amnesty, Truth and Justice: AZAPO*, 13 S. AFR. J. HUM. RTS. 283 (1997).

178. See Sections II.B–D (discussing Kenya, Uganda, and Tanzania).

tions prevented the government from arresting President Bashir.<sup>179</sup> The court countered first that the Rome Statute does not provide head of state immunity,<sup>180</sup> and second, that under the U.N. Charter, “Members of the United Nations agree to accept and carry out the decisions of the Security Council,” and President Bashir’s indictment was pursuant to such a decision.<sup>181</sup>

When the South African government ignored the court’s arguments, the court pointed out that the justices were “concerned with the integrity of the rule of law and the administration of justice.”<sup>182</sup> The court elaborated as follows:

A democratic State based on the rule of law cannot exist or function, if the government ignores its constitutional obligations and fails to abide by court orders. A court is the guardian of justice, the corner-stone of a democratic system based on the rule of law. If the State, an organ of State or State official does not abide by court orders, the democratic edifice will crumble stone-by-stone until it collapses and chaos ensues.<sup>183</sup>

In the end, however, President Bashir fled South Africa unscathed.<sup>184</sup>

President Zuma also resisted a court ruling ordering him to repay the South African government. The political opposition accused President Zuma “of using ‘ill-gotten wealth’ to upgrade his home with a swimming pool and amphitheater.”<sup>185</sup> The court ruled that his failure to respect that order violated the constitution.<sup>186</sup>

In sum, while South Africa sets an example for many African countries with regard to the judicialization of politics, it continues to struggle in some areas. South Africa can improve in many regards, especially by: increasing use of African jurisprudence in its

179. See 2015 (5) SA 1 (GP) ¶ 17, 19 (S. Afr.).

180. *Id.* ¶ 28.8.

181. U.N. Charter art. 25.

182. *Southern Africa Litigation Centre*, 2015 (5) SA, ¶ 33.

183. *Id.* ¶ 37.2.

184. *Id.* ¶ 12. The decision provided the following background on the case: “[In] 2009 the ICC issued a warrant for the arrest of President Bashir for war crimes and crimes against humanity. Thereafter and in 2010 the ICC issued a second warrant for the arrest of President Bashir for the crime of genocide. . . . In the wake of these warrants and relying on Article 59 of the Rome Statute, the ICC requested States Parties to the Statute including South Africa to arrest President Bashir in the event that he came into their jurisdictions.” *Id.*

185. Victor Muisyo, *S. Africa: Zuma Found Guilty, Opposition Launches Impeachment Campaign*, AFRICANEWS (Mar. 31, 2016), <http://www.africanews.com/2016/03/31/safrica-zuma-found-guilty-opposition-launches-impeachment-campaign/> [https://perma.cc/95WD-UKRV].

186. See *Economic Freedom Fighters v. Zuma* 2016 (3) SA 580 (CC), ¶ 105 (S. Afr.).

judicial review; continuing to address more progressive areas of socio-economic and cultural rights; and exerting pressure on the executive to be more compliant with its decisions, thereby legitimizing those decisions.

## B. Kenya

Kenyan courts have a nuanced and robust approach to incorporating opinions from other African jurisdictions, but the courts could better leverage trans-African jurisprudence to expand its judicialization project. This Section details these practices.

### 1. Kenya's Reliance on Other African Jurisprudence

While mindful of the need to make appropriate distinctions,<sup>187</sup> Kenyan courts reference a broad range of jurisprudence from various African countries. For example, Kenyan courts rely on jurisprudence from South Africa and Uganda, two countries they view as being existentially similar to Kenya.<sup>188</sup> Such similarity appears to be the primary rationale for referencing and relying upon other countries' jurisprudence, as evidenced by the following Kenyan Court of Appeal's statement:

The . . . 2013 general elections in Kenya can perhaps be compared to the . . . 1994 general elections in the Republic of South

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187. See, e.g., *Kenya Airways Ltd. v. Aviation & Allied Workers Union Kenya* (2014) K.L.R. \*1, \*12 ¶19 (C.A.K.) (Kenya) (noting that Kenyan and South African employment laws differ).

188. For example, Kenya's Court of Appeal has relied on Uganda's electoral jurisprudence in deciding cases regarding electoral justice and constitutional interpretation. *Moses Masika Wetang'ula v. Musikari Nazi Kombo* (2014) K.L.R. 7 ¶ 28 (C.A.K.) (Kenya) (referencing the Ugandan cases *Baptist v. Electoral Commission*, Election Appeal No. 11 of 2007; *Kizza v. Kaguta*, Election Petition No. 1 of 2001; and *Joho v. Shahbal* (2014) K.L.R. (S.C.K.) (Kenya)); *King'ara v. Indep. Electoral & Boundaries Comm'n* (2014) K.L.R. \*1, \*12 ¶ 32 (C.A.K.) (Kenya) (adopting the Uganda Supreme Court's concept of "material irregularities" developed in the Ugandan case *Kizza v. Kaguta*); *Odinga v. Indep. Electoral & Boundaries Comm'n* (2013) K.L.R. \*1, \*36 ¶ 191 (S.C.K.) (Kenya) (referencing Ugandan case law and stating "[c]omparative judicial practice on the burden of proof helps to illuminate this Court's perceptions"). Kenya's courts have also adopted jurisprudence of African courts dealing with new constitutional dispensations. See, e.g., *Law Soc'y of Kenya v. Ctr. for Human Rights & Democracy* (2013) K.L.R. (C.A.K.) (Kenya) (referencing the Ugandan case *Tinyefuza v. Att'y Gen.*, to support the proposition that a constitution should be "read as an integrated whole," as well as the Ugandan case *Att'y Gen. v. Tinyenfuzza*, adopting the political question doctrine) (internal citations omitted). In the Kenyan case of *Judicial Service Commission v. Shollei*, (2014) K.L.R. ¶ 48 (C.A.K.) (Kenya), Kenya's Court of Appeal relied on the "often quoted passage" from the Ugandan case *Pastoli v. Kabale District Local Government Council*, [2008] 2 EA 300, as well as the South African case *Pharmaceutical Manufacturers Association of South Africa: Ex parte President of the Republic of South Africa*, 2000 (2) SA 674 (regarding principles governing constitutional reference or review).



Africa in the sense that both events marked the ushering in of a new democratic order. The description of the South African general elections . . . by Justice Z. M. Yacoob as “historic, indescribably poignant and undoubtedly significant . . .” is true of the . . . general elections in Kenya[,] being the first general elections in Kenya held under the 2010 Constitution under which the people of Kenya put in place a devolved system of government and established County Governments in Kenya.<sup>189</sup>

Kenya’s courts provide additional justifications for their references to other African countries’ jurisprudence related to Kenya’s own judicialization project. When engaging in comparative trans-African review, Kenya’s Court of Appeal weighs geographic proximity and similarity of legal systems heavily.<sup>190</sup> In one case, for example, the Kenyan court reasoned that its view “that appeals lie only from judgments and decrees in election matters, is neither unique to Kenya nor eccentric in reasoning. In next door Uganda, the law on the hearing and determination of electoral disputes is akin to ours.”<sup>191</sup> This line of analysis is an extension of common law reasoning moving beyond the boundaries of a single state to, at the very least, neighboring states. In fact, such analysis regards the jurisprudence of other countries as not merely persuasive, but almost legally binding. For example, in a case regarding an election petition, a Kenyan court “accept[ed] as good law the . . . reasoning of the Ugandan Court of Appeal.”<sup>192</sup> Moreover, one Kenyan court suggested a preference for jurisprudence from African countries, as opposed to non-African countries, in Kenya’s judicialization project, stating, “[c]loser home, the Constitution of the Federal Republic of Nigeria . . . provides for the removal of a governor or deputy governor.”<sup>193</sup> In other cases, Kenyan courts have justified adoption of African jurisprudence on the basis of “[s]imilar reasoning”<sup>194</sup> or on the legislation involved being “more or less similar.”<sup>195</sup>

Kenya’s courts have been particularly eager to adopt jurisprudence from South Africa and Uganda. For example, in *Wambora v.*

189. Alice Wahito Mwangi Ndegwa v. Indep. Electoral & Boundaries Comm’n (2013) K.L.R. \*1, ¶ 27 (Kenya).

190. See *Kakuta Maimai Hamisi v. Peris Pesi Tobiko* (2013) K.L.R. \*1, \*9–10 (Kenya).

191. *Id.* at 9.

192. *Id.*

193. *Wambora v. Cty. Assembly of Embu* (2015) K.L.R., ¶ 225 (Kenya).

194. See, e.g., *Comm’r of Lands v. Essaji Jiwaji* (1978) K.L.R. \*1, \*6 (Kenya) (“Similar reasoning is to be found in cases involving equivalent articles of the Constitution of the United States of America and the Republic of South Africa.”).

195. See, e.g., *Daniel N. Mugendi v. Kenyatta Univ.* (2013) K.L.R. \*1, \*10 (Kenya).

*County Assembly of Embu*,<sup>196</sup> the High Court of Kenya adopted jurisprudence from South Africa's Supreme Court—which held that no parliament, official, or other institution is immune from judicial scrutiny—as well as related jurisprudence from Uganda.<sup>197</sup>

That said, in general, Kenyan case law exemplifies a balanced approach to referencing a broad range of precedents from many African countries, particularly those that are part of the common law system.<sup>198</sup> Accordingly, while Kenya's High Court mostly references South African case law, it frequently does so in conjunction with the case law of other African states. For example, in *Wambora v. County Assembly of Embu*,<sup>199</sup> the court referenced South African case law as well as the Ugandan case *Tinyefuza v. Attorney General*,<sup>200</sup> the Nigerian case *Inakoju v. Adeleke*,<sup>201</sup> and the Namibian cases *State v. Acheson* and *Minister of Defence v. Mwandighi*.<sup>202</sup> Unlike the South African judiciary, however, Kenyan courts' proactive approach to trans-African judicial review has operated independently from their engagement with local constitutional issues, as the following Subsection explores.

196. *Wambora*, (2015) K.L.R., ¶ 195.

197. There are other cases in which Kenya's Court of Appeal referenced South African jurisprudence. See *Nairobi Metro. Psv Saccos Union Ltd. v. Cty. of Nairobi Gov't* (2014) K.L.R., ¶ 31–32 (Kenya) (quoting Chief Judge Chaskalson of the South African court); *Kipkoech Kangongo v. Bd. of Governors Sacho High Sch.* (2015) K.L.R. \*1, \*9–10 (Kenya) (referencing the South African case *President of the Republic of South Africa v. South Africa Rugby Football Union*) (citations omitted).

198. For a list of African countries that adhere to the common law tradition, see *The World Factbook*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html> (last visited May 11, 2017) [<https://perma.cc/YJ89-RFBK>]. Kenya's judiciary made these observations in *Wambora*, (2015) K.L.R. (Kenya).

199. *Wambora*, (2015) K.L.R., ¶¶ 130, 197–204 (referencing the South African Constitutional Court's cases *Doctors for Life International v. Speaker of the National Assembly* 2006 (6) SA 416 (CC), *Poverty Alleviation Network v. President of the Republic of South Africa* 2010 (6) BCLR 520 (CC), *Minister of Health v. New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC), and *Maqoma v. Sebe* 1987 (1) SA 483); see also *Lewa v Mwangandi* (2015) K.L.R., 24 (Kenya) (referencing South Africa's Constitutional Court).

200. *Tinyefuza v. Att'y Gen.*, [1997] UGCC 3 (CC) (Uganda).

201. [2007] 4 NWLR (Nigeria); see also *Waititu v. Indep. Electoral & Boundaries Comm'n* (2014) K.L.R. (C.A.K.) (Kenya); *Ndeti v. Indep. Electoral & Boundaries Comm'n* (2014) K.L.R. (C.A.K.) (Kenya) (referencing the Nigerian case *Akpanudoeche v. Akpabio*, SC No. 154 of 2012); *Miriti v. Mbae* (2014) K.L.R. ¶ 95 (C.A.K.) (Kenya) (“[S]uch a judicial approach . . . is well exemplified in the several cases from Nigeria.”) (citation omitted).

202. *State v. Acheson* 1991 (2) S.A. 805 (Namib. H.C.); *Minister of Defence v. Mwandighi* 1992 (2) SA 355 (SC) at \*11–12 (Namib.) (regarding the liberal or purposive interpretation of the constitution as opposed to a narrow and legalistic interpretation).

## 2. Kenya's Judicialization Project Today

The extent to which Kenya's judicialization project has succeeded correlates with the Kenyan judiciary's direct engagement with constitutional issues, irrespective of courts' engagement with trans-African jurisprudence. As compared to other African states, Kenya has enjoyed a measure of political stability in the interest of economic advancement.<sup>203</sup> This stability, however, has often been at the expense of judicial and political integrity.<sup>204</sup> Among Kenya's most recent political developments are first, the end of Moi's long regime, which was replaced by the Kibaki regime in 2002; and second, the adoption of Kenya's newest constitution.<sup>205</sup>

First, the judiciary has shaped these milestones through constitutional engagement. For example, in *Njoya v. Attorney General*, the applicants claimed that: (1) certain sections of the Constitution of Kenya Review Act (CKRC) vitiated the constituent power of the people of Kenya; (2) the CKRC was unconstitutional because it permitted a National Constitutional Conference to discuss and adopt a draft bill to alter the constitution; and (3) the draft bill did not reflect the Kenyan people's views.<sup>206</sup> The applicants argued that the constitutional conference should be suspended pending the review process' compliance with the constitution.<sup>207</sup> The High Court of Kenya held that the CKRC was unconstitutional because the power to make a new constitution belongs to the people of Kenya as a whole, and that in the exercise of that power, all Kenyans were entitled to have a referendum on any proposed new constitution.<sup>208</sup> It further held that the National Constitutional Conference was not a constituent assembly because the delegates had not been directly elected by the people to transact the specific business of constitution making.<sup>209</sup> In response to the *Njoya* ruling,

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203. Although Kenya endured a long period of undemocratic governance under President Arap Moi's regime, Kenya has not undergone violent political changes like those in Burundi, the Democratic Republic of Congo, Rwanda, Somalia, Sudan, and Uganda. See generally Makau Mutua, *Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya*, 23 HUM. RTS. Q. 96 (2001) (discussing the significant transformations that Kenya has undergone since 1895).

204. See *id.* at 98 ("The judiciary, which lacks independence and is viewed by Kenyans as subservient to the executive, continues to be a captive instrument of repression.").

205. See Wambua Kituku, *The State of Constitutionalism in Kenya – 2013*, in THE ANNUAL STATE OF CONSTITUTIONALISM IN EAST AFRICA 2013 43, 48–51 (Thierry B. Murangira ed., 2013). See generally Mutua, *supra* note 203.

206. (2008) 2 K.L.R. 658, 658 (H.C.K.) (Kenya).

207. *Id.*

208. *Id.* at 659.

209. *Id.* 677–80.

the Kenyan government adopted an amendment to the constitution that provided for a mandatory referendum through which the people of Kenya would enact their constitution.<sup>210</sup> The Kenyan court thus succeeded in influencing policy in *Njoya*, particularly with regard to the making of the new constitution.

Additional cases also affected the constitutional review process. As Deputy Executive Director of the Centre for Law and Research International in Nairobi, Kenya, Morris Odhiambo notes, the “overall effect of the various legal challenges to the [National Constitutional Conference] was to change the focus of constitution making at that point in time from concentration on the content of the draft constitution as debated at the [National Constitutional Conference] to debate on the process.”<sup>211</sup> For example, in *Onyango v. Attorney General*, building on its *Njoya* decision, the High Court of Kenya held that only the people had the power to enact a new constitution.<sup>212</sup>

Additionally, the courts played a pivotal role in influencing the adoption of some provisions in the current Kenyan Constitution. For example, in *Kamau v. Attorney General*, the applicants argued that in light of Kenya’s multireligious and multicultural nature, retention in the draft constitution of a section similar to Section 66 of the 1963 Constitution of Kenya<sup>213</sup> was sectarian and discriminatory, amounted to segregation, and was therefore unconstitutional.<sup>214</sup> The defense argued, *inter alia*, that this issue was not ripe for judicial determination. The defense claimed that other government organs were better suited to resolve the underlying issue because “the judiciary cannot be turned or transformed into an ombudsman for general grievances of citizens. The politics of constitution-making is being exported to the courts and the contests of supremacy [are] turning the business of litigation into simply politics by other means.”<sup>215</sup> The High Court of Kenya observed that “[t]he process of altering . . . the Constitution . . . lies in the

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210. See Morris Odhiambo, *Constitutionalism Under a “Reformist” Regime in Kenya: One Step Forward, Two Steps Backwards?*, in CONSTITUTIONALISM IN EAST AFRICA: PROGRESS, CHALLENGES AND PROSPECTS IN 2004 51, 76 (Lawrence M. Mute ed., 2007).

211. *Id.*

212. ONGOYA Z.E., PATRICK OUMA ONYANGO AND 12 OTHERS VS THE HONOURABLE ATTORNEY GENERAL AND 2 OTHERS: A CLASSICAL CASE OF MISAPPLYING AND DIS-APPLYING JURISPRUDENCE? 9 (2012).

213. *Kamau v. Att’y Gen.* (2010) K.L.R. at \*3–4 (H.C.K.) (Kenya). Section 66 established and entrenched the office of the Chief Kadhi and the Kadhis’ Court, and supported both with public funds. *See id.*

214. *Id.* at \*4.

215. *Id.* at \*34.

National Assembly (*Parliament which enacts the law and the President who assents to the law*) before it becomes operational or comes into effect."<sup>216</sup>

However, Kenyan courts have struggled to influence policy beyond these few cases. An example of such a struggle can be found in *Gachiengo v. Republic*.<sup>217</sup> Gachiengo and Kahuria, two government officials, were charged with abuse of office<sup>218</sup> and applied for a court determination whether, inter alia, the provisions establishing the Kenya Anti-Corruption Authority (KACA) were constitutional.<sup>219</sup> The High Court of Kenya held that KACA's criminal prosecutorial powers were unconstitutional, finding that Section 26 of the constitution did not vest KACA with such powers.<sup>220</sup> Corruption continues to be systemic and endemic in Kenya, and in the wake of *Gachiengo*, several Kenyan legal commentators argued that the court had been used as an instrument to shield a government official.<sup>221</sup> The International Monetary Fund even postponed the release of loans because of the government's perceived failure to undertake reforms for combating corruption.<sup>222</sup> Indeed, the paucity of cases arising out of this scandal exemplifies Kenyan judicial inertia to fight corruption, and thus the failure to influence policy.<sup>223</sup>

Additionally, in the early 1990s, a government official was charged with abuse of office in *Republic v. Attorney General Ex parte Ng'eny*.<sup>224</sup> When KACA was disbanded, the attorney general terminated KACA's case against the minister, Ng'eny, but Ng'eny was immediately recharged with the same counts.<sup>225</sup> In November 2001, the High Court issued an order of certiorari prohibiting all further prosecution on the counts in the indictment against Ng'eny.<sup>226</sup> The High Court of Kenya ruled that prosecuting Ng'eny was oppressive and did not accord with his constitutional rights because there was a lengthy and unexplained nine-year delay between the time of the commission of the offenses charged and

216. *Id.* at \*42.

217. (2000) K.L.R. (H.C.K.) (Kenya).

218. *Id.* at \*1.

219. *Id.*

220. *Id.* at \*6.

221. Lawrence Murungu, *Constitutional Developments in Kenya: A Critical Appraisal of the Year 2001*.

222. *Id.*

223. *Id.*

224. (2002) 2 K.L.R. 166.

225. Murungu, *supra* note 221.

226. *Id.*

the initiation of prosecution by the attorney general.<sup>227</sup> However, in Kenya, there is no statute of limitations for crimes regarding abuse of office.<sup>228</sup>

In fact, commentators noted that the court's application of Section 77 to Ng'eny's situation was not relevant,<sup>229</sup> as the constitution provides: "If any person is charged with a criminal offence, then unless the charge is withdrawn the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."<sup>230</sup> Legal commentators argued that under this provision, determination on whether a person has a hearing "within a reasonable time" must be assessed from the moment that such person is charged with a criminal offense, and not from the date when the alleged crime was committed;<sup>231</sup> however, the court took into account the time since the commission of Ng'eny's offenses.<sup>232</sup>

In contrast to South Africa, Kenyan courts refer mostly to African jurisprudence from similarly situated African countries. This could be because Kenya continues to struggle with the rule of law, like the countries whose jurisprudence it references.

### C. *Uganda*

#### 1. Uganda's Use of African Jurisprudence

Uganda has adopted much jurisprudence from other African countries, particularly South Africa. Ugandan courts of judicial review justify their borrowing from other African countries' jurisprudence on a number of grounds. First, they point to the similarity of constitutional or statutory provisions.<sup>233</sup> For example, the Uganda Constitutional Court noted the "provisions on separation of powers in the Constitution of South Africa are remarkably similar to those in the Constitution of Uganda,"<sup>234</sup> reasoning that while

227. *Id.*

228. *Id.*

229. *Id.*

230. CONST. art. 50 (2010) (Kenya).

231. Murungu, *supra* note 221.

232. *Id.*

233. See *Obbo v. Att'y Gen.* [2000] UGCC 4 (CC) at \*12 (Uganda) (remarking that jurisprudence from "similar jurisdictions" was "highly persuasive").

234. Jim Muhwezi et al., v. Att'y General [2010] UGCC 3 (CC) (Uganda), available at <https://www.ulii.org/ug/judgment/constitutional-court/2010/3/> [https://perma.cc/33YK-YUFL].

the court is not bound by foreign jurisprudence, such case law might prove persuasive and helpful in deciding similar cases.<sup>235</sup>

Second, Ugandan courts are willing to adopt jurisprudence from other African countries if those countries belong to the common law tradition. In *Kigula v. Attorney General*,<sup>236</sup> the Uganda Constitutional Court stated that it was willing to look at case law from other African countries on a similar question because those countries also followed the common law tradition.<sup>237</sup>

Third, Ugandan courts have borrowed from other countries with historical, political, cultural, and economical similarities, referring to cases from similarly situated African countries to validate their rulings to political elites and constituents. For example, in referencing South African jurisprudence, Uganda's courts often refer to the fact that both countries have a "chequered history on human rights."<sup>238</sup> *Abuki v. Attorney General* exemplifies the cultural affinity *raison d'être* for jurisprudential adoption.<sup>239</sup> In *Abuki*, the Uganda Constitutional Court fully adopted the reasoning in the South African case of *Makwanyane*.<sup>240</sup> The Ugandan court stated:

The myth of Africans requiring harsh punishment has been exploded by the judgment of the South African Supreme Court in [*Makwanyane*] . . . in which it is shown that African values are based on "need for understanding but not for vengeance, and need for reparation but not retaliation, a need for *ubuntu* but not for victimization." Of course the concept of "*ubuntu*," the idea that being human entails humaneness to other people is not confined to South African or any particular ethnic group in Uganda. It is the whole mark of civilised societies . . . . It will be recalled that the word "*ubuntu*" though linguistically peculiar to only certain groups, is a concept embraced by all the communities of Uganda. I would gladly associate myself with the view expressed by [Justice Madala] . . . that the African concept

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235. *Muhwezi v. Att'y Gen.* [2010] UGCC 3 (CC) (Uganda); *see also Kigula v. Att'y Gen.* [2005] UGCC 8 (CC) at \*17 (Uganda) ("The Nigerian case of *Kalu vs. the State* . . . is of particular interest . . . here because the provisions of the Nigerian Constitution considered therein by their Supreme Court are in *pari materia* with our articles . . . now in question.") (internal citations omitted).

236. [2005] UGCC 8 (CC) (Uganda).

237. *Id.* at \*16.

238. *E.g., Olum v. Att'y Gen.* [2000] UGCC 3 (CC) at \*27 (Uganda) (referencing the preamble to Uganda's Constitution which recalls "our history which has been characterised by political and constitutional instability"); *Du Plessis v. De Klerk* 1994 (6) BCLR 124 (CC) at 128 (S. Afr.) ("When interpreting the Constitution and more particularly the Bill of Rights it has to be done against the backdrop of our chequered and repressive history in the human rights field."); *Rwanyarare v. Att'y Gen.* [2000] UGCC 2 (CC) at \*8 (Uganda); *Uganda Law Soc'y v. Att'y Gen.* [2009] UGCC 1 (CC) at \*40 (Uganda).

239. *See generally* [1997] UGCC 5 (CC) (Uganda).

240. *See id.* at \*8-9; *State v. Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.).

embodies within itself humaneness, social justice and fairness, and permeates fundamental human rights.<sup>241</sup>

Fourth, Ugandan courts adopt other African jurisprudence to ensure that the courts take advantage of principles that have been tested and proven elsewhere—particularly where there is a dearth of local precedent to reference, as is often the case in developing countries such as Uganda. Thus, the Uganda Supreme Court castigated the Uganda Constitutional Court for ignoring African case law: the omission was “almost tantamount to taking a maiden voyage into the mystery of interpretation.”<sup>242</sup> In *Kigula v. Attorney General*, a Ugandan court held that where an issue was not previously adjudicated upon in Uganda, judges should look to other countries for guidance, focusing on countries “nearer [to] home, with similar legal systems like ours.”<sup>243</sup>

In adopting jurisprudence from other countries for the reasons indicated above, Ugandan courts have referenced a broad range of countries including Botswana,<sup>244</sup> Ghana,<sup>245</sup> Kenya,<sup>246</sup> Malawi,<sup>247</sup>

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241. *Abuki*, [1997] UGCC 5, at \*8–9.

242. *Ssemogerere v. Att’y Gen.* [2004] UGSC 10 (SC) at \*66 (Uganda) (discussing the constitutionality of certain constitutional amendments).

243. [2005] UGCC 8 (CC) at \*99 (Uganda).

244. *Found. for Hum. Rts Initiatives v. Att’y Gen.*, [2008] UGCC 1 (CC) (Uganda) (referencing *Att’y Gen. v. Modern Jobe* (Gambia) and *Unity Dow v. Att’y Gen.* (Botswana) regarding the need to give constitutional provisions on human rights a “generous and purposive interpretation”).

245. *Besigye v. Att’y Gen.* [2010] UGCC 6 (CC) at \*18–19 (Uganda) (referencing the Supreme Court of Ghana case *In re Akufo-Addo v. Dramani*, for the proposition that “where a party alleges non-conformity with the electoral law[,] the petitioner must not only prove that there has been noncompliance with the law, but that such failure of compliance did affect the validity of the elections”).

246. *Soon Yeon kong Kim v. Att’y Gen.* [2008] Uganda Legal Information Institute (CC) (Uganda) (referencing *Juma v. Attorney General of Kenya*, (2003) 2 EA 461 (SC), for the proposition that “[t]he accused must be given and afforded those opportunities and means so that the prosecution does not gain an undeserved or unfair advantage over the accused”).

247. *Kamba v. Att’y Gen.* [2014] UGCC 5 (CC) (Uganda) (referencing the Supreme Court of Malawi’s reference by the Western Highlands Provincial Executive for the proposition that “[t]he overriding principle is that in any question relating to the interpretation or application of any provision of the Constitution, the primary aids to the interpretation must be found in the Constitution itself” (internal citations omitted)).



Namibia,<sup>248</sup> Nigeria,<sup>249</sup> Tanzania,<sup>250</sup> Zambia,<sup>251</sup> and Zimbabwe.<sup>252</sup>

At the same time, Ugandan courts make appropriate distinctions when adopting jurisprudence from other African countries. Thus, in the *Kigula* case, Uganda's Constitutional Court reasoned that the South African Constitutional Court held that the death penalty was unconstitutional because the South African Constitution provides for an unqualified right to life, but noted that the Ugandan Constitution was markedly different, listing the death penalty as an exception to the right to life.<sup>253</sup>

Similarly, Uganda's courts will not adopt other countries' jurisprudence if they believe that there are important political or cultural differences between the two countries.<sup>254</sup> For example, while both South Africa and Uganda experienced political transitions and adopted new constitutions around the same time,<sup>255</sup> South Africa adopted a law of amnesty that withstood constitutional challenge,<sup>256</sup> while Uganda's amnesty law did not.<sup>257</sup> Distinguishing

248. *Abuki v. Att'y Gen.* [1999] UGSG 7 (CC) (Uganda) (referencing *Ex parte Att'y-Gen. of Namibia, In re Corporal Punishment* for the proposition that "[i]t is degrading to bar a man from his own home because a homeless person has no dignity in him") (internal citations omitted).

249. *See e.g., Kigula v. Att'y Gen.* [2005] UGCC 8 (CC) (Uganda) (referencing the Nigerian Supreme Court case *Kalu v. State*, deeming the death penalty constitutional) (internal citations omitted).

250. *Kamba v. Att'y Gen.* [2014] UGCC 5 (CC) (Uganda) (referencing *Ssemwogerere v. Attorney General* [2003] Uganda Legal Information Institute (SC) (Uganda) and *Attorney General v. Mtikila* [2010] (CA) (Tanz.) for the proposition that "[t]he entire Constitution has to be read together as an integral whole and no particular provision destroying the other but each sustaining the other").

251. *Besigye v. Att'y Gen.* [2010] UGCC 6 (CC) at \*23 (Uganda) (referencing the Zambian case *Mazoka v. Mwanawasa*, (2002) for the proposition that elections would not be annulled where, "while not being totally perfect . . . (the elections) were substantially in conformity with the law and practice") (internal citations omitted).

252. *See e.g., Kigula*, [2005] UGCC 8, at \*16–17 (referencing the Zimbabwe Supreme Court's decision in *Catholic Commission*, in which the court held that the death penalty and execution by hanging were constitutional) (internal citation omitted).

253. *Id.* at \*19.

254. *See e.g., Besigye* [2010] UGCC 6, at \*13 ("Counsel for the petitioner compared our position with that of Zambia and Tanzania. However, the two countries are not comparable bearing in mind our unique political history and the aspirations of our people.").

255. Uganda adopted its Constitution in 1995, while South Africa adopted an interim Constitution in 1994 and a final Constitution in 1996. *See* S. Afr. CONST. 1996; UGANDA CONST. 1995; *Who We Are*, PARLIAMENT OF THE REPUBLIC OF S. Afr., [http://www.parliament.gov.za/live/content.php?Category\\_ID=11](http://www.parliament.gov.za/live/content.php?Category_ID=11) (last visited May 12, 2017) [<https://perma.cc/M6CN-3M2N>].

256. *See* Azanian People's Org. v. President of S. Afr. 1996 (4) SA 672 (CC) at \*44 ¶ 50 (S. Afr.).

257. *Uganda v. Kwoyelo* [2015] Uganda Legal Information Institute (SC) (Uganda). The Uganda decision held that the Amnesty Act of Uganda only covers crimes that are committed in furtherance of or that cause war or armed rebellion, in which respect it

the South African case *Azanian People's Organisation v. President of South Africa*,<sup>258</sup> in which the South African court held that a state was free to grant amnesty for crimes committed during internal conflict, the Uganda Supreme Court reasoned that its situation differed from South Africa's as follows:

In the South African situation, there was some degree of accountability. The person had to make a full disclosure of all the facts and then seek amnesty. The Uganda Amnesty Act does not provide for full disclosure, but restricts the type of offences that qualify for amnesty. It does not seek to give amnesty to each and every crime however grave and unrelated to the furtherance of or cause of the rebellion.<sup>259</sup>

## 2. Uganda's Judicialization Project Today

Ugandan courts of judicial review—the constitutional courts and Supreme Court—have been moderately successful in their judicialization project. Since a new Ugandan constitution was enacted in 1995, these courts have largely served as instruments of policy development and reconstruction of the rule of law, as well as agents of political stability.<sup>260</sup> Despite this, regimes determined to stay in power have always found ways to prevent the courts from achieving full judicialization of politics; as Professor J. Oloka Onyango succinctly notes, “While the Supreme Court has made some decisions that could be considered quite revolutionary in the Ugandan context, it has also erred in favour of caution if the matter may have implications of a serious political nature.”<sup>261</sup> This process is exemplified by a number of cases that have come before the courts.

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resembles the South African case, but it differs to the extent it holds—unlike the blanket South African amnesty—that any crimes committed against innocent civilians or communities cannot be categorized as “crimes committed in furtherance of the war or rebellion,” and therefore a person who commits such acts does not qualify for a grant of amnesty under the Uganda Amnesty Act. *See id.*

258. *Azanian People's Org.*, 1996 (4) SA, at \*8 ¶ 7, \*44–45 ¶ 50.

259. *Uganda v. Kwoyelo* [2015] Uganda Legal Information Institute (SC) at \*58–59 (Uganda).

260. *See, e.g.,* *Abuki v. Att'y Gen.* [1997] UGCC 5 (CC) (Uganda); *Obbo v. Att'y Gen.* [2000] UGCC 4 (CC) at \*12 (Uganda); *Masalu Musene v. Att'y Gen.* Constitutional Petition No. 5 of 2004; *Uganda Ass'n of Women Lawyers v. Att'y Gen.* [2004] UGCC 1.

261. J. Oloka-Onyango, *Liberalization Without Liberation: Understanding the Paradoxes of the Opening of Political Space in Uganda*, (Human Rights & Peace Ctr., Working Paper No. 2, 2005) (observing that *Besigye v. Museveni* held for the president because “while all the judges found that there were serious irregularities in the 2001 contest, only [two] of [five] were willing to state that those anomalies were so excessive as to impugn [sic] the results”) (internal citation omitted).

At first, Ugandan courts were reluctant to strike down statutes on constitutional grounds. In *Abuki*,<sup>262</sup> the constitutionality of the Witchcraft Act was at issue.<sup>263</sup> A reticent constitutional court held that “[t]he Witchcraft Act may have outlived its usefulness but . . . it is not inconsistent with the Constitution.”<sup>264</sup> Reluctance to strike down statutes and engage in judicialization of politics continued in a number of constitutional cases.<sup>265</sup> “[Upon] closer examination the courts [sic] interpretation . . . put the rules of procedure above the Constitution [, and] . . . did not address itself to the supremacy of the Constitution.”<sup>266</sup> Moreover, when the Constitutional Court provided judicial review after the adoption of the 1994 Constitution, it was simply either too legalistic or timid to confront the other branches of government and thus was unable to execute its judicialization role.

Thereafter, however, more constitutional challenges were brought before the courts, and the executive and legislature expressed willingness to cooperate, and so the judiciary gradually grew in confidence and began executing its judicialization project. The courts’ increasing awareness of their judicializing role in directing legislative and political developments is explicitly reflected in one Supreme Court decision which declared, “[t]he

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262. [1997] UGCC 5.

263. Under the Witchcraft Act, punishment included banishment from a defendant’s home for ten years after release from prison. *Id.* at \*4. The petitioners challenged the constitutionality of the Witchcraft Act because banishment orders amounted to cruel, inhuman, and degrading treatment. *Id.* at \*5.

264. *Id.* at \*17.

265. The court reached the same decision in *Kasirye Byaruhanga & Co. Advocates v. Uganda Development Bank*, S.C.Civil Appeal No.2 of 1997 (Uganda Supreme Court); see also *James Rwanyarale v. Att’y Gen.* [1997] UGCC 1, 15–18 (holding that the Court did not have jurisdiction to hear the case because its role was restricted to interpretation and did not extend to human rights enforcement). This view was later reversed in *Tinyefuza*, *supra* note 200 (holding that the Constitutional Court could entertain matters of enforcement of human rights if their enforcement had an element of interpreting the constitution); see also *Uganda Journalists Safety Comm. v. Att’y Gen.* [1997] UGCC 8 (CC) at \*2–5 (Uganda) (holding that the court could not redress violations of human rights in conjunction with interpretation of the penal code provisions challenged for constitutionality); *Serugo v. Kampala City Council* [1998] UGCC 6 (CC) at \*4 (Uganda) (denying jurisdiction on similar grounds); *Katugugu v. Att’y Gen.*, [1998] UGCC 2 (CC) at \*1–5 (Uganda) (rejecting documents affixed to affidavits as being uncertified public documents). Similar technical considerations were central to the refusal to determine the merits in other cases as well. See e.g., *Pyrali Abdul Rasul Esmail v. Sibo* [1998] UGCC 7 (CC) at \*20–21 (Uganda); *John v. Att’y Gen.* [1997] UGCC 10 (CC) at \*2 (Uganda); *Obbo v. Att’y Gen.* [2000] UGCC 4 (CC) (Uganda).

266. Peter Mukidi Walubiri, *Toward A New Judicature in Uganda: From Reluctant Guards to Conscientious of Justice*, in *UGANDA: CONSTITUTIONALISM AT THE CROSS ROADS* 164 (Peter Mukidi Walubiri ed., 1998).

Court should not allow itself to be diverted from its duty to act as an independent arbiter of the Constitution.”<sup>267</sup> In a number of cases, it became clear that courts of judicial review were willing to vigorously strike down legislation and influence public policy.<sup>268</sup>

There remains, however, a judicial awareness of the fact that political incumbents only allow a certain amount of judicialization beyond which the courts are not allowed to influence the course of events politically. Thus, in several cases<sup>269</sup> challenging the grip of political incumbents on power, the Uganda Supreme Court consistently upheld every electoral challenge, the latest example being *Mbabazi v. Museveni*.<sup>270</sup> Indeed, the executive and legislature even attempted to curtail the judicial review powers of the courts with a constitutional amendment in 2005.<sup>271</sup> The proposed amendment stated that the “Constitutional Court shall not declare an Act of Parliament or any other law as being inconsistent with or in contravention of a provision of this Constitution if that Act or other law is repealed, spent, expired or has had its full effect at the date of delivery of judgment.”<sup>272</sup> It also provided that:

267. *State v. Makwanyane* 1995 (3) SA 391 (CC) at \*59 ¶ 89 (S. Afr.).

268. See e.g., *Ssemogerere v. Att’y Gen.* [2004] UGSC 10 (SC) (Uganda) (declaring the Constitutional Amendment Act of 2000 unconstitutional); *Law & Advocacy for Women in Uganda v. Att’y Gen.* [2007] UGCC 1 (SC) at \*14 (Uganda) (striking down Section 154 of the Uganda Penal Code for violation of the antidiscrimination provisions of the constitution); *Charles Onyango Obbo v. Att’y Gen.* Constitutional Appeal No. 2 of 2002 (Judgment of Feb. 11, 2004) (striking down penal provisions criminalizing so-called “false” news); *Paul Kawanga Semwogerere v. Att’y Gen.* [1999] UGCC 5 (CC) at \*16 (Uganda), Constitutional Petition No. 3 of 1999 (striking down a referendum law); *Masalu Musene v. Att’y Gen.*, (CC) (Uganda) Constitutional Petition No. 5 of 2004 (holding that taxation of judges’ salaries was unconstitutional); *Olum v. Att’y Gen.* [2000] UGCC 3 (CC) at \*18, 24, 35 (Uganda) (striking down the National Assembly Act on the grounds that it infringed the constitutional rights to a fair trial and access to information); *Uganda Ass’n of Women Lawyers v. Att’y Gen.* [2004] UGCC 1 (CC) at \*26 (Uganda) (striking down as discriminatory provisions of divorce law); *Paul K. Ssemogerere s. Att’y Gen.*, Constitutional Petition No.5 of 2002 (Constitutional Court of Uganda) (unpublished opinion on file with author) (striking down provisions of the Political Parties and Organisations Act).

269. See, e.g., *Besigye v. Att’y Gen.* [2010] UGCC 6 (CC) at \*25–26 (Uganda) (holding that while there had been state-inspired military violence during the elections, the incumbent candidate was not responsible for any wrongdoing because the president did not approve or have knowledge of the violent acts); *Besigye v. Electoral Comm’n* [2007] UGSC 24 (SC) at \*95 (Uganda) (holding that while there was noncompliance with the electoral law, the overall conduct of the election did not substantially affect the results).

270. [2016] UGSC 4 (SC) (Uganda).

271. GOV’T OF UGANDA, GOVERNMENT WHITE PAPER ON (1) THE REPORT OF THE COMMISSION OF INQUIRY (CONSTITUTIONAL REVIEW) AND (2) GOVERNMENT PROPOSALS NOT ADDRESSED BY THE REPORT OF THE COMMISSION OF INQUIRY (CONSTITUTIONAL REVIEW) 106 (Sept. 2004).

272. *Id.*

Notwithstanding anything in this article, where the Constitutional Court declares any Act of Parliament or any other law to be inconsistent with or in contravention of a provision of this Constitution, the declaration shall not affect anything duly done or suffered or any right, privilege, obligation, or liability, acquired, accrued or incurred under the authority of that Act or other law prior to the date of the judgment which declared the Act or other law inconsistent with or in contravention of a provision of this Constitution.<sup>273</sup>

The amendment was an attempt to bully and drastically curtail the Constitutional Court's power to review laws and acts of the government. If passed, the government would simply repeal the law or render it expired before the court delivered any judgment against it.

#### D. Tanzania

##### 1. Tanzania's Reliance on African Jurisprudence

Tanzania's Court of Appeal references jurisprudence from other African countries, particularly South Africa. For example, in *Ndyanabo v. Attorney General*,<sup>274</sup> Tanzania's Court of Appeal referenced the South African case *Lesapo v. North West Agricultural Bank* regarding the right to access to the court.<sup>275</sup> Similarly, in *Attorney General v. Mtikila*,<sup>276</sup> the Tanzanian Court of Appeal referenced what it called the South African "persuasive authorities" of *Makwanyane*<sup>277</sup> and *State v. Bhulwana*.<sup>278</sup> The Court of Appeal has also gone out of its way to describe the constitutions of Malawi, Namibia, and South Africa as being from the "African soil."<sup>279</sup>

In general, Tanzania has adopted decisions from the common law countries, as evidenced by its references to Zimbabwe and Gambia, and their respective jurisprudence, such as *Bull v. Minister*

273. *Id.* The government later withdrew the amendment bill from consideration by the legislature after the Uganda Supreme Court held that the courts have the power to construe one provision of the constitution against other provisions of the same constitution. See *Ssemogerere v. Att'y Gen.* [2004] UGSC 10 (SC) at \*25 (Uganda).

274. [2002] AHRLR 243 (TzCA 2002) (Tanz.).

275. See *id.* at \*23 (quoting *Lesapo v. North West Agric. Bank*, Case CCT 23/99).

276. *Mtikila v. Att'y Gen.*, Misc. Civil Cause No. 10 of 2005, [2006] TZHC at 5 (Tanz.) (May 5, 2006), available at <http://www.saflii.org/tz/cases/TZHC/2006/5.html> [<https://perma.cc/CYL4-Q8P2>].

277. *State v. Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.).

278. 1996 (1) SA 388 (CC) (S. Afr.); see also *Ndyanabo*, [2002] AHRLR at \*23 (referencing the South African Constitutional Court).

279. *Mtikila* [2010] TzCA at \*51 ¶ 29.

of *Home Affairs and Attorney General of the Gambia v. Jobe*.<sup>280</sup> The Tanzanian Court of Appeal has also referenced jurisprudence from its neighbor, Kenya. For example, in *Mtikila* it referenced the Kenyan decision of *Kamau v. Attorney General*.<sup>281</sup>

## 2. Tanzania's Judicialization Project

The impact of Tanzania's courts of judicial review on the political process must be assessed against the fact that Tanzania has a measure of political stability that tends to permeate public discourse, including the extent to which applications can be made to the court regarding judicial review. To begin with, Tanzania did not have a bill of rights in its constitution until the Fifth Constitutional Amendment Act of 1984.<sup>282</sup> Importantly, the Tanzanian Bill of Rights uses claw-back clauses that take away the substance of the guaranteed rights by inserting limiting language.<sup>283</sup> Such clauses include "in accordance with law" and "subject to the laws of the land."<sup>284</sup> However, the rights are enforceable through constitutional petition in the High Court of the United Republic of Tanzania and the High Court of Zanzibar, respectively.<sup>285</sup> Before a petition can be heard by either of those courts, however, it must first be presented to a single judge who screens for frivolous petitions.<sup>286</sup> Only non-frivolous petitions can be placed before a panel of three judges who hear and determine the matter.<sup>287</sup> As renowned constitutional and human rights lawyer Sengondo Mvungi observes, "This long procedure has made human rights litigation in Tanzania a nightmare. It makes it difficult for individuals to defend their rights."<sup>288</sup>

That said, the courts in Tanzania have shown spirited vigilance in making sure that claw-back clauses that take away, water down, or seek to defeat the substance of the guaranteed rights do not

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280. See *Dir. of Pub. Prosecutions v. Daudi Pete* [1991] TZCA 1 (Tanz.) (referencing *Bull v. Minister of Home Affairs*, (1987) LRC (Const.) at 555 and *Attorney General of the Gambia v. Memedou Jobe*, (1984) A.C. 689 (PC)).

281. *Mtikila* [2010] TzCA at \*70 ¶ 40 (referencing *Jesse Kamau v. Attorney General*, [2010] eKLR).

282. See SENGONDO MVUNGI, CONSTITUTIONALISM IN EAST AFRICA: PROGRESS, CHALLENGES AND PROSPECTS IN 2002 68–69 (Fredrick Jjuuko ed., 2006).

283. See *id.* at 69.

284. See *id.*

285. *Id.*

286. See *id.* at 71–72.

287. See *id.*

288. *Id.* at 72.

prevail. For example, in *Pumbun v. Attorney General*,<sup>289</sup> the Tanzanian Court of Appeal held that claw-back clauses must be strictly construed, “otherwise the guaranteed rights under the Constitution may easily be rendered meaningless.”<sup>290</sup>

Related to the human rights concerns that claw-back clauses present is the issue of the extent to which legislation conforms to human rights guaranteed by the constitution in the first place. One such example is the right to participate in democratic governance. In 1992, the government introduced a multiparty political system and various new legislation,<sup>291</sup> but was very slow in changing these laws to conform to human rights norms.<sup>292</sup> Two new political parties were given permanent registration in 2002, including the Democratic Party,<sup>293</sup> which was headed by Christopher Mtikila.<sup>294</sup> In one of his most famous actions, Mtikila moved the High Court of Tanzania to declare that a candidate not belonging to any political party could contest the presidency.<sup>295</sup> However, soon after this decision, the parliament amended the constitution, rendering the ruling of the High Court ineffective or a nullity and defeating the general right to participate in the governance of the country.<sup>296</sup> In a subsequent petition, the High Court condemned the government’s action as “contrary to the dictates of good governance.”<sup>297</sup> The High Court reasoned that parliament’s legislative powers were not without limits, and held that forcing anyone to join a political party was expressly unconstitutional.<sup>298</sup> The court was conscious of its critical role in shaping political evolution in the country, as exemplified by the following statement: “By analogy our Constitutional provisions on representative democracy, having emerged

289. 1993 TLR 159 (CA) (Tanz.).

290. *Id.* at 167.

291. See *Tanzania: Key Historical and Constitutional Developments*, KITUO CHA KATIBA, <http://www.kituoachakatiba.org/sites/default/files/legal-resources/Tanzania%20Key%20Historical%20and%20Constitutional%20Developments.pdf> (last visited May 11, 2017) [<https://perma.cc/HC6G-GWH3>].

292. See MVUNGI, *supra* note 282, at 116.

293. See *id.* at 76.

294. See *id.*

295. *Mtikila v. Att’y Gen.* [1995] TLR. 31, 31, available at <https://www.elaw.org/content/tanzania-rev-christopher-mtikila-v-attorney-general-civil-case-no-5-1993-high-court-tanzania> [<https://perma.cc/22ZW-FSZ9>]; see also *Mtikila v. Att’y Gen.* [2006] TZHC 5 (observing Mtikila’s determination in filing with the court). Mtikila alleged that the amendments effectively forced ordinary Tanzanians to join a political party to participate in government affairs or to be elected to any of the posts of president or member of parliament, and were therefore unconstitutional. *Id.*; see also *Mtikila*, [2006] TZHC 5.

296. See MVUNGI, *supra* note 282, at 76–77.

297. *Mtikila*, *supra* note 276.

298. *Id.*

from the cocoon of a one party system should be interpreted so as [to] expand the arena of representative democracy and not shrink back to that era as demonstrated in the attempt [made] by Act 34 of 1994.”<sup>299</sup>

In 2002, the Court of Appeal ruled on a provision of the Elections Act, 1985, as amended by Act No. 4 of 2000, in the case of *Ndyanabo v. Attorney General*.<sup>300</sup> The court held that this provision’s imposition of a five million shilling deposit upon petitioners as security for court costs was excessive and unreasonable.<sup>301</sup> The court declared that the provision denied petitioners their constitutional right to free access to justice.<sup>302</sup> The public hailed the decision as a landmark in the struggle for the public’s right to access the courts.<sup>303</sup>

The speaker of the parliament, however, reacted bitterly against the decision, arguing that the court had “usurped” the power of the legislature.<sup>304</sup> The speaker further said “that the legislature’s competence to make or unmake laws is not limited by anybody or anything except by legislator’s common sense and wisdom.”<sup>305</sup> In its October session, the government docketed a bill re-enacting the same provision in the Elections Act that the Court of Appeal knocked down in *Ndyanabo*.<sup>306</sup> In doing so, the government dared the court to repeat its earlier holding, an indication of the limited scope of the court’s impact on policy through judicial review.

### E. Nigeria

Nigeria’s checkered political past<sup>307</sup> is well documented and was accompanied by a lack of judicial independence.<sup>308</sup> However, dur-

299. *Id.*

300. [2002] AHRLR 243 (TzCA 2002) (Tanz.).

301. *See id.* at \*10.

302. *Id.* at \*38.

303. *See MVUNGI, supra* note 282, at 80.

304. *See id.*

305. *Id.*

306. *See id.*

307. *See* Hakeem O. Yusuf, *The Judiciary and Political Change in Africa: Developing Transitional Jurisprudence in Nigeria*, 7 INT’L J. CONST. L. 654, 657 (2009) (“Nigeria has had a checkered history, in which military authoritarianism virtually destroyed the fabric of state and society. By 1999 it had witnessed almost three decades of military rule, interspersed with two brief spells of democratic governance.”).

308. The African Commission on Human and People’s Rights commented on the lack of judicial independence in a number of cases. *See, e.g.*, Constitutional Rights Project v. Nigeria, Comm. No. 60/91, [1995] Afr. Ann. Act. Rep., ¶ 14 (holding that transfer of jurisdiction “from the normal courts to a tribunal chiefly composed of persons belonging to the executive branch of government . . . creates the appearance, if not actual lack, of



ing the political transition that restored democratic governance in Nigeria, the judiciary heard many cases and thus became “a strategic actor in policy-decision making.”<sup>309</sup> Nigeria’s “suspect democratic credentials [have tried] to legitimize the exercise of power through the judicial process,”<sup>310</sup> and, importantly, the courts were “faced with the difficult task of maintaining the normative balance between pure politics and law in [their] interpretive institutional role.”<sup>311</sup> Much as the courts in South Africa and Uganda functioned as checks on other branches of government during political transitions, the Nigerian judiciary played a political role throughout transition, mediating to the extent that its transitional jurisprudence lent legitimacy to the political process.<sup>312</sup> The judiciary has been “called upon continually to play an active and critical role in the political reconstruction and democratic transition.”<sup>313</sup>

Many cases illustrate the increasingly assertive role of the Nigerian judiciary in shaping public policy. For example, in *Attorney General of Abia State v. Attorney General of the Federation*,<sup>314</sup> petitioners alleged that the impugned statute, in providing for direct disbursement of local government allocations from the federal account—with federal authorities to monitor the process—violated the constitution because it took away the powers allocated to the local governments over fiscal matters.<sup>315</sup> The Supreme Court of Nigeria agreed, holding that the statute ran afoul of constitutional limits.<sup>316</sup>

Some commentators argue that this decision was “essentially policy-based,”<sup>317</sup> and that “a fundamental policy objective attracted unanimous support of the Court even as it compromised another constitutional imperative”<sup>318</sup>—state power. The court was willing to “sacrifice such [state] autonomy in favor of the overriding priority that . . . members of the Court’s Constitutional Panel accorded

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impartiality”); Constitutional Rights Project v. Nigeria, Comm. No. 87/93 ¶ 3 (1995); Civil Liberties Org. v. Nigeria, Comm. No. 129/94 ¶ 2 (1995).

309. Yusuf, *supra* note 307, at 656.

310. *Id.*

311. *Id.*

312. *See id.*

313. *Id.* at 660.

314. Att’y Gen. of Fed’n. v. Att’y Gen. of Abia State, 7 NLR 71 (2006) (Nigeria), available at <http://www.nigeria-law.org/Attorney-General%20of%20the%20Federation%20%20V%20%20Attorney-General%20of%20Abia%20State%20&%2035%20Ors.htm> [https://perma.cc/AZ44-MLNR].

315. *See id.*

316. *See id.*

317. Yusuf, *supra* note 307, at 673.

318. *Id.*

to the power of the National Assembly to make laws for the ‘peace, order and good government of the Federation.’”<sup>319</sup> That is, regardless of constitutional provisions respecting power reserved to the states, the court endorsed the federal government’s “anticorruption initiative.”<sup>320</sup> According to one researcher, the “Court consciously promoted policy over law,”<sup>321</sup> but remained confident that its decision would be legitimate. The political climate surrounding the legislation’s adoption explains the court’s decision:

[The law was] passed a few months after the inauguration of the new civil administration of President Olusegun Obasanjo, whose proclaimed anticorruption policy attracted immense popular support. The country was reeling from revelations of staggering corruption of past military regimes . . . . Public utilities and basic social infrastructure like roads, public health institutions, potable water, electricity, and others were in state of dilapidation or were altogether absent. Many were unable to afford three meals a day.

When the Court heard [the case], it was aware of the depth of public outrage at the perceived reluctance of the National Assembly to pass the [disbursements statute], and of national and international concern over the situation.<sup>322</sup>

Overall, however, commentators on the role of the Nigerian judiciary note that the court has tended to defer to the legislature.<sup>323</sup> For example, one scholar explained:

In case after case, when called on to strike down a piece of challenged legislation in its entirety, the Court has exercised restraint. For all its seeming readiness to take on political issues and its commitment to uphold the Supremacy Clause, the Court has been reluctant to declare any piece of legislation illegal.<sup>324</sup>

With regard to the role of comparative international jurisprudence, the Nigerian record appears to be mixed. In some cases, the court appears to embrace foreign jurisprudence—mostly from England—but in others it appears reticent. For example, in *Attorney General of Abia State v. Attorney General of the Federation*,<sup>325</sup> the Supreme Court of Nigeria relied on a variety of international jurisprudence and norms.<sup>326</sup> However, in *Fawehinmi v. Babangida*,<sup>327</sup>

319. *Id.*

320. *Id.* at 674.

321. *Id.* at 675.

322. *Id.*

323. *See id.* at 664.

324. *Id.*

325. *Att’y Gen. of Fed’n. v. Att’y Gen. of Abia State*, *supra* note 314.

326. *See* Yusuf, *supra* note 307, at 678.

327. *See* Fawehinmi v. Babangida (2003) LPELR-SC.360/2001, available at <http://lawreport.allfwlr.com/index.php/cases/detail?tokz=1302> [<https://perma.cc/D2VU-R6CB>].

the court cited to Section 35(1) of its own constitution, which is based on comparative human rights law and jurisprudence.<sup>328</sup>

Overall, the Nigerian judiciary's record is a mixed bag, dictated by Nigeria's turbulent and brutal political past and by the more recent politically stable disposition.

## CONCLUSION

In the selected African countries that have experimented with judicial review, success has been limited. This Article has argued that improvement in this area can be achieved if the process is deemed to be legitimate, and that the legitimacy of this exercise can be enhanced by more comparative trans-African judicial review. The Article also presented evidence to support the proposition that countries that have engaged in comparative trans-African judicial review are still not engaging in nearly enough comparative trans-African judicial review,<sup>329</sup> although some African courts have pointed to the legitimacy of such an approach.<sup>330</sup> Numerous reasons described herein justify more borrowing from African precedent as opposed to foreign precedent.<sup>331</sup> For example, several African ruling elites have argued that because African societies are still developing economically, they are not in a position to embrace outside influences, including foreign jurisprudence, that do not readily respond to the contingencies that obtain in Africa.<sup>332</sup> The Article also recognized the arguments against adopting trans-African judicial review.<sup>333</sup>

Incorporation of African cases increases the legitimacy of judicial decisions that impact public policy. Accordingly, courts of judicial review across common law Africa should reference jurisprudence from as broad a range of African countries as possible. It is striking that even when courts reference other African countries' jurisprudence, they generally only reference South Africa's or that of courts from their neighboring countries.<sup>334</sup> Courts in southern Africa should refer to jurisprudence from as far as Nigeria and

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328. See Yusuf, *supra* note 307, at 679.

329. See Part I.

330. See Part II (discussing South African, Ugandan, and Kenyan jurisprudence that has supported this approach).

331. See Part I (discussing the sovereignty, autonomy, economic, and historical and cultural arguments).

332. See Subsection I.A.2.

333. See Section I.B.

334. See generally Section II.A (discussing South African judicial review).

Ghana; and Nigerian courts should similarly refer to African cases, and should not limit themselves to English cases.

One reason for the dearth of references to jurisprudence from other countries could be the fact that the jurisprudence of most African courts of judicial review is not readily available to other African courts. While many courts across the globe have posted their jurisprudence online (perhaps with the exception of South Africa), very little African jurisprudence seems to be readily accessible online. This makes researching African jurisprudence more difficult. Each African country, therefore, should endeavor to provide resources that would avail their jurisprudence to other African countries.

More advanced political regimes, such as South Africa, must set examples for other states to follow. Their courts should more explicitly highlight that there are political and economic dividends that accrue from allowing courts to impact policy. This could act as an incentive for other struggling countries to follow in their paths. Additionally, because scholars play an important role in helping jurists change the way that those jurists perceive their responsibilities, more foreign scholars and students should engage African students, scholars, and jurists, whether through study abroad, cosponsored conferences, or speaker invitations, to emphasize and render in a more positive light African legal regimes.

More stable and economically advanced African countries tend to have more politically powerful courts.<sup>335</sup> Although economically advanced countries, including South Africa, have accorded political power to courts, even these countries have tended to see courts as a means for the preservation of stability, rather than a vehicle for political change.<sup>336</sup> Less democratic African regimes have given courts relatively limited ability to impact policy developments. This latter condition appears to be the case in Kenya, Uganda, and Tanzania.<sup>337</sup>

It is remarkable that countries like South Africa do not reference the jurisprudence of other African courts to the same extent as the other African countries surveyed in this Article.<sup>338</sup> Courts with more advanced political and legal regimes should try to incentivize development or lend support to those countries that are still strug-

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335. See Part II (discussing South Africa and other better politically and economically situated countries).

336. See Sections II.A, C.

337. See Sections II.B–D.

338. See Subsection II.A.1.

gling in certain respects, such as Kenya, Uganda, and Tanzania, by making reference to those other countries' jurisprudence, even if only to contrast it.

Finally, this Article presents a challenge to African judicial review courts: boldly embrace each other's jurisprudence to present more legitimate and effective judicial review to ruling political elites who have hitherto used foreign jurisprudence as a pretext to resist the impact of judicial review on policy and the rule of law.