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Public Interest Litigation Strategy

ACKNOWLEDGEMENT

Kenya has undergone great social, economic and political transformation especially with the promulgation of the Constitution 2010 which, *inter alia*, recognizes the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. The requirement for public participation, accountability, transparency, inclusiveness and equity as national values is enshrined in the Constitution. The result of this is that provisions of the Constitution must be interpreted in line with these values and principles.

While constitution-making is a political process, the realization of the aspiration and rights enshrined will to a large extent require legal process by way of strategic public interest litigation. Owing to the complexity of the constitutional issues that may arise, The Law Society of Kenya is better placed to take lead in litigation on behalf of the public in order achieve progressive realization of Socio-economic rights.

To facilitate this, the Law Society of Kenya set up a public interest litigation unit at the Secretariat to oversee the identification and litigation of public interest cases to their logical conclusion. This unit works closely with the Council's Committee on public interest litigation to achieve its objectives.

I wish to convey our gratitude to the GiZ and its officials, Mr Opimbi Osore and Dr. Gefion Schuler for the invaluable support in coming up with the strategy for public interest litigation.

I also thank the team of Katibu Institute comprising Prof. Yash Pal Ghai, Jill Cottrel-Ghai, Waikwa Wanyoike and Korir Sing'Oei for putting together the ideas for preparation of the strategy document.

Last but not least, I thank the Council of the Law Society of Kenya for the policy direction and Lilian Njeru, Program officer- Public Interest & Advocacy for industry and commitment to the course.

APOLLO MBOYA
SECRETARY/CEO

FORWARD

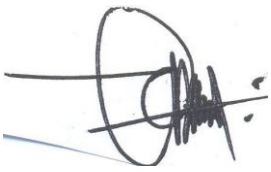
The Law Society of Kenya (LSK) is a statutory body whose objects among others include protecting and assisting the public in all matters touching, ancillary or incidental to the law. LSK is therefore expected to provide appropriate leadership on matters touching on the rule of law, governance issues, legal education and training while evolving and responding to the changing needs of society. The Law Society of Kenya has in the past used strategic litigation to clarify important points of law, challenge discriminatory practices and to strengthen protection of human rights.

Development of this litigation strategy became necessary to enable LSK deal with emerging challenges in the operating environment following the promulgation of the Constitution 2012.

Having re-examined its mandate and core functions, the Society has developed its vision and mission statements, and the core values which will provide strategic direction. Out of the six strategic objectives, promotion of the rule of law through enhanced access to justice is at the centre of the LSK activities.

The Law Society of Kenya has been engaging in a number of public interest litigation and this strategy is intended to refine the engagement in a targeted manner required to achieve the objectives for every litigation intervention.

The successes of the public interest litigation over the years remain the building blocks for this strategy. After reviewing the progress made so far, it is without doubt that much more needs to be done for the Law Society of Kenya to robustly achieve its mandate.
I believe that this strategy will be a central pillar in ensuring the successful implementation of the objectives of the society and delivery of the targets set in the strategic plan. The formulation of this strategy has taken into account our desire and commitment to the promotion of good governance and the just rule of law.



ERIC KYALO MUTUA
CHAIRMAN

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INTRODUCTION

The necessity for the Public Interest Litigation Strategy has arisen because of following the issues and objectives:

ISSUE	OBJECTIVE
1. Proper organization of clients	Creation of impact on the target groups that have special interest in the matter being litigated.
2. Coordination and information sharing	Proper coordination and information sharing among strategic partners to bring on board technical expertise into the matter being litigated upon.
3. Timing of litigation	Timing is an essential element since Litigation to commence in the right atmosphere when the relevant evidence is in place.
4. Research	Detailed research to be undertaken in advance and during the litigation period to give a proper theoretical and factual foundation
5. Follow up	Any victory in litigation can be translated into practical benefits for a large number of people on the ground, including those who are not directly involved in the litigation.

To help ensure successful implementation of the strategy a case tracking system for pro bono lawyers will be installed in the Secretariat Law Society of Kenya.

Chapter 1

Public Interest Litigation: Origins, Nature, Scope and Issues

There are many "definitions" of public interest litigation (PIL). It may be necessary to define the concept if special rules or concessions are to apply; otherwise it may not be necessary to all. The feature that most people would think of as defining PIL is that the issue is one of importance to the public at large, or for a major section of the public, and for many that section would have to be a disadvantaged one. Also the impact of the case should, for many, be a change in the law or in social conditions, as affected by law.

Traditionally, the law discouraged PIL, especially cases brought by those not directly affected by an issue. But there have been changes in many countries, in rules of standing, costs, remedies and in other respects that have made PIL more useful as a tool of social change.

PIL is often understood to have begun in the USA, but there is a stream of litigation and case law now amounting to a tradition from the Indian courts. Both have had considerable influence on PIL in other countries. The courts of India have been especially creative in devising new procedures.

Now PIL is found in many countries, although some judiciaries remain resistant, often relying on the old rules of standing to block cases. PIL cases have involved socio-economic rights, rights of prisoners, environmental issues, and equality issues, but the range is very wide. In some countries, including India, the use of PIL terminology is largely restricted to human rights.

PIL is not without controversy. Does it interfere with the separation of powers? Do the courts have the capacities to deal with complex cases involving public expenditure and policy issues? Is there a risk of cases being brought, or even decided, for political motives? What is the impact of PIL on the executive and administration: are they encouraged to do what they ought to do, or discouraged because the courts will make up their deficiencies? It would be wrong to deny that these are genuine concerns. It would also be wrong to deny however, that these concerns play no part in more "traditional" litigation – even on the part of the judges.

There have certainly been signs in some countries of executive resistance to PIL and efforts to cut back on funding and other factors that support PIL.

There is a good deal of knowledge now about what makes for more effective PIL. Some of these are not within the control of the legal profession, such as a judiciary prepared to respond to innovative cases.

Some factors that are more within the legal profession's control are:

- careful strategising in terms of cases accepted and clients supported, and of timing
- treating PIL as one among a number of strategies, and choosing carefully between them
- very thorough and imaginative preparation of cases
- use of Brandeis briefs, which are present research and sociological data before the courts
- working with specialist NGOs, which add not only their expertise but their quality of being "repeat players"
- increased use of amicus curiae (who are often NGOs) or interveners

- supporting the client throughout the litigation process, whether that is an individual or a group
- working with the broader community of stakeholders in the litigation, educating them, getting their support
- Follow-up after a case is concluded, to ensure implementation of remedies or to expand the impact of the case to other jurisdictions.

Key lessons related to PIL are that (1) pro bono assistance from practitioners or law students may be very helpful in carrying the burden, (2) that failure of implementation has been a common problem, and that (3) the impact of PIL is not always through winning the individual case – even losing cases can give rise to publicity, create awareness and may ultimately lead to social and political change.

What is public interest litigation?

There are many attempts, judicial and otherwise, to elucidate the nature of public interest litigation (PIL). The Australian Law Reform Commission wrote:

> *13.2 No clear definition of public interest exists in legislation or case law. The courts have preferred to leave the definition open and to determine the question of public interest on the basis of the circumstances of each case. However, the courts give some guidance as to how the question is to be approached. A widely accepted approach is to see whether the case affects the community or a significant sector of the community or involves an important question of law.*[1]

Whether a case is actually PIL may become important if the court is considering using a special procedure or granting a special remedy, or if an NGO or a funding body has to decide if a case fits within its mandate. We can see this in the Canadian Supreme Court's observation that it is "for the trial court to determine in each instance whether a particular case, which might be classified as 'special' by its very nature as a public interest case, is special enough to rise to the level where the unusual measure of ordering costs would be appropriate."[2] Otherwise it may be unnecessary for a case to be characterised as PIL at all.

Most would agree that the defining purpose of PIL is "to precipitate social change through court-ordered decrees that reform legal rules, enforce existing laws, and articulate public norms."[3] In most cases, PIL's reach is "beyond the individual case and the immediate client."[4] In relation to Eastern Europe, scholars have described PIL as "law-

[1] *Costs Shifting - who pays for litigation* Report No. 75 (1994) http://www.austlii.edu.au/au/other/alrc/publications/reports/75/13.html#Heading4

[2] *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371, para. 38.

[3] Helen Hershkoff, *Public Interest Litigation: Selected Issues and Examples* available at http://www1.worldbank.org/publicsector/legal/PublicInterestLitigation.doc>.

[4] Edwin Rekosh, Kyra A. Buchko, &VesselaTerzievaeds *Pursuing the Public Interest: A Handbook for Legal Professionals and Activists*, (2000) at 81.

based advocacy intended to secure court rulings to clarify, expand, or enforce rights for persons beyond the individuals named in the case at hand."[5]

A central concern for most would be that the policy change PIL seeks to produce should be on "behalf of individuals who are members of groups that are underrepresented or disadvantaged."[6] Where donor funding or pro bono input into the case is a major factor, this will necessarily be an important, probably explicit, requirement. The Indian courts have laid special emphasis on this – for reasons that will be discussed in later paragraphs.

The Public Interest Law Clearing House in Victoria and the Public Interest Law Clearing House Inc in New South Wales in Australia use certain quantitative and qualitative criteria to determine which cases to support: "The matter must require a legal remedy and be of public interest, which means it must; a) affect a significant number of people not just the individual or; b) raise matters of broad public concern or; c) impact on disadvantaged or marginalized group, and d) it must be a legal matter which requires addressing *pro bono publico* ('for the common good').[7] The Tanzanian constitutional court also emphasizes an effective legal remedy which courts can fashion in response to the public concern, stating that PIL is:

> *not the type of litigation which is meant to satisfy the curiosity of the people, but it is a litigation which is instituted with a desire that the Court would be able to give effective relief to the whole or a section of the society…the condition which must be fulfilled before public interest litigation is entertained by the Court is that the court should be in a position to give effective and complete relief. If no effective relief can be granted, the court should not entertain public interest litigation.*[8]

The Canadian Supreme Court's description also speaks of "public law", implying that a private suit could not be PIL. That would be the case in India where the legal vehicle for PIL is Article 32 of the Constitution (enforcement of fundamental rights in the Supreme Court). But for the moment we leave open whether there can be private PIL suits. Abraham Chayes contrasted public law litigation with the traditional private law model:

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[5]James Goldstone, *Public Interest Litigation in Central and Eastern Europe: Roots, Prospects and Challenges*, 28 Hum. R. Qly, 492-527, 496 (2006).

[6]Helen Hershkoff& Aubrey McCutcheon, "Public Interest Litigation: An International Perspective", in Mary McClymont& Stephen Golubeds*Many Roads To Justice: The Law-Related Work Of Ford Foundation Grantees Around The World*, 283, 284 (New York: Ford Foundation, 2000). See also Geoff Budlender in Ayesha Dias and Gita Welch, eds., *Justice for the Poor: Perspectives on Accelerating Access*(Delhi: Oxford University Press, 2009) at 204.

[7]Penny Martin, *Defining and refining the concept of practicing in the public interest* 28(1) Alternative Law Journal (2003)pg. 3.

[8]In the High Court of Tanzania at Dodoma, Civil Case No 5 of 1993, *Rev Christopher Mtikila v Attorney General* (ruling of October 27,1994) at pg.26.

(1) The scope of the lawsuit is not exogenously given but is shaped primarily by the court and parties.
(2) The party structure is not rigidly bilateral but sprawling and amorphous.
(3) The fact inquiry is not historical and adjudicative but predictive and legislative.
(4) Relief is not conceived as compensation for past wrong in a form logically derived from the substantive liability and confined in its impact to the immediate parties; instead, it is forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees.
(5) The remedy is not imposed but negotiated.
(6) The decree does not terminate judicial involvement in the affair: its administration requires the continuing participation of the court.
(7) The judge is not passive, his function limited to analysis and statement of governing legal rules; he is active, with responsibility not only for credible fact evaluation but for organizing and shaping the litigation to ensure a just and viable outcome.
(8) The subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy.[9]

There are many related terms, such as human rights litigation, strategic litigation, social impact litigation, social action litigation, social change litigation, test case litigation, and class actions.[10] Analytically PIL is distinguishable from these, though most examples are based on human rights, while test cases and class actions are more specifically legal concepts that may be used, but which are not necessarily PIL.

The classic view

The classic common law view of litigation was that it involved parties going to court to protect their own interests, either as plaintiffs or defendants. This was supported by a number of rules of law or procedure, and attitudes, including:

- that only a person with an "interest" could bring an action, others not having "standing"
- that under various statutes only "persons aggrieved"[11] by some previous decision may bring an action or an appeal;[12]

[9]Helen Hershkoff& David Hollander, "Rights into Action: Public Interest Litigation in the United States" in Many roads to justice, above.
[10]Paul Goldstone, "Public Interest Litigation in Central and Eastern Europe", in Ayesha Dias and Gita Welch, above, p. 259.
[11]The phrase appears many times in Kenyan legislation, e,g., s. 15 of the Physical Planning Act.
[12]It might seem that this is the same as the previous point, but at least some courts have taken a different view. E.g. in *Historic Buildings Monuments Commission for England (English Heritage v Secretary of State for Communities and Local Government &*[2010] JPL 451, [2009] EWHC 2287 (Admin) the court said "There is a temptation to equate the test of "standing" in judicial review... and the test of being a person aggrieved . In my judgment that would be wrong. Parliament has chosen to use the word "aggrieved" as setting the threshold for being able to bring a statutory challenge to certain planning acts or orders. There are sound reasons for setting the threshold higher than on a judicial review."

- that it was a crime and a tort (maintenance) for a person who had no personal interest in an alleged wrong to support another person to sue;
- that it was a crime and a tort (champerty) for a person who had no personal interest in an alleged wrong to support another person to sue in return for a share of the proceeds of the litigation, if any;
- that although it was possible to bring a representative action on behalf of a number of people it was not possible in such an action for damages to be awarded;
- that normally the losing party in civil litigation is ordered to pay the costs of the winning party
- the rule that certain issues involving the public interest could be litigated only by the Attorney-General, or with the AG's approval
- suspicion of amici curiae.[13]

Either by statute or by judicial precedent, many of these rules have been modified, for example, maintenance and champerty have been abolished as crimes and torts by statute in many jurisdictions[14]and the "person aggrieved" concept is applied less rigidly.[15]

United States

Public interest litigation in the United States emerged from the legal battles that surrounded the civil rights movement. Litigation was one component of a broad strategy to change discriminatory laws and policies – along with protests, sit-ins, civil disobedience, and lobbying government officials, legal cases were filed in courts around the country. The famous school desegregation case of *Brown v Board of Education of Topeka, Kansas*[16] often is viewed as the first real PIL case.

> *It is the classic model of public litigation: no private injury was asserted, no dollars in redress were sought, no individual person was prosecuted as a wrongdoer, and no past focus limited the remedy or the role of the Court.*[17]

Learning from the success of using litigation as a component of the civil rights movement, non-governmental organizations across the United States which focused on gender equality, reproductive rights, disability rights, children's rights, and etc. began using litigation as a central tool in their advocacy strategies. A Ford Foundation study emphasises the importance of civil rights organisations, such as the American Civil Liberties Union, which have enabled "historically marginalized groups to participate in this national judicial process" through PIL in the United States.

[13]Amicus curiae, literally "friend of the court", appearing maybe at the instance of the court or at the request of the amicus her/itself; "I had always understood that the role of an amicus curiae was to help the court by expounding the law impartially, or if one of the parties were unrepresented, by advancing the legal arguments on his behalf" Salmon LJ in *Allen v Sir Alfred McAlpine& Sons Ltd* [1968] 2 QB 229 at p.266.
[14]Though not in Kenya perhaps.
[15]Ibid.
[16]347 US 483 (1954).
[17]LaFrance, Arthur B., "Federal Rule 11 and public interest litigation" (1988) 22 *Valparaiso University Law Review* p331-358.

PIL in the United States often describes cases involving "allegations broadly implicating the operations of large public institutions such as school systems, prisons, mental health facilities, police departments and public housing authorities; and remedies requiring long-term restructuring and monitoring of these institutions."[18] In terms of people and rights, many cases have involved segregation in education, reproductive rights, rights of immigrants, rights of indigenous peoples, and sexual harassment.[19]

Certain procedural features of United States law facilitate public interest litigation, in particular the tradition of class action suits, where a lead plaintiff or plaintiffs can represent the interest of sometimes thousands of similarly situated individuals. Class actions are specifically provided for by rules of court and by statute. Under the Federal Court Rules in the United States, a class action is possible if the class is very numerous, there are questions of law or facts common to the class, the representative (actual party to the litigation) has a claim typical of the class and can represent the class adequately. Many class actions are brought against private businesses and involve what are known as mass torts – cases where negligence or another tort committed by a corporate actor, such as dumping toxic waste, has led to harm for hundreds or thousands of people. Although these are "private" suits they can fall into the category of public interest litigation because they often have broad effects, such as changing corporate practice or inspiring new policy and regulation to control corporate behaviour – when companies change dangerous practices because of threatened by litigation or when litigation exposes loopholes in government regulation, it can be considered to be in the public interest even though it is ostensibly a suit for damages against a private actor.

Class actions also can be brought against the government, in what might be considered a more traditional "public" interest litigation. For example, in *Brown v. Plata* the Supreme Court upheld an injunction ordering the reduction of prisoner populations in overcrowded prisons in the US state of California.[20]

Rules about the awarding of costs also facilitate public interest litigation in the United States. In addition, many civil rights laws in the United States provide that costs can be awarded in favour of civil rights claimants, and other cases against the federal government, in contrast to the usual US rule that costs are not awarded against losing litigants.[21] "Congress generally authorizes fee shifting where private actions serve to effectuate important public policy objectives and where private plaintiffs cannot ordinarily be expected to bring such actions on their own."[22]

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[18]Charles F. Sabel& William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 Harv. L. Rev. 1015, 1017 (2004); See also Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976).

[19]See Hershkoff and Hollander above.

[20]131 S.Ct. 1910 (2011).

[21]E.g. by the Civil Rights Attorneys' Fees Awards Act of 1976 and the Equal Access to Justice Act.

[22]Robert V. Percival and Geoffrey P. Miller, "The Role of Attorney Fee Shifting in Public Interest Litigation" (1984) 47 *Law and Contemporary Problems* pp. 233-247 at p. 241

Courts have also developed their own costs rules, for example the "private attorney general" rule under which "a successful plaintiff may be awarded fees where the interest vindicated is shared by a significant portion of the public and where the availability of private enforcement is essential to the effectuation or protection of the interest."[23]

Factors other than legal rules have aided the development of PIL in the US. First, implementation of rulings generally is not a problem on the same scale as in many other nations. Especially in the case of monetary damages, implementation is fairly routine. When policy changes or other similar remedies are ordered, the courts play an active role in ensuring that decisions are made real in effect. In addition, a culture of pro bono work by individual lawyers and large law firms, as well as the development of clinical legal education programmes through which students can engage in public interest work, have dramatically enhanced the feasibility of bringing many PIL cases.[24] (Please see chapter 3 on Pro Bono.)

India

PIL in India has very different legal foundations, origins, and style, though it does owe something to inspiration from the US. It exists as a specific phenomenon due to interpretation of the Constitution, especially by a few judges of the Supreme Court in the late 1970s and 1980s.

The first major signs of the new jurisprudence were a series of cases involving the rights of prisoners in the late 1970s, in which the Court held that prisoners remain entitled to human rights, laid down rules on the use of leg irons, ordered the release of "undertrial" prisoners who had been in detention longer than they could have been sentenced to serve if convicted, and held that there was a right to counsel to prepare appeals.[25]

The constitutional basis in terms of substance has generally been Article 21, often expanded by reference to the Directive Principles, e.g., "This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy."[26] In procedural terms, the Supreme Court relied upon Article 32 which provided for suits to be taken direct to the Supreme Court, seeking "writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari", among other remedies.

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[23]Graybeal "The Private Attorney General and the Public Advocate: Facilitating Public Interest Litigation" (1981-1982) 34 Rutgers L. Rev. 350, 354.
[24]Cummings, Scott L.; Rhode, Deborah L., "Public Interest Litigation: Insights from Theory and Practice" (2009) 36 *Fordham Urban Law Journal* p 603-651.
[25]The cases included *M.H. Hoskot v Maharashtra* (1978) 3 SCC 308, *HussainaraKhatoon v Bihar* (1980) 1 SCC 98, *Sunil Batra v Delhi Administration* (1978) 4 SCC 494, *Charles Sobraj v Superintendant, Central Jail*, (1978) 4 SCC 104.
[26]Bhagwati J in *BandhuaMuktiMorcha v. Union of India* [1984] 2 S.C.R. 67.

In addition to its Constitutional underpinning, Indian PIL is primarily a product of procedural innovation on the part of judges. For example, the judiciary allowed a human rights organization to intervene in a prisoners' rights case. Later, in a prosaic case about drainage, Justice Krishna Iyer attacked the "blinkered rules of 'standing' of British Indian vintage"[27] and said these must be tackled if "the centre of gravity of justice is to shift, as the Preamble to the Constitution mandates, from the traditional individualism of *locus standi* to the community orientation of public interest litigation."

In *Gupta v President of India* the Supreme Court formulated the principles of the new jurisprudence more fully. Justice Bhagwati wrote:[28]

> *17 It may therefore now be taken as well established that where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 and in case of breach of any fundamental right of such person or determinate class of persons, in this Court under Article 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons.*
>
> *19…Today we find that law is being increasingly used as a device of organised social action for the purpose of bringing about socio-economic change. The task of national reconstruction upon which we are engaged has brought about enormous increase in developmental activities and law is being utilised for the purpose of development, social and economic. It is creating more and more a new category of rights in favour of large sections of people and imposing a new category of duties on the State and the public officials with a view to reaching social justice to the common man. Individual rights and duties are giving place to meta-individual, collective, social rights and duties of classes or groups of persons.*

The key procedural features of PIL in India have been:

- the ability of organisations or groups to bring cases on behalf of others who are unable because of disadvantage to do so
- informal means of initiating cases, even by letter or postcard, or through courts themselves initiating a case on the basis of newspaper reports[29]

[27] *Municipal Council RatlamvVardhichand* 1980 AIR 1622.
[28] AIR 1982 SC 149, 1981 Supp (1) SCC 87, 1982 2 SCR 365

- proactive ways of finding out the facts, including the courts appointing or ordering the appointment of committees of experts to produce reports, sometimes over a period of years
- requiring public bodies to report back on their own performance in response to court orders
- a wider range of remedies than the courts would traditionally have allowed.

Using this "latitude" concerned individuals[30] and NGOs[31] have brought before the courts cases involving workers in conditions amounting to bonded labour, pavement dwellers, the starving, the mentally ill, those denied emergency medical treatment, and pollution, among others.

The Court has sometimes stressed that what it is doing with PIL is to require the state to carry out its obligations under laws and policies to which it was already committed. This was well expressed in a fairly recent case:

> *39. Public interest litigation is not in the nature of adversary litigation but it is a challenge and an opportunity to the government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice which is the signature tune of our Constitution. The Government and its officers must welcome public interest litigation because it would provide them an occasion to examine whether the poor and the down-trodden are getting their social and economic entitlements or whether they are continuing to remain victims of deception and exploitation at the hands of strong and powerful sections of the community and whether social and economic justice has become a meaningful reality for them or it has remained merely a teasing illusion and a promise of unreality, so that in case the complaint in the public interest litigation is found to be true, they can in discharge of their constitutional obligation root out exploitation and injustice and ensure to the weaker sections their rights and entitlements.*[32]

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[29]This "epistolary jurisprudence" has its own problems. The court will appoint counsel as amicus and often ask him or her to produce 'proper' documentation for the court; see Desai and Muralidhar, Public Interest Litigation, Potential and problems" in Kirpal, *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (New Delhi: OUP, 2000) p. 159 at text to fn 151 (also an IELRC paper available at www.ielrc.org/content/a0003.pdf)

[30]e.g. *UpendraBaxi v State of UP* (1983) 2 SCC 308, and the many cases brought by M C Mehta on environmental issues.

[31]e.g., the Rural Enlightenment and Litigation Kendra which has brought many cases, and the People's Union of Civil Liberties. The former's website http://www.rlek.org now says little about PIL. The PUCL (www.pucl.org) has more though rather hidden. Another NGO People's Union for Democratic Rights includes the judgments in cases it has litigated: http://www.pudr.org/reports_main_page/Important%20Judgments.

[32]*State of Uttaranchal v Balwant Singh Chaufal* Civil Appeal Nos.1134-1135 of 2002 decided January 18 2010

In the *Municipal Council, Ratlam*, case Justice Krishna Iyer said,

> *The key question we have to answer is whether by affirmative action a court can compel a statutory body to carry out its duty to the community by constructing sanitation facilities at great cost and on a time-bound basis. At issue is the coming of age of that branch of public law bearing on community actions and the court's power to force public bodies under public duties to implement specific plans in response to public grievances.*

From an approach of directing the state to carry out its own existing commitments, the courts have sometimes moved towards directing the state to make law or laying down itself elaborate sets of rules. These have included the development of judicial criteria for foreign adoption of babies[33], guidelines on sexual harassment in which the court adopted internationally recognised norms[34], and guidelines for dealing with emergency cases in hospital in which it used material on the practice in the US state of Nebraska[35]. In *Basu v State of West Bengal*[36], involving police torture, the Supreme Court laid down "requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf" about the records to be kept and the contacts an arrested person was to be able to have. Most remarkably, perhaps, the Court made very specific orders about the phasing out of diesel vehicles in Delhi, stepping from broad rule-making to technical decision making, with directions as detailed as "NCT of Delhi shall phase out 800 diesel buses per month."[37]

One significant feature of Indian PIL has been the extent to which orders have been only interim – many cases never reached the stage of final ruling. A major right to food case, pending before the court since 2001, is a particular example. The Court held that there was the right to food, and it has over the years issued approximately 40 orders to various state bodies on all sorts of food related topics.[38] The early directives were to carry out existing commitments. The Court's orders have related to food distribution in emergencies, school meals for children, and the position of pregnant women for example. It also appointed Commissioners on the Right to Food who presented their 8th report in 2008 which focused on the right to food for various marginalized groups such as single women (including widows), the poorest Dalits, 'Primitive' Tribal Groups, urban homeless, and slum-dwellers. The reports of these Commissioners have been very full and thorough and are posted on the Commission's website.[39] One concern that has been raised about this procedure, however, is how far it is appropriate to view the reports of such commissioners as evidence of the matters they investigate.

[33] *LaxmikantPandey Vs. Union of India* AIR1984 SC469
[34] S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008) p. 14; the case is *Visakha v. State of Rajasthan*, AIR (1997) SC 3011.
[35] *PaschimBangaKhetMazdoorSamityvs State of West Bengal* 1996 SCC (4)37.
[36] Writ Petition (Crl) No. 592 Of 1987, decided 1996.
[37] *M. C. Mehta v Union of India* (Writ Petition (C) No. 13029 of 1985.
[38] http://www.righttofoodindia.org/orders/interimorders.html
[39] http://www.sccommissioners.org/.

Given that Indian PIL has been in many ways a creation of the judiciary, the remedies that the courts have ordered involve extensive involvement of the courts in their implementation. Courts often require authorities to report back on what they have been doing to implement court orders, not leaving it to those who have brought the case to take the initiative.

Because of its unique character and focus on marginalised groups, some scholars in India have preferred the term social action litigation (SAL), to distinguish the Indian phenomenon from that in the United States and to reflect the particular nature of Indian PIL.

One of the problems faced by the Indian courts has been the risk of PIL being taken over by political concerns or by the already comfortable and well-represented in society. This has been a risk perhaps more at the High Court level. Courts at both levels have dismissed cases because they have been motivated by personal or political considerations or have been trivial. In the recent case of *Balwant Singh Chaufal*[40] the Supreme Court ordered, among other things, that the "courts must encourage genuine and bona fide PIL and effectively discourage and curb the PIL filed for extraneous considerations", and that court should develop Rules for this purpose, a task which is now under way.

PIL results have also been mixed in terms of their benefits for the most marginalised, especially environmental PIL cases. Some have benefited all sections of society– and this probably includes the famous Delhi bus case in which the Supreme Court ordered the replacement of all diesel with compressed natural gas buses. But orders to remove polluting businesses outside the city centre, to stop all activity in a forest, including by "tribals", and the demolition of slum dwellings have been "pro-middle class" rather than "pro-poor" decisions, and thus strayed from the original conception of PIL.

Another challenge has been the sheer numbers of cases in a country whose courts were already overloaded and where delays were of Dickensian proportions. The Supreme Court has tried to deal with this by setting up a committee to scrutinise petitions, and about 50% of Supreme Court PIL petitions are weeded out at the beginning.[41]It is easier to take this approach because the underlying jurisdiction is not one as of right.

[40]The court also gives an overview of developments over the years of PIL in India.
[41]S. Fredman, above 128n.

The expanding scope of the jurisdiction for PIL has also been controversial. And in Dhavan's phrase it has become "an institution of governance." Parmanand Singh has written[42]:

> *PIL is no more limited to the enforcement of the human rights of the oppressed and the victimized groups who cannot on their own move the court for redressal of their grievances. One can file a PIL for better service conditions of subordinate judiciary,[43] for enforcing ban on smoking in public place,[44] for controlling noise pollution during festivities,[45] for checking ragging in the universities,[46] for electoral reforms,[47] and for questioning irregular allotment of petrol pumps.[48] PIL has been filed by lawyers challenging commercial transactions of public institutions,[49] and for judicial review of appointment of government counsel.[50] PIL was allowed to be filed by a retired IAS officer with regard to power purchase agreement,[51] by a tax payer to prevent misuse of public property by anyone,[52] and by guardians of students to challenge the revision of syllabus for VIII class.[53] Advocates practicing in various courts in Tamil Nadu were permitted to file a PIL for the cancellation of bail granted to certain persons.[54] In the present author's view PIL has gone its way ruthlessly, impelled by an inner logic of its own, sweeping aside all objections and obstacles until it would in course of time run its course. The way PIL has grown in its expanded scope and reach there is a high probability that it will gradually dilute the original commitment of social activism to empower the oppressed masses to use law for vindication of their legitimate human rights.*

There are also serious problems about implementation (though probably no worse than implementation of government's own projects in many cases).

The extent and direction of judicial activism has depended in part on the personality of individual judges and on other factors in the national and international environment – though this can be true of "ordinary" litigation, too. But PIL has been even less predictable than ordinary litigation.

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[42] "Public Interest Litigation" (2003) Vol. XXXIX *Annual Survey of Indian Law* 661, 662

[43] *All India Judge's Association v. Union of India*, AIR 1992 SC 165

[44] *MurliS.Deora v. Union of India*. 2001(8) SCALE 6

[45] *In re Noise Pollution,* 2001(7) SCALE 481

[46] *VishwaJagriti Mission v.Central Government*, 2001 (3) SCALE 503

[47] *Union of India v. Association of Democratic Reforms*. 2001 (3) SCALE 188.

[48] *Common Cause v. Union of India*.1996 (6) SCC 530.

[49] *A. Parthasarthy v. Controller of Capital*, AIR 1991 SC1420.

[50] *Harpal Singh Chauhan v. State of UP*, 1993(4) JT (SC) 1.

[51] *Dr J. C. Almedia v. State of Goa*, AIR 1988 Bom 191.

[52] *Jayalalita v. Government of Tamil Nadu*, AIR 1999 SC 2330.

[53] *West Bengal Board of Secondary Education v. Smt. Basan Rani Ghosh*, AIR 1982 Cal 467.

[54] *R.Ratinam v. Slate District Crime Branch Madurai*, AIR 2000 SC 1 851.

Other jurisdictions

It is possible to say that there are two main streams of PIL, one drawing its inspiration from the United States and one from India. But this is an oversimplification. India has been influenced by the US experience, while many other jurisdictions have influence from both streams, and their own local needs and experience, not to mention professional and judicial tradition has also been important.

The Indian experience was a direct inspiration to some other Asian countries, especially Pakistan, Bangladesh, Nepal and Sri Lanka. Often, having somewhat similar arrangements for the enforcement of human rights was a significant factor. In all these countries there have been cases that have distinct echoes of the Indian jurisprudence. The Philippines also have had their own cases, drawing perhaps on both India and the United States. Malaysia has been resistant to PIL, in fact the courts' attitude to locus standi has prevented any significant developments in this direction, and the same is true of Singapore.[55]

Many other common law countries have developed features of their legal systems that make certain types of public interest litigation possible. They include England, Ireland, Australia, Canada, New Zealand and Hong Kong. The degree of acceptance of these new forms of litigation in different countries varies. Australian commentators feel that their country has not fully embraced PIL.[56] A writer on Hong Kong says, "It is wholly unclear when a public-spirited applicant, who seeks to vindicate a public grievance on behalf of the community at large or a segment of the public, would have the requisite locus standi to bring a judicial challenge."[57]

Outside of India, there have not been quite the same sweeping procedural developments as in that country. The main innovations have related to the concept of standing and to costs. The courts of Ireland recognise Brandeis briefs[58], which enable the bringing of broad types of material before the courts. Class actions are possible in Canada.

Relaxation of the rules of standing has become common. NGOs such as the Campaign for the Protection of the Harbour in Hong Kong or the Child Poverty Action Group in the UK have been able to litigate for the protection of the broad public interest or that of large sections of society. Lord Diplock said,

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[55]Roger Tan KorMee "The Role of Public Interest Litigation in Promoting Good Governance in Malaysia and Singapore" (2004) XXXIII No 1*The Journal of the Malaysian Bar* p. 58.
[56]Michel Kirby, "Deconstructing the law's hostility to public interest litigation" (2011) 137 *Law Quarterly Report*.
[57]Po Jen Yap, "Understanding Public Interest Litigation in Hong Kong" (2008) *37 Common Law World Review* 257–276.
[58]Brandeis brief is a written argument for the court that supplies sociological information, statistics etc rather than relying, or as well as relying, on orthodox legal sources such as cases.

> *It would, in my view, be a grave lacuna in our system of public law if a pressure group like the [National Federation of the Self-employed], or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.*[59]

On costs, there is even a possibility in England of a "pre-emptive costs order" limiting the costs that could be awarded against a person bringing an action in the public interest. Such an order was made for the first time in a case in which the Campaign for Nuclear Disarmament brought an action for an advisory opinion "that the United Nations Security Council Resolution 1441 [on Iraq and weapons of mass destruction] does not authorise the use of force in the event of there being a breach."[60]

South Africa, Uganda and Kenya

The role of PIL in securing the gains of the post-apartheid Constitution in South Africa has been the subject of extensive literature.[61] Public interest cases in South Africa have resulted in the rolling-out of a major programme for distribution of generic anti-retroviral drugs to prevent mother-child infection,[62]the extension of ARTs to prisons,[63]as well as some other, rather piecemeal, improvements to prison conditions[64], abolition of the death penalty, disallowance of evictions of squatters without provision of alternative housing or at least without "meaningful engagement" of the squatters prior to eviction,[65]and a series of cases gradually removing discrimination against sexual minorities[66] among others.

PIL in South Africa has been encouraged by key constitutional provisions (which formed the basis for articles in Kenya's Constitution, see chapter 4) including the ability of organisations and individuals to bring actions on behalf of others, the right to information, substantive socio-economic rights. Like in the United States, the existence of

[59]*R v Inland Revenue Commissioners, ex parte National Federation of Self Employed* [1982] AC 617, 644E.
[60]*Campaign for Nuclear Disarmament, R (on the application of) v Secretary of State for Defence* [2002] EWHC 2712 (Admin)
[61]J Dugard 'Court of First Instance? Towards a Pro-Poor Jurisdiction for the South African Constitutional Court' (2006) 22 SAJHR 261; J Dugard 'Civil Action and Legal Mobilisation: The Phiri Water Meters Case' in J Handmaker& R Berkhout (eds) Mobilising Social Justice in South Africa: Perspectives from Researchers and Practitioners (2010); RoniAmit, "Winning Isn't Everything: Courts, Context and the Barriers of Effecting Change Through Public Interest Litigation" (2011) 27 SAJHR (in a special issue of the journal on PIL, available at http://www.wits.ac.za/academic/clm/law/southafricanjournalonhumanrights/13545/; G Marcus & S Budlender, *A Strategic Evaluation of Public Interest Litigation in South Africa* (Atlantic Philanthropies, 2008) available at http://www.atlanticphilanthropies.org/sites/default/files/uploads/public_interest_litigation_sa.pdf.
[62]*Minister of Health v Treatment Action Campaign (TAC)* (2002) 5 SA 721 (CC).
[63]*B and Others v Minister of Correctional Services and Others* 1997 (6) BCLR 789 (C).
[64]Rudolph Jansen and Emily TendayiAchiume, "Prison Conditions in South Africa and the Role of Public Interest Litigation since 1994" (2011) 27 SAJHR.
[65]*Government of the Republic of South Africa v Grootboom*, 2001 (3) SA 1 (CC), and many others.
[66]Including

a number of very effective NGOs, such as the Treatment Action Campaign and the Legal Resources Centre, have pushed forward the development of PIL in South Africa. Similarly, there are university based legal assistance and research centres which have acted as amici or represented parties, such as the Centre for Applied Legal Studies at the University of the Witwatersrand,[67] and the Community Law Centre at the University of the Western Cape,[68] which has also been part of a group of amici before a Kenyan court in an evictions case.[69] As well as the courts developing the constitutional principles, they have also developed rules on costs: generally in an action against the government a party that loses should not have to pay the government's costs, and if the party loses, each side should bear its own costs.[70] Articulating this principle, Justice Sachs in *Biowatch* case reasoned thus:

> *Nevertheless, even allowing for the invaluable role played by public interest groups in our constitutional democracy, courts should not use costs awards to indicate their approval or disapproval of the specific work done by or on behalf of particular parties claiming their constitutional rights. It bears repeating that what matters is not the nature of the parties or the causes they advance but the character of the litigation and their conduct in pursuit of it. This means paying due regard to whether it has been undertaken to assert constitutional rights and whether there has been impropriety in the manner in which the litigation has been undertaken. Thus, a party seeking to protect its rights should not be treated unfavourably as a litigant simply because it is armed with a large litigation war-chest, or asserting commercial, property or privacy rights against poor people or the state. At the same time, public interest groups should not be tempted to lower their ethical or professional standards in pursuit of a cause. As the judicial oath of office affirms, judges must administer justice to all alike, without fear, favour or prejudice.*[71]

In contrast to the gains made in the deployment of PIL in the South African context, Uganda has over the years witnessed a weakening of constitutional safeguards for the poor.[72] Despite constitutional provisions that support PIL and some PIL victories in Uganda, recent decisions of the courts seem to be narrowing the scope for PIL. The courts recently dismissed a Constitutional action brought by a coalition of civil society and women's rights groups seeking a declaratory judgment that the government's failure to provide essential maternal health care services was a human rights violation also. The

[67]See its website at http://www.wits.ac.za/academic/clm/law/cals/11159/cals_home.html.
[68]http://www.communitylawcentre.org.za/court-interventions
[69]See http://www.communitylawcentre.org.za/court-interventions/kenyan-housing-and-evictions-case for the amicus brief and the judgment
[70]*Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2005 (6) BCLR 529 (CC); 2006 (3) SA 247 (CC).
[71]Sachs J at para. 20 of *Biowatch Trust v Registrar Genetic Resources and Others* (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC) ; 2009 (10) BCLR 1014
[72]Philip Karugaba, *Public InterestLitigation in Uganda Practice and Procedure: Shipwrecks and Seamarks* (2005). See also High Court Petition Number 16 of 2011,*Centre for Health Human Rights and Development and Others v AG*(decision of June 5, 2012) (where constitutional court declined to scrutinize government maternal health policies on the basis that to do so would infringe on the doctrine of separation of powers).

suit also sought damages for maternal deaths because of lack of access to care. A five-judge bench summarily dismissed the case stating that to hear it would be to infringe on the executive's prerogative.

In Kenya, the Constitution of 2010 has revolutionized the concept and conduct of PIL (see chapter 4). Prior to adoption of the Constitution, the reasons for poor use of litigation for advocacy were myriad. They ranged from political intimidation of the legal profession,[73] onerous costs of litigation, its complexity, indeterminacy of outcomes and an inefficient and executive- minded judiciary that had traditionally been reluctant to embrace *actiopopularis* matters. Rules of procedure also imposed heavy *locus standi* requirements which limited the potential claimants in a given case hence curtailing the potency of PIL litigation. However, there were occasional cases, including *Charles LekuyenNabori& 9 others v Attorney General & 3 others* in which Justice Ang'awa held:

> *Each Kenyan is entitled under the constitution and under the environmental Act EMCA to a right to life, a right to a clean and healthy environment. The ProsopisJuliflora plant has seen the populace being misplaced and the development and social life style being interpreted [sc. interrupted]. Their right to develop and improve their life style has been curtailed by the introduction of this plant. The government has failed in its task to put in place a management programme or made it a national issue. The Petitioners have had their rights infringed when they have been deprived of the sustainable development... I would interpret the "Right to life" using a broad meaning in this case that includes the right to be free from any kind of detrimental harm to human health, wealth and or socio-economic well-being. The effect of the said plant has affected the right of the Petitioners accessing their properties.*
> *...the Government of Kenya be held accountable in damages caused by the introduction of ProsopisJuliflora to the region.*
>
> *That the Ministry of Environment is to produce a policy working paper on the management and eradication of the plant and present this to Parliament within 60 days for debate and interpretation.*[74]

This fairly progressive decision has, unfortunately, not attracted enforcement by the Kenyan state.

In the new Constitutional dispensation, a plethora of PIL cases have already been presented before various high courts in the country. Having not benefited from sufficient legal research or adequate and experienced legal representation or mobilization of other interested actors, most of these cases have yielded less than satisfactory outcomes. Divergence in judicial responses to certain constitutional doctrines and their application is

[73] *Aaron GitongaRingera and Others v P. K. Muite, Law Society of Kenya and Others,* Nairobi High Court Miscellaneous Civil Application No. 1216 of 2000.
[74] [2008] eKLR.

already creating variegated readings and understandings of various provisions of the Constitution giving room to confusion. Problems of practice, procedure, certainty, efficacy of results, the challenges in fashioning remedies in PIL cases must be addressed.

Challenges and successes in PIL

Several lessons can be drawn from various country case studies that have been presented above. The implications of these for an organisation such as the Law Society of Kenya, which is contemplating embarking upon a programme of PIL, should be carefully considered as programs are developed and implemented.

Philosophical (and the practical) dimensions of PIL

It would not be right to ignore that there are certain real issues about the involvement of courts in some of the decisions that may be involved in PIL cases. These issues can be summarised as follows:

- How far can judges go in monitoring, and perhaps overturning or requiring, decision of the executive without over-stepping the bounds of the appropriate sphere for judges and trespassing on those of the executive or even the elected legislature? We shall return to this issue when discussing PIL and the role of the judiciary under the Constitution in a later paper.
- Can the courts give to issues the sort of close attention, investigation and evidence and consideration of alternatives that policy and law making have – or more accurately ought to have – when carried out by the executive and legislature? The issues that have been reaching the Court through PIL especially in India are often far removed from the sorts of cases that would be heard by the courts normally, where the parties are often two only, occasionally with intervention on behalf of the state or a third party. They are multiplex, involving the interests of various groups. They are the sorts of issues that, if being decided by a government or legislature, would involve masses of material, public submissions, committees of inquiry, detailed legislative debates. And in case of executive or legislative action there are always the courts to backstop the human rights issues. What happens when the highest court itself makes the legislative decisions? Here is where the separation of powers issue becomes particularly acute.
- There is perhaps a greater risk of PIL becoming a political football at the hands of government than of other types of litigation. On the one hand the politics of the judiciary itself may affect the scope of PIL; in India it has been very clear that the personality, and perhaps the politics, of individual Chief Justices has had a powerful influence on the activism of the Supreme Court. In the US the Reagan administration, and some successor governments, keen to cut back on public interest litigation, proposed amending costs statutes, e.g. by providing that "public interest organizations that employed staff attorneys in litigation

would be prohibited from receiving fee awards".[75] In the UK the current government is hostile to the judiciary and especially to the European Convention on Human Rights.

Impacts on the legal system and the government

The growth in litigation that PIL can inspire can have grave effects on already stretched legal systems. Given the concerns about delays and overburdened courts in Kenya, this is a particularly relevant issue. And although one may view PIL as a way of ensuring that government does its job, "There are many who consider that [PIL] has had the effect of perpetuating government inactivity. The prospect of a Court appointed Commission either gives the executive a pretext for further inaction, or makes action seem futile because judges would decide in any case."[76]

Factors for success

A number of studies have explored what makes for success in PIL. The Marcus and Budlender study proposed:

- Proper organisations of clients;
- Overall long-term strategy;
- Co-ordination and information sharing;
- Timing;
- Research;
- Characterisation; and
- Follow-up.

We explore some of these elements below.

Preparing the judiciary and the bar for PIL

Public spirited litigation cannot happen successfully without courts oriented towards social reform and social justice.[77] Though it is rare for the judiciary to be as proactive as that in India, PIL does require the judges to take a fairly expansive view of its own role, to step outside the comfortable familiarities of legal technicalities and the passive role of the judicial arbiter. Not all judges will find this easy to do.

In addition, lawyers must be equipped and ready to try to lead judges where they fear to tread. We can see this very clearly in two contrasting Kenyan eviction cases. In one, Justice Ojwang said that counsel had not undertaken a "systematic evaluation of the right to housing under the Convention on Economic Social and Cultural Rights,[78] and thus he decided that this was an aspiration and not an enforceable right. On the other hand in *Ibrahim Sangor Osman V Minister of State for Provincial Administration & Internal*

[75] Ibid. p.342.
[76] Fredman, above, p. 135
[77] Peter H. Schuck, *Public Law Litigation and Social Reform*, 102 Yale L.J. 1763, 1769 (1993).
[78] *Engineer CharowaYaa v JamaAbdi Noor* (Miscellaneous Civil Application 8 of 2011, decided May 13 2011 at Mombasa)

Security the Judge said, "The Constitution of Kenya entrenches both civil and political rights and also social and economic rights, and makes both justiciable. It is an acknowledgment of the fundamental interdependence of these rights. The interdependence is out of the realization that people living without the basic necessities of life are deprived of human dignity, freedom and equality." This was the case in which various NGOs, including at least one South African one, presented a joint, amicus brief. In other words, preparation, at least in this case, paid off.

Legal education

The legal profession tends to be conservative, but much PIL is radical, at least in terms of technique. In many countries, the institution of law clinics in universities, and even of clinical legal education (that is making the involvement in actual legal practice part of the curriculum, not just a voluntary activity) has had a significant impact, not just in providing labour for PIL but in changing attitudes, in getting students interested, even excited, about the possibilities of social change through law.[79] In some countries, including the United States and Canada, it is possible for students to appear in court in certain types of cases. In other countries they may just provide back-up for practitioners. And they may also work with NGOs in "street law" programmes on legal literacy and in conducting the massive amount of client preparation and investigation that is required for PIL cases.[80]

Clinical legal education is very expensive in human resource terms. It should also be remembered that in different countries students study law at different ages: it may be an undergraduate programme (as in Kenya) or a postgraduate subject (as in the US and Canada) or a country may have a five year degree with two subjects covered (as in Australia and many Indian universities). This has significance for the capacity and maturity of students to undertake actual litigation work.

Client interests in PIL

Lawyers, and NGOs, are often enthusiastic about PIL. Perhaps sometimes the views if not the interests of the client individual or community may be overlooked or misconstrued. It has even been suggested of *Brown v Board of Education* that many black communities would have been happier with local community, all black, schools rather than the forceful integration that middle class blacks, and whites, who sponsored the litigation were so keen on, and convinced the Court about. Often lawyers, keen on taking up a particular point, may search for a suitable client, but it is not always clear that those clients are really convinced, or that they really represent the community, the public interest. The Ford Foundation report on US PIL said, "Many people believe that the

[79]There are various examples in the Ford Foundation Report, *Many Roads*, above.
[80]See,e.g., http://www.ukcle.ac.uk/resources/teaching-and-learning-practices/grimes/; on South Africa see http://www.streetlaw.org.za/legaleduintro.html.

national women's groups did not do enough grassroots organizing after their victory in *Roe v. Wade*, that they went too far, too fast and lost support from their constituents."

Important considerations arise if the organisation that is supporting the client views the particular case as part of a broader strategy.

> *the client must be made aware from the beginning that his or her case forms part of a litigation strategy and that decisions and advice by the lawyer will be guided by that strategy. In the end, however, the strategy may not [read as must not] prejudice a client.*[81]

The role of advocacy organizations

The role of legal advocacy organizations, generally in the form of NGOs, has been critical in the global development of PIL. Although PIL cases can be brought by individuals acting on their own with counsel, the vast majority of PIL cases have been conceived and backed up by NGOs. The expense and practical logistics of brining PIL, especially a class action or representative suit, makes this the only feasible way to successfully litigate. NGOs can have major impacts on the course of litigation. South African Justice Albie Sachs said of the impact of the Legal Resources Centre in the *Grootboom* case,

> *The amicus intervention swung the debate dramatically. Most of the preceding arguments had failed to really look socioeconomic rights in the eye. There had been technical arguments and attempts to frame the case in terms of children's rights, but [the LRC intervention] forced us to consider what the nature of the obligations imposed by these rights was. Although we didn't accept the entire argument of the amici, this wasn't vital. What was important was the nature of the discourse. It was placing socio-economic rights at the centre of our thinking and doctrine.*[82]

The sort of expertise than NGOs build up is often crucial to these cases. Interestingly, it has been suggested that it may be a negative factor if NGOs are too focused on one right.

At this point it may be appropriate to comment on the issue of research. The quality of preparation that has to go into these complex cases is very great. The South African NGOs and their lawyers produce submissions often of 100 pages or more in length. Such quality work (and there is quality and not just quantity) has surely been important in achieving the legal revolution that PIL represents in that country.[83]

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[81]David Cote and Jacob Van Garderen "Challenges to Public Interest Litigation in South Africa: External and Internal Challenges to Determining the Public Interest" (2011) 27 SAJHR 167, 180.

[82]Albie Sachs, "Concluding Comments on the Panel Discussion" in (2007) 8 (1) *ESR Review*, quoted in Marcus and Budlender at para. 101.

[83]Submissions (heads of argument) in some cases are on the internet, e.g. Tshwaranang Legal Advocacy Centre to End Violence Against Women http://www.tlac.org.za/legal-judgements/, the Treatment Action Campaign's

Engaging the community and stakeholders

One of the recurrent themes of the literature is the need to work closely with community groups and other stakeholders who are impacted by the litigation. Obviously this is an issue if the actual client is a community. But even then, counsel must appreciate that the task of client relationship is rather different in a PIL cases than in the ordinary case of litigation. Many communities involved in PIL will have little or no experience of the law, and may have excessively high expectations of results in a short time. PIL litigators and their NGO partners need to support the community, informing, educating, and encouraging them. The formal client group, or the section of the public in whose broader interests litigation is brought may not really be a "community":

> *Some organisations experience difficulties in mobilising the social groups that they represent – for example, refugees, who often face discriminatory practices, and who do not form a homogenous group but are a diverse community comprising multiple identities facing a variety of legal challenges.*[84]

Broader "community" issues include the importance in many cases of support from the broader community. Among the cases that have shown how useful this is are the Treatment Act Campaign in South Africa and the Right to Food case in India. Both of these organisations have multi-pronged approaches to their particular issues: education, political pressure, mass mobilisation as well as litigation. One organisation cannot always do all these things, and working in coalitions is a critical technique.

Awareness of rights on the part of the people is a crucial factor. An NGO cannot litigate effectively on behalf people who are not conscious that they have rights. Many NGOs have education campaigns about the issues of their focus that are at least important as litigation. On the TAC it has been written:[85]

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amicus Heads of Argument in the *Pharmaceutical Association v Mandela* at http://www.tac.org.za/Documents/MedicineActCourtCase/pharmace.txt, in the New Clicks ase at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0CFcQFjAD&url=http%3A%2F%2Fwww.tac.org.za%2FDocuments%2FMedicinePricingRegulations%2FPSSA%2520Papers%2FHeads%2520of%2520argument.doc&ei=47v7T86REsXMqgGf_qyKCQ&usg=AFQjCNGWv7FXjRx-sr6bMZ3QL2LLyWvqTQ&sig2=XemyYGDk_DG68Q88pTsAAw, CALS amicus heads of argument in *City of Cape Town v Hoosain*http://www.lrc.co.za/images/stories/Desktop/2011_11_22_Masonwabe_Heads_FINAL.pdf, amicus heads of argument of Children's Institute in *Stemelev The Presiding Officer of the Children's Court, District of Krugersdorp* http://www.lrc.co.za/images/stories/Desktop/Stemele_heads_2012-03-21_FINAL.pdf and many others.

[84]Brian Kearney-Grieve, *Public Interest Litigation: Summary of a meeting of organisations from Northern Ireland, the Republic of Ireland, South Africa and the United States* May 2011, Johannesburg, South Africa http://www.atlanticphilanthropies.org/sites/default/files/uploads/PublicInterestLitigationExchange_Summary.pdf.

[85]Geoff Budlender "A Paper Dog With Real Teeth" Mail & Guardian 12 July 2002, quoted in Marcus and Budlender.

The TAC built a strong alliance with key pillars of civil society – trade unions, churches and media. It built a genuine social movement and showed how the Constitution, which represents the best ideals and values of our country, can be a powerful tool for holding government to those ideals and values.
In some ways, the final judgment of the Constitutional Court was simply the conclusion of a battle that the TAC had already won outside the courts, but with the skilful use of the courts as part of a broader struggle.

Strategic issues

Some of the issues that an NGO has to face when deciding whether to bring a particular PIL case have been summarised as:[86]

In the case of an NGO, the practical criteria are more similar to:

- *Does this case have the potential to set a precedent?*
- *Does it fall within our litigation strategy in this particular sector of the law?*
- *Do we have the time and resources to devote to this case?*
- *Do we have the knowledge necessary to pursue such a case or should it be referred to another organisation?*
- *Who is the client and does he or she match our criteria for assistance (income level, etc)?*

Issues of timing

There are a number of issues related to timing, especially in relation to strategy. Having an impact requires careful timing. Sometimes this relates to whether it is wise at a particular juncture to bring a particular type of case at all, and sometimes to the sequencing of related cases.

The litigation on sexual identity and gender rights in South Africa is particularly interesting on the latter. A deliberate decision was made not to bring a gay marriage case initially, but to begin with the simpler issue of discrimination constituted by criminalisation of homosexual sexual activity but not heterosexual. A gay couple who had wanted to assert the right to marry was persuaded not to proceed with it. After success on the issue of criminalisation of sodomy, later cases addressed laws which excluded same sex partners from immigration rights permitted to spouses, followed by cases on pension rights of gay partners, rights of gay couples to adopt children and finally the gay marriage issue. Marcus and Budlender[87] comment that this sequence of cases involved the following ingredients of success:

[86] David Cote and Jacob Van Garderen, above at p. 179.

[87] At p. 41.

> *63.1. The presence of a well-organised client who was a repeat player[88] in constitutional litigation;*
> *63.2. An overall long-term strategy to achieve a goal step by step;*
> *63.3. An organisation that not only co-ordinated litigation around these issues, but generally had the legitimacy to ensure that the correct cases were brought at the right time; and*
> *63.4. An impeccable sense of timing.*

Similarly in the Treatment Action Campaign case the TAC was working on the issues in various ways for some years before actually initiating litigation. Interestingly, there has been some criticism of this approach from the perspective of victims, but the TAC itself believed that this was the most effective way to proceed. Clients must be made aware that PIL cases rarely provide a quick fix. They take a long time to prepare if they are done properly. A final point on timing is that in this type of case the parties (the actual clients) may need longer, perhaps than rules allow, to be ready for cases. This also suggests the need to be ready before commencing an action.

Post-litigation strategy

Winning, or losing, a case may be only the beginning. It is true that certain rights may be "self-executing" and do not require substantial administrative enforcement. Judicial decrees mandating gay marriage are a case in point. But even with relatively straightforward court orders compliance cannot be guaranteed. A case in point is litigation in Kenya related to issuing identity cards to Muslims.[89] Although, it has become easier for Muslims to get ID cards since the test case in Mombasa, some still face demands for information that the High Court said in that case was discriminatory.

It may be necessary to keep litigating, including asking for those who refuse to comply with judgments to be held in contempt of court – which the TAC had to do in South Africa after the ARV for mothers case. Or where a case gives directives only to certain respondents, it may be necessary to replicate cases against other authorities – as was done in the USA after *Brown v Board of Education*. As the Ford Foundation report describes:

> *Time and continued vigilance are essential to achieve the change sought, and that's why institutional support to litigating groups to enable them to keep going during the compliance stage is so critical.[90]*

[88]This refers to the work of Marc Galanter: he points to the difference between the one-shotter and the repeat player with the latter having obvious advantages. An experienced NGO can give to the otherwise inexperienced one-shotter the advantages of being a repeat player as here. See "Why the "Haves" Come Out Ahead:Speculations on the Limits of Legal Change" (1974) 9 L. &Soc'y Rev. 95.
[89]Need a cite here
[90]*Many Roads*, p. 106.

Enforcement has been a major issue in many PIL cases. It is often observed that Irene Grootboom was little better off when she died than when she was the nominal plaintiff in the famous case. A *Time* magazine report said of Kanpur in India:

> *The city's leading environmental crusader, Rakesh Jaiswal, is worn out from a two-decade case against tannery pollution. His legal battle with the tanneries resulted in the closure of 127 egregious polluters in 1998. But closing tanneries just pushed them farther downstream.*[91]

PIL as part of a Coordinated Approach to Social Change

PIL, in almost every case, is only one component in a larger strategy to bring social change. While it may sometimes be necessary to move to court quickly to address an issue, the time, resources, and risks involved in litigation mean that it will remain a last resort or a minor strategy for many campaigns on social issues. Indeed, "research on public interest lawyers suggests that they often view their work as *complementing* and *contributing to* political mobilization [emphasis added]."[92]As one Indian judge noted:

> *We must always remember that social action litigation is a necessary and valuable ally in the cause of the poor, but it cannot be a substitute for the organisation of the poor, development of community self-reliance and establishment of effective organisational structures through which the poor can combat exploitation and injustice, protect and defend their interests, and secure their rights and entitlements.*[93]

Accordingly, before any organization undertakes PIL, all other strategies must be considered and a risk analysis conducted. Other strategies to achieve social change include:

- Political action (lobbying, passage of new legislation, policy changes)
- Public education
- Quiet diplomacy, negotiation, and out-of-court settlements
- Administrative advocacy, for example before a Human Rights Commission or ombudsman
- Protests, civil disobedience, rallies, etc.

Some or all of these may be suitably carried on in conjunction with litigation, as we have seen. Some may be tried before litigation (such as quiet diplomacy or negotiation), some may be a necessary pre-requisite (such as public education). Sometimes there is a formal exhaustion of remedies rule. And "the effectiveness of litigation in any given situation depends on a range of complex, contextual factors, and must be evaluated in relation to plausible alternatives."[94]

[91]http://www.time.com/time/magazine/article/0,9171,2002524-3,00.html-ixzz15uRLe3lS (19 July 2010).
[92]Scott L. Cummings, Deborah L. Rhode "Public interest litigation: insights from theory and practice"
[93]Bhagwati.
[94]Ibid p. 613.

> *It is, of course, true that-under certain circumstances-litigation may divert activists from sustained mobilization or result in decisions that are susceptible to political reversal. But so can political strategies. A key insight of the recent literature is that evaluations of litigation always need to consider the risks and feasibility of alternatives. Sometimes political strategies are not realistic options because of the strength of the opposition. Even when political strategies are possible, they are not always superior to litigation.*[95]

Cost, time, available remedies, and type of impact all are factors to be taken into account in combination with the views of the clients, who must always be a central party in decision-making about PIL.

Conclusion: What is success – or failure?

It is important to recall that PIL arises from a desire to see a specific social change or a particular remedy that affects many people. In this regard, winning or losing a particular PIL case can both contribute to that goal. For instance, winning does not necessarily mean success in the broader endeavour, and all too often not even in the narrower one – as comments on enforcement have stressed earlier. Winning a case may also not lead to the intended results for many years to come. The Grootboom case may have done little for Irene Grootboom, but it has been very significant in later cases and in pushing forward the right to housing and other socio-economic rights in South Africa. Moreover, losing is not necessarily failure:

> *Even if a lawsuit fails to change an unjust law, the act of going to court can influence or even change attitudes about the law and contribute to a climate for reform. Unorthodox arguments can serve to suggest innovative uses of the law; complaints can present a cumulative record that documents mistreatment.*[96]
>
> *Even losing cases, when part of a larger coordinated strategy, can generate intensive media coverage, can be a platform for public education and can swing public opinion towards legislation that would change a seemingly unjust result in the courts.*

SiriGloppen, explains the scope of PIL as an instrument for effecting social change thus:

> *…the value of litigation should not only be judged in terms of how a case fares in court (success in the narrow sense), or whether the terms of the judgment are complied with (immediate impact). It is as important to look at the systemic impact – the broader impact of the*

[95] Ibid.
[96] *Many Roads,* above p. 295.

litigation process on social policy, directly and through influencing public discourses on social rights and the development of jurisprudence nationally and internationally.[97]

In conclusion, public interest litigation must always be viewed as part of a broader context, a context in which there are risks and possibilities only some of which are in control of the parties arguing in court.

[97] SiriGloppen, *Public Interest Litigation: Social Rights and Social Policy (*conference paper, 2005).

Chapter 2

The Need and Justification for Coordinated Approach to PIL

Coordination is crucial where a multiplicity of actors operate within a given sector with similar aims. This is particularly the case where broad social change is the aim, as in the case of public interest litigation (PIL). Such wide-ranging results cannot be attained merely through the work of one organization, no matter its statutory or operational competencies. Achieving social change requires action at various levels, Courts being one of several arenas.

Coordination requires that litigators are engaged with and aware of the strengths and weaknesses of all actors in the litigation process. These actors include, the initiators of the litigation (perhaps the client, perhaps an NGO) the client, the legal team, the judiciary, interested non-governmental stakeholders, government stakeholders, the media, and others depending on the case.

Often court orders in PIL cases are declaratory, stating that laws or actions are in breach of a government's obligation in regard to a fundamental right, but leaving to the parties – the state and the plaintiff – to devise a remedy. For instance in *Grootboom*, a landmark case on housing rights, the constitutional court of South Africa ordered the state to "devise a comprehensive and workable plan to meet the needs of people in desperate need…"[98]

In other cases, PIL remedies are detailed and mandatory, requiring specific actions to be taken. Judicial creativity in fashioning out remedies is particularly important if a decision will have bearing on social inequality. In one Indian case, complex issues of fact involving multiple claimants led the court to order for the establishment of "…special commissions of inquiry …to overcome problems related to the need for establishing fact."[99] In some cases courts have also taken on a supervisory role, requiring the relevant agency to report back within a set time-frame.[100] Beyond judicial monitoring however, civil society, media, and international pressure generally also is needed to secure the social change that was the original aim.

Further, social change requires that an organization's engagement with an issue is seen to be legitimate rather than opportunistic. Legitimacy is important if legal outcomes

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[98] *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000)

[99] Through the *Agra Protective Home case* and the *BandhuaMuktiMorcha case*, the Court institutionalized the "practice of appointing socio -legal commissions of inquiry for the purposee of gathering relevant material in public interest litigation" (Bhagwati 1985, 57). Critics warned that the Court began to act as a 'parallel government', to which Justice Bhagwati replied that the judges were 'merely enforcing the constitutional and legal rights of the underprivileged and obligating the Government to carry out its obligations under the law. The poor cannot be allowed to be cheated out of their rights simply because those who should act do not act, act partially, or fail to monitor what they are doing' (Bhagwati 1985, 576).

[100] Theunis Roux, *Legitimating Transformation: Political Resource Allocation in the South African Constitutional Court* (Centre for Applied Legal Studies (2004) pgs. 5–6.) The article shows how the South African Constitutional Court in Grootboom, initiated its social rights jurisprudence from a low base, handing down a declaratory order that many commentators felt was weak in relation to the case made out by the complainants, while handing down a more intrusive order in the Treatment Action Campaign case, which occurred in the context of a mass mobilisation campaign that insulated the Court from the repercussions of its decision.

secured will be seen as representing the core interest and the voices of an affected group. Legitimacy is indeed an important component of sustainable action on an issue, without which rapid legal action will fail to inspire much needed ownership. Community defence of a court outcome (which is necessary in the context of intransigent non-enforcement of decisions on the part of the executive) will also be undermined absent such ownership. An institution that enjoys legitimacy with a class or an aggrieved community may not necessarily have competence to prosecute a PIL action on behalf of the group, thereby requiring some form of collaborative action. Situations of this type may provide an opportunity for LSK to engage. Such an engagement would, in theory, address criticism advanced elsewhere on the quality of PIL:

> *[O]n the issues of constitutional law, litigants who can lay no claim to have expert knowledge in that field should refrain from filing petitions…which are drafted in a casual and cavalier fashion giving an extempore appearance not having had even a second look…Such litigants must not succumb to spasmodic sentiments and behave like a knight-errant roaming at will in pursuit of issues providing publicity…He owes it to the public as well as to the court that he does not rush to the Court without undertaking research…A good cause can be lost if petitions are filed on half-baked information without proper research or by persons who are not qualified and competent to raise such issues as the rejection of such a petition may affect third party rights…*[101]

Public interest litigators must also be aware that they may become engaged in collaborations that they never sought, as a result of the new Constitutional provisions on PIL in Kenya. By liberalizing *locus standi* and expanding the actors in constitutional motions beyond aggrieved persons to include *amicus curiae* and other interested parties, the new constitution has in effect liberalized PIL.[102] Because the rules of entry for Constitutional litigation have been placed at a bare minimum, a proliferation of busy bodies and wayfarers is to be expected. Indeed, such challenges have been experienced in jurisdictions such as India, where the ascendancy of PIL has come with its challenges:

> *[M]ore often than not, the courts are confronted with frivolous petitions by the litigants wearing the mantle of the public interest litigation. It is only a garb for them. Many rumour mongers and mischief makers are making their way into the portals of justice in the name of public interest litigation. Publicity crazed cranks too have their own axe to grind…The prophecy that PIL is publicity interest litigation has to be proved wrong."*[103]

[101]Supreme Court of India, *SachidanandPandey v State of South Bengal*, 1987 (2) SCC 295. The Court went on to indicate in clear terms when PIL petitions should be entertained thus: "it is only when courts are appraised of gross violation of fundamental rights by a group or a class action or when basic human rights are invaded or when there are complaints of such acts as shock the judicial conscience that courts, especially this court…should hear such cases…."

[102]Article 22 of the constitution. This issue will be further elaborated in the last part of this strategy document.

[103]Justice P.S. Narayana, *Public Interest Litigation*, (2007) pg. 10.

Coordinated PIL can help to ensure that courts are not hijacked by such busy bodies thereby subverting the intent of the constitution. However, it is often quite difficult to halt litigation once it has begun or to stop parties from filing cases that are detrimental and poorly conceived. Accordingly, it is critical that LSK's coordinated approach involve reaching out to actors around the country with training on PIL and that LSK actively seeks intelligence on emerging litigation.

The other rationale for greater coordination is the challenges implicit in PIL. Overcoming obstacles such as prohibitive costs, lengthy and complex proceedings, acquiring sufficient subject matter expertise, limited competencies in large-scale, complex litigation articulated in earlier parts of this research require the cooperation of multiple actors to enable such an effort to be sustained.

PIL that secures social change is only successful when there exists an engaged bar as well as an informed and empathetic bench (even an activist one); one that can be moved by the plight of the poor and the marginalized. Indeed, there is a constitutional imperative in Kenya upon "…all state organs [the judiciary included] and public servants to address the needs of vulnerable groups within society…"[104] Given that most judges are from the middle and elite classes of society, "unless particular efforts are undertaken, their sensitivity to the plight of the marginalized and how the law may provide protection for their socio-economic rights, tend to be limited, due to the difference in life experience and values. Elite litigants may thus often be at an advantage…."[105]

The Litigation Process as a Component of Coordination

Understanding how PIL claims emerge, are processed through the court system, and subsequently are implemented is important in designing any coordination framework. It must be appreciated that the process of seeking judicial intervention in public interest cases is anything but linear. Litigation is an iterative process-where the same case is taken to different courts on appeal and courts repeatedly hear similar cases-and adjudication is influenced by earlier decisions (as well as by their political fate and social influence). In this context, stages may be bypassed, while failed litigation may influence policy and social outcomes.

Gloppen models the litigation process for advancing social rights of marginalized groups through five phases - voice, responsiveness, capability, compliance and systemic change.[106] We modify this model, condensing the phases into three: voice, capability and compliance as shown on the below.

[104]Article 21(3) of the Constitution.
[105]Sydney Kentridge, *The Highest Court: Selecting Judges*, 62:1 Cambridge Law Journal (2003) pg 55.
[106]SiriGloppen, *Public Interest Litigation: Social Rights and Social Policy (*conference paper, 2005).

'Envoicing' a claim

This is the claim formation stage of the PIL. The actors at this stage are primarily the claimants and the potential legal representative. While the assumption is usually that there is convergence between the interests of various actors involved in a litigation process, this is not necessarily the case, especially when seen from the perspective of what would constitute success of the litigation:

> *The success of social rights litigation can be perceived in different ways (improvement in social conditions; winning the case; building progressive jurisprudence, changing social policy) and in many cases means different things to the different actors involved in the process.*[107]

The possible divergence in goals in turn has implications for what is regarded as an effective voicing of claims. Effective voicing of claims in the sense of cases with a reasonable chance of success in court, does not necessarily equal most effective in influencing social policy - or reflecting the most pressing issues for marginalized groups.

Many activists note how the process of voicing claims and researching the case, provide important impetus for social mobilization and tools that can be used for advocacy and training.[108] They find that social mobilization or 'winning the case in the streets' seem to make judges' more inclined to rule in their favour – and inversely, the litigation process (even when not successful in narrow terms) provide an important political momentum that aid the broader cause. As described in chapter 1, cases that are not decided in favour of the claimants may still have a transformative impact. Authorities threatened with court action may settle out of court, and when courts provide a platform for voicing social rights concerns, this may generate or intensify popular debate and create a political momentum. A successful 'envoicing' of a claim will also require substantial investigative and research capacities, to develop evidence in close collaboration with the claimants, as well as developing in-depth knowledge of existing policies and how these could be transformed to better protect or advance the right.[109]

Discussing the reasons *for the success of two important social* rights cases in South Africa, *Grootboom* and *Treatment Action Campaign*, commentators have argued that "close ties between the broader social movement and top-level expertise in the field and the existence of in-house legal scholars with continuous research capacity on this scale who knew the government's policies better than the government did and had the ability to carefully plan and build up jurisprudence"[110] was essential.

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[107]International Commission of Jurists, *Courts and the Enforcement of Social Economic Rights: Comparative Experiences of Justiciability* (2008) pg 76.
[108]Squires John, Langford Malcolm & Thiele Bret, *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights*(2005) pg.15.
[109] P. Jones and K. Stokke (eds.), *Democratising Development: The Politics of Socio- Economic Rights in SouthAfrica* (2005) pg. 153.
[110]SiriGloppen, *Legal Enforcement of Social Rights: Enabling Conditions and Impact Assessment*, 2:4 Erasmus Law Review, Volume (2009) pg. 471.

Success in court, success in the material sense and success in the social sense are some of the ways in which the impact of litigation could be assessed - the envoicing process should make all of these possible impacts evident to all actors and make clear the different ways in which all actors view success.

Capability

Capability relates to the actual adjudication process. An effective adjudication framework must distinguish between characteristics of the court itself and the way in which the judges deal with the litigants' claims in their judgments.

Presently in Kenya, there are few barriers to access to courts in PIL cases as already discussed. Both cost and procedural concerns have been minimized by the Constitution, at least until now. In this sense, therefore, the capability of courts to accept cases is almost guaranteed. What is of concern is the composition of the court and the background and competence of the judges, which influences both the level of judicial independence and the responsiveness to public interest claims. Given that judicial independence is emphasized in the constitution and the ongoing vetting process, institutional independence appears more or less secured. However, this does little in creating functional independence on the part of individual judges. The biases that are formed in the context of various socializations, limited understanding of social rights concerns, and etc. can only be mitigated through building capacity and creative case framing.

Whether or not the judges uphold a PIL claim is not the only concern in PIL; which remedies they provide for in their orders is perhaps of equal or greater importance. Judgments in PIL cases range from declaratory orders, where courts affirm the claim without issuing further directions; to mandatory orders, where specific remedies are authorized; to supervisory orders, those that require parties to report back within set time-frames. Increasingly, courts also develop "structural judgments," in which they order authorities to initiate a process to develop new legislation, policies, and plans to remedy a rights violation within parameters set by the judges. Formulating appropriate remedies is not just the function of judges, but is largely informed by the nature of pleadings and prayers submitted by counsel. (Please see chapter 4 for further discussion of remedies.)

Compliance

Compliance concerns itself with what happens after a decision is handed down. This depends in part on the scope of the judgment itself and the response of a mobilized constituency. The executive organs of the state do generally have the responsibility to implement judicial decisions. Gloppen distinguishes between two forms of implementation: narrow compliance with the judgment and long-term implementation.[111]

[111]SiriGloppen, *litigation as a strategy to hold governments accountable for implementing the right to health*, 10:2 Health and Human Rights Journal (2008) pg. 30.

Narrow compliance secures enforcement of a given decision, most often because the decision is sufficiently detailed and the orders issued are fairly restricted to an individual as opposed to a broader class. Long-term implementation is seen in terms of the systemic impact or structural change on policies, system and legislation. Voluntary compliance is assumed to be more likely when the judgment fits the authorities' political or ideological views or interests; but compliance is also presumably influenced by the political-legal culture.

Enforcement mechanisms include actions by courts themselves, such as when officials are charged with contempt of court for failing to implement orders, but also include actions by monitoring agencies, such as the Commission on Administrative Justice[112] or the National Council on Administrative Justice.[113] The hypothesis here is that the presence and vitality of official enforcement mechanisms have a positive impact on compliance. Equally significant for consideration are unofficial "enforcement mechanisms." These are actions by litigants or others in support of the judgment, such as follow-up litigation where implementation is lacking; monitoring and reporting; and shaming of institutions and officials through the media, demonstrations, and advocacy. Most likely, the more unofficial enforcement voices that engage the formal compliance mechanisms, the higher the degree of compliance. As described earlier, implementation of judgments in many cases seems to depend on social movements to monitor and follow up when compliance is lacking.[114]

Current PIL Context in Kenya

In order to understand the nature of PIL cases pursued subsequent to the adoption of the new constitution in Kenya, this research did three things. First, it surveyed 10 organizations that are heavily involved in PIL to determine the scope of their engagement, nature of coordination and their perceptions regarding the potential role of the Law Society in PIL.[115] Second, unstructured interviews were held with three senior advocates who have been involved in PIL over the last couple of years to tease out their experience as well as any ideas on LSK's involvement. Third, review of jurisprudence emanating from the courts was undertaken in order to inform how LSK should be strategically involved in the evolving PIL environment.

[112]Commission on Administrative Justice Act 2011, established pursuant to Article 59 (4) of the Constitution.
[113]National Council on the Administration of Justice is created by Article 34 of the Judicial Service Commission Act (2011). LSK has membership in this body whose mandate includes "ensure a co-ordinated, efficient, effective and consultative approach in the administration of justice and reform of the justice system."
[114]Supra note 13, pg. 55.
[115]See annex 1 for the instrument used in collecting information from the surveyed organizations.

Organization	Current PIL Case Load	Case Type	Internal Capacity	Coordination	LSK's Role as Perceived by Respondents
ICJ Kenya	11	Torture, security, FOI, wrongful detention, international criminal justice	In-house lawyers and panel of external lawyers	Unclear	-LSK PIL committee mandate should be broadened -Amicus briefs -Formulation of PIL Rules
Kituo Cha Sheria	15	ECOSOC rights, wrongful evictions, right to health, & land Labour?	In-house lawyers & external pro bono panel	Network of volunteer lawyers established; monthly litigation caucus meetings held to share information	LSK should provide incentives to PIL practitioners including CLE earning
ICPC	5	Cases advancing constitutional implementation; international criminal justice	Outsourced from private bar	Unclear	LSK should develop a pro bono database
KHRC	8	Human rights cases; citizenship	Outsourced from private bar	Urgent Action Ct' that assists in identifying high target PIL cases	LSK should be enjoined in high impact cases -provide legal research support -Amicus briefs
KNCHR	5	Human rights cases	Outsourced from private bar	Liaise with CSOs involved in PIL; have established PIL caucus	-LSK should be an active litigator in standard setting cases -could act as amicus on issues of great importance
COVAW	4	SGBV cases	In house lawyers; panel of pro bono lawyers	Active engagement with CSO's involved in PIL	-Create database of judgments & rulings on PIL -Formulate post adjudication advocacy strategies
FIDA Kenya	4	Affirmative action; labour rights; women rights to property; succession; SGBV	In house litigators; pro bono panel of lawyers	Work with strategic partners; each case preceded by strategy session bringing various actors together	-enhance involvement in constitutional implementation cases
ICTJ	0	Domestic accountability for international crimes	Works through KPTJ	Works through KPTJ	-panel of PIL litigators desegregated by areas of competency
KPTJ	4	Domestic accountability for international crimes; suits preserving judicial reform process;	Outsourced from private bar	Strategy to ensure coherent coordination being developed	-amicus curiae -interested party in high impact litigation

		integrity in appointment of key state officers			
Muslims for Human Rights	2	Citizenship discrimination; right to development issues	Outsourced from private bar	Unclear	-amicus curiae -research support
CREAW	5	SGBV, compliance with article 27(8) of the constitution	Outsourced from private bar	Unclear	-amicus curiae -research support

Emerging from the above matrix, it is clear first in terms of geographic scope that most PIL interveners are Nairobi-based, except in the case of MUHURI, giving rise to the concern that interest in using PIL to address structural constraints and human rights violations exists only in Nairobi and not elsewhere. Conversely, it could imply a weaker awareness on the utility of PIL in the post 2010 constitutional dispensation context outside Nairobi. This can be disconcerting particularly in the context of a country where devolution of power will usher in some complex governmental action at the sub-national level, without whose robust monitoring, abuse may be replete. The de-concentration of the state must be matched with the diffusion of PIL competency across various counties of Kenya.

Many organizations seek service from the private bar or engage pro bono lawyers (who are LSK members) to undertake the actual litigation. Indeed, of the 24 cases contested between September 2010 and April 2012 reviewed by the National Council on Law Reporting (NCLR),[116] only six cases involved litigation conducted by organizations traditionally involved in PIL.[117] Most of the cases were pursued by private citizens who instructed counsel to pursue these actions, most of which in the nature of constitutional interpretation. This explains the recommendation that LSK should move to develop a directory of PIL practitioners or pro bono database to help potential consumers to make more informed choices on which lawyer to engage with in relation to specific human rights/constitutional issues.

The case load for most organizations is quite large, raising capacity concerns. This, coupled with the fact that most of these organizations did not share a coherent case selection plan, suggests that most PIL cases are interventionist and may lack a sustainability plan beyond the initial court action. Given the heavy workload that many organizations face around PIL cases, most of the respondents viewed LSK's role to include participating in PIL as amicus curiae based on the perception that such an intervention would improve the quality and depth of legal arguments and submissions to court, thereby enhancing chances of success and perhaps improving the quality of jurisprudence.

[116]National Council on Law Reporting, *A Compilation of Summaries of Selected Cases on the Interpretation of the New Constitution of Kenya*, October 2010-April 2012 (in file with authors).

[117] See e.g., Nairobi High Court, Petition 243/2011, *Community Advocacy and Awareness Trust, Women Empowerment Link, Grassroots Reform on Women Agenda, Women Political Alliance, Federation of Women Groups, Women Empowerment Society, Women of Kenya Initiative, Foundation of Women Rights in Kenya &Tushauriane Self Help Group v AG and others.*

Most respondents evidenced a lack of clear coordination strategy. The few that did, demonstrated a case to case approach rather than a holistic coordination infrastructure. None of the respondents' coordination mechanisms, if at all, went beyond lawyers to other actors that may have a bearing either in the advocacy or post-adjudication process. Kituo Cha Sheria stood out for its more permanent "Network of volunteer lawyers" which holds "monthly litigation caucus meeting to share information." The effectiveness of both 'the network' and caucus meetings as coordination vehicles by Kituo could not be independently verified. Few of the respondents however viewed LSK as having any role to play in the coordination of PIL. This could be explained by the fact that most institutions view PIL from the narrow lens of courtroom success, such as obtaining conservatory orders or injunctive relief, and thus, post-adjudication enforcement can fall through the cracks.

In general, most organizations see LSK playing a significant role in addressing information asymmetries in PIL, participation in rule making for more effective procedural rules to govern PIL, provision of legal research on technical issues of law and most importantly, participating in court as amicus. The next section will grapple with possible ways in which LSK could coordinate these disparate sectoral expectations while remaining true to its mandate as a bar association.

The Law Society and PIL Coordination

The statutory mandate given to LSK to *inter alia* "protect and assist the public in Kenya in all matters touching, ancillary or incidental to the law" provides a broad basis for LSK's engagement with PIL matters. This is further buttressed by Article 3 of the Constitution mandating citizens to defend the Constitution. The society has a vested interest in the proper administration of justice, without which the basis for sustainable work by legal professionals will be jeopardized. LSK's current strategic plan seeks to give effect to this mandate through two objectives, namely access to justice and constitutional implementation. According to this strategy:

> *LSK needs to put in place systems that will enhance access to justice by the public and also promote the implementation of the Constitution. Access to justice will be achieved through promotion of legal aid through pro-bono scheme. In addition the Society needs to enhance strategic public litigation. The Society needs to advocate for efficiency in the judicial process and affordability of justice in terms of filling fees. Further, the Society needs to partner with civil society organizations (CSOs), para-legal practitioners and other institutions involved in legal aid and human rights as a way of enhancing access to justice.*[118]

[118] LSK Strategic Plan, 2012-2016, pg 29.

In effectively executing this strategy and given the discussion on the complexity of the PIL process and current actors' involvement in PIL, LSK's coordination becomes important. The intention of GIZ-LSK collaboration to "build up a strong and well-functioning PIL Unit at LSK which takes up, files and litigates high impact PIL cases" clearly envisions a PIL process that has impact beyond immediate clients, again emphasizing the place of coordinated action.

Most bar associations have been litigants in narrow circumstances where the litigation has direct or indirect bearing on the practice of law. The American Bar Association (ABA) is one such example. The main role that the ABA plays is in encouraging and incentivizing pro bono legal practice across the profession, as well as acting as amicus on key cases that touch on the role of the judiciary and the bar. One notable exception to this general role is the ABA's death penalty representation project, through which the ABA actually coordinates and supports law firms across the United States to take on pro bono death penalty cases. Officially, the ABA has no policy position on whether the death penalty should be abolished and instead its engagement "has focused primarily on issues relating to the underlying fairness of how the capital punishment system operates not necessarily in opposition of the death penalty but one the ensures that defendants on death row receive competent right to counsel."[119] This project has been responsible for providing high quality legal representation to defendants on death row, filed hundreds of amicus briefs on various death penalty cases, established a litigation fund and engaged in legislative advocacy on death penalty issues across various jurisdictions over a period of 25 years. In contrast, the Tanganyika Law Society (TLS) has established a Human Rights Committee as one if its Standing Committees and given itself the mandate of inter alia: " To intervene, protest and condemn all acts of human rights abuse both locally and internationally"[120] As a result of this more interventionist approach to its involvement on human rights issues, TLS has been involved, as a party, in a number of important cases, including the *Reverend Christopher Mtikila*case presently ongoing before the African Court on Human and Peoples' Rights.[121]

Coordination can therefore take different forms. LSK could constitute litigation hubs or projects on issues that it seeks to litigate on (which are discussed further in another part of this report). Such hubs can bring together different advocacy groups that have competencies required in the advancement of the issue, with LSK helping in monitoring emerging cases, identifying competent counsel, formulating litigation strategy

[119]ABA Newsletter, *Attorneys for the Damned: ABA Project Marks 25 Years of Providing Counsel to Death Row Inmates* (2011) at http://www.abajournal.com/magazine/article/attorneys_for_the_damned_aba_project_marks_25_years_of_providing_counsel_to/>

[120]Tanganyika Law Society, Human Right Committee Rules, 1998 at http://www.tls.or.tz/otherpages/commetee_humanr.asp>.

[121]See African Court on Human and Peoples' Rights, Application No. 009 & 011/201 *Tanganyika Law Society and The Legal and Human Rights Centre and Reverend Christopher Mtikila v. The United Republic of Tanzania* (case concerning alleged violation of Articles 2, 10 and 13 (1) of the African Charter on Human and Peoples' Rights (the Charter), Articles 3, 22, 25 and 26 of the International Covenant on Civil and Political Rights (ICCPR) and Articles 1, 7, 20 and 21 (1) of the Universal Declaration of Human Rights) at http://www.african-court.org/en/index.php/news/latest-news/148-public-hearing-mtkila-case-2>.

and undertaking legal research. The other organizations in the hub can equally make contribution towards one component of the advocacy or litigation strategy that falls well within their areas of competence. This would ensure that LSK is not exposed to the entire gamut of advocacy on a given issue with competing interests of its membership implicated. Such a hub can share information and coordinate activities through meetings, dedicated list serves, case digests or newsletters, among others.

Enjoinment as amicus is seen as a key role for LSK. To do this, LSK must have a clear system and procedure for its enjoinment. An amicus quality control team should be in place to protect the integrity of LSK's amicus briefs. This team's authorization of a brief must precede its filing. This means that LSK should formulate a clear policy on PIL engagement to minimize potential conflict with its membership and ensure that the quality of its PIL submissions are unimpeachable, helping courts maximize the provisions of Kenya's progressive Constitution.

LSK must institute a system to monitor PIL cases countrywide. Nothing detracts the emergence of standard setting jurisprudence more than the existence of multiple suits being initiated on an issue before different courts in the country resulting in disparate and often contradictory judgments.

The dangers of weak coordination: Case example

Source: Gilbert Marcus and Steven Budlender, *Strategic Evaluation of Public Interest Litigation in South Africa* (2008).

Hoffmann v South African Airways 2001 (1) SA 1 (CC). That case concerned the practice of South African Airways' refusal to employ HIV-positive persons as cabin attendants. Hoffmann was a Legal Resources Centre case. However, at around the same time, the AIDS Law Project was litigating precisely the same issue for another cabin attendant in A v South African Airways (Pty) Ltd. The difficulty was that although Hoffman was the case to first reach the Constitutional Court, it appeared to lack certain important medical evidence on the transmission, progression and treatment of HIV, as well as the ability of people with HIV to be vaccinated against yellow fever, an important issue in the case. In contrast, the case of A v South African Airways contained precisely such evidence. Ultimately, the difficulty was avoided when the Aids Law Project applied to be an amicus in the Hoffman case and successfully sought to place the relevant evidence before the Constitutional Court. Ultimately, the Constitutional Court ruled in favour of Hoffmann, relying substantially on the evidence from the AIDS Law Project. The case thus ended in a victory for all concerned. However it demonstrates the danger of insufficient co-ordination among public interest litigation organisations. If the AIDS Law Project had not intervened and if the Constitutional Court had held that the absence of the medical evidence meant that the discrimination against Hoffman was justified, this would have represented a major setback for organisations in this sector. It could also have irreparably damaged the A v South African Airways case, even though the relevant evidence was available.

In circumstances where multiplicity of claims are lodged in different courts, LSK must be in the know of ongoing litigation in order to intervene directly or through other institutions to ensure that the courts have facts of relevance. LSK could undertake such monitoring through monthly communications requesting information from its membership on PIL cases and thereafter convening meetings bringing counsel involved in such litigation together to initiate conversation and share strategies on their litigation efforts. Conversely, LSK could task its branches to compile monthly information on ongoing PIL cases within courts in their geographic areas of operation. Such information can then be analysed and case specific forums held, under LSK's coordination, among counsel involved and also bringing other actors that could have an interest in broader advocacy on the issues.

If indeed "high impact" is the intent of LSK's engagement with PIL, which it must be, it is clear that its involvement needs to cut across the envoicing-capability-compliance continuum as discussed before. To achieve this level of substantive involvement, however, will require capacity which at present does not exist within the institution. LSK's PIL Unit located within the Public Interest Division of LSK is envisioned to have the following responsibilities: "i. Implement pro-bono services; ii. Organize the legal awareness week; iii. Regulate para-legals; iv. Organize and implement public awareness and education forums; v. Undertake fundraising for programmes; vi. Conduct research relevant to its jurisdiction."[122] The division is anticipated to be headed by a program officer supported by an assistant and interns. This capacity is certainly inadequate to bear the full gamut of PIL work as already exposed in this chapter.

The import of this is that LSK's involvement in PIL must be informed not only by its capacity but also by its real mandate and perceived strategic strength from the perspective of other actors. Its current capacity cautions against LSK taking on an onerous burden of cases, suggesting rather that its action should be confined to a very small number of cases with fairly high impact. Senior counsel pointed out the need for LSK to identify key constitutional issues whose vindication it must lead on behalf of the public. Defending the independence of the judiciary is one arena where LSK must exercise vigilance in the public interest. Any attack at ongoing judicial reform is seen as a direct threat on the constitution, and LSK's defense of the judiciary will not be seen as partisan. Another area where LSK's engagement should stand out relates to police reform, a sector where vested interests appear bent on subverting constitutional intent. The haphazard manner in which the provincial administration is being restructured without due regard to the role of county governments is another arena where LSK-led PIL will benefit the public. Generally, LSK must identify very clear sectors where it can institute PIL action while supporting other ongoing litigation through filing amicus briefs.

Internal coordination of LSK's PIL work however needs to take place in tandem with external coordination. Internally, the PIL Unit should be equipped to do more including: creating a regular forum for new ideas in public interest lawyering, provision of continuing legal education to "PIL Section members" as well as educating and

[122]LSK Strategic Plan, 2012-2016, pg 60-61.

involving the entire Bar in issues affecting the public interest. PIL section membership should be recruited from public interest and private lawyers, law school faculty, and law students.

External coordination should be facilitated through creating regular forums bringing PIL interested organizations to share information, strategies and develop case specific collaborations. This component of coordination also includes LSK seeking to improve delivery of PIL services to the public through publication of PIL practitioners' directory and maintenance of an interactive database of PIL cases. Improving service delivery in PIL is also a function of rules of engagement which suggests the need for LSK to be an active participant in pursuing the expeditious formulation of PIL Rules envisaged in Article 22(3) of the Constitution and soliciting members' input in such rule formulation process.

In ensuring that judgments in PIL cases are not merely symbolic but substantive, monitoring and incentivizing compliance will be needed as a component of coordination. Denying litigants the fruit of their judgments offends their right to remedy. Non-compliance also weakens the precedential value of such a decision. LSK has greater leverage than other actors in PIL to ensure compliance with court rulings. It has a vested interest in ensuring fair administration of justice and is represented in various governmental agencies that can be used to demand greater enforcement. Engagements with the Commission on Administrative Justice and the National Council set up under the Judicial Service Commission Act on non-compliance with judgments are an essential correlative of coordination towards ensuring "impact" of litigation efforts. Yet LSK cannot know the status of enforcement of court decisions in important PIL cases without a system of monitoring compliance.

Outreach to judicial training institutions and law schools to ensure institutionalization of an understanding of PIL and human rights components thereof is equally crucial in the consolidation of a judiciary that is willing to chart new understanding of constitutionally sanctioned social rights of marginalized groups.

The need to restructure further the PIL Committee of the LSK to enable it provide more coordinated response to various dimensions of PIL becomes necessary. Sub-groups dealing with Implementation of the Constitution, Human Rights Committee, Law Schools and Law Firms' Outreach; Legal Rights of Marginalized groups (Children, Persons with Disabilities; and Women's Rights) is one way of effecting restructuring that will facilitate more expedited coordination and information exchange.

The County system of governance presents an important opportunity for the development of PIL practice outside Nairobi. It is imperative that LSK encourages advocates outside Nairobi to engage in PIL and establish a system to keep itself informed of PIL activities outside the capital. Where an LSK branch in a county outside Nairobi has its own PIL program, it is best for LSK to offer technical assistance to cases rather than get directly involved in PIL cases within that County.

Relationship between LSK and Other Legal Aid Providers

As indicated above, there are a number of legal aid providers that engage in some public interest litigation work. Mainly, these organizations deal with individual client's matters. They normally have staff and expertise to carry out their day to day legal interventions for individual clients. However, they are not institutionally designed to litigate complex public interest litigation, and often they have to hire external advocates or work with volunteer advocates to help them litigate PIL.[123]

Regardless, there are a number of opportunities in setting up relationships between the LSK and other legal aid providers. The following is a non-exhaustive list of areas of cooperation/partnership for which LSK can establish relationship in with these organizations.

Advocacy and Community Mobilization

Advocacy is key in PIL litigation. It is useful in mobilizing communities where PIL relates to community grievance and where a common approach is required. Moreover, it is necessary to ensure that there is reasonable understanding by members of the community on why litigation is needed. Equally important, advocacy and mobilization are important in ensuring community buy in on the issues of litigation to minimize the possibility of subterfuge.

Most of the legal aid providers have experience in advocacy and mobilization work. Most have established internal infrastructural mechanism to conduct advocacy and mobilization. Additionally most of the legal aid providers work in specialized areas and have generated great credibility within the sectors of community they serve. Where LSK is initiating or supporting litigation that concerns a sector that is served by a legal aid provider, partnership with such an organization would likely provide a significant boost to the litigation.

Legal and other Non-Legal Expertise

The specialization of certain legal aid providers helps their staff develop significant expertise in their area of work. Moreover, such organizations have linkages with internal and external experts in their areas of focus. This expertise is mostly useful as a tool to influence the Court's view of the issues in dispute.

[123]For example, FIDA had lawyers from private practice as lead counsel in the case of *Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & Another [2011] eKLR.* The case raised the issue of the gender composition of the persons recommended for the position of the Supreme Court Judges. This was also the approach taken by some of the Legal Aid providers in the case of*Centre for Rights Education and Awareness & 7 others v Attorney General [2011],* a petition challenging the constitutional authority of the President to appoint certain state officers including the Chief Justice. Although the case involved a number of llegal aid providers, most of their lead advocates were drawn from the private practice bar.

Joinder of Legal Aid Providers as Interested Parties/Amicus Curiae

The role of interested parties and amicus curiae can strengthen PIL litigation. Where LSK is involved in PIL litigation that relates to an area of a legal aid provider's specialty, the opinion of such a provider might be significant in strengthening the approach taken by LSK in the litigation. Establishing relationships with legal aid providers would allow the LSK to prompt such organizations to join the PIL litigation as interested parties or amicus curiae where the circumstance allows.

Training of PIL Litigators

A number of Legal Aid providers conduct training for their advocates to strengthen their skills, including on PIL work.[124] The LSK can partner with the relevant organizations to offer training and enhance capacity for its pro bono PIL advocates.

Possible Linkages Between LSK and NALEAP

The June 2012 version of the draft Legal Aid Bill, 2012 creates some statutory linkages between LSK and the National Legal Aid Service. It provides that LSK will nominate a member to its Board.[125] The Board is mandated to establish and administer the national legal aid system as well as advise the cabinet secretary on policies on legal aid.[126]

While the bill is still undergoing review and public participation processes, there is a clear indication that LSK will likely play a key role in the establishment and administration of the National Legal Aid Service. Moreover, Article 12 of the draft bill provides the National Legal Aid Service with the powers to act in coordination with other governmental and non-governmental agencies in the discharge of its work. LSK would undoubtedly be a key partner for National Legal Aid Service in regard to the coordination role described in clause 12 of the bill. In fact, in its proposal for the establishment of a public interest litigation unit, the LSK has indicated that the unit "will work closely with the National Legal Aid Awareness Program … to secure the services of pro bono lawyers and come up with a scheme that can effectively and objectively monitor the productivity *pro bono* lawyers."[127]

The role LSK is given in the draft Bill is important as a first step in establishing linkages between the two organizations. There are other possible areas of linkage between LSK and NALEAP. We wish to discuss two such possibilities that are relevant to LSK PIL work.

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[124]For example, Kituo cha Sheria holds, jointly with Katiba Institute, an annual PIL Colloquium for its staff and volunteer advocates

[125]Art. 5 of the Draft Legal Aid Bill, 2012 (June 2012 version)

[126]Ibid at art. 6

[127]See, Proposal on Establishment of a Public Interest Litigation Unit at the Law Society of Kenya

Clause 53 of the Draft Legal Aid Bill provides for an additional linkage between LSK and National Legal Aid Service. It envisages that "advocates operating under the *pro bono* programme of the Law Society of Kenya"[128] may apply for accreditation as Legal Aid Providers. If this provision is sustained when the bill eventually becomes law, it may be necessary for LSK PIL Unit to investigate whether the stated accreditation would apply to its PIL pro bono advocates as this may help to defray some of the costs associated with PIL processes.

Regardless, LSK PIL Unit should consider making a request to NALEAP to set up a structure/facility that can help support its PIL pro bono work. In certain jurisdictions, Legal Aid Schemes have created structures that help them to develop mechanisms and criteria for funding the high cost PIL work. The funding will sometime cover advocates fees but in some circumstances it may be limited to payment of disbursement fees only. For example, the Legal Aid Ontario implemented a funding scheme for "test case litigation" through which it provides "legal aid assistance for group certificates, test cases and/or coroner's inquests."[129] Similar possibility may be available for LSK to receive support from NALEAP (or National Legal Aid Service – when it comes to be) to assist with funding some of its PIL Unit work and specifically some of the PIL cases it may undertake especially those that affects large numbers of persons who would otherwise individually qualify for legal aid assistance.

[128]See the Art. 53(b) of the Draft Legal Aid Bill, 2012 (June 2012 version)

[129]See information on Legal Aid Ontario Test Case Litigation available at http://www.legalaid.on.ca/en/info/test_cases.asp

Chapter 3

Proposed Pro Bono Lawyering Framework

This chapter appraises and elaborates on a pro bono scheme for litigating PIL cases for and on behalf of the LSK. It first tries to understand the reach of the concept of pro bono and looks at whether pro bono is possible and practical in the context of PIL. It proposes an award scheme to motivate PIL pro bono lawyers. In addition, it discusses the concept of a referral service for pro bono PIL advocates and considers the factors that would inform the choices of such referral. Finally, it looks at the possibility of creating partnership between LSK and legal aid providers as well as linkages between LSK and the National Legal Aid Programme (NALEAP).

Pro Bono Defined

Lawyers and the public have popularly used the phrase *pro bono publico* (generally pro bono) to mean professional legal work done at no fee or under the market rate fee.[130] But, like most phrases, scholars have debated the exact definition of pro bono. In essence they draw their definitions from varied interpretation based on purpose, target clientele, nature and scope of service etc.[131]

Most of the definitions are guided by two considerations. First, whether the work is done for no fee at all or a substantially reduced fee. Second, whether the scope of the work includes activities other than legal representation and non-litigious legal work such as involvement in alternative dispute resolution work, law reform initiatives, lobbying on access to justice issues and community legal education.

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[130] *Mapping Pro Bono Services in Australia*, Report of the National Pro Bono Resource Centre, May 2007 at pp. 3 states that whereas there is no universally acceptable definition of pro bono notes "All definitions of pro bono include services that are provided without a fee being charged, and many include work done for a substantially reduced fee or reduced fee." Report available at: http://www.nationalprobono.org.au/ssl/CMS/files_cms/NPBRC_mapping_book_web.pdf

[131] Esther F. Lardent, for example notes that there are four broad categories under which pro bono definitions fall: Legal services to the poor and near-poor; Legal services, more broadly defined, to the poor and near-poor, non-profit associations or groups who serve that population, **as well as** legal services to other nonprofit groups, including governmental and educational institutions and assistance in civil rights, civil liberties, and public interest matters; a combination of the first and second option as well as activities to improve and enhance the administration of justice and the legal system, such as service on a bar association or courts committee, that do not include the provision of legal services and finally, the broader categories in the third option together with as well as non-legal community service, such as general non-legal service on non-profit boards, fundraising and similar charitable activities. See also, Gillian McAllister and Tom Altobelli, *Pro bono legal services in Western Sydney* (November 2005) University of Western Sydney and the Law and Justice Foundation of NSW at p 25. Available at https://wic041u.server-secure.com/vs155205_secure/CMS/files_cms/westernsydney.pdf (date accessed August 21, 2012).They argue that there are competing school of thoughts in regard to what constitutes pro bono work on account of no fee or partial fees

The scope covered by a specific definition seems to be informed by the purpose for which pro bono work is required. This is best exemplified by the various definitions adopted by different professional and regulatory organizations that require or encourage pro bono work from their membership. Research shows that regulatory organizations which require minimum pro bono work tend to define pro bono in more specific terms. For example, the Cape Law Society[132] (South Africa) predicates its definition of pro bono on "matters falling within the professional competence of an attorney"[133] and requires that the work be done through "recognized structures."[134] This clarity is necessary where the Rules of the society make it an obligation for its members to perform a minimum number of hours of pro bono work to ensure the requirement to do pro bono work is not based on a vague concept that may hinder enforcement. [135]

Conversely, non regulatory professional organizations tend to emphasize pro bono as an aspirational concept. For example, the American Bar Association has adopted a pro bono declaration which states that every member should aspire to perform fifty (50) hours of pro bono work per year. A similar approach is taken by the International Bar Association in its Pro bono Declaration[136], which "encourages" lawyers to devote a proportion of their "time and resources" to pro bono work.

Equally, and importantly, regulatory organizations which do not mandate pro bono services but nevertheless encourage their members to perform pro bono work are more likely to define pro bono in more general terms. This seems to be the case with the Law Society of Kenya (LSK).[137]

Pro bono and Public Interest Litigation

Traditionally conceptions and definitions of pro bono tend to focus on financially needy individual clients with private legal disputes. However, there are definitions that include also, the concept of public interest. For example the Law Foundation of New South Wales defines pro bono work as:

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[132]The Cape Law Society is a statutory body established in terms of the Attorneys Act 53 of 1979 to administer and regulate the attorneys' profession in the Eastern, Western & Northern Cape Provinces.

[133]Rule 21 of the Rules of Cape Law Society states that "*Pro Bono* services shall include, but not be limited to, the delivery of advice, opinion or assistance in matters, falling within the professional competence of an attorney, to facilitate access to justice for those who cannot afford to pay, through recognised structures, approved in terms of sub-rule 21.3 and identified in terms of sub-rule 21.4.

[134]Rule 21 further states that recognized structures include "

the office of the Registrars of the High Court when issuing *in forma pauperis* instructions, *Legal i*, small claims courts, community (non-commercial) advice offices, university clinics, non-government organisations, the office of the Inspectorate of Prisons, Circle and specialist committees of the Society, etc…."

[135]Rule 21 of the Cape Law Society prescribes varying minimum number of pro bono work hours to be performed by lawyers based on the length of their membership.

[136]See, the International Bar Association's Pro Bono Declarations – Approved by IBA Council on 16th October 2008 available at http://www.internationalprobono.com/declarations/ (Date Accessed, August 10, 2012)

[137]LSK states that it encourages pro bono from its lawyers, with one structured opportunity to do pro bono being the Legal Awareness Week. For more information see http://www.lsk.or.ke/index.php/for-the-public

> *services that involve the exercise of professional legal skills and are services provided on a free or substantially reduced fee basis. They are services that are provided for:*
> *people who can demonstrate a need for legal assistance but cannot afford the full cost of a lawyer's services at the market rate without financial hardship; non-profit organisations which work on behalf of members of the community who are disadvantaged or marginalised, or which work for the public good; and public interest matters, being matters of broad community concern which would not otherwise be pursued.* [138]

The final part of this definition does recognize that availability of pro bono services is important in bringing to light matters of public interest that may otherwise not be pursued through a fee or perhaps even legal aid retainer schemes. However, definitions that include PIL and especially where PIL is considered to mean "matters of broad community concern" seem to be few. Perhaps this can be understood because of the complexity and level of involvement required to litigate PIL matters with broad community concerns. Additionally, there may be recognition that for such matters, the mandatory or aspirational hours that organizations set for their members to do pro bono work would not be sufficient to litigate the matters exhaustively.

The LSK may wish to take a cue from organizations that have used a broad and aspirational approach in defining and prescribing pro bono work required/expected of its members. Specifically, in regard to pro bono for public interest litigation, we think that some critical considerations have to be made to characterize what exactly the LSK requires of its members who will be involved in pro bono work. This would include, having an LSK working definition for PIL cases certainly but perhaps for pro bono work generally. Such a definition should address certain relevant issues relating to the general understanding and conduct of pro bono, including; clarifying whether pro bono applies only where fee is not expected or would also apply with possibility of reduced or partial fee; whether pro bono should be made mandatory or should remain as a voluntary activity; and even if pro bono work remains voluntary, whether it should be structured and centrally managed by the LSK.

We would recommend a pro bono scheme for PIL that anticipates free work but also the possibility of a reduced or partial fee. It should be structured (we later address a case referral system) and centrally managed by the LSK. This recommendation takes into account the hefty work that PIL requires, but also incorporates the need for LSK to ensure

[138]see Gillian McAllister and Tom Altobelli, *Pro bono legal services in Western Sydney* (November 2005) University of Western Sydney and the Law and Justice Foundation of NSW at p 1. Available at https://wic041u.serversecure.com/vs155205_secure/CMS/files_cms/westernsydney.pdf (date accessed August 21, 2012)

professionalism and integrity in the conduct of PIL pro bono work, especially noting the importance and overreaching nature of issues that PIL raises.[139]

Lawyer Referral Systems

A lawyer referral service is a system used by organizations to match a client to a lawyer. The system has been used to match clients with lawyers in situations where clients pay for services[140] as well as where legal services are rendered on a pro bono basis.[141] Numerous law societies and other professional legal organizations in the world have implemented lawyer referral services. Lawyer referral services are also utilized by legal aid schemes to match an appropriate advocate to a legal aid client.

A referral system requires that the professional organization create a department/section that handles referral work. The department in turn solicits lawyers' enrolment in the scheme. Enrolling lawyers are required to identify their areas of expertise, level of experience, geographical area of operation, language spoken, and gender, among other relevant factors. A database (mostly electronic) is created that is capable of desegregating these data. Potential clients are required to complete an application form that requires information which is used to match them with appropriate lawyer(s). Some referral systems require some progress reporting from the lawyer on the case,[142] while others seek satisfaction report from the client.[143] Ideally, the system should do both.

There are some unique aspects of the manner in which LSK has proposed to carry out its PIL work that also calls for a setting up a unique referral system. First, it is the indication that LSK will be selective in the number of cases and the nature of issues addressed through its PIL. Second, it is the levels of work needed to litigate PIL case – the

[139]We should warn though that while the foregoing recommendation is desirable, LSK must develop a mechanism to deal with the possibility of conflict to the extent that it has some regulatory role in disciplining advocates. This would arise where there are claims of negligence or malpractice involving one of the pro bono PIL advocate in relation to a PIL case for or referred to by LSK. The complexity is that where the LSK PIL Unit is monitoring such litigation and there is a complaint of professional negligence against the pro bono advocate with the carriage of the matter, it may be hard to establish sufficient distance between the LSK PIL Unit and the LSK participation in the disciplinary processes.

[140]Most Law Societies in Canada operate a lawyer referral service that assists clients identify lawyers with expertise to assist in their respective matters. More information on the referral services can be obtained at - In Ontario - http://www.lsuc.on.ca/faq.aspx?id=2147486372; in Alberta - www.lawsociety.ab.ca/public/**lawyer_referral**.aspx*; In British Columbia* - http://www.cba.org/bc/initiatives/main/lawyer_referral.aspx

[141]The Law Society of New South Wales have a pro bono lawyer referral service. More information on the referral service can be obtained at http://www.lawsociety.com.au/community/findingalawyer/probono/index.htm

[142]In Ontario, lawyers are required to report back to the law society whether they have taken the case and how the case was disposed of (trial, summary judgment etc)

[143]The New Hampshire Bar pro bono services requires that the client provide feedback on services as a means of monitoring the services rendered to the client. For more information, visit - http://www.nhbar.org/for-the-public/free-legal-services.asp

cases have significant public dimensions and are often labour intensive. This contrasts with most pro bono referral systems implemented by professional organizations which usually serve the interest of individual clients with private disputes. Third, because of the public nature of PIL, the legal work has a significant social dimension. As such extra-legal skills are important to effectively prosecute a PIL case. Fourth, in conventional referral systems, referral services will have a wide pool of advocates to choose from. However, in PIL, and especially in Kenya, where PIL is just taking root, it is unlikely that there would be such a wide pool of advocates available and experienced enough to conduct PIL work – at least at the initial stages.

Therefore, the following factors should guide LSK in creating an PIL lawyer referral system:

- What area(s) of law is LSK's PIL likely to focus heavily on?
- What experience does a given advocate have in the identified areas of litigation? Who will judge the advocate's experience?
- What internal resources – e.g. junior associates and researchers – does the advocate have at her disposal?
- What extra-legal interest and skills does the advocate possess? For example, is the advocate involved in community activities that would provide him/her with insight on social issues? Does the advocate have skills in community organizing, media, mediation, etc.

Case Documentation System

For ethical and regulatory reasons, pro bono work has to meet the same professional standards as fully paid legal work. This, in the minimum, requires implementation of a strong case management system. A key component of a case management is the case documentation system.

Case documentation systems are intended to help advocates and legal service providers better organize and manage their cases. Many law and bar associations adopt minimum case management systems and provide advocates with ongoing training and support.[144] There are numerous advantages of having a properly organized Case Management or Documentation system, including that it assists advocates to improve on the efficiency and effectiveness of delivery of services; acts as a control to reduce risk and improve quality of services, assists in clients' relations; provides an opportunity for legal service providers to utilize technology and improve efficiency and delivery of services. [145]

Because the LSK has a primary role in determining the PIL case to be litigated as well as monitoring the case to ensure it proceeds in a manner that protects the public

[144]For example, see the Management Assistance System (MAP) implemented by the Oklahoma Bar Association with the information available at http://www.okbar.org/members/map/;
[145]ibid

interest. It is our view that the LSK PIL Unit must demand of its pro bono lawyers to implement the following minimum case documentation systems:

Case Intake Data

The intake form will be used at the front end by the PIL Unit Officers or the pro bono advocate to record all the vital information of the person(s) intending to initiate a law suit – in a case where LSK is not acting as the petitioner. This includes the bio-data, contact information. The form also records initial critical information regarding the nature of the dispute and where available details of the respondents.

Conflict Check

A conflict check is intended to ensure that there is no conflict in respect of the pro bono lawyer selected by LSK. The conflict check must be undertaken by the LSK and the potential pro bono lawyer, before a final determination on whether the lawyer should undertake the case is made. The form should identify the parties and contain any additional information that may assist the advocate to determine whether a possibility of conflict exists.

Client-Lawyer Agreement

A client-lawyer agreement is used to describe the terms of engagement between a client and an advocate. Usually the agreement sets out the nature of the matter to be litigated, the obligations of the advocate to the client as well as the client's undertaking to the advocate. This agreement should reflect the rule of professional conduct for Kenyan lawyers. It further sets out the manner in which the client is to pay for both professional and disbursement fees, if at all.

In all PIL cases where LSK refers a case to a pro bono advocate, it will be necessary to have an agreement. In a case where LSK is the petitioner, the retainer would have to be completed between the LSK and the advocate. However, where the petitioner is not the LSK the agreement will be between the pro bono advocate and the petitioner. In such a case, standards may be developed where a copy of the agreement may be filed with the LSK as one of the tools to enable it monitor the progress of the case.

Docketing Systems

Dockets are used to record every event/activity undertaken on a matter. They are intended to be the full record reflecting all the work done on a file. Dockets are important tools when reviewing the professional work done by an advocate, determining costing for the services rendered and also reviewing whether an advocate has met the professional standards required on the work done. It is our opinion that the LSK must require that every pro bono lawyer uses a comprehensive docketing system to record all the work undertaken on a file.

Case Progress Report

Case progress reports are used to update a client on the progress of their matter. The progress should be periodically filed and especially in anticipation and after the occurrence of a significant event in litigation. The following are some of the processes that may require progress reports:

- Demand processes – to record what type of demand should be made and what is to be anticipated (next steps) if the demand notice is not honoured;
- Filing of the Case – may include a copy of the petition and a summary of the immediate next steps to follow and the applicable timelines;
- Motions/Objections – if any is filed or argued and what the outcome was;
- Directions from the Court on the process to be followed;
- Submissions – may attach copies of submissions filed by all parties;
- Any change of strategy by the advocate;
- Hearing – when, and the overall conduct of it when it is done, including any difficulties the Court may have had with petitioner's position and whether any intervention is necessary before judgement is rendered;
- Judgement – what the Court decided (in summary) attaching the judgement.
- Plan and progress of enforcement – if the judgement/ruling required action on enforcement.

Diary System

A diary (tickler) system is intended to diarize all the important dates by which legal work on a file has to be completed. It assists an advocate to anticipate the deadlines and timelines needed to complete a task. It is one of the critical tools of case management that ensures that cases are not neglected and that appropriate time is set aside to complete relevant tasks.

Because PIL litigation is often complex, involves a lot of parties, includes both legal and extra-legal activities, implementing a good tickler system is important in order to ensure that no process is neglected.[146] LSK should therefore consider developing an electronic diary system that can be used by its PIL pro bono advocates. The LSK PIL Unit can also use the tickler system to monitor the work being done by its pro bono advocates to satisfy itself that important dates and processes in a case are not missed out.

Document Filing & Storage

[146]The Tennessee Bar Association lists the following as the characteristics of a good tickler system • Immediate and automatic entry of all dates. • Entry of reminder dates in association with critical deadline dates. • Entry of follow-up dates in association with deadline dates. • Back-up or duplication of the main calendar and tickler systems. (Both an automated and manual system are recommended.) • Central location of tickler and calendar systems for easy access for everyone in the office. • Tickler entries for pulling the appropriate file should be made in conjunction with the entry of a calendar date for that file. • There should be a tickler entry for every file to ensure that all files are reviewed regularly. • Appropriate response by the attorney to the reminders and deadlines posed by the systems. Article available at http://www.tba.org/tickler-and-calendar-systems

It is critical that a proper filing/storage system be adopted to preserve all the critical documents in a PIL case. PIL in its nature requires the ability of the public to interact with the process and to be informed as much as possible on the progress of the matter. Easy accessibility of documents by the public, government officials and members of the LSK PIL Unit is therefore a critical element in determining the design of the filing system that is appropriate for a PIL case.

One advantage of implementing a pro bono PIL litigation through the LSK is to enable as many advocates to become interested in and well versed with ways to conduct complex PIL. It is expected that at the beginning, the number of advocates available and able to handle such cases will be few. It is therefore important that a case filing system be implemented which allows other members of the LSK to access PIL precedents which would assist with capacity enhancement.

We would therefore recommend an electronic filing system for all the critical documents in a specific PIL case which allows for easy retrieval of the documents – at least by the LSK members.

Award Scheme for Pro Bono Advocates

Generally, organizations involved in pro bono work implement an award system to motivate its volunteer advocates.[147] Because advocates are hardly paid to do pro bono work, recognition is an essential tool that can be used to motivate them as well as others to participate in pro bono work. Kituo cha Sheria, for example, has an annual Volunteer of the Year Award (VOYA)[148] which recognizes a volunteer advocate who has provided dedicated service to the work of the organization. We recommend the following to be considered for an award scheme for advocates who participate in PIL pro bono work:

Recognition Awards such as:

- **Pro Bono Annual Award** – to be awarded to the advocate(s) who have demonstrated outstanding commitment to LSK PIL pro bono work. The winner of the award(s) should be recognized at an elaborate ceremony such as the Annual Lawyers Conference or at a special LSK occasion for recognizing lawyers engaged in pro bono work;
- **A paid up feature article** in the leading daily newspapers or professional magazines extolling the contribution of the award winners;
- **Nominationas LSK's representative to agencies/organizations**. There are many statutory and non-statutory agencies which require representation from LSK in their Boards/governing bodies. LSK may consider nominating its dedicated pro bono advocates as its representative to some of these agencies.

[147]See, American Bar Association at http://www.americanbar.org/groups/probono_public_service.html; The Canadian Bar Association at www.cba.org; International Bar Association at http://www.internationalprobono.com/; The pro bono unit of the UK at http://www.barprobono.org.uk/bar-pro-bono-award-2012.html;

[148]See for example, http://www.kituochasheria.or.ke/index.php?option=com_content&task=view&id=28

Prize Awards: These may include the following:

- **All expenses paid for** to an international/regional bar association conference. For example the International Bar Association has an annual Pro Bono conference that awardees would likely find inspiring;
- **Items of value (personal),** such as Ipads, special (personalized) embossed bags;
- **Items of value (legal),** such as special law book collections, legal research software, subscription to legal resource sites – such as law journals etc.

Chapter 4

PIL Provisions in the Constitution

As described in earlier chapters, the Kenyan Constitution (2010) has revolutionized public interest litigation (PIL) in the Kenyan context. Perhaps the most central constitutional provision related to PIL is Article 22:

Enforcement of Bill of Rights

22. *(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.*

(2) *In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—*

(a) *a person acting on behalf of another person who cannot act in their own name;*

(b) *a person acting as a member of, or in the interest of, a group or class of persons;*

(c) *a person acting in the public interest; or*

(d) *an association acting in the interest of one or more of its members.*

(3) *The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteriathat—*

(a) *the rights of standing provided for in clause (2) are fully facilitated;*

(b) *formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;*

(c) *no fee may be charged for commencing the proceedings;*

(d) *the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and*

(e) *anorganisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court.*

(4) *The absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court.*

Article 22 responds directly to shortcomings in the previous Constitution, which did not provide for a self-enforcing bill of rights. Article 22 renders the bill of rights immediately justiciable.

Another article essentially replicates Article 22 in relation to the Constitution generally. Article 259(1) provides that "Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention." Other provisions that are relevant include Article 163(6) which gives the Supreme Court the power to provide advisory opinions on matters related to county

government,[149] and provisions that direct the courts on how to interpret the Constitution.

These provisions are all concerned with what might be described as the mechanics of bringing an action. In the final part of this paper we look at other provisions of the Constitution in relation to the issues of substance on which they invite litigation.

What cases can be brought?

Any case to enforce the Constitution under Article 22 or 259 must either argue that "a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened" or that some other provision of the Constitution "has been contravened, or is threatened with contravention." An important consideration is whether there is any significance to the use of the terms "denied, violated or infringed." It seems unlikely that any legal consequence attaches to these multiple terms. The South African Constitution, from which the language is largely taken, contents itself with "infringed." It is perhaps common to think of freedoms being denied and rights violated. But the fact is that the usage is not fixed and one can speak of rights being denied and freedoms violated. And any of these is an infringement of the Constitution and is ripe for litigation.

The issue of "academic" disputes

Constitutional cases must allege an actual violation of a right that has taken place or that is threatened. In other words, cases cannot challenge legislation that has not been implemented simply on the basis that it appears that it might infringe on Constitutional rights. There is a well-established principle that courts will not deal with what is sometimes called "abstract review," or to put it another way, that there must be a "case or controversy." The practical reasons for this include:

- that it is often not possible to judge whether a policy or legislation for example will violate rights until there is a concrete instance to study
- that the method of decision making in courts is best suited to dealing with specific issues and not with broad policy issues
- that it is not an efficient use of courts' time to use them to decide issues that may never actually result in actual harm to anyone
- that litigation should generally be viewed as a last resort, and a flood of hypothetical cases may simply overload the courts
- possible infringement of the separation of powers
- risk of involvement of the courts in political decisions
- the possibility that the argument is one-sided, there being no-one with a current interest in putting before the court the arguments against the position of, usually, the government
- the risk of the courts being dragged into being the government's legal advisor.[150]

[149] "The Supreme Court may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government."

The notion of "advisory opinion" refers to issues that have not become focused in individual or specific claims of violations. In the common law system there has been a traditional reluctance on the part of the courts to accept such cases. In 1793, the Justices of the U.S. Supreme Court declined to concede to the request of Thomas Jefferson, Secretary of State, on behalf of President Washington, who had asked the judges' whether they would be prepared to give their opinion on "on the construction of our treaties, on the laws of nature and nations, and on the laws of the land, [which] are often presented under circumstances which do not give a cognisance of them to the tribunals of the country.[151] The Justices referred to:

> *the lines of separation drawn by the Constitution between the three departments of the government. These being in certain respects checks upon each other, and our being judges of a court of the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to…*

There are authorities from many other jurisdictions to similar effect. In Australia, for example, the term "matter" has been held to require a concrete dispute and not to permit advisory jurisdiction. The High Court held, in *Re Judiciary Act 1903-1920 & In re Navigation Act 1912-1920* (1921) 29 CLR 257

> *[W]e can find nothing in Chapter III of the Constitution to lend colour to the view that Parliament can confer power or jurisdiction upon the High Court to determine abstract questions of law without the right or duty of any body or person being involved…*

The current attitude of the English courts also is one of reluctance to deliver advisory opinions. Munby J observed in the case of *The Queen (on the application of (1) A (2) B (by their litigation friend the Official Solicitor) (3) X (4) Y Claimants v East Sussex County Council* [2003] EWHC 167 (Admin):

> *At times during the argument I almost felt as if I was being asked to write, in the guise of giving a judgment, a textbook or manual on the law and practice of manual handling[152]. This is not the function of the court. As I had occasion to remark in the Howard League case at para [140]:*

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[150]"The Judges would be liable to be hindered in the discharge of their appropriate duties by being employed, in this manner, as the law advisers of the crown – a position which might lead to the undesirable entanglement of the Bench in political matters." Irving, "Advisory Opinions, The Rule Of Law, and the Separation of Powers" [2004] Macquarie Law Journal 6 (available on the internet at http://www.austlii.edu.au/au/journals/MqLJ/2004/6.html#fn27) - quoting from Quick and Gordon, *The Annotated Constitution of the Australian Commonwealth* (1901), 767 summarising the Convention debates.

[151]Available in many places including in *The Works of Thomas Jefferson,* Federal Edition (New York and London, G.P. Putnam's Sons, 1904-5).Vol. 7, and on the internet in the Online Library of Liberty at http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=804&chapter=86587&layout=html&Itemid=27.

[152]Of severely disabled patients.

"The Administrative Court nowadays has to deal with many issues which even in the comparatively recent past would not have troubled the courts at all and which would probably have been thought by many to be simply non-justiciable. That is an entirely wholesome development. But making every allowance for this, the fact remains that the courts – including the Administrative Court – exist to resolve real problems and not disputes of merely academic significance. Judges do not sit as umpires on controversies in the Academy. Nor is it the task of a judge when sitting judicially – even in the Administrative Court – to set out to write a textbook or practice manual or to give advisory opinions."

There are some Constitutions, however, that do specifically confer advisory jurisdiction on the courts, and the Constitution of Kenya is one – but in a very limited situation: the Supreme Court may hear applications for an advisory opinion. The Katiba Institute has argued, as amicus curiae, that this is the only situation in which the courts of Kenya may deliver such an opinion: and indeed that even the Supreme Court may entertain applications only for an opinion on matters related to county government. There are indications that the courts of Kenya have so far agreed with this analysis.

However, it is important to note that the Constitution is not limited to violations that have actually occurred. Some meaning has to be given to the word "threatened" in Article 22(1) and 259(1). A recent case challenged a decision of a public body to demolish a petrol station alleged to have been built on a road reserve. Clearly the applicant would not have to wait until the demolition took place to take action.
The South African courts have dealt with such issues and their case law provides some direction. In a case that involved a challenge to legislation that provided minimum sentences applicable to children (though no such sentence had in fact been imposed) the Constitutional Court said,

Although the Centre did not act on behalf of (or join) any particular child sentenced under the statute as amended, its provisions are clearly intended to have immediate effect on its promulgation. So the prospect of children being sentenced under the challenged provisions was immediate, and the issue anything but abstract or academic.[153]

The Court has also pointed out that, if abstract issues take over a case that begins with a concrete dispute, this may be to the detriment of the individual parties.

The consideration of irrelevant constitutional issues threatens the right of parties to a judicial process limited by a threshold of relevance. This right is vital in respect of accused persons, and is one protected by section 35(3)(d) of the Constitution [on right to trial without delay]. In the present matter, the High Court put the trials of MessrsPhaswane

[153] *Centre for Child Law v Minister for Justice and Constitutional Development* (CCT98/08) [2009] ZACC 18; 2009 (2) SACR 477 (CC); 2009 (6) SA 632 (CC) ; 2009 (11) BCLR 1105 (CC) para. 11.

and Mokoena on hold while it called for submissions from amici on provisions largely irrelevant to their criminal trials. Without deciding the point, delays of this kind may infringe section 35(3)(d) of the Constitution.[154]

The court also noted that the interests of the complainants were affected as well:

It is indeed the position that it may not necessarily be in the public interest to determine abstract questions where there is no evidence that conduct amounting to an infringement of the Constitution has [sc. been]or is likely to be committed.[155]

Mootness

A related issue may arise if in the particular case, litigation cannot affect the outcome of the particular dispute, for example if the date for the disputed thing to happen has already passed. This issue has also been confronted by the South African Constitutional Court. In *Independent Electoral Commission v Langeberg Municipality:*[156]

[9] In National Coalition for Gay and Lesbian Equality and Others v Minister ofHome Affairs and Others[157] *Ackermann J said:*
A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.

Even though a matter may be moot as between the parties in the sense defined by the quote above, that does not necessarily constitute an absolute bar to its justiciability. The Court has discretion whether or not to consider a given issue. Langa DP, in *President, Ordinary Court-Martial and Others v Freedom of Expression Institute and Others*,[158] throws some light on how such discretion ought to be exercised. The conclusion in that judgment is that section 172(2) of the Constitution does not oblige this Court to hear proceedings concerning confirmation of orders of unconstitutionality of legislative measures which have since been repealed but has a discretion to do so and "should consider whether any order it may make will have any practical effect either on the parties or on others." The reasoning is equally applicable to this appeal.

[11] This Court has a discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require. A prerequisite for the exercise of the discretion is that any order which this Court may make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might

[154] *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* (CCT 36/08) [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (2) SACR 130 (CC); 2009 (7) BCLR 637
[155] *Lawyers for Human Rights v Minister for Home Affairs* (2004) para. 67 Madala J
[156] [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883
[157]
[158]

have, the importance of the issue, its complexity, and the fullness or otherwise of the argument advanced. This does not mean, however, that once this Court has determined one moot issue arising in an appeal it is obliged to determine all other moot issues.
[14] …As the disputes between the parties are moot and as future cases might present different factual matrixes it would serve no purpose to resolve them.

Prerequisites to litigating

The South African Constitution provides (in a section about cooperative relations between levels of government):

> 41 3) An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.

This is mandatory: all other remedies must be exhausted. The Constitution of Kenya has a provision derived from this, but less stringent. Article 189 (2) provides that in any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation. However, Section 31 of the Intergovernmental Relations Act 2012 provides the national and county governments shall take all reasonable measures to—

> (a) resolve disputes amicably; and
> (b) apply and exhaust the mechanisms for alternative dispute resolution provided under this Act or any other legislation before resorting to judicial proceedings as contemplated by Article 189(3) and (4) of the Constitution.

This is provision is deficient in the sense that Articles 189(3) and (4) are about <u>not</u> going to court. What exactly is meant by taking all reasonable measures to exhaust ADR? It still does not sound as firm a requirement as under the South African Constitution.

The Act at section33 goes on to say that:

> (1) Before formally declaring the existence of a dispute, parties to a dispute shall, in good faith, make every reasonable effort and take all necessary steps to amicably resolve the matter by initiating direct negotiations with each other or through an intermediary.

But if this fails:

> (2) …a party to the dispute may formally declare a dispute by referring the matter to the Summit, the Council or any other intergovernmental structure established under this Act, as may be appropriate.

And Section 35. Where all efforts of resolving a dispute under this Act fail, a party to the dispute may submit the matter for arbitration or institute judicial proceedings.

Presumably a party to a dispute does not have to exhaust the Summit ("National and County Government Co-ordinating Summit which shall be the apex body for intergovernmental relations" – s. 7) <u>and</u> the Council (Council of County Governors – s. 19) <u>and</u> any other intergovernmental structure (there is a Technical Committee under the

Summit which is assisted by a Secretariat and can set up "sectoral working groups or committees" – are these the other structures referred to?).

1. How does this elaborate but unclear structure relate to the issue of advisory opinions on country matters? True an advisory opinion implies that the issue is not yet fully formed as a dispute, but in fact it may well stem from a dispute about what the Constitution means, even if the issue is as yet somewhat moot. A dispute is not quite the same as a "case or controversy".
2. In the *Langeberg* case, the South African Constitutional Court decided that a dispute that involved the Electoral Commission, an independent body, was not an "intergovernmental dispute" for the purposes of s. 41 of the Constitution. It is suggested that it would be appropriate to reach a similar conclusion in Kenya. The Court said,
   [29] …The Commission cannot be independent of the national government, yet be part of it.

The Constitution of Kenya has created institutions that perform their functions in terms of national legislation but are not subject to national executive control. The very reason the Constitution created the Commission - and the other chapter 9 bodies - was so that they should be and manifestly be seen to be outside government. The Commission is not an organ of state within the national sphere of government. The dispute between [the municipality] and the Commission cannot therefore be classified as an intergovernmental dispute. There might be good reasons for organs of state not to litigate against the Commission except as a last resort. An organ of state suing the Commission, however, does not have to comply with section 41(3).

Thus, even if a party to a strictly intergovernmental dispute (an expression used in the Kenyan Intergovernmental Relations Act) must try to resolve the dispute through the Summit, the Council or whatever, and this does apply to seeking an advisory opinion, the prerequisite does not apply to a state organ that is not the government at either level.

Who can bring cases?

Closely related to the question of what cases can be brought is that of who may bring them. It may be tempting to slip into an assumption that anyone may bring any case. The Constitution says:

> *22. (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—*
> *a person acting on behalf of another person who cannot act in their own name;*
> *a person acting as a member of, or in the interest of, a group or class of persons;*
> *a person acting in the public interest; or*
> *an association acting in the interest of one or more of its members.*

But many of the same issues that militate against too generous a view of what cases may be brought are equally applicable to this issue. As discussed in Chapter 1, the origins of this expanded concept of standing lie in the work of the Indian Supreme Court. That court has repeatedly warned against "busy-bodies", politically motivated cases, or cases motivated by concerns other than for the downtrodden in society who are unable to bring actions on their own behalf. The court said many years ago:

> *Though we spare no efforts in fostering and developing the laudable concept of PIL, and extending our long arm of sympathy for poor, the ignorant, the oppressed and the needy whose fundamental rights are infringed and violated and whose grievances go unnoticed , unrepresented and unheard; yet we cannot avoid but express our opinion that while genuine litigants with legitimate grievances relating to civil matters involving properties worth hundreds of millions of rupees and criminal cases in which persons sentenced to death facing gallows under untold agony and persons sentenced to life imprisonment and kept in incarceration for long years, persons suffering from undue delay in service matters- government or private, persons awaiting the disposal of cases wherein large amounts of public revenue or unauthorized collection of tax amounts are locked up, detenus expecting their release from the detention orders etc. etc. are all standing in a long serpentine queue for years with the fond hope of getting into the Courts and having their grievances redressed, the busy bodies, meddlesome interlopers, wayfarers or officious interveners having absolutely no interest except for personal gain or private profit either of themselves or as a proxy of others or for any extraneous motivation or for glare of publicity break the queue muffling their faces by wearing the mask of public interest litigation and get into the Courts by filing vexatious and frivolous petitions and thus criminally waste the valuable time of the Courts and as a result of which the queue standing outside the doors of the court never moves, which piquant situation creates frustration in the minds of the genuine litigants and resultantly they lose faith in the administration of our judicial system.*[159]

It seems likely that the courts of Kenya will similarly require information to satisfy themselves as to the basis on which parties are seeking the court's attention. This is how the South African courts – whose constitution inspired Kenya's language on this issue – have proceeded. Determining whether a litigant has standing in the sense of having a personal interest is something the courts are accustomed to do. On the matter of persons coming to court in the "public interest", Justice O'Regan of the Constitutional Court said:

[159] *Ashok Kumar Pandey v. State of West Bengal* 2003(9) SCALE 741, 746.

> *This Court will be circumspect in affording applicants standing by way of s 7(4)(b)(v) and will require an applicant to show that he or she is genuinely acting in the public interest. Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court. These factors will need to be considered in the light of the facts and circumstances of each case.*[160]

Justice Yakoob added,

> *A distinction must however be made between the subjective position of the person or organisation claiming to act in the public interest on the one hand, and whether it is, objectively speaking, in the public interest for the particular proceedings to be brought. It is ordinarily not in the public interest for proceedings to be brought in the abstract. But this is not an invariable principle. There may be circumstances in which it will be in the public interest to bring proceedings even if there is no live case. The factors set out by O'Regan J help to determine this question. The list of relevant factors is not closed. I would add that the degree of vulnerability of the people affected, the nature of the right said to be infringed, as well as the consequences of the infringement of the right are also important considerations in the analysis.*[161]

And on the particular facts of the case he said,

> *In these circumstances, the possibility that the people affected by these provisions will challenge their constitutionality is remote. They may well have left the country before the constitutional challenge could or would materialise even if it is assumed that they would have the resources, knowledge, power or will to institute appropriate proceedings. If section 34(8) of the Act is unconstitutional, hundreds of vulnerable people could be detained unconstitutionally for short times before their removal from South Africa without the constitutionality of these provisions ever being tested. This is not in the public interest. It is therefore, objectively speaking, in the public interest for these proceedings to be brought. The constitution of the first applicant records commitment to a principal objective which is to "promote, uphold, foster, strengthen and enforce in South Africa all human rights,*

[160] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC), para. 234 quoted by Yakoob J in at para. 15.
[161] Ibid. para. 18.

including civil rights, political rights and socio-economic rights". The first applicant accordingly acts genuinely in the public interest and has standing.

Similarly, according to Articles 22 and 259 of the Kenyan Constitution, actions may be begun by "a person acting on behalf of another person who cannot act in their own name; a person acting as a member of, or in the interest of, a group or class of persons." The first draws perhaps on the classic rule of habeas corpus– that anyone could go to court on behalf of a person detained who was not in a position to do so for themselves. Other reasons might be physical incapacity or being overseas. It is suggested that normally a court should require to be satisfied that the person in question either consented to the action being brought or, for very good reason, was unable to express a desire on the matter. It is in principle undesirable, for a person to be compelled to go to court to seek a remedy against their will. Just as the freedom of association means the freedom not to associate, so the right to fair legal process must include the right not to go to court.

"[A]cting as a member of, or in the interest of, a group or class of persons" may be a little different. It may be that a group of affected persons is very large, and scattered. It may be that they would wish to go to court but are reluctant because of concerns such as not offending a landlord, or a political leader. If the class is relatively confined, should the court entertain an argument by the defence that not all, or indeed none, of them actually want the case to proceed? If the class is large and diffuse, it can be viewed as a case of the public benefit. The benefit of provisions such as these is that it is not necessary to search for a specific individual to be the torch bearer for a whole class of society.

One other dilemma: in some cases a person not directly affected has joined, or initiated, action primarily brought by individuals who are affected. The motive is sometimes to deal with the fear that those individuals will be persuaded to withdraw. If that happens, should the court entertain an argument that there is no-one now who wishes to proceed other than the Article 22 (2) parties? If so, it is suggested that it could be argued that the court should be require the defence to establish that indeed all respondents/defendants have withdrawn or no longer wish to proceed.

What can the courts do?

Courts can be creative in the remedies that they propose, but the Kenyan Constitution also provides for specific remedies of various types.

Declarations of invalidity

The Constitution provides that one of the remedies available for the courts is "a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24."[162] Article 2 provides that "Any law… that is inconsistent with this Constitution is void to the extent of the inconsistency."

[162]Art. 23(3)(d).

One question that will ultimately come to be decided is whether the courts may decide in advance of enactment that a law will be unconstitutional. One argument against would be the reference in these two sub-clauses to "any law": a Bill is not a law until enacted. Certainly the courts will be reluctant to declare anything not yet passed by Parliament unconstitutional, and such an action might be considered an advisory opinion which we have discussed earlier courts general are reluctant to provide. But are there any circumstances in which the courts might take this step?

Turning again to the South African courts, the Constitutional Court has adopted the approach of the Privy Council which:

> *held that a court in Hong Kong may intervene if there is "no remedy when the legislative process is complete and the unlawful conduct in the course of the legislative process will by then have achieved its object."*[163]

One of the reasons for limiting the cases that come before the courts is respect for the principle of separation of powers. The South African Constitutional Court set out the dilemma clearly:

> *One of the founding values in section 1 of the Constitution is a multi-party system of democratic government to ensure accountability, responsiveness and openness. The legislature has a very special role to play in such a democracy – it is the law-maker consisting of the duly elected representatives of all of the people. With due regard to that role and mandate, it is drastic and far-reaching for any court, directly or indirectly, to suspend the commencement or operation of an Act of Parliament and especially one amending the Constitution, which is the supreme law. On the other hand, the Constitution as the supreme law is binding on all branches of government and no less on the legislature and the executive. The Constitution requires the courts to ensure that all branches of government act within the law. The three branches of government are indeed partners in upholding the supremacy of the Constitution and the rule of law.*[164]

The Court held that:

> *A high court has jurisdiction to grant interim relief designed to maintain the status quo or to prevent a violation of a constitutional right where legislation that is alleged to be unconstitutional in itself, or through action it is reasonably feared might cause irreparable harm of a serious nature.*
> *Such interim relief should only be granted where it is strictly necessary in the interests of justice.*[165]

[163] In *Rediffusion (Hong Kong) Ltd v Attorney-General of Hong Kong* [1970] AC 1136 (PC) at 1157E–F.quoted in Glenister v President of the Republic [2008] ZACC 19 para. 43.

[164] *President of the Republic of South Africa and Others v United Democratic Movement (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae)* (CCT23/02) [2002] ZACC 34; 2003 (1) SA 472 (CC); 2002 (11) BCLR 1164, para. 25.

[165] Para. 32.

What exactly is a declaration of invalidity?

Should the Kenyan courts issue relief in the form of a declaratory order, it is important to understand exactly what that can mean. A "declaratory order" has a specific, but somewhat limited, meaning in administrative law; it is an order issued, usually to a government, which states what the law is but carries no "teeth" – no enforcement mechanism exists. The South African Constitution is clear, by implication at least, that such a declaration actually has legal effect; it may be suspended "to allow the competent authority to correct the defect" (s. 172(1)(b)(ii)), which implies that otherwise it takes immediate effect.

The Constitution of Kenya also says that any law that conflicts with the Constitution is invalid. This implies that a court's "declaration" has more than declaratory force. Courts may make a declaration and suspend its effect to allow the defect to be corrected, although the Kenyan Constitution is silent on the power to issue a suspended declaration. This power has been very useful, for example in Canada, where the Supreme Court held that all the legislation of Manitoba was invalid because of a failure to respect a rule about publishing it in French as well as English, but suspended the order for 2 years.[166] The Hong Kong courts grant similar delayed declarations of invalidity.[167] It seems likely that the Kenyan courts would decide that (i) their declarations of invalidity are binding and (ii) that they have some sort of inherent power to delay their effect. Of course this depends on how well the issue is argued if ever it comes up.

Other approaches to legislation that fall short of declaring it unconstitutional are discussed under interpretation below.

Other remedies

The Kenyan Constitution spells out various other remedies in Article 23 (3) including a declaration of rights, an injunction, a conservatory order, an order for compensation, and an order of judicial review. The following section discusses each remedy, in varying levels of detail.

A "declaration of rights" is a final order, not an interim one. It raises the same issues as discussed earlier – a declaration is usually a remedy without teeth. But it can be coupled with a concrete order, either an injunction or some other judicial review order, or an order for compensation. A conservatory order is used as an interim order to prevent the doing of acts that would preclude certain resolutions to the case in court.

[166] *Reference re Language Rights under s. 23 of Manitoba Act, 1870 and s. 133 of Constitutional Act, 1867, [1985]* 1 S.C.R. 721.
[167] See *Koo SzeYiu v Chief Executive* (2006) 9 HKCFAR 441.

Injunctions – against the state?

Traditionally, an injunction could not be obtained against the government. The theory was that there could be no order technically against the monarch, in the monarch's own courts. In fact the remedy of a declaration was viewed as a substitute, and as good as an injunction because of the expectation that the government would comply with the declaration.

Over time, there thinking on this issue has developed in different common law jurisdictions. The UK House of Lords, for example, held that there was no reason, under the relevant legislation and the Rules of Court why an injunction (and other orders that raised similar issues) could not be granted against, not the Crown as such, but against Ministers and servants of the Crown acting in their official capacity.[168] Lord Wolfe noted that;

> *The fact that, in my view, the court should be regarded as having jurisdiction to grant interim and final injunctions against Officers of the Crown does not mean that that jurisdiction should be exercised except in the most limited circumstances. In the majority of situations so far as final relief is concerned, a declaration will continue to be the appropriate remedy …I do not believe there is any impediment to a court making such a finding, when it is appropriate to do so, not against the Crown directly, but against a government department or a Minister of the Crown in his official capacity.*

In Kenya, the Government Proceedings Act says,

> *16. (1) In any civil proceedings by or against the Government the court may, subject to the provisions of this Act, make any order that it may make in proceedings between subjects, and otherwise give such appropriate relief as the case may require:*
> *Provided that -*
> *(i) where in any proceedings against the Government any relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and*
> *(2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order will be to give any relief against the Government which would not have been obtained in proceedings against the Government.*

[168] M v Home Office [1993] UKHL 5, [1994] 1 AC 377, [1993] 3 WLR 433, [1993] 3 All ER 537.

It has been argued, even under the previous Constitution, that in constitutional matters this statutory provision does not apply.[169] The very specific mention of injunction in the current Constitution, in the context of human rights for which most of the cases will surely be against the state in some form, would, it is suggested, make possible a particularly strong argument. On the other hand, the same approach would be harder to use in cases not involving human rights, where no remedies are mentioned, though Article 259 (1) is similar in effect to Art. 22(1), on parties, there is no equivalent of Article 23 (3) on remedies.

Structured injunctions

Structured injunctions are remedies that involved directives on behalf of the court to a particular party to take specific actions. For example, In *Residents of Joe Slovo Community v Thubelisha Homes* the Constitutional Court made an order that it described in the course of its judgment in the following terms:

> *(5) First, this Court's order imposes an obligation upon the respondents to ensure that 70% of the new homes to be built on the site of the Joe Slovo informal settlement are allocated to those people who are currently resident there or who were resident there but moved away after the N2 Gateway Housing Project had been launched. Secondly, this Court's order specifies the quality of the temporary accommodation in which the occupiers will be housed after the eviction; and thirdly, this Court's order requires an ongoing process of engagement between the residents and the respondents concerning the relocation process.*

Such complex orders, or structured injunctions, are also regularly used in the USA. It has been argued that such injunctions offer a valuable way of enforcing economic and social rights and ensuring official accountability, especially in situations where petitioners are poor, and where government officials may disregard other forms of order making declaration ineffective.[170]

Like the Constitution of South Africa the Constitution of Kenya speaks of the courts having the power to grant "appropriate relief." Thus it may prove possible in PIL cases to persuade the Kenyan courts to be similarly creative in the development of structured remedies.

[169]See MuthomiThiankolu, "Landmarks for El Mann to the Saitoti Ruling; Searching a Philosophy of Constitutional Interpretation in Kenya" in Kenya Law Review http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Thiankolu_Paper.pdf.

[170]Hirsch, "A Defense of Structural Injunctive Remedies in South African Law" (2007) 9 *Oregon Review Of International Law* 1

Orders of judicial review

Again on "an order of judicial review", this expression is used only in connection with human rights. These orders are mandamus, prohibition and certiorari according to Order 53 of the Civil Procedure Rules. The first two raise rather similar issues to injunction: that disobedience incurs the risk of being in contempt, and the same sorts of arguments can be anticipated.

But could it be argued that these two orders, even if available against the state or officers in strictly constitutional cases, are not in judicial review cases? On the one hand the Government Proceedings Act does not bar them, unlike the injunction. Further, it seems likely that the line between judicial review and constitutional proceedings will become increasingly blurred. In *Republic v Attorney General & 2 Others Ex-Parte Consumers Federation of Kenya (COFEK) suing through its officials*[171] Justice Korir said,

> I have carefully looked at the application placed before me and I find that the same is a judicial review application and not a constitutional petition. The same clearly meets the standards of a judicial review application. I agree with the respondents that a constitutional petition has to meet certain parameters. The fact that the Applicant has quoted constitutional provisions does not however make the application a constitutional petition.
>
> Courts are creatures of the Constitution and their primary task is to uphold and protect the Constitution. Judicial officers walk, sleep and dream the Constitution. Even if a party does not quote the provisions of the Constitution, a court of law will always ensure that its decision is in tandem with the Constitution.

The existence of a right to fair administrative practice will also blur the distinction somewhat.

Damages

The constitution anticipates that damages can be awarded to redress violations. In *Ibrahim Sangor Osman V Minister of State for Provincial Administration & Internal Security* ,the court in seeking to provide remedy to victims of forced eviction, awarded damages amounting to Ksh. 2.24 billion to 1123 petitioners. In arriving at this remedy, the court reasoned that:

> *The Petitioners asked for general, aggravated, exemplary and punitive damages against the Respondents jointly and severally. I note that the orders above will to some extent restore the Petitioners to their previous situation. I consider that the Petitioners did not provide information regarding the value of what was lost in the evictions, or what they have spent so far in terms of seeking to survive under their present circumstances. These, however, should not minimize the gravity of the matter and the violations of the fundamental rights of the Petitioners by the Respondents. The petition was not defended. And yet, the court cannot assume that the Respondents have a limitless purse. It is in these circumstances that I have decided that each ofthe 1,123 Petitioners shall get a global figure of Ksh.200,000 in damages from the Respondents, jointly and severally. The Respondents shall then pay the costs of the petition.* [172]

[171] [2012] eKLR May 12 2012,

[172] Embu High Court, Constitutional Petition No.2 of 2011 *Ibrahim Sangor Osman V Minister of State for Provincial Administration & Internal Security (Judgment* of Justice Muchelule, at pg 11).

Execution of judgments

It is one thing to obtain a judgment; it is another thing to get the benefit of it. In the case of a judgment against the state there are additional complications. For similar reasons as an injunction could not be issued against the Crown, execution in the usual way was not possible. And there are additional reasons: what would a judgment debtor seize? The nearest hospital or its equipment? In Kenya, the Government Proceedings Act provides that:

> *21 (4) Save as provided in this section, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any money or costs, and no person shall be individually liable under any order for the payment by the Government or any Government department, or any officer of the Government as such, of any money or costs.*

However, the section does also specify that:

> *(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the accounting officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon.*

But of course there is no way of enforcing this duty, and it is clear that getting damages from the government has proved very hard. On August 1 2012, the Attorney-General told Parliament,

> *I am personally committed to and have already started implementing is taking an audit of all the pending claims against the Government. I have divided those claims into two; we have human rights violations which are several. Some of them are already pending in courts. For others, damages have already been awarded and I want to prioritise their payments. The others are court claims and contract claims against the Government. With regard to the court claims, I have prioritized them into different categories. We have road traffic accidents, injuries by wildlife et cetera. We also have Government contracts. We hope to have a comprehensive Cabinet Memorandum authorising the payment of all these pending claims. I want by the end of this parliamentary term, the Government not to owe the public any money in this respect.*

The Attorney General also indicated a plan to amend the Government Proceedings Act.

Despite the Attorney General's statements, any party embarking on PIL must develop a plan for how they will proceed in case of resistance to executing the judgment. A plan to mobilize around executing the judgment should be in place at the beginning of the litigation and should form part of the risk analysis that is carried out prior to initiating litigation.

Judicial Interpretation as a Route to a Remedy

A substantial part of PIL in many countries revolves around interpretation of the Constitution and legislation. PIL advocates must be prepared to guide the courts through innovative interpretations of the Constitution and legislation in the service of the public good.

The Constitution requires the courts to approach their work of interpreting and applying the Constitution in specific ways. We can divide this into three (interlinked) tasks: (i) understanding what the Constitution itself says, (ii) interpreting other statutes in the light of the Constitution, and (iii) applying and developing the common law.

Article 20 says:

> (2) In applying a provision of the Bill of Rights, a court shall—
>
> (a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and
>
> (b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.
>
> (3) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote—
>
> (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and
>
> (b) the spirit, purport and objects of the Bill of Rights.

This rather mixes up the three tasks. Clause (3) applies to the task of interpreting the Bill of Rights itself. And with that one must also read Article 259:

> (1) This Constitution shall be interpreted in a manner that—
>
> (a) promotes its purposes, values and principles;
>
> (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
>
> (c) permits the development of the law; and contributes to good governance.

In other words, the Bill of Rights must permeate the Constitution so that all parts are interpreted in a way that supports fundamental rights. So must all other purposes, values and principles of the Constitution (1)(a), which brings into play not only Article 10 which

explicitly sets out national "values and principles"[173], but other value oriented provisions such as Article 60 on values in the context of land, 73 on leadership, including "Authority assigned to a State officer— (a) is a public trust to be exercised in a manner that…and (b) vests in the State officer the responsibility to serve the people, rather than the power to rule them", and 174 on the objects of devolution, not to mention 159 on the judiciary itself.

Article 20(2)(b) might be read as referring to how the Constitution itself is read, but this makes little sense in view of 22(3) and 159. It is best understood as referring to the reading of other statutes: they must also be read in a way that ensures they comply with the Constitution. This may involve the resolution of any ambiguity in favour of an interpretation that advances human rights and other values protected in the Constitution. And it is important to understand the considerable ability of courts to find ambiguities! It involves the application of a "purposive" approach – that is the explicit reading of the language of statute in terms of what it was intended to achieve. This may be a double-edged sword in reading existing legislation, because there may have been a purpose that is inconsistent with the Constitution.

In the case of new legislation it must be read on the assumption that the legislative branch intended to be consistent with the Constitution. It may involve the more activist process of "reading down" the statute; a process that hovers between interpretation and a declaration of unconstitutionality. The process of interpretation was described by Sir Anthony Mason, in the context of applying human rights provisions to criminal legislation in Hong Kong[174]:

> *Our first task is to ascertain the meaning of [the relevant statutory provision] according to accepted common law principles of interpretation as supplemented by any relevant statutory provisions. Our second task is to consider whether that interpretation derogates from the presumption of innocence and the right to a fair trial as protected by the Basic Law and the BOR. If that question is answered "Yes", we have to consider whether the derogation can be justified and, if not, whether it could result in contravention of the Basic Law or the BOR and consequential invalidity. If invalidity could result, then it will be necessary to decide whether the validity of the section or part of it can be saved by the application of any rule of construction, severance of the offending part, reading down, reading in or any other remedial technique available to the Court.*

This language from the Hong Kong courts makes clear the lengths to which courts will go to avoid invalidating an act of the legislative branch. PIL advocates must be aware of this

[173](2) (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
(c) good governance, integrity, transparency and accountability; and
(d) sustainable development.

[174]*Lam KwongWai* (2006) 9 HKCFAR 574 para. 29. Hong Kong cases are available at wwww.hklii.org or the judiciary website at

judicial tendency, which is a valid philosophy in the service of separation of powers, and work within this framework in requesting relief. If sections of a statute can be severed, while upholding the rest of the law, or if language can be creatively interpreted so as to preserve constitutionality, advocates should work towards assisting the judges in such an endeavor. Striking down legislation as unconstitutional should be a last resort.

Severance or partial invalidity

The Constitution of Kenya, at Article 2(4) specifies the option of declaring laws partially unconstitutional, thus severing unconstitutional clauses, with the statement that "any law, including customary law, that is inconsistent with this Constitution is void ***to the extent of the inconsistency***…" [emphasis added]. This can be described as the blue pencil approach in which even a few words can be excised as being unconstitutional. Justice O'Regan[175] cites *Coetzee v Government of the Republic of South Africa*[176] as an example of this technique. The Constitutional Court was faced with a provision that unconstitutionally permitted imprisonment for debt:

> *[15]…there are two questions to be answered with regard to the possible severance of the provisions of the law not consistent with the Constitution. First, can one excise the provisions which render the option of imprisonment unconstitutional because they do not distinguish between those who can pay but will not from those who cannot pay? If not, can the provisions which provide for imprisonment itself be severed from the rest of the system for enforcement of judgment debts?*
> *Although severability in the context of constitutional law may often require special treatment, in the present case the trite test can properly be applied: if the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute.*

Justice O'Regan also refers to what she calls "notional severance":

> *It focuses on the words 'to the extent that' and rather than eliminating specific words in a provision, narrows the scope of the provision by indicating circumstances to which the provision is not applicable.*

The first example in South Africa of the use of notional severance related to a provision in the Companies Act that provided that a person could be called upon to give evidence before an enquiry into the affairs of a company, compelled to answer questions, and the answers could be used as evidence against that person in subsequent proceedings.[177] The notional severance order provided that the provisions of section 417(2)(b) are declared

[175]Ibid.
[176][1995] ZACC 7; 1995 (10) BCLR 1382; 1995 (4) SA 631
[177]*Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984.

invalid to the extent only that it 'may apply to use of any such answer in criminal proceedings, other than proceedings' for perjury.

Reading in

Legislation may also be problematic because of vague and poor language, typographical errors, incompleteness, or other drafting problems. Courts may be called on to "read in" something that was not there in order to avoid unconstitutionality, or even an evident absurdity. PIL advocates must be prepared to present options to the court as to how "reading in" could assist the court in resolving the matter in favor of the public interest. Advocates should be careful in their proposals. For instance, in one Hong Kong case the court stated, "the insertion must not be too big, or too much at variance with the language used by the legislature."

The South African Constitutional Court has read in language to statutes as part of its constitutional role. The Court has said:

> *[75] In deciding to read words into a statute, a court should also bear in mind that it will not be appropriate to read words in, unless in so doing a court can define with sufficient precision how the statute ought to be extended in order to comply with the Constitution. Moreover, when reading in (as when severing) a court should endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution.*[178]

Reading down

"Reading down" has been used quite frequently in connection with burdens of proof: to require only an evidential burden on an accused person, that is a burden of raising an issue but not of having to prove it.[179] "Reading down", or indeed any other technique of interpreting legislation is not a mechanical process. Justice O'Regan of the South African Constitutional Court has observed,

> *One of the questions that arises is how far a court should go to find a meaning consistent with the Constitution in the face of the express language in the provision itself. In South Africa, two principles are in tension here: the desirability of avoiding a declaration of invalidity which, is at least at one level, an affront to the legislature who enacted it and therefore a result that courts, for reasons of institutional comity and respect, prefer to avoid; the other is the rule of law principle that legislation should be clear and intelligible upon its face. Attaching a meaning to the words in a legislative provision that is different to the ordinary import of the words may well impair this principle.*[180]

[178] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affair* 2000 (2) SA 1

[179] E.g. *R v. Lambert* [2002] 2 AC 545 (House of Lords)

[180] "Fashioning constitutional remedies in South Africa: some reflections" *advocate* (official journal of the General Council of the Bar of South Africa) April 2011, 41, 42; http://www.sabar.co.za/law-journals/2011/april/2011-april-vol024-no1-pp41-44.pdf

LSK's Decision- Making in PIL Cases

Evident from the foregoing analysis of the Constitution, numerous opportunities exist for LSK to engage in PIL. However, to be an actor in every conceivable cause will present LSK with both operational as well as ethical constraints that may well considered overwhelming. Without identifying all the possible areas where LSK could engage in PIL, the best approach is for the organization to adopt a decisional model that systematically enables it to only engage where its resources and competences provide the most optimal leverage.

Chapter 5

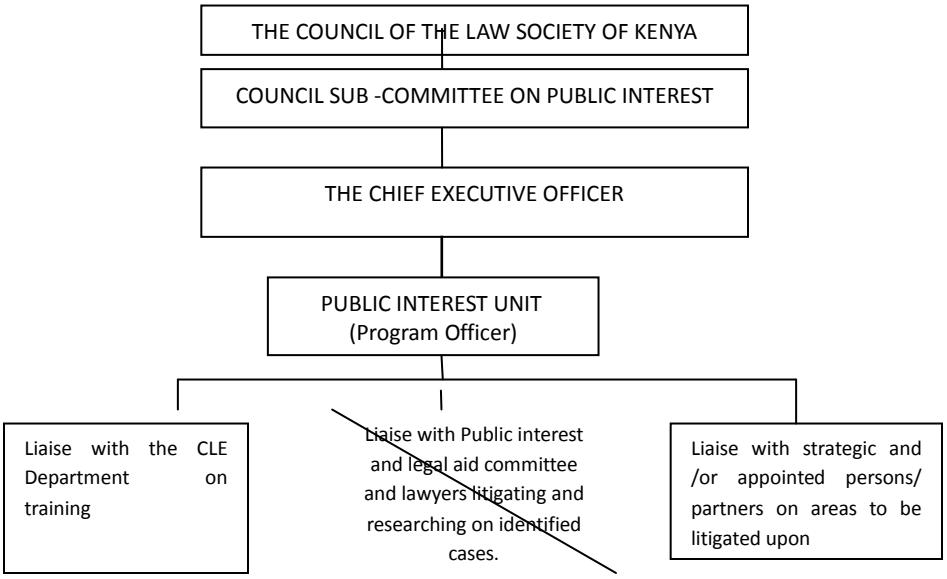
LSK strategy for PIL

This strategy document has sought to provide an in depth guidance to the Law Society of Kenya on its long term engagement and involvement with PIL.While noting the increased opportunity for PIL presented by the new constitution, the report is clear on the need to apply well-established strategies deployed in other jurisdictions where PIL has flourished, including; the place of adequate factual and legal preparation of cases supported with comparative research, constituency building, coordination with like-minded actors including the media as well as strengthening the capacity of both the bar and bench on PIL. The first chapter has provided rich comparative information on the evolution of PIL in various countries in order to assist LSK's membership to appreciate the potential and constraints of such litigation. The practical aspects of the strategy are presented in the second and third parts which discuss the place of coordinated approaches to PIL work and how to institutionalize a *probono* system that will link PIL clients and issues with legal capacity resident within the Law Society. In order to identify the areas and issues for LSK's PIL work, the fourth part of the paper links constitutional interpretation approaches to a specific decisional framework which LSK may adapt in order to objectively determine the scope of its involvement in a given legal cause.

Effective mechanisms to address Public interest issues will require LSK to:

1. Structure the PIL Committee to enable it provides more coordinated response to various dimensions of PIL. Sub-groups dealing with Implementation of the Constitution, Human Rights Committee, Law Schools and Law Firms' Outreach; Legal Rights of Marginalized groups (Children, Persons with Disabilities and women) could be established.

STRUCTURE OF THE PUBLIC INTEREST LITIGATION UNIT



2. Equip the PIL Unit to do more including: creating a regular forum for new ideas in public interest lawyering, provision of continuing legal education to "PIL Section members" as well as educate and involve the entire Bar in issues affecting the public interest through colloquia, newsletters and list serves.
3. Formulate a clear policy on PIL engagement to minimize potential conflict with its membership and ensure that the quality of its PIL submissions is unimpeachable.
4. Develop a comprehensive policy dealing with its PIL participation as amicus curiae. An amicus quality control team should be in place to protect the integrity of LSK's amicus briefs.
5. Consider establishing an IT-Database that include (irrespective of funding) a three-tier database for *pro bono* lawyers, namely (1) a database of lawyers engaged in *pro bono*, (2) a *pro bono* knowledge management system, and (3) a *pro bono* case management system. The first tier, the *pro bono* lawyers database, should facilitate the matching of the adequate lawyer with the client. The second tier of the database, the knowledge management system, could be used as a PIL library and research center. Write-ups of decided cases could be filed for further reference, critiques of judgments, appeals including the reasons for the appeal, as well as preliminary research conducted and general PIL case strategies could be incorporated amongst other necessary features. The knowledge management system could also be used for monthly updates on PIL cases from around the country. Finally, the third tier, the PIL case management system, would have limited access only for the LSK and the litigating *pro bono* lawyer.
6. Establish an incentives system for PIL and *probono* lawyers including through award of Continuing Legal Education (CLE) units and formal recognition.

Criteria for Identifying Public Interest Litigation Cases

In considering the number and cases to be taken up by the Law Society on public interest will include the following:

1. The strategic litigation falls within statutory objects and strategic plan of the Law Society.
2. There is a legal problem that relates to a broader social problem.
3. Involves controversy on emerging jurisprudence of human rights.
4. The test case will challenge a policy or practice that has caused significant disadvantage.
5. There are no alternative methods to achieve the goals or the effectiveness of alternative methods is doubtful vis-à-vis strategic litigation.
6. The decision requested from the court would address the problem.
7. The case will clarify an important point of law.
8. The courts will be independent, receptive or sympathetic to the strategic litigation.
9. There is no another group or organization that instituted a similar case.
10. It is cost effective to undertake the strategic litigation.

Objective 1: To restructure the PIL Committee to enable it provide more coordinated response to various dimensions of PIL

	Strategy	Expected outcome	Activity	Output indicators	Timeline	Resources (Kshs)
1	Establish thematic PIL sub-committees on bill of rights, special groups of persons, gender issues and resource allocation.	To have a more responsive PIL Committee	Develop work plan for the sub committee	Work plan	Six months	Kshs. 6,000,000
			Capacity build committee members on thematic areas	Meetings	Continuous	
			Develop a hand book on Bill of Rights	Published Hand Book	Two years	
			Sensitising advocates on thematic areas	Meetings	Continuous	
			Undertake a survey on gender parity in the legal profession	Baseline Survey	Two years	
2	Establish expertise & skills requirements for PIL	To enhance capacity of LSK members to undertake PIL issues	Create an electronic resource centre for PIL issues	Electronic resource centre	Two years	Kshs. 4,000,000
			Train advocates on handling of PIL matters	Trainings	Continuous	
			Develop an annual PIL journal	Journals	Annually	
			Train the LSK PIL Unit	Trainings	Continuous	
			Establish exchange programs for PIL advocates	Partnerships	Continuous	
			Enter into partnerships with publishers to provide resource materials for PIL	Partnership agreements	Continuous	
TOTAL						**Ksh 10,000,000**

Objective 2: To put the necessary infrastructure for the PIL Unit

	Strategy	Expected outcome	Activity	Output indicators	Timeline	Resources (Kshs)
1	Database for *Pro Bono* Lawyers, Referral System ,Case Documentation System and Reward System	To enhance LSK capacity to coordinate *pro bono* work	Create an electronic database of all members who are willing to take up matters *pro bono*	Database	One year	Kshs. 4,000,000
			Create a comprehensive referral system with other legal aid providers and NALEAP	Electronic referral system	One year	
			Create a case documentation system for matters taken up by the Law Society of Kenya	Case documentation system	One year	
			Create a reward system for lawyers who are taking up matters *pro bono*	Reward system	Two years	
TOTAL						**Ksh 4,000,000**

Objective 3: To offer quality PIL services

	Strategy	Expected outcome	Activity	Output indicators	Timeline	Resources (Kshs)
1	Undertake Public Interest Litigation	To enhance implementation of the Constitution and influence government and policy reforms	Identify strategic issues to be litigated by LSK	Agreed areas	Continuous	Kshs. 8,000,000
			File PIL cases	Number of cases litigated on	Continuous	
			Design a support system for advocates executing PIL Cases on behalf of LSK	Support system	Continuous	
2	Strengthen research on emerging public interest issues	To enhance jurisprudence on emerging legal issues	Create a research unit at the Law Society of Kenya	Research Unit	Continuous	
			Make presentations on emerging PIL issues at CLE Programs	Number of presentation	Continuous	
			Publish case digests on PIL issues	Case digests	Continuous	
3	Encourage collaboration, partnerships and exchange with other partners	To enhance access to justice	Have networking and information sharing meetings with partners on PIL issues	Meetings	Continuous	Kshs. 200,000
			Identify CSO's with grassroots reach	List if CSO's	Continuous	
TOTAL						**Ksh 8,200,000**

GRAND TOTAL	**Ksh 22,200,000**

Decisional Template for consideration of PIL cases

Case No.

The Case: broad nature						
Is there an existing claimant/petitioner/ applicant etc? (Tick under appropriate response)	Is existing individual or group	Individual etc. – and would be test case	Art22 (2)(b) case: LSK would be acting in interest of group/class.	Art. 22(2)(c): LSK would be acting in the public interest in initiating case	LSK would be interested party in existing litigation	LSK would be amicus
Finance (source):						
Beneficiary individual(s), category/ies or group(s)						
Impact on the law (Art. of Constitution interpreted, statute etc. but with indication of broad effect on law)						

Factors for decision (ranking 0-10–10 being "we must take this, and 0 "avoid at any cost")		
Factor	Remarks (explain relevance of factor and also if indicates amicus, interested party etc involvement, or leaving it to someone else, or referral to pro bono lawyer	Rank 0-10
Will this be in the interests of the downtrodden etc?		
Is it something for the LSK can make a particular contribution?		
Is this a topic on which there is a real need for quality argument that the LSK can supply?		
Is it a case of national or more local interest?		
Will LSK enable those who otherwise will not be able to litigate to do so?		
Will the case have long term benefits in terms of development of law etc?		
Will the case establish principles, rather than deciding application in particular case?		
How long will the case take?		
Is there any smell of politics, or a likelihood of perception of politics?		

Notes

Include total "score" in column 3; and in columns 2, overall recommendation and explanation of recommendation if is to take case on, even if there is some score of 0, or not to take it even if is a score of 10 on some factor.