

Kenyans for Peace with Truth and Justice (KPTJ),  
Africa Centre for Open Governance (AfriCOG)  
and the Katiba Institute

# A guide to Public Interest Litigation in Kenya



**Cover Illustration**

Statue of a boy wearing a wig and clutching a fish in the midst of a water fountain that stands outside the Supreme Court in Nairobi. It symbolises the adage: "Justice is naked, blind and open for everyone to see".

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# Abbreviations and Acronyms

AfriCOG	Africa Centre for Open Governance
JTI	Judiciary Training Institute
KPTJ	Kenyans for Peace with Truth and Justice
LGBTI	Lesbian, gay, bisexual, trans-sexual and intersex
LSK	Law Society of Kenya
PIL	Public Interest Litigation
SA	South Africa
TAC	Treatment Action Campaign
UK	United Kingdom
URL	Universal resource locator
US	United States
WPA	Witness Protection Agency

# Foreword

This *Handbook on Public Interest Litigation (PIL) in Kenya* is a milestone in the history of PIL in Kenya. I take this opportunity to commend Kenyans for Peace with Truth and Justice (KPTJ), Africa Centre for Open Governance (AfriCOG) and the Katiba Institute for developing it. I am happy to note that KPTJ, AfriCOG and Katiba Institute have developed a solid reputation for urging the Kenyan state and polity to adhere to the commitments it has made to improve democracy, human rights and open governance in the country. The three organizations have been particularly audible, visible and articulate in focusing attention on issues of social and economic transformation in the country such as land rights violations, police abuses, corruption and electoral malpractice as well as making critical inputs in policy deliberations on these and other governance concerns.

Now that Kenya has a new constitution that provides for a devolved system of governance, economic and social rights and more robust protection for women's rights and rights of the marginalized, it is not premature to state that the strategic battle for the creation of a new framework for democracy and open governance has been won. However, the next phase of focus for the democracy and governance sector is to see to it that these new constitutional provisions are fully implemented to the benefit of the people of Kenya. This phase will, of necessity, include the calibration of the delicate content of these provisions and will, in all likelihood, continue into the foreseeable future. We can also conclude, in comparative perspective, that the next phase will be most challenging.

It is for this reason that the decision to develop this Handbook is important. History shows that PIL has been a particularly critical tool for testing, clarifying and shaping law, policy and practice in societies across the globe. PIL will make an important contribution to the lives of many Kenyans if it succeeds in influencing and reshaping the discussion on the issues of democracy, human rights and open governance. So far, some of the PIL actions undertaken in Kenya in recent times have helped, for instance, to establish important legal precedents on due process rights and land rights protections. Future innovative PIL actions can also help shine a light on the neglected issues of violence against women, child abuse, food insecurity, deaths from preventable diseases and extreme poverty among others. There are also the emerging issues of exploitation of minerals and fossil fuels and the building of mega projects which, while they stand to bring important benefits to Kenyans, may also result in the exploitation, displacement and marginalization of some of the more vulnerable members of our society. More importantly, PIL holds the key to making the instrument of the law (and, particularly, the Social and Economic Rights provisions of the Constitution) the pivot for social and economic transformation in Kenya, the leverage and hinge of the social-democratic pact that our Constitution envisages.

This Handbook is therefore a timely and Kenya-specific tool to include in the toolbox for public interest litigators who are concerned about the need to prevent such outcomes. A review of this Handbook shows that it provides detailed conceptual and practical guidance on various options for public interest litigators to use the law and courts to inform on-going and future public and policy discourses on pressing social and governance issues in Kenya. While there are a number of locally developed PIL guides, the KPTJ/AfriCOG / Katiba Institute Handbook is unique for its focus on the unfolding governance realities in Kenya which are, in part, the result of Kenya's progressive bill of rights and the move towards decentralization. It also incorporates the observations and key lessons learned by leading Kenyan public interest litigators who have been engaged in various PIL actions concerned with housing and land rights, police abuses, corruption, electoral malpractice and political violence among other issues.

As the Director of the Judiciary Training Institute and Head of the Judiciary Transformation Secretariat, I can say with confidence that our team and the rest of our colleagues in the Judiciary are tirelessly working to transform the courts into vehicles that advance social justice, the rule of law and expand access to justice for more Kenyans. One of the key goals of Judiciary Transformation is to reposition the Judiciary so that it can play its rightful role in the implementation of the Constitution – including the very robust Bill of Rights contained in the Constitution. The Judiciary has identified the overhaul of its judicial-legal as well as the organizational culture as one of the key vehicles for achieving this. One of the cultural changes we have aggressively sought is structured, respectful and constructive engagement with all our stakeholders to ensure that the work of the administration of justice is proceeding apace. Public Interest Litigators are, no doubt, one of our key stakeholders. We are acutely aware that unless Kenya develops a self-conscious cadre of Public Interest Litigators who are passionate, professional and fully capacitated, the promises and liberties of our Constitution will be a pipe dream. That is why, at the Judiciary, we celebrate the efforts to increase the skills and knowledge of Public Interest Litigators that this Handbook entails. Ultimately, this Handbook will make our work of transforming the Judiciary, and the Kenyan society through the instrument of the Constitution easier and more efficient.

I thank and congratulate KPTJ, AfriCOG and Katiba Institute sincerely for this invaluable resource. I am confident that this Handbook will be the fulcrum upon which constructive engagement among the legal fraternity, civil society, the courts and Kenyans will be constructed as a foundation to the vision of social justice enshrined in our Constitution.

**Justice (Prof.) Joel Ngugi**

Director, Judiciary Training Institute  
Head, Judiciary Transformation Secretariat  
Judge, High Court of Kenya

# Acknowledgements

KPTJ, AfriCOG and the Katiba Institute have been partners in a number of initiatives aimed at improving governance and expanding access to justice in Kenya. Our partnership is focused on providing technical advice and support in policy and legal processes, in particular the ongoing implementation of Kenya's new constitution.

This, our most recent initiative, *The Handbook on Public Interest Litigation in Kenya (2014)*, presents us with an opportunity to take advantage of the progressive environment that is emerging in Kenya's judiciary. Towards this end, it is anticipated that the Handbook will contribute to the strengthening of the capacity of individual litigators, as well as organizations, to mount effective PIL actions in the Kenyan courts. This Handbook is particularly sensitive to the changing constitutional and governance context in Kenya, defined by a progressive Bill of Rights that contains social rights, and the shift towards devolved governance.

KPTJ, AfriCOG and the Katiba Institute are most grateful to the individuals whose invaluable contributions, knowledge and insights have helped shape this Handbook. We owe a special debt to: James Gondi, Jill Cottrell Ghai, Mikewa Ogada, Carole Theuri, Noelle Okoth, Sandra Ochola, Stanley Kamau, Stephanie Wairimu, Eric Mwendwa, Susan Muriungi, Njonjo Mue, Tom Santoro, Gladwell Otieno and Waikwa Wanyoike who played a critical role in conceptualizing, producing and reviewing the final version of this publication. We are confident when we say that the Handbook is unique as it provides its users with the opportunity to tap into expertise, as well as the actual experiences of some of Kenya's leading public interest litigators consulted in the course of its development. To this end, we specially appreciate the late Odindo Opiata of Hakijamii, Haron Ndubi of Haki Focus, Njeri Thuku of the Judiciary Training Institute (JTI), Kethi D. Kilonzo and Mbugua Mureithi who took time to share their expert views and insights on the practice of PIL in Kenya. We feel honoured to have had the opportunity to incorporate into this publication the lessons these committed public interest litigators have learned over the years. A special thank you is also due to Wachira Maina for his efforts in the lead up to the development of this Handbook.

The publication of this Handbook was made possible through the generous support of the Embassy of the Kingdom of the Netherlands to whom we are most grateful.

We recognise that this Handbook does not replace the need for practitioners to consult the many existing resources for PIL and legal aid work. What it does is to provide a Kenya-centred practical guidance for the conduct of successful public interest litigation. In so doing, it builds on the relevant work of other institutions, including the Law Society of Kenya (LSK) and Kituo Cha Sheria (Legal Advice Centre).

We hope that this Handbook will meet the needs and demands of individual legal practitioners and organizations working on public interest issues and legal aid.

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Executive Director, AfriCOG

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## About this Handbook

This Handbook is divided into two parts. Part I provides a conceptual background. It begins with a discussion on the concept itself, its origins and development, and puts the idea of PIL in perspective in the Kenyan context. Some of the issues explored in this part include the changing legal framework in Kenya and its relations to PIL, among other issues. Part II can be described as the practical component of the guide. It provides guidance on how to develop and execute a strategy for effective PIL action in Kenya. Some of the issues in focus include: case selection; client identification; case preparation; funding and ideas on how to optimize the impact of PIL through coalition building, and using appropriate media strategies.

The process of developing this Handbook has involved the review of existing PIL resources developed by Kenyan legal aid actors and others from around the world. In particular, it draws from the Draft PIL Manual developed by Waikwa Wanyoike of the Katiba Institute, the Law Society of Kenya's *Public Interest Litigation Strategy* and Kituo Cha Sheria's *Report of the Colloquium on Public Interest Litigation: Lessons in Litigating Rights* and an unpublished research paper, 'Is it necessarily a good idea to allow courts of law to adjudicate on the interpretation of our social rights?', authored by Mikewa Ogada. Additional Kenya-specific lessons were drawn from consultations with three public interest litigators and one judicial officer, whose work in the field of PIL has been exemplary. These interviews provided critical insights into Kenya's legal and judicial context and the opportunities and challenges one can expect to encounter in the practice of PIL. The content of this Handbook has also been substantially improved by comments provided by officials of AfriCOG/KPTJ and the Katiba Institute.



# Part I: Understanding Public Interest Litigation (PIL)

*"PILs are like alarm clocks. They tell the government: don't sleep, please get up."*

Justice Yatindra Singh, High Court of Allahabad, India

## 1. Introduction

Although there is no agreed definition of the idea of 'public interest,' the term has been defined as relating to or relevant to "the welfare or well-being of the general public".<sup>1</sup> The term public interest litigation (PIL) relates to litigation whose focus is on issues of importance to the public at large. One defining characteristic of PIL is that, through cases focusing on either individuals or groups, it seeks to have a broader impact on the pressing, sometimes polarizing, contemporary social issues. Legal strategies have been integral in many struggles for social justice. One seminal example is *Brown vs. Board of Education* (347 U.S. 483 [1954]), a leading PIL case in the fight against racial discrimination in the United States. In fact, court rulings can command broad societal attention and support. Partly because courts tend to be viewed as neutral arbiters, their decisions may also be treated widely as authoritative analyses of the root causes of social injustices.<sup>2</sup>

PIL can help promote dialogue between the courts and government and other actors on how to shape social policy and remedy long-standing injustices. PIL may therefore focus on challenging governmental decisions and actions in order to encourage compliance with the law, especially of regulatory laws and standards, and/or improve policies and legal protections relating to a wide range of concerns including the environment, human rights, consumer rights, children's rights, women's rights and the rights of sexual minorities. Through PIL actions public understanding on contemporary

public interest issues may be enhanced. Even unsuccessful PIL actions may generate public outrage and spur political and other forms of action. PIL may also inform the courts about possible interpretations of domestic and international laws in ways that support the development of progressive or positive jurisprudence.

### 1.1 Summary of characteristics of PIL

- It is a strategy for redress
- It is social justice litigation
- It is social action litigation
- Its objectives transcend the litigating parties
- It is for public causes.

See Kilonzo, 2013

PIL also tends to be associated with the provision of no-cost legal services to the poor and vulnerable to support their struggles to challenge powerful economic, political and governmental interests. In that sense, PIL is often a subset of *pro bono* legal work. However, not all PIL is conducted through *pro bono* means. In fact, PIL tends to be expensive because of the complex legal and policy issues that are involved and often the lengthy period such cases take to conclude. Such PIL actions may aim at expanding the coverage of social services and/or enhancing the standards of living for poor, vulnerable people, among other goals. To be sure, victims of injustices can rarely mount political actions easily, which can tend to be expensive and even harmful to them in certain contexts. Social rights activism carried out by relatively disadvantaged groups can sometimes be met by

1 The Random House Dictionary <http://dictionary.reference.com/browse/public+interest>

2 Brinks and Gauri 2008, p. 77; Langford 2008, p. 33; Geary and Montouvalou 2011, p.114.

state repression in certain countries, making the courts a safer alternative.

## 1.2 Summary of objectives of PIL

- Achieve individual redress for clients
- Set legal precedent
- Enforce existing legal protections
- Implement new rights or safeguards
- Precipitate policy and statutory changes
- Promote access to justice
- Foster government accountability
- Document historical injustices
- Correct historical injustices
- Raise community consciousness on the issues/ civic education
- Protect the environment
- Strengthen the Judiciary.

Courts have proved to be an important avenue for disadvantaged people to make their voices heard.<sup>3</sup> However, critics of PIL have argued that using the courts to address pressing social issues in a democracy can be improper, as judicial officials are not elected or politically accountable to the electorate and traditionally are not empowered to form state policies. Nor, it is suggested, do they have the skills and tools to do so. However, it cannot be denied that even democratically elected members of either the executive or legislative branches of government are capable of neglecting duties or overstepping limits placed on their powers, which may result in the oppression of minorities and disadvantaged groups. In such circumstances, courts are a legitimate alternative, and perhaps the only available option. Moreover, the judicial process can allow for a systematic evaluation of social injustices that may not always be possible via legislatures, which can succumb to populist pressures and special interests.<sup>4</sup>

## 2. The origins and development of PIL

There is debate as to the origin of the idea of PIL. Some observers credit the United States for pioneering this concept and approach. They assert that Louis Brandeis, an American lawyer who later became a justice in the US Supreme Court, popularized the idea in the early 1900s. Brandeis urged lawyers to get involved in shaping society by addressing public interest issues in their work. He himself undertook such cases in his own legal practice. Other observers however, point to the existence of PIL as far back as the 1700s when it was used to expose the evil of slavery in England.<sup>5</sup> Judges in England also occasionally directed lawyers to act for the indigent, an element of contemporary PIL. While the roots of PIL remain contested, what is clear is that the late 1960s and 1970s witnessed an increasing number of American lawyers getting involved in PIL work at a time when the country grappled with pressing political and social issues, among them the struggle for civil rights, the anti-war movement and the debate over abortion.

Traditionally, the law and courts discouraged PIL, especially cases brought by those not directly affected by an issue, mainly through 'rules of standing' limiting the right to go to court at all to those actually affected. The courts would deny *locus standi* (Latin for a place to stand - but used to mean status or ability to start a case). However, over the past three decades, several jurisdictions in the world have opened up to the idea of PIL in one form or another. A number of them, including the US, India, South Africa and Kenya, have expanded the 'rules of standing'. Some jurisdictions now encourage PIL by eliminating court fees for

3 Woodiwiss 2006, p.34; Langford 2008, p.33; Gearty and Montouvalou 2011, pp.124-5.

4 Langford 2008, p.33.

5 See generally Harlow and Rawlings, 1992.

launching such actions and/or minimizing the possibility that PIL litigants will have to pay for legal costs where their actions do not succeed. There are even jurisdictions that reward PIL litigants when successful, recognising that their action has a positive impact on the rule of law.

Other jurisdictions are even more liberal and allow PIL actions to be initiated through fairly informal means, such as the writing of letters of application by petitioners to the courts. This opens room for people personally affected, and civil society organizations acting for others, to launch actions.



## 2.1 PIL in the United States

There has been a relatively long history of PIL in the United States. *Brown v. Board of Education* (347 U.S. 483 [1954]), a landmark 1954 anti-segregation case, stands out as one of the cases that have had a major influence on the practice of PIL in that country. The case involved five separate US Supreme Court cases concerning racial segregation in public schools in some five school districts around the country, which were consolidated by the court.<sup>6</sup> This is an exemplar of PIL action: no private injury was asserted, no damages were sought and no one was prosecuted for any wrong-doing (Lafrance, 1988). Rather, the case sought to focus society on the injustice of racial discrimination that had deeply polarized America.

<sup>6</sup> See History of *Brown v. Board of Education*, available at: [uscourts.gov/educational-resources/get-involved/federal-court-activities/brown-board-education-re-enactment/history.aspx](https://uscourts.gov/educational-resources/get-involved/federal-court-activities/brown-board-education-re-enactment/history.aspx)

In the years that followed, the success of *Brown* in promoting equality and non-discrimination encouraged American civil society groups, such as the American Civil Liberties Union (ACLU), to use PIL to advance gender equality, reproductive rights, disability rights and the rights of immigrants, among other issues. Since *Brown*, several factors have encouraged the growth of PIL in the United States. The first such factor is the concept of class action lawsuits. In a class action, a petitioner represents a group or class of persons affected by a violation or illegality. Class action lawsuits have become extremely popular in the United States as well as in other jurisdictions such as Canada. In particular, they have turned out to be an effective tool for groups of people to enforce rights, especially against private entities such as corporations. They have also been used against government agencies. A case in point is *Brown v. Plata* 131 S.Ct. 1910 (2011), in which the US Supreme Court upheld an injunction ordering the reduction of prisoner populations in prisons in the state of California. The last three decades have seen a significant proliferation of class action suits in the US. A second factor is that, for the most part, litigants in public interest cases are rarely required to pay costs, even if their actions are unsuccessful. Another factor that has especially encouraged indigent litigants to take advantage of PIL is the contingency fee scheme. This allows litigators to fully finance the costs of litigation (both legal and administrative fees) and to recover the costs from compensation awarded if he/she is successful (so useful only for cases in which such compensation is sought and likely to be substantial).

## 2.2 PIL in India

India has emerged as a global leader on PIL.<sup>7</sup> This is the result of a combination of factors, including relaxed rules of standing, and the growth of a civically-engaged population (Narayana, 2007). Indian courts have in some instances initiated proceedings and adjudicated in matters in which there is an unexplained failure to act in accordance with the constitution or the law. Courts may also initiate such public interest cases on the basis of petition transmitted by way of a letter. Two early cases had a significant impact in redefining the rule of standing in India. In *People's Union for Democratic Rights v Union of India* (AIR 1982 1473), the Indian Supreme Court held that a third party could petition the courts in a matter in which it was not directly affected. This case marked a departure from the legal principle of standing, which discourages individuals and groups from initiating legal proceedings in matters in which they are not directly affected. Another important Indian case is *S.P. Gupta vs. President of India* (AIR 1982 SC 1491), which is popularly known as the 'Judges Transfer case'. In this case, the court ruled that third parties could approach courts in order to litigate violations of rights of persons who may not be able to bring a case of violation themselves. Seen together, these and other instances of positive Indian jurisprudence have made important contributions to the development of legal principles associated with PIL.

<sup>7</sup> For PIL in India, one can file a petition in the Supreme Court under Art.32 of the Constitution or in the High Court under Art.226 of the Constitution or before the Court of Magistrate under Sec. 133 of the Code of Criminal Procedure, 1973.

## 2.3 PIL in South Africa

PIL has played a critical role in securing the gains of South Africa's post-apartheid constitution (Dugard, 2006). PIL in South Africa has been encouraged by progressive constitutional provisions, including the ability of organizations and individuals to bring actions on behalf of others, the right to information, and a Bill of Rights that provides for economic and social rights. There are a number of very effective South African NGOs, such as the Treatment Action Campaign and the Legal Resources Centre, which have used PIL skilfully to advance human rights. For instance, *Minister of Health vs. Treatment Action Campaign* (TAC) (2002[5] SA 703), which was brought before South Africa's Constitutional Court by TAC, resulted in the rolling out of a major programme for distribution of generic anti-retroviral drugs to prevent mother to child HIV infection. Other PIL actions have resulted in the abolition of the death penalty, protection of squatters from eviction<sup>8</sup> without provision of alternative housing, and stronger protections for sexual minorities. Besides this growth in positive jurisprudence, the South African courts, like their Indian and American counterparts, have developed rules aimed at reducing or eliminating the costs associated with mounting PIL actions. Generally, in an action against the government, a party that loses need not pay the government's costs (see *Affordable Medicines Trust and Others v Minister of Health and Another*, [2005] ZACC 3; 2005 (6) BCLR 529 (CC); 2006 (3) SA 247 (CC).

## 3. The development of PIL in Kenya

History shows that the Kenyan courts have at various times served as a critical platform for the political mobilization of disadvantaged people to demand justice. There has been a history of individual Kenyan lawyers and civil society organizations launching PIL actions as part of broader struggles, to draw attention to the underlying structural issues that result in injustice, inequality and poverty.

PIL actions in Kenya have provided marginalized individuals and groups with a platform to link their shared concerns on various social issues. Using PIL, new opportunities have arisen for Kenyans to leverage the law and courts to influence government policy dialogue and formulation. Moreover, PIL provides an opportunity for Kenyan civil society organizations to be proactive and set the agenda for social change. PIL actions undertaken by civil society groups and individuals

in Kenya have exposed public service delivery gaps and supported the struggles of poor Kenyans to claim their rights.

### 3.1 Standing and PIL under the Constitution of Kenya 2010

For a long time, Kenyan courts relied on the English tradition rule on standing to determine who could sue. The English rule barred private individuals from litigating the rights of the public in courts. The English rule of standing was elaborated in such cases as *Gouriet vs Union of Post Office Workers and Others* [1977] 3 All ER 70. In that case, the court wrote:

"It can be properly said to be a fundamental principle of English law that private rights can be asserted by individuals, but, that public rights can only be asserted by the Attorney-General as representing the public. In terms of constitutional law, the rights of the public are vested in the Crown, and the Attorney-General enforces them as an officer of the Crown. And just as the Attorney-General

8 In addition, when evictions are ordered, courts have required that those who may be rendered homeless be provided with alternative housing.

has in general no power to interfere with the assertion of private rights, so in general no private person has a right of representing the public in the assertion of public rights. If he tries to do so his action can be struck out.”<sup>9</sup>

However, later on some Kenyan judges attempted to deviate from this English rule, allowing for a more relaxed rule of standing, where one could still sue even though he or she could not show that he or she had suffered more harm than the general public. For example in *Albert Ruturi, J. K. Wanywela & Kenya Bankers Association vs The Minister of Finance & The Attorney-General and Central Bank of Kenya* ([2001] 1 EA. 253 Nairobi High Court Misc. Civil Application No.908 of 2001) two judges of the High Court, sitting as a Constitutional Court, held that one could sustain a public interest suit if the person established “a minimal personal interest”, even in a case where the person could not show that he or she was more affected than any other member of the public.

Fortunately for public interest litigators and the public-at-large, the new constitution has now largely settled issues relating to standing, especially on matters relating to human rights (specifically Article 22) and other violations of the Constitution (Article 258). Both articles allow persons with or without direct interest in a matter to approach the courts. Each provides that “[e]very person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention”.

Initiating a PIL action on the basis of *individual standing* is envisioned in Articles 22(1) and 258(1), which grant a person who is directly affected by an action to institute proceedings against the perceived perpetrators. Individuals approaching the courts on the basis of individual standing must be prepared to demonstrate their “personal interest” in the relevant matter. Articles 22(2c) and 258(2c) allow Kenyans to institute court



9 *Gouriet v. Union of Post Office Workers and Others* [1977] 3 All ER 70 at p. 80.



proceedings based on public interest. However, the Constitution does not define the idea of ‘public interest’. Instead, those invoking these articles need themselves to demonstrate why their action qualifies as a public interest matter, and ultimately, the courts will determine what constitutes the public interest on a case-by-case basis.

In Kenya once a case has been found to constitute public interest, a higher threshold of conditions must be met if it is to be withdrawn. Rule 27(2) of the Article 22 Rules requires the courts to determine the “juridical effects” of granting the withdrawal of a public interest case. In the precedent-setting Constitutional Petition 305 of 2012 (*Musyoka v Attorney-General*), a panel of judges declined an application by petitioners to withdraw a public interest case lodged in response to the environmental concerns associated with the planned extraction of coal deposits in the Mui Basin in Kitui County. In their ruling, the judges declined the application, concurring with the position of *amici* (drawn from the Katiba Institute and Kituo Cha Sheria), that the petitioners had not satisfactorily shown that, even if the case was withdrawn, the rights of the local community to benefit economically from the coal mining venture would be safeguarded. The court said that the “juridical effects” provision in Section 27(2) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* meant that the impact on the public interest must be considered, as well as whether withdrawal would be an abuse of process.

Articles 22(2)(a) and 258(2)(a) grant standing to a third party to institute proceedings “on behalf of another” in relation to violation of human rights or other constitutional violations, respectively. To do so, the third party must demonstrate that the person on whose behalf they act cannot “act in their own name.” This will have to be worked out also on a case-by-case basis. Applicable situations may include:

- *Habeas corpus* applications, whereby the

person directly concerned may not be physically available to institute proceedings (a long-established exception to the usual rule)

- Where ill-health prevents a person from instituting proceedings
- Where it is necessary to conceal identity of the affected person to protect them
- Cases involving communities lacking knowledge and awareness of their rights
- Exceptional cases in which the person(s) affected may be oblivious of the need to approach the court to stop violations (this might include situations where a person[s] acquiesces in harmful/ illegal practices believing they are obligated to do so).

Articles 22(2)(b) and 258(2)(b) allow individuals to institute PIL actions on the basis that they are “acting as a member of, or in the interest of, a group or class of persons” to enforce constitutional provisions that are under threat or to seek remedy for human rights harms, respectively. (However, not all cases brought to courts on this basis will be public interest cases as the two provisions can and do accommodate cases of a private nature.) Articles 22(2)(b) and 258(2)(b) of the constitution also allow PIL actions to be instituted by an “association acting in the interests of one or more of its members”.

In June 2013, the Chief Justice gazetted *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (see Annex 1 of this Handbook), aimed at facilitating the right of Kenyans to institute court proceedings where they believe freedoms under the Bill of Rights have been violated, or there is the threat they will be violated.<sup>10</sup> This progressive set of rules seeks to reduce formalities and free the courts from unreasonable procedural restrictions in order to expand the options of access to justice for all persons as required by Article 48. The rules also specify the forms of admissible evidence, the criteria of admission of ‘friends of the court’ (*amici curiae*) or interested parties, and sets out guidance

10 For a complete copy of the Rules, please see: <http://www.kenyalaw.org/klr/index.php?id=1635>

on when parties in a matter can resort to out-of-court settlements or other Alternative Dispute Resolution (ADR) approaches.

In addition, Article 22 provides that formalities are to be kept to a minimum, and the court may “entertain proceedings on the basis of informal documentation” (this can be traced to what in India is called “epistolary jurisdiction”).<sup>11</sup> This idea is also reflected in the Chief Justice’s Rules, which say “Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom” (Rule 10[3]). Article 22

(3)(c) says no fee may be charged for instituting proceedings under the Article; this has not been properly reflected in the Rules (see Rule 34) and may be an issue of some controversy given that the Constitution seems to have outlawed filing charges on PIL matters, although some argue that it discourages but does not outlaw fees. These access-broadening provisions apply only to human rights cases (so are not in Article 258, unlike the broader standing rules). PIL cases are not necessarily constitutional cases, so a case based on contract, tort or some other area of the law is governed by the usual rules, however much the case is of public interest.

**PIL in Kenya:** The Garissa eviction PIL case (*Osman v Minister of State for Provincial Administration* High Court of Kenya Constitutional Petition No. 2 of 2011)

In June 2011, Ibrahim Sangor Osman instituted a public interest case seeking court orders to reverse his eviction and that of 1,100 other people from public land they had occupied since the 1940s in Medina in Garissa County. (The Economic and Social Rights Centre - Hakijamii - supported the petition as an interested party.) The households had been violently evicted from their homes by the local administration on Christmas Eve 2010 to make way for road construction. They were not consulted or given any written notice of the planned eviction, which led to the demolition of 145 houses, and the social dislocation of about 1,100 people. In its ruling, the High Court found that the eviction had violated the new constitutional provision on the right to adequate housing. Drawing from human rights law, in particular the observations of the international human rights treaty body known as the Committee on Economic, Social and Cultural Rights (CESCR), the High Court found that the eviction violated several other rights, including the rights to life, water and sanitation, physical and mental health, to education, to information, to fair administrative decisions, and to be free from hunger, among others. The High Court also ordered the authorities to return the families to their land, and to reconstruct their homes or provide them with alternative housing arrangements. Each of the petitioners was also awarded Ksh 200,000 in damages. Without a doubt, this particular PIL action has contributed positively to the emerging jurisprudence on social rights in Kenya. By actualizing and translating the idea of housing rights into tangible benefits, the action helped the community in Medina, and Hakijamii’s network of communities, to understand their rights in a more concrete way that cannot be achieved through human rights public information campaigns. Another significant result of the action is that it united and mobilized this large group of people to begin to directly challenge local authorities and leadership to improve the delivery of basic services, including water and security.

11 “In numerous instances, the Court took suo moto cognizance of matters involving the abuse of prisoners, bonded labourers and inmates of mental institutions, through letters addressed to sitting judges. This practice of initiating proceedings on the basis of letters has now been streamlined and has come to be described as ‘epistolary jurisdiction.’ – Former Chief Justice of India, Balakrishnan, “Growth of Public Interest Litigation in India” [http://supremecourtindia.nic.in/speeches/speeches\\_2008/8\[1\].10.08\\_singapore\\_-\\_growth\\_of\\_public\\_interest\\_litigation.pdf](http://supremecourtindia.nic.in/speeches/speeches_2008/8[1].10.08_singapore_-_growth_of_public_interest_litigation.pdf).

## **3.2 Future development of Kenyan PIL and the Bill of Rights**

Looking ahead, PIL will likely continue to play a critical role in supporting the implementation of the new constitution. As the Garissa constitutional petition demonstrates, PIL action in the development of jurisprudence helps to define the content and scope of freedoms contained in the Bill of Rights, particularly the provisions on social rights. These kinds of PIL actions will be critical for providing opportunities for disadvantaged Kenyans to address decades of unjust and unfair economic and social policies. PIL will also likely become an important tool for implementing the new constitution's strong provisions on public participation, which require all levels of government to ensure that they consult citizens in policymaking and other decisions. Where government fails to engage with citizens, it can expect legal action on the basis of Article 258 and on the grounds that it has failed to be "accountable" and "transparent" as required under Article 10 on national values and principles for governance.

## **3.3 Emerging areas for PIL: counties and natural resources**

Counties are emerging as key units of governance in Kenya and are the new area for public service delivery, resource allocations and the realisation of human rights, particularly social rights. As can be expected with the introduction of an overhaul of a system of governance, there will be challenges over the interpretation of the powers and functions of counties, how they use public resources and how they deal with diversity, among others. Legal strategies may therefore be necessary to address some of the initial challenges of establishing the counties, now and into the future. If well-designed, certain types of PIL actions can play a critical role in helping citizens to shape the process of establishing county governments, as well as informing their priorities and processes in ways that ensure they work efficiently, effectively and have some transformative value for people's lives.

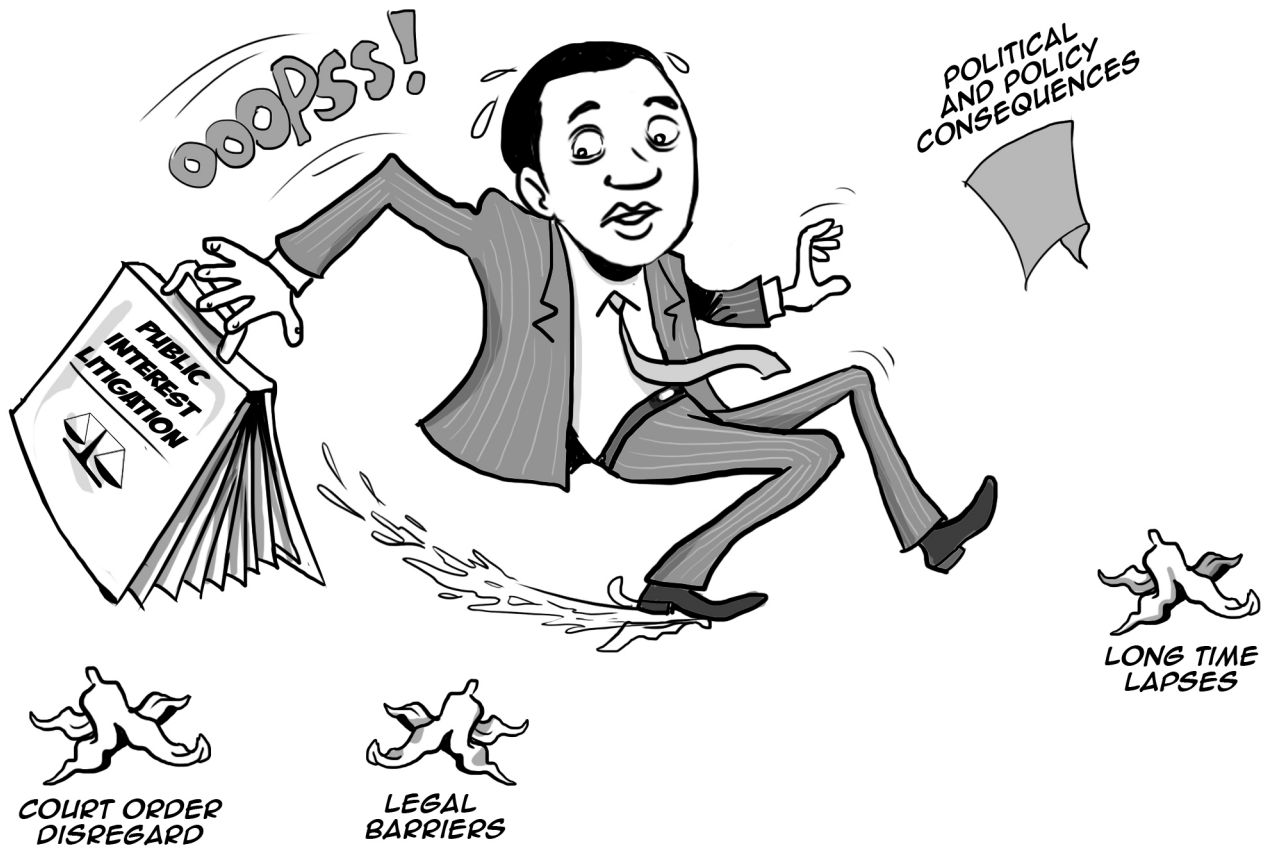
Another fertile area for PIL action relates to the potential of Kenya's newly discovered mineral, water, and energy resources to improve the quality of life for more people. As new discoveries continue to be made, attracting increasing attention from global mining and energy interests, there is the risk that these new-found resources may be exploited in ways that disadvantage local communities - for instance by causing their displacement from ancestral lands. Where government policies do not adequately protect them, PIL will become an important option for these communities to effectively bargain with government and corporations to safeguard their interests.

# **4. Understanding the limitations of PIL**

While PIL has strong potential to promote the rule of law and be a catalyst for social transformation, those who rely on it must understand its limitations. Being aware of its constraints from the outset enables litigators to make informed decisions about when to use PIL, and to what extent. Below is a discussion of some critical weaknesses of PIL.

## **4.1 Systemic issues in the Kenyan justice sector**

As with any approach or mechanism, public interest lawyers should be alert to the limitations of PIL. In our Kenyan context, authorities often fail to comply with and enforce court orders from PIL actions. Part of the reason is that court orders arising from PIL actions may touch directly on political and policy issues, and there may be resistance to them. At other times, the implementation of court orders may be complex and require a long time. Furthermore, court orders would rarely, if ever, be suitable for making systemic changes necessary to remedy situations of widespread poverty. While PIL is itself able to address legal concerns (either legal barriers or the failure to respect existing laws) there are additional sources of injustice and inequality with social, economic, and historical origins that litigation is less suited to address.



Even when courts do function properly, and their orders are obeyed, litigation can remain a challenging process that might take years to resolve. When faster resolution of an issue is necessary or desirable, advocates may consider other options to supplement, or perhaps replace, a litigation strategy.

## 4.2 Defining the proper role of the courts

There is also justified concern that some PIL actions, particularly those focused on an individual, may promote inequality and privilege individual interests over broader public interest goals. To illustrate, this challenge is particularly present in some of the Brazilian healthcare rights jurisprudence in respect to access to treatment cases, whereby courts have effectively allowed

litigant patients to “jump the queue”.<sup>12</sup> But this is not a complete picture. There are examples of jurisprudence that suggest courts can also be especially sensitive about the potential of their orders to create unjust outcomes that privilege individuals over the greater public. The case of *Soobramoney v. Minister of Health (Kwazulu-Natal)*, (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765(CC);1997(12)BCLR1696, is illustrative. In this case, the applicant, a renal failure patient, sought the intervention of South Africa’s Constitutional Court to order the public health authorities to provide him with immediate, free access to dialysis. The court however, ruled in favour of the respondent, asserting the applicant’s rights had not been violated as the limited resources needed for the treatment had been allocated on the basis of reasonable criteria, which he did not satisfy.

Further, the case holds that the government only

12 Gauri and Brinks 2008, p.142.

has to provide constitutional guarantees within the resources that it has. In other words, petitioners should be prepared for the government to argue a lack of resources in achieving constitutional mandates in PIL cases. In Kenya this kind of argument is endorsed by Article 20(5)(a) of the Constitution, which places the burden of establishing the lack of resources on government. Article 20(5)(a) requires government to demonstrate that the required resources are actually not available, and this should be viewed in the context of the obligation “to achieve the progressive realisation of the rights” and that it is in fact taking all necessary steps to ensure the progressive realisation of the relevant constitutional guarantee or right (see Article 21(2)). In doing so, government must have regard to factors including “vulnerability of particular groups or individuals” (Article 20(5)(b)), which are relevant in allocating resources.

One view holds that some certain PIL actions can encourage courts to intervene in questions of social policy with serious implications for resource use plans.<sup>13</sup> However, a review of emerging social rights jurisprudence from South Africa, Brazil, India, Indonesia and Nigeria for instance, demonstrates that courts have tended to refrain from ordering the implementation of specific policy measures, preferring instead to propose policy solutions.<sup>14</sup> In South Africa for instance, the Constitutional Court has tended to provide “supervisory jurisdiction” whereby it evaluates social policy commitments against constitutionally-entrenched social rights standards.<sup>15</sup> Supervisory rulings direct governments to take “progressive steps” to address identified social injustices. There is evidence that these rulings tend to be flexible and this flexibility tends to encourage policy

planners to rethink and reshape unjust social policy priorities as opposed to more qualified directives, which could be perceived as encroaching on their mandate.<sup>16</sup> In general, courts making supervisory rulings have tended to be somewhat deferential to social policy planners, opting more to rule in a way that encourages policy debates on the aims and possibilities for different areas of social policy. This kind of supervisory jurisdiction of the courts has enhanced transparency and accountability in social policy planning.<sup>17</sup> Moreover, many Indian PIL cases have simply required authorities to implement the laws that exist, though some cases have gone further and required, or even imposed, policies from scratch.

### 4.3 Court intervention in issues of social policy

Even if the foregoing arguments were to be accepted, some critics remain concerned about the proper role of the courts in addressing social policy planning issues that may be at the centre of some PIL actions. They suggest that courts lack the technical competence to intervene on questions of social policy. However, this critique ignores the continuous interventions courts make in the related areas of taxation and commerce, which have implications on social and economic planning, yet few would suggest that courts should not so intervene.<sup>18</sup> Moreover, judges undergo continuous training to equip them with the competencies required to address emerging issues. For instance, they can receive training to enable them to develop procedures for determining when it is necessary to call on expert evidence in relation to any given social policy issue under judicial examination.

13 Ibid.,

14 Brinks and Gauri 2008, p.305 and p.323; Steiner et al. 2008, p.330.

15 Langford 2008, p.34; Steiner et al. 2008, p.316.

16 Gauri and Brinks 2008, p.323.

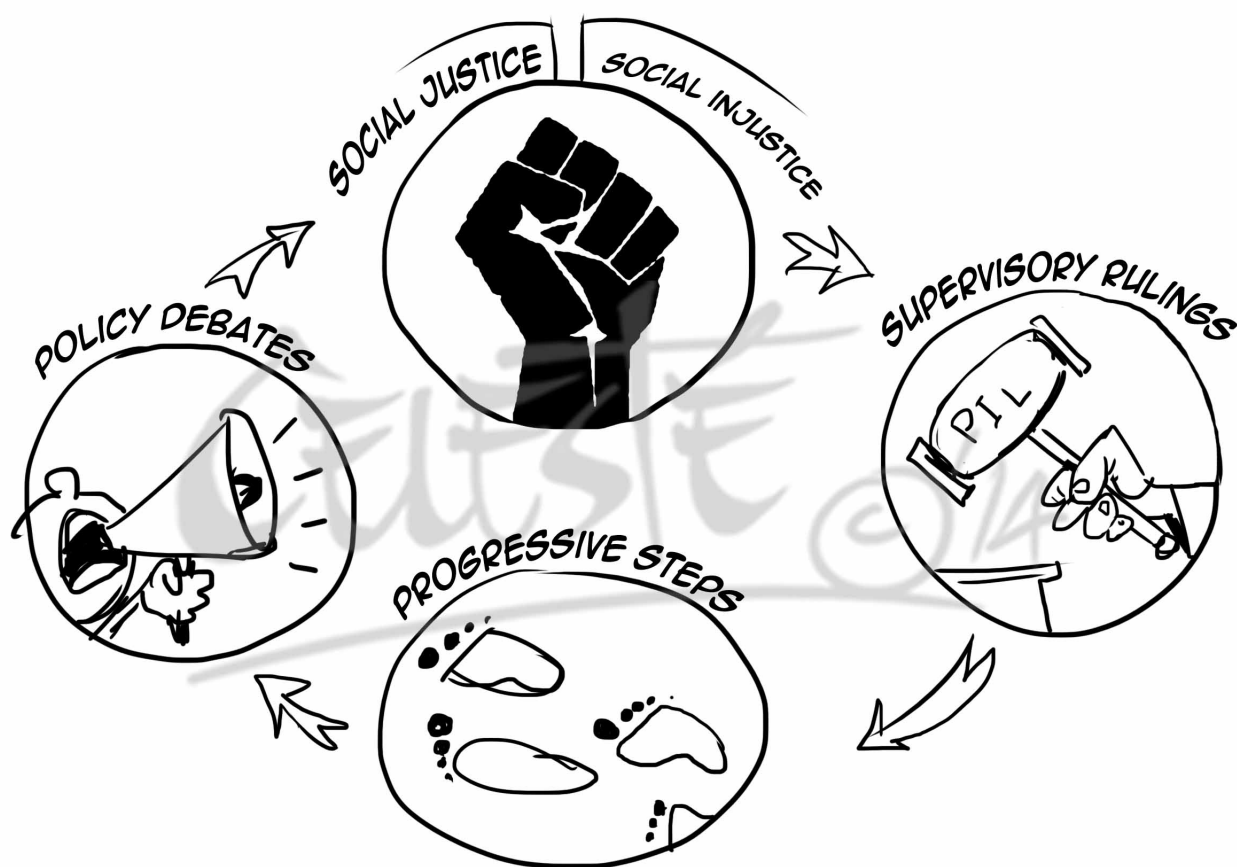
17 Davis 2008, pp.702-3.

18 Steiner et al 2008, p.315; Gearty and Montouvalou 2011, p.118.

#### 4.4 The need to integrate PIL with other advocacy approaches

The foregoing concerns demonstrate that public interest issues must be addressed inside and out of court. PIL should therefore be combined with other advocacy strategies, including mobilization and outreach that can mitigate possible failure of litigation.<sup>19</sup> As such, PIL actions ought to be aligned to broader national level campaigns, which incorporate various approaches including protest

marches, petitioning of political leaders, and effective use of media, as well as making technical contributions to policy and law-making processes. PIL organizations and practitioners should actively seek to collaborate with others who have complementary skills; for example, if you are a sole practitioner with expertise only on Kenyan law, it may be useful to team up with a group strong in legal research and international law, as well as with organizations skilled in media and public outreach.



19 Davis 2008, p.710; Langford 2008, pp. 39-42.

# Part II: Strategies for Effective PIL in Kenya

## 1. Introduction

PIL should be part of a broader strategy of action that seeks to influence the course of a particular issue of public interest or to shape the development of law and public policy. The resort to PIL should therefore be strategic and look beyond the law alone to contemplate media outreach, public education, legislative advocacy, and other activity that would ultimately support reaching the desired conclusion. In fact, early analysis should weigh whether these (or other) strategies might be more effective in combination with, or as a substitute for litigation.

Some Kenyan public interest lawyers consider PIL not to be the first line of defence but rather the last option for achieving the foregoing goals. In their experience and analysis, PIL efforts can be counter-productive if not well thought out and planned for. For instance, undertaking an action that will result in a court decision that likely will not be implemented might, based on the circumstances, mean that little can be gained through litigation other than eroding confidence in the law as an effective tool for social change. Seen from another perspective, the resort to law can sometimes deflect attention from the structural issues that underlie many social problems.<sup>20</sup> Indeed, defenders of this stance suggest that social struggles stand to be optimized if they take place in the political, and not the judicial, realm.

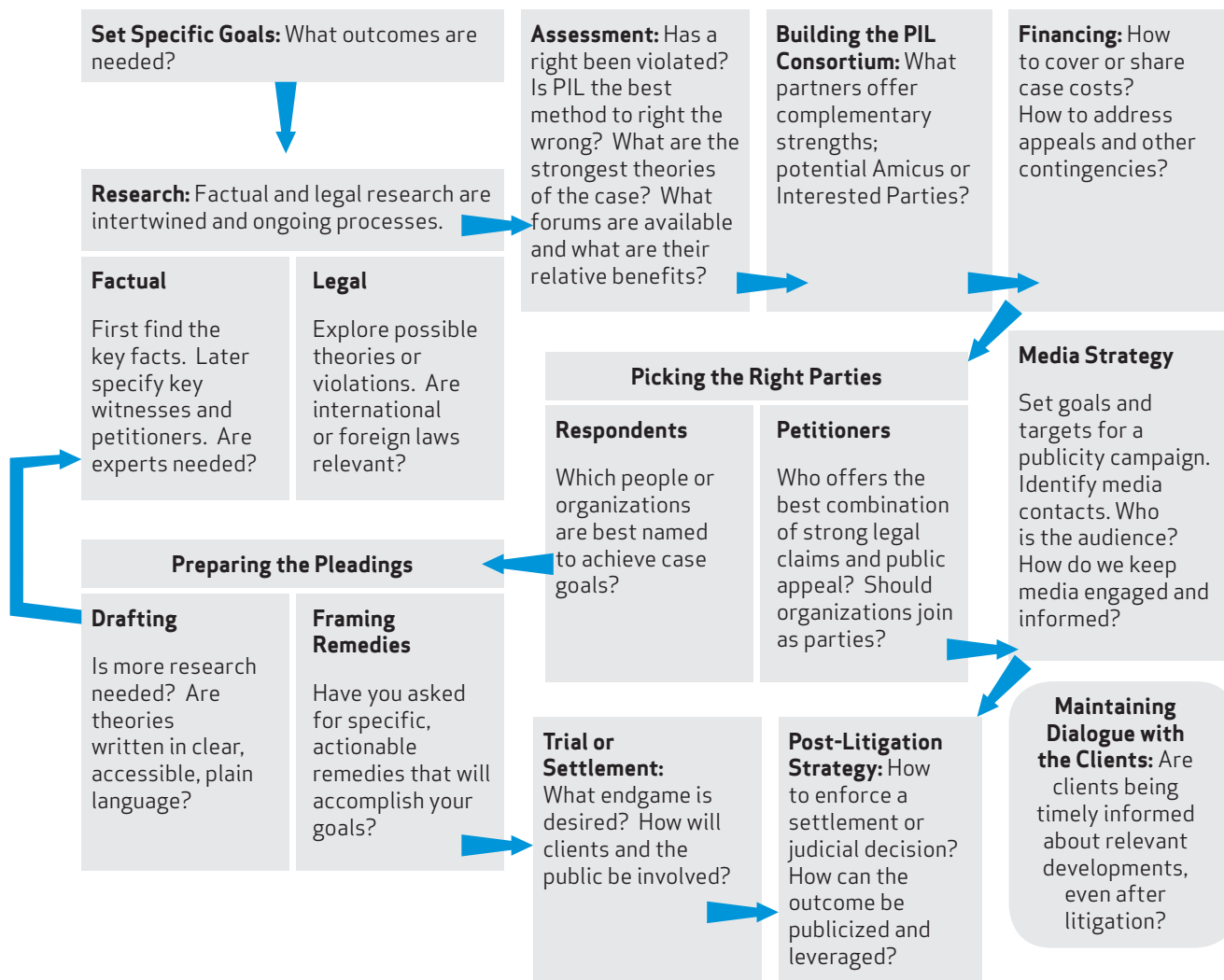
Lawyers planning PIL actions must therefore carry out careful assessments to determine if legal action is the best way to proceed to advance

a particular issue of public interest. This can be done by undertaking a strategic assessment of factors, such as the legal issues to be canvassed and the merits and the likelihood of success. But lawyers also need to assess concerns, such as the characteristics of the client(s), the nature of the courts' attitude towards the issue at hand, and the possibilities for the courts interpreting the law in a manner that promotes the public interest, constitutional values and principles, the rule of law and human rights. Further, they need to take into account any other forces that may shape the outcome of their litigation, possible political responses to their actions, as well as the contextual issues that may complicate the enforcement of the resultant court rulings.

Once litigation is chosen, advocates ought to develop and implement a strategy that allows them to optimize the chances for its success. Key elements to consider in such a strategy are: case selection and timing; preparation of pleadings; analysis of the potential to set new precedent, as well as the identification of the 'right' client(s) and naming of the 'right' defendants. Other key elements are: the identification of partners, including the media, who can add value to the action; the options for integrating political action/activism as part of a broader approach; the potential for the enforcement of the resultant judgment, as well as the options for financing the action. Public interest lawyers should also have a keen awareness of the limitations of PIL, and integrate any relevant lessons into the broader strategy.

<sup>20</sup> Gearty and Mantouvalou 2011, p.70.

## 1.1 PIL Preparation Plan



## 2. Assessing the potential of a PIL action

### 2.1 Checklist for assessing the potential of a PIL action

- Is there a clear public interest dimension in the case?
- Can the case cause positive change in the policy, legal or socio-economic environments?
- Can the case elicit public reaction, e.g. interest and sympathy?
- Are the issues in the case communicable to the public or are they too complex?
- Is it the right time to launch the case? Do the right conditions exist for success?
- Is the litigation timeline consistent with the achievement of the overall goal, or are other approaches more appropriate?
- What is the philosophical/ideological orientation of the current judiciary or specific judicial official?
- Which available forum would be most favourably inclined to the case?
- Should this case be split into parts and undertaken incrementally in order to gradually build public support for the overall goal?

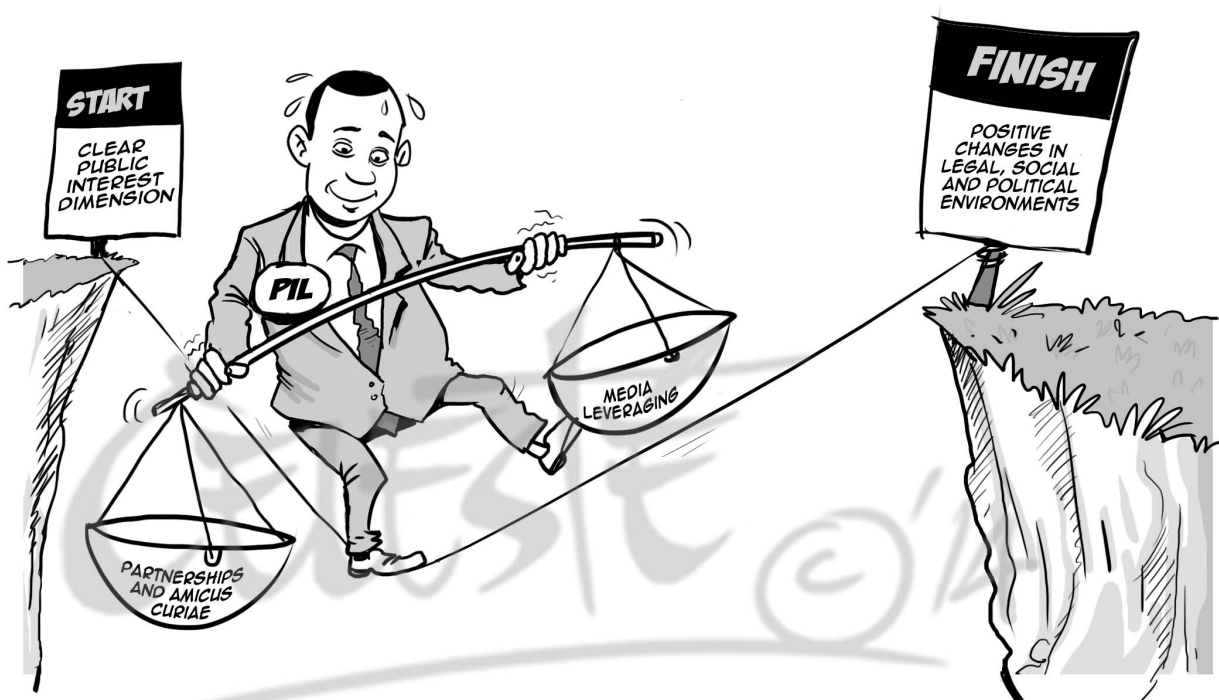


A critical consideration in taking the decision to launch a PIL action is the likelihood that the final determination of the case will actually be one that promotes the public interest by directly or indirectly causing positive transformations in the policy, legal or socio-economic environments. Often, cases that have this kind of impact may be referred to as precedent-setting or as cases that break new ground.

To achieve such an outcome, litigators must carefully evaluate each case they bring to court to determine if it is likely to achieve the desired impact. As such, a number of considerations ought to inform the case selection process. First, at the centre of the case should be a clear issue of public interest/concern. It might be, for instance, an existing or impending violation of human rights or of disregard of a particular aspect of the law or constitution whose continuation harms the public interest. Second, the facts relied upon to establish the issue or concern at the centre of the case should be clearly elaborated in the pleadings, and easy to understand, even to lay persons. It is important to use plain language in the pleadings because PIL actions require and seek some level of public engagement and support.

Another issue of great importance is timing. Indeed, the success of a PIL action is partly dependent on timing and seizing opportunities as they emerge. Therefore, public interest litigators should ask themselves the following questions when considering launching a PIL action: is this the right time to litigate, and on this particular issue? How might legal action facilitate or inhibit the achievement of the desired goal? Is there favourable public opinion for the issues at the centre of the case, and therefore the planned action? To be sure, public opinion may have some bearing on how courts make a determination on a particular matter. This possibility may be particularly pronounced where the matter at hand is one that is politically or socially polarizing, and therefore elicits either strong public support or opposition.

There is also a need to know the bench well. Of course, in theory a judge or magistrate ought to try not to be influenced in their decisions by their personal beliefs, but every litigator knows that some are less successful at this, and it is always sensible to avoid needlessly provoking a judge. Litigators ought therefore to take a keen interest in the ideological/philosophical orientations, as



well as the expertise, of individual judicial officers who may hear their case.

Departing from the foregoing analysis, a Kenyan PIL practitioner argues that:

“There is currently a good climate for human rights activists to consider bringing a PIL action on sexual minorities’ rights in the Kenyan courts. While the issue of sexual minorities’ rights is gaining prominence in public discourses, there does not seem to be much strong political or cultural opposition to the idea that sexual minorities should enjoy equality and non-discrimination protections. In addition, the current Judiciary seems to be more liberally oriented than at any other time in the country’s history, and there is a considerable international movement (with links to Kenya’s civil society) that supports the advancement of the rights of sexual minorities. These trends therefore create a more conducive context for the greater likelihood of a successful PIL action seeking stronger equality and non-discrimination protections for sexual minorities.”

One way of optimizing the chances for the success of PIL is to build cases that seek to transform controversial policies, laws or practices in an incremental manner. This ‘foot-in-the-door’ approach can help placate strong public opposition to the transformation sought through litigation. For example, in societies like the United States where there is considerable support for capital punishment, PIL actions that directly seek to outlaw the punishment may attract significant public opposition. However, PIL action that seeks to bring attention to the inhumane ways in which death sentences are carried out may pave the way for greater public support for abolition. In South Africa, groups litigating lesbian, gay, bisexual, trans-sexual and intersex (LGBTI) rights developed a litigation strategy which provided for litigation of the least controversial LGBTI issues, and

then slowly escalated to the most controversial issue of same sex marriage. The groups were successful with every case, therefore building their achievements incrementally and managing to mobilize significant public support (or perhaps minimizing public opposition) with each new case and issue.<sup>21</sup>

## 3. Case Selection and Preparation

### 3.1 Identifying the ‘right’ client

Checklist for identifying the ‘right’ client

- Is the client’s safety and security going to be compromised in any way by this case? If so, what options are there to mitigate harm coming his or her way?
- Is the client a compelling individual(s) with a story that might attract official and public attention to the case?
- Is the client ready to commit their time and attention to the case?
- Is there a client willing to sacrifice or minimize their personal interest for the greater public good?

Public interest lawyers ought to appreciate, from the onset, that when they decide to undertake PIL they are not in it for individual gain but to promote their clients’ interests as well as the broader public interest. The interests of the client must be at the heart of any particular case and its strategy. However, the client should also be made aware that there is a broader public interest at stake. Should pursuit of that public interest ever conflict with the client’s individual interests, it is critical that the client be made to understand the issue so he or she can make an informed decision about how to proceed. Therefore, having clients who are equally committed to pursuing the public interest from the beginning may help strengthen the overall case.

21 See for example the litigation strategy adopted in South Africa relating to violations against Lesbians Gay Bisexuals Transgendered persons discussed in Marcus and Budlender (2008).

### 3.2 Client and witness intimidation

A critical consideration to keep in mind in client selection is the personal safety and security of the clients. Some PIL actions undertaken in the Kenyan context (for instance those concerning land rights, corruption, or police abuses) could conceivably lead to pressure or intimidation being used against clients and cause them to abandon a case. Clients who are more likely to withstand pressure or such risks are often ideal to be the face of the litigation. However this is not always possible, and in certain cases, litigators need to ensure their clients' safety by seeking further support. For example from the Witness Protection Agency (WPA) and civil society institutions that have developed some capacity to run witness protection schemes, offering witnesses access to safe houses, arranging for exile or offering psychosocial support and medical care, among other services. It should be noted however, that the WPA is a young and untested institution that has yet to build a clear track record. There is also apprehension in some human rights circles that it may not be completely neutral because its oversight organ, the Witness Protection Board, features political actors, including the Cabinet Secretary for Finance.

### 3.3 Client selection and public perception

Where lawyers are in a position to choose which individuals or groups are to be the litigants on a particular issue, in order to optimize the success of a PIL action, they should choose carefully. Because PIL is about transforming conditions, lawyers should select clients whose stories consist of compelling facts that advance the broad objectives of the public interest issue(s) at hand. Compelling stories generate significant (and mostly positive) public interest. It may be necessary to consider whether particular potential clients have more public appeal. However, these decisions must be taken in the context of the overarching obligations (including ethical ones) of lawyers to the justice system, the Constitution and the client. Clients

must also be ready and willing to commit their time and attention to the case.

### 3.4 Maintaining good relations with clients

PIL practitioners need to reflect deeply on the question of when the client or the PIL practitioner should act as the face of the PIL action. This requires an awareness of the power relations that emerge between lawyers and their client. In most cases, the emerging relations will be tilted in favour of the former. There is the risk that a lawyer might become patronising towards clients who tend to have a better understanding of the issues affecting them and how they might be resolved. Therefore, PIL lawyers need to ensure that they observe the ethical requirement to keep their clients informed about all the important aspects of their own case. Moreover, clients ought to be given every opportunity to play central, decisive roles in the preparation and implementation of PIL cases.

A related issue for practitioners to consider as they identify clients is whether they ought to be the ones who determine the need to initiate cases on behalf of individuals and groups, or whether cases ought to emerge organically from other actions being undertaken by the clients. The pros and cons of going one way or the other have not been adequately debated in the Kenyan context. Some groups like the Law Society of Kenya (LSK) or the Consumers' Federation of Kenya (COFEK) appear to have adopted PIL as a tool for influencing the development of policy and jurisprudence. In such cases, the inspiration to act is drawn more from the practitioner, who may argue he or she is acting in the public interest. Other groups like FIDA-Kenya and Hakijamii also use PIL with the hope of influencing policy and jurisprudence. However, in addition they appear to use it as a tool for social and political mobilization, and therefore tend to prefer their clients to be at the forefront of their cases.

Point-of-view of a Hakijamii official:

"For Hakijamii, our approach [to PIL] is almost exclusively predicated on the belief that we

have to do it with the people affected by the matter at hand. Our theory of using PIL is to use it to empower marginalized people so that the case and its outcome is their victory. We want it to be embraced by the groups as a mobilizing tool for achieving and advocating for their rights. We prefer that PIL is used in combination with the other advocacy strategies that the communities have been engaged in. What we want is for the victims to be at the centre of the case. Therefore, when we are building a case, we see it as part of the broader advocacy partnerships we have with our communities. We don't initiate these cases in our name. We are never a named party. We simply represent our partners."

### 3.5 Naming the right defendants

Because of the possible policy implications that may come up from a PIL matter, ensuring that the proper defendants are named is important. This may not be a problem in litigation where the government is the defendant, as naming the Attorney General is usually sufficient to ensure that orders issued by the courts will bind the government.

There are, however, some situations where naming individual organs of state as defendants is strategic. Independent Commissions, for example, should be named as defendants if their actions are at issue. The rule of thumb should be to include every body whose behaviour is in question or against whom any remedy is sought. If there is refusal to obey an order, and contempt proceedings arise, it is important to be able to show who was bound by the court's order.

### 3.6 Procedural issues

When a PIL practitioner considers where to lodge a case, relevant factors are:

- Which place has the greatest connection to the matter at hand?
- What division of the court is most competent to handle the matter?

- Which court is more convenient for petitioners?
- Is the case likely to need hearing by a bench of more than one judge, and if so would this cause unacceptable delay in the particular place?
- Is a case brought in one area more likely to provide better opportunities for media attention for the case?
- How important is local involvement and how will this be affected by where the case is heard?

Articles 22 and 258 of the Constitution of Kenya (2010) state that each person has the right to institute court proceedings if there is reason to believe that the Constitution has been contravened. The Constitution does not provide a specific process to be used in instituting court proceedings. There are different ways to start a matter at the High Court. In civil cases, there are three established ways to do it: by plaint, judicial review or petition. A plaint is the document filed to start a matter at the High Court relating to a tort claim or breach of contract and mostly used where no other mechanisms of moving the court (starting a legal claim in court) are available. A judicial review is the process through which one asks the High Court to review a decision made by a tribunal or an administrator who is exercising quasi-judicial function. Finally, a petition is the mechanism generally used to start a claim of constitutional violation. The Article 22 Rules do not define what a petition is, instead choosing only to define a petitioner. The Rules define a petitioner as "any person who institutes proceedings ..." under the rules. The Rules further contemplate that court proceedings started on the basis of Article 22 are to be started by way of petition. It is worth noting that PIL matters can be litigated through any one of the forms discussed above. What determines if a matter is initiated as a plaint, judicial review or petition is the nature of the matter. For example, if the matter relates substantially to breach of contract, courts may require that it be initiated through plaint. Importantly, constitutional violations can be alleged whether the matter starts by way of judicial review, plaint or petition.

## Preparing pleadings: the various parts to a petition (see Article 22 Rules in Annex 1)

Petitions are fairly common ways of instituting PIL matters. This text box discusses how a petition should be sequenced.

1. Case title  
This is the first part of the petition. It identifies:
  - The court including the specific court station and where necessary the division
  - Number assigned to the petition by the court
  - List of provisions of the constitution relied on or principles of constitution contravened (where relevant)
  - The names of the parties – starting with petitioner(s), then respondent(s), interested parties and *amicus curiae* (friends of the court) in that order
2. Describing parties
  - Petitioner - identify who is the party initiating the petition and describe its identity
  - Respondents – Identify in each paragraph who are the respondents and explain why they have been included in the petition (What is their responsibility, wrongdoing in relation to the violation?)
3. Facts – Set out briefly and in a systematic way the facts bringing rise to the petition
4. Application of law to the facts – explain how the facts interact with the law to establish a violation
5. Relief – set out what relief/orders/remedies you wish the court to make in order to stop or compensate the violation.

## Checklist of key considerations when developing a case litigation strategy

- In what order will you present the issues? Chronological, in order of importance, most important first, by reference to Article of the Constitution?
- What are the counter-arguments to the case's claims and assumptions? What are the responses?
- What remedies are sought? Are these realistic and implementable, and how will they advance the broader goals of the PIL action? Or might they have an adverse impact?
- Use plain language to keep the text accessible.

There are too many poorly prepared PIL cases in Kenya. In a number of instances, PIL has been used in reaction to an action by government, with people rushing to court without taking time to consider the questions properly or even doing proper research. Such poorly planned cases may lead to adverse decisions even when victory was possible. Indeed, there is the risk that taking poorly prepared cases to court, that end up in failure, could create the perception that PIL does not work. Cases should

be brought at a time when all the necessary evidence and legal analysis necessary to prove the allegations of the case is gathered.

Despite the complexity of any claim, plain language should be used in a highly structured manner to make issues, law, and arguments clear and accessible. Whenever possible, legal and technical jargon should be avoided for common phrasings.

### 3.7 Expert evidence

Engaging expert evidence can be an integral part of the litigation strategy in PIL cases. Experts can be particularly useful in providing evidence that can shed light on difficult questions and complicated facts in a given case. In Kenya, expert witnesses have been identified and used by PIL organizations in a number of cases touching on social rights. For example, in September 2011, Miloon Kothari, one of the world's foremost experts on housing rights,

and a former UN Special Rapporteur on the Right to Adequate Housing, joined Kituo Cha Sheria's suit (*Satrose Ayumba v Registered Trustees of Kenya Railways Retirement Benefits Scheme* High Court of Kenya Constitutional Petition No. 65 of 2010) against the forced, inhumane evictions of people from Muthurwa Estate by the then City Council of Nairobi. The final judgment of the Court shows that his expert evidence lent credibility and professional clout to the case.

#### Identify, selecting and using expert witnesses

Because expert witness evidence can be such an important factor, there can be much at stake for litigators in the process of finding and selecting an expert. Determining if an expert is needed, and if so, what kind, are the two questions that lawyers must address before beginning a search for an expert witness.

Once the decision is made to use an expert, counsel must next consider when to engage the expert. With few exceptions, it should be done as early as possible for the following reasons:

- It increases the chance that your client will be able to retain the expert best suited for the case and that your chosen expert will not be snapped up by the other side.
- It allows lawyers to use the expert to add input on often-valuable early-stage questions, such as whether or not the case is worth litigating, potential settlement value, identification of key technical, economic, or financial concepts or issues, and to assess whether the expert's findings and opinions have implications for other parts of the legal strategy.
- Early participation helps the expert to develop the most effective opinion, as he or she will benefit from sufficient time to do appropriate research as well as the ability to ensure that the data and information central to the expert's opinion can be collected and made available for analysis.

Generally speaking, most expert witnesses fall into one of three categories:

- Academics with expertise and experience in a particular disciplinary field
- Practitioners with extensive experience in a particular industry
- Experts who work at expert consulting firms, with careers devoted to providing expert evidence in their areas of expertise.
- Lawyers should start by considering their own networks: individuals who have experience working with, or otherwise know personally. Trusted but credible colleagues with relevant experience can also be helpful sources of referrals.
- The client's network should also be leveraged in identifying experts.
- Well-credentialed experts and leading academics in the relevant field can often be found by searching publications, electronic CVs, academic citations, and conference presentations.
- Consider how well the expert will stand up to cross-examination in court before making a final selection.

Once potential experts have been identified, there are several factors to consider before engaging them:

- Conduct a background check
- Check several references
- Interview the expert – where possible face-to-face
- Ensure there are no direct conflicts of interest in relation to the case at hand
- Consider how the expert will be compensated
- Consider the expert's publications in the academic or professional arena.

This section features excerpts from an article written by Greg Eastman and Vandy M.Howell in Bloomberg Law Reports. See <http://www.bna.com/a-primer-on-when-to-use-expert-witnesses-and-how-to-find-them>

### 3.8 Freedom of information (FOI) and PIL

The importance of access to information, particularly in PIL cases involving governmental action or inaction, cannot be overstated. For instance, a case touching on the sensitive issue of security management in Kenya may be handicapped by lack of access to certain types of government data. One way of addressing this gap would be for PIL practitioners to lodge freedom of information requests on the basis of Article 35, which enshrines the right of access to information. The procedures for discovery may also be useful, but cannot be invoked before litigation is begun. Of course, Article 35 also applies to court rules.

### 3.9 Remedies and forming an effective prayer for relief

The effectiveness of PIL cases is largely dependent upon the types of requests for relief put forth by the petitioners. Therefore, conceptualizing remedies is perhaps the most critical aspect of designing PIL strategy because the remedies granted by the courts affect significantly the impact a case will have. The Constitution of Kenya 2010 at Article 23(3) provides several options for remedies where violations of the constitution are established:

- An order for compensation
- An order of judicial review

- Declaration of invalidity of any law or act that is unconstitutional: this remedy invalidates a law or provision of the law or an action that is unconstitutional.<sup>22</sup>
- Declaration of rights: this is a final order confirming that a party indeed has a particular right(s). However, a declaration is not a binding order and no contempt proceedings can be initiated in the event of non-compliance. It should be noted that Article 19(3)(b) envisions the possibility of more rights beyond those enshrined in the Bill of Rights, and therefore through jurisprudence new rights may be recognised.
- Injunction or a conservatory order: this is an interim order that causes a certain action/ omission that seems to be violating rights to be stopped from proceeding during the time the matter is being considered by the courts. (Note: in certain situations an injunction may be a final outcome, not an interim order.)

Although not specifically stated in the Constitution, there are other remedies that can be quite effective in PIL cases. A fairly common one is the issuing of 'orders of *mandamus*', which require or direct government officials or agencies to carry out an action they failed to take. Another is the ordering of 'structured injunctions' – a remedy whereby a court directs a party to carry out a certain action in a specified manner and within a certain timeframe,

<sup>22</sup> Articles 2(4) and 165(3d)(i) give the High Court the power to invalidate any law, act or omission that is inconsistent with the Constitution. In fact, the High Court has on numerous occasions struck down provisions of laws that it determined to be unconstitutional, see *Samuel G. Momanyi v. The Hon. Attorney General and Another*, Petition No. 341 of 2011: In this case, the court struck down a provision of the section 45(3) of the Employment Act 2007 because it was inconsistent with the Constitution's Articles 28, 41 (1), 47, 48 and 50(1).

and requires a progress report. This particular remedy has become common in both Kenya and South Africa<sup>23</sup>, especially in the context of implementing judgments that relate to social rights. Further, it may be possible under Article 23(3)(d) of Kenya's Constitution for a court to declare invalid any legislation that "denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24 [which sets out limits of rights and fundamental freedoms]".

Additionally, because the outcomes of PIL may have great impact on public policy, it is necessary for those crafting the remedy to think about the positive and negative effects that the sought remedy may have both in the short and long term. This assists in mitigating the possible backlash from remedies that may, on the surface seem very progressive (or at least are in the short term), but which have long term negative effects. (The alternative could also be true where the immediate effect of the remedy is negative but the long-term outcome is positive.) In this latter scenario, a good communication and publicity strategy may be required to win the public's support for the litigation. It should also be borne in mind when conceptualizing remedies that state agencies tend to be more likely to comply with prohibitive rulings than with rulings requiring positive action. Courts have traditionally been reluctant to grant the latter, because they do not want to be involved in supervising implementation; but courts have got involved, especially in some Indian cases.

Even where there is a positive ruling, remedies requiring complex actions and the involvement of many actors may have lower chances of being implemented. Disregard of court orders or failure to implement them could result in the loss of popular confidence in the role of legal strategies in resolving their problems. Nevertheless, there are

also situations where lawyers decide strategically to litigate, knowing very well that they may not succeed. To be sure, the cases initiated by Kenyan activists who challenged the repressive laws of the 1990s were aimed at making political statements. In other words, the courts were being used strategically to pursue and publicize a broader social agenda, and failure to win a favourable opinion from the court did not necessarily undermine that overall agenda.

### 3.10 Award of costs

Public interest lawyers ought to prepare and present their cases in court in a manner that demonstrates the public interest dimension of their cases, and appeal to the court to consider declining to award costs in the event that they lose their cases.

Kenyan courts have tended not to award costs when they have determined that a matter was in the public interest. However, it must be clear that in Kenya there is no rule that insulates litigants from having costs awarded against them by the court. Therefore, PIL practitioners should ensure that their actions are not deemed frivolous in nature, since this could trigger award of costs. In order to limit exposure to costs, public interest lawyers should ensure that the issues they pick up are realistic, and work efficiently and effectively during the litigation process. Diligence in litigation is often a mitigating factor against the award of costs. If costs are assessed by the court some may be disallowed as unnecessary.

It is interesting to note that in some jurisdictions, such as the US, Canada and the UK, courts have, in some public interest cases, awarded costs with the aim of compensating litigants for the cost of carrying litigation.

23 See the judgment of the High Court in *Satrose Ayuma and 11 others v. Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 Others* [2013]: In this case, the presiding judge directed the state, among other points, to effect an appropriate legal framework for eviction based on internationally acceptable guidelines and to report to the High Court on its progress in this regard. In *August v. the Electoral Commission*, CCT 8/99 the Constitutional Court of South Africa provided directions on what needed to be done to ensure prisoners' right to vote was effected, despite lack of legislation.



## 4. Researching the law, the facts and surrounding political/social/policy contexts

Sound research as part of the preparations for PIL can help clarify the issues at hand and the options available to address them. The quality of research also has a direct impact on how courts eventually rule.

Research informs the advocacy strategy on the case. In strategic litigation, this may include the choice of client(s). For example, if the violations emanate from failure to enforce already existing provisions of the law, the strategy may be more focused on requiring the courts to issue directives for enforcement and the consequences of failing to enforce. Where the research reveals violations because of a gap in the law, the advocacy may involve going to court to pressure policy makers to develop a suitable law to plug the gap (something that is much more problematic).

Typically, there are two types of research that should be undertaken in PIL: factual research and legal research. But they are intertwined. It is facts that will spark the interest or concern that leads to litigation. Legal research will be needed to decide whether, and on what basis, to proceed to and with litigation. Many PIL cases may implicate areas of law that are novel or unclear. In such circumstances, preliminary legal analysis to understand the issues, legal elements, or key exceptions, may be critical to successful factual research.

### 4.1 Factual research

Lawyers tend to think of the ‘facts of the case’: the specific events that triggered a legal claim. But for PIL broader facts are often also relevant. At the level of deciding what cases to pursue, lawyers or organizations engaged in PIL work may need to carry out research into the extent of the problem.

When it comes to the particular case, it may be

essential to provide factual background. How could the Treatment Action Campaign case (*Minister of Health and Others v Treatment Action Campaign and Others (No 2)* [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033) have been conducted without a good understanding of the chances of the child of an HIV+ mother being born HIV+, or of the way in which supplying Nevirapine could make a difference? Consequently, a PIL actor may want to bring evidence of a social or statistical nature: about psychological impacts (not on individual parties but more generally), or about poverty, for example. Here, research may be of a different nature: looking up government reports, academic publications, talking to specialists, etc. In such cases, litigators will have to consider whether they will have to bring in a person to support the evidence or whether documents from a reputable source will suffice.

More often than not, issues surrounding PIL cases are linked to complex, ongoing public policy deliberations. It may therefore be useful at this stage for public interest lawyers to partner with civil society groups or even research institutions to carry out the necessary policy research and analysis. But the primary responsibility of keeping up with the relevant public policy deliberations rests on the public interest lawyers themselves.

‘Facts of the case’ themselves are of different types: there are primary facts, namely what has happened (or is in danger of happening), to whom, when etc. Then there are the secondary inferences that are drawn from the facts: for example that the facts show negligence or failure to take relevant considerations into account, or bias.

Assembling primary facts, and evidence as to those facts, will be directed towards trying to ensure that the court is convinced of the situation at that secondary level. This will require interviewing clients and witnesses and gathering other types of information, perhaps even photographs and maps. Decisions as to what evidence to use, and what witnesses to call will be affected by the rules and the realities of evidence: not using hearsay, issues of credibility, and so on.

Parties often dispute the findings of secondary fact (for example, whether an individual was negligent) and may also dispute the primary facts. Yet some types of PIL do not turn on factual evidence, or do not need witnesses. Judicial review cases are generally dealt with on the basis of affidavits. The assumption is that the facts will not be controversial, and at issue are usually procedures used, and the interpretation of the law, rather than primary facts. If your case is at an appellate level, evidence is rarely the issue; judges may draw different inferences of secondary fact but will usually not challenge the lower court's factual determinations.

## 4.2 Legal research

Legal research is perhaps the most important stage in researching a PIL action. Besides the primary and factual research, a case's strength will rest on the legal arguments and authorities on which it grounds its claims.

Legal research is a reiterative process: the litigator thinks he or she has identified the issues, but as the research process continues, he or she is likely to come across new issues, or sub-issues. The necessity of exploring these newly discovered depths means that legal research frequently takes much more time and effort than is initially anticipated, and should be budgeted for accordingly. But the more carefully one thinks through the issues before one starts the less one will find oneself going round in circles.

If the topic is something with which the litigator is not so familiar (or not so up to date with), the best way to start is by reading a secondary source: a good textbook, treatise, or a journal article. If there is no access to a library, Google Scholar is worth searching for books and a surprising number of 'pdf' articles.

Once the litigator has a handle on the basics, then they can identify the key issues: list them, and decide the logical order for thinking them through and researching them. If the answer to issue 4 depends on the answer to issue 2, it is recommended

that one should unpack and research issue 2 first.

Litigators ought to be focused, but creative, in thinking about relevant sources. If they can't find relevant Kenyan cases, other countries might have relevant case law that is more developed. Which countries are most useful will depend largely on the nature and context of the case. For example, should the litigator then restrict him or herself to common law countries? Not necessarily, if the issue is a written constitution or a provision based on international law. Should the litigator restrict him or herself to African countries? Only if the issues are particular to Africa, but he or she should think about how receptive the court will be to particular authorities. If the issue is about powers of counties, the litigator may need to consider whether he has considered which countries have federal or devolved systems of government, and are therefore more likely to have relevant authorities.

A view on new directions in legal research from a JTI official:

"Recently we have seen PIL practitioners relying on cases from the Commonwealth and countries from the global south, in particular South Africa and India. They are also relying on cases from Colombia (South America)..."

Most of us do not know the answers to these questions offhand. So where is this information found? If you have access to a good library, use it, and find printed sources, and use them. Many jurisdictions around the world rely increasingly, and sometimes almost exclusively, on electronic sources. These are accessible and growing in number (see Annex 3). If one is lucky enough to have access to Lexis or Westlaw, then use it, but don't be constrained by it. Different libraries subscribe to different databases.

PIL practitioners need to learn about the good free databases for the countries that they might find useful, and for which they will not require expensive access to Lexis or Westlaw. Annex 3 lists a wide range of legal research websites. Of course, one must master the use of Kenya Law Reports online.<sup>24</sup>

<sup>24</sup> [www.kenyalaw.org](http://www.kenyalaw.org)

But one might also find useful cases from Uganda, Southern Africa, India, Canada or Australia, the UK, Hong Kong, or the US Supreme Court (all listed in Annex 3). While not binding, well-developed and well-reasoned case law from other jurisdictions may be very persuasive for a court, especially in the absence of strong local precedent. To the degree that foreign cases interpret international law, they may also support arguments under Articles 2(5) and 2(6) of the Constitution of Kenya (2010). Annex 3 also includes a number of international (as opposed to foreign) sources.

Tools for interpreting the meaning of a word or phrase in a legal document

- Common sense – what do you think the word or phrase means?
- A definition section in the document
- Kenyan case law – how have courts used this word or approach before?
- The context of the word or phrase
- Dictionaries, including legal dictionaries (make sure it's a good one)
- The Interpretation and General Provisions Act (for statutes but not for the Constitution)
- The principles of statutory or constitutional interpretation
- Indexes to law reports with 'words and phrases' sections (note that these resources may not be available for free)
- Foreign case law
- International committees, courts, or tribunals that interpret the relevant document
- Legislative history of the legal document, which may shed light on what the legislature intended the word or phrase to mean
- Secondary sources on what legal scholars think the word or phrase means.

### 4.3 Electronic searching

While conducting any search using electronic research tools, it is often helpful to make a list of search terms, along with a list of possible synonyms for each term – since different sources might use different words to describe the same topic.

Googling a list of words is a useful and straightforward approach. But it can produce a huge number of responses. Powerful and free search engines, including Google and others with a legal focus, often have lists of tools or notations that allow for more targeted searching. PIL practitioners should try to find the list relevant to their search engine of choice before they start researching. Most people are probably also familiar with the technique of using quotation marks to get the exact phrase:

“National human rights institutions” (but even without “ ” the most relevant come up straight away).

Advanced search [http://www.google.com/advanced\\_search?hl=en](http://www.google.com/advanced_search?hl=en) provides a guided way to refine searches; for example insisting that a particular word or phrase must be present. It also enables other useful things like:

- searching within a specific website
- searching by type of document (e.g. pdf).

A search can be restricted to a particular site by using the term “site:www.xxxx.com” if the site's address is known, or restricted to a particular country: e.g. site:.ke.

Finally, Boolean searches allow researchers to very closely manage the desired associations between search terms.

(child\* or minor) w/30 (“death penalty” or “capital punishment”) w/20 (cruel or inhuman or unusual) and (punishment or treatment)

Not all websites allow searches like this. A search for child\* means the researcher will accept child or children (or childless!). Google automatically searches for variants like singular and plural. Google allows \* to replace a whole word but not part of a word in the search. (Term A w/30 Term B) means the second word/phrase must be within 30 words of the first. Google does not recognise this.

When using a site that includes a lot of data and a search engine for the first time, PIL practitioners should take time to familiarise themselves with it.

For example, the LII family (see Annex 3) often has powerful search possibilities; it is worth clicking on “Boolean operators” in <[www.saflii.org](http://www.saflii.org)> for example.

## 5. Building partnerships: the role of *amicus curiae* and interested parties

PIL benefits greatly from interventions of other parties that have an interest in the matter or that have in-depth expertise on the issues. It is strategic to seek such groups and encourage them to join the litigation. The presence of such parties may also have an impact on bringing additional interest and amplifying the public interest components of the matter. They may prove useful partners to highlight or remove a particular issue from long discussion in other court filings. It is always strategic to partner with other parties who can enable public interest lawyers and their clients to gain access to additional intellectual, technical, political and financial resources that optimize the effectiveness of the PIL actions. Caution should be taken not to invite or support the admission of parties that are likely to confuse or discredit the litigation.

In the event of controversial questions, it may be necessary for public interest lawyers to enjoin as *amicus curiae* in certain cases in order to help sensitize the courts on a matter by giving expert opinion on the issues. The role of *amicus* is to argue impartially in order to help clarify an issue in dispute. To that end, amici often adopt a neutral, objective tone even if their conclusions strongly favour one side over the other. Therefore, *amici* must demonstrate that they have the expertise and experience required to make useful contributions in support of a PIL action. *Amici* are unlikely to be ordered to pay costs as they are viewed as impartial parties to a matter.

It is therefore important for public interest lawyers to cultivate relationships with experts and expert institutions (such as public policy research centres) in order for them to have access to a pool of *amicus* from which they can draw support. For example, in High Court of Kenya Constitutional Petition No. 2 of 2011 (summarised earlier), the litigators benefited from the expertise of the South African-based Centre for Applied Legal Studies at the University of the Witwatersrand<sup>25</sup> and the Community Law Centre at the University of the Western Cape, which both served as *amicus* in the case.<sup>26</sup>

25 [http://www.wits.ac.za/academic/clm/law/cals/11159/cals\\_home.html](http://www.wits.ac.za/academic/clm/law/cals/11159/cals_home.html) and <http://www.communitylawcentre.org.za/court-interventions>

26 <http://www.communitylawcentre.org.za/court-interventions/kenyan-housing-and-evictions-case> for the *amicus* brief and the judgment.

## Who can be amicus curiae?

- The Constitution says that “an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court” (Article 22(3)(e))
- The Rules for cases under Article 22 say the court can allow any person to be a “friend of the court” and they define such a person as “an independent and impartial expert on an issue which is the subject matter of proceedings but is not party to the case and serves to benefit the court with their expertise”.
- The Supreme Court Rules 2012 say “The Court shall before allowing an amicus curiae take into consideration the expertise, independence and impartiality of the person in question and it may take into account the public interest, or any other relevant factor.”
- Two judges of the Supreme Court have said that “an amicus is only interested in the Court making a decision of professional integrity. An amicus has no interest in the decision being made either way, but seeks that it be legal, well informed, and in the interest of justice and the public expectation. As a ‘friend’ of the Court, his cause is to ensure that a legal and legitimate decision is achieved.” But their remarks were not essential to the case – which was about the Law Society of Kenya being allowed to be an interested party, which is different from amicus. (*Trusted Society of Human Rights Alliance v Matemo Petition No 12 of 2013*)
- Some organisations have been refused permission to appear as amicus curiae, usually because one side to the case objects. Katiba Institute was refused permission by the High Court; the court said the Attorney General “argued that Katiba held strong views regarding the issues raised in this petition, which views support some of the parties”.
- Clarification of the rules is needed: should a court be deprived of the benefit of hearing a possible amicus just because that person or organisation has views? Or is the price of being able to appear as amicus, and share expertise, to be the inability to express views in public on issues of the moment that might come to court? Who benefits from such an approach?

## 6. Developing an effective media strategy

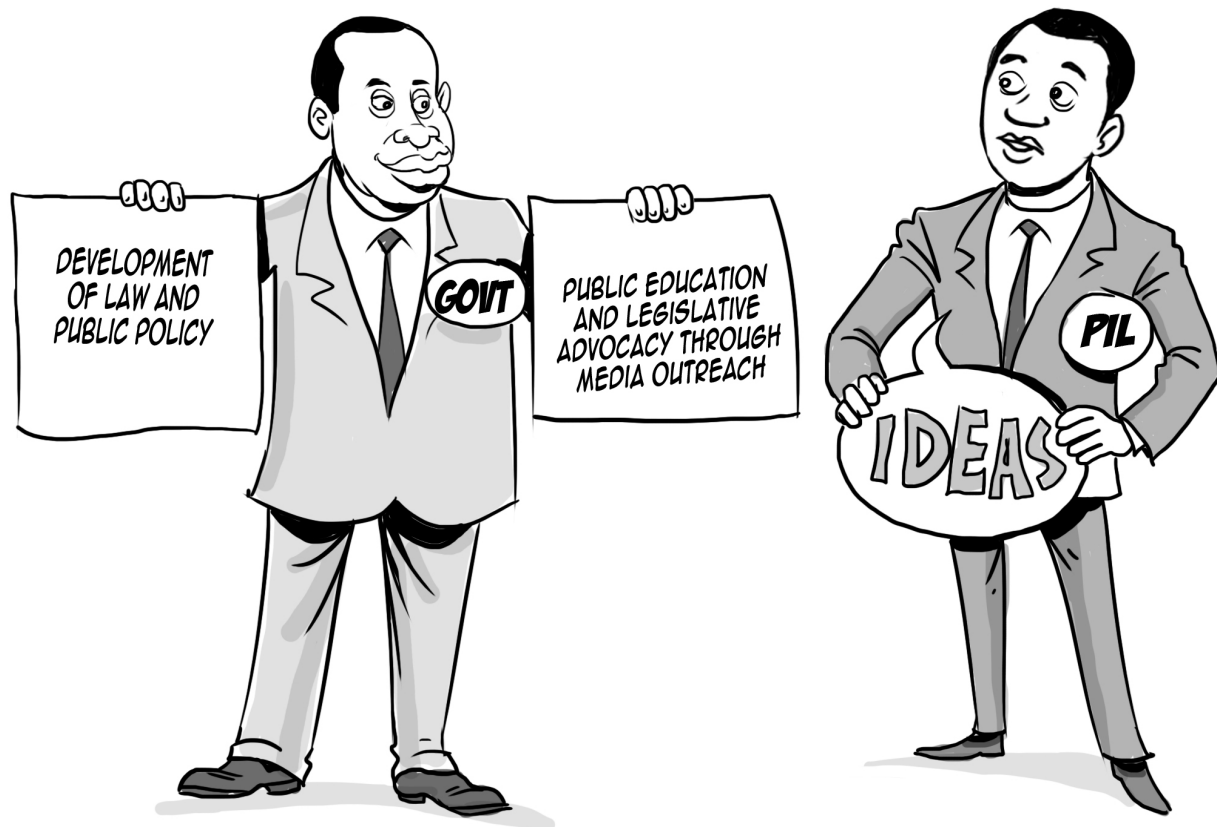
PIL actions seek to draw official and public attention to their objectives, so a well-targeted media publicity strategy should be developed early. Defining and refining a publicity plan for PIL cases should be an on-going process. Developing a media strategy may begin during the early planning phases of a case, when the focus is on setting media related goals and defining the target audience. While early planning for media engagement is positive, it may be difficult to effectively engage with a consistent message before the case is

actually filed; often this is when arguments are being debated and refined.

The actual publicity drive may begin with filing, but continues throughout the case even after the final decision is given. The aim of a publicity campaign is to ensure that the public is informed of significant case developments and how its outcome may affect them, as well as to try and win the support of the public in pushing whatever policy reforms the particular case may be advancing. But not every PIL case benefits from a publicity strategy. For example, one should carefully consider whether publicizing litigation dealing with an issue that is generally unpopular with the public detracts from or undermines the litigation.

## Questions to consider in developing media strategy

1. What are the short-and-long-term goals and targets of the media strategy?
2. Who is the audience?
3. What are the best means for reaching the audience?
4. What are the available media outlets?
5. Who would be an effective spokesperson for communicating the information?
6. What kind of information and events does one have that would interest the media?
7. Who should be included in a media contact list?
8. Should you prepare a media kit explaining issues that is specifically targeted at the media?



## 6.1 Defining goals, target audiences, and core messages

A PIL media campaign should start with a set of clearly defined goals. Generally, in PIL the goal is to make the public aware of the underlying problems and their adverse impact on people's rights, as well as the recourse sought through litigation. The campaign might also seek to influence the thinking or behaviour of some officials by making them aware of the issues and desired impact of the litigation. Also consider the proper socio-geographic scope of the campaign: is this a national or local effort, and are there certain communities it is critical to reach? In some cases it might be necessary to weigh media engagement against risks to the client and the litigation team. Note that these issues often relate closely back to how success is defined in the case and may evolve as a case strategy develops.

Once established, these goals form a basis for determining the target audience or audiences, and for choosing appropriate messaging, media, and spokespeople. When the general public is the target audience, consider a strong, sympathetic narrative that emphasises the need for justice for the client, and also educates the public about the issues and how they affect daily life. Messaging aimed at officials may focus more heavily on accountability for past and future transgressions, as well as respect for rights.

Note that legal questions central to the case may be unintuitive or complex for many, and it is important to refine the message for a given audience so that it is not lost in the details. The social context is also important. Often a PIL case is surrounded by ongoing political and/or social debates, which need to be factored into picking the themes and messages to emphasise.

## 6.2 Cultivating media relationships

To get access to media, functional contacts should be established with news and feature editors as well as reporters who specialize in relevant topics.

The careful cultivation of journalists is necessary to sustain their interest and to promote reporting on any particular matter. This may be accomplished by having both formal and informal conversations with them to clarify the issues at hand. Helpful journalists may be identified through collaboration with other public interest organizations, through personal and professional networks, or by contacting media organizations directly.

Once developed, a media contact list should be used as a more targeted means of sharing information. Announcements for press conferences or other events may be sent to a listserv based on a media contact list. This can include the substance of the press conference, the press release, and information about the case. Over time, providing timely, well developed, and accurate information will help individuals in media outlets to trust the content that's put out.

Building bridges to a range of media outlets is also important. Consider that even consistently positive coverage from media outlets that only have one particular affiliation, or that are always on one side of an issue, might not be the most effective way forward.

## 6.3 Leveraging different forms of media engagement

The media can be a powerful tool for public interest lawyers to raise awareness of their claims. Media statements and press conferences are frequently used as initial steps to inform the public and the media about the issue. They may also be helpful in testing the message developed to ensure that it is clear and effective. Further media engagement can include interviews with print or broadcast journalists, opinion pieces, and televised public debates, among others.

Social media, such as Twitter and Facebook, can also be used to cheaply push out messages to the general public or the world at large. At minimum, these platforms can allow sympathetic and technologically sophisticated people to follow a case's progress. Even so, public interest lawyers

need to consider carefully the target audiences, and assess which of these are likely to engage with these platforms.

## **6.4 Determining who faces the media**

Public interest lawyers, their clients, and partners will often be the public face of the issue at hand, and some among them need to assume a leadership role in writing, speaking and creating awareness about the subject matter of the litigation. This may call on lawyers to consider non-legal factors and devote precious resources to tracking and analysing relevant public policy concerns, as well as seeking publicity opportunities in print, radio, TV, the Internet, or through public speaking engagements. Obviously, some individuals or organizations will have more developed capacities in accessing and engaging with the media than others. This is one possible area for collaboration with other organizations to build the most potent coalition possible (and as early in the process as possible). Care needs to be taken when expressing views in writing. Arguably the idea that a person is guilty of contempt of court by expressing views about the outcome of a case that is in court is out of date; it made more sense when decisions were made by juries who were non-lawyers, but judges – who are professionals – ought to be able to make decisions uninfluenced by media comment. However, as things stand the law may be used to penalise those who express a view in such circumstances. In addition, there is something unsatisfactory about a lawyer entering into active public debate about a case in which the lawyer is representing a client. Might this actually be counter-productive in terms of the impact on the judge? And is there not perhaps a risk that the practice of expressing public enthusiasm for one's client's case puts in jeopardy the principle that everyone, however unpopular, is entitled to representation and the

lawyer should not be considered to have endorsed the client just by agreeing to represent him or her?

Some clients may be excellent spokespersons for their own cause, whereas others might be less able to face the media. So the decision to put a client in the spotlight should be very carefully considered. When that tactic is chosen, be sure to carefully prepare the client for the moment so that they stay “on message”. Clients should be prepared to give short, compelling statements that discuss the need for justice to be done, for problems in the system to be corrected, and for them to be made whole again.

## **6.5 Developing a media kit**

The Kenyan media has been a strong ally to public interest lawyers at times. Even so, there is a need for public interest lawyers and their clients to be proactive in guiding media practitioners on how to report on their cases. In many instances media houses tend to show more interest in reading politics into PIL actions than focusing on legal and social issues. Thus, their reporting may distort facts and issues in ways that adversely affect the on-going actions. Developing and delivering media kits to media practitioners is a particularly effective way of ensuring that accurate information is available on a PIL action and the issues it raises. Media kits can incorporate basic information about the action, as well as catchy (but also informative) quotes from clients, case law, and expert reports, among other information. They could be reinforced with pictures and other forms of information that are depicted graphically for ease of reference. Media kits can be distributed at any point during the claim, but are often particularly useful before and after press conferences to support journalists in their reporting. Any information provided in a media kit should be written in such a way that a journalist could use it in their work product. For a sample case summary see Annex 5.



## How to write effective press statements

1. **Grab attention with a good headline** The beginning of a press release -- just as with a magazine article, book or promotional pamphlet -- is the most important. A strong headline will pull in journalists seeking good stories. Your headline should be engaging and accurate.
2. **Get right to the point in the first paragraph** Reporters are busy people, so assume that they will only read the first sentence and then scan the rest. Get the message of your press release out quickly. Every important point should be addressed in the first few sentences. By the end of the first paragraph, the issues, and what conclusion should be reached about these issues, should be clear. Subsequent paragraphs should be for supporting information and explanation. But throughout keep it clear and simple, without too much legal jargon.
3. **Make it grammatically flawless** Proofread your press release -- and let a few other people proofread it as well -- before sending it out. Even a single mistake can dissuade a reporter from taking you seriously.
4. **Include quotes whenever possible** There is a source of natural colour that cannot be replicated: quotes. Quotes lend a human element to the press release, as well as being a source of information in their own right.
5. **Include your contact information** A common oversight that can render a press release ineffectual is a lack of contact information for reporters to follow up with. Don't forget to include an email address and phone number on the release (preferably at the top of the page).
6. **Include details about your organization** Provide a short paragraph on your organization and its goals and objectives -- this will be a quick reference for journalists to explain why you have chosen to represent your clients. Also include relevant links to your work and what you've already accomplished. Don't make writers search on their own for more information -- guide them as quickly as possible to where they can find it.
7. **One page is best and two is the maximum** As with most good writing, shorter is usually better. Limit yourself to one page, though two pages are acceptable. This will also force you to condense your most salient information into a more readable document -- something journalists are always looking for.

Zach Cutler, 8 Tips for Writing a Great Press Release, Huffington Post (Nov. 13, 2013), [http://www.huffingtonpost.com/zach-cutler/press-release-tips\\_b\\_2120630.html](http://www.huffingtonpost.com/zach-cutler/press-release-tips_b_2120630.html).

## Key questions to consider when planning a press conference

1. Is this 'really' news? Do we have evidence to support the claims we are making?
2. Have we identified the right time and venue to hold our press conference?
3. Are we competing for airtime/column space with other major news events?
4. Have we prepared and packaged relevant and informative media kits?
5. Have we invited journalists who specialize in covering related matters?
6. Are our speakers articulate, authoritative and interesting to listen to? Are they properly prepared?
7. Are we prepared to answer challenging questions or arguments against our positions?

### Other tips:

- Encourage reporters to ask questions and ensure that in your answers you reiterate the key messages and concerns.
- Hold your press conference as early as possible in the day to allow reporters to file in their stories on time. Newspapers in Kenya generally go through the last editorial review at 3pm.
- Because Sunday is not considered a 'news day' in Kenya, it is a good day to hold a press conference if the point is to maximize coverage of your issue.
- Press conference locations should be central and easy for media to get to, with easily accessible transport and parking.
- If practical, holding press conferences outside the court house can offer a dynamic environment that is good for filming.
- Remind media participants often about the press conference, including resending the invitation early on the day of the event.
- Prepare a media sign-in sheet to identify new contacts in attendance to add to your media contact list.

## 7. Financial aspects of PIL

PIL is generally expensive. Depending on the nature of the case, public interest lawyers may find that they need to meet the subsistence costs of some clients and/or hire the services of policy experts. These factors require adequate funding, which is not always easily mobilized.

Moreover, while PIL cases offer lawyers and legal aid organizations visibility and attention, PIL is not particularly well paying and there are few monetary incentives to attract the large majority of experienced lawyers to take PIL cases. However, some experienced litigators may be interested in the opportunities for publicity that can arise in PIL, or may be passionate about a particular issue. Regardless of their motivations, lawyers who undertake PIL cases usually have to sustain themselves with other legal work, and therefore tend not to be able to allocate enough time to build and argue strong PIL cases. This particular factor may have an adverse impact on the long-term strategy of PIL cases, as circumstances may at times compel public interest lawyers to drop out of cases midway.

Kenyan legal aid/PIL organizations have an important role to play in ensuring the financial sustainability of PIL work. However, many of them are not self-driven and tend to rely on funding from international development partners to sustain their work and organizations. The challenge with this approach is that funding from these sources is not always assured. In fact, the ongoing economic difficulties in parts of the West (where most of this funding is sourced), and the subsequent adoption of austerity measures in a number of Western countries, will likely continue to affect the reliability of funding streams to organizations in countries like Kenya.

Nevertheless, in the absence of other sources, legal aid/PIL organizations need to find new ways of persuading international development partners to continue to support PIL. One way is to approach funding partners to consider setting up a funding facility for strategic litigation. This will require that legal aid/PIL organizations collaborate more closely in influencing donors and penetrating mechanisms such as the Donor Democracy and Governance Group, which co-ordinates funding to civil society organizations in Kenya.

One obstacle they might face from donors is reluctance and impatience to fund activities, such as PIL, which will likely not be concluded neatly within the project set timelines. The case of the defunct Litigation Fund for Torture (LIFAT) is instructive. This initiative, which brought together the Independent Medico-Legal Unit (IMLU), Kenya Human Rights Commission (KHRC) and Rights Protection and Promotion (RPP), sought to initiate 10 ‘strategic’ cases relating to torture and other police excesses with the aim of winning damages for clients and thereby discouraging police officials from condoning torture. However, it was ended rather abruptly partly because the demonstration of the project’s achievement of key results indicators – the completion of the cases at the end of each project year – was not always possible given the nature of Kenya’s justice system at the time, which was characterized by long delays in case completion. Explaining this, and other aspects of the operating context for PIL work in Kenya, to funding partners could go a long way in convincing funding partners to consider more flexible funding facilities for PIL work.

PIL practitioners should also encourage community partners to rely as much as possible on locally available resources to support the PIL actions that they initiate. This approach has enabled several communities to work more effectively within their means, and to better focus their activities to meet their own needs and interests. It has been used quite effectively by groups like Hakijamii.

One way around these challenges is for the legal fraternity (led by the LSK) to invest more in encouraging and providing incentives to lawyers to undertake PIL on a *pro-bono* basis. An important model can be found in Kituo Cha Sheria’s use of *pro-bono* lawyers. The Law Society of Kenya, together with Amnesty International Kenya has taken the important step of setting up an annual award for pro bono lawyer of the year.

## 8. Post-litigation strategies

A combination of insufficient political will to undertake human rights reforms and a poor human rights enforcement framework continue to be obstacles to enforcement of judicial decisions in PIL cases. This challenge is not confined to Kenya. Therefore, public interest lawyers need to plan ahead to optimize the possibility that positive rulings arising from the PIL cases they bring to court will be implemented. They need to develop and incorporate a post-litigation strategy as part of their broader PIL strategy. In preparing for the Garissa evictions case in 2010, Hakijamii and its partner communities decided that, in the event of a positive ruling, the displaced families would rebuild their homes and other symbols of residency (such as mosques) to demonstrate they were reclaiming their land.

### 8.1 Publicizing the decision

At another level, the impact of a PIL ruling likely depends largely on how well the ruling is disseminated and publicized. Beyond members of the public, an effective dissemination and publicity strategy for judgments in PIL cases ought to target the duty bearers and other parties affected by the judgment who will be instrumental in implementing its directives. For example, in *Satrose Ayuma and 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefit Scheme & 2 Others* [2011] eKLR, the High Court directed that the Kenya Water Act should be amended to ensure compliance with relevant constitutional requirements. In this case, the court ordered the Attorney General to consider amendments to the Water Services Act of 2002 to bring it in line with the Constitution (see Article 43).

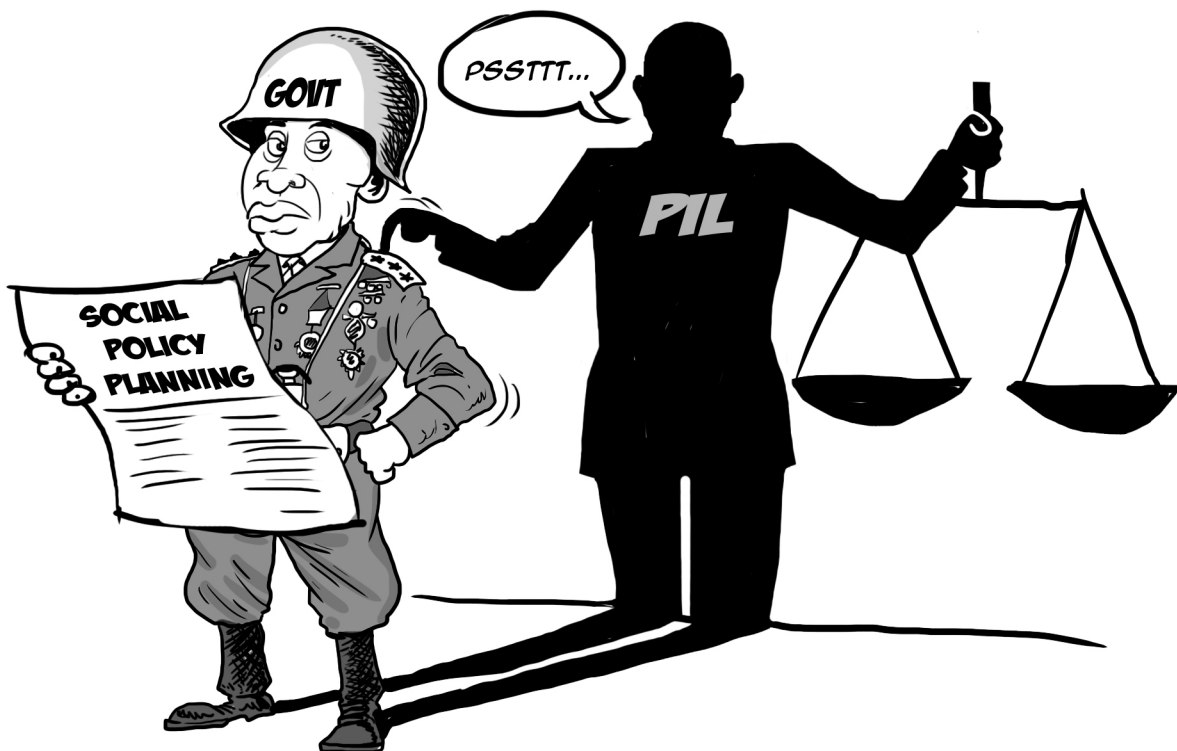
To execute this order it would be important to disseminate the judgment to critical organs of the state, such as Parliament and Water and Sewerage Boards, which have a role in ensuring that the directives and orders are implemented. But it would also require publicity of the directives in order to inform the public on the court's pronouncement, and enable them to participate and track the government's responsiveness to the court's directives. The decision and importance of the new precedent should also be communicated to legal professionals such as lawyers and judges to ensure that it is quickly incorporated into new case law.

Publicizing the outcome of a case is also important for letting the public know the impact the case has on the applicants. In the Garissa eviction case, Hakijamii worked with an alliance of civil society groups (the Land and Housing Rights Coalition) to create awareness of the implications of the positive ruling, which ordered that evictions must be carried out humanely in accordance with established international practices (see General Comment 7 of the Committee on Economic, Social and Cultural Rights).

## 8.2 Maintaining dialogue with the courts

Even when not pursuing litigation, advocates and activists ought to keep the courts informed about relevant public policy developments relating to the cases they bring to the courts. They can keep courts informed by submitting research reports, policy position papers and other materials directly to the court's library, and by interacting with judicial officials in appropriate forums such as trainings.

Kenya's Judiciary Training Institute (JTI) has demonstrated openness to interacting closely with public interest lawyers and the PIL issues they focus on. Social rights litigation in Kenya is likely to become an important field in the future, and there will be a need to enhance the capacity of judicial officials to adjudicate on this particular set of rights. This presents an opportunity for public interest lawyers, human rights groups and legal aid organizations to open a dialogue with the courts on social rights issues.



## Conclusion

Cultivating a network of PIL actors is useful to allow them to share their experiences, success stories and the lessons they have learned over time. Legal aid/PIL advocacy should lead in establishing this network, which would strengthen PIL work by helping to create a reservoir of analytical knowledge on what works and doesn't work in PIL in the Kenyan context. Potential functions and activities of a dynamic Kenyan PIL network could include:

- Helping lawyers to build stronger cases by sharing rulings, legal research findings and analyses of emerging political and policy issues
  - Evaluating past cases to identify key opportunities, as well as limitations, in order to inform the development of stronger, future strategies for PIL
- Operating a PIL digital knowledge portal that caters for the informational needs of public interest lawyers and organizations (it should be pointed out however that there are limitations on people's and organizations' adaptability to new technology. Therefore, any plans for serious investments in improving PIL networking through technology should be subject to broad consultations and rigorous piloting)
  - Organizing training and interactions with judicial officials on pertinent legal issues
  - Partnering with relevant actors to develop viable media capacity-building strategy aimed at cultivating a core group of media practitioners who have knowledge on the importance and relevance of PIL to policy development and social transformation.

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# Annex 1: Chief Justice's 2013 Rules on Instituting Court Proceedings

## Legal Notice No 117, The Constitution of Kenya

IN EXERCISE of the powers conferred by Article 22(3) as read with Article 23 and Article 165 (3) (b) of the Constitution of Kenya, the Chief Justice makes the following Rules:—

THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

### PART I – PRELIMINARY

1. These rules may be cited as the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013

2. In these rules, unless the context requires otherwise—

“Constitution” - means the Constitution of Kenya;

“costs” - means lawyers’ fees and other disbursements of the parties but does not include court fees;

“Court of Appeal” - means the Court of Appeal of Kenya established by Article 164 of the Constitution;

“document” - includes--

(a) any publication, or any matter written, expressed, or inscribed on any substance by means of letters, figures or marks, or by more than one of those means, that is intended to be used or may be used for the purpose of recording that matter; and

(b) Electronic files;

“friend of the court” - is an independent and impartial expert on an issue that is the subject matter of proceedings but is not party to the case and serves to benefit the court with their expertise;

“High Court” - means the High Court of Kenya established by Article 165 of the Constitution and includes courts with the status of a High Court established under Article 162 (2) of the Constitution;

“informal documentation” - includes any legible document in any language that is simple, does not conform to any particular form or rules of grammar and conveys information;

“interested party” - means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation;

“person”- includes an individual, organization, company, association or any other body of persons whether incorporated or unincorporated;

“petitioner” - means any person who institutes proceedings or cross petitions under these rules and for the purposes of a cross petition includes a cross petitioner;

“Registrar” - includes assistant and deputy registrar in any particular court;

“respondent” - means a person who is alleged to have denied, violated or infringed, or threatened to deny, violate or infringe a right or fundamental freedom;

“service” - means delivery of an order, summons, or other legal papers to the person required to respond to them; and “Supreme Court” - means the Supreme Court of Kenya established by Article 163 of the Constitution.



3. (1) These rules shall apply to all proceedings made under Article 22 of the Constitution.
- (2) The overriding objective of these rules is to facilitate access to justice for all persons as required under Article 48 of the Constitution.
- (3) These rules shall be interpreted in accordance with Article 259(1) of the Constitution and shall be applied with a view to advancing and realizing the—
  - (a) Rights and fundamental freedoms enshrined in the Bill of Rights; and
  - (b) Values and principles in the Constitution.
- (4) The Court in exercise of its jurisdiction under these rules shall facilitate the just, expeditious, proportionate and affordable resolution of all cases.
- (5) For the purpose of furthering the overriding objective, the Court shall handle all matters presented before it to achieve the—
  - (a) Just determination of the proceedings;
  - (b) Efficient use of the available and administrative resources;
  - (c) Timely disposal of proceedings at a cost affordable by the respective parties; and
  - (d) use of appropriate technology.
- (6) A party to proceedings commenced under these rules, or an advocate for such party is under a duty to assist the Court to further the overriding objective of these rules and in that regard to—
  - (a) Participate in the processes of the Court; and
  - (b) comply with the directions and orders of the Court.
- (7) The Court shall pursue access to justice for all persons including the—
  - (a) Poor;
  - (b) Illiterate;
  - (c) Uninformed;
  - (d) Unrepresented; and
  - (e) Persons with disabilities
- (8) Nothing in these rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

## **PART II—PROCEDURE FOR INSTITUTING COURT PROCEEDINGS**

4. (1) Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.
- (2) In addition to a person acting in their own interest, court proceedings under sub rule (1) may be instituted by—
  - (i) A person acting on behalf of another person who cannot act in their own name;
  - (ii) A person acting as a member of, or in the interest of, a group or class of persons;
  - (iii) A person acting in the public interest; or
  - (iv) An association acting in the interest of one or more of its members.
5. The following procedure shall apply with respect to addition, joinder, substitution and striking out of parties—
  - (a) Where the petitioner is in doubt as to the persons from whom redress should be sought, the petitioner may join two or more respondents in order that the question as to which of the respondent is liable, and to what extent, may be determined as between all parties.

- (b) A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.
  - (c) Where proceedings have been instituted in the name of the wrong person as petitioner, or where it is doubtful whether it has been instituted in the name of the right petitioner, the Court may at any stage of the proceedings, if satisfied that the proceedings have been instituted through a mistake made in good faith, and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as petitioner upon such terms as it thinks fit.
  - (d) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—
    - (i) order that the name of any party improperly joined, be struck out; and
    - (ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.
  - (e) Where a respondent is added or substituted, the petition shall unless the court otherwise directs, be amended in such a manner as may be necessary, and amended copies of the petition shall be served on the new respondent and, if the court thinks, fit on the original respondents.
6. The following procedure shall apply with respect to a friend of the court—
    - (a) The Court may allow any person with expertise in a particular issue that is before the Court to appear as a friend of the Court.
    - (b) Leave to appear as a friend of the Court may be granted to any person on application orally or in writing.
    - (c) The Court may on its own motion request a person with expertise to appear as a friend of the Court in proceedings before it.
  7. (1) A person, with leave of the Court, may make an oral or written application to be joined as an interested party.
  - (2) A court may on its own motion join any interested party to the proceedings before it.
  8. (1) Every case shall be instituted in the High Court within whose jurisdiction the alleged violation took place.
  - (2) Despite sub rule (1), the High Court may order that a petition be transferred to another court of competent jurisdiction either on its own motion or on the application of a party.
  9. (1) The Court may direct that notice of institution of petition be posted on the Court notice board or be published in the Gazette, a daily newspaper with national circulation or the Judiciary's website.
  - (2) The notice referred to in sub rule (1) shall—
    - (a) Contain a brief summary of the case, reference to the provisions of the Constitution violated or infringed and the relief sought; and
    - (b) Be approved by the Registrar.
  10. (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.
  - (2) The petition shall disclose the following—
    - (a) The petitioner's name and address;
    - (b) The facts relied upon;
    - (c) The constitutional provision violated;
    - (d) The nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;

- (e) Details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
  - (f) The petition shall be signed by the petitioner or the advocate of the petitioner; and (g) the relief sought by the petitioner.
- (3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation that discloses denial, violation, infringement or threat to a right or fundamental freedom.
- (4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.

## **Form of petition.**

11. (1) The petition filed under these rules may be supported by an affidavit.  
(2) If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit.
12. The Registrar shall cause a prescribed form to be available in the Registry to assist petitioners who bring oral applications to have them reduced in writing.
13. A petition filed under certificate of urgency may be placed before a Judge for appropriate orders or directions.
14. (1) The petitioner shall serve the respondent with the petition, documents and relevant annexures within 15 days of filing or such time as the court may direct.  
(2) Proof of service shall be the affidavit of service set out in Form B in the Schedule with such variations as may be necessary.
15. (1) The Attorney-General or any other State organ shall within fourteen days of service of a petition respond by way of a replying affidavit and if any document is relied upon, it shall be annexed to the replying affidavit.  
(2) (a) A respondent not in the category of sub rule (1) shall within seven days file a memorandum of appearance and either a—  
(i) Replying affidavit; or  
(ii) Statement setting out the grounds relied upon to oppose the petition.  
(b) After filing either of the documents referred to in sub rule (2) (a), a respondent may respond by way of a replying affidavit or provide any other written document as a response to the petition within fourteen days.
- (3) The respondent may file a cross-petition, which shall disclose the matter set out in rule 10(2).
16. (1) If the respondent does not respond within the time stipulated in rule 15, the Court may hear and determine the petition in the respondent's absence. (2) The Court may set aside an order made under sub-rule (1) on its own motion or upon the application of the respondent or a party affected by the order.
17. The Court may on its own motion or on application by any party consolidate several petitions on such terms as it may deem just.
18. A party that wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the Court.
19. A formal application under these rules shall be by Notice of Motion set out in Form D in the schedule and may be supported by an affidavit.

## PART III – HEARING AND DETERMINATION OF COURT PROCEEDINGS

20. (1) The hearing of the petition shall, unless the Court otherwise directs, be by way of—
  - (a) Affidavits;
  - (b) Written submissions; or
  - (c) Oral evidence.
- (2) The Court may limit the time for oral submissions by the parties.
- (3) The Court may upon application or on its own motion direct that the petition or part thereof be heard by oral evidence.
- (4) The Court may on its own motion, examine any witness or call and examine or recall any witness if the Court is of the opinion that the evidence is likely to assist the court to arrive at a decision.
- (5) A person summoned as a witness by the court may be cross examined by the parties to the petition.
21. (1) In giving directions on the hearing of the case, a Judge may require that parties file and serve written submissions within fourteen days of such directions or such other time as the Judge may direct.
- (2) A party who wishes to file further information at any stage of the proceedings may do so with the leave of the Court. (3) The Court may frame the issues for determination at the hearing and give such directions as are necessary for the expeditious hearing of the case.
22. (1) Each party may file written submissions.
- (2) Subject to such directions as may be issued by the court, written submissions shall contain the following—
  - (a) A brief statement of facts with reference to exhibits, if any, attached to the petition;
  - (b) Issues arising for determination; and
  - (c) A concise statement of argument on each issue incorporating the relevant authorities referred to together with the full citation of each authority.
- (3) Copies of the authorities to be relied on shall be attached to the written submissions.
23. (1) Despite any provision to the contrary, a Judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory or interim orders.
- (2) Service of the application in sub rule (1) may be dispensed with, with leave of the Court.
- (3) The orders issued in sub rule (1) shall be personally served on the respondent or the advocate on record or with leave of the Court, by substituted service within such time as may be limited by the Court.
24. (1) An application under rule 23 may be made by way of notice of motion or by informal documentation.
- (2) Where an oral application is made under rule 23, the Court shall reduce it in writing.
25. An order issued under rule 22 may be discharged, varied or set aside by the Court either on its own motion or on application by a party dissatisfied with the order.
26. (1) The award of costs is at the discretion of the Court.
- (2) In exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms.
27. (1) The petitioner may—
  - (a) On notice to the court and to the respondent, apply to withdraw the petition; or
  - (b) with the leave of the court, discontinue the proceedings.
- (2) The Court shall, after hearing the parties to the proceedings, decide on the matter and determine the juridical effects of that decision.

- (3) Despite sub rule (2), the Court may, for reasons to be recorded, proceed with the hearing of a case petition in spite of the wish of the petitioner to withdraw or discontinue the proceedings.
28. If the respondent does not dispute the facts in the petition whether wholly or in part, the Court shall, after hearing the parties, make such orders as it may deem fit.
29. The parties may, with leave of the Court, record an amicable settlement reached by the parties in partial or final determination of the case.
30. The Court may extend time limited by these rules, or by any decision of the Court.
31. The Court may refer a matter for hearing and determination by alternative dispute resolution mechanism.
32. (1) An appeal or a second appeal shall not operate as a stay of execution or proceedings under a decree or order appealed.  
(2) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling and the court may issue such orders as it deems fit and just.  
(3) A formal application for stay may be filed within 14 days of the decision appealed from or within such time as the court may direct.
33. (1) Part III of The Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 is revoked.  
(2) Despite sub rule (1), a matter currently pending in Court under Part III of Legal Notice No.6 of 2006 may be continued under these rules.
34. There shall be paid in respect of all proceedings under these Rules the same court fees as are payable in respect of civil proceedings in the High Court in so far as the same are applicable.
35. (1) A person who wishes to be exempted from paying court fees may apply to the Registrar.  
(2) An application under sub-rule (1) may be made by informal documentation.  
(3) The reasons for the Registrar's decision shall be recorded.
36. The Chief Justice may issue practice directions for the better carrying out of these rules.
37. The Chief Justice may review these rules from time to time.

## Annex 2: List of Legal Aid/PIL Organizations in Kenya

Institution	Mandate
<p>Centre for Rights Education and Awareness (CREAW)            Chalbi Drive House No 55, Lavington,            Off Isaac Gathanju Rd            Tel: +254-20-2378271            Cell: +254 720357664            info@creaw.org            http://creawkenya.org/ke/</p>	<p>CREAW is a non-governmental, non-partisan organization based in Nairobi whose mission is to transform the Kenyan society through the promotion and expansion of women's human rights, rule of law and social justice. It carries out PIL on matters of SGBV.</p>
<p>Coalition on Violence against Women (COVAW)            Valley Field Court, House No. 2,            Korosho Road – off Gitanga road            Valley Arcade, Nairobi            Tel: (020) 804 0000, 0722 594794            Hotline: 0723703939            Free SMS Hotline: 20351            info@covaw.or.ke            www.covaw.or.ke</p>	<p>COVAW is a Kenyan non-profit making national women human rights organization. It carries out legal aid and PIL on matters of sexual and gender-based violence (SGBV).</p>
<p>Economic and Social Rights Centre-Hakijamii            53 Park Building,            Along Ring Rd, Off Ngong Rd            Tel: +254-020-2589054 /2593141            Mobile: +254-726-527 876            esrc@hakijamii.com            www.hakijamii.com</p>	<p>Hakijamii is national human rights organization that works with marginalized and vulnerable groups in Kenya to advocate and realize their human rights. The mission of the organisations is to strengthen the people's capacity to participate in advocating and realizing their economic, social and cultural rights in Kenya. It carries out PIL on social rights issues.</p>
<p>Independent Medico Legal Unit (IMLU)            David Osieli Road, Off Old Waiyaki Way, Westlands            Tel: (020) 4450598            Cell: 0724 256 800            advocacy@imlu.org            www.imlu.org/</p>	<p>IMLU is a non-governmental human rights and governance organization that promotes the rights of torture victims, survivors, and protects all Kenyans from all forms of state-perpetrated torture. IMLU documents torture perpetration through forensic medical reports which aids in legal redress for torture victims and exploits legal and advocacy means to seek justice for torture survivors. It carries out legal aid and PIL on matters of police abuses.</p>

<p>International Centre for Policy and Conflict (ICPC)  13thFlr, Ambank House,  Utalii Lane, Nairobi.  Tel: (020) 2219757, 2473042  Cell: 0714 838 894  icpc.afric@gmail.com, admin@icpcafrica.org  www.icpcafrica.org</p>	<p>ICPC is a non-profit and nongovernmental organization fostering democratic, peaceful, secure and just societies in the great lakes region and the horn of Africa by promoting the principles of justice, accountability, the rule of law and sustainable human security. It carries out legal aid and PIL on matters of constitutional implementation and international criminal justice.</p>
<p>International Commission of Jurists – Kenya Section (ICJ-Kenya)  Vihiga Road, off Othaya Road,  Kileleshwa, Nairobi.  Tel: (020) 2084836/8  Cell: 0720 491 549, 0733 491 549  info@icj-kenya.org  www.icj-kenya.org</p>	<p>ICJ-Kenya is a non-governmental, non-partisan, not for profit making, membership organisation. The mission of ICJ Kenya is to protect human rights, and promote the rule of law and democracy in Kenya and across Africa through the application of legal expertise and international best practices. It carries out PIL on matters of torture, security, freedom of information, wrongful detention and international criminal justice.</p>
<p>International Federation of Kenya Women Lawyers (FIDA)  Amboseli Road, off Gitanga Road, Lavington, Nairobi.  Tel: (020) 3870 444 or (020) 3873 511  Cell: 0722 509760 or 0733 845003  info@fidakenya.org  fidakenya.org</p>	<p>FIDA Kenya is a non-profit women’s rights organization registered in Kenya. Its mission is to ensure that women are free from all forms of injustices based on gender, sex, class, ethnic origin, physical disability and religious beliefs. It carries out legal aid and PIL on matters affirmative action, labour rights, succession, SGBV and women’s rights to property.</p>
<p>Kenya Human Rights Commission (KHRC)  Gitanga Road, Opp. Valley Arcade Shopping Centre  Tel: (020) 2044 545, (020) 2106 709  Cell: 0722 264 497, 0733 629 034  admin@khrc.or.ke  www.khrc.or.ke</p>	<p>KHRC is a national non-governmental organisation whose core agenda is campaigning for the entrenchment of a human rights and democratic culture in Kenya. It carries out PIL on matters of citizenship rights, torture and internal displacement.</p>

<p>Kenyans for Peace Truth and Justice (KPTJ) Africa Centre for Open Governance (AfriCOG) Kabarsiran Ave, Nairobi Telephone: (020) 4443 707 Cell: 0737 463 166 admin@africog.org kptj.africog.org</p>	<p>KPTJ is a coalition of over 30 Kenyan and East African legal, human rights, and governance organizations, together with ordinary Kenyans and friends of Kenya, convened in the immediate aftermath of 2007's presidential election debacle. KPTJ maintains that there can be no peace without truth and justice - truth and justice for the failed presidential election and the violence that followed. Justice requires that we face the truth of our history, and of the 2007 election, to address the deep chasms and inequities in Kenyan society. KPTJ is currently active in the monitoring, implementation and enforcement of the mediation agreement. It carries out PIL on matters of domestic accountability for international crimes; suits preserving judicial reform process and integrity of key state officers.</p>
<p>Kituo cha Sheria (Legal Advice Centre) Ole Odume Rd, off ArgwingsKodhek Rd Tel: (020) 3874 220, (020) 3874 191 Cell: 0727 773 991, 0734 874 221 info@kituochasheria.or.ke kituochasheria.or.ke/</p>	<p>Kituo cha Sheria is a human rights organization that advocates for the people of Kenya through legal aid and representation. It provides services through various means, which include litigation and community mobilization. It carries out legal aid and PIL on matters of social rights.</p>
<p>Muslims for Human Rights (MUHURI) Haki House, Off Mathenge Road, Off Nyerere Avenue, Mombasa. Tel: (041) 2227 811, (041) 2315 607/8 info@muhuri.org www.muhuri.org</p>	<p>MUHURI is a non-governmental organisation based in Mombasa which promotes the struggle for human rights. MUHURI's mission is to promote a culture of constitutionalism and the progressive realization of human rights. It carries out legal aid and PIL on matters of citizenship, discrimination and social rights.</p>



## Annex 3: List of Free Electronic Resources

Foreign Legislation & Constitutions	Scope	Comment
Constitute, <a href="https://www.constituteproject.org/#">https://www.constituteproject.org/#</a>	The world's constitutions, browse by topic or state	The topical search is not fully advanced yet. Otherwise, very user-friendly
Cornell Legal Information Institute, <a href="http://www.law.cornell.edu/world/">http://www.law.cornell.edu/world/</a>	Cases, US federal and state; encyclopaedia; legislation, Supreme Court- its own decisions	
Jurist, <a href="http://jurist.law.pitt.edu/world/index.htm">http://jurist.law.pitt.edu/world/index.htm</a>	Legal news, cases, statutes, can browse by country	Site not very advanced but comprehensive
Legislationonline.org, <a href="http://www.legislationline.org">http://www.legislationline.org</a>	International norms and standards, for each country: domestic legislation and documents	Organized topically and by country
Library of Congress Law Online, <a href="http://www.loc.gov/law/guide/index.html">http://www.loc.gov/law/guide/index.html</a>	Constitutions, legislative guides, U.S. legal system guides, primary documents from other countries	Database on U.S. laws is more extensive than that of other jurisdictions
The World Law Guide, <a href="http://www.lexadin.nl/wlg/">http://www.lexadin.nl/wlg/</a>	Legislation from different countries	
World Legal Information Institute, <a href="http://www.worldlii.org/">http://www.worldlii.org/</a>	Primary and secondary sources	Mostly comprises links. Probably the "go-to" guide but hard to keep it 100% accurate.
Case Law	Scope	Comment
General resources for case law from common law states, <a href="http://libguides.bodleian.ox.ac.uk/content.php?pid=445196&amp;sid=3647052">http://libguides.bodleian.ox.ac.uk/content.php?pid=445196&amp;sid=3647052</a> or	Cases in the common law legal tradition	
WorldLii, <a href="http://www.worldlii.org">www.worldlii.org</a>	Not restricted to common law	See above
Australia, <a href="http://www.austlii.ac.au">www.austlii.ac.au</a>	Cases, legislation, some journal articles, law reform commissions etc. from Australia and New Zealand	
Canada, <a href="http://www.canlii.org">www.canlii.org</a>	Local court judgments, tribunal decisions, statutes, regulations and commentaries by Canadian jurisdiction	

Canada, <a href="http://scc-csc.lexum.com/scc-csc/en/nav.do">http://scc-csc.lexum.com/scc-csc/en/nav.do</a>	Supreme Court only “updated within minutes of the public release of the judgments by the Court”	Lexum.com preferred site by Canadian courts for Supreme Court decisions. Once printed, cases are available in pdf format, in bilingual version as published
Commonwealth states, <a href="http://www.commonlii.org">www.commonlii.org</a>	Constitutions and cases in commonwealth states; a few common law non-Commonwealth (not US)	Familiar search engine for LII family
Hong Kong, <a href="http://www.hklii.org">www.hklii.org</a>	Hong Kong cases, regulations, reports, consultation papers, case notes	
India, <a href="http://www.liiofindia.org/">http://www.liiofindia.org/</a> or <a href="http://www.indiankanoon.org">www.indiankanoon.org</a>	Case law from High Court and Supreme Court	
Kenya, <a href="http://www.kenyalaw.org/kl/">http://www.kenyalaw.org/kl/</a>	Laws, constitution, case law	Extensive, organized database. Some weaknesses in search engine
Pakistan Supreme Court, <a href="http://www.supremecourt.gov.pk/web/page.asp?id=109">http://www.supremecourt.gov.pk/web/page.asp?id=109</a>	Courts, judgments, orders, judicial system, Supreme Court rules, national judicial policy	Seems to be no search engine
United Kingdom, Ireland, <a href="http://www.bailii.org">www.bailii.org</a>	Cases and legislation	
United States Supreme Court, <a href="http://www.supremecourt.gov/">http://www.supremecourt.gov/</a>	Court documents, briefs, court rules, opinions, orders and secondary sources	Once published, judgments available as published.
Nigeria Supreme Court, <a href="http://www.nigeria-law.org/LawReporting.htm">http://www.nigeria-law.org/LawReporting.htm</a> or <a href="http://www.commonlii.org/ng/cases/NGSC/">http://www.commonlii.org/ng/cases/NGSC/</a> or <a href="http://easylawonline.wordpress.com/">http://easylawonline.wordpress.com/</a>  Court of Appeal, <a href="http://www.courtofappeal.gov.ng/">http://www.courtofappeal.gov.ng/</a>  Federal Capital Territory High Court, <a href="http://www.fcthighcourt.gov.ng/">http://www.fcthighcourt.gov.ng/</a>		Poor searching methodology. You need to know what you are looking for
Liberia, <a href="http://www.liberlii.org/">http://www.liberlii.org/</a>	Supreme Court cases, some legislation and other material	

Seychelles <a href="http://www.seyllii.org/">http://www.seyllii.org/</a>	Some published reports downloadable; recent cases available, legislation etc.	
Southern Africa, <a href="http://www.saflii.org/">http://www.saflii.org/</a>	Cases from South Africa and other Sub-Saharan African countries.	Country and court-specific searching available
Swaziland, <a href="http://www.swazilii.org/">http://www.swazilii.org/</a>	Judgments, legislation	Not a strong search engine
Uganda, <a href="http://www.ulii.org">http://www.ulii.org</a>	Mostly useful for judgments	Seems useful advanced search
Sierra Leone, <a href="http://www.sierralii.org/">http://www.sierralii.org/</a>	Judgments, legislation, links	Cases not very up to date
Zambia, <a href="http://www.zambalii.org/">http://www.zambalii.org/</a>	Judgments, legislation	Advanced search is hard to find
Zimbabwe, <a href="http://www.zimlii.org/">http://www.zimlii.org/</a>	Cases, legislation	A bit limited, not entirely up to date
Pacific Islands, <a href="http://www.paclii.org">www.paclii.org</a>	Cases, legislation, some other material	
<b>International Treaties &amp; Conventions</b>	<b>Scope</b>	<b>Comment</b>
African Union Treaties on the AU website, <a href="http://au.int/en/treaties">http://au.int/en/treaties</a>		
East African Community treaties -the EAC website, <a href="http://www.eac.int/">http://www.eac.int/</a>		
European Union Treaties, <a href="http://europa.eu/about-eu/basic-information/decision-making/treaties/index_en.htm">http://europa.eu/about-eu/basic-information/decision-making/treaties/index_en.htm</a>	Legislation and case-law, guidance on EU decision-making,	
FLARE Index to Treaties (FIT), <a href="http://ials.sas.ac.uk/treatyindex.htm">http://ials.sas.ac.uk/treatyindex.htm</a>	Treaty search engine	More useful if one knows what one is looking for
Geneva Conventions, <a href="http://www.icrc.org/ihl.nsf/CONVPRES?OpenView">http://www.icrc.org/ihl.nsf/CONVPRES?OpenView</a>	Geneva Conventions treaties, documents search and commentaries	
Human Rights Treaties, <a href="http://www.ohchr.org">www.ohchr.org</a>	All UN Conventions etc and related documents	Including which countries have ratified. Search by country, treaty etc.; you can cut and paste the URL for a particular treaty, e.g. <a href="http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx">http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx</a> (Convention on the Rights of the Child).

International Committee of the Red Cross (ICRC), International Humanitarian Law – Treaties and Documents, <a href="http://www.icrc.org/ihl">http://www.icrc.org/ihl</a>	Treaties and documents relating to victims of armed conflicts, warfare, criminal repression, cultural property and related IHL topics	Organized, contains all primary documents related to international humanitarian law
International Labour Organization (ILO), <a href="http://www.ilo.org/global/standards/lang--en/index.htm">http://www.ilo.org/global/standards/lang--en/index.htm</a>	ILO Conventions and other labour standards documents	
Kenya Law website, <a href="http://www.kenyalaw.org/treaties/">http://www.kenyalaw.org/treaties/</a>		Probably better to use official UN, AU or EAC websites
United Nations Treaty Collection, <a href="http://untreaty.un.org/">http://untreaty.un.org/</a>	Legal resources on the UN, a section for Treaties	
<b>International Commissions, Courts &amp; Tribunals</b>	<b>Scope</b>	<b>Comment</b>
African Commission on Human and People’s Rights, <a href="http://www.achpr.org/">http://www.achpr.org/</a>	Cases, reports of special rapporteurs, country reports, concluding observations, etc.	
African Committee of Experts on the Rights and Welfare of the Child, <a href="http://acerwc.org/">http://acerwc.org/</a>	Reports of sessions, cases (e.g. Nubian Children case)	Not very user-friendly
African Court, <a href="http://www.worldcourts.com/acthpr/eng/index.htm">http://www.worldcourts.com/acthpr/eng/index.htm</a>	Orders and decisions of the African Court on Human and People’s Rights	
European Court of Human Rights, <a href="http://www.echr.coe.int/Pages/home.aspx?p=home">http://www.echr.coe.int/Pages/home.aspx?p=home</a>	Judgments, decisions and case law analysis	
East African Court of Justice, <a href="http://eacj.org/">http://eacj.org/</a>	Cases before the EACJ under the Treaty	Can bring up cases by country, article, key word
Inter-American Commission on Human Rights, <a href="http://www.oas.org/en/iachr/default.asp">http://www.oas.org/en/iachr/default.asp</a>	Cases and press releases, country reports	Easy to navigate
Inter-American Court of Human Rights, <a href="http://www.corteidh.or.cr/index.cfm?CFID=493873&amp;CFTOKEN=75918412">http://www.corteidh.or.cr/index.cfm?CFID=493873&amp;CFTOKEN=75918412</a>	Court judgments	
Permanent Court of Arbitration, <a href="http://www.pca-cpa.org/">http://www.pca-cpa.org/</a>	Conventions, rules of procedure, model clauses, submission agreements, treaties and other instruments referring to the PCA	Easy to navigate

International Court of Justice (includes Permanent Court of International Justice cases), <a href="http://www.icj-cij.org/homepage/index.php">http://www.icj-cij.org/homepage/index.php</a>	Decisions, statute, rules, etc.	
International Criminal Court, <a href="http://www.icc-cpi.int/en_menus/icc/Pages/default.aspx">http://www.icc-cpi.int/en_menus/icc/Pages/default.aspx</a>	Decisions and other documents including Statute, Rules etc.	
International Criminal Tribunal for the Former Yugoslavia, <a href="http://www.icty.org/">http://www.icty.org/</a>	Case law database, court records, reports and publications, statute of the tribunal, rules of procedure and evidence etc.	
International Criminal Tribunal for Rwanda, <a href="http://www.icttr.org/">http://www.icttr.org/</a>	Cases, minutes, calendar, rules of procedure etc.	
Special Court for Sierra Leone, <a href="http://www.rscsl.org/">http://www.rscsl.org/</a>	Mandate, documents, decisions, news, publications etc.	
<b>Peace Agreements &amp; Truth Commissions</b>	<b>Scope</b>	<b>Comment</b>
Conciliation Resources, Accord Peace Agreement Index, <a href="http://www.c-r.org/our-work/accord/peace-agreements/index.php">http://www.c-r.org/our-work/accord/peace-agreements/index.php</a>	Publications on peace building, full Accord series, each country	
INCORE International Conflict Research Institute, <a href="http://www.incore.ulst.ac.uk/services/cds/agreements/">http://www.incore.ulst.ac.uk/services/cds/agreements/</a>	Database of peace agreements	
USIP Peace Agreements Digital Collection, <a href="http://www.usip.org/category/publications/peace-agreements">http://www.usip.org/category/publications/peace-agreements</a>	Database of peace agreements by issue area, country or expert	Allows access to secondary sources published by USIP (US Institute of Peace)
USIP Truth Commissions Digital Collection, <a href="http://www.usip.org/category/publications/truth-commission">http://www.usip.org/category/publications/truth-commission</a>	Database of truth commissions by issue area, country or expert	
<b>United Nations Materials</b>	<b>Scope</b>	<b>Comment</b>
United Nations Bodies (on the various human rights treaties), <a href="http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx">http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx</a>	Database of human rights bodies, both charter-based and treaty-based	

United Nations Dag Hammarskjold Library, <a href="http://www.un.org/Depts/dhl/">http://www.un.org/Depts/dhl/</a>	Library catalogue, voting database, index to speeches, index to proceedings, UN member states on the record, training and tutorials etc.	
United Nations Documentation Centre, <a href="http://www.un.org/documents/">http://www.un.org/documents/</a>	UN Charter, legal resources and training, ICJ, Secretariat, etc.	
United Nations Office of the High Commissioner for Human Rights, Human Rights Bodies, <a href="http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx">http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx</a>	Database of human rights bodies, both charter-based and treaty-based	
United Nations Secretary General reports, <a href="http://www.un.org/en/sc/documents/sgreports/">http://www.un.org/en/sc/documents/sgreports/</a>	Security Council reports, exchanges of letters, reports of the Security Council missions, annual reports, documents search	
<b>Secondary Sources</b>	<b>Scope</b>	<b>Comment</b>
<i>Human Rights</i>		
International Council on Human Rights, <a href="http://www.ichrp.org/en/themes">http://www.ichrp.org/en/themes</a>	Working papers and reports on cross-cutting issues in human rights	
Interights, <a href="http://www.interights.org/">http://www.interights.org/</a>	Advanced case search and publications, commonwealth and international law databases	Future of this site unclear
Minority Rights International, <a href="http://www.minorityrights.org/">http://www.minorityrights.org/</a>	Publications on minority rights	
REDRESS, <a href="http://www.redress.org/home/home">http://www.redress.org/home/home</a>	Human rights, torture, reparations	Publishes many reports related to human rights
University of Minnesota Human Rights Library, <a href="http://www1.umn.edu/humanrts/">http://www1.umn.edu/humanrts/</a>	Primary and secondary resources and Guides	
<i>Electoral Processes</i>		
ACE Project: The Electoral Knowledge Network, <a href="http://aceproject.org/">http://aceproject.org/</a>	Comparative data interactive map on electoral systems in the world, encyclopaedia	

International Institute for Democracy and Electoral Assistance (International IDEA), <a href="http://www.idea.int/">http://www.idea.int/</a>	Publications, analysis and policy, databases, and training materials	
International Foundation for Electoral Systems (IFES), <a href="http://www.ifes.org">http://www.ifes.org</a>	Publications by theme, topic, region	
<b>Research Guides</b>	<b>Scope</b>	<b>Comment</b>
ASIL Electronic Resource Guide, <a href="http://www.asil.org/resources/electronic-resource-guide-erg">http://www.asil.org/resources/electronic-resource-guide-erg</a>	Explanatory text, with links to sources of various aspects of international law including HR, international criminal law, environmental law etc.	
GlobalLex, <a href="http://www.nyulawglobal.org/globallex">www.nyulawglobal.org/globallex</a>	International law guides and legal documents	Laws listed alphabetically. Variable quality
Google Advanced Search, <a href="http://www.google.com/advanced_search?hl=en">http://www.google.com/advanced_search?hl=en</a>	Advanced search engine	Provides a guided way to a Boolean search
Law Library Research Exchange, <a href="http://www.llrx.com/category/1050">http://www.llrx.com/category/1050</a>	Archive of research guides and special topics	
Pence Law Library Research Guide: International Law, <a href="http://library.wcl.american.edu/courts/2006/slides/ResearchingInternationalLaw2006/ResearchingInternationalLaw06.html">http://library.wcl.american.edu/courts/2006/slides/ResearchingInternationalLaw2006/ResearchingInternationalLaw06.html</a>	Research guide and links to other international law resources	
United Nations Documentation, Research Guide, <a href="http://research.un.org/en/docs/">http://research.un.org/en/docs/</a>	Guide to researching UN documents, by subject, by body	
University of Chicago Law School, Legal Research on International Law Issues Using the Internet, <a href="http://www.lib.uchicago.edu/~llou/forintl.html">http://www.lib.uchicago.edu/~llou/forintl.html</a>	Compilations of international legal research resources and links	

## Annex 4: Some Domestic, Regional and International Mechanisms that Complement PIL Strategies

Independent Commissions and Bodies	Regional courts and bodies
<ul style="list-style-type: none"> <li>Independent Police Oversight Commission</li> <li>Kenya National Commission on Human Rights</li> <li>National Gender and Equality Commission</li> <li>Public Procurement Oversight Authority</li> <li>Ethics and Anti-Corruption Commission</li> </ul>	<ul style="list-style-type: none"> <li>African Court of Human and People's Rights</li> <li>African Commission on Human and People's Rights</li> <li>East African Court of Justice</li> </ul>
Quasi-judicial international human rights bodies	
<ul style="list-style-type: none"> <li>Committee against Torture</li> <li>Human Rights Committee</li> <li>Committee on Economic and Social Rights (Optional Protocol allowing CESR to entertain individual reports. Not yet signed by Kenya.)</li> </ul>	

## Annex 5: Sample Media Summary for PIL Case

### William Musembi & 13 others v Moi Education Centre Co. Ltd & 3 others

**Date of court ruling:** October 14 2014

**Which court and which judge or judges?** The High Court, in Nairobi; the Judge was Justice Mumbi Ngugi

**What is the case about?** The eviction of residents of two villages in South C Nairobi, by a private school that had been allocated the land, with the assistance of the police. The question was whether this was against the Constitution.

**Who brought the case?** Two cases were joined together. In one 10 residents sued, on behalf of over 300 people; they were joined by the director of Kituo cha Sheria, the legal aid organisation. The other case was brought by three other residents.

**Who is the case against?** Against the school (Moi Education Centre), the Inspector General of Police, and the Attorney General (on behalf of the government). These were the respondents.

**What happened at this hearing?** This was the final stage in the case, the judge had finished hearing the lawyers for the parties and gave judgment.

**What did the court decide and why?** The court decided that even though the residents had no right to the land, this did not mean they could be evicted without following proper procedures. It was wrong to evict without proper notice, at 4 a.m., forcefully, and with no consideration of alternative accommodation for the residents. They did have the right to housing under the Constitution which the state must respect. The rights of the children and the elderly were also affected. And the Constitution also applies to private citizens, so the school could also be liable.



The court also said it was wrong to use the police for this purpose.

And the court ordered the school to pay KShs150,000 to each petitioner and the state to pay KShs100,000 to each. And the respondents should pay the legal costs of the petitioners.

**What happens next?** If the school does not pay the petitioners could seek the assistance of the court which could order assets of the school to be seized to pay. It is less easy to get orders against the government satisfied. The respondents could appeal to the Court of Appeal

**Who were the lawyers?**Mr. MbuguaMureithi for the petitioners,Mrs Manyarki for the school and MsGitiri for the state and police.

**Are there other interesting points about the case?** The petitioners said that former President Moi had publicly promised that the residents would be given alternative accommodation, but this never happened. And the petitioners also produced part of the Ndungu report to show that the land had been wrongly allocated. The judge did not have to make any decision about these points. She also pointed out that the State had produced a National Housing Policy as long ago as 2004.

## Annex 6: How to Cite

### The Principles

Statements of law require the support of a proper citation. The purpose of a citation is simple: to convey to the reader exactly what source of information or argument you are referring to, and to do so in such a way that the reader knows how to find the specific location within the document (or occasionally another object such as a video) referenced. In order to convey this information as quickly as possible, it is best – and customary – to adhere to certain conventions about how the information is presented. And when you are engaged in advocacy – trying to get the court on your side – there is the added dimension that it would be counter-productive to irritate the judge by presenting the information in an unorthodox or confusing manner.

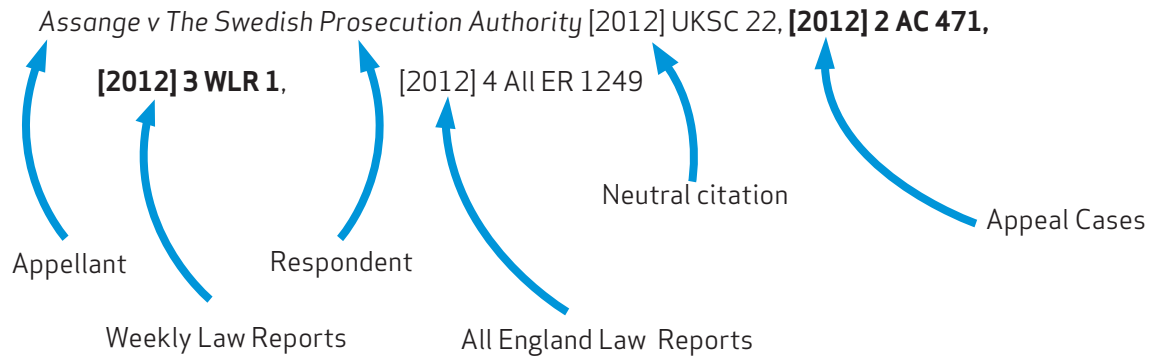
Kenya has yet to adopt an official, standardized citation system. For that reason, a number of different citation systems are noted from various common law jurisdictions. However, most Kenyan practitioners are likely to find the system employed by the UK most familiar, and thus this is the system most heavily discussed below.

Many other countries have guides to citation, sometimes more directed towards academic writing and sometimes towards lawyers. The most complex and detailed are in the US, especially the Blue Book – because of the complexity of the US federal system. At the end of this section is a list of web-based sources on citation.

**The Golden Rule** - Use your common sense, focus on conveying the information simply and clearly, and be consistent. Ask yourself if, based on the information in the citation, the reader can immediately identify the source that made the relied upon statement, and quickly find the exact language referenced.

Here we shall go through the most usual authorities relied upon by litigators, and at the end provide a short list of example citations of cases from a variety of courts – the most complex situation.

## Cases



### The vital information here is:

- (i) names of the parties
- (ii) name of the series of published reports in which it appears
- (iii) number of the particular volume
- (iv) page number in the volume at which the particular case begins
- (v) date of report (may not be exactly the same as the date of decision – but if for some reason there was a major discrepancy, it would be wise to indicate the date of decision too)
- (vi) in countries that have adopted it the “neutral citation” – see below
- (vii) the court (which does not have to be spelled out here because the neutral citation makes it clear: UKSC=UK Supreme Court and AC (Appeal Cases) means it is either the Supreme Court (formerly House of Lords) or the Privy Council.

Other points to note are:

**Multiple Reports** A case may often appear in a number of published reports as well as in online formats. It may not be necessary to give every published citation. If there is an official or quasi-official series of reports, give that, after the neutral citation, if any. In the *Assange* example above, the quasi-official reports are emboldened, just to indicate to users of this Handbook what they are. If you know that the most relevant library has a particular series of reports, be sure to give that citation.

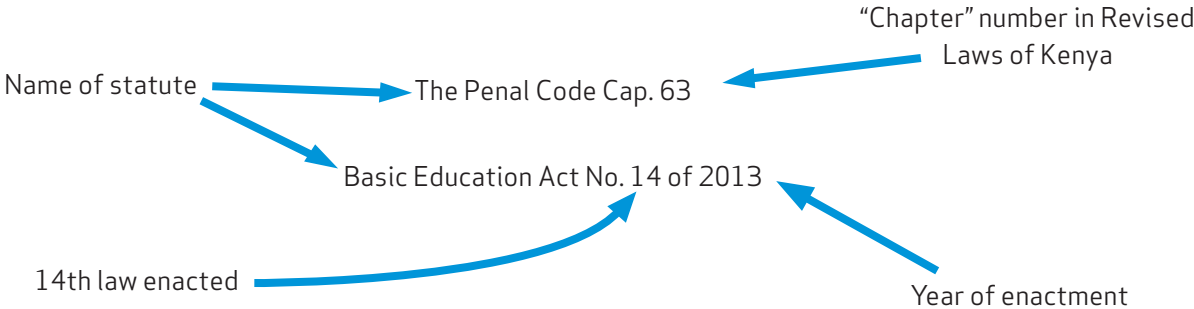
**Neutral Citations** The neutral citation is a recent development (since about 2001 in the UK). Neutral citations do not depend on physical publication in a printed volume. Each case decided is assigned a number and a code that indicates the court, such as UKSC (UK Supreme Court) or ZACC (South African Constitutional Court). Practice Directions usually indicate that neutral citations must always be used (and usually that they appear first). This system is not yet fully adopted in common law jurisdictions, including Kenya. In the US, not every state has adopted the system, and federal cases still cite to reporters and page numbers (although it has been endorsed by the American Bar Association).

**Brackets** At least in the English tradition there is a difference between [ ] and ( ). If the date is within square brackets it means that date is essential to finding the printed volume. So [2012] 1 QB 27 means there is more than one Queen’s Bench volume for 2012 and you need the year to find the volume. If every printed volume had a different number the year is not an essential piece of information for finding the volume and would be in round brackets. Many other countries do not observe this convention.

**Unreported cases** It may be necessary to give more information about unreported decisions, especially if there is no neutral citation. The case number – the number of the suit, petition etc. – is often used. In Kenya be careful to include the court because it seems that each court has its own sequence of numbers. It would also be useful to give the date of hearing (the case number may be from several years earlier, of course).

**Citing Electronic Sources**<sup>27</sup> As legal resources are increasingly available online, it is useful to give the web address (URL). In fact, returning to the ‘Golden Rule’ above, this is often one of the best ways to make citations readily accessible. Online case law collections often provide citable URL links. Bailii (British and Irish Legal Information Institute [www.bailii.org](http://www.bailii.org)) gives this at the head of each case (that for the Assange case is <http://www.bailii.org/uk/cases/UKSC/2012/22.html>). The European Court of Human Rights (<http://hudoc.echr.coe.int/>) similarly provides a citable document URL. Try to cite as specifically as possible to the page or location relied upon, rather than a top-level webpage, although this rule may be reasonably broken if a pinpoint URL is prohibitively long and a higher-level webpage provides obvious access to the webpage needed. A practice is developing of providing the court with a CD compiling electronic versions of all sources cited in a submission, lessening the burden on the judge, or someone else, to track down source materials.

**Statutes**



Acts of Parliament, or in the US, of Congress, get given a number in the year in which they were enacted (we can forget old English statutes that had a number in a parliamentary year which related to the regnal year of the monarch, neither necessarily the same as a calendar year). Periodically Kenyan statutes are supposed to be revised, so all changes are incorporated in a republished version (see Revision of the Laws Act Cap. 1). A few statutes don’t get included, such as the Annual Appropriation Act. Then they are known by their name and number in that revision. This was last done in 2009. Every statute passed since then has to be known by its number in the particular year. It is not uncommon for statutes in the Revised Edition to be referred to by their year of enactment, but certainly older laws, like the Penal Code, would not be – it has been amended so many times.

County Acts are given a number in the particular year, for example, the Nairobi City County Flag and Other Symbols Act, 2013, No. 5 of 2013.

Statutes are divided into sections, and sections into sub-sections, and sub-sections into sub-sub-sections. Sub-sub-sections are these days often called ‘paragraphs’, and below them you may have sub-paragraphs. Sub-sections are numbered (1) etc., sub-sub-sections or paragraphs (a) etc. and the next sub-divisions as (i) etc. Occasionally a section, or sub-section, has a proviso (which should be referred to as “proviso to s. xx”); this is falling out of fashion, fortunately. It is not normal to mention the ‘Part’ of a statute into which

27 See also, “Citing the Internet” below.

a section falls, if any, unless you want to refer to the whole Part. Schedules to statutes (appendices) are usually divided into paragraphs.

The Constitution 2010 is divided into articles, which are divided into clauses; and it has schedules that are divided into sections. In India, where the Constitution also has 'Articles' it is traditional for the word 'Article' to have a capital A when a specific Article is being referred to (and the abbreviation is 'Art.'). But there, as in Kenya, sections of any other legislation are referred to as section (no capital) or s.xxx. It is too early to say that Kenya has developed any convention on this: > be logical and consistent.

Most Commonwealth countries use a similar system for Acts to that in Kenya. In the US, a national (federal level) statute is known as 'Public Law' (PL) + a number. All the national legislation is then consolidated in the US Code. Similar consolidations are done at state level, but each of the 50 states will have slightly different citation requirements. Citations are usually to the Code unless it is a very recent statute. It is not always necessary to mention the name of the specific statute, but some are traditionally known by a commonly used name. Since, for you, citing a US statute is likely to be a rare thing, it makes sense to give the name whenever one is available. So the Alien Tort Statute (also known as the Alien Tort Claims Act)<sup>28</sup> should be referred to by one of these two names plus its place in the Code: 28 U.S.C. § 1350. The '28' refers to Title 28 of the US Code (this title covers 'Judiciary and Judicial Procedure'). The symbol '§' is used for the word 'section' and is doubled '§§' if there is more than one section included in the citation to a given title. Within a section (§) divisions go (a) (1)(A)(i). But for the Alien Tort Statute there are no divisions to this section. Thus, a complete citation would appear as follows: Alien Tort Claims Act, 28 U.S.C. § 1350.

The US Constitution is referred to, for example: as U.S. Const. art. III, § 2, cl. 2 or U.S. Const. amend. XIII, § 1. But for your purposes, for judges not familiar with this form of citation, it would be best to say US Constitution, Art. III s. 2(2) or Art. III §2(2), which would make it easy to find.<sup>29</sup> Or US Constitution, 13th Amendment § (or s.) 1, which was enacted after the American Civil War to say, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction".

## Subsidiary legislation

A Cabinet Secretary or some other body or officer may have authority under statute to make documents having the force of law. These may be called Regulations, Rules, By-Laws, Order or Notice. Traditionally in Kenya this type of law has been called 'subordinate legislation'. A new Act in 2013 to regulate the process of making such law is called the 'Statutory Instruments Act' - introducing English terminology. Each one is published in Supplements to the Gazette, and termed a Legal Notice and given a number. So, for example the LN 23 of 2014 is The National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, 2014. It is not normal to give the date of the Gazette, but if the publication is very recent this is helpful.

The official way to refer to the Gazette is, for example, *The Kenya Gazette* Vol. CXVI-No. 79 04 July, 2014.

The system is similar in other Commonwealth countries, though in the UK and in some other countries the numbering system is SI (Statutory Instrument). In the US, government agencies may similarly have rule-

28 The Alien Tort Claims Act of 1789 grants jurisdiction to US Federal Courts over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Since 1980, courts have interpreted this statute to allow foreign citizens to seek remedies in U.S. courts for human-rights violations for conduct committed outside the United States.

29 This provision of the US Constitution says, "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

making authority, and today most state and federal agency material is accessible online for free. Similar to the statutory citations discussed above, the relevant codification is called the 'Code of Federal Regulations' or 'C.F.R', and will be preceded by a Title number, and followed by a section number. For example, 40 C.F.R. 122.26(b)(14)(iii) cites to a specific clause in a regulation from the Environmental Protection Agency dealing with storm water discharge.

## Official reports etc

Kenya does not have a systematic way of referring to official reports. There are relatively few of them. So be careful to use the full title of the report and include the date and the name of the chairperson. So, for example: '*Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007* (Kriegler Report) (2008)'. A paper that has gone to Parliament will often be called a 'Sessional Paper', and this should be included: e.g. Ministry of Housing, Sessional Paper No. 3 on National Housing Policy for Kenya (2004).

Other countries may have a system of numbering reports. Most UK non-parliamentary reports and policy documents are (notionally only) published by the command of the monarch and have a number in a series called 'Command Papers'. This phrase is abbreviated, but over the decades that abbreviation has changed: C, Cd, Cmd, Cmnd, and Cm. There are also papers printed by order of the House of Commons, or House of Lords, or by the Law Commission. Each has its own number in a series: numbering from 1 each parliamentary year. House of Commons Papers are in the HC series. Law Commission Reports are numbered Law Comm or LC xxx (most recently number 350), but they also have Consultation Papers that are numbered in a single sequence, and Discussion Papers, that are, it seems, not numbered.

Generally speaking, you are likely to find that for other countries you first come across a reference to the document by someone else. Unfortunately, you can't always be sure that they are punctilious in their citation style. US legal sources are likely to be accurate on US sources, but less familiar with others. Non-US sources are often less well schooled, whether on their own or others.

- > As a matter of principle, try to include the person or body that produced the report, name of the report, date, reference number if any, and a pinpoint citation. For pinpointing references, if possible use paragraph numbers, rather than page numbers.

## Hansard & legislative proceedings

Mr Hansard was a government printer in London in the 18th-19th centuries, who published the parliamentary proceedings. These are known as Hansard in most Commonwealth countries – though probably most people don't know why. However, it is not usually the official name, which will be 'Proceedings' or 'Debates'.

The important information is the legislative house (if more than one), the volume number for printed versions, the date, and the page or column number. You should also identify the nature of the discussion (answers to questions, response to speech on opening of Parliament, debate on a reading of a Bill etc.) and the person speaking. There may be conventional abbreviations. E.g. HC Deb 3 February 1977, vol 389, cols 973-76 is (UK) House of Commons Debates, on Feb 3 1977, in volume 389 and columns 973-6) because the UK Hansard is printed 2 columns to a page and the columns are numbered). In a federal/devolved system you need to identify the jurisdiction too. E.g. ACT. Parliamentary Debates, Legislative Assembly 2002. Vol. 14. 15.<sup>30</sup> = Australian Capital Territory, and 15 is the page. So in Kenya it is necessary to identify the County Assembly, or National Assembly or Senate.

<sup>30</sup> This rather jerky, period-punctuated style is apparently from the US Bluebook – see <http://canberra.libguides.com/content.php?pid=238252&sid=2908813>.

A correct cite for Hansard that has not been printed would be, e.g., National Assembly, Proceedings followed by the date (and indicate if it is morning or afternoon if there were both -- usually Wednesdays).

In the US they speak of the 'Congressional Record' and a citation might look like this:

Representative McCollum (MN). "Megan's Law." Congressional Record 142: 89 (May 7, 1996) p. H4451:

Name of member (indicating he is a member of the House of Representatives), his State (Maryland), the topic, the volume and the issue number, the (date) and the page preceded by H for House (or S for Senate).

> Kenya's Parliament now publishes online 'Votes and Proceedings' (for each house) recording just the decisions not the debate. Cite this as such if Hansard is not available (and both if they differ).

## Treaties

A treaty may involve just two states, or any number. Usually if it is between a considerable number of states, it is sponsored by some international body (the UN or the AU mostly for Kenya).

A citation should give the name of the treaty, the parties if they are only a few, the sponsoring body and the date. But which date? A treaty will be signed on a particular date - but a multilateral treaty may be signed by different countries on different dates. It will not usually come into effect unless ratified; and some multilateral treaties will not come into effect until ratified by a certain number of states. And once such a treaty has come into effect other countries may become parties by accession. Give the date of signature, or when it opened for signature, and when it came into force. Only if relevant for the particular country need you also mention the date it acceded, if different.

It is also customary to say where it can be found. There are various publications, official or not, including the *UN Treaty Series*, and *International Legal Materials*. The truth is that these days people are most likely to find treaties on-line. Thus, a citation to a treaty might appear as:

African Charter on Human and Peoples' Rights art. 4(1981). Available at <http://www1.umn.edu/humanrts/instreet/z1afchar.htm>. For websites with treaty texts see Annex 3.

## Other international documents

Other international documents are also best referred to online. There is such a variety that it is of little help giving guidance as to how to cite them. But the usual principles of author or body of origin, title and date apply, and many will have some sort of reference number that it is wise to use. For example Human Rights documents have a reference that indicates which treaty they relate to. For the recently concluded meeting of the Human Rights Council, one paper was A/HRC/26/3, which indicated HRC for the Human Rights Council and 26 for its 26th meeting. (The document was the *Report of the Working Group on the Universal Periodic Review on New Zealand*).

## Journal articles

The principle here is fairly simple: include the name of the author(s), title of the article (date) volume number abbreviation of journal, page. The only issues likely to arise are:

- (i) Whether to put the surname of the author first
- (ii) How many authors to include if there are several
- (iii) Whether to include the part/issue number as well as the volume
- (iv) When not to use abbreviations
- (v) Whether to put the date at the end or before the volume number.

Reasonable guidance is:

- (i) Put the name in the natural order
- (ii) Give more than one author only if there are no more than two, but if there are three or more give the first one and say et al or and others
- (iii) There is no need to give issue numbers unless each issue begins at p. 1
- (iv) Use abbreviations for the best known journals but spell out the name for others (and for litigation purposes it might be good to spell out the title anyway)
- (v) Put the date before the volume number.

And rule (vi) is >Depart from any 'rule' if necessary to be clear (i.e., remember the Golden Rule that common sense, consistency, and clarity are most important).

Occasionally an English journal has no volume number so the year is vital – and should appear in [square brackets].

E.g.: J. B. Ojwang and D. R. Salter, "The Legal Profession in Kenya" (1990) 34 JAL [or J Af L] 9

## Books

The fullest style is: author (name in natural order), *book title* (place of publication: publisher, date).

If the book is edited not single-authored, put (ed) after his/her name.

Chapters: if the book is all by the same hand(s) it is not normal to refer to a chapter, just to a page. But if it is an edited book and you want to refer to a particular chapter or page, you should give:

Chapter author, "chapter title", in editor's name (ed), *book title*, (place of publication: publisher, date) first page of chapter (or even first and last pages) and specific page number.

If you are referring to a specific edition (often the case with law texts) put this as the first item in the brackets.

E.g.: YP Ghai and JPWB McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework from Colonial Times to the Present* (Nairobi: Oxford UP, 1970)

Malcolm Langford, "Housing Rights Litigation: *Grootboom* and Beyond" in M Langford and ors.(eds.), *Socio-Economic Rights in South Africa: Symbols or Substance?* (New York: Cambridge UP, 2014) pp.187-225

## Encyclopaedias

Like *Halsbury's Laws of England*: you do not need to give the author(s), just title (edition and date) volume number, paragraph. If the volume includes different topics, indicate the "topic" as well, after the volume number.

## Citing the Internet

If the internet site is a replica of something that has a printed form, you should give the information as though giving the printed reference, but add "available at" and give the URL – the universal resource locator. If it is not clear what the site is, specify the organisation.

If it is an internet only resource, treat it as much like an article as possible: giving author, title and if it is part of something larger give that too. No need to say "available at" – just go on to give the URL.

- > Do not cut and paste an enormously long URL. Give the reference to a page on the site from which it is possible to click to the precise page you are referring to. Try to make it something that a person could copy out easily, and then say “click on xxx” so they know where to go.

The Oxford Standard Citation for Legal Authorities says that links for online citations should be in angled brackets “<www.URL.org>” and mention the date last accessed.

C Penfold, ‘Nazis, Porn and Politics: Asserting Control over Internet Content’ [2001]  
2 JILT <[http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2001\\_2/penfold](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2001_2/penfold)>  
accessed 27 April 2005

Is it necessary to observe the convention of saying “accessed on [date]”? This is a fairly useless piece of information. But > you ought to check that you are supplying a still-functioning link.

## Crosscutting issues

Pinpointing: if you can cite a paragraph rather than a page this is desirable, especially for cases where paragraphs should remain the same in whatever series of reports, or internet site, you go to. The usual English tradition for pinpointing a specific page is to put the specific page after a comma; in fact you would usually have for a case or journal article at least, the first page of the case/article followed by, xxx [xxx being the specific page]. But there is no harm in saying “at p xxx” – but be consistent.

To punctuate or not? The leading English Guide (Oscola) says not to use full stops after abbreviations: so All ER not All E.R., and LQR not L.Q.R. But we cannot say there is a rule in Kenya. Again, be consistent.

On citing foreign sources: Americans put journal article titles in *italics* and book titles in CAPITAL LETTERS. Don’t import this into an otherwise ‘English style’ document. But you should not change another country’s citing tradition if it is well established: so just because A.I.R. 1992 S.C. 382 is an unusual way for you to see cases referred to (it is All India Reporter 1992 Supreme Court p. 382) don’t feel you can put the date in ( ) or [ ]!

## Repeated mentions

It is usually acceptable to shorten the form of citation if you have given it in full earlier. So just the first name party in a case with the date (but not of course if that first named party is ‘State’ or ‘Republic’) is fine. And a shortened version of the name of a statute or just the short code cite for US legislation (e.g. 28 U.S.C. §§ 1350-51). But, always remember the basic principles: be consistent (so always use the same shortened version), take pity on your reader: if the earlier reference is a long way back maybe you should repeat it in full, and use short forms that are instantly comprehensible.

Similarly, a case after its first citation can be reduced to the first named party, a reporter volume and the pinpoint cite to the specific page. The case *Novak v. Kasaks*, 216 F.3d 300, 301 (2d Cir. 2000) can subsequently be cited as *Novak*, 216 F.3d at 301. Note that both citation formats give a pinpoint cite to page 301, but the short form omits information about the second party (*Kasaks*), the reporter page number the case begins on (300), the court issuing the opinion (“2d Cir.”, which is the United States Second Circuit Court of Appeals), and the year the opinion was issued (2000).<sup>31</sup>

31 For further information on how US citations are formatted, please go to Cornell Law School, Peter W. Martin, Introduction to Basic Legal Citation (online ed. 2013), available at <http://www.law.cornell.edu/citation/>



## Annex 7. Examples of Good Practice in Citing Cases

### East Africa

Case cite	Explanation	Comment
<i>Mathendu v Maseni</i> (1906-8) 2 EALR 406	East African Law Reports 1897-1905	Good to put the Court, too
<i>Siqueira v Noronha</i> [1934] UKPC 12 [1934] AC 332 (PC from Kenya)	Appeal Cases Judicial Committee from EACA	Neutral citation is recent addition, of course
<i>Singh v Notkin</i> (1952) 19 EACA 117	Eastern African Court of Appeal Reports 1934-56 covered EACA and Privy Council	
<i>Daily Nation v Mukundi</i> [1975] EA 311	East Africa Law Reports 1957-75: Court of Appeal for East Africa and the superior courts of Kenya, Uganda, Tanzania, Aden, Seychelles and Somaliland  Revived by Law Africa (that gives EALR as abbreviation)	Best to state court
<i>Mandavia v Mangat</i> [1954] KLR 68	Kenya Law Reports 1922-65 (Supreme Court - High Court)  1976-80	
<i>Nation Newspapers Ltd v Chesire</i> (1984) [1982-88] KAR 17	Kenya Appeal Reports (Butterworths) 2 volumes only (1982-1992) covered Court of Appeal only	Perhaps wise to indicate (CA)
<i>Kajima v East African Newspapers Ltd</i> [1972] KHCD 25	Kenya High Court Digest	
<i>Emperor v Fazal Jan Mohamed</i> (1907) 1 Zan LR 243	Zanzibar Law Reports	
<i>Cornelius v Martinaglia</i> (1934) II TLR (revd) 492	Tanganyika Law Reports	
<i>Salum Mhando v R</i> [1993] TLR 170	Tanzania Law Reports 1980-2006 (recently by Law Africa)	
<i>East African Development Bank v Blueline Enterprises Ltd</i> (Civil Appeal No. 110 of 2009) [2011] TZCA 1 available at <a href="http://www.saflii.org/tz/cases/TZCA/2011/1.html">http://www.saflii.org/tz/cases/TZCA/2011/1.html</a>	Presumably unreported	Because neutral citation may be unfamiliar, have also given Appeal No. Have also added online citation in saflii because many may not be aware some Tanzanian cases are available there

<i>Giles &amp; Geeson v The Ugandan News</i> (1929) (1920-29) 3 Ug Prot LR 236	Uganda Protectorate Law Reports	
<i>De Souza v George Bros Ltd</i> (1956-7) 8 ULR 115	Uganda Law Reports	
<i>Lord Bar v The People Newspapers</i> [1972] ULR142	Uganda Law Reports 1952-74. Law Africa has published 2007, 2008	
<i>Construction Engineers and Builders Ltd v The New Vision</i> [1994] III KALR 37	Kampala Law Reports	

## South Africa

<i>S v Makwanyane</i> [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391	Butterworths Constitutional Law Reports; South African Law Reports	Neutral citation indicates court
<i>Carmichele v Minister of Safety and Security</i> [2000] ZASCA 61; 2001 (1) SA 489 (SCA); [2000] 4 All SA 537	All South African Law Reports	Neutral citation indicates Supreme Court of Appeal

## India

<i>Bachan Singh v State of Punjab</i> AIR 1980 SC 898, (1980) 2 SCC 684, 1983 1 SCR 145	All India Reporter, Supreme Court Cases, Supreme Court Reports	All indicate court
<i>Public Prosecutor v P Ramaswami</i> AIR 1964 Mad 258	All India Reporter Madras (cases in Madras High Court)	The old nomenclature for High Court, still used, does not reflect modern state boundaries and you might want to indicate state if it matters

## Canada

<i>RWDSU v. Dolphin Delivery Ltd.</i> , [1986] 2 SCR 573, 1986 Canlii 5 (SCC); 33 DLR (4th) 174; [1987] 1 WWR 577; 9 BCLR (2d) 273	Supreme Court Reports, Neutral citation, Dominion Law Reports (4th Series), Western Weekly Reporter, British Columbia Law Reports	Note: Canlii did not put neutral citation first.
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## Australia

<i>Stephens and Others v West Australian Newspapers Ltd</i> [1994] HCA 45; 182 CLR 211; [1984] 1 NSWLR 317; 124 ALR 80	Neutral citation, Commonwealth Law Reports, New South Wales Law Reports (State), Australian Law Reports	CLR report only High Court cases; ALR reports various levels from all states and federal jurisdiction
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## USA

<i>Brown v. Board of Ed. of Topeka</i> , 347 U.S. 483 (1954)	US Reports	This reporter covers the Supreme Court only, and so no court is specified in the parentheses at the end.
<i>Kennedy v. Nat'l Juvenile Det. Ass'n</i> , 187 F.3d 690 (7th Cir. 1999), available at <a href="http://scholar.google.com/scholar_case?case=831338763820382502">http://scholar.google.com/scholar_case?case=831338763820382502</a>	Federal Reporter 3rd Edition (for federal appeals cases)	This is a case from the federal "circuit court" or "court of appeals" level. Specifically, this is the 7th Circuit. Note that while the electronic citation is to a public source, most US lawyers cite to Westlaw or Lexis for case law. Also, note that the heavy use of abbreviation in this example follows the strict requirements of the Bluebook rules.
<i>Colston v. Pingree</i> , 498 F. Supp. 327, 330 (N.D. Fla. 1980).	Federal Supplement Reporter (for federal level trial cases).	This case is from the federal "district court", which is the trial level court, specifically, one that sits in the Northern District of Florida (N.D. Fla.).
<i>Brundage v. Hahn</i> , 57 Cal. App. 4th 228, 230 (Cal. Ct. App. 1997).	California Appellate Reports, 4th Edition	A state-specific reporter for California Appeals cases. Because of that limited scope, technically the court specification "Cal. Ct. App." is not necessary at the end, but is included for clarity.
<i>Green v. State</i> , 165 P.3d 118, 120-23 (Cal. 2007).	Pacific Reporter (regional, state level reporter).	This case is from the California State Courts. For non-US readers it would be good to indicate that in the brackets. The pinpoint citation covers four pages, from 120-123.

## UK

<i>Willmet v Harmer</i> (1839) 8 C&P 695, 173 ER 678	Carrington & Payne (private reporter) – English Reports	Always give ER <sup>33</sup> – virtually no-one has access to original reporters.
<i>Child Poverty Action, R (on the application of) v Lord Chancellors Department</i> [1998] EWHC Admin 151 [1999] 1 WLR 347, [1998] 2 All ER 755  URL: <a href="http://www.bailii.org/ew/cases/EWHC/Admin/1998/151.html">http://www.bailii.org/ew/cases/EWHC/Admin/1998/151.html</a>	Weekly Law Reports, All England Law Reports	Neutral citation make it clear the court is the High Court of England and Wales. Cases reported in 1 WLR are not later reported in QB etc.

## Other courts/bodies

<i>Handyside v UK</i> [1976] ECHR 5493/72, (1976) 1 EHRR 737 <a href="http://www.bailii.org/eu/cases/ECHR/1976/5.html">http://www.bailii.org/eu/cases/ECHR/1976/5.html</a>	European Court of Human Rights application No.; European Human Rights Reports (UK publication)	Wise to give means to find it electronically
<i>Johnson v Ghana Communication No. 2177/2012</i> (CCPR/C/110/D/2177/2012) (2014) (available through <a href="http://www.ohchr.org">www.ohchr.org</a> )	UN Human Rights Committee	Date of decision is 2014
<i>Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya</i> (African Commission on Human and People's Rights 276.03) (decided 2009) <a href="http://caselaw.ihrda.org/doc/276.03/view/">http://caselaw.ihrda.org/doc/276.03/view/</a>		Added date of decision
<i>Mbugua Mureithi wa Nyambura v Attorney General of Uganda &amp; Attorney General of Kenya</i> EACJ Ref No.11 of 2011 (decided 2014) available at <a href="http://eacj.org/">http://eacj.org/</a> (case finder)	East African Court of Justice	

32 For which see [http://www.bailii.org/form/search\\_ers.html](http://www.bailii.org/form/search_ers.html)

# Useful websites on citing:

Note: Many of these are prepared for use by academics and students, and you should remember that the appropriate style may be a bit different if you are preparing a submission of list of authorities.

## USA

Cornell Law School, Peter W. Martin, Introduction to Basic Legal Citation (online ed. 2013) <http://www.law.cornell.edu/citation/>

## Canada

Queen's University Law Library <http://library.queensu.ca/law/lederman/legalcitation>

## Australia

Australian Guide to Legal Citation <http://www.law.unimelb.edu.au/files/dmfile/FinalOnlinePDF-2012Reprint.pdf>

## New Zealand

New Zealand Law Style Guide (Law Foundation) <http://www.lawfoundation.org.nz/style-guide/>

## South Africa

[http://www.library.up.ac.za/law/ref\\_sky.htm](http://www.library.up.ac.za/law/ref_sky.htm)

## UK

Oxford University Standard for Citation of Legal Authorities (OSCOLA) <http://www.law.ox.ac.uk/publications/oscola.php>

(This page has links to:

- Quick Reference Guide for key reference types
- OSCOLA 2006: Citing International Law section; OSCOLA (4th edn) does not cover International Law
- OSCOLA styles for EndNote, Latek, Refworks and Zotero [referencing software]
- Frequently asked questions about using OSCOLA style (updated 7 January 2014)
- Complete previous edition of OSCOLA: OSCOLA 2006 (pdf)
- Citing the Law using OSCOLA - an online tutorial by Information Services staff at Cardiff University
- Newcastle Law Faculty OSCOLA tutorial)

# Preparing a List of Authorities

## The Supreme Court Rules say

15. (1) A party shall file and serve a list of authorities at least two working days before the hearing.  
 (2) The list of authorities under sub rule (1) shall contain a summarized analysis of each of the listed authorities specifying the ratio decidendi, relevance and applicability to the matter before the court.

The court rules in other countries may be more detailed about what is required. For example, a distinction might be called for between cases that will simply be cited, and those from which extracts may be read out (or copied in a submission). Or there may be a distinction between cases the party intends to cite and those he or she anticipates will be relied on by other parties. Practice is remarkably varied, both in terms of what information is required and in what form it should be given.

- > In the absence of any further guidance from the Kenyan courts, be as helpful as possible without going overboard, and above all be clear. There has been a tendency for lawyers to prepare a huge bundle of authorities without indicating why they are being included, thus wasting great quantities of paper and time. It is suggested:
  1. You prepare a table of authorities on the lines suggested below.
  2. You supply printed copies only of anything that is really central to your argument, with passages you intend to quote or pinpoint clearly marked.
  3. You supply a CD with electronic copies of other sources.

## Sample (extract) from Table of Authorities

Name and citation of authority	Significance of authority	Intended reliance
<i>Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offender</i> [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (SA Constitutional Court)	Construction of Human Rights especially limitation provision in s. 36 of Constitution of SA	To quote from para. 36 quoting <i>Moise v Greater Germiston Transitional Local Council</i> [2001] ZACC 21; 2001 (4) SA 491 (CC); 2001 (8) BCLR 765 and from para. 106 <i>S v Manamela (Director-General of Justice Intervening)</i> [2000] ZACC 5; 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) para 32
Committee on Economic, Social and Cultural Rights, General Comment 15, "The right to water" U.N. Doc. E/C.12/2002/11 (2002)	Nature of the rights to water under International Covenant on Economic, Local and Cultural Rights	To refer especially to para. 12 on adequacy of water.





The Katiba Institute, located in Nairobi, was established in 2011 to promote knowledge and studies of constitutionalism and to facilitate the implementation of Kenya's new constitution. Its activities include publications on the constitution, workshops on constitutional issues, public interest litigation, development of the legal and judicial system, providing technical support on devolution, land reform, review of legislative bills to implement the Constitution, and promoting the participation of Kenyans in public affairs.

Website: [www.katibainstitute.org](http://www.katibainstitute.org)



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