

# Strategic Litigation as a guardrail to protect and sustain Kenya's transformative 2010 Constitution



By Waikwa Wanyoike

## Overview

In this paper, I try to do three things. First, I attempt to explain what Strategic Litigation (SL) is by comparing and contrasting it with Public Interest Litigation (PIL) and providing its defining elements. Secondly, I discuss the concept of transformative constitutionalism including the constitutional ideological underpinnings of transformative constitutionalism. Finally, I explain how SL and which of its factors are critical in promoting transformative constitutionalism.

## Introduction

Transformative Constitutions emerge from and respond to people's history and their historical frustrations; determine the ideal values and aspirations that should guide a nation to its future; and provide effective tools for the people to use to vindicate those values and aspirations.

In many ways, the Kenyan 2010 Constitution is transformative. The evidence of this is in the process used to make it; the ubiquitous and progressive values it prescribes; its



emphasis on social justice and social transformation; and, the nature of authority given to some of the tools it has provided to the people to help them vindicate those values and its aspirations. The judiciary is one such constitutional tool. Another is the formal recognition by the Constitution of PIL or SL.

## What is it: Public Interest Litigation or Strategic Litigation

Let me start by problematizing the nomenclature. In Kenya, we tend to use the term PIL more than we do SL. For this paper, I have intentionally chosen the use of the term SL over PIL for reasons that – I hope – will soon be apparent. I should note from the outset that often PIL and SL are terms used interchangeably in both scholarly

work and in practice. This happens to some extent, in this paper.

## Public Interest Litigation versus Strategic Litigation

PIL – or legal practice that advances social justice or other causes for the public good<sup>1</sup> is litigation whose impact goes beyond the litigant who has filed the case. Impact and public interest, as a value, become the defining features of the litigation.

However, in a strict sense, SL is value-neutral. Strategic in SL therefore connotes two aspects. First, the aim, objective, or impact intended to be achieved by litigation. Second, the intentional way the litigation is undertaken – that is – tactics of conducting litigation to make it strategically impactful.

<sup>1</sup>Bryan Garner and Henry Black, *Black's Law Dictionary* (11th edition, Thomson Reuters 2019).



Jurisdictional issues are crucial in legal systems as they determine which court or authority has the power to hear and decide a particular case. Clarity on jurisdiction helps ensure fairness, efficiency, and the proper application of laws.

**Impact**

My organization, the Open Society Justice Initiative (OSJI), notes that impact in SL is intended to be broadly synonymous with the terms “effect,” “result,” and “outcome”<sup>2</sup> Understood this way, some of the typologies of impact in SL are material impacts<sup>3</sup> - that is direct quantifiable changes achieved through litigation, such as monetary damages, compensation for harm and specific performance in land claims. These could also include the barring of a person from contesting public office or orders to disclose specific information sought through litigation.

The second type of impact is “instrumental impacts” described as quantifiable yet indirect result of SL.<sup>4</sup>

Examples here are changes in policy, law, jurisprudence, or even some qualitative institutional changes that occur as a result of litigation. Because, unlike material impacts, these changes tend to occur or be palpable years after the litigation is concluded, they are less readily associated with the litigation that catalysed them.

Finally, there are “non-material impacts” – these are SL impacts that are indirect and impossible to quantify.<sup>5</sup> However, these are the impacts that denote the most enduring outcome of SL since they result in a change of behaviour and attitudes of policymakers or public officials; empower communities to be more assertive in the future on issues that affect them, among other

systemic impacts. In a sense, these changes are the real measures of how much the outcomes associated with SL help establish a culture of constitutionalism.

**Tactics**

While in a few instances, SL may be reactive, most often it is proactive, intentionally thought out, with each aspect tactfully planned and executed. These intentional steps or actions in the conduct of litigation are what SL practitioners refer to as tactics.

Tactics are often jurisdictionally contextualized as they tend to engage the practical realities of the jurisdiction of the litigation – such as standing rights, the nature of the law and the options it offers in the conduct of litigation including availability of, scope and the features of judicial review. Some of the tactics used in conceptualization and conduct of SL includes the choice of litigants and forum; the manner of conducting litigation including whether to use experts, conduct site visits; and, whether advocacy and communication should be used to amplify the litigation or issues being pursued through litigation and, even then, how and to what extent.

Instructively, most of the litigation characterised as PIL may not, at least initially, be inspired by public interest considerations or conceptualized and executed with much intentionality or in a manner that maximizes on amplifying public interest. Public interest character of such matters only arises or is apparent following the outcome, or based on the interest generated following the

<sup>2</sup>Open Society Justice Initiative, ‘Strategic Litigation Impacts: Insights from Global Experience’ (OSF 2018) at p. 26

<sup>3</sup>Ibid

<sup>4</sup>Ibid

<sup>5</sup>Ibid

launch, of the litigation.

This then explains why, for this paper, I have chosen the term SL over PIL – to emphasize the point that, if the mission of the litigation is to protect and promote constitutionalism and engender social transformation, then litigation must be conceptualized and conducted with a high sense of intentionality to maximize or achieve the intended impact.

### Public Interest in PIL/SL

If PIL has to be presumptively normative on account of public interest, then what is public interest? Though commonplace in judgments and rulings, Kenyan courts have rarely defined or delineated elements of what constitutes public interest.

One unsatisfactory attempt at this is by the Supreme Court of **Kenya in Kenya Revenue Authority v Export Trading Company Limited** where the court adopted the Black's Law Dictionary of what constitutes public interest – that is, “the general welfare of the public that warrants recognition and protection, something in which the public as a whole has stakes...”<sup>6</sup> That definition characterizes the public as “all members of the community; relating to or concerning people as a whole; or all members of a community; of the state; relating to or involving government and governmental agencies.”

I say it is an unsatisfactory attempt because by adopting a dictionary definition of the term with little



Public Interest Litigation has become a significant legal tool in many jurisdictions to address systemic issues, promote good governance, and protect the rights and interests of the public.

more, the court failed to infuse the necessary Kenyan context in order to provide for the autochthonous character of what public interest means – an approach that is demanded of the court by Section 3 of the Supreme Court Act. That provision instructs the Supreme Court to “develop rich jurisprudence that respects Kenya’s history and traditions and facilitates its social, economic and political growth”.<sup>7</sup>

In my view, the starting point of giving an autochthonous character to the term public interest is requiring, as a threshold issue, that what constitutes public interest must align with the values of the Constitution given the obvious understanding that the

Constitution reflects Kenya’s shared history, values and aspirations. Consequently, any constitutional litigation whose impact is intended to protect, promote or vindicate the Constitution and its values – engages public interests.

### The content of Kenya’s transformative constitutionalism

Transformative constitutionalism has been aptly described as the exercise of “conceptualizing the Constitution as a comprehensive order for a more equal and just society and a tool to prompt the state to that purpose as much as to restrain it”.<sup>8</sup>

The transformative aspects of a Constitution are country specific. Gautam Bhatia in his book *The*

<sup>6</sup>Kenya Revenue Authority v Export Trading Company Limited (Petition 20 of 2020) [2022] KESC 31 (KLR) (Civ) (17 June 2022) at para 65

<sup>7</sup>See, Section 3 of Supreme Court Act, No. 7 of 2011

<sup>8</sup>Hailbronner, Michaela. “Transformative Constitutionalism: Not Only in the Global South.” *The American Journal of Comparative Law* 65, no. 3 (2017): 527–65.





The late Pius Langa, former Chief Justice Emeritus of South Africa

*Transformative Constitution: A Radical Biography in Nine Acts*<sup>9</sup> notes that what India's Constitution set out to transform in the 1950s was political as well as social transformation. Instructively, because of the prevalence of incidents and highly steeped socio-cultural and economic drivers of inequality in India, a significant part of social transformation that India's Constitution focuses on seeks to promote equality.

Similarly, Karl E Klare notes that the purpose of transformative constitutionalism is to radically change a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.<sup>10</sup> In South Africa, all these aspirations are relevant – but perhaps most critical is the effort to engineer “egalitarian social transformation”.<sup>11</sup>

Relevantly, Pius Langa, the former Chief Justice of South Africa posits what – at core - transformative constitutionalism is about:

*For me, this is the core idea of transformative constitutionalism: that we must change. But how must we change? How does the society on the other side of the bridge differ from where we stand today?*<sup>12</sup>

### **Objectives of the Kenya's transformative constitutionalism**

It is hard to pin down a precise provision or statement of the Constitution that stipulates its overall transformative objective. Still, the Constitution's preambular statement on “recognising the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law” provides an instructive starting point.

### **In Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others,**<sup>13</sup>

Kenya's Supreme Court noted that the transformative nature of the Constitution is intended to address both social transformation and political change. Earlier, the court in the **Matter of the Speaker of the Senate & another**, stated that

Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional 'liberal' Constitutions of the earlier decades which essentially sought

<sup>9</sup>Bhatia, Gautam *The Transformative Constitution: A Radical Biography in Nine Acts*, Uttar Pradesh : HarperCollins Publishers India, 2019

<sup>10</sup>Karl E Klare, *Legal Culture and Transformative Constitutionalism*, South African Journal on Human Rights Volume 14, 1998 - Issue 1 at 146

<sup>11</sup>Ibid

<sup>12</sup>Pius Langa, *Transformative Constitutionalism*, 17 Stellenbosch L. Rev. 351 (2006)

<sup>13</sup>Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR

the control and legitimisation of public power, the avowed goal of today's Constitution is to institute social change and reform, through values such as *social justice, equality, devolution, human rights, rule of law, freedom and democracy ...*<sup>14</sup>

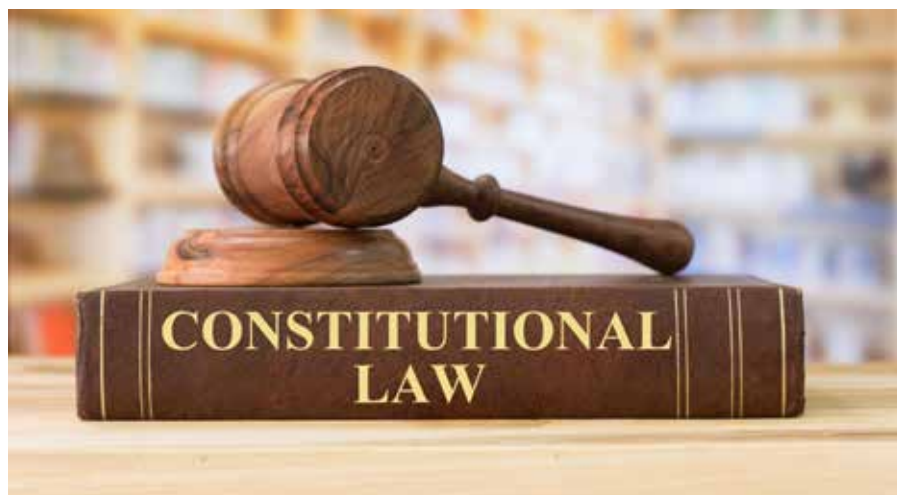
I suggest that an analysis of the Constitution underlines the following objectives for transformation. Fostering constitutionalism, democracy and rule of law; and social transformation.

Kenya's ideology and tools for transformative constitutionalism Kenya's transformative constitutionalism derives its ideological anchor on at least four aspects. First, and I believe the most consequential anchor, is Article 1 which provides that "sovereign power belongs to the people of Kenya" and they may exercise it "either directly or through their democratically elected representatives." This is a radical constitutional statement for a number of reasons.

One, it is the anchor of the constitutional legitimacy of any and all people's activities to vindicate the Constitution, including those taken in parallel of what may be considered formal government policy.

Two, it is the foundational basis of the Constitution's overinsistence on public participation as a *sine qua non* to the legality and legitimacy of any state policy or action.

Three, it provides the underlying legitimacy of the people's efforts



Constitutional law is foundation to the functioning of a legal system and the protection of individual rights. It serves as a framework for governance, ensuring government actions align with principles of justice, democracy, and the rule of law.

to constantly audit government's actions and to require that every policy or action be justified and justifiable under the Constitution. This way, the Constitution's reconfirms and re-enforces its architectural agency design – requiring that those with delegated power undertakes only constitutionally firm and justifiable actions.

Four, it is a clear statement of the intention to liberate our legal philosophy from the jurisprudential hostage-taking English colonial legal system and culture. This is by shifting the state sovereignty from parliament (or at times, the executive) to the people. Additionally, it is a de-emphasis or caution on (over)reliance on English common law - which is mostly built from a scaffolding of monarchical and class-based inspired private law.

The second ideological anchor is its overemphasis on values collectively encapsulated in Article 10. In fact, the ubiquitous values

the Constitution enumerates are the most informative of what an ideal outcome of the constitutional transformational project would look like.

The third anchor is spelt out in Article 19(1). It is the statement that the "Bill of Rights is an integral part of Kenya's democratic state and is *the framework for social, economic and cultural policies.*" This not only underlines the emphasis that constitutions ordinarily give to rights, but adds the requirement that all aspects of state policy be steeped in and guided by rights' consideration.

The fourth anchor is the horizontal application of the Constitution. Horizontal application of the Constitution has gained significant currency in post-cold war liberal constitutions. Still, worthwhile to underline the emphasis of the Principle in Kenya's constitution because a significant part of the effectiveness of the constitution would be lost if its application was

<sup>14</sup>In the Matter of the Speaker of the Senate & another [2013] eKLR at para 51





The judiciary in Kenya plays a crucial role in upholding the rule of law, interpreting the constitution, and ensuring justice for individuals and entities. The judiciary is an independent arm of government, and its functions are outlined in the Kenyan constitution.

limited only to regulating vertical constitutional relationships.

The foregoing provides the objectives and constitutional ideological underpinning for Kenya's transformative constitutionalism. These must inform and act as guide in any SL relating to the constitution.

**SL as an effective tool for safeguarding transformative constitutionalism**

Ultimately, what makes SL such a potent tool for safeguarding and promoting the objectives of Kenya's transformative Constitution? I identify three.

**1. The constitutional legitimization of people's participation and action**

For most jurisdictions, the starting

point on whether one can bring a legal challenge hinge on and is strictly regulated by very technical rules of standing. In Kenya, the foundational basis of bringing litigation to foster constitutionalism is the constitutional legitimation of people's direct exercise of power (Article 1); the obligation to defend the Constitution (Article 3); and the centrality of and insistence on public participation. Still, the constitutional rules of standing – in Article 22 (litigation on rights), 258 (general constitutional litigation) and Article 70 (enforcement of environmental rights) - are highly permissive.

**2. Constitutional character and role of the judiciary**

Kenya's judiciary is a constitutionally powerful and consequential

institution. The Constitution assigns the judiciary the unique role of being its ultimate protector. As the ultimate protector, the judiciary has (at least potentially) the last word on what is constitutionally permissible in all affairs of the state and the public. Moreover, Article 159(2)(e) emphatically assigns the judiciary the explicit role of ensuring that "the purpose and principles of this Constitution shall be protected and promoted". In other words, Article 159(2)(e) obligates the judiciary to play a leading role in helping deliver the promise of transformative constitutionalism.

Though it is at times slow at acting; though at times it seems to second-guess itself – and, even - the Constitution; though at times

it moderates the transformative reach of the Constitution, I still hold the view that Kenya's judiciary is consequential and progressive. This is because of its near unfettered scope and power of judicial review and, comparatively, the unmatched institutional and individual commitment at catalysing change.

### **3. Reach and expansiveness of constitutional power for judicial review**

For the most part, SL is about finding ways to package socio-economic and political problems into justiciable legal issues to give the judiciary the authority to adjudicate on them. In fact, the effectiveness of SL as a tool for the promotion of social transformation is this ability to formally democratize the search for policy solutions by allowing individuals and communities to either formally – through courts - question the government's policy options, or to participate in developing policy and legal solutions on critical issues affecting them. This approach – which scholars, including Prof. Oloka-Onyango have referred to as the judicialization of politics<sup>15</sup> - deviates from the traditional approach to litigation, which insists that litigation must be limited to strictly legal disputes ostensibly to prevent abuse of the justiciability rule.

The Constitution underscores the use of litigation to defend and promote it and minimizes or perhaps entirely eliminates the technical and substantive reach of the justiciability rule. It is instructive, for example, that Article 165, which establishes the judicial review authority of the court, uses expansive and



Prof. Joe Oloka-Onyango

generous language on what is amenable to judicial review including “anything said to be done under the authority of this Constitution or any law is inconsistent with, or in contravention of, this Constitution”.

The power of litigation as a tool for social change is the formality it brings to the issues. Legal processes and success in court can secure material benefits, shift policy, grant legitimacy to long-silenced claims, and narrow the range of available justifications for defenders of oppression. In a country like Kenya where power is overly mystified, SL is a strong and very empowering tool to demystify power – even by individuals or communities considered most marginalized or inconsequential. Litigation facilitates a formal space – and at least some notional equality - where individuals

and communities can negotiate with those in power and allow their views and grievances to shape the solutions to address the relevant socio-political, cultural, or economic issue under contestation.

#### **Challenges facing SL in Kenya**

Despite its seemingly limitless potential, the growth and conduct of SL face myriad challenges in Kenya. I identify two categories of critical challenges - implementation of court decisions; and SL resources.

#### **Implementation of Court Decisions**

SL is grounded on the basic understanding that litigants and impacted groups will recognize and abide by the formal power of the court by complying with and implementing decisions and directives. However, Kenya still suffers from acute democratic and

<sup>15</sup>See, J. Oloka-Onyango, *When Courts Do Politics: Public Interest Law and Litigation in East Africa* Cambridge Scholars Publishing (2017)





Chief Justice Emeritus David Maraga

constitutionalism deficit.<sup>16</sup> This lack of culture that respects the law, especially by formal actors regularly manifests itself through failure or refusal to implement court decisions. In most cases, there is outright defiance or contumacious violation of Court orders. Retired Chief Justice David Maraga reflected on the enormity of this problem:<sup>17</sup>

**[127]** ... It is trite that until they are set aside, court decisions

have to be obeyed by all and sundry; court orders are part of the law of this country and must be obeyed by all.

**[128]** As such, the Government as well as State organs and State officers should be at the forefront in obeying and complying with court decisions. As a country, we cannot and should not allow the Government to demand obedience by its citizenry to the law of the land

which it is itself disregarding with abandon. No State organ or State officer should be allowed to do that as that will be courting anarchy.

I recommend two ways to try and redress the problem of implementation of court decisions. One, more proactive engagement by the courts on implementation of its decision; two, a more collaborative approach in conducting SL, especially on litigation that engages complex socio-economic and cultural issues.

*A pro-active judiciary:* The Constitution allows for courts to craft structural remedies, which may include aspects of the implementation of their decisions. To their credit, courts have made some attempts to issue structural remedies<sup>18</sup> – including monitoring of enforcement of the decision – where they perceive the violations are systemic. Supreme Court has recently given constitutional imprimatur to structural remedies. However, our judicial practice in this regard is incoherent and lacklustre, even at the level of the Supreme Court – the best example being the failure to follow through on the implementation of its decision on legislative reform in the Muruatetu case.<sup>19</sup> Similarly, in spite of initial concerted effort by the High Court in following up on implementation of its structural orders in **Satrose Ayuma v Registered Trustees of the Kenya Railways Staff Retirement**

<sup>16</sup>On what may entail constitutional and democratic deficit, see; Blokker, Paul, The Constitutional Deficit, Constituent Activism and the (Conference on the) Future of Europe (December 18, 2021). Paul Blokker, 2021, ed., Imagining Europe. Transnational contestation and civic populism, series European Political Sociology, Palgrave., Available at SSRN: <https://ssrn.com/abstract=3988878> or <http://dx.doi.org/10.2139/ssrn.3988878>

<sup>17</sup>Council of Governors & 47 others v Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae) [2020] eKLR

<sup>18</sup>See, Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018) [2021] KESC 34 (KLR)

<sup>19</sup>Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR); Francis Karioko Muruatetu & another v Republic [2017] eKLR



**Benefits Scheme & 2 others;**<sup>20</sup>

the court ultimately seems to have succumbed to fatigue.<sup>21</sup> Still, the structural remedies had the salutary effect of legislative reform to introduce specific provisions of the law relating to evictions.<sup>22</sup> Many other structural remedies by Kenyan courts remain unimplemented with little judicial follow-up.

Regardless of whether state organs have the goodwill to implement court decisions, because of the complexity of what constitutes effective remedies in litigation with a significant impact on social transformation, there is a need for courts to develop coherence and a sustainable approach to require and monitor the implementation of their decisions.

*Collaborative approach to litigating and adjudication:* This brings me to the second suggestion – that is, pursuing a more proactive and collaborative approach in SL. Litigation whose impact is intended to result in social transformation is complex since it requires sensitive, sensible and judicious assessment of policy options available to bring about the desired change. Often courts and lawyers do not have the expertise to unilaterally make the judgment call of what are the prudent policy options. Because of the long-term effect the outcome of such litigation will likely have on society, a mechanistic approach to lawyering and adjudication is counter-productive. Certainly, an approach to adjudication on PIL matters that fully relies on the



Collaborative lawyering is based on the premise that parties are better able to control the outcome of their dispute and preserve relationships when they actively engage in a cooperative process.

traditional common law approach of adversarial conduct of litigation is imprudent.

My view is that where a court believes that the outcome or conduct of litigation is likely to result in significant public interest impact, the court ought to take a more proactive posture and demand from the parties a more collaborative approach. This heightens the possibility of amicable, fair and informed resolution of the matter. Elements of a proactive posture may include the court adopting a more inquisitorial adjudication approach and a hands-on case management process, including inviting its experts, engaging in site visits, and even, where possible, demanding evidence-based modelling of policy

or remedial options available in the litigation.

Collaborative lawyering acknowledges the complexity of and potential salutary or detrimental impacts that may result from litigation. It recognises that the constitutional permission to engage in litigation that impacts public interest is an onerous obligation – that calls for a significant sense of prudence. Litigating to win, which is the traditional instinct of a lawyer, is, often the wrong approach to SL. Instead, litigating for impact is a more appropriate and prudent approach. At the core of anticipating litigation impact is the ability to weigh the pros and cons of the outcome and make the necessary but responsible call –

<sup>20</sup>Ayuma & 11 others (Suing on their own Behalf and on Behalf of Muthurwa Residents) v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 others; Kothari (Interested Party) (Petition 65 of 2010) [2013] KEHC 6003 (KLR) (Constitutional and Human Rights) (30 August 2013) (Judgment)

<sup>21</sup>Satrose Ayuma & 11 others v Registered trustees of the Kenya Railways Staff retirement benefits scheme & 3 others [2015] eKLR

<sup>22</sup>See, Section 152A-I of Land Act, No. 6 of 2012



Litigating organizations play a vital role in shaping legal precedent, influencing public policy, and advancing social justice. They contribute to the development of the law and provide legal representation for those who may otherwise lack access to the legal system.

guided by public interest – on the best cause, including oftentimes, not undertaking the litigation at all no matter how intellectually or politically stimulating the issues are. I reckon that taking a collaborative approach is less socialized in most of us lawyers – and perhaps even more so among government actors.

**Litigation resources**

In his appraisal of the development of SL in South Africa, Jason Brickhill identifies three resource challenges SL faces, which, in my view, equally apply to Kenya: suitable litigants and litigating organizations; funding of SL; and shortage of publicly spirited SL lawyers.<sup>23</sup> There are certainly more challenges afflicting SL in Kenya.

*Litigants and litigating organizations:* The growth and conduct of PIL in Kenya have been mostly ad hoc. Except for a handful of individuals, most of the litigants are one-time litigants who have a direct interest in the outcome of the case, though the impact may have public interest dimensions. It is unlikely that such litigants will be concerned with the strategic aspects of litigation hence minimizing the possible impact of the litigation.

The situation is not that different when it comes to litigating organizations. Since the promulgation of the Constitution, very few organizations have been formed with SL as their mainstay mandate. On this, Katiba

Institute, and a handful of other organizations are the exception. For most organizations, including human rights organizations, that often bring or participate in PIL, litigation is a peripheral activity. As such, I believe it is difficult for these organizations to develop the critical, nuanced approach that SL calls for. Additionally, because most of these organizations engage in diverse issues of constitutional litigation, it is nearly impossible for them to develop issue-specific expertise or the knowledge base that at times is needed to sharpen SL issues and impact.

*Funding:* There is no established and predictable funding available in Kenya to support SL. Even

<sup>23</sup>Brickhill, Jason: Strategic litigation in South Africa : understanding and evaluating impact. PhD Thesis (2021). Available at <http://ora.ox.ac.uk/objects/uuid:e7be10e6-c511-40b1-8126-df3b3b229b5b> <https://ethos.bl.uk/OrderDetails.do?uin=uk.bl.ethos.864702> (Accessed December 2, 2023)



Effective lawyers possess a strong foundation of legal knowledge in their practice areas. They continually update their understanding of relevant laws, regulations, and legal precedents.

though the Legal Aid Act<sup>24</sup> identifies PIL as one area that should be legally funded, Legal Aid Board has struggled to meet even basic operational costs let alone find money to fund PIL. Hence most PIL in Kenya is self-funded, with the exception of a few organizations that can mobilize litigation funding from (mostly, western) donors. Often, that funding comes with significant restrictions.

Yet, good and effective SL is expensive. And it should be, because if we accept the foundational premise that SL is litigation for the public good, whose impact is far-reaching including changing policy, laws and ultimately engineering social transformation, then we must accept that SL is a critical, involving, and an expensive affair. Effective SL calls for significant comparative research, top-level expert evidence

and analysis and often elaborate site visits. All these come with significant funding costs.

*Lawyers:* Effective SL lawyers must possess certain attributes. Brickhill highlights two: a good understanding of political context and the ability to listen.<sup>25</sup> Listening and adaptability skills are especially a critical attribute of an SL lawyer because of the level of heightened engagement SL calls for with individual litigants and communities, including in the development of litigation strategy and remedies.

Kenya has a weak base of legal aid or movement lawyering, which often is the incubation space for later - to be effective - SL lawyers. Worse, because of the generalist tendency of Kenya's litigation culture, at times even exceptional lawyers may lack the facilities, knowledge base, and

nuanced approach that specific but complex issues SL engages calls for.

But perhaps the greatest challenge is the personal attributes inherent in effective lawyers. SL requires an ideological commitment to issues. It calls for lawyers who believe in an egalitarian, gracious, and collaborative approach to all the critical relationships i.e. litigants, opposing parties, and the court. It also calls for resilience, since, because of the consequential impact they carry, hardly are SL matters resolved with a single stroke.

### Conclusion

The Constitution provides clarity on what the outcome of implementing transformative constitutionalism should be. It also provides the tools and demarcates pathways for people to use to achieve those outcomes. Certainly, SL coupled with the constitutional authority of the judiciary is one of the consequential tools to do so. To a large extent, we owe the judiciary and SL whatever we have achieved in engendering some elements of constitutionalism. Still, there is a lot more to be done – including recruiting more publicly-spirited lawyers and insisting on continued decisional and institutional independence of the judiciary to fully tap on the latent potential that SL holds to help fully entrench constitutionalism and engineer social transformation. Thank you!

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<sup>24</sup>LEGAL AID ACT (No. 6 of 2016)

<sup>25</sup>Brickhill op cit, footnote 23