IDLO DISCUSSES NEW BOOK ON THE ROLE OF ‘FRIEND OF THE COURT’ IN KENYA

August 25, 2017

IDLO has partnered with a number of organizations in Kenya to publish a new book on non-party participation in litigation – a legal concept known as “friend of the court” or “amicus curiae”. The book was developed to provide guidance to the Kenyan Judiciary to ensure court rulings are fair, consistent and efficient. On the line with us today we have Kimberly Brown, Field Program Manager in IDLO’s Nairobi office, to tell us more.

Q. Why is the “friend of the court” something that people should care about or even know about?

A. Amicus curiae or “friend of the court” is a term applied to a by-stander, who without having an interest in the case, or the cause, of his own knowledge in submission makes a suggestion on a point of law, or fact, for the bench and for the courts’ understanding on the particular case in question. The by-stander can be an individual or an organization, and often those who submit amicus have an interest or expertise in the particular area of the law. So, for example, a civil society organization who has a particular expertise in sexual and gender-based violence might submit on a case of that nature.

The submission of amicus briefs is a widely accepted practice across common and civil law jurisdiction at the national level, as well as within regional and international courts. However, what is often confusing and differs across jurisdiction are the procedural rules and guidelines that apply. It should be noted that amicus briefs play an imperative role in helping courts deepen their understanding of issues in a case. Often of constitutional interpretation or in human rights cases, where fundamental rights are involved.

Amicus allows for a nuanced perspective and for issues to be raised, and often the gravity of the legal issues at hand are so important, that they need to be analyzed on a deeper level by the court.

Q. Friend of the court, or amicus curiae, is embedded in the 2010 Constitution of Kenya. What value does the book add at this point?

A. So, following the adoption of the 2010 Constitution in Kenya, there has been a big increase in strategic public interest litigation cases in Kenya. This increase is attributable to the nature of the Constitution itself in Kenya. It is held as a progressive and transformative document, useful as an instrument of change of sorts. The Constitution provides space for citizens to use the courts as an avenue for protecting rights and seeking justice. Unlike the past constitutional order, there is a great recognition for the space of public rights and protection by individuals, and public participation, overall. And, this is embodied throughout the Constitution in its values and principles and in the provisions there within.

There is also an increased use of courts, as I was mentioning a little bit about, the strategic litigation component to provide policy guidance. There is a need to provide greater policy guidance from the courts, in certain instances expanding the frontiers so that public interest
litigation can be better utilized and better streamlined and controlled.

The goal of the publication in my view, and as IDLO Kenya’s view, is twofold. First, it is to provide the Kenyan Judiciary with a tool that they can use, when determining when to admit *amicus* petitioners and when to seek out *amicus* participation on their own initiative. Following the critical analysis within the last chapter of the book, which is really important for us because we always seek to distil practical tools and practical application in the work that we do, the book seeks to distil the issues at play in Kenya by providing a step-by-step approach for the bench – a tool, if you will – for deciding on the participation of *amicus*. Through this, the book aims to ensure the practical application of the issues that we enumerate upon within the book.

The second objective, I would say, of this book, is to provide a form and structure – a suggested form and structure - of best practices for *amicus* briefs, which can be used by civil society and others interested in *amicus* participation, whether individual practitioners, or academia. The hope is that this will help ensure that a clear, concise, high-quality, user-friendly *amicus* submission is brought to the court and this will help, overall, increase the quality and consistency of jurisprudence in Kenya.

The Constitution in Kenya expressly provides for *amicus* participation and litigation. But, rather than delineating the scope of that participation, it has left the courts to interpret. The interpretive task has been somewhat difficult, especially given the limited role that *amicus* has historically played in Kenya, and the broad, often inconsistent definitions applied in other jurisdictions. It can range the scope, depending on what country we are talking about.

Kenya, unlike other jurisdictions, has even incorporated friend of the court as a concept within its Constitution. And, while the Mutunga Rules - Mutunga was the former Chief Justice of Kenya, and under the Constitution is given the authority to enumerate rules on the issue of *amicus* - while the rules that were developed under former Chief Justice Mutunga provide some guidance for the Supreme Court, and several other Supreme Court cases in jurisprudence have addressed the issue, there still remains some confusion about how to apply the rules in a manner that is both, consistent and faithful to the 2010 Constitutional mandate for public participation in the judicial process.

Reimagining the role of *amicus* causes two problems for Kenya. The first is conceptual, because the friend of the court must always be defined in the context of the jurisdiction that it is used. The courts must determine what the friend of the court really means in Kenya, especially from a judicial participatory context. This requires an analysis of Kenya’s previous treatment of friend of the court – Constitution, case law and court rules in the development of jurisprudence.

Second, but equally important, the Kenyan Judiciary is faced with a practical problem. How do you implement the right to friend of the court participation in a way that respects the important role it plays in the judicial process, but does not infringe upon the rights of the litigants and does not overwhelm the courts with an administrative backlog?

This book aims to illustrate, in line with the principles and values enshrined in the 2010 Constitution, how *amicus* can be a vibrant tool for the bench and legal practitioners, civil society and academia, breathing life into Kenya’s constitutional context and interpretation. Critically, it also looks at a number of issues, from comparative jurisdiction. So, in the book we look at Uganda, which is our neighbour to the west, we have South Africa, we have Ghana, we have India,
Canada and Columbia, which have often been held as comparative jurisdictions when it comes to the constitutional issues and the familiarity, and similarities in the Kenyan Constitution.

The book also illustrates thematic examples in the areas of electoral dispute resolution, environmental law, gender discrimination and women’s rights, as well as other economic, social and cultural rights, which is really critical as we breathe life into the 2010 Constitution. What is also interesting about this book is, we include perspectives from the bench in Kenya. We have a chapter that Justice Odek, the current director of the Judiciary Training Institute, contributed to help go through and delineate some of the issues that are of critical importance for the bench, today.

Q. So, you have mentioned electoral dispute resolution and of course, the book is being launched just a few days after the general elections were held in Kenya. So, why is it that amicus participation is particularly relevant for electoral disputes?

A. So, amicus participation became a hot button issue in the 2013 presidential petition case before the Supreme Court, here in Kenya. This was a very contested issue in the public and in the civil society space, and even amongst judges. This was even an issue that we as IDLO explored in our 2016 publication, ‘Balancing the Scales of Electoral Justice’. We had a chapter submitted by Dr. Collins Odote, which looked at the issue of 2013 petition, and how amicus would played out before the Supreme Court.

The 2013 petition had amicus applications from The Law Society of Kenya, which is the bar here, we also had Katiba Institute, which is a vibrant civil society organization in Kenya that plays a critical role in public interest litigation and expanding the constitutional provisions, and the Attorney General of the Republic of Kenya.

The first two applications were rejected by the Supreme Court. This was the Law Society of Kenya and Katiba Institute, the civil society organization. The Attorney General’s petition and application was accepted. Like several other aspects of this case, which still even today as we move into the 2017 petition era, and there are a number of issues that were hotly debated in Kenya,

Clarifying these issues around amicus participation is especially important as we move into the electoral dispute resolution phase here in Kenya. The Judiciary has a strong incentive to ensure the decisions on electoral dispute be seen as fair and be made after a broad assessment of the disputes in issue.

A better understanding of amicus will ensure more consistent and more efficient determinations of who should be allowed to participate in these cases. After all, in the issue of electoral dispute, perception and public participation play such a critical role as democratic elections and the participatory component are so critical to the overall success of the perception of the Judiciary’s role in adjudicating these disputes.

The book includes also – which is very helpful I think for the Judiciary - a comparative analysis from other jurisdictions on electoral dispute resolution, as I mentioned. This includes a robust chapter on an illustrative component with Uganda and their recent presidential petition as well, and the role of amicus in electoral dispute resolution, providing some tangible guidance for the bench in Kenya on how they should apply amicus.
What is interesting and we are very excited about, while there was a lack of clarity in 2013, the Kenya Supreme Court on August 21st this week, provided for *amicus* submissions in their practice directions for the presidential petition that is currently under consideration, following the filing of a petition last Friday, August 18th.

Q. And, what has IDLO’s contribution been to this process?

A. As IDLO Kenya, we have been committed to enriching the development of constitutional jurisprudence for several years, here in Kenya, through the development of knowledge products with the Judiciary and other actors. This project illustrates IDLO’s unique capacity to convene government and civil society on a somewhat contentious or political issue to promote the sharing of ideas, research and knowledge and thus deepening the constitutional implementation by stakeholders in the sector.

IDLO worked with the Judiciary and civil society to conceptualize a solution-oriented approach and tool on the issue of *amicus* that would help a wide range of actors, whether the Judiciary, academia or civil society. This project was a joint initiative between IDLO, the Kenya Judiciary Training Institute, the National Council on the Administration of Justice, Public International Law & Policy Group, Equality Now, the Solidarity for African Women’s Rights Coalition, Kenyans for Peace with Truth and Justice, the Kenyan section of the ICJ, and Katiba Institute, a wide range as you can see of different partners.

The co-editors of the publication, which are very interesting: we had Christopher Kerkering – a tremendous public interest lawyer with global experience - and Dr. Christopher Mbazira, Head of the Public Interest Law Clinic at Makerere University in Kampala, Uganda and a well-known expert on the topic of *amicus* in the region.

As part of this project we also facilitated sessions on *amicus* with judges as part of the electoral dispute resolution training and sensitizations.

We hope that this resource will serve an important role in illustrating why *amicus* is a constitutional issue of significance in Kenya and beyond.


Learn more about IDLO’s work in Kenya: [http://www.idlo.int/where-we-work/sub-saharan-africa/kenya](http://www.idlo.int/where-we-work/sub-saharan-africa/kenya)