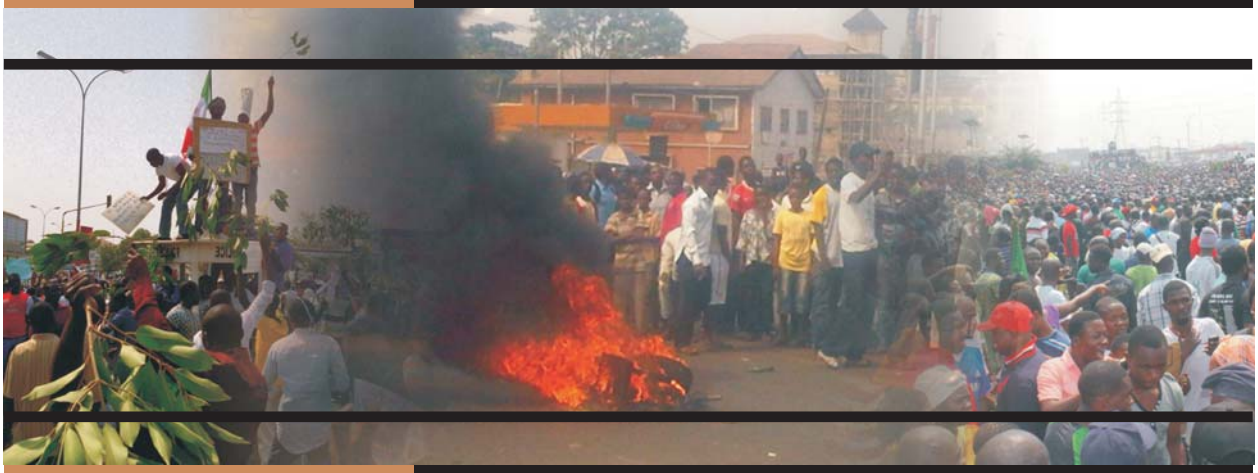

LITIGATING *for* JUSTICE

A Primer on Public Interest Litigation (PIL)

Edited By
Joseph Otteh

Produced by
Access to Justice

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9E Badagry Road, Off Marine Road,
P. O. Box 1868, Apapa, Lagos, Nigeria.
Phones: 015871279; 018980330
E-mail: info@accesstojustice-ng.org
Website: http://www.accesstojusitce-ng.org

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Introduction

Public interest litigation (PIL), known also by a variety of other epithets – public law litigation, social action litigation, cause lawyering, strategic impact litigation – is gaining increasing attention and fascination across much of the world for the possibilities it is opening up to "democratize" social justice in both constitutional democracies and transitioning societies. Still in that dynamic process of defining itself and being defined as well by those who study it, public interest litigation is extending its appeal and space in authoritative ways; it is as well signaling that its influence will likely grow larger as societies – particularly developing societies – feel their way increasingly towards a more social justice direction; as they explore ways to redistribute wealth, opportunities and their resources more fairly and evenly to meet the needs of the neediest and most desperate; as they make effort to reduce social exclusion and inequality; and as they press upon their Constitutions to deliver meaningful and redeemable promises to their citizens, particularly the poor and powerless. This makes PIL an interesting subject of some study - particularly by those – like us - keen to leverage the power of this "social technology" - as one writer puts it - to transform the situations of particular people who suffer peculiar disadvantages.

As we see from countries featured in our study, public interest litigation is helping to give voice to persons whose circumstances deprive them of effective voice in government, visibility to those whose lives have been lived on the fringes and whose concerns have been trodden under by mainstream society, and, more generally, helping to improve governance and the rule of law. It has been used to attack and disestablish obstacles and denials that disenfranchise or discriminate against people, to reclaim the promises of

constitutional guarantees and to win back human dignity where they have been denied. It has helped to reaffirm that constitutional rights are meaningful and appropriable by the people to whom they belong.

This study looked at how public interest litigation, in its various adaptations, has evolved in different societies; the factors that have shaped its growth and defined its form and those that have stood in its way. The research also looked at its potentials and its future, to understand what prospects it has going forward. Our goal in doing this is to inform ourselves and others interested in the subject of how public interest advocacy has grown from its humble beginnings, what it has accomplished, the extent to which it has succeeded in altering or impacting the status quo, and the role it will likely play, going forward, in ameliorating social inequalities and injustices by securing the benefits of constitutional rights to persons and communities who cannot effectively claim for themselves, those benefits and freedoms guaranteed them by their Constitutions.

The justification for embarking on this inquiry is virtually self-evident. Take Nigeria for example where severe inequalities stand out in stark, oftentimes brutal uniqueness. To be poor means you have, literarily, less protection from the state because you are exposed to "the elements of poor governance". You are more likely to be a victim of police violence, torture or extrajudicial killings, more likely to be charged for an offence you may not have committed, and more likely to be detained for longer periods than is constitutionally permissible. You are more likely to be stopped and stripped searched by law enforcement agents, more likely to have your business grounded or business premises demolished, or, if you are a transporter, your motorbike impounded; more likely to catered for by poorly equipped and staffed public hospitals, more likely to be denied the franchise, and more likely to live in environmentally degraded neighbourhoods, as well as attend poorly run and funded public schools. Inequalities like this can produce huge differences in the quality of life, in economic opportunity, and in the enjoyment of civil rights and freedoms. These are invariably the kinds of inequalities that most public interest litigations aim to mitigate.

It is hoped that this study will help to educate, inspire and mobilize more civic action towards reducing social inequalities in the various forms they manifest themselves through law, challenge Judges to rethink the role of the judiciary (particularly in developing societies) and the ends which constitutional adjudication should serve. A former Indian Chief Justice once said that the Indian Supreme Court, in effect, re-modeled its jurisprudence towards "...finding 'turn around' situations in the political economy for the disadvantaged and vulnerable groups". Should judiciaries of developing nations – or any nation for that matter – interpret their Constitutions within that philosophical or ideological framework? Or should they not? One conclusion reached by this study is that the role which public interest litigation will play in a country, the difference it can make in the way it alleviates critical human needs, and the authority with which it can legitimize the innovative use of judicial power will all depend, in some way, on how Judiciaries answer this question.

PART ONE

Public Interest Litigation: Basis, Historic Role and Purpose

Chapter One

Meaning and History of Public Interest Litigation

It was Professor Abram Chayes of the Harvard Law School who in 1976 coined the phrase "public law litigation" to represent the practice of US lawyers seeking to precipitate social change through court-ordered decrees that reform legal rules, enforce existing laws, and articulate public norms.[1] As this new civil litigation concerned public policy issues that arose from the implementation and enforcement of public laws, he called it "public law litigation."[2] Public interest litigation is a court-centred action or intervention that is also known by such other epithets as "cause lawyering", "interest group litigation", "public law litigation", "social action litigation", "strategic" or "impact litigation", etc.

But what exactly is 'public law litigation', or 'public interest lawyering', or, as we have chosen to call it, 'public interest litigation' ('PIL')? As Cummins and Rhode note;

> The concept of the "public interest" is contested at the level of both theory and practice. Commentators differ over whether there are widely shared criteria for assessing the public's interest as well as whether any particular case meets the definition."[3]

In their essay "Social Action Litigation and Access to Justice in Nigeria",

Professors Agbakwa and Okafor remark that:

> "[d]efining PIL presents difficult challenges of precision. Most writers on the subject offer no clear working definition of the concept. As scholars like Jill Cottrell, Daniel Jacobs, and Peter Nussbaum readily acknowledge, a precise, hard, and fast definition of PIL is largely elusive, due in part, to the rapidly changing nature of society. As a result, there is a preference for a broad and flexible definition, one that is of necessity at once under and over inclusive."[4]

This difficulty is not with PIL alone; even related concepts, like "cause lawyering" encounter these dilemmas. Austin Sarat and Stuart Scheingold who have written extensively on this concept have said that "[w]hile cause lawyering is significant in the way it serves and challenges legal professionalism, providing a single, cross-culturally valid definition of the concept is impossible." According to them, "[i]t is, in other words, important to think of cause lawyering as a protean and heterogeneous enterprise that continues to reinvent itself in confrontations with a vast range of challenges."[5] As Lesley K. McAllister said, although "their definitional contours vary, each of these terms expresses the idea that civil lawsuits are being used in a new way to benefit the condition of groups within society or society as a whole."[6]

In spite of these difficulties, there have been worthy efforts to construct definitions or descriptions. To Schwarte, the term "public interest litigation" refers to the use of litigation for the public good.[7] Peter Nussbaum defines PIL as involving litigation "brought by private plaintiffs in the hope of achieving broader results by litigating issues of extreme current importance which when resolved will affect substantial numbers of people.[8] The South African Law Reform Commission's definition is also noteworthy; it views a public interest action as one "... brought by a plaintiff who, in claiming the relief he or she seeks, is moved by a desire to benefit the public at large or a segment of the public. The intention of the plaintiff is to vindicate or protect the public

interest, not his or her own interest, although he or she may incidentally achieve that end as well."[9] As another writer said, PILs are filed in pursuit of the public interest. Such suits may be filed by a public-spirited individual or group of individuals or by a civil society organization whose mission covers the issue in relation to which the action is filed.[10]

No matter the definition adopted by the reader, four characteristics of PILs are worthy of note; first, PIL is useful in protecting the rights or interests of the public or of segments of the public, who often make up a class affected by something the government has done or left undone, and is in a position to change; second, such actions are brought by either a member of the affected class, or a public-spirited person or organization interested in remedying the problem, and the action is usually a public action, brought against the state or its agencies; third, remedies sought are usually public law remedies, not private; fourth, a decision on such a litigation will affect the situation of the class broadly, and not only those in whose names the litigation is brought.

History of Public Interest Litigation

Some scholars trace the history of public interest litigation to the early African-American struggle for equality, that is, the civil rights movement. Hershkoff provides this historical narrative:

> Commentators frequently date the emergence of public law litigation in the U.S. to the celebrated campaign that resulted in the decision in *Brown v. Board of Education,* in which the U.S. Supreme Court declared unconstitutional a state's segregation of public school students by race. Brown included many procedural features since associated with public law litigation: the defendant was a public institution; the claimants comprised a self-constituted group with membership that changed over time; relief was prospective, seeking to reform future action by government agents; and the judge played a leadership role, complemented by the

> parties' efforts at negotiation. The literature distinguishes this form of litigation from the classical model of adjudication, which is conceptualized as a private, bipolar dispute marked by individual participation and the imposition of retrospective relief involving a tight fit between right and remedy.[11]

But not all PILs developed from this antecedence and in countries such as South Africa, PILs had a nearly contemporary origin with the Brown decision, although the form it was used was different from that of the United States where Brown was decided. Stephen Golub helps us understand that "though South African public interest law achieved a kind of critical mass in the 1989's, its roots reach back at least to the 1950s".[12]

Geoff Budlender, a South African PIL activist writes also that"...anti-apartheid public interest litigation had been conducted by private practitioners who usually received some limited funding on a case-by-case basis for this purpose."[13] According to him, "[a] turning point came towards the end of the 1970s, when a number of public interest law organizations were formed. While their methods varied, there were a number of elements which they had in common; they aimed to work on or through the law as a means of promoting social justice...."

Anyway, inspired by the Brown case which perhaps set the precedent for representative or class PIL, public interest litigation has since grown in use, triggering worldwide interest as a litigatory tool for fighting social injustices against discrete minorities or against people who suffer unjust treatment or oppression from any cause; the causes that employed it have varied, and include efforts to fight environmental degradation, prison decongestion and sexual discrimination; litigation to defend prisoners' and reproductive rights, to stop forced evictions and expand access to housing, healthcare and drugs, etc. The Brown case inspired lawyers in different nations who were attracted and persuaded by the power of this example to believe that law could be utilized as a tool for transforming the situation of marginalized groups. It has

been said that:

> While Chayes and other scholars described this new type of litigation in the United States, foreign scholars analyzed the need for group litigation in their legal systems. In particular, Mauro Cappelletti, an Italian comparativist, researched and wrote extensively about how European countries with civil law systems might enable the legal defense of group interests, which he viewed as an essential aspect of "access to justice" in a modem society.[14]

"Activists" Prof. Siri Gloppen wrote, "...see it [PIL] as a channel through which the voices of the poor can be articulated into the legal-political system and as a mechanism to make the state more responsive and accountable to their rights."[15]

The idea represented by public law or interest litigation has spread across national boundaries responding to a variety of needs in many parts of the world.

Varieties and Adaptations of Public Interest Litigation

Although the PIL language has developed to embrace a number of strategic litigatory approaches inviting courts to make orders or declarations producing some social, legal or policy changes, yet, within the rubric of what we know as PIL, there is both mixture and diverseness of method in the effort to achieve this goal. There is mixture because elements of both traditional and neo-traditional forms of PIL are found in the types of public interest litigations in use in a growing number of countries. There is diverseness because newer, probably more creative variants of PIL that reach beyond the traditional form, are taking root and finding acceptance and authenticity as well in newer places. In India, for example, while scholars and jurists have pointed to important achievements of PIL in that jurisdiction, they have also been careful to show that PIL has evolved in radically new ways there, leading to it being

described now as Social Action Litigation (SAL) instead.

Justifying this evolution, Justice P.N. Bhagwati, former Chief Justice of India noted:

> Largely due to the efforts of the highest court in India, social action litigation has been effectively conceptualized and it is now on the way to being institutionalized. It has come to be recognized as an effective weapon in the armoury of the law for securing implementation on the constitutional and legal rights of the under-privileged segments of society and ensuring social justice to them. Though this strategy, evolved by the Supreme Court has come to be known as public interest litigation in western societies, Professor Upendra Baxi, an eminent jurist, prefers to call it 'social action litigation'. The reason for this is that the expression “public interest litigation” has acquired a certain meaning in the United States of America and it is connected with a particular kind of development which is peculiarly American in its nature. The kind of public interest litigation model which we in India have evolved is different from the public interest litigation in vogue in the United States. Our model is directed towards finding 'turn around' situations in the political economy for the disadvantaged and vulnerable groups. It also concerns itself with other more diffused and less identified groups. Its focus is the immediate as well as long-term resolution of the problems of the disadvantaged in our quest for distributive justice. Moreover, in our model, the disadvantaged are not regarded just as beneficiaries in a one-to-one relationship with the designated lawyer. They are very much a part of, again to borrow a phrase from Professor Upendra Baxi, 'taking suffering seriously'. That is why, agreeing with Professor Upendra Baxi, I would prefer to call this enterprise in which we are engaged social action

> litigation rather than public interest litigation. The substance of social action litigation is much wider than that of the public interest litigation of the United States."[16]

Prof. Upendra Baxi, the jurist cited by Justice Bhagwati himself accounts for his choice of the term "Social Action Litigation" in this way:

> "... I use the term 'social action litigation' (SAL) in preference to the more popular term 'public interest litigation' (PIL). The label PIL has slipped into Indian juridical diction as effortlessly as all Anglo-American conceptual borrowings readily do, but while labels can be borrowed, history cannot. The PIL represents for America a distinctive phase of socio-legal development for which there is no counterpart in India; and the salient characteristics of its birth, growth and, possibly, decay are also distinctive to American history.
>
> The PIL efflorescence in the United States owed much to substantial resource investment from government and private foundations; the PIL work was espoused by specialized public interest law firms. The issues within the sway of PIL in the United States concerned not so much state repression or government lawlessness but rather civic participation in governmental decision making. Nor did the PIL groups there focus pre-eminently on the rural poor. Typically, PIL sought to represent 'interests without groups' such as consumerism or environment. Given the nature of state and federal politics, PIL marched with public advocacy outside courts through well established mechanisms like lobbying. In brief, the PIL movement in the United States involved innovative uses of the law, lawyers and courts to secure greater fidelity to the parlous notions of legal liberalism and interest group pluralism in an advanced industrial capitalistic society."[17]

Referring to this diversity, Hershkoff remarked that:

> "[a]lthough Professor Chayes limited his discussion to the United States, variegated forms of "cause lawyering" or "social activist" litigation also exist in the courts of many other countries, presenting localized strategies that draw on separate traditions and function within specific contexts. In the courts of India and South Africa, of Israel and Nigeria, in international tribunals and before regional commissions, law and litigation are important mechanisms for enforcing human rights, extending public participation, improving economic conditions, encouraging grassroots empowerment, reforming laws and legal systems, and fostering government accountability -- aspects of what some commentators loosely refer to as "rule of law" values.[18]

PILs come in other ramifications as well. Agbakwa and Okafor posit, for example, that a discrete form of PIL popular in Nigeria is "strategic impact litigation" (SIL) which they describe as "lawsuits chosen because of their potential to broadly transform the legal landscape. It involves the use of particular 'test cases' (that are mostly filed on behalf of handpicked 'clients') to broaden the general access of members of the society to the enjoyment of their human rights. This strategy has been widely used by progressive social forces around the world."[19] It is usual, as these authors note, that a combination of approaches will be found in any one country where PIL is common. They cite Nigeria where "... although the term 'SAL' is basically absent from the vocabulary of human rights litigation... evidence of the use of litigation as a tool for socio-political (and less frequently economic) public agenda setting, or to force politically unresponsive entities to respect human rights, is far more ample."[20]

Indigenous conditions also shape the form and variety of PIL in different countries. Helen Hershkoff elaborates on this in this way: "The context of

public law litigation varies from place to place. In some countries, such as Russia, lawyers and activists do not use the term 'public interest litigation'" but their law-based activities -- such as university based law clinics; assistance to prisoners and the poor; and environmental work -- are connected to the concept." "Similarly, Professor Clark Cunningham describes public interest litigation in India as "a phoenix: a whole new creature arising out of the ashes of an older order." As Prof. Frank Upham emphasizes, public law litigation in Japan "evolved in directions largely different from ... our Western models."[21]

Indigenous conditions reflect the peculiar social, economic and political realties among States, and these factors have had a profound, far-reaching influence on the development, outlook and legacy of PIL in given societies. For example, PIL in Third World countries is, in different but widening forms, taking account of economic and social conditions of widespread illiteracy, powerlessness and poverty. Unlike what we know as PIL in Western societies, the Indian Supreme Court has said, for example, that PIL litigation is not in the nature of an adversarial litigation.[22] Hershkoff completes this narrative:

> Social, economic, and political conditions create different pressures and opportunities for public interest litigation, which is further affected by the nature of the existing legal regime, the independence and prestige of the judicial system, and forms of professional organization. Governments also differ considerably in their support of nongovernmental groups pursuing public interest litigation. In some countries and on some issues, courts will be able to help forge a social consensus in favor of reform; elsewhere, courts will be disabled from precipitating change unless the public already displays some measure of receptivity to reform. Even where formal structures for judicial review are in place, courts in transitional or developing countries may lack the confidence, credibility, or capacity to secure enforcement or respect of their decisions.[23]

Is there a "Number of Beneficiaries" Test to Public Interest Litigation?

How many members of the public must benefit from an action before it can be regarded as being in the public interest? There are different views on this as well; there are some who think that an action has to benefit every single member of society in order to be truly in the public interest, but there are others who think that any action can be in the public interest as long as it benefits some of the population and harms none.[24]

Budlender addresses the dilemma in this way:

> "Many litigants assert that they are acting in the public interest. There are two ways of defining "public interest" litigation.
>
> One is by reference to the merits of the dispute. This can lead to considerable and ultimately unhelpful dispute over what is and is not in the interests of the public. As the merits are after all the very issue in dispute, the means of defining 'public interest' litigation is ultimately circular and unhelpful.
>
> A second way is by defining 'public interest' litigation' as litigation on behalf of interests which are unrepresented or under-represented in the political and legal process. In this definition, 'public interest' is not defined by the merits of a particular viewpoint in any dispute. The public interest really lies in providing a voice and access to those who are inadequately represented in social processes, and to those who are marginalized and vulnerable."[25]

In Australia, the Public Interest Law Clearing House[26] adopts a three-way test to determine whether issues are of public interest thus: it must affect a

significant number of people and not just an individual or it must raise matters of public concerns; it must impact disadvantaged or marginalized groups, and it must be a legal matter which requires addressing pro bono publico for the common good.[27]

Notes to Chapter One

1. Helen Hershkoff, "Public Interest Litigation: Selected Issues and Examples". This "Note" was accessed on the internet at http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/PublicInterestLitigation[1].pdf through the month of April 2012. *Blacks Law Dictionary* defines public interest as: "Something in which the public, the community at large has some pecuniary interest, or some interest by which their legal rights or liability are affected. It does not mean anything so narrow as mere curiosity, or as the interest of the particular localities, which may be affected by the matters in question. Interest shared by citizens generally in affairs of local, state or national government."

2. Lesley K. McAllister, "Revisiting a "Promising Institution": Public Law Litigation in the Civil Law World" in 696 *Georgia State University Law Review* [Vol. 24:693]

3. Cummings Scott and Rhode Deborah, "Public Interest Litigation: Insights from Theory and Practice" *Fordham Urban Law Journal*, Vol. XXXVI (2009), UCLA Public Law Series, UCLA School of Law, UC Los Angeles. *Black's Law Dictionary* defines public interest as: "Something in which the public, the community at large has some pecuniary interest, or some interest by which their legal rights or liability are affected. It does not mean anything so narrow as mere curiosity, or as the interest of the particular localities, which may be affected by the matters in question. Interest shared by citizens generally in affairs of local, state or national government."

4. Agbakwa and Okafor, "Social Action Litigation and Access to Justice in Nigeria", in *Justice for the Poor: Perspectives on Accelerating Access*, (eds.) Dias and Welch (2009), UNDP, Oxford University Press, p. 209

5. *Cause Lawyering: Political Commitments and Professional*

Responsibilities, (eds) Sarat and Scheingold, (New York: Oxford University Press: 1998)

6. Revisiting a "Promising Institution": Public Law Litigation in the Civil Law World" in 696 *Georgia State University Law Review* [Vol. 24:693]

7. Christopher Schwarte, "Public Interest Litigation". This article was accessed online at http://www.environmental-mainstreaming.org/documents/EM%20Profile%20No%203%20-%20Public%20Interest%20Litigation%20(6%20Oct%2009).pdf, (last visited 22/05/2012).

8. P. Nussbaum, "Attorney's Fees in Public Interest Litigation" 48 *New York University Law Review* (1973) 301 at 304, cited in Agbakwa and Okafor, *(supra)*.

9. South African Law Commission: Project 88, "The Recognition of Class Actions and Public Interest Actions in South African Law". (http://www.justice.gov.za/salrc/reports/r_prj88_classact_1998aug.pdf. Accessed 19/04 2012). Another view describes PIL as proceedings which may be regarded as having a public element and which evolve remedies traditionally associated with matters of public concern. These proceedings focus generally on the enforcement of rules of constitutional and statutory law and supervision of governments and administrative tribunals, agencies and offices - Justice R.K.Abichandani, Managing Public Interest Litigation

10. Odhiambo, Michael Ochieng "Legal and Institutional Constraints to Public Interest Litigation as a Mechanism for the Enforcement of Environmental Rights and Duties in Kenya" accessed online at http://www.inece.org/5thvol2/odhiambo.pdf on 22/05/2012.

11. *Op. cit*, p. 3. Footnotes omitted.

12. Stephen Golub, "Battling Apartheid, Building a New South Africa" in *Many Roads to Justice: The Law Related Work of Ford Grantees Around the World*, (eds.) McClymontm, Golub, (2000), The Ford Foundation, p. 22.

13. Geoff Budlender, "The Public Interest Movement in South Africa" in *Justice for the Poor: Perspectives on Accelerating Access*, (eds.) Dias and Welch (2009), UNDP, Oxford University Press, p. 187

14. Lesley K. McAllister, "Revisiting a "Promising Institution": Public Law Litigation in the Civil Law World" in 696 *Georgia State University Law*

Review [Vol. 24:693]

15. Siri Gloppen, "Public Interest Litigation, Social Rights and Social Policy" in Anis Dani and Arjan de Haan (eds.) *Inclusive States. Social Policy and Structural Inequalities*. Washington DC: World Bank (2008) 343-368

16. P.N. Bhagwati, "Social Action Litigation: The Indian Experience" in *The Role of the Judiciary in Plural Societies*, (eds.) by Tiruchelvam and Coomaraswamy, (1987) St Martin's Press, New York, p. 22

17. U. Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India", in *The Role of the Judiciary in Plural Societies*, (eds.) by Tiruchelvam and Coomaraswamy, (1987) St Martin's Press, New York, p. 33.

18. *Ibid*, p. 33

19. *Op cit*., page 210. (Footnotes omitted).

20. *Op.cit*. at p. 220.

21. Taken from Helen Hershkoff, "Public Interest Litigation: Selected Issues and Examples", op.cit.

22. According to *Bhagwatti J. in Bandhua Mukti Morcha v. Union of India Air* (AIR 1984 SC 802), public interest litigation is not in the nature of adversary litigation but it is a challenge and an opportunity to let the Government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community.

23. *Op cit*

24. Srinivas Madhav, *The Right to Information and Public Interest: A Primer*. *Words and Phrases Legally Defined* weighs in thus: "It is fallacious to say that a condition is not in the public interest, or may not be in the public interest, if it is the case that a great many of those who constitute the public are not directly affected by it, and it is equally fallacious to say that a condition cannot be in the public interest if a great many members of the public neither know or care about it.

25. Op cit, at page 204

26. The Public Interest Law Clearinghouse was set up jointly by community legal centers, private law firms, and barristers to receive requests for pro bono legal assistance and to determine which come from needy clients

27. James A. Goldston and Mirna Adjami, “The Opportunities and Challenges of Using Public Interest Litigation to Secure Access to Justice for Roma Minorities in Central and Eastern Europe” Prepared for World Justice Forum, Vienna, July 2-5, 2008 p. 8

Chapter Two

Why Use Public Interest Litigation?

Very simply put, PILs aim to remedy injustices or wrongs suffered by particular groups of people through the judicial process: PILs leverage the power of judicial review which courts possess and invoke those powers to determine complaints by particular persons who act for themselves or for others in order to remedy infringements of the rights which the affected groups suffer.

Often, PILs turn courts into arenas where otherwise disadvantaged people engage and challenge the government and question policies which adversely affect them; by doing this, they expose the flaws, biases, unreasonableness, illegalities, bad faith, or unconstitutionality of such policies or actions (or inactions). PILs often provide minorities who suffer some disadvantages access to justice and create opportunities to protect collective rights. They aid civic participation in governance and enhance transparency and accountability in governance. In *S.P. Gupta v. Union of India*,[28] Bhagwati C.J. (as he then was) put it this way:

> Where a legal wrong or a legal injury is caused to a person or a determinate class of persons, ... and such a person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for

> relief, any member of the public can maintain an application for appropriate direction.

According to another author, Soli Sorabjee,

> "[t]he main objective of PIL is to secure easy and effective access to justice for disadvantaged classes and groups, for the meaningful realization of their guaranteed fundamental rights."[29]

Prof. Siri Gloppen provides an interesting formulation. According to her;

> The aim of public interest litigation is to transform the situation not only for the litigants but also for all those similarly situated: that is, to alter structured inequalities and power relations in society in ways that reduce the weight of morally irrelevant circumstances, such as socioeconomic status, gender, race, religion, or sexual orientation. Thus, the success of litigation should be judged not only in terms of how a case fares in court but also on whether the terms of the judgment are complied with. Even more important is the systemic impact—the broader effects on social policy, public discourses on social rights, and the development of jurisprudence.[30]

"From Nigeria to India, public interest lawyers have used litigation for various purposes: they have documented injustice and exposed the inequalities of repressive regimes; they have repeatedly gone to court to help implement constitutional principles and laws, as well as to further legal reform through creative forms of lawyering; and they have struggled to integrate favorable international norms into their domestic legal systems and pursued vindication of rights in international tribunals."

- Helen Hershkoff & Aubrey McCutcheon

Tawanda Zhuwarara has elaborated ten purposes which PILs serve; because these fairly cover the field of goals served by PILs in many jurisdictions, they are reproduced in some length. He says;

> "PIL is a creative and powerful means for precipitating social change. It can be used in a wide variety of ways and some of them are enumerated below:
>
> Rule of Law
> The rule of law in its basic form is the principle that the law is supreme and should be respected by all. PIL has been used extensively to enforce constitutional and legislative provisions with the aim of translating legal rights and entitlements into practical reality. It is within this process of enforcing the law that PIL plays the important role of protecting and promoting the rule of law.
>
> Clarifying laws
> In certain instances PIL is instrumental in the clarification of existing laws. Fresh legislation is often [not made]..... and PIL offers the Courts an opportunity to make various pronouncements that explain or spell out the law and its resultant effects. This clarification can help strengthen the legal system by providing better understanding of the legal rules themselves.
>
> Challenging laws
> The most common use of PIL has been in the challenging of laws and or policies that violate ... fundamental rights. Using PIL one can also prevent the enforcement of bad law, strike them from the statute books and force governments or other defendants to change policies and practices.

Building laws

PIL can reveal gaps in existing laws and offers the judiciary an opportunity to fill in those gaps and correct inconstancies. It can both lay the groundwork for future cases and speed up the development of new practices and policies to address violations of rights or other protections on the ground.

Fostering Government Accountability

Government action and policy is by nature subject to legal challenge if it is outside the realm of legality. PIL is particularly suited to encouraging the Government to ensure that its actions and policies are in conformity with the law. This view was expressed in the case of *Dr. D.C. Wadhawa v. State of Bihar* where the court stated

> "Public interest litigation serves as an important instrument for publicizing human rights abuses and for helping to provide protection to marginalized groups. Even if a lawsuit fails to change an unjust law, the act of going to court can influence or even change attitudes about the law and contribute to a climate for reform. Unorthodox arguments can serve to suggest innovative uses of the law; complaints can present a cumulative record that documents mistreatment."
>
> - Helen Hershkoff & Aubrey McCutcheon

> "that exercise of the power by the State, whether it be the legislature or the executive or any other authority, should be within the constitutional limitations and if any practice is adopted by anyone of them which is in flagrant and systematic violation of its constitutional limitations, the petitioner as a member of public would have sufficient interest to challenge such practice by filing a writ petition and it would be

> constitutional duty of the court to entertain the writ petition and adjudicate upon the validity of such practice".

Creating Pressure

PIL (especially before international bodies) even if unsuccessful, promotes government accountability. In many cases, the mere fact that a matter is brought before the courts initiates positive change. The extent to which a government will feel pressured by the filing of a suit largely will depend on the attitude of the government and its respect for the rule of law. In some instances the pressure created by the suit can result in change even when the matter its self is unsuccessful in court.

Advocacy

PIL is an excellent advocacy tool and may be instrumental in advancing causes or goals. One case can have a dramatic impact as it affords litigants an opportunity to send a message out to the media, the public and government. One such example where PIL has been used as an advocacy tool is the famous Diane Pretty case in which the Voluntary Euthanasia Society of England was also active. The case related to an application to the Attorney General for an assurance that a terminally ill patient's husband would not be prosecuted under the Suicide Act of England if he helped her to take her own life.

Documenting injustices

In many jurisdictions, PIL is used [to] document or expose institutionalized injustice even when the lawsuit is unlikely to succeed. For victims of human rights violations, this process of having their case heard by a court can often be a very important form of redress in and of itself.

Public Awareness

PIL can bring a cause or issue into the limelight, sometimes at far less expensive cost than mounting an elaborate media campaign. This attention raises general awareness and fosters public discussion and debate. In China in the case of *Xu Jianguo vs the Public Security Bureau* the claimant challenged the practice of the Chinese Police who used to stop anyone and demand to see identification without them showing the concerned individual any identification or furnishing a reason for stopping them. Although the claimant later withdrew the case the suit put into the limelight the arbitrary nature of Police power in China.

> "Public interest litigation is a weapon, which has to be used with great care and circumspection, and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. The Court must be careful to see that a body of persons or member of public, who approaches the Court is acting bona fide and not for personal gain or private motive or political motivation or other oblique consideration."
>
> Indian Supreme Court in Pandev v. The State of West Bengal

Civic Education

Because of its cutting-edge nature, PIL raises the level of legal literacy by educating the legal profession as well as the general public on the issues and intricacies of social justice. Most individuals are unaware of their rights and PIL, and the publicity that usually surrounds it, goes a long way in raising public awareness on various social rights issues.[31]

PIL therefore enables the judiciary to recognize the voice of the marginalized, examine the legality of policy decisions, promote human rights and resolve controversial issues. In developing countries, or countries where access to courts are difficult for ordinary citizens because of prevailing conditions, PIL is a particularly attractive form of litigating to remedy violations of the rights of large and vulnerable groups, or oppose dictatorships (in the case of tyrannical or undemocratic governments) as was the case of Nigeria under military rule. Justice Benjamin Odoki, Chief Justice of Uganda reasons that;

> Effective enforcement of human rights in Courts is hampered by the high cost of legal services, complexity of litigation and the procedural restrictions on the right to bring actions in Courts. These constraints affect the poor and vulnerable groups more adversely than the rich and affluent. It is for this reason that in many countries judicial and legislative innovations have been developed to increase access of the poor to justice so that they may realize their God given entitlements which no one, not even the state has the right to take away.[32]

He continues;

> "Why do we need public interest litigation? Public interest litigation gives more hope for the people than any other strategy given the current socio-economic conditions in our developing societies. Many people are illiterate and unaware of the law and their rights. The vast majority of the people are poor and cannot afford the services of a lawyer. There is also apathy because of mistrust of the legal system. Therefore it is necessary and healthy to allow public-spirited individuals to take up worthy causes on behalf of others who are not in a position to do so."[33]

Public interest Litigation and Class Action: Any Nexus?

It has been said that class actions and public interest actions are part of the worldwide movement to make access to justice a reality.[34] A class action is a civil proceeding brought by a group or class of plaintiffs against one or more defendants. It takes the form of joining a number of people in a suit as a representative of a larger number or class where the subject matter of controversy is one of common or general interest to the larger group or class. Class action is beneficial and considered as economically efficient as the cost of litigation can be shared among the victims.

Civil procedure rules of various countries provide for persons having an interest in an action (whether because they have similar causes of action or would be jointly or severally affected), to be joined as plaintiffs or defendants and represent the interest of the class affected by the lawsuit. This is the basis of class action suits.[35] Comparing class actions and public interest actions in South Africa, the South African Law Reform Commission said:

> "In the Working Paper the Commission argued that class actions and public interest actions are two different but not mutually exclusive procedures. There is no absolute line between these two procedures and they overlap to some extent. In cases involving civil rights, consumer interests and environmental protection issues may be of such public importance that, although the interests of the class or group are at stake, the public interest also comes into play. In such an event either a class action or a public interest action can be instituted.
>
> ---
>
> The essential difference between a class action and a public interest action is that the judgment given in a class action binds all the members of the class and may, therefore, be pleaded as res judicata against the members of the class. The judgment in a public interest action does not bound (sic) the

Notes to Chapter Two

28. (1982) 2 SCR 365 at 520; cited in Agbakwa & Okafor, op cit, page 233

29. S.J. Sorabjee, "Protection and Promotion of Fundamental Rights by Public Interest Litigation in India" 51 *Review of International Commission of Jurists* (1993) 31 at 33; cited in Agbakwa and Okafor, op.cit. page 233.

30. Siri Gloppen, "Public Interest Litigation, Social Rights and Social Policy" in Anis Dani and Arjan de Haan (eds.) *Inclusive States. Social Policy and Structural Inequalities*. Washington DC: World Bank (2008) 343-368.

31. Tawanda Zhuwarara, "Public Interest Litigation Manual" accessed online at http://www.scribd.com/zhuwi/d/60522716-Public-Interest-Litigation-Manual on 12/04/2012.

32. Odoki "Public Interest Litigation and Enforcement of Human Rights" in *Commonwealth Judicial Journal* (London, 2003), p. 20 at p. 21

33. *Ibid*, at p. 21.

34. Cappelleti (ed) Access to Justice 14; Morabito and Epstein *Class Actions in Victoria*, taken from "The Recognition of Class Actions and Public Interest Actions in South African Law Report" (1998) accessed online on 23/05/12

35. In India, Order 1 rule 8 of the India Code of Civil Procedure 1908 allows for class action. The Rule provides that "In the case of a public nuisance or other wrongful act affecting or likely to affect the public, a suit for declaration and injunction or for such other relief as may be appropriate in the circumstance of the case may be instituted...by two or more persons even though no special damage has been caused to such persons by reason of such public nuisance or other wrongful act." In Nigeria, Order 11 Rule 1 of the Uniform Civil Procedure Rules and Order 14 Rule 1 of the High Court Rules of Lagos State permits parties to be joined in a suit either as plaintiffs or

defendants; however, the precise reference to class action provided is in Order 14 Rule 15 of the Uniform Civil Procedure Rules which applies in cases of administration of estates, trust and in other cases where the court grants leave. However, Rule 3 of the Fundamental Rights (Enforcement Procedure) Rules 2009 provides that the court should encourage anyone to bring a public interest litigation acting as a member of, or in the interest of a group or class of persons.

36. *Ibid*

PART TWO

A Comparative Survey of Public Interest Litigation in Some Selected Countries

Chapter Three

Public Interest Litigation in the United States of America

As stated earlier, PIL in the United States can be traced to the case of *Brown v. Board of Education*[37] where the United States Supreme Court found that a state's segregation of public school students by race was unconstitutional. PILs in the US have, right after Brown, sought to reform public schools, assert reproductive choices for women, defend the rights of immigrants, advance gender equality, end the death penalty and protect environmental and animal rights.[38] As Hershkoff and Hollander state;

> Civil rights groups use different techniques to trigger the process of judicially precipitated reform. Test cases can establish precedents that will apply to many individuals. Class actions with many, often thousands, of plaintiffs allow the interests of a broad group of people to be addressed in one proceeding. Individual lawsuits have the potential to declare new rights and to extend a legal principle into new areas.[39]

Hershkoff has analyzed the categories of PIL commonly used in the US. She says:

> "The forms of public interest litigation in the U.S. flow from these three theoretical insights. One category of public

> interest litigation, the so-called "test" case, challenges the legality of existing laws and regulations or attempts to give new meaning to existing laws. A test case may be filed on behalf of a single individual, but the effect of stare decisis will give the judgment precedential effect in other lawsuits filed by other individuals.
>
> In addition, government agents or bureaucracies may feel obliged to conform their programs to a test-case ruling without further action by a court. A second form of action, the "structural reform suit," challenges deficiencies in the enforcement of existing laws, and seeks to regulate the defendant's future conduct through the imposition and monitoring of detailed judicial decrees that spell out in highly specific terms constitutional or statutory requirements. In practice, the line between the creation of "new" law and mere enforcement blurs: rights frequently have an indeterminate scope and are given content and acquire social meaning only through an on-the -ground process of implementation.
>
> Finally, both forms of action depend on declaratory relief: the judicial expression of a constitutional or statutory norm that informs and educates the other branches and the public at large."[40]

However, considering that the popularity, growth and appeal of PIL is largely credited to the legacy of American courts and jurisprudence, the development of PIL in that country has suffered a slow growth comparatively, and this can be accounted for by the influence of the application of the doctrine of locus standi in public law proceedings. The American Supreme Court has interpreted Article III Section 3 of the Constitution of the United States to require a litigant to show that his injury is *"concrete and particularized; the threat [of injury] must be actual and imminent, not conjectural or*

hypothetical; it must be fairly traceable to the challenged action of the defendant…" This position has been followed in a plethora of cases[41] to frustrate PIL.

Examples of Public Interest Litigation in the United States

A. Brown v. Board of Education[42]

In this landmark case, the National Association for the Advancement of Colored People (NAACP) brought an action to end racial segregation by striking down the doctrine of separate but equal education in public schools. The Brown's case reflected some of the features now associated with public interest litigation; the claimants were a self-constituted group with membership that changed over time. The defendant was a public institution and the relief sought was targeted at reforming future governmental action. The U.S Supreme Court found that a state's segregation of public school students by race was unconstitutional, struck down the "separate but equal" doctrine and ordered all schools to be racially integrated.

B. Friends of the Earth v. Laidlaw Environment Services[43]

Defendant-respondent Laidlaw Environmental Services (TOC), Inc., bought a facility in Roebuck, South Carolina, that included a wastewater treatment plant. Shortly thereafter, the South Carolina Department of Health and Environmental Control (DHEC), acting under the Clean Water Act (Act), (a)(1), granted Laidlaw a National Pollutant Discharge Elimination System (NPDES) permit. The permit authorized Laidlaw to discharge treated water into the North Tyger River, but limited, among other things, the discharge of pollutants into the waterway. Laidlaw began to discharge various pollutants into the waterway; these discharges, particularly of mercury, an extremely toxic pollutant, repeatedly exceeded the limits set by the permit.

On April 10, 1992, plaintiff-petitioners Friends of the Earth and Citizens Local Environmental Action Network, Inc. (referred to collectively here, along with later joined plaintiff-petitioner Sierra Club, as "FOE"), notified Laidlaw of

their intention to file a citizen suit against it under the Act, (a), after the expiration of the requisite 60-day notice period. DHEC acceded to Laidlaw's request to file a lawsuit against the company. On the last day before FOE's 60-day notice period expired, DHEC and Laidlaw reached a settlement requiring Laidlaw to pay $100,000 in civil penalties and to make “every effort” to comply with its permit obligations.

On June 12, 1992, FOE filed this citizen suit against Laidlaw, alleging noncompliance with the NPDES permit and seeking declaratory and injunctive relief and an award of civil penalties. Laidlaw moved for summary judgment on the ground that FOE lacked Article III standing to bring the lawsuit. The District Court denied the motion, finding that the plaintiffs had standing. The District Court also denied Laidlaw's motion to dismiss on the ground that the citizen suit was barred under §1365(b)(1)(B) by DHEC's prior action against the company. After FOE initiated this suit, but before the District Court rendered judgment on January 22, 1997, Laidlaw violated the mercury discharge limitation in its permit 13 times and committed 13 monitoring and 10 reporting violations. In issuing its judgment, the District Court found that Laidlaw had gained a total economic benefit of $1,092,581 as a result of its extended period of noncompliance with the permit's mercury discharge limit; nevertheless, the court concluded that a civil penalty of $405,800 was appropriate. The court declined to order injunctive relief because Laidlaw, after the lawsuit began, had achieved substantial compliance with the terms of its permit.

FOE appealed as to the amount of the District Court's civil penalty judgment. The Fourth Circuit vacated the District Court's order and remanded with instructions to dismiss the action. Assuming, *arguendo*, that FOE initially had standing, the appellate court held that the case had become moot once Laidlaw complied with the terms of its permit and the plaintiffs failed to appeal the denial of equitable relief. Citing *Steel Co. v. Citizens for Better Environment,* 523 U.S. 83, the court reasoned that the only remedy currently available to FOE, civil penalties payable to the Government, would not redress any injury FOE had suffered.

Held: The Fourth Circuit erred in concluding that a citizen suitor's claim for civil penalties must be dismissed as moot when the defendant, after commencement of the litigation, has come into compliance with its NPDES permit.

(a) The Constitution's case-or-controversy limitation on federal judicial authority, Art. III, §2, underpins both standing and mootness doctrine, but the two inquiries differ in crucial respects. But because this Court concludes that the Court of Appeals erred as to mootness, this Court has an obligation to assure itself that FOE had Article III standing at the outset of the litigation.

(b) FOE had Article III standing to bring this action. This Court has held that to satisfy Article III's standing requirements, a plaintiff must show "injury in fact," causation, and redressability. An association has standing to bring suit on behalf of its members when its members would have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires individual members' participation in the lawsuit. The relevant showing for Article III standing is not injury to the environment but injury to the plaintiff. To insist on the former rather than the latter is to raise the standing hurdle higher than the necessary showing for success on the merits in a citizen's NPDES permit enforcement suit. Here, injury in fact was adequately documented by the affidavits and testimony of FOE members asserting that Laidlaw's pollutant discharges, and the affiants' reasonable concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests.

(c) Laidlaw argues that FOE lacked standing to seek civil penalties payable to the Government, because such penalties offer no redress to citizen plaintiffs. For a plaintiff who is injured or threatened with injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress. Civil penalties can fit that description.

Notes to Chapter Three

37. *Op cit*

38. Also influenced, private foundations established funds for establishing and supporting the work of organizations whose focus was law-based reforms. Notable are the contributions of organizations like the Ford Foundation which provided funds for establishment of legal and human rights programmes across various continents where it operated.

39. See Hershkoff and Hollander "Rights into Action: Public Interest Litigation in the United States" in *Many Roads to Justice, supra*, 89, at p. 97. According to Hershkoff, "the Brown's case provided inspiration to a generation of lawyers who saw law as a source of liberation as well as transformation for marginalized groups…courts, …became involved in a broad range of social issues, including voting and appointment, contraception and abortion, employment and housing discrimination, environmental regulation and prison conditions".

40. "Public Interest Litigation: Selected Issues and Examples", *op cit*. pgs. 10-11.

41. *Summer et al v. Earth Island Institution*, 552 US; *Sierra Club v Morton*, 405 US 72 (1972); *Lujan v Defenders of Wildlife* 504 US 555 (1992).

42. *Op cit*.

43. 528 US 167, 180-181 (2000). The summary of the case and judgment which follows is an edited version of the Legal Information Institute's Case Syllabus, accessed on its website http://www.law.cornell.edu/supct/html/98-822.ZS.html on 12/04/2012.

Chapter Four

Public Interest Litigation in India

The history of PIL in India is embedded in an effort by the judiciary to provide access to justice for deprived and vulnerable sections of society. Hitherto, courts in India were widely regarded with suspicion as dishonest and corrupt. They were for a long time used only by those who were wealthy, and it was practically impossible for the poor to have access to justice. Upendra Baxi would say that the Indian Supreme Court was "an arena for legal quibbling for men with long purses".[44] Today, the judiciary has taken on an activist role and has become the ally of individual citizens to ensure justice and good governance by the state, and some have come to see the court as the "good governance court"[45]. "Now, increasingly, the Court is being identified by justices as well as people as the "last resort for the oppressed and the bewildered".[46]

Part III of the India Constitution provides for fundamental human rights.[47] The Constitution also provides that anyone whose rights have been infringed can seek remedies by approaching the Supreme Court directly for enforcement of any fundamental right(s). Part IV of the India Constitution, which has been described as the conscience of the Constitution[48], enshrines the Directive Principles of State Policy. In a plethora of cases,[49] the Indian Supreme Court has stated that fundamental rights are not superior to the Directive Principles of State Policy, even if the latter are non-justiceable; rather, the court views them as complementary and says that fundamental

rights are a means of achieving the goals indicated in the Directive Principles of State Policy.

The Supreme Court's major efforts to develop PIL included altering the requirements for locus standi and easing procedures for filing civil petitions for redress in the court, expanding fundamental rights and evolving innovative remedies to redress fundamental rights infringements. Currently in India, any public spirited person, the court suo moto, a non governmental organization or a public interest law firm may file a case against the government on behalf of a group of persons whose rights have been encroached upon or are about to be; a private person may also be included as co-respondent. The Court has leveraged its power of judicial review to sustain its deep engagement with ameliorating the suffering of the Indian people and remedying abuses committed against them.

Justice Bhagwati, a chief architect of this development justified the transformation, saying that the "judicious and sustained use of this power [judicial review] to further the cause of social justice has come to be regarded as not only beneficent but imperative in a developing country where there is large scale poverty and ignorance." The judiciary, he opines, "has to play a vital and important role not only in preventing and remedying abuse and misuse of power but also in eliminating exploitation and injustice" It is therefore important, in his view to"... make procedural innovations in order to meet the challenges posed by this new role of an active and committed judiciary."[50]

To achieve these objectives, the Indian Supreme Court had to rethink and re-interpret its role in society and its responsibility to its nation. "The summit judiciary in India," Bhagwati wrote, "...keenly alive to its social responsibility and accountability to the people of the country, has liberated itself from the shackles of Western thought" and has "...made innovative use of the power of judicial review, forged new tools, devised new methods and fashioned new strategies for the purpose of bringing justice to socially and economically disadvantaged groups."[51]

The court's thrust in this direction has gained wide popularity, with the court going ahead to enumerate what kinds of litigation it would entertain under this rubric. In December 1988, the Indian Supreme Court in the exercise of its administrative jurisdiction, issued a notification on what matters could be entertained in PIL suits. These included matters concerning bonded labour, neglected children, petitions from prisoners, petitions against the police, petitions against atrocities on women, children and scheduled castes and tribes. They also included petitions pertaining to environmental matters, adulteration of drugs and food, maintenance of heritage and culture, and other matters of public importance.[52]

Some of the new approaches adopted by the Indian Supreme Court include departing from the adversarial procedure in civil proceedings and the appointment of socio-legal commissions of enquiry to undertake fact-findings relevant to determining questions before the courts;[53] simplifying public access to the court by acting on simple letters written to the court by either aggrieved persons or activists and treating these as petitions cognizable by the court (epistolary jurisdiction)[54], alongside evolving new remedies to ensure distributive justice to deprived and vulnerable sections of society when the need arose. Robinson notes that "[t]his new public interest litigation often touched on large and complex social issues". In response, he said, "…the Court shifted from an adversarial to a more inquisitorial judicial model. To aid in research, the Supreme Court created commissions to gather data and present recommendations on the issues presented in a complaint. The Court also began to exercise continuing jurisdiction over cases, issuing preliminary interim orders and then periodic follow-up orders."[55]

In the Bihar Blinding Cases[56] for example, the court directed that under-trial prisoners who had been blinded should be given vocational training in an institute for the blind, and appointed monitoring agencies for the purpose of ensuring implementation of orders and judgments made by the court.

A wide range of public interest litigation has been entertained by the court, including cases of untried prisoners, industrial relations, governance and environmental matters.

Examples of Public Interest Litigation in India

A. Shanistar Builders v. Narayan Khimalal Tatome & Ors[57]

This was a constitutional challenge implicating the right to life, including the right to a reasonable accommodation to live in (Article 21 Indian Constitution).

Under Sections 20 and 21 of the Urban Land Ceiling and Regulation Act, 1976, the State of Maharashtra exempted certain excess land from the provisions of the Act on the condition that the land be used by the builders for the purpose of providing housing for the 'weaker sections of society.' It was alleged that the builders had not done so. Although it found that the applicant's writ of petition had been rendered infructuous, the Bombay High Court gave some directions regarding future monitoring of the scheme sanctioned under Section 20.

On appeal, the Supreme Court stated that "[b]asic needs of man have traditionally been accepted to be three - food, clothing and shelter. The right to life is guaranteed in any civilized society. That would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in." The Court iterated that shelter for a human being has to be a suitable accommodation which would allow him to grow and develop in every aspect - physical, mental and intellectual. A reasonable residence is an indispensable necessity for fulfillment of the constitutional goal in the matter of development of man and should be taken as included in 'life' in Article 21.

Amongst other things, the Court ordered the builders not to make any allotment of flats until the claim of the complainants (who belonged to the 'weaker sections') were scrutinised and the allotment of accommodation for such number of persons as were found to belong to the 'weaker sections' was provided. The Court prescribed certain guidelines in relation to such allocation and ordered State Government to constitute a committee for monitoring allotment of the flats to the weaker sections.

B. Pashim Banga Khet Mazdoor Samity v. State of West Bbengal[58]

This action was brought by the petitioner before the Supreme Court against the state of West Bengal for failure of the government to provide timely emergency medical treatment. The Court held that such failure constituted a violation of the right to life and ordered that the state compensate the Petitioners and to enact laws remedying the situation and preventing same occurrences in the future.

C. M.C. Mehta v. Union of India[59]

This action was brought under Article 32 of the India Constitution by a letter written against Shriram Foods and Fertilizer Industries that had several offices and was engaged in the production of several chemical substances, such as caustic soda, chlorine, hydrochloric acid, stable bleaching powder, super phosphate, vanaspati, soap, sulphuric acid, alum anhydrous sodium sulphate, high test hypochlorite and active earth. The company's offices were located in a densely populated region and the complaint was that Oleum gas had leaked from one of the units of Shriram Food and Fertilizer Ltd and had caused the death of several persons. A District Magistrate relying on Section 133(1) of Criminal Procedure Code, directed that within two days, Shriram should cease from carrying on the occupation of manufacturing and processing hazardous and lethal chemicals and gases including chlorine, oleum, super-chlorine, phosphate at their establishment in Delhi and to remove the said chemicals and gases within seven days. M.C. Mehta filed a PIL at the Supreme Court to claim compensation for the damages occasioned thereby and argued that the closed office should not be allowed to re-commence operation. While the writ petition was pending, the Delhi Legal Aid and Advice Board and the Delhi Bar Association filed another petition for the award of compensation to the victims of the leakages. These applications for compensation raised a number of issues of great constitutional importance

Relying on Justice Bhagwati's opinion in *Bandhua Mukti Morcha v. Union of India*,[60] the court held that the scope and ambit of Article 32 of the Constitution of India did not merely confer power on it to issue a direction, order or writ for enforcement of the fundamental rights, but lays upon it a

constitutional obligation to protect the fundamental rights of the people for which purpose it has all incidental and ancillary powers, including the power to make and adopt new remedies and fashion new strategies, designed to enforce fundamental rights. The court also held that the right to live with human dignity derives its substance from the Derivative Principles enshrined in the Indian Constitution. Concerning whether compensation should be provided to the victims of the oleum gas leakages and the scope of the liability in such a case, the court had to consider the Common Law rule in *Rylands v. Fletcher* and whether it was applicable in the case, as well as if any other principle of liability can be applied.

The court reasoned that the situation before it was not at all envisaged by English law and that it was required to develop its own law and, if necessary, construct a new principle of liability. It further said that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of the hazardous or inherently dangerous nature of the activity which it has undertaken, particularly where they alone have the resources to discover, as well as guard against hazards and provide warning against potential hazards; the court held that in such cases the measure of compensation payable must be correlated to the magnitude and capacity of the enterprise because such compensations must have a deterrent effect.

D. Common Cause, A Registered Society v. Union Of India And Others[61]

Mr. H. D. Shourie Director, Common Cause prayed the Court to have a Lok Pal to curb corruption in the country. The petition was filed as a PIL by virtue of Article 32 to expose the wanton way in which allotments were made by the petitioner, Captain Satish Sharma who was, at that time, Minister of State for Petroleum and Natural Gas in the Central Government. Mr. Shourie also drew the Court's attention to a news item in the front page of Indian Express of Friday, 11 August, 1995, under the caption 'In Satish Sharma's reign, Petrol and Patronage Flow Together'.

After hearing the petition, the Court by a judgment dated 25 September, 1996,[62] nullified all the 15 petrol outlets allotted by the Minister to various persons out of his discretionary quota. The court held that it had an obligation, being the protectors of the civil liberties of the citizen, to grant relief in exercise of its jurisdiction under Articles 32 and 226 of the Constitution to the victim (or the heir of the victim) whose fundamental rights under Article 21 of the Constitution of India are established to have been flagrantly infringed by calling upon the State to repair the damage done by its officers to the fundamental rights of the citizen, notwithstanding the rights of the citizen to the remedy by way of a civil suit or criminal proceedings, and held that the State too, has a right to be indemnified by the wrongdoer in accordance with law.

The court further reasoned that law is in the process of development and the process necessitates developing separate public law procedures as also public law principles. It further held that with the change in socio-economic outlook, and as public servants are being entrusted with more and more discretionary powers even in the field of distribution of Government wealth in various forms, if a public servant abuses his office either by an act of omission or commission, and the consequence of that is injury to an individual or loss of public property, an action may be maintained against such public servant. No public servant can say 'you may set aside an order on the ground of mala fide but you cannot hold me personally liable.' No public servant can arrogate to himself the power to act in a manner which is arbitrary."

E. Hussainara Khatoon v. State of Bihar[63]

In this case, the attention of the court was drawn to the situation of Bihar under trials whose period of detention pending trial exceeded the maximum sentence for the offences they were accused of. The court made an order for speedy trial and also passed a general order releasing under trials who had undergone detention beyond the maximum sentences of the offences with which they were charged.

F. Kadra Pahadiya v. State of Bihar[64]

In this case, on the basis of a petition sent in by a prisoner drawing the attention of the court to the poor conditions of life convicts in Tihar jail, the Court introduced humaneness into the penitentiary system by requiring that solitary confinement be only on the basis of exceptional circumstances and with adequate precautions.

G. Vellore Citizen's Welfare Forum v. Union of India[65]

This action was in reaction to pollution caused by over 900 tanneries operating in five districts of Tamil Nadu. The court drew on the concept of sustainable development and the need to balance ecology and development. The Court noticed that the leather industry was a major foreign exchange earner and its product accounted for 80 per cent of the country's export. Nevertheless, the court pointed out that the leather industry had no right to destroy the ecology, degrade the environment and pose a health hazard. It refused them to continue or expand production until they tackle the problem of pollution created by them. The courts direction included: 1) Pursuant to section 3 (3) of the Environmental Protection Act 1986, the Central Government was directed to constitute an authority. II) Each polluting industry was asked to pay a pollution fine of Rs. 10,000 to be kept in an Environmental Fund to be used for compensating affected persons and the restoration of damaged areas.

Notes to Chapter Four

44. Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India" in *The Role of the Judiciary in Plural Societies*, *op.cit*, p. 33.

45. See Nick Robinson, "Expanding Judiciaries: India and the Rise of the Good Governance Court" in *Washington University Global Studies Law Review*, Volume 8 No. 1 2009. This article can also be accessed on the webpage http://law.wustl.edu/WUGSLR/Issues/Volume8_1/robinson.pdf.

46. Baxi, *op.cit*, p. 33

47. Article 32 of the Constitution of India, 1950

48. Deva, "Public Interest Litigation in India: A Critical Review", *Civil Justice Quarterly*, Issue 1, (2009), 21 quoting Austin, *Cornerstone of a Nation* (Oxford, Clarendon Press, 1966)

49. Including *Minerva Mills Ltd v Union of India* [AIR 1980 SC1789] and *Unni Khrishnan v State of AP*, [(1993) 1 SCC 645

50. Bhagwati, *op cit*, p. 20.

51. Bhagwati, *op cit*, p. 21.

52. Desai and Muralidhar, "Public Interest Litigations: Potentials and Problems", p.5, available at www.ielrc.org/content/a0003.pdf and accessed on 12/04/2012.

53. In the Agra Protective Home Case, the Supreme Court appointed the District Judge of Agra as commissioner to visit the protective homes and to make a detailed report in regard to the conditions in which the girls were

living. Also in the case of *Bandhua Mukti Morcha v. Union of India & Ors,* concerning the existence of bonded labourers in Faridabad stone quarries, the Supreme Court appointed a professor of sociology working in the India Institute of Technology to carry out social-legal investigation into the conditions of the stone quarry workers.

54. "For example, when a journalist wrote the Court in 1982, complaining that certain female suspects were tortured in police custody, the Court treated the letter as a petition and gave directions to ensure protection of these women and other prisoners in similar situations. This action by the Court spawned a practice of persons writing letters asking the Court to intervene on pressing social issues. In 2006, the Supreme Court received almost twenty thousand such letters from across the country. These letters are screened on predetermined criteria by the PIL division of the Registrar and by the Registrar him- or herself. After this initial filtering, only about one percent of these letters are placed before the Court as admission matters. - Robinson, op.cit. pgs. 43-44 (footnotes omitted).

55. *Op.cit*, page 44.

56. *Rudul Sah v. State of Bihar* (1983) 4 SCC 141

57. The summary of this case has been taken from the website of the International Center for Economic, Social and Cultural Rights and slightly edited.

58. (1996) 4 SCC 37

59. AIR 1984 SC 802

60. *Op cit*

61. Review Petition (C) No. 98 of 1997 in Writ Petition No. 26 of 1995, decided on August 3, 1999.

62. [(1997) 1 Comp LJ 30 (SC): (1996) 6 SCC 530]

63. (1980) 1 SCC 811

64. (1981) 3SCC 671

65. (1996) 5 SCFC 647

Chapter Five

Public Interest Litigation in Uganda

PIL is gaining traction in Uganda as well. Its foundation is Article 50(2) of the Ugandan Constitution which provides that "[a]ny person or organization may bring an action against the violation of another person's or group's human rights." The import of the article is that any individual or organization can sue to protect the rights of another whether or not the violated individual knows it or not and irrespective of whether or not s/he has filed a complaint. In *Ismail Serugo v. Kcc & Attorney General*, Mulenga JSC was emphatic that the right to present a constitutional petition was not vested only in the person who suffered the injury but also in any other person. Commenting on these provisions, Chief Justice of Uganda, Benjamin J. Odoki said: "This procedure should be able to allow the stronger to protect the weaker and to make every person his or her brother's keeper. It should also be able for individuals or groups to take proceedings to protect group rights or interests for the entire community"[68]

This right is further anchored on Article 3(4) of the Constitution which imposes a right and duty on every citizen of Uganda to defend the Constitution. Article 137(3) further empowers any person who alleges a violation of the Constitution to have taken place to petition the Constitutional Court for redress.[69] Furthermore, section 71 of the National Environment Act (Cap. 153) empowers any person to apply for an environmental restoration order even though such person is not suffering any harm and has no interest in the land in issue.

Based on the above laws, several PIL cases have been filed in the Constitutional Court in respect of civil and political rights, including rights pertaining to those on death row; environmental cases, actions on smoking in public places and on stronger warning labels for tobacco products.

Examples of Public Interest Litigation in Uganda[70]

1. *Environmental Action Network Ltd v. The Attorney General and National Environment Management Authority*[71]

The applicant, a public interest litigation group brought an application on its own behalf and on behalf of the non-smoking members of the public, under Article 50(2) of the Constitution, to protect their right to a clean and healthy environment, their right to life, and for the general good of public health in Uganda. In the application, information based on medical and scientific reports highlighted the dangers of exposure to second hand smoke or environmental tobacco smoke. The applicant sought several declarations which included declarations that smoking in public constituted a violation of the rights of non- smoking members of the public to a clean and healthy environment as described under Article 39 of the Constitution of the Republic of Uganda and Section 4 of the National Environment Statute 1995; a violation of the rights of non-smoking members of the public to the right to life as prescribed under Article 22 of the Constitution of the Republic of Uganda and that the second respondent takes the necessary steps to ensure the enjoyment by the Ugandan public of their right to a clean and healthy environment.

The respondents raised preliminary objections that the applicant had no cause of action, and could not claim to represent the Ugandan public and that no notice that the present suit would be filed against the respondents was filed as provided for in the Civil Procedure and Limitations of Actions (Miscellaneous Provisions) (Amendment) Act 2000.

The trial Judge who heard the application held that the objection relating to failure to give Statutory notice of 45 days to the second respondent as a

scheduled corporation before filing the application was misconceived because the applications, brought under Article 50 of the Constitution, were governed by the Fundamental Rights and Freedoms (Enforcement Procedure) Rules 1992 (S.I No.26 of 992) and the Civil Procedure Act and Rules made there under. He held that it was not necessary to give prior notice of 45 days because people need immediate and urgent redress in case of infringement of their rights and freedoms.[72]

The Principal Judge also dismissed the second objection.[73]

Greenwatch v. Attorney General and the National Environment Management Authority[74]

The applicant, a non-governmental organisation that sought to protect the environment and expose threats to it, brought an application before the High court of Uganda seeking several orders and declarations, among which were declarations that the manufacture, distribution use, sale, disposal of plastic bags and containers etc violate the rights of citizens of Uganda to a clean and healthy environment, and sought too, an order banning the manufacture, use, distribution and sale of plastic bags and plastic containers of less than 100 microns. They also sought an order directing the second respondent to issue regulations for the proper use and disposal of all other plastics whose thickness was more than 100 microns including regulations and directions as to recycling and reuse of all other plastics.

The respondents raised several objections, amongst which were that the application did not disclose a cause of action, and that, furthermore, the application was not before the Court in that it was brought by the applicant on behalf of other Ugandans who had not authorized the applicant to do so, and without leave of Court as legally required by order 1 rule 8 of the Civil Procedure Rules before filing a representative suit. The court referred to Article 39 of the Constitution[75] as well as Article 20(2)[76] and then observed that the State and the Authority had a duty towards all citizens of Uganda to promote and preserve the environment. The court said;

> "I have studied the application and the two affidavits filed in support and I find them pointing a finger at the state that it has failed or neglected its duty towards the promotion or preservation of the environment. The state owes this duty to all Ugandans. By so failing or neglecting the Government is in breach of its duty towards the citizens of Uganda.
> Any concerned Ugandan has a right of action against the Government of the Republic of Uganda, for that matter against the Attorney General in his representative capacity to seek the enforcement of that failed or neglected duty of the state.[77]

The Judge referred to Article 50 and stated that from the wording of Clause (2) of the Article, any concerned person or organization may bring public interest action on behalf of groups or individual members in the country even if that group or individual is not aware that his fundamental rights or freedoms are being violated. He gave lack of public awareness about human rights as one of the justifications for such public interest litigation when he recognised that, "There is limited public awareness of fundamental rights or freedoms provided for in the Constitution, let alone legal rights and how the same can be enforced. Such illiteracy of legal rights is even evident among the elites." The learned Judge concluded that the applicant had locus standi to bring the action on behalf of other Ugandans:

> "It is just appropriate that a body like the applicant comes up to discharge the Constitutional duty cast upon every Ugandan to promote the Constitutional rights of the citizens of Uganda and the institution of a suit of this nature is one of the ways of discharging that duty. This Court is under an obligation to hear the concerned citizen, in the instant case of the Applicant."

Litigation in the Constitutional Court[78]

Uganda Association of Women Lawyers and Ors v. The Attorney General[79]
The applicants brought a petition claiming that several sections of Uganda's Divorce Act[80] contravened and were inconsistent with the Ugandan Constitution;[81] were discriminatory against women, perpetuates inequality between sexes and was incompatible with the dignity, welfare and interest of women and undermines their status. The Respondent argued, relying on the provisions of rule 4(1)[82] of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules, 1992, (Legal Notice No.4 of 1996) that the petition was time-barred and therefore unsustainable.

On this preliminary point, the Court held that to the extent that rule 4(1) of Legal Notice No.4 of 1996 imposes restrictions to the right of access to the Constitutional Court, which the constitution itself does not provide for, it was seeking to add to and or vary the constitution and therefore to amend it without doing so through the amendment provisions of the Constitution. The court held that it was clearly against the spirit of the constitution and thereafter restored, in full, citizens' right of access to the Constitutional Court by declaring that the Rule is in conflict with the Constitution and was null and void.

Regarding the merits of the suit, the Court held that it was clear that the challenged sections had the effect of negating the concept of equality as a core value of the Constitution and that the Divorce Act (Cap.249) was "archaic in content and in substance, a colonial relic whereby the traditional patriarchal family elevated the husband as the head of the family and relegated the woman to a subservient role, of being a mere appendage of the husband, without a separate legal existence."[83]

Mpagi-Bahigeine JA opined that this concept of the family has been drastically altered in recent decades and that marriage is now viewed as an equal partnership between husband and wife. Although, as the Justice said, the old ideas and patterns persist, as do their psychological and economic

ramifications, but that notwithstanding, women are entitled to full equality in respect of the right to form a family and upon dissolution of the family, consistent with Article 33(1). Men and women of the age of eighteen years and above have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and at its dissolution.[84]

Salvator Abuki v. Attorney General[85]

In this case, the Constitutional Court held that certain sections of the Witchcraft Act were unconstitutional and in particular Section 7 which authorises a Court to make an exclusion order banishing a person found to be practicing witchcraft from his home. It was held that such an order contravenes Article 24 which prohibits inhuman or degrading treatment or punishment. In *Kyamanywa Simon v. Uganda*,[86] the Constitutional Court held that the sections in the Penal Code imposing corporal punishment were unconstitutional as being in contravention of Article 24 of the Constitution prohibiting torture, cruel, inhuman or degrading punishment or treatment.

Notes to Chapter Five

66. Clauses 1 and 2 of Article 50 provide; "(1) Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to competent Court for redress which may include compensation. (2) Any person or organisation may bring an action against the violation of another's or group's human rights."

67. Constitutional Appeal No. 2 of 1998

68. *Op cit*, p. 24.

69. The article provides that:

"A person who alleges that;-

a) an Act of Parliament or any other law or anything in or done under the authority of any law; or

b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate."

70. The section on Uganda has benefitted immensely from the information and case summary narratives of Odoki CJ, op cit.

71. Misc. Application No. 39 of 2001

72. In so holding the Judge said; "I agree with this requirement that the respondent usually Government or a scheduled corporation which is supposed to be as busy as Government, needs sufficient period of time to investigate a case intended to be brought against it so as to be able to avoid

unnecessary expense on protracted litigation. This rationale cannot apply to a matter where the rights and freedoms of the people are being or about to be infringed. The people cannot afford to wait for 45 days before pre-emptive action is applied by the Court. They would need immediate and urgent redress. They need a short period which is the one provided under the ordinary rules of procedure provided by the Civil Procedure Act and Rules. To demand from the aggrieved party a 45 days notice is to condemn them to infringement of their rights and freedoms for that period which this court would not be prepared to do. Any alleged infringement must be investigated expeditiously before damage is done."

73. Counsel for the respondents had contended that the applicant could not claim to represent the Ugandan public and, therefore, it should have brought the application under Order 1 rule 8 of the Civil Procedure Rules. The Judge overruled this objection holding that representative actions and public interest litigation were distinguishable and the latter was governed by Article 50 of the Constitution. He held: "Here again the State Attorney failed in his preliminary objection to distinguish between actions brought in a representative capacity pursuant to Order 1 Rule 8 of the Civil Procedure Rules and what are called "Public Interest Litigations" which are the concern of Article 50 of the constitution and S.1 No. 26 of 1992. The two actions are distinguishable by the wording of the enactments or instruments pursuant to which they are instituted. Order 1 Rule 8 of the Civil Procedure Rules governs actions by or against the parties (i.e. plaintiff or defendant) together with parties that they seek to represent and they must have similar interest in the suit. On the other hand Article 50 of the Constitution does not require that the applicant must have interest as the parties he or she seeks to represent or for whose benefit the action is brought."

According to the Judge Clause (2) of Article 50 of the Constitution was sufficient to answer the State Attorney's objection that the applicant could not represent the Ugandan non-smoking public. The judge recognized that there were decided cases which decided that an organisation could bring a public interest litigation on behalf of groups or individual members of the public even though the applying organisation had no direct individual interest in the infringing acts it sought to have redressed. He referred to *Regina v.1 RC Exp*.

Federation of Self- Employed (H.L.E) (1982) A.C 643, and the Tanzanian case of *Mtikila v.The Attorney General* Civil Suit No. 5 of 1993 (unreported). The judge observed that he understood from these two decisions that the interest of the public demands that rights and freedoms transcend technicalities as to the rules of procedure leading to the protection of such rights and freedoms.

74. Misc. App.No. 39 of 2001 (High Court of Uganda).

75. This provides that "[e]very Ugandan has a right to a clean and healthy environment."

76. This provides that: "[t]he rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of the Government and all persons."

77. The court ruled that the respondent has a mandatory duty to ensure that the principles of environmental management are observed. These include:- "to assure all people living in the country the fundamental right to an environment adequate for their health and well being." The court concluded that it was clear that there was a plea that the second respondent was in breach of its duty to ensure that the principles of environment management are observed which duty it owes to the citizens of Uganda. The Judge therefore overruled the first objection that there was no cause of action. Regarding the second the court noted that it was impracticable to bring a representative action on behalf of all the citizens of Uganda because they are required to give consent in a case like this where the complaint is of common and general interest, not just a group but all citizens of Uganda.

78. Article 137 of the Constitution provides that any question as to the interpretation of the Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court. The Court of Appeal is established by Article 129 of the Constitution and normally determines appeals from the High Court. Constitutional jurisdiction is the only original jurisdiction it exercises. The Constitution allows any person to bring an action in the Constitutional Court to challenge the Constitutionality of any Act of Parliament or any act committed by any person or authority. In this connection, clause (3) of the Constitution provides, "(3) Any person who alleges that –

> (a) an Act of Parliament or any other law or anything done under the authority of any law, or (b) any act or omission by any person or authority of any law, is inconsistent with or in contravention of a provision of the Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate."

Clause (4) of the same article gives power to the Constitutional Court to grant a declaration or order of redress or refer the matter to the High Court to investigate and determine the appropriate redress.

79. Constitutional Petition No. 2 of 2003) [2004] UGCC 1 (10 March 2004).

80. The following history of the Divorce Act is found in the Judgment: "The Divorce Act which was enacted in Uganda in 1904 has got its origins in the Matrimonial Causes Act of 1857 of England. That Act also had its roots in the Common Law of England whereby a valid marriage could only be terminated by the death of one of the parties to it or by a divorce decree pronounced by a court of competent jurisdiction. The Matrimonial Causes Act 1857 provides that a party to a marriage could obtain a decree of divorce on proving that the spouse had committed a matrimonial offence. The only offence that entitled a husband to obtain the decree was adultery. For a wife, it was not enough for her to prove adultery against her husband. She had to prove that me husband was guilty of aggravated adultery (which meant adultery plus another offence e.g. incest, bigamy, cruelty, desertion etc) or he had changed his faith from Christianity to some other faith and gone through a form of marriage with another woman. This law was brought into force in Uganda by the enactment of Divorce Act on 1st October 1904."

81. Particularly Articles 2.1(1) & (2), Article 3.1(0 and Article 33(1) & (6) of the constitution

82. "4(1") The petition shall be presented by the petitioner by lodging it in person, or, by or through his or her advocate, if any, named at the foot of the petition, at the office of the Registrar and shall be lodged within thirty days after the date of the breach of the Constitution complained of in the petition."

83. Concurring opinion of Mpagi-Bahigeine JA

84. The court said further:

"It is well to remember that the rights of women are inalienable, interdependent human rights which are essential in the development of any country and that the paramount purpose of human rights and fundamental freedoms is their enjoyment by all without discrimination which discrimination is manifest in The Divorce Act. The concept of equality in the 1995 Constitution is founded on the idea that it is generally wrong and unacceptable to discriminate against people on the basis of personal characteristics such as their race or gender. Legal rules, however, continue to be made gender neutral so much so that there are no more husbands or wives, only spouses. This step is in the right direction. It is further important to note and appreciate that the 1995 Constitution is the most liberal document in the area of women's rights than any other Constitution South of the Sahara. This was noted at the Judicial Colloquium on the Application of International Human Rights Law at the Domestic Level, held on 9-11 September 2003 in Arusha-Tanzania. It is fully in consonance with the International and Regional Instruments relating to gender issues. (The Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) which is the women's Bill of Rights and the Maputo Protocol on the Rights of Women in Africa [2003]). Be that as it may, its implementation has not matched its spirit. There is urgent need for Parliament to enact the operational laws and scrape all the inconsistent laws so that the right to equality ceases to be an illusion but translates into real substantial equality based on the reality of a woman's life, but where Parliament procrastinates, the courts of law being the bulwark of equity would not hesitate to fill the void when called upon to do so or whenever the occasion arises."

85. Constitutional Petition No 1 of 1997 (unreported)
86. Constitutional Reference No. 10 of 2000

Chapter Six

Public Interest Litigation in South Africa

According to Budlender: "South African public interest law really took off towards the end of the 1970s, but it did not start there."[87] According to him, pre-1910 reported judgments show that PIL was being utilized in South Africa on behalf of the unrepresented and underrepresented in political and legal processes. In the 60's, there were more anti-apartheid public interest litigation initiatives being supported by the South Africa Defence and Aid Fund and later by the International Defence Aid Fund. By the 70's, more organization's were undertaking PIL. However, their work was done in a hostile environment; judges had no regard for the values which were supposed to underlie the legal system; in addition to this, there were difficulties posed by the doctrine of locus standi.

Before 1994, a litigant suing on a public law platform had to show that he had a sufficient, direct and personal interest in the matter. This position was followed in earlier cases like *Director of Education, Transvaal v. McCagie and Others*[88] and *Von Moltke v. Costa Areosa (Pty) Ltd*[89] which considerably constrained litigation in the public interest. The position has changed in matters that concern public interest environmental litigation and the enforcement of the Bill of Rights by section 38 and section 24 of the Constitution of the Republic of South Africa 1996. By section 38, any of the following persons can bring an action:

- Anyone acting in their own interest;
- Any one acting on behalf of another person who cannot act in their own name;
- Any one acting as a member of, or in the interest of, a group or class of persons;
- Any one acting in the public interest;
- Any association acting in the interest of its members.[90]

Writing about PIL under the South African Constitution of 1996, Tumai Murombo says:

> Prior to 1994 the requirements for standing in South Africa for all civil cases, public and private, were largely based on the common law requirements which then, by and large, mirrored the USA approach. The Constitution of the Republic of South Africa, 1996 did away with strict standing requirements where any right in the Bill of Rights is implicated, and ... also relaxed the approach to standing in public interest environmental litigation.[91]

Examples of Public Interest Litigation in South Africa

Wildlife Society of Southern Africa & Others v. Minister of Environmental Affairs and Tourism & Others[92]

The applicants applied for an order compelling the respondents to enforce the provisions of Decree No 9 (Environment Conservation) 1992.[93] The applicants contended that the 4th – 7th respondents had granted rights of occupation and allocated sites within the coastal conservation area to private individuals for very small considerations. Shacks, dwellings, roads, pathways and tracks had been constructed on the sites resulting in environmental degradation but, the applicants argued, the responsible Ministers had not undertaken any preventive measures.

The *locus standi* of the applicants was challenged but later conceded by reason of the provisions of S. 7(4)(b) read with S. 29 of the Constitution of the Republic of South Africa Act 200 of 1993. The Court remarked that apart from these constitutional provisions, there was much to be said for the view that when a statute imposed an obligation upon the State to take certain measures in order to protect the environment in the interests of the public, then a body such as the first applicant, with its main object being to promote environmental conservation in South Africa, should have *locus standi* at common law to apply for an order compelling the State to comply with its obligations under the terms of such statute.

Leon Joseph and Others v. City of Johannesburg and Others[94]

The applicants were all tenants in a block of flats in Johannesburg (Ennerdale Mansions) owned and let by the fourth respondent, Mr. Thomas Nel. The applicants paid their electricity bills to Mr. Nel as part of their rent accounts and had kept up with their electricity payments at the time of the disconnection. Nel was contracted with the second respondent, City Power, for the supply of electricity to the building and had accumulated arrears of approximately R400 000. As a result, on 8 July 2008, the electricity supply to Ennerdale Mansions was disconnected by City Power. The tenants received no prior notice of the disconnection. They have been living without electricity for some 12 months and continued to live in Ennerdale Mansions because they could not afford to leave.

The South Gauteng High Court, Johannesburg held that there was no obligation on the City of Johannesburg and its service providers to afford procedural fairness to tenants with whom the service provider has no contractual relationship before taking a decision to disconnect their electricity supply. An appeal against the decision was lodged at the Constitutional Court.

The applicants contended that the Promotion of Administrative Justice Act 3 of 2000 (PAJA) required City Power to afford them procedural fairness before taking a decision to disconnect their electricity because the decision materially and adversely affected their rights.[95] The court held that to the extent that the

Electricity Bye-laws permit the termination of electricity supply "without notice", it is inconsistent with PAJA and section 33 of the Constitution. This invalidity is cured by severing the words "without notice" from bye-law 14(1), which must be read in the light of PAJA to require pre-termination notice.

In the result, the court granted the application for leave to appeal and upheld the appeal, setting aside the order of the High Court. The termination of electricity supply to Ennerdale Mansions was declared to be unlawful, and the City was ordered to reconnect the electricity supply to the building forthwith.

August and Another v Electoral Commission and others[96]

The main question before the Constitutional Court was whether prisoners' constitutional right to vote will be infringed if no appropriate arrangements are made to enable them to register and vote. The Court pointed out that the right to vote by its very nature imposes positive obligations upon the legislature and the executive. This is the reason why the Constitution provides for the establishment of the Independent Electoral Commission as an independent and impartial body to manage the elections and ensure that they are free and fair. The court emphasised the universal adult suffrage on a common voters roll as one of the foundational values of the South African constitutional order and went further to say that the universality of the franchise is important not only for the nationhood and democracy, but that the vote of each and every citizen is a badge of dignity and of personhood. The Court held that the right to vote must be interpreted to enfranchise rather than disenfranchise eligible voters.[97]

Neither the Constitution nor the Electoral Act 73 of 1998 contained a provision that disqualifies or limit the rights of awaiting trial and sentenced prisoners. In view of the fact that Parliament, being the only organ with the power to disenfranchise prisoners of their right to vote in terms of the law of general application, had not sought to limit this right, neither the Independent Electoral Commission nor the court has the power to assume this role. In the absence of a disqualifying legislative provision, it was not possible for respondents to seek to justify the limitation of prisoners' rights in terms of s.36

of the Constitution as there was no law of general application upon which they could rely on. As a result, the court held that prisoners retained their constitutional right to vote and that the Independent Electoral Commission was obliged to make all the necessary and reasonable arrangements to enable them to vote.[98]

Minister of Health and Others v. Treatment Action Campaign and Others (No 1)[99]

The South African government in this case devised a programme to deal with mother-to child-transmission (MTCT) of HIV at birth and identified nevirapine as the drug of choice. The Medicines Control Council, a body created under the Medicines and Related Substance Control Act,101, to determine the safety of drugs before their being made available in South Africa registered nevirapine in 1998, confirming the quality, safety and efficacy of the drug. The World Health Organisation had also recommended the administration of drug to mother and infant at the time of birth in order to prevent MTCT. For safety and efficacy concerns however, government adopted a policy that restricted the availability of nevirapine in the public health sector to pilot sites designated for purpose of research and training personnel on the use of the drug. An observation period of two years was reserved to test the suitability of the drug within the South African socio-economic context, with two pilot sites designated for each of the provinces of South Africa. However, the use of the drug in private health facilities whenever it was medically indicated and where there were testing and counseling facilities was not restricted.

The applicants challenged the government's policy of restriction, contending that the policy was unreasonable when measured against the constitutionally mandate requirement that the state and all its organs must give effect to the rights guaranteed by the bill of rights, the rights in issue being the right to have access to health care service and the rights of children to be afforded special protection. They prayed for an order directing the government to make nevirapine available to pregnant women with HIV who give birth in the public health sector and to their babies where the drug is medically indicated and the

women concerned have been tested and counseled. They also sought an order directing government to plan and implement an effective, comprehensive and progressive programme for the prevention of MTCT of HIV throughout the country.

Government countered that the administration of the drug required a multiple-strategy approach or comprehensive package that could best guarantee its efficacy, but the immediate implementation of which was, at the material time, encumbered by social, economic, public health, cultural and manpower constraints that made the restrictive policy necessary. The government argued that administering a comprehensive package of nevirapine treatment required substituting breastfeed for formula feed (bottle-feed) in order to prevent subsequent transmission after the administration of the drug. However socio-cultural preference for breastfeeding among an overwhelming majority of nursing mothers (most of whom were rural dwellers) who lack easy access to hygienic water and the means to procure formula feed, constituted a major impediment to persuading HIV/AIDS nursing mothers towards using breast milk substitutes. These constraints, it was argued, increased risk to infants growing up with inadequate nutrition and sanitation Government accordingly submitted that the policy was introduced to equip government with sufficient data that would help it develop and monitor its human and material resources on a national scale for the delivery of the comprehensive MTCT prevention package.

The High Court granted the applicants' prayers and respondents appealed. The Constitutional Court found that although there was some justification for restricting nevirapine to pilot sites from which vital information could be gathered for developing the best possible prevention programme for MTCT from the public point of view, the rigid application of the policy denies mother and their newborn children at public hospitals and clinics outside the research and training sites their constitutional rights to access health care service and, was, in the face of the life threatening potentials of the HIV/AIDS pandemic, unreasonable. The court declared that government was under constitutional

obligation to devise and implement within its available resources, a comprehensive and coordinated programme to realize progressively, the rights of pregnant women and their newborn children to have access to health care service to combat MTCT of HIV, alongside, appropriate testing counseling. The court also ordered the government to, amongst others, remove restriction on the availability of nevirapine at public hospitals and clinics that are not research and tanning sites, and to permit and facilitate the use of the drug throughout the public health sector, when the drug is medically indicated. The court did not preclude government from adapting its MTCT policy in a manner consistent with the constitution whenever the need arose.

Notes to Chapter Six

87. Geoff Budlender, "The Public Interest Movement in South Africa: Law as a means of promoting Social Justice" in *Justice for the Poor: Perspectives on Accelerating Access* (eds). Ayesha Dias and Gita Welch UNDP, 2009

88. [1918] AD 616, 623

89. [1975] (1) SA 255

90. "This South African Bill of Rights includes, among other rights, the right to an environment not harmful to health and well being, right to housing, health, sufficient water and food. The way the right is framed and subsequent legislation giving content to this right have all practically given a measure of rights to the environment and animals that can be enforced by environmental organisations and concerned citizens without them showing any particularized interest or injury suffered as a result of the impugned action or inaction. If a public interest organization seeks to bring litigation, it must obviously show that one of its objectives is to protect the environment, that is, that it was established to further the interests of environmental protection in one way or the other. - "Tumai Murombo, 'Strengthening locus standi in public interest environmental litigation: Has leadership moved from the United States to South Africa?' in 6/2 Law, Environment and Development Journal (2010), p. 163, accessed online at http://www.lead-journal.org/content/10163.pdf on 23/04/12 (footnotes omitted).

91. Tumai Murombo, op.cit.

92. 1996 (3) SA 1095 (Tk)

93. The first applicant was the Wildlife Society of Southern Africa and the second was its Conservation Director. The third and fourth applicants were two lawful occupiers of cottages located on the coast and members of the (Wild) Coast Cottage Owners' Association.

94. [2009] ZACC 30, Case CCT 43/09, Date of Judgment: 9 October 2009. This decision can also be accessed at http://www.saflii.org/za/cases/ZACC/2009/
30.html. The case summary is considerably in the form provided in the Constitutional Court's website.

95. They also challenged the validity of the City's Credit Control By-laws not only to customers of City Power but to any person whose rights would be materially and adversely affected by the termination of electricity supply. Electricity supply in the City was also regulated by its Electricity By-Laws (1999).

96. [1999] ZACC 3; CCT 8/99 . Decided on 1 April 1999. This case can also be accessed on the webpage

97. In relation to the proper interpretation of the phrase 'ordinarily resident' in so far as it relates to prisoners, the court held that this phrase is not a term established in our law that the word 'residence' must be interpreted in its context. Its meaning depends on the context in which it is used and the purpose it is intended to serve. The phrase must therefore be interpreted in a way which facilitates both the constitutional and legislative objectives.

98. The case summary is considerably in the form provided in the Constitutional Court's website

99. (CCT9/02) [2002] ZACC 16; 2002 (5) SA 703; 2002 (10) BCLR 1075 (5 July 2002)

Chapter Seven

Public Interest Litigation in Nigeria

Pubic interest litigation in Nigeria does not recount an early history, notwithstanding the emergence of a legal system that dates far back to British colonial rule in the 19th century, and in spite of the peculiar challenges of colonialism. This is not surprising given that until the Independence Constitution of 1960, there really was no constitutional protection of human rights in Nigeria and the struggles for independence were mostly waged on the political platform. The reason is not farfetched as the idea of a constitutional Bill of Rights only emerged in 1957 when the Willink's Minorities Commission of 1957 made recommendations for the inclusion of a bill of rights in the Independence (Nigerian) Constitution of 1960 - in line with the provisions of the European Convention on Human Rights.[100]

The period between 1957 and 1979 did not witness any remarkable breakthroughs in the use of PIL to demand governmental accountability, respect for the rule of law or to secure other social benefits for the people. In spite of the existence of a Bill of Rights in both federal and regional Constitutions, early efforts drew blank because of the effect of the doctrine of locus standi. Attempts by few lawyers to challenge the constitutionality of statutory and subsidiary legislations on the premises that they violated human rights foundered against the invocation or application of the locus doctrine as the Federal Supreme Court (as it then was) had no hesitation deciding that the applicants showed no “peculiar” or “sufficient” interest or

suffered no peculiar injury as to warrant judicial review of the legislative and executive actions in question.[101] The tyranny of the locus standi doctrine continued to cordon-off access to the courts, with the courts narrowly defining their own role until the 1970's. At this time, suits against the government could only proceed with the consent of the government itself, by virtue of the Petition of Rights Act of 1958 (as Amended) in 1964.[102]

The Military Era and Public Interest Action

Apathy for litigations in the public interest was tempered by an increasingly assertive Supreme Court, which in 1970 decided the epochal case of *Lakanmi Kikelomo v. AG Western Region*.[103] Lakanmi's case would not pass for a PIL in the way we presently understand the concept, but it signaled the emergence of a Supreme Court that was ready to take on government and reaffirm the supremacy of the rule of law; to awaken courts to a new possibility of utilizing law to confront the excesses of absolutist or authoritarian government and uphold such rights of citizens as are afforded by law. The Supreme Court held in the case that the federal military government's Decree No 1 of 1966, which constituted its powers to govern, could not enable it usurp judicial functions and that Decrees directed to this end exceeded the exigencies of its necessity to govern or enact decrees.

Just as in *Ademolekun v. The Council of University of Ibadan* (where the Supreme Court insisted that the courts have the power to question the validity of a military edict[104]) the resoluteness with which the Supreme Court asserted its constitutional powers of judicial review to uphold the civil right of a citizen served as a rebuke to the notion that military dictatorship was unaccountable to law.

These decisions undoubtedly inspired resurgent thinking about what Nigerian courts can do towards securing governmental accountability and social justice if moved to do so. Thus, when ouster clauses were relied upon by subsequent military governments between 1984 to 1998 to forestall judicial inquiry into actions of those governments, courts were often well disposed to avoiding the harshness of those decrees, side-stepping a complex labyrinth of

ouster clauses in order to do so. In *Abacha v. Fawehinmi*[105] for instance, the Supreme Court ingeniously asserted courts' jurisdiction to hear a challenge to the military government's detention powers by relying on the African Charter on Human and Peoples' Rights[106] supremacy over the ouster provisions of Decree No 2 of 1984. Again, although the case was not canvassed strictly on a public interest platform, it reinforced the view that the courts would take a liberal view of civil liberties and while subjecting government to the rule of law and would be ready to extend that liberalism outwards when public law litigations were in issue.

It was not only the Supreme Court that was making serious judicial effort to resist tyranny: courts lower in hierarchy too, like the Court of Appeal and the High Courts were, likewise. In 1993, for example, a High Court was asked to stay execution of seven persons sentenced to death by a tribunal whose constitution and trial failed to satisfy key due process standards, pending the consideration of a Communication filed by a civil rights group – the Constitutional Rights Project (CRP) - to the African Commission on Human and Peoples' Rights on the conviction. The injunction imposed *pendente lite* by the Court prevented the execution of the seven persons until they were subsequently released by the military government. See *The Registered Trustees of the Constitutional Rights project v. Nigeria*.[107]

The history of PIL in Nigeria will not be completely rendered without mentioning the indefatigable vigour with which the late Chief Gani Fawehinmi (SAN), a prolific icon, resisted arbitrary actions of government that were arguably inconsistent with the rule of law using PILs - whether it was to force military governments to render an account of oil export earnings, or to challenge the misuse of public funds by the wife of a military president, her 'office' not being created by law, or to declare unconstitutional, the setting aside of 5% of the Federal Government allocation to all Local Government Authorities for the maintenance of traditional rulers. PILs brought by him, it has been said, were over three hundred cases.[108]

Public Interest Action Under the 1979 and 1999 Constitutions

Following Nigeria's return to democratic governance in 1979, new space emerged, both for civic activism and for judicial review of governmental actions: civil rights and rule of law activists took advantage of that space quickly, leading to a significant amount of PILs coming to court. Beginning with *Abraham Adesanya v. President of the Federal Republic of Nigeria*[109] cause activists took on what they perceived as unconstitutional governmental actions, and urged courts to invalidate them.

In Adesanya's case, the question was raised whether a Senator who had participated in proceedings in the Senate for the confirmation of the Chairman of the Federal Electoral Commission (but had objected to the confirmation), had locus standi to bring a legal action afterwards complaining that the appointment was unconstitutional. The Supreme Court held that he did not have *locus standi*. The floodgates of litigation however, did not open since Adesanya's case as conservative jurists had feared. In fact, not so much flood built up either as courts vacillated in many other subsequent cases over the true meaning of the Adesanya decision. However, in *Mom & Lawyers Alert v. Chairman Benue State INEC* [110] Tur. J of the Benue State High Court recognized the locus standi of a non- governmental organization to sue for the people of the State challenging the suspension of local government elections by the state government in 2003.[111] The 2007 decision of the Court of Appeal in *Ukaegbu v. Nigerian Broadcasting Corporation (NBC)*[112] complicated public interest groups' search for representative legitimacy because the court of appeal formulated a distinction between the right of access to court and the right to establish a right of action that is personal to the litigant. A number of subsequent decisions employed this distinction to throw out public interest group litigations on the grounds that the lead representatives of such actions were not the personal possessors of the rights they canvassed, and that they did not show harm or injury over and above any other citizen in Nigeria.[113] This state of affairs demanded more strategic intervention- like legislative support.

Building legislative Support for Public Interest Action

This vacillating judicial positions on the application of the *locus standi* doctrine inspired activists to explore legislation-backed platforms for PILs. Although there had been prior efforts to reform the Fundamental Rights (Enforcement Procedure) Rules[114] in the past, Access to Justice, a justice advocacy organization and the Nigerian Bar Association (NBA) worked collaboratively and pushed further for the reform of the rules, urging in the process for specific consideration of; a) the inclusion of liberal standing rules to aid public interest litigations; b) better legal space for representative actions and c) easier, faster procedures for enforcing fundamental rights in Nigeria. Their advocacy was fruitful and new Rules were made. The promulgation of the new Fundamental Rights (Enforcement Procedure) Rules 2009 ("FREP Rules") subsequently by (then) Chief Justice of Nigeria Justice Idris Kutigi ushered in long sought reforms, and moved ahead of the current state of jurisprudence at the time.

Article 3 (e) of the new Rules provides that:

> "the court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of *locus standi*. In particular, human rights activists, advocates, or groups, as well as any non-governmental organizations, may institute human rights application on behalf of any potential applicant".

Article 3 (d) is also very instructive and provides that the court shall proactively pursue enhanced access to justice for all classes of litigants, especially the poor, the illiterate, the uninformed, the vulnerable, the incarcerated, and the unrepresented.

What has emerged as Articles 3 (d) and (e) of the FREP Rules 2009 is the recognition that courts must be sensitive to the needs of the 'suffering poor',

'the weak' or the 'socially neglected' in whatever situations these vulnerabilities might be manifest, and should entertain no barriers in the way of efforts of those who feel called upon to mitigate the circumstances of these people. They also express the conviction that human rights, the rule of law and constitutional democracy would be meaningless if impediments of doubtful utility - like *locus standi* - are allowed to stand in the way to prevent the Constitution from providing tangible socio-economic benefits for citizens.

No doubt, the stage is now better set for engaging Nigerian courts in a more constructive partnership in the popular struggle for accountability and good governance, the rule of law and justice, for equitable policy-making and greater sensitivity and responsibility in the use of state power. How this engagement plays out in actual decisions will need to be seen, but the power has been given, and the space for activism extended.

Examples of Public Interest Litigations in Nigeria

i) *Senator Adesanya v. President of the Federal Republic of Nigeria*[115]
Senator Abraham Adesanya brought an action to challenge the appointment of the Chairman of the Federal Electoral Commission (FEDECO) on the ground that it was in contravention of certain provisions of the Constitution. At the Court of Appeal, the issue was raised whether or not Senator Adesanya had *locus standi* to institute the action as he had not shown any interest that could be regarded as “personal”, “peculiar” and “sufficient” in the seat of the Chairman of FEDECO. Although the Supreme Court was guided by its earlier decisions in *Gamioba v. Esezi* and *Olawoyin v. AG, Northern Nigeria*,[116] and with different reasons held that Senator Adesanya had not locus standi to bring the suit, the tenor of its opinions was, all together liberative, not dogmatic or doctrinaire. In a more general sense, the court sided with granting access to citizens, not blocking it.[117]

It is important to point out that Chief Justice Fatayi Williams called for considerable recognition of the socio-economic and socio-cultural realities of our local environment in interpreting our laws (including the Constitution).

ii) *Chief Gani Fawehinmi v. Colonel Halilu Akilu*[118]

Gani Fawehinmi, legal counsel of the late Dele Giwa, a journalist and the Editor in Chief of the *Newswatch* magazine (and who was assassinated by a parcel bomb suspected to have been delivered by agents of the military government) had submitted to the Director of Public Prosecution (DPP) a 39 page document containing all details of the investigation he had conducted which, he averred, implicated two serving army officers in the assassination - the Director of Military intelligence, and the Deputy Director of the State Security Service. Acting pursuant to section 342 of the Criminal Procedure Code, Gani Fawehinmi requested the Lagos State Director of Public Prosecution to exercise his discretion whether or not he would prosecute the respondents for the murder of Dele Giwa and, if he declined to prosecute, to endorse a certificate to that effect on the information submitted to him by Fawehinmi to enable him prosecute the respondents for the murder. The Director of Public Prosecution in his reply stated that he could not yet decide whether or not to prosecute until he receives a report of police investigation into the matter. Consequently, the Appellant filled an application to the High Court of Lagos state for leave to apply for an order of Mandamus to compel the Director of Public Prosecution make a decision.

The application was refused on the ground that he had no locus standi to make the application as he did not fall into recognizable consanguinity with the deceased as to constitute “sufficient” or “peculiar” interest affected by the death of Dele Giwa. His appeal to the Court of Appeal was refused, with the court calling him a 'busybody'. On further appeal to the Supreme Court, his appeal was allowed on the premise that the rights of a private prosecutor created by section 342 of the Criminal Procedure Law of Lagos State made every citizen his brother's keeper, and qualified anyone to protect any other person against crime. The Supreme Court unanimously expanded the meaning of consanguinity to include intimate friendship that is reinforced by a professional client /counsel relationship. Justice Kayode Eso said as follows:

"My Lords, the issue of locus standi has always been held as one of the utmost importance by this Court for in effect, it is one that delimits the jurisdiction of the Court, for in the interpretation of the Constitution, it is hoped that the courts would not possess acquisitive instinct and garner more jurisdiction than has been ascribed to it by the organic law of the land. It is this, I think, that has inhibited your Lordships, and rightly too, in being careful, as your Lordships should be, in threading carefully on the soil of locus standi. This is well and good. I hold the view, with utmost respect that as the Court has been made, by the Constitution itself, to be the guardian of that Constitution. The court has a constitutional responsibility, also legal and sociological, to interpret the provisions of the Constitution in the light of the socio-economic and cultural background of the people of this country.

For it is for those people's background that the Constitution is fashioned. Certainly, with respect, my Lords, this must be a major part of the functions of this court. What I am now urging is therefore an extension of what I had respectfully urged (in regard to fundamental rights) in *Ariori v. Elemo* (19830 1 SCLR 1 when I said "The courts in this country, especially this Court, being a court of last resort have a duty to safeguard fundamental rights". The extension should be from fundamental rights to the Constitution generally and criminal law. My reason in *Ariori v. Elemo* case[119] for broad interpretation was "Having regard to the nascence of our Constitution, the comparable educational backwardness, the socio-economic and cultural background of the people of the this country and the reliance that is being placed and necessity have to be placed as a result of this background on the courts, and finally, the general atmosphere in the country".[120]

iii) *Chief Gani Fawehinmi v. Federal Republic of Nigeria*[121]

This case was filed by the applicant challenging the decision of (former) Nigerian President Olusegun Obasanjo to pay some ministers salaries in US dollars. The issue of locus standi was raised against the applicant's standing to litigate a matter of general public interest, or to litigate a matter for which he showed no interest or injury above that of every other tax-paying citizen. In deciding the question of the applicant's standing, Aboki JCA observed and held as follows:

> "...Judicial function must primarily aim at preserving legal order by confining legislative and executive arms [of government] within their powers in the interest of the public and since the dominant objective of the rule of law is to ensure observance of the law, it can best be achieved by permitting any person to put the judiciary machinery in motion in Nigeria whereby any citizen can bring an action in respect of a public derelict. Thus, the requirement of locus standi becomes unnecessary in constitutional issues as it will merely impede judicial functions."

Once again, the Court of Appeal not only reflected the spirit and philosophy of the modern trend, it deepened the content of that philosophy by stating that the restrictions imposed by locus standi have become unnecessary in constitutional issues as it will not only bar access to court by aggrieved persons, but also impede the constitutional role of the courts as defenders of the Constitution and rule of law.

iv) *Mr. Gbemre (representating Iwherekan Community of Delta State, Nigeria) v. Shell Petroleum Development Company Nigeria Ltd& Others*[122]

The Applicant's brought an application for declaratory reliefs claiming that the constitutionally guaranteed rights to life and dignity of human persons provided in sections 33(1) and 34(1) of the 1999 Nigerian Constitution and reinforced by Articles 4, 16 and 24 of the Africa Charter includes the right to a

clean, poison-free, pollution free and healthy environment, and that the flaring of gas by the 1st and 2nd Respondents in course of their oil exploration and production in the Applicant's community was a violation of their fundamental rights as stated above. They further claimed that the failure of the 1st and 2nd Respondents to carry out an environmental impact assessment concerning the effects of their gas flaring activities in Iwherekan community was a violation of the fundamental rights of citizens of the community and that the provisions of the Associated Gas Re-injection Act which allows continued flaring of gas are inconsistent with the Applicants' guaranteed rights under the Constitution, including the right to life and dignity of human persons.

The Applicants summarized in their Affidavit that the 1st and 2nd Respondents have been engaged in massive, relentless and continuing gas flaring in their community without regard to its deleterious and ruinous consequences like pollution, respiratory-track infections and other health hazards. Their complaints included that the respondents merely concentrated on pursuing their commercial interest aimed at maximizing profits and averred that gas flaring in their communities polluted their environment, affected their health and livelihood, increased the risk of premature deaths, predisposed them to respiratory hazards (like asthma, cancer), as well as environmental mishaps like climate change and poor crop production.

The Court granted the declarations sought by the Applicants and made an order restraining the 1st and 2nd Respondents, their servants and workers from further flaring of gas in the Applicant's community and to take steps to end the flaring. The Court further ordered that the Attorney General of the Federation set into motion, after due consultations with the Federal Executive Council, necessary processes for the enactment of a Bill to speedily amend the relevant sections of the Associated Gas Re-injection Act and bring them in line with the provisions of chapter 4 of the 1999 Constitution in view of the fact that the continuous flaring of gas by the 1st and 2nd Respondents was inimical to health.

v) *SERAC (For and on Behalf of the Ogoni People) v. Federal Republic of Nigeria* (Communication before the African Commission)[123]

This Communication was filed by the Social and Economic Rights Action Centre and the Centre for Economic and Social Rights before the Africa Commission for Human Rights. The Communication alleged that: (i) the Nigerian Government: participated in oil, water and soil contamination of oil producing lands, thereby endangering the health of the Ogoni people, (ii) the Nigerian Government failed to protect the Ogonis from the activities of Nigerian National Petroleum Company and Shell Petroleum Development Company operating in their community and, instead, ordered its security forces to damage their homes, crops, etc, (iii) the government failed to undertake or permit studies of actual or potential environmental or health risks caused by the oil operations. The Commission found that the Federal Republic of Nigeria was in violation of Articles 2 of the African Charter on Human and Peoples' Rights (on equality of rights of persons), Article 4 (the right to life), Article 14 (the right to property), Article 16 (the right to health), Article 18(1) (the right to family life), Article 21 (the right to freely dispose of their natural resources) and Article 24 (the right to a healthy environment). The Commission further stated that the State had a duty to ensure that social and economic rights are respected, protected, promoted and fulfilled.

Notes to Chapter Seven

100. Abiola Ojo, *Constitutional Law and Military Rule in Nigeria* (Ibadan: Evans Brothers (Nigeria Publishers Ltd), (1989), pages 247 – 248.

101. See the 1961 decisions of *Gamioba v Ezesi* and *Olawoyin v AG Northern Region* [1961] All NLR, 584 and [1961] All NLR 269 respectively

102. *Chief Aminu Are v. AG, Western Region* [1960] WNLR, page 108; *Mezville Roberts v. Alhaji Sule Katagum* [1968] NILQ, vol 3, page 113

103. [1970] NSCC, Vol 9, page 143

104. 'Edicts' were laws made by the military governments of respective States, while 'Decree' was that made by the ruling federal military government.

105. [2001] CHR, 20

106. Cap 10 Laws of the Federation 1990

107. 3 International Human Rights Reports (1996) 137, or Communication No 87/93, or Suit No /102/93

108. "Public interest lawyering in Nigeria" – a paper delivered by Professor Ademola Popoola, Dean of Law, Obafemi Awolowo University Ile Ife, at Access to Justices sensitization Workshop on Public Interest Litigation in Nigeria, August, 2009.

109. [1981] 2 NCLR,358. This case is significant because of its treatment of the threshold question of locus standi which, as later litigations showed, would constitute the most important impediment to PILs. Although most Justices of the Supreme Court in that case seemed to favour the need for an

applicant to show locus standi or "sufficient interest" or "justiciable rights" before litigating on public interest causes, their respective reasoning and rationales varied considerably. In other words, there were enough differences within the spectrum of opinions to justify virtually any interpretation of the case.

Several cases afterwards leaned towards a more liberal interpretation of the Adesanya decision, deciding that courts should not preclude any citizen from challenging the constitutionality of acts act of government which affect his civil rights - even if the right in question is shared in common with other citizens. See *Hassan v AG Kaduna State* (1984) 5 NCLR 235, *Attorney General Bendel State v. AG Federation* (1982) 3 NCLR, p. 1, *Gani Fawehinmi v. Akilu & Togun* [1987] 12 S C, p. 320, *Badejo v. Federal Minister of Education* [1990] 4 NWLR (Pt 143) page 254, *Nnamani v. Nnaji* [1997] 7 NWLR (Pt 610) p 313, *Owodunni v. Registered Trustees of CCC* [2000] 10 NWLR (Pt 675) 315, *Shell Petroleum v. Nwauka* [2001] 10 NWLR (Pt 102) p. 83, *Fawehinmi v. Federal Republic of Nigeria* [2007] 14 NWLR (Pt1054) p 275.

110. Reported in [2007], *Cases on Human Rights* (CHR), p 279.

111. But in *Hurilaws v. Nigerian Communications Commission (NCC) & ORS* FHC/L/CS/39/2000, an action brought by HURILAWS to challenge an action of the Nigerian government in setting up an inter-ministerial committee to oversee the licensing of GSM operators contrary to the provisions of the Nigeria Communication's Act was lost because of lack of *locus standi*.

112. [2007] 14 NWLR (Pt 1055), p. 551

113. See the decision of Archibong. J in Rita Dibia v NBC (FHC/L/CS/492/2004) - where he relied totally on *Ukaegbu v. NBC* (supra)

114. These are rules of practice and procedure made under powers granted to the Chief Justice of Nigeria for the enforcement of fundamental rights enshrined in the Constitution.

115. *Adesanya v. The President* [1981] 2 NCLR 358

116. [1961] All NLR, 584 and [1961] All NLR, 269 respectively

117. Fatayi Williams CJN said:

"If, in a developing country like Nigeria, with a written Constitution, a

legislative enactment appears to be ultra vires the Constitution or an act infringes any of the provisions dealing with Fundamental Rights, who has locus standi to challenge its constitutionality? Does (or should) any member of the public have the right to sue? Or should locus standi be confined to persons whose vested legal rights are directly interfered with by the measure, or to persons whose interests are liable to be specially affected by its operation, or to an Attorney general who is a functionary of the Executive Branch?

I take significant cognizance of the facts that Nigeria is a developing country with a multi-ethnic society and a written federal Constitution, where rumour-mongering is the pastime of market places and construction sites. To deny any member of a society who is aware or believe, or is led to believe, that these has been an infraction of any of the provisions of our Constitution, or that any law passed by any of our Legislative Houses, whether Federal or state, is unconstitutional, access to a Court of law to air his grievance on the flimsy excuse of lack of sufficient interest to provide a ready recipe for organized disenchantment with the judicial process. The framers of our Constitution had all these factors in mind by providing for the many checks and balances which appear therein. In fact, a close scrutiny of its very detailed provisions will convince anyone that relies on the decisions, whether British, Australia, given in a different social and political context, will only lead to restrictive rules of locus standi which, in the interest of the need for total compliance with the provisions of our Constitution, I find it difficult to accept or countenance"

118. (1987) PART 2, NSCC, VOL 18, P. 1265

119. [1985] 6 NCLR, page 1

120. At pages 1300 – 1301

121. [2007] 14 NWLR (Pt.1054) 275 at p.334 paras. G-H,r [2001] Cases on Human Rights (CHR), p. 20.

122. *Ibid*

123. Extract from "Training manual on ESC Rights" by The Social and Economic Rights Action Center ;

PART THREE

Public Interest Litigation Across Other Jurisdictions

Chapter Eight

Public Interest Litigation Across Other Jurisdictions

Across the world, in particularly developing countries (and not only those with Common Law traditions but including those of Civil Law), PIL in its various forms and adaptations is expanding. This expansion can be seen in transitioning societies that have created new spaces for civic activism, and in older democracies where the courts are grappling with pressures to curtail overreaching social or economic policies, to defend vulnerable communities from exploitation by multinational mining or industrial corporations, and expand the protection of civil and political liberties, alongside social and economic rights in more meaningful ways. In *Zia v. WAPDA*,[124] the Pakistani Supreme Court on receipt of letter from citizens in that respect, found that the letter raised two questions, namely, whether any Government agency had a right to endanger the life of citizens by its actions without the latter's consent and whether zoning laws vest rights in citizens which could be withdrawn or altered without the citizen's consent. The Court held that citizens, under Art. 9 of the Constitution of Pakistan were entitled to protection of law from being exposed to hazards of electro-magnetic fields or any other such hazards which may be due to the installation and construction of any grid station, any factory, power station or such like installations. The court held that Article 184 of the Constitution, therefore, could be invoked because a large number of citizens throughout the country could not make such representation and may not like to make it due to ignorance, poverty and disability. Considering the gravity of the matter which could involve and affect the life and health of the citizens at large, notice was issued by Supreme Court to the Authority.[125] According to the Court;

> Article 9 of the Constitution provides that no person shall be deprived of life or liberty save in accordance with the law. The word "life" is very significant as it covers all facts of human existence. The word "life" has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally. For the purposes of present controversy suffice it to say that a person is entitled to protection of law from being exposed to hazards of electromagnetic fields or any other such hazards which may be due to installation and construction of any grid station, any factory, power station or such like installations.

In *Dr. Mohiuddin Farooque v. Bangladesh and Ors*,[126] the Bangladesh apex Court conceded standing to an environmental group, the Bangladesh Environmental Lawyers Association to challenge the activities and implementation of a Flood Action Plan (FAP) -20 undertaken in the District of Tangail because, as the group claimed, the Plan would damage the soil, destroy the natural habitat of fisheries and other flood plain, flora and fauna and create drainage problems as well as threaten human health. The court held that PILs contribute to sustaining the rule of law, further the cause of justice and accelerate the pace of realization of constitutional objectives.

In Malaysia, as Gurdial Singh Nijar reports, the Indian Supreme Court decisions on the expanded definition of 'life' were incorporated through case law into its constitutional jurisprudence.[127] Nijar further informs us that the Sri Lankan Supreme Court has adopted a similar position. Referring to *Bulankulama v. Ministry of Industrial Development*, the author says the Court "anchored its decision on significant pronouncements on sustainable development and the incorporation of international treaties in domestic law."

Continuing, the author writes that in the "... Eppawela case in 2000, the Sri Lankan Supreme Court found that a Government proposal to lease a phosphate mine to an American company for 30 years conflicted with principles of sustainable development and had not been subject to adequate environmental assessment. It emphasised the

importance of public access to environmental information, drawing on the policies of the European Commission and the Rio Declaration to provide positive content to the fundamental rights guaranteed by the constitution".

In *Major (Res.) Yehuda Ressler v. Minister of Defence*,[128] the Israeli Supreme Court, sitting as the High Court, granted standing to petitioners in the Army Reserve Service who claimed that "their army reserve service is prolonged as a result of the extensive deferment, amounting to exemption, of Yeshivah students from military service and that the burden of reserve service for them and others in their position would be considerably alleviated if Yeshivah students were recruited into full-time military service."[129]

In Gambia, any citizen has *locus standi* to go to court to challenge an unconstitutional act by virtue of the decision of the Supreme Court of Gambia in *United Democratic Party (UDP) & Ors vs. The Attorney General of The Gambia*.[130] Also in Ghana, any citizen of Ghana has standing to bring an action to declare an act of

"Public interest law advocates in Israel have also filed dozens of lawsuits before the Supreme Court to strengthen and expand that country's legal protection for marginalized people. Through such litigation before the Supreme Court, the Association for Civil Rights in Israel (ACRI) has slowly helped develop human rights jurisprudence in Israel. Its landmark victories include cases involving gender equity, freedom of information, gay and lesbian rights, and freedom from discrimination."

"In September 1999, ACRI and other groups won a historic victory on behalf of Palestinians when the Supreme Court outlawed use of physical force by Israeli security officers during interrogations. For years, human rights organizations had contended that Israeli security often abused Palestinians who were detained for questioning. Although public interest lawyers had brought dozens of cases, the court had avoided making a precedent-setting ruling. In May 1998, the Court agreed to address the legality of the interrogation methods, and it heard a series of petitions brought by ACRI and other public interest law groups. By now, each of the nine justices had heard many such cases in which ACRI had marshaled important facts during its years of litigation. The Court's September ruling constituted a major legal step toward more equitable treatment of Palestinians and an affirmation of human rights principles more generally."

- Helen Hershkoff
& Aubrey McCutcheon

government as unconstitutional. That was the decision of the court in *Tuffuor v. Attorney General.*[131] A litigant does not have to show how the act affects him personally; once it involves a violation of a constitutional provision, any person or organization can challenge the act. In Tanzania, private citizens are conferred with the right to initiate public interest litigation by law. Proceedings may be instituted by any public spirited individual to challenge either the legality of public decisions or actions or the consistency of legislation with the constitution. The enabling law is the Basic Right and Duties Enforcement Act which permits any citizen to file a public interest litigation by way of petition. The court may permit the parliament in the case of a law to correct the law or may make any order necessary and appropriate to secure the enjoyment of basic rights, freedoms and duties. England is also warming up to public interest litigations and recognizing standing of individuals and public interest groups to litigate for the public good by challenging governmental actions or policies where they diminish or undermine the public interest; this progress is seen in the relaxation of stringent *locus standi* requirements hitherto applicable to lawsuits of this nature. Writing on this development, D. G.T. Williams said:

> In deciding whether to grant leave to apply for judicial review, the High Court is obliged to consider whether the applicant "has a sufficient interest in the matter to which the application relates. Different rules of standing existed for each of the prerogative orders prior to 1977, but the move toward liberalisation of standing rules, typified by Lord Justice Lawton's observation that "courts have come a long way . . . in allowing grievances against persons performing public duties and exercising statutory powers to be given a hearing in the courts,' had affected prerogative orders as well as some other remedies. A striking example of this liberalization was *Regina v. Greater London Council, ex parte Blackburn,* in which the Court of Appeal, in a case concerning cinema licences and allegedly indecent films, held that the applicants had standing to seek an order of prohibition.
>
> In his judgment, Lord Denning MR emphasised that one of the applicants "is a citizen of London. His wife is a ratepayer. He has children who may be harmed by the exhibition of pornographic

> films. If he has no sufficient interest, no other citizen has. Lord Denning repeated his assertion in an earlier case about the constitutional importance of ensuring access to the courts when "'a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects.'[132]

In *R (Gregan) v. Hartlepool Borough Council,* decided in 2003, a British company (Able UK), was commissioned by the US government to scrap 13 'ghost ships' containing environmentally threatening waste products. The site in Hartlepool, where the ships were supposed to be scrapped, was adjacent to sensitive wildlife habitats protected under European and international law. The site's original planning permission only allowed for the dismantling and refurbishment of oil platforms and other marine structures. Public Interest Lawyers, a UK nongovernmental organisation acting on behalf of local residents, successfully brought a public interest law suit against Hartlepool Council and Able UK in the High Court. The court ruled that the Environment Agency's decision to modify Able UK's original waste management licence was unlawful - as it did not consider the effect that dismantling the ships might have on nearby internationally protected wildlife sites.[133]

Notes to Chapter Eight

124. P L D 1994 SC 693. The facts of the case, (in edited form), and text of judgment were taken from the website of the Environmental Law Alliance Worldwide (ELAW), http://www.elaw.org/node/1342.

125. With the consent of both the parties Court appointed Commission to examine the plan and the proposals/schemes of the Authority in the light of complaint made by the citizens and submit its report and if necessary to suggest any alteration or addition which may be economically possible for construction and location of the grid station. The Supreme Court further directed that Government should establish an Authority or Commission manned by internationally known and recognized scientists having no bias and prejudice, to members of the Commission whose opinion or permission should be obtained before any new grid station was allowed to be constructed. The Authority, therefore, was directed by the Supreme Court that in future, prior to installing or constructing any grid station and/or transmission line, it would issue public notice in newspapers, radio and television inviting objections and finalize the plan after considering the objections, if any, by affording public hearing to the persons filing such objections. Such procedure was directed to be adopted and continued till such time the Government constituted any Commission or Authority as directed by the Court.

126. 1997 B.L.D. 17, P 33; also, [2002] 2 CHR,569

127. The author cites cases such as Tan Teck Seng [1996] 1 MLJ 261(CA); Hong Leong Equipment [1996] 1 MLJ 481(CA) and *Ketua Pengarah Jabatan*

Alam Sekitar & Ors v Kajing Tubek & Others [1997] 3 MLJ 23 (CA). See "Public Interest Litigation: A Matter of Justice. An Asian Perspective" accessed at http://www.aseanlawassociation.org/9GAdocs/Malaysia.pdf on 19/04/12.

128. HCJ 910/86; the text of this decision can also be found at http://elyon1.court.gov.il/files_eng/86/100/009/Z01/86009100.z01.pdf, accessed on 19/04/2012.

129. Barak J, wrote "Accordingly, I accept Dr. Segal's approach, that the "public petitioner" should be recognized "when he or she points out a matter of particular public importance, or what appears to be a to an apparently particularly serious flaw in the authority's action, or to the fact that the action assailed is of particular importance" (Segal, in his book supra, at page 235). Nonetheless, these should not be viewed as a closed list of "exceptions", but rather as mere signposts which reflect the proper borderline between the High Court of Justice engaging in judicial review and refraining therefrom. Indeed, the point of departure guiding me is the fundamental outlook - which Justice Berinson stressed nearly twenty years ago - that this Court is the citizen's safest and most objective refuge in his dispute with the government" (H.C. 287/69 [6] supra, at page 362), and that the role of the High Court of Justice is to ensure the realization of the principle of the rule of law. Closing this Court's doors before the petitioner without an interest, who sounds the alarm concerning an unlawful government action, does damage to the rule of law. Access to the courts is the cornerstone of the rule of law (see G.L. Peiris, "The Doctrine of Locus Standi in Commonwealth Administrative Law"[1983] Pub. L.52,89). Lord Diplock stressed this in the *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd.* (1982) [72] case, at 644:

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

23. Indeed, according to my outlook, courts in a democratic society should undertake the role of safeguarding the rule of law. This means, inter alia, that it

must impose the law on governmental authorities, and ensure that the government acts in accordance with the law; this conception of the judicial role does not contradict the principle of the separation of powers and the role of the court within the confines of this principle. On the contrary: this approach is supported by the principle of the separation of powers and the rules thereof. In modern times, this principle means checks and balances between the various authorities (see President Shamgar's statement in H.C. 306/81 [21], at page 141, and also A. Witkon, Politics and Law (Hebrew University of Jerusalem, 5725) 71"

130. (Unreported) Suit No S.C.C.S. NO: 3/2000, a judgment delivered on February 14, 2001.

131. (1980) G.L.R. 637

132. D. G.T. Williams, *Administrative Law in England: The Emergence of a New Remedy*, 27 Wm. & Mary L. Rev. 715 (1986), http://scholarship.law.wm.edu/wmlr/vol27/iss4/7. Accessed 20/04/2012.

133. The case summary was adopted from Profiles of Tools and Tactics for Environmental Mainstreaming (No. 3), accessed at http://www.environmental-mainstreaming.org/documents/EM%20Profile%20No%203%20-%20Public%20Interest%20Litigation%20(6%20Oct%2009).pdf

PART FOUR

Advancing Public Interest Litigation

Chapter Nine

Advancing Public Interest Litigation

As the foregoing comparative narrative shows, what is meant by PIL in terms of construct, usage and characteristics differ, sometimes widely, across jurisdictions, but the sense in which PIL is understood, particularly amongst activists, scholars and jurists across much of the world now is coalescing around a dynamic access to justice concept or artifice, representing anything necessary to be done to alleviate specific human rights, environmental or developmental problems through the legal process. This way, PIL has come to represent a moral ideology to serve the common good of people who otherwise may continue to suffer unabated hardships within a given status quo; some sort of way the legal system and its resources can respond to the social and economic needs of the suffering majority whose voices and needs are underrepresented in, and unmet by the political system.[134]

PIL is embraced as tool for remedying social, economic and environmental problems of society in the form where the judiciary plays an active part in the effort. Therefore PIL proceedings not only create spaces for public spirited activists, individuals or lawyers to champion public interest causes, they offer Judges a chance to get involved in social justice struggles. In this way, judging becomes less distanced from the actual life of society, and less indifferent to social policy making, and Judges are better able to engage with policies or actions that hurt people, disenfranchise them or encroach upon their rights and truly become the defenders of the Constitution.

Shutting the door against PILs had always been a convenient juristic strategy to avoid questioning those who rule the social policy landscape or interrogating the policies they make; deciding that plaintiffs in PILs do not have locus standi to challenge policies or actions of government is, oftentimes therefore, a euphemistic expression of a lack of desire to engage tough social or economic questions whose resolution may have unpredictable or undesired effects. Whenever there is a shift of thinking or perspective, a judiciary will often see great value in public interest actions. PILs open new door to the Judiciary to enforce the values and principles of the Constitution alongside domestic and international human rights norms in ways that could often bring about the greater good for a greater number of people. As Cummings, Scott L and Rhode, Deborah L noted:

> Litigation is a key strategy for protecting the rights and enlarging the power of subordinated groups, particularly when other channels of influence are unavailable. Groups hobbled by discrimination or collective action problems may turn to courts as allies in the struggle for social justice.[135]

The responsibility of enforcing constitutional rights is, undoubtedly, the province of the Judiciary, and many PILs seek just this – to enforce constitutional rights! Accepting this as the main objective, some judiciaries have even gone further to find ways of achieving that objective independently of the conventional litigation process. In some Asian countries, Judges are taking the lead, and are conducting PIL cases even without waiting for lawyers to litigate the cases. And some of the key exponents of PILs (or Social Action Litigation as they characterize this) make no pretenses about this and base their actions on achieving the objectives of the Constitution.

PIL is also a way of engaging the Judiciary in the business of filling gaps left by branches of government responsible for designing and enforcing social policy, to attend to those cases the legislature and executive have either overlooked, condoned or side-stepped.

As PIL advances, it will involve courts in resolving critical social, economic, political and environmental challenges in society, and increasingly bring the judicial process in conflict with those branches of government which, by constitutional definition and political tradition, have first-line responsibility for articulating policy on social, political and economic matters: it will increasingly take courts towards more contested peripheries of power, and risk escalating the resentment already felt by political office holders and their bureaucrats towards it for its "excesses". As Radhika Coomaraswamy puts it:

> "[t]he courts were suddenly presented with numerous cases involving constitutional principles and found that they had to react accordingly. The surge in constitutional activity paralleled a disenchantment with representative legislatures whose preoccupation with "expediency" and "majority interests" prevented them from taking special care in protecting the rights of minority groups or individual citizens. It was also augmented by a frustration with an executive bureaucracy which often appeared to be implementing legislation in an 'irrational' and 'unreasonable' manner."

Many Supreme Courts, he said:

> "... were propelled forward by citizen groups which had become increasingly aware that the fora for the exercise of legislature and executive power were unresponsive to certain types of issues. John Hart Ely's remark that 'Constitutional Law appropriately exists for those situations where representative governments cannot be trusted' reflected the attitudes of members of the bar who were committed to social justice through judicial action."[136]

How far will PILs require the courts to go in search of sustainable solutions to the problems of underrepresentation of vulnerable groups, and where should

a line be drawn between the interpretation of the Constitution and the 'judicial' making of policy in a constitutional democracy? When will it be legitimate for the courts to require government to set up, for example, standing commissions to protect specific people where elected governments have not 'elected' to prioritize such protections? Or to what extent will it be legitimate for courts to require governments to make fiscal appropriations in order to provide shelter for homeless communities? Will political branches rebuff the courts harshly in the new direction some of them are already going with PILs?.

Political theories prevalent in Western societies maintain that unelected and politically unaccountable Judges should not stray into the policymaking zone because that would violate the principle of democratic accountability of representative government, and will intrude into the power the electorate retains in a democracy to hold elected representatives accountable for the policies they make, and to vote them out if they pursue policies that are not favoured by the majority. Asking Judges who are not accountable to the electorate to stray into the policymaking arena is, therefore, according to this theory, antithetical to democratic principle and practice.

> "In a representative democracy value determinations are to be made by our elected representatives, and if in fact most of us disapprove we can vote them out of office. Malfunction occurs when the process is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will say out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system."
>
> - John Hart Ely,
> Democracy and Distrust:
> A Theory of Judicial Review

Responses are still evolving to concerns like this, but some of the justification will be rooted in the constitutional mandate: the Constitution, it can be argued, requires courts to enforce its provisions in ways that make real meaning for those it is intended to benefit. A remedy which a court orders, after determining a PIL case, is a remedy necessary to vindicate the court's

powers secured to it by the Constitution as well as enforce the rights of those who have come to court. Other justifications will inexorably reach to and implicate a number of countervailing political considerations relevant to the needs of developing countries, considerations such as the educational, social and economic circumstances of the majority of the people who make up society but who cannot effectively hold those in power accountable through the electoral process, in the first place.[137] As former Nigerian Supreme Court Justice Kayode Eso said, in his opinion in the Adesanya case;[138]

> I hold the view, with utmost respect that as the Court has been made, by the Constitution itself, to be the guardian of that Constitution. The court has a constitutional responsibility, also legal and sociological, to interpret the provisions of the Constitution in the light of the socio-economic and cultural background of the people of this country.

In any event, anecdotal evidence shows that in some of the places where these risks have been present for some time, political branches of government are accommodating activism and assertiveness by courts and are doing fairly well with complying with courts' directives and orders; in India for example, the executive has gone so far as to make appropriations of budgetary resources necessary to carry out PIL judicial directives.

"Some commentators have suggested that the Court's role in protecting minorities should consist only in removing barriers to their participation in the political process. We have seen however – and the realization is one that threads our constitutional document – that the duty of representation that lies at the core of our system requires more than a voice and a vote. No matter how open the process, those with most of the votes are in a position to vote themselves advantages at the expense of the others, or otherwise to refuse to take their interests into account. 'One person, one vote,' under these circumstances, makes a travesty of the equality principle."

- John Hart Ely,
Democracy and Distrust:
A Theory of Judicial Review

Will PILs always and consistently be aligned to, and be about the interests of the larger public, as distinct from more insular, parochial interests? Maybe

not! It is foreseeable that insular interest groups may also attempt to block policies intended to benefit the greater public good by using PIL strategies as well, and courts will sometimes be involved in delicate balancing acts to reconcile conflicting interests of these diverse group aggregations from time to time in many societies.

Judicial Philosophy Can Play Decisive Role in Shaping Future of PIL

More progress in utilizing PIL across legal systems as well as within them will be seen proportionally to how quickly Judiciaries liberalize standing requirements in public law litigations and create juridical tools to enforce litigation decisions and orders. It is therefore, no coincidence that in countries where this has been achieved, PIL activism and its legacy has been stronger, and the dividends richer. Yet, getting to this point may require an ideological shift of some sort among Judges, some evolution of thought and personal conviction among Judges, of the role of law in society generally, or in particular to developing societies, and the role of those who interpret law and give it life. If Judges do not, at some moment in time, interrogate their thinking about the function of law in society and question how law is fulfilling that function in their societies, change may be slow in coming.

Prof. Gloppen puts it analytically, thus:

> "How legal norms are interpreted in a particular case is also linked to the individual judge's personal, ideological, and professional values. These values combine with the legal culture to shape the judge's perception of his or her role, the understanding of what is the appropriate way to deal with social rights, and the extent to which social rights are within the proper domain of the courts. The judges' sensitivity — individually and collectively — to the concerns of marginalized people is crucial to their interpretation of the law. Training and experience shape this consciousness, but the composition of the bench (the judges' social, cultural, and ideological background; their legal education and

> professional qualities; and their integrity and commitment) has the most profound influence. Studies conducted in Argentina, Colombia, and India conclude that appointment of judges who are sensitive to the suffering of disadvantaged groups significantly favors courts' responsiveness to social rights (Gargarella, Domingo, and Roux 2006). Institutionally, the composition of the bench is a function of the system and criteria for appointment of judges. Inclusive and transparent appointment systems may create more diverse and socially sensitive courts, but formal procedures do not necessarily change courts' responsiveness to the concerns of the poor—and more responsive courts have come about without changes in the appointment procedures"[139]

Going further, Goppen notes that:

> Gargarella, Domingo, and Roux (2006) conclude that many of the cases they have looked at show that judges who are willing to take an active role regarding social rights manage to create new instruments or to find solutions even in the midst of poverty, inequality, and social tension. Indian judges developed a series of new mechanisms to better address what they held to be socially relevant cases: epistolary jurisdiction was introduced to provide easy access to the court; special commissions of inquiry were created to overcome problems related to establishing facts; and traditional legal remedies were supplemented with monitoring agencies in charge of enforcing court orders. (Hunt 1996). South Africa's Grootboom case on the right to housing is an example of how a creative court can decide social rights claims. Here, the court ordered the state to "devise a comprehensive and workable plan" to meet the needs of people in desperate need (see Gloppen 2005; Roux

(2004). Examples from Colombia and Costa Rica similarly demonstrate the creativity of constitutional courts in finding new legal remedies to be applied in social rights cases (Gargarella, Domingo, and Roux 2006; Wilson 2005).

Former Indian Chief Justice P.N. Bhagwati tells us that the Indian Supreme Court turned a whole new direction because "... keenly alive to its social responsibility and accountability to the people of the country..." it "liberated itself from the shackles of Western thought, made innovative use of the power of judicial review, forged new tools, devised new methods and fashioned new strategies for the purpose of bringing justice to socially and economically disadvantaged groups."[140] In other words, the court debated its role in its society and reached a judgment of the goals it must deliver to the Indian people. In the nineties, the Nigerian Supreme Court was walking in the same direction, saying that courts must be conscious of the social, political and economic environment within which it interprets the law and enforces the Constitution.

Lawyers or cause activists also have a profound role to play, of course. Coomaraswamy again puts it remarkably, saying: "No Supreme Court is ahead of the Bar which serves it. Unless members of the legal profession take the initiative, it is unlikely that a Supreme Court will make a necessary contribution to the needs of a changing society."[141]

Notes to Chapter Nine

134. As Helen Hershkoff says: "the social technology of public interest litigation seems to have developed in many different countries, drawing on common background issues, but within specific conditions, taking different shapes and assuming indigenous forms.... But it is also important not to lose sight of the indigenous forces and extraordinary variegation that currently mark public interest litigation around the world. Supra, at page

135. "Public Interest Litigation: Insights from Theory and Practice" UCLA Public Law Series, UCLA School of Law, UC Los Angeles (2009), accessed online at http://escholarship.org/uc/item/0mj8r4hc on 23/05/2012

136. Radhika Coomaraswamy "Toward an Engaged Judiciary" in *The Role of the Judiciary in Plural Societies*, *op.cit*. page 3.

137. Helen Hershkoff makes the point that: "[l]itigation is an important participatory activity that complements and supports electoral politics; for marginalized groups, litigation sometimes offers the only, or least expensive, entry into political life at a given time. The shared act of litigation, the temporary coming together in the collective of a plaintiff-class, contributes to a sense of public purpose and builds social capital by encouraging trust and cooperation" in "Public Interest Litigation: Selected Issues and Examples", *op.cit*, p. 14

138. *Supra*

139. Gloppen, *ibid,* p. 9

140. "Social Action Litigation: The Indian Experience", *ibid,* at page 20.

141. *Ibid* page 15.

Chapter Ten

Conclusion

The court is the last hope of the common man, so the cliché goes. But the experience has not always leveled up with the platitude. If courts must remain 'hope' rather than 'dope', if the courts must hold out real hope for 'common' people and not merely secure the ways of life of the uncommon, then its doors should be open for 'common causes'. Litigating for the common cause should have a free course, and courts should warm up to causes brought to advance and preserve the common interest. For it is indeed, a way to litigate for social justice!, As former Indian Chief Justice, P.N. Bhagwati puts it; "a modern judiciary can no longer obtain social and political legitimacy without making substantial contributions to issues of social justice." Public interest litigation, whether so expressed or represented by any of its associated forms, acts as a moral force for the public good, galvanizing available resources of law and power to improve conditions of human existence or prevent foreseeable danger to such existence in the various forms and circumstances in which these human needs arise. PILs help to bring governance to terms with those whose circumstances and interests are obscured by governance policies or underserved by them.

As the forgoing literature suggest, the future of PIL in developing countries is promising and bright as judiciaries grapple continuously with pervasive and sometimes overwhelming social problems of denial, want and destitution still pervasive in many societies. Where courts have not been quick enough to

expand the space for PIL activism, legislative reforms are, in some cases, moving right ahead of courts and paving the way for courts to feel more comfortable in engaging public interest cases. This has been the development in Nigeria and South Africa, as well as Ghana and Uganda.

Society is evolving at a hectic, sometimes, chaotic speed, and so are inequality gaps in economic, social and political spheres in many developing countries. Social pressure is coalescing, therefore, towards making available state resources more equitably distributed and governance institutions more open and transparent, accountable and accessible. Whether arising from a sense of disillusionment, enlightenment or empowerment, there is more audible insistence, in many countries for good governance which, when translated, means less corruption, indifference and waste, better resource husbandry, prudence and development benefits. PILs have helped to create platforms that enable activists vocalize these demands for good and accountable governance in various forms, particularly when politically representative institutions have been less inclined to do so; sometimes the PIL contribution has been primarily to create this space, this letting out and expression of grievance, a right taken for granted in many countries but denied in many others. Without this space, it becomes harder to exercise political rights or to canvass political change. So in this way, PIL aligns itself with broader political campaigns for civil or political freedom. In other ways, it can help achieve goals, however imperfectly, that would have required other significant sacrifice to secure, particularly through difficult political mobilization. Its results come without the blood, carnage, conflict (military or civil) or upheavals that oftentimes accompany political struggles.

Useful resources and links

India: Public Interest Litigation (Survey 1997 - 1998)
www.ielrc.org/content/a9802.pdf

"Public Interest Litigation: Selected Issues and Examples – Helen Hershkoff
http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/PublicInterestLitigation%5B1%5D.pdf

Private Public Interest Environmental Law: History, Hard Work, and Hope – John E. Bonine
http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1562&context=envlaw&sei-redir=1&referer=http%3A%2F%2Fwww.google.com.ng%2Furl%3Fsa%3Dt%26rct%3Dj%26q%3DPrivate%2BPublic%2BInterest%2BEnvironmental%2BLaw%3A%2BHistory%252CHard%2BWork%252C%2Band%2BHope%26source%3Dweb%26cd%3D1%26ved%3D0CE0QFjAA%26url%3Dhttp%253A%252F%252Fdigitalcommons.pace.edu%252Fcgi%252Fviewcontent.cgi%253Farticle%253D1562%2526context%253Denvlaw%26ei%3DAAvST96cOpOyhAeGldDcAw%26usg%3DAFQjCNEXb1k03T5BlWDPHgZumzsCdVPYTQ#search=%22Private%20Public%20Interest%20Environmental%20Law%3A%20History%2CHard%20Work%2C%20Hope%22

Class Action, Public Interest Litigation and the Enforcement of Shared Legal Rights and Common Interests in the Environment and Ancestral Lands in the Philippines - Justice Renato C. Corona, Justice Of The Supreme Court Of The Philippines
http://www.aseanlawassociation.org/9GAdocs/Philipines.pdf

Impact Fund Annual Report 2004: Strategic Public Interest Litigation for Social Justice
http://www.impactfund.org/documents/cat_4-41/2004annualreport.pdf

The Use of Social-Science in the Public Interest Litigation: A Role for Community Psychologists – Douglas D. Perkins
http://www.springerlink.com/content/m3x57q51k0k38010/

The Battle for Public Interest Law: Exploring the Orwellian Nature of the Freedom Based Public Interest Movement – Timothy L. Foden
http://www.law.uconn.edu/system/files/private/foden.pdf

Putting the Guesswork Back into Capital Sentencing – Sean O'Brien
_http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=850294

Legal and Institutional Constraints to Public Interest Litigation as a Mechanism for the Enforcement of Environmental Rights and Duties in Kenya – Odhiambo, Michael Ochieng
http://www.inece.org/5thvol2/odhiambo.pdf

A Brief Guide to Costs in Public Interest Litigation
http://www.qpilch.org.au/_dbase_upl/A%20brief%20guide%20to%20costs.pdf

Public Interest Litigation: Potential and Problems
www.ielrc.org/content/a0003.pdf

Arthur Liman Program: Public Interest Newsletter
http://www.law.yale.edu/documents/pdf/Intellectual_Life/2007_Liman_Newsletter.pdf

Public Interest Litigation in Uganda Practice & Procedure Shipwrecks and Seamarks by Phillip Karugaba
greenwatch.or.ug/pdf/news/SHIPWRECKS_AND_SEAMARKS.pdf

Public Interest Law – The pro bono Way: A View from South Africa by Odette Geldenhuys
http://www.flac.ie/download/pdf/pil9_ogeldenhuys_safrica_rntbl_30jun06.pdf

Judicial Activism and the Environment in India. Implications for Transnational Corporations by Pranay Lal and Veena Jha
Http://www.cseindia.org/sites/default/files/Judicial%20activism.pdf

UNEP Global Judges Programme Application of Environmental Law by National Courts and Tribunals Presentation 9remedies in Environmental Cases
Http://www.unep.org/DEC/PDF/trainingmodules/09_REMEDIES%20IN%20ENVIRONMENTAL%20CASES.pdf

From NAACP to LEAF: American Legal Exports to Canada – Ian Brodie
http://publish.uwo.ca/~irbrodie/l&srsubmission.pdf

The Changing Role of the Indian Judiciary
http://www.asienhaus.de/public/archiv/Chap3.pdf

EGM/GPLVAW/2008/EP.03: *Sexual Harassment and Law Reform in India* by Naina Kapur
http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/expertpapers/EGMGPLVAW%20Paper%20(Naina%20Kapur).pdf

Tanzania: Human Rights Advocacy and the Bulyanhulu Gold Mine by Tundu A.M. Lissu
http://www.eli.org/pdf/advocacytoolscasestudies/casestudy.tanzania.final.pdf

Loyola Journal of Public Interest Law Spring 2002 Article: *106 Guardians Ad Litem in Private Custody Litigation: The Case for Abolition* by Richard Ducote
www.thelizlibrary.org/liz/DucotearticleJuly2002.pdf

Strengthening *Locus Standi* in Public Interest Environmental Litigation: Has Leadership Moved From the United States to South Africa? By Tumai Murombo
http://www.lead-journal.org/content/10163.pdf

Opia's Guide to Conservative/Libertarian Public Interest Law
www.law.harvard.edu/current/careers/.../guide-conservative.pdf

Plaintiff Magazine: You win some; you lose some
http://www.plaintiffmagazine.com/May08%20articles/Bader_You%20win%20some%20you%20lose%20some_Plaintiff%20magazine.pdf

Public Interest Litigation as a Tool for Vulnerable Groups: Lessons from India by Dr. Joshua Castellino
http://www.flac.ie/download/pdf/pil6_jcastellino_pilatool_16jun06.pdf

Brochure - Friends of Land Air Water Updated 2/25/10
www.pielc.org/Brochures/2010.pdf

Public Interest Environmental Litigation in China: Lessons Learned from the U.S. Experience by Patti Goldman
http://www.vjel.org/journal/VJEL10055.html

Experience in England and Wales: Test Case Strategies, Public Interest Litigation, the Human Rights Act and Legal NGOs by Roger Smith
http://www.essex.ac.uk/armedcon/story_id/000696.pdf

One Billion Enforcers by Alex Wang
http://www.epa.gov/ogc/china/wang.pdf

Public Interest Litigation in China: A New Force for Social Justice
Http://www.clb.org.hk/en/node/50381

Some PIL Centres

Access to Justice
www.accesstojustice-ng.org

Environmental Rights Action/ Friends of the Earth Nigeria
www.eraction.org

Center for Science in the Public Interest
www.cspinet.org

The Center for Public Integrity
www.publicintegrity.org

John and Terry Levin Center for Public Service and Public Interest ...
www.law.stanford.edu/program/centers/pip/

The Center for Medicine in the Public Interest | Homepage
www.cmpi.org/

The West Africa Public Interest Litigation Center (WAPILC)
www.wapilc.org

Public Interest Research Centre - PIRC.
www.pirc.info/

British Columbia Public Interest Advocacy Centre (BCPIAC)
www.bcpiac.com/

Public Interest Law Centre
publicinterestlawcentre.ca/

Center for Public Interest Law
www.cpil.org

Center for Lobbying in the Public Interest
www.clpi.org

TOLEDOT, public interest institution
www.toledot.org

Arizona Center For Law in the Public Interest
www.aclpi.org

CPIP -- Eagleton"s Center for Public Interest Polling
eagletonpoll.rutgers.edu

Centre for Policy Alternatives - CPA
www.cpalanka.org/index.php?th=4

Centre For Public Interest Law CEPIL
cepilug.com/

Public Interest for German Limbtech Centre
www.openpr.com/.../High-Public-Interest-for-German-Limbtech-Centre-at-Rehab-2008-Conference-and-Exhibition.html

Cyberspace Law and Policy Center
www.bakercyberlawcentre.org/About_the_Centre.htm - Cached - Similar

Wilson Center for Leadership in the Public Interest
www.hsc.edu/wilsoncenter/paf/bioethics05bios.html

The British Columbia Public Interest Advocacy Centre
www.ic.gc.ca/...Public-Interest-Advocacy-Centre.../dgtp-002-07-The-British-Columbia-Public-Interest-Advocacy-Centre.pdf

Center for Lobbying in the Public Interest
www.clpi.org

Public Interest Advocacy Centre | ...
www.planc.povnet.org/node/144

The British Columbia Public Interest Advocacy Centre
www.bcuc.com/.../DOC_8891_C1-3_BCOAPO%20Submission.pdf - Canada -

Zero Carbon Britain - The Public Interest Research Centre
www.zerocarbonbritain.com/content/view/44/57/

Public Interest Legal Support and Research Centre
www.unhcr.org

Organization: Public Interest Legal Support and Research Centre
www.wiserearth.org

The Property and Environment Research Center
www.perc.org/

The Public Interest Legal Support and Research Centre (PILSARC)
www.law.utoronto.ca/documents/ihrp/report05_Mahajan.doc

Scientific Interest Group: National Human Research Centre (CNRH ...
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