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Beyond The Locus Standi Doctrine: The Jurisprudence of Public Interest Litigation

Bob Abraham

Faculty of Law, Abia State University, Umuahia Campus

Abstract

This article discusses the important subject of Public Interest Litigation which allows a person who has little or no personal interest in a public interest matter to take an action for a remedy that benefits the public. In the past, such actions had always failed for want of locus standi. Prior to 2019 however, some courts in Nigeria had made some efforts in this direction by entertaining such actions. But, it was in the case of Centre for Oil Pollution Watch v. NNPC that the Supreme Court specifically upheld Public Interest Litigation, thus bringing Nigeria into the League of Nations that have accepted the PIL. Such countries include the USA, India and Uganda. This Supreme Court's decision has watered down the influence of the doctrine of locus standi in Nigeria, thus enhancing the capacity of the people to challenge arbitrariness in the execution of government policies. This is in line with the doctrine of the rule of law, human rights and constitutional democracy. This paper has examined the meaning and nature of public interest and efforts that led to the acceptance of PIL in Nigeria and some jurisdictions.

Keywords: Public Interest Litigation, locus standi, access to justice, civil society organizations, public-spirited individuals

Corresponding author: bob.abraham@abiastateuniversity.edu.ng

Introduction.

Access to courts and access to justice are fundamental attributes of a constitutional democracy. A society or government that fails to provide adequate means for its citizens to access the courts to ventilate their grievances has failed in its core responsibility and duty to its people. In order to ensure justice for the poor, the weak and the indigent persons in the society, the practice of public interest lawyering has developed in many jurisdictions, Nigeria inclusive. This practice enables legal actions to be brought in favour of the general public, a community or class of persons by an individual, group or organization who have no personal interest in the outcome. It refers to the practice of precipitating social change through court decisions that reform legal rules, enforce existing laws and articulate public norms which has as its prime objective, the promotion of the public good and interest in justice delivery. This paper considers the meaning and nature of public interest lawyering and other concepts relevant to this research, the scope, the practice of public interest lawyering and the law and practice relating thereto. It also undertakes a survey of the practice of public interest lawyering in some other common law countries to underscore the fact that the practice has also grown in popularity other jurisdictions.

The Meaning of Public Interest

As the name implies, public interest litigation (PIL) consists of legal action that is meant to protect public interest. Public interest is defined by Black's Law Dictionary as the 'general welfare of the public that warrants recognition and protection, something in which the public as a whole has a stake; especially an interest that justifies governmental regulation. It has been observed that the term 'public interest' was used throughout history to justify everything relating to governance and public administration, from democracy to totalitarianism; as part of the term 'public interest law' justifies a wide range of legal actions for the interest of the public.

According to Erugo, public interest could be said to be the area that provides legal representation to people, groups, or interests that are historically underrepresented in our legal system. It emphasizes some kind of commonality of interest, a single interest that all citizens are presumed to share. This single interest must serve the ends of the public and not those of a minor section of it. A precise definition and delimitation of the expression is not easy to

achieve. Yet it is not an uphill task to identify a matter which comes within the framework of public interest. Edwin Rekosh has made this observation in the following words:

It has become common place among those who have studied the public-interest law phenomenon in the United States and elsewhere to throw up their hands when it comes to providing a definition of the term that is at all generalisable or carries any intellectual precision whatsoever. Many like to follow the lead of what US Supreme Court Justice Steves famously said about pornography: I know it when I see it".

Having given up on attempt at precise definition, Edwin Rekosh shifted his attention to other meanings assigned to the term. He made references to the expressions credited to Louis Brandeis, a pioneer public interest lawyer in United States (who later became a Supreme Court Justice). In a celebrated address to the Harvard Ethical Society in 1905, Justice Brendeis chided lawyers for neglecting their obligation to use their powers "for the protection of the people". Speaking further, Brandeis made reference to how the American Bar had in the past used her opportunities in the interest of the people. In his words,

The great opportunity of the American bar is, and will be, to stand again as it did in the past, ready to protect also the interest of the people.

From the foregoing, it is easily noticeable that the emphasis is in the "interest of the people". In other words, public interest means whatever that is in the interest of the people. Following the prompting of Justice Brandeis and some others, some American lawyers later began to address themselves as public interest lawyers with self-imposed obligations to represent the poor and the other under-represented interests in the society, a condition made more compelling by the social turmoil of the 1960s. The self-imposed role, according to Rekosh, was necessitated partly as "a corrective to the disproportionate influence of economically powerful interests". This notion of counter-balancing the influence of powerful economic interests in the legal system is what Rekosh called the social conception of public interest law. It covers a multitude of objectives ranging from civil rights, consumer rights, to environmental protection.

On the substantive/doctrinal implications of the term "public interest", Rekosh examined some dictionary definitions, and eventually came to the conclusion that, even though there is no code of public interest law in the United States, there are numerous references to that term in the legislation and jurisprudence of the U.S and other countries. He viewed the dictionary definitions as unhelpful as it renders the term capable of subjective determination by any individual (such as a judge or governor or the legislature). This can lead to many arbitrary and inconsistent interpretations by government bureaucrats. But since their decisions are subject to judicial review, there is a consolatory outcome because the courts have developed a judicial standard for limiting arbitraries and inconsistent decision-makings by public officers.

From the foregoing, public interest means anything that is in the best interest of the society as a whole. Its determination connotes some measure of discretion. Fortunately, the doctrine of judicial review which is available in common law jurisdictions, ultimately passes the buck to the courts. This, in our opinion, is a good development because as noted above, the courts are in a better situation to do justice to the issue of discretions in public law.

The Concept of Public Interest Litigation

From the foregoing, public interest litigation means an action which seeks to protect or enforce what is in the best interest of the public as a whole. It generally seeks to counter-balance the interests of the economically powerful and those of the weaker segment of the society. The essence of the litigation is not to confer personal benefit(s) on the plaintiff(s). An action that seeks to confer personal benefits is narrow in its purpose and must invariably, be caught up by the doctrine of locus standi. Therein lies the distinguishing feature of PIL. The doctrine of locus standi which is meant to prevent a floodgate of litigations by busy bodies is thus not applicable to public interest litigations. The court must therefore be on alert to ensure that the doctrine of

locus standi is not employed by defence counsel to defeat an action which is meant to protect the public interest as opposed to one which seeks to protect only the plaintiff as an individual.

Public interest law has been used to designate all projects organized outside governmental agencies whose purpose is to use the law to defend public interest. More pragmatically, public interest law is a wide range of legal views, approaches and strategies which, in the process of their realization eliminate the existing gap between the legal reality and the needs of the society according to the principles of justice, rule of law, and human rights. It is interpreted as activities aimed at the implementation of positive social change in the government and society based on the use of legal tools to pursue a broad spectrum of public interest, as opposed to a narrow instrumental interpretation of law as a means to legitimize the actions of government, private corporations or powerful individuals.

According to Lasley, PIL expresses the idea that civil law suits are being used in a new way to benefit the condition of groups within society or the society as a whole. It is further seen as the use of litigation for the public good. It is also seen 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 members of the public.

The South African Law Reform Commission's description of PIL is noteworthy. The Commission views PIL as action 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. The distinguishing feature of PIL which is based on the broad remedial outcome of the litigation has aptly been captured in the following words:

Public interest litigation is about using the law to empower people, to knock down oppressive barriers to justice, to reclaim and restore the right of social justice for the majority of the people; to attack oppression and denial that disenfranchises our people, and is about winning back human dignity of the people. It is about caring for the rights of others, besides oneself. It is about getting lawyers and judges committed to this struggle and using the law more for the benefit of the collective not just for individuals or private interest.

In the case of Centre for Oil Pollution Watch v NNPC, the Supreme Court of Nigeria seized the opportunity to take a definite stand to liberate public interest cases from the shackles of locus standi doctrine which has for long hindered the enforcement of public nuisance and other matters of public concern. This case deals with environmental degradation. In a unanimous judgment of 7-0, the apex court held that:

> *public-spirited individuals and organizations can bring an action in courts against relevant public authorities and private entities to demand their compliance with relevant laws and to ensure the remediation, restoration and protection of the environment. PIL is thus, an effective tool to initiate and maintain an action by one or more persons on behalf of some victims who are incapable of approaching the court for redress as a result of inpecumousity and/or similar factors*.

Public Interest Litigations in Other Jurisdictions: An Overview

Nigeria is not the only country that has embraced this tool to broaden access to justice for the poor and indigent persons. Other jurisdictions have also appreciated and enhanced its applications. In the Centre for Oil Pollution Case, the Supreme Court noted that the responsibility of the state to protect the environment is now a well-accepted notion in all countries. This observation underscores the global concern on the dire consequences of environmental degradation on the present and future generations. However, as noted earlier, PIL should not be restricted to environmental degradation cases. The following is a brief discussion of PIL in other jurisdictions.

United States of America

As noted earlier, public interest lawyering has its origins in the United States of America through the advocacy of Louis Brandeis which became widely adopted during and after the social turmoil of the 1960s. There were non-governmental organizations (NGOs) that work to promote and protect human rights using the United States legal system. Others fight to protect the environment, or advocate on behalf of consumers. These organizations refer to themselves as public interest organizations. In the United States jurisdiction, a large community of lawyers practice public interest law in the form of providing legal assistance free of charge to those who cannot afford the cost of legal services. Also, the Clinical Legal Education, which is well established in the United States provides opportunities for law students to do practical legal work on basic legal matters as well as more complex public interest issues. Some law schools have Public Interest Centers. Pro bono programmes at the bar association and law firms provide opportunities for commercial lawyers to donate time to public interest law activities. No doubt, PIL is an institution in the United States.

Uganda

Public interest litigation is gaining traction in Uganda as well. Its foundation is Article 50(2) of the Uganda constitution which provides that any person or organization may bring an action against the violation of another person or group of people'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 he/she has filed a complaint. In Ismail Serugo v. Kampala City Council and 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 this provision, Chief Justice of Uganda 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 enable individuals or groups to take proceedings to protect group rights or interests for the entire community.*

Section 71 of the National Environmental Act of Uganda empowers any person to apply for an environmental restoration order even though such person is not suffering any harm and has no interest in it. This has led to a boom in Public Interest Litigation cases, notable among which is the case of Greenwatch v Attorney General and the National Environment Management Authority, where the applicant (a Non-governmental Organization) seeking to protect the environment and expose threats to it, successfully brought an application before the High Court of Uganda, seeking several orders and applications, 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.

India

India is one of the most popular jurisdictions on matters of judicial activism. The major instrument through which judicial activism has flourished in India is public interest litigation. Before 1980s, the doctrine of locus standi was very much in operation to prevent the courts from entertaining cases where the plaintiffs were not affected directly or indirectly. PIL cases were introduced by Justice P.N. Bhagwati when in 1979, he entertained a petition filed by a member of the public regarding the condition of prisoners detained in Bihar jails. The petition led to the release of 40,000 prisoners. Thereafter, the Indian Courts started entertaining cases of public interest filed by persons who otherwise had no locus standi. However, there were instances of frivolous PIL being dismissed by the courts. In one of such cases, it was discovered by the court that the PIL relate to a business conflict and was accordingly dismissed as abuse of court process.

The Jurisprudence of Public Interest Litigation in Nigeria

The constitution of the Fed eral Republic of Nigeria provides in section 46(1) that:
Any person who alleges that any of the provisions of this chapter has been, is being or likely to be contravened in any state in relation to him may apply to a High Court in that state for a redress.

This provision is an adjunct to the doctrine of judicial review which empowers the court in a democratic system to review actions of public officers to ensure compliance with the provisions of the law. Judicial Review is premised strongly on the doctrines of separation of powers and the rule of law. It is a common knowledge that the doctrine of judicial review is severely limited by the doctrine of locus standi, a trend that allows infractions by public officers to escape judicial scrutiny and remedial indictment simply because the plaintiff is unable to show that he has a higher interest in the matter than other members of the society.

With particular reference to human rights enforcement, section 46 which empowers individuals to apply to the High Courts for redress also empowers the Chief Justice of Nigeria (CJN) to make rules for such applications. The Fundamental Rights (Enforcement Procedure) Rules (FREP Rules) of 2009 made by the CJN has removed or watered down the locus standi doctrine in the following language:
Any person or body who desires to be heard in respect of any human rights application and who appears to the court to be a proper party to be heard may be heard whether or not the party has been served with any of the relevant process, and whether or not the party has any interest in the matter.

Section 46 thus, empowers and encourages individuals, groups and communities who allege that that there is or there would be an infringement of their individual and collective rights to approach a court of law for a redress. This right of access however, cannot be fully utilized amidst the state of penury, lack of awareness and possibly undue intimidation by powerful perpetrators of the infringement. Hence, the clarion call on certain public-spirited individuals and organizations to take up such actions on behalf of the victim(s) in the form of public interest litigation, thus breaking through the dogma and hatchet of locus standi was made when it stated specifically that it is better to allow a party to go to court and be heard than to refuse him access to the court as justice should not be rationed. Guda v. Kitta. Subject to measures designed to prevent abuse of the court process, this writer agrees with this observation and wishes to submit that it should form the guiding principle on the right of access to the court.

The rationale behind public interest litigation was eloquently captured in Centre for Oil Pollution Watch v NNPC in this language:

It is intended to improve access to justice to the poor when their rights are infringed upon and for the protection of the public affected. Furthermore, such public interest litigations serve as a medium for protecting, liberating and transforming the interest of the marginalized groups. It raises issues against non-personal interest of the applicant. One of the features of this type of litigation is that the victims are often groups or persons who could not ordinarily be in a position to approach the court on their own due to impecuniosity or lack of awareness of their rights.

In our view, the tenet of PIL is like proffering answers to the questions: how can a man without leg walk? And how can a man without eyes be made to see? Providing access to justice for the under-represented and the indigent groups is the foundation of public interest lawyering. Access to justice is therefore an important common point of interest among public interest law practitioners. It turns the courts into an arena where otherwise disadvantaged people engage and challenge the government and question policies which adversely affect them; in so doing, they expose the flaws, biases, unreasonableness, illegalities, bad faith, or unconstitutionality of such policies or actions (or inactions) and promote transparency and accountability in governance.

In S.P. Guta v Union of India, the Indian Supreme Court re-echoed the same sentiment and objective underlying public interest litigations. In the words of Bhagwati, C.J.,

Where a legal wrong or 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 in socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for appropriate direction.

Erugo was right when he remarked that the content and rationale of public interest law relate to the following:

i. Access to justice
ii. Law reform
iii. Political and social empowerment, and
iv. Social change or justice

The importance of PIL to human rights and democracy cannot be over-emphasized. It is a strong weapon to keep the government and public agencies within the bounds and limits of constitutional democracy. Its potential capacity to restrain governmental arbitrariness is in line with the doctrine of the rule of law. The era of striking out cases concerning public rights in limine simply on the basis of locus standi is over. Before striking out cases involving matters of public concern, the courts must scrutinize the claims carefully to determine the true beneficiaries thereof.

The ancestral chain of locus standi has thus been relaxed to allow private citizens and organizations take up actions for the public. This new development must have been forseen by Aboki, JCA in Fawehinmi v. President, Federal Republic of Nigeria when he 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 to ensure observance of the law, it can best be achieved by permitting any person to put the judicial machinery in motion in Nigeria whereby any citizen can bring an action in respect of a public derelict.

We agree with this observation and also wish to submit that even though the case involving the Centre for Oil Pollution Watch deals with environmental degradation, other cases of public interest should be accorded similar judicial recognition to give a willing Non-governmental organization and public-spirit persons access to the court to protect the public interest. Access should not be restricted to environmental protection cases.

As indicated above, before the Supreme Court came up with the laudable decision in Centre for Oil Pollution Watch Case, some Nigerian courts had shown readiness to widen the horizon of locus standi in the public interest in deserving cases. The courts had earlier granted the irrepressible Gani Fawehinmi locus standi to challenge some governmental actions bordering on interpretation of constitutional provisions. It is in one of such cases that Aboki, JCA made the above remarks. The other case is Fawehinmi v. Akilu. Another similar case that succeeded earlier at the Court of Appeal is Babalola v. Attorney General of the Federation in which a private legal practitioner brought an action bordering on the right of appeal from the decisions of the National Industrial Court under Sections 243 and 245C of the 1999 Constitution. The action was dismissed at the High Court for want of locus standi. But the decision was reversed by the Court of Appeal.

PIL Finally Survives Locus Standi in Nigeria

Coming back to Nigeria, we wish to recall the efforts that were made prior to this dispensation to relax the locus standi rule in cases involving public interest. The efforts did not yield much success as a result of the Supreme Court's position in Adesanya's case. In that case, the Plaintiff (a Senator) challenged the appointment of the second respondent as the FEDECO Chairman as unconstitutional. After extensively reviewing the law on locus standi in most

common law jurisdictions, the Supreme Court held that the plaintiff has no locus standi as he could not disclose any infraction of his civil rights. In the words of the learned JSC:

The mere fact that the act of the Executive or the Legislative is unconstitutional without any allegation of infraction of or its adverse effect on one's civil rights and obligations poses no question to be settled between the parties in court. I am therefore in no doubt … that the appellant has no locus standi to initiate these proceedings.

This eloquent and unambiguous judicial protection of an act which is obviously unconstitutional, with the greatest respect, leaves much to be desired. In his own judgment, Williams CJN remarked that it should be possible for any person who is convinced that there is an infraction of the constitution to go to court and ask for appropriate declaration ad consequential relief. In fact, he conceded this right to any person resident in Nigeria whether a citizen or not. It was therefore surprising that after all said and done, Williams CJN, also held that the appellant had no locus standi. Some relief however, came the way of proponents of relaxation of the locus standi rule in the aforementioned Court of Appeal decision of Fawehinmi v. President of Nigeria.

Advocates of liberalization of the locus standi doctrine of Nigeria were not unmindful of the notion of judicial self-restraint and the need to prevent a floodgate of litigations of busy-bodies, both of which principles are the foundation of the doctrine of locus standi. Their case however, is that the court should relax the doctrine as a way of checking executive arbitrariness and mitigating the adverse effects of some extra-legal factors that clog the wheel of justice. In the Centre for Oil Pollution Watch, the Supreme Court has finally liberated public interest cases from the shackles of the doctrine of locus standi and at the same time officially welcomed PIL into the Nigerian Legal System.

Conclusion and Recommendations

The pursuit of public interest work could ordinarily flow from conscientious instincts of what is or is not right for the generality of the people, within the values of social justice, morality, fairness and equality. It could also emanate from a deep understanding or appreciation of the vision and theory of established public interest law sectors. In either case, it is coupled with the capacity to seek or cause desired change or impact. This capacity could be enhanced by learning and exposure. Public-spirited individuals or organizations have been known to play critical roles in enthronement or development of democratic societies and their unsung contributions or activities in the development of democracies underline the importance of knowledge of public interest law theory, the vision and practice as well as the setting of public interest activism.

With the decision of the Supreme Court of Nigeria in Oil Pollution Watch Case, it is now safe to say with confidence that PIL has come to stay in Nigeria. With this development, Nigeria has joined the league of nations who have embraced the progressive idea of protecting the less privileged people in the society through a judicial process of PIL. We hereby make the following recommendations, namely:

1. There is a clarion c all on individuals, groups, activists to wake up to the realization that public interest litigation is now a veritable tool to enhance access to justice for the poor, indigent and under-represented in Nigeria and accordingly put it to good use to protect public rights in Nigeria.
2. The courts should be on alert to promote public interest litigations and make it attractive by doing substantial justice in such cases instead of bending towards unnecessary technicalities.
3. Establishment of public interest litigation organizations that will specialize in such rights will promote this aspect of the law, which has the potential to protect the generality of the citizenry from the arbitrariness of public agencies, thus promoting human rights, the rule of law and constitutional democracy. This is a wake-up call on NGOs and other civil society groups in Nigeria.