



**PUBLIC INTEREST LITIGATION
AS A TOOL OF PROMOTING
DEMOCRACY AND RULE OF LAW**



ABOUT WEST AFRICA PUBLIC INTEREST LITIGATION CENTRE

◆ VISION STATEMENT ◆

“To help achieve a West African community where citizens have greater access to justice through the development of effective capacities and implementable jurisprudence by means of Public Interest Litigation”

◆ MISSION ◆

“To build the capacity of lawyers, judicial officers and other stakeholders in West Africa; to ensure through Public Interest litigation that government policies and practices in the formulation and implementation of laws, treaties and covenants in national, regional and regional settings are in public interest;

And

To ensure the development of a Public Interest Law and Jurisprudence in the region that can be shared and used to improve access to justice in national jurisdictions.”

◆ MANDATE ◆

To litigate and support litigation;
To conduct advocacy and awareness;
To build capacity of the bar and the bench, not excluding other relevant stakeholders;
To research, document, publish and disseminate knowledge;
and,
To build networks by pooling expertise and experience together.



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EXECUTIVE SUMMARY

FOR TWO intensive days – 12-13 May 2011 – brain and experience engaged each other together at Abuja, Nigeria to discuss the subject of Public Interest Litigation (PIL). The different experts and practitioners from national bar associations, the judiciary of national and regional courts, human rights advocacy groups and institutions; media operators and civil society organisations from within and outside West Africa were confronted with a common purpose. It was to explore ways of *“Promoting the use of Public Interest Litigation as a tool for Democratization and establishing the Rule of Law.”* Thirteen critical issues under four sub-themes dominated the discussion. They were exploration of: (a) Public Interest Litigation in West Africa – The Conceptual and Contextual Background; (b) Best Practices Models – Cases and Experience Sharing; (c) PIL: Engaging and Mobilising Citizens for Active Participation; and, (d) Breaking the Barriers to PIL: Pleading the case for Reform. While West Africa could show good accounts of few individuals and organisations asserting public interest, the reality was that PIL was however yet of comparative limited scope as an underlying legal concept or driving principle in ensuring those public authorities did not undermine welfare of particularly vulnerable members of the society.

Some of the hurdles discovered were the short supply of public agencies delivering justice and legal services in most countries; the absence of effective public defender schemes; the non-justiciability of certain provisions of human rights (e.g. the social and economic rights); and, the compromising of the integrity of the judiciary. Also important was the issue of the little use being made of international and regional judicial institutions such as the ECOWAS Court of Justice. To improve on the situation, participants considered many cogent steps as essential, the summary of which was:

- That there is an urgent need to conduct yet another survey in the West African region to determine some of the most important legal and judicial obstacles to the emergence of the PIL in the region. This must come with the reform of the legal systems in the various West African countries. And,
- A greater collaboration and cooperation among the relevant professional groups in the region towards building a corps of professionals who can kick-start a massive effort at entrenching PIL both within the countries and at the regional level.



1.0. INTRODUCTION

IF LAXMI were to be alive, how would she feel listening to her tragic story being told to an international gathering of lawyers, judges, media operators and a cross-section of civil society activists engaging in a brainstorming exercise to examine the potentials of Public Interest Litigation as a tool for promoting democracy and rule of law? By way of introduction, Laxmi was an Indian woman, a destitute, as poor as a rat and homeless. Her entire life was on the street, where she lived, struggled for existence, tried to fulfil every woman's desire by giving birth, but eventually paid a huge cost for it. She died! The irony was that Laxmi died right under the nose of government because her home was around the Connaught Place, a neighbourhood in the very heart of Delhi, the capital of India. Laxmi's case was a story of social neglect hitting human rights right on the head. Another homeless woman had delivered her of the baby girl, yet, four days went by during which Laxmi struggled to overcome labour complications with no help forthcoming. Eventually, she lost the struggle. She lost her most valuable possession: life. But Laxmi's case was not an isolated incident. She only highlighted the plight of other Indian homeless pregnant destitute women often lacking access to reproductive health care and other life supporting amenities like food and shelter. They struggled daily to exist. Laxmi did not however die in vain. Her death provoked reaction based on a report filed by Human Rights Law Network (HRLN) and on which the Chief Justice of Delhi High Court issued the groundbreaking instructions to the Government of NCT Delhi. The government was directed to, amongst others, (a) establish five shelters exclusively for pregnant and destitute women and lactating mothers; (b) ensure that adequate medical assistance and food are provided in the shelters and professionally trained personnel are deployed; and, (c) create a hotline service.

Again, taking another case from South Africa, the relentless pursuit of issues surrounding the rights of the immigrant refugees through legislative, judicial and policy advocacy, today, had led to some improvements in the immigration detention system. Equally, the similar efforts begun earlier in 1963 as test cases concerning the protection of the rights of consumer, in areas such as automobile safety, clean and cost-efficient technology, airline safety by Ralph Nader. Now, it is resolved that consumers deserve best bargain or value worth for their money. Not in the least were the many battles of Raymond Blackburn of the United Kingdom, noted for being frequently in and out of court for the



reason best summed by Lord Denning while adjudicating in one of the several cases instituted:

“I regard it as a matter of high constitutional principle that if there is good ground for supposing that a government department or 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, then any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced, and the courts in their discretion can grant whatever remedy is appropriate.”

All the above cases lead to a common subject – Public Interest Litigation (PIL). While in West Africa good accounts of few individual and organisational efforts to assert public interest exist, PIL was however yet to be an underlying legal concept or driving principle toward upholding the interests of the public from being undermined by public authorities and agencies as well as corporate entities. Thus, the democratic atmosphere that was widening in West Africa continued to face challenges of widespread human rights abuses. Alongside, the fundamental lack of access to justice, impunity, and limited sanctions at punishing rights violations have negative psychological effects on the citizens making them disheartening victims. Yet, a key tenet of just, open and equitable society is access to justice coupled with equality in the society, which are the basic ingredients of the rule of law that define a democratic state. These principles, indeed, are guaranteed in all of international, regional and national laws pertaining to fundamental human rights.

These gaps at building democratic West Africa based on the values of justice, equality before the law along with equitable dispensation of justice motivated the Open Society Initiative for West Africa (OSIWA) to search for ways to address the challenges. In collaboration with key partners and the broader civil society, the West Africa Public Interest Litigation Centre (WAPILC) was established. The central objective was to enlarge the democratic space, create a new window of effective access for the poor, the marginalised and the exploited about upholding their human rights in the region. Through PIL, it is envisaged that a new era would open that can lead to the development of a novel culture of deep and sincere respect for both human rights and justice in a transformative society such as West Africa. If it is possible to redress grievances of victims of exploitation and human rights abuse, if a medium exists to create public awareness regarding the prospects of defending rights, then the possibility of a new regime of people-centred policies, legislations, and even seeing institutions of governance becoming



more accountable could become highly possible in West Africa. With government becoming more open, just fair and equitable in the distribution of the common wealth of the people, very little doubt should exist that the new trend will further lead to the social transformation that is very necessary in the region. Therefore, the necessity and importance of PIL as a legitimate instrument of change, a potent strategy to combat prevailing rights atrocities, as well as a force against state inaction denying the masses of the people of humane and just existence in West Africa, is a justifiable means to secure a desirable end.

2.0. PIL AND WEST AFRICA

PUBLIC INTEREST is the overriding philosophy of PIL as shown by the experiences of countries such as South Africa (which is Africa's best notable example), or India that is not limited to Asian model but a global frontrunner in the use of PIL, or, the United States of America, where there has been well-established, extensive use of the PIL. However, a clarification is very necessary. It is about the acceptable definition of PIL. Noteworthy is the fact that notwithstanding the emerging nature of PIL that has seen it taking firm roots in countries such South Africa, India, United States of America, etc. legal or jurisprudential scholarship on the subject is yet to reach the level of common agreement as regards the very meaning of its conceptual foundation. The complication extends further by the fact PIL goes beyond legal or judicial areas. Other variables or factors such as advocacy, sensitization, mobilisation, social marketing etc., which are tools for strategic change, are embedded in the successful execution of PIL that, they therefore create a wider context for PIL usage and application in the social change arena. Furthermore, PIL's outcome may serve as a foundation for legislative, administrative, or social reform widening its scope a societal transformation tool beyond the corrective legalistic cum judicial remedy of righting a wrong. It thus means a state of confusion because of the many dimensions of PIL: a legal tool, a judicial instrument, a social change process, or societal engineering mechanism, all rolled into one. What is not in dispute is the end of PIL, which is to attain equitable, just and fair society, that respects and recognises the rights of the down-trodden. In this perspective, it is thus limiting to construe PIL solely in terms of law or legal practice or as the mark of the bench or judicial activism. Nevertheless, there have been helpful legal and judicial clarifications – sometimes constitutional – that showed some similarities in countries with thriving PIL.




Between South Africa and India, for instance, similarities regarding the conceptual and contextual landscape of PIL have been borne out of constitutional, legal and judicial processes. Drawing on the Indian example, the PIL is a right given to promote a public cause by seeking judicial redress of public injury. Categorically stated is that such injury may arise from breach of public duty or owed to a violation of some provision of the Constitution. The Indian Supreme Court's rule allowed any member of the public having sufficient interest to initiate an action or petition, which is quoted below:

- There is a personal injury or injury to a disadvantaged section of the population for whom access to legal justice system is difficult;
- The person bringing the action has sufficient interest to maintain an action of public injury;
- The injury must have arisen because of breach of public duty or violation of the Constitution or of the law; and finally,
- It must seek enforcement of such public duty and observance of the constitutional law or legal provisions.

The aim is to provide a powerful safeguard against the failure on the part of the government to meet the needs of the oppressed or marginalised members of the society, the ground for Public Interest Litigation or Social Action Litigation, as described by its foremost advocate, Professor Upendra Baxi, so that the court will have "epistolary jurisdiction". With respect to South Africa too, apart from section 33 of the Constitution that equips every person with the right to administrative action, there is also the provision for a number of socio-economic rights (such as the right to housing and health care) which are justiciable) with section 38 permitting, "Anyone has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights...." This clause expanded the traditional law of *locus standi* by a considerable degree. It became no hindrance for an indigent person directly affected by an unlawful action to find the resources to bring the matter to court. The provision allows for a number of parties, particularly parties with far more resources than the average person, to bring such an application. The clarity thus required in understanding PIL is very well summarised by the eloquent submission of the Indian Supreme Court that:

The rule of law does not mean that the protection of the law must be available only to a fortunate few or that the law should be allowed to be prostituted by the vested interests for protecting and upholding the status quo under the guise of enforcement of their civil and political rights. The poor



too have civil and political rights and rule of law is meant for them also, though today it exists only on paper and not in reality. If the sugar barons and the alcohol kings have the fundamental right to carry on their business and to fatten their purses by exploiting the consuming public, have the chamars belonging to the lowest strata of society no fundamental right to earn an honest living through their sweat and toil?

An overview of PIL in West Africa however shows a combination of gaps and prospects. Highlighting the gaps is the result of a needs assessment study by OSIWA in nine countries of the region – Cameroon, Cote d’Ivoire, Niger, Nigeria, Ghana, Guinea, Liberia, Senegal, and Sierra Leone. First, public agencies that deliver justice and legal services are in short supply in most countries of the sub-region. Geographical distribution of courts and tribunals as well as publicly funded legal aid schemes are equally skewed in favour of urban centres leaving rural areas at great expense of accessing legal services. Secondly, most countries lack effective public defender regimes. In some countries, the concept of a public defender does not even feature at all in the legal system. Consequently, matters of great matters of public interest are taken up either by public-spirited citizens or not at all. Thirdly, legal systems in some of the countries are fraught with structural barriers impeding enforcement of public interest and human rights norms. Examples include the requirement to demonstrate standing in order to bring an action in court coupled with the non-justiciability of certain aspects of human rights (e.g. the social and economic rights). Fourthly, the democratic regimes in most of the countries are nascent, shaky at the base—with lip service paid to democratic freedoms and the rule of law. Fifthly, political interference especially by the executive arm of government in the judiciary is so common with the result of eroding the independence of the judges and general timidity of the judiciary even if the arm (that is, judicial organ) is interested in cases bothering on public interest litigation. Sixthly, in the Francophone countries, the concept of public interest litigation is still at an embryonic stage; the effect is that it is relatively little understood. The seventh point relates to the very little use made of international and regional judicial institutions such as the ECOWAS Court of Justice. Apart from Nigeria where few organizations in Nigeria had attempted a handful cases, resort to the regional courts and tribunals on public interest litigation has been far and in-between. Nevertheless, PIL is not without prospects in the region. One, the general legal, constitutional and political environment in most of the countries is conducive for the conduct of public interest litigation. Almost all the countries had written constitution with a bill of rights. Two, in their constitutions, too, most of the countries conferred too power



of judicial review of legislative and executive acts on the judiciary, with explicit guarantee of the independence of the judicial arm of government. Three, it is provided for in the constitutions of virtually all the countries respect for the fundamental rights of the citizens with a substantial majority establishing human rights commissions or agencies a demonstration of commitment to the ideal. Overall, was the apparent fact that the concept of PIL was yet to have common understanding in West Africa.

3.0. PIL, DEMOCRACY & RULE OF LAW

A **AGAINST THE** background of the identified gaps and prospects of PIL in West Africa, it became imperative that to encourage the necessary intervention agenda, a pool of relevant stakeholders be brought together to examine the prospects of PIL as a tool of enhancing democracy and building rule of law in West Africa. From May 12-13 2011, PIL experts and practitioners, national bar association members, judges from national and regional courts, human rights advocates and institutions, media operators and civil society activists drawn from within and outside West Africa, all converged in Abuja, Nigeria to reflect, analyse and identify ways forward in sowing PIL seed in the West African region. Paramount to the conference was *“Promoting the use of Public Interest Litigation as a tool for Democratization and establishing the Rule of Law.”* The coming together, as envisaged, would help the overall objective of promoting PIL in West Africa with benefit that included the assessment of the current ‘state of affairs’ regarding the extent of use of PIL in the region. Also, opportunity would be afforded to pool knowledge together and document the best practices on the PIL while there would also be an attendant clarification of roles by the different stakeholders in PIL’s promotion. To the known extent that West Africa inherited different legal regimes, equally of concern to the experts gathering was the identification of the needed reforms suitable to make countries’ legal systems compliant to the emergence of PIL in the region. Underlying all of these goals or objectives was the important way of forming a network of resource persons that could advance the PIL in the West African region.

Overall, thirteen areas or issues of importance under four sub-themes were explored. The four sub-themes: (a) Public Interest Litigation in West Africa – Conceptual and Contextual Background; (b) Best Practices Models – Cases and Experience Sharing; (c) PIL: Engaging and Mobilising Citizens for Active Participation; and, (d) Breaking the




Barriers to PIL: Pleading the case for Reform, were as reflective as they were indicative. They reflected the desire to drive PIL in West Africa on a new course.

4.0. ISSUES ARISING

WHAT KEY issues arose from the conference? There were varieties of issues considered vital to advancing PIL as a tool as well as means of achieving democracy sustenance and towards entrenching the rule of law in West Africa. From the many issues were the following condensed ones:

- a. There is need for critical appraisal of the role of lawyers in West Africa against the background of their professional practice and orientation because they are crucial to the PIL process. PIL involves social change, thus raising the important question of how many lawyers in the region are prepared to devote time and energy to such cases? Along with this issue is also the question of legal education, which hardly prepares for social change. The same observation applies to the issue of free legal or pro bono service for the indigent clients. Not many lawyers engage in or are committed to rendering to work for social change or in public interest.
- b. PIL requires the support of governments; therefore, efforts are required to promote the ECOWAS Protocol on Democracy and Good Governance to create the enabling environment for its growth within West African national boundaries. This has also made it important for collaborations between bar associations and media professionals in the region.
- c. *Locus standi* that constitutes serious impediment to PIL needs to be vigorously challenged in order to have an enabling environment for PIL as obtaining in South Africa and India.
- d. The reality of limited room for private right action in Francophone and Lusophone countries that served as a hurdle for PIL needs to be grappled with. The code-based nature of the legal rules takes away judicial discretion from the courts as against the practice in the Anglophone countries where judges tend to have discretion and can creatively interpret the law.
- e. The courts need to be involved through training and re-training in order to diffuse the concept of PIL among judges who are critical not only to upholding it but are in the position to expand its frontiers.


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- f. In the same perspective, separating the office of the Attorney-General from that of Minister of Justice is seen as a positive step that can lead to the upholding of public interest in the administration of justice. Similar to this, is the necessity to have constitutionally guarantee for the Office of Public Defender so that there can be protection of rights of the indigent members of the public.
 - g. There should be the broadening of the PIL's focus in West Africa to include the issues of corruption, accountability, transparency, and respect for law, amongst others.
 - h. In order to increase the effectiveness of the ECOWAS Court of Justice, efforts are needed to have member-states to enact domestic laws to back up and enforce the judgements of the court.
 - i. As a way of developing skill-based PIL among up-coming lawyers, Clinical Legal Education should be promoted, which in turn, would also help create access to legal representation for the disadvantaged and the marginalised particularly in rural areas where there are dearth of legal services.
 - j. Increased collaboration and cooperation among civil society organisations are also required towards making PIL more effective. Along this line too, is the necessity to evolve a platform to exchange knowledge and share ideas in the West African region.
 - k. Within the context of West Africa, exploring Alternative Disputes Resolution mechanism can be of benefit in extending the use of PIL.
 - l. The media are essential to social change and since PIL's ultimate objective is to achieve social change, it is important that the media be integrated right from inception of contemplating a PIL case.
 - m. In view of the fact that it is not practicable to have a wholesale reform of the legal system, the most advisable step to follow is to go step-by-step, identifying and targeting sectors that are important such as environment, children and women's rights, penal reform, as starting points.
 - n. Also, there should be focus beyond the supra, national level, focusing on issues and subjects that touch the lives of the communities and the grassroots in the use of PIL as well as not limiting PIL to litigation but seeing it as a social change that demands a combination of approaches in order to avert a failure.
 - o. In the end, it helps better understanding of PIL that it is not a legal concept or jurisprudential idea but a passion against injustice, hence the solution to it will not be found in law but summoning up the courage and will to fight it.



5.0 . RECOMMENDATIONS

DERIVING FROM the issues were important steps that were suggested would need to be undertaken in order to ensure that PIL have foothold in West Africa, serve the cause of democracy, and help to sustain the rule of law. Central to the recommendations were:

1. That there is an urgent need to conduct yet another survey in the West African region to determine some of the most important legal and judicial obstacles to the emergence of the PIL in the region. The study, it is believed, will provide the fundamental basis to guide PIL strategic intervention in the advancement of democracy and rule of law.
2. That it is strongly recommended that the process of reform of the legal systems in the various West African countries should commence immediately. Issues that should feature prominently in the advocacy for reform include the need to grant greater independence or autonomy to the institutions whose work centre on or revolve around determination of what constitutes public interest as well as mechanism of seeking and/or pursuing legal claims to the rights and benefits.
3. That lawyers within the region are urged to avail themselves of knowledge and understanding of PIL. In this regard, the call is made for the review of the curriculum of legal education, inculcating necessary skills as well as inculcating pro bono, social and communal legal aids through appropriate means and schemes.
4. That greater collaboration and cooperation should be encouraged among lawyers and other relevant professional groups like the media within the region with a view to creating a pool of professionals with the required PIL knowledge in the region and to kick-start a massive effort at entrenching PIL.
5. That though PIL may not be a peculiar preserve of the legal profession, nevertheless given the important roles of lawyers, judges and law-makers in facilitating the emergence of PIL, sensitisation and mobilisation of these sectors of the society through training and re-training programmes should be accorded immediate attention.
6. That to strengthen ECOWAS Court of Justice and make it achieve the dream set for it as a protector of the community citizens' human rights, efforts should



begin without further delay at all member-countries towards amending or reviewing national laws incompatible with the implementation of the community's court judgment. Consequently, all member-states are urged to establish national judicial institutions or mechanism to be fully responsible for the implementation of the decisions of the court.

7. That the national Bar Associations in all of the countries of West African region need to show greater interest in defending and pursuing matters arising from or pertaining to PIL. As means of practically demonstrating this commitment and ensuring that adequate funds are available to support litigation in this direction, it is suggested that certain percentage be set aside from their members' annual subscription, pooled as a dedicated fund for the purpose of PIL.
8. Finally, that in the light of the fact that national human rights institutions constitute essential pillars to the realisation of the goal of PIL, there is need to involve them when planning and implementing PIL as a strategic engagement of securing the interests of the public.

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