# The concept of public interest litigation (pil)

*THE CONCEPT OF PUBLIC INTEREST LITIGATION (PIL)*

*Abstract*

*Public Interest Litigation is simply an action in the court of law instigated with the mission to promote the public interest. PIL is a powerful instrument of social engineering. Civil society activist, human rights crusaders, pressure groups and the NGOs have found PIL as a veritable tool for the advancement of good governance, social justice, equity and fair play. This easy sought among other things to critically examine the concept and the origin of the PIL. The easy will consider who can initiate or file a PIL and finally demonstrate the application of PIL in United State, India and the Nigerian as well as criticism against PIL.*

INTRODUCTION:

Following the growing concern for equal access to justice by all and the quest of human rights activist the civil society, social movement, and legal practitioners to promote and guarantee the basic fundamental human rights for the most vulnerable groups such as person with disabilities, children and those who are the underprivileged of the society, the 1960s and 1970s saw the rise of Public Interest Litigation (PIL) in America. The idea was to promote social equality and the rights of the underprivileged. PIL triggered the emergence of vibrant civil liberty groups that stood against discrimination, inequality and the gross violation of people’s rights that prevailed at that period.  The concept of PIL may not be an end in itself but a means to an end. Today, the concept that started in America about four decades ago, has spread across to different countries of the world to become a global

phenomenon strengthening the scope of constitutional democracy across the world. Even those who opposed to the practice of PIL will agree to the fact that it impacts on human rights protection, the rule of law and constitutional democracy cannot be overemphasized. Although PIL is often confronted with challenges, it has achieved so much for the struggles of freedom, the liberation of the oppressed, vulnerable groups and the underprivileged as far as social justice, equity and the rule of law is concerned. The following part of this easy will defined in greater details the concept of PIL and demonstrate how it has been practised in US, India and Nigeria with a view to illuminating the commonalities, contrast and its important role in our society. The paper will conclude by discussing the various criticism against PIL as an instrument of partial political colonialization of the legal process[1].

WHAT'S ' PUBLIC INTEREST LITIGATION (PIL)'?

There is no generally accepted definition of PIL. In other words, ''PIL is not defined in a statute or in any act''[2]. Thus;

*''PIL refers to the practice of precipitating social change through court decisions that reform legal rules, enforce existing laws and articulate public norms. It has its prime objective in the promotion of public good''* [3] *.*

It is, therefore, safer to claim that PIL as a concept is built on the foundation of social justice, equity and the principles of the rule of law for societal good. Accordingly, the concept of PIL can best be seen and appreciated in the light of a veritable tool that confronts the social injustice against humanity[4]. In our today's society bewildered by dysfunctional global injustice orchestrated either by the global north against the global south, imperial regimes against

colonies, dictatorial governments against their citizen, powerful monarchs against their subjects and the powerful individuals against the weak, the civil society activists, human rights crusaders, Non-Governmental Organisations (NGOs), and human rights lawyers all over the world has continue to deploy the instrumentality of PIL to demand for accountability, responsiveness and social justice for the vulnerable groups and the underprivileged.

The deployment of the lexicon ‘ public interest litigation’ to provide legal services or judicial activism for the fundamental issues affecting the large proportion of citizens predate the 1960s.[5]The concept was developed to provide free legal representation for those who cannot afford and this gives an explanation of why ‘ PIL’ is often used interchangeably with ‘ legal-aid’ by many scholars.

Thus, one cannot overemphasise the power inherent in PIL in advocating for a progressive social change. PIL may not be an end in itself, but a means to an end. A PIL case whether successful or not, once it gains publicity, it may generate public consciousness and inspire human rights crusaders to push for the enactment of legislation that will bring the anticipated social change on a perceived injustice for society benefit[6]. I think the concept of PIL resonates with the philosophy and the ideas of a Chinese artist who advanced that; ‘’Human rights are not a given property, but rather something we can only gain from our own defence and fight’’.[7]PIL is, therefore, an instrument of defence and legal contest on behalf of those who cannot defend or fight for themselves.

THE ORIGIN OF PIL.

PIL started in USA between the 1960s and 1970s by the civil rights and civil liberty groups who were out to promote social reforms geared toward the correction of the societal ills of segregation and discrimination against the African Americans in USA public schools.[8]. This was the dark period of the USA racial discrimination and apartheid regime. PIL prompted the emergence of civil rights moments in the USA. This period saw the rise of civil resistant to discrimination and segregation. PIL had set the stage for the American revolution. The incident of Rosa Parks refusing to give up her sit on a Bus to the white and her subsequent arrest which snow bowed into the ‘ Montgomery bus boycott and the beginning of public demonstrations led by Martin Luther King, Jr which is today the symbol of the ‘ American dream’, all started with the catalyst of the most celebrated PIL case of *Brown V. Board of Education* [9], which will later be discuss in this paper.

The drive of the PIL in the USA is to guarantee citizens who are oftentimes the beneficiaries or victims of government programmes and initiatives the ample opportunity to participate and contribute their quota into government policies. Thus, the judiciary and the bureaucracy  that design, implement, apply or interpret government policies ought to operate an open door policy to accommodate all shields of citizens view whose lives may be affected by such policies and actions[10]. This suggests that citizens must always be free and unhindered to participate and challenge any denial or any attempt to frustrate their enjoyment of their basic fundamental social, economic and political rights without the fear of coercion and suppression irrespective of the citizen’s station in life.

THE LOCUS STANDI UNDER PIL:

The question of who can sue and be sued under the PIL is dependent on a state's judicial system. Under the civil law which is often paired with an inquisitorial system like in India, Justice PN Bhagwati succinctly explain the locus standi thus;

" *Whenever a legal wrong or a legal injury is committed upon an individual or a particular class of individuals by reason of violation of any fundamental/legal right or without authority of law any legal wrong is committed or legal injury is inflicted upon, or any illegal burden is inflicted upon the downtrodden section of individual(s) by reasons of poverty, disability, helplessness, poor economic and social conditions, are unable to approach the judiciary for relief then any member of the society can file a writ under Article 226 of the Constitution in the High Court and in case of a breach in the fundamental rights of such individuals or class of individuals, relief can be sought in the Supreme Court by virtue of Article 32 of the Constitution* "[11]

While under the common law often pair with adversarial system and mostly used by common law countries, for example in Nigeria, those whose rights are violated and their representatives can sue, interest group and human rights activist are permitted under the law to institute a PIL action in the competent court of law[12].

SUBJECTS OF PIL:

The subjects of PIL also differs depending on the legal system. In India for example, ''matter pertaining to the public interest are all subjects of PIL''[13].

While in Nigeria, the subject of PIL is the breach of Fundamental Human Rights under Chapter IV of the 1999 Constitution of the Federal Republic of Nigeria. Under this heading, the applicant must allege that:

(a) Any of the rights are being breached;

(b) Is likely to be breached;

(c) Has been breached[14].

It must be clearly pointed here that, under the Nigerian Constitution of the Federal Republic of Nigeria, social rights are not enforceable in any court of law[15].

THE APPLICATION OF PIL IN THE UNITED STATES.

As a prelude to our discussion under this heading, in 1896, the Supreme Court of the U. S. upheld in the case of *Plessy V. Ferguson* [16]that racially segregated public facilities were lawful, provided the facilities were equal giving birth to the doctrine of ‘ separate but equal’. This period represents what I called: ‘ the dark period of the U. S. human rights struggle’.

PIL has been applied on a number of occasions in the USA, however, because of limited space, one is constrained to discuss only the most celebrated case of *Brown V. Board of Education* [17]as a rejoinder to the doctrine of ‘ separate but equal’. It must be mention from the onset that the case under review is one of the pioneer cases that opened a new vista for the emergence of PIL in the USA.

The Fourteenth Amendment (1868) of the American's Constitution which among other things stated that ''no state shall deprive anyone of either ''due process of law'' or of the ''equal protection of the law''.

Notwithstanding the so-called Amendment, African Americans were still discriminated and treated with disdained unlike the Whites in the USA. As a matter of fact, many States in the USA enacted legislation that segregated the Black and the Whites from using the same public facilities.

The most celebrated case of Brown V. Board of Education is five separate cases that were consolidated by US Supreme Court[18]. The cases that later came to be known as Brown v. Board of Education were Brown V. Board of Education of Topeka, Briggs V. Elliot, Davis V. Board of Education of Prince Edward Country (VA.), Bolling V. Sharpe, and Gebhart V. Ethel.

It is interesting to note that, while the five above mentioned cases shares different facts, the fundamental issue for the court to decide was the same. The question was for the Supreme court to determine the Constitutionality of segregation in public schools.

Also interesting to note is the fact that the five cases mentioned above were championed by a civil rights organisation called ' Thurgood Marshall and the NAACP Legal Defense and Education Fund'.

The Plaintiffs' counsel, Marshall argued convincingly that ''separate school systems for blacks and whites were fundamentally unequal, and consequently violated the ''equal protection clause'' of the Fourteenth Amendment to the U. S. Constitution[19]. He went further to support his

argument that ‘’the segregated school system posed a risk of conditioning the black children to the state of mediocracy and the feeling of inferiority complex before the White children and therefore such a system must not be legally sanctioned[20]. At this point, everything was set for the judges to give their verdict.

Following the above, US Supreme Court’s judges held unanimously in Brown v. Board of Education that, ‘ the segregation in public schools was unconstitutional’[21]. Meanwhile on the 14 May 1954, the Chief Justice ( Earl Warren) went further to deliver the opinion of the court that, ‘’We conclude that in the field of public education the doctrine of ‘ separate but equal’ has no place. Separate educational facilities are inherently unequal…’’[22]. The import of this resounding judgment is that the doctrine of ‘ separate but equal’ was constitutionally abolished and that heralded an end to segregation in U. S. public school. This can be described as a landmark victory for PIL in the USA constitutional democracy.

In the light of the above, it is, therefore, safer to argue that PIL as a concept although with its origin in USA, has spread all over the world and this leads us to briefly discuss the application of PIL in India.

THE APPLICATION OF PIL IN INDIA.

In India, PIL is practice differently from what is obtainable in the USA[23]. In other words, PIL is not practised in the nature of the adversarial system.

*‘’PIL is not in the nature of adversary litigation but it is a challenge and an opportunity to the government and its officers to make basic human rights*

*meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice which is the signature tune of our Constitution. When the Court entertains public interest, litigation, it does not do so in a cavilling spirit or in a confrontational mood or with a view to tilting at executive authority or seeking to usurp it, but its attempt is only to ensure observance of social and economic rescue programmes, legislative as well as executive, framed for the benefit of the have-nots and the handicapped and to protect them against violation of their basic human rights, which is also the constitutional obligation of the executive. This is also the constitutional obligation of the executive. The Court is thus merely assisting in the realisation of the constitutional objectives* [24] .

In the light of the above the case of *Hussainara Khatoon & Ors v. Home Secretary, State Of Bihar* will be brought under review to demonstrate how PIL has been practiced or been practised in India.

*Hussainara Khatoon & Ors v. Home Secretary, State Of Bihar* , this is another typical case of how PIL was applied in India. The case is celebrated for the right to speedy trial under Article 21 of the Indian's Constitution and the provision of free legal aid to under-trials.[25]which are the hallmark of PIL as a concept.

The above-mentioned case is about the release of under-trial prisoners who were held illegally bound in prison in Bihar for a long period of time than the maximum sentence period given the position of the Indian law. Mrs Kapila Hingorani reported the deplorable condition of the under-trial prisoners to

the court. The court set a committee to investigate the case and after the investigation, it held among other things as follows:

- *‘’ The procedure under which a person may be deprived of his life or liberty should be ‘ reasonable fair and just.’ Free legal services to the poor and the needy is an essential element of any ‘ reasonable fair and just’procedure. A prisoner who is to seek his liberation through the court’s process should have legal services available to him.*
- *Article 39A also emphasises that free legal service is an inalienable element of ‘ reasonable, fair and just’ procedure for without it a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice. The right to free legal service is, therefore, clearly an essential ingredient of ‘ reasonable, fair and just’ procedure for a person accused of, an offence and it must be held implicit in the guarantee of Art. 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services, on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer.*
- *The poor in their contact with the legal system has always been on the wrong side of the law. They have always come across “ law for the poor” rather than “ law of the poor”. The law is regarded by them as something mysterious and forbidding-always taking something away from them and not as a positive and constructive social device for*

*changing the socio-economic order and improving their living conditions by conferring rights and benefits on them. The result is that the legal system has lost its credibility for the weaker sections of the community. It is, therefore, necessary to inject equal justice into the legality and that can be done only by a dynamic and activist scheme of legal services.*

- *The urgent necessity of introducing a dynamic and comprehensive legal services programme impressed upon the Government of India as also the State Governments. That is not only a mandate of equal justice implicit in Art. 14 and right to life and liberty conferred by Art. 21 but also the compulsion of the constitutional directive embodies in Art. 39A.*
- *The State cannot avoid its constitutional obligation to provide a speedy trial to the accused by pleading financial or administrative inability. The State is under a constitutional mandate to ensure speedy trial and whatever is necessary for this purpose has to be done by the State. It is also the constitutional obligation of this Court, as the guardian of the fundamental rights of the people as a sentinel on the qui-vive, to enforce the fundamental right of the accused to speedy trial by issuing the necessary directions to the State which may include taking of positive action, such as augmenting and strengthening the investigative machinery...''* [26] .

The import of the above landmark judgement is that more than forty under-trial prisoners were released to go home with compensations not necessarily in commensuration with their losses, pains, torture and human indignity, but

to uphold the sanctity of their human rights which the state has a binding legal obligation to promote at all times irrespective of one's station in life on equal basis. PIL has made a tremendous impact in India just like the USA where it originated from. One cannot argue less for the important of PIL for the interest of the general public especially those who are deprived and underprivileged as can be seen demonstrated in the cases under review and so many more which may not be discussed in this paper for lack of space.

THE APPLICATION OF PIL IN NIGERIA.

Before 1988, PIL suffered a great deal in Nigeria. The scope of locus standi in the Nigeria legal system was very narrow and consequently, it was extremely difficult for civil society organisation, NGOs, social crusaders and human rights activist or concern individuals to take up cases that would have benefited the general public[27]. However, in 1988, one of the most respected human rights activist and a Lawyers in the case of *Chief Gani Fawehinmi v. Akilu and Tagun* [28]Challenged the narrow application of Locus standi in the Nigeria legal system and today the Constitution of the Federal Republic of Nigeria has adopted a liberal approach to locus standi especially on human rights cases. This is a human rights case related to the death of Mr Dele Giwa (An Editor of NewsWatch Magazine) a client and a friend to Chief Gani Fawehinmi who claimed his friend was murdered by a bomb by Col. Akilu and Col. Togun. Gani Fewehinmi wrote the Director of Public Prosecution to prosecute Col. Akilu and Col Togun or issue him (Gani Fewehinmi) a fiat to enable him to prosecute the accused persons as a private prosecutor, however, nothing was done. Gani Fewehinmi filled an application to the High Court for leave to apply for an order of Mandamus to

compel the Director of Public Prosecution (DPP) to prosecute the accused. The application was dismissed for lack of locus standi to bring an application for Mandamus. He appealed to the Supreme Court of Nigeria and his appeal was granted.

Accordingly, the locus standi relating to issues of Fundamental Human Rights in Nigeria legal system was expanded and later incorporated into the present Constitution of the Federal Republic of Nigeria thus:

*''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 organisations, may institute human rights application on behalf of any potential applicant. In human rights litigation, the applicant may include any of the following:*

*(i) Anyone acting in his own interest;*

*(ii) Anyone acting on behalf of another person;*

*(iii) Anyone acting as a member of, or in the interest of a group or class of persons;*

*(iv) Anyone acting in the public interest, and*

*(v) Association acting in the interest of its members or other individuals or groups''* [29] .

It is interesting to note here that the above provision of law is the direct product of PIL in Nigeria. As argued elsewhere, indeed, PIL is an instrument

of social change not only in the Nigerian legal system but inother jurisdictions of the world. PIL even though a celebrated concept has been greeted with a lot of misgivings.

THE CRITICISM AGAINST PIL

PIL although undoubtedly an instrument of social change, strengthening social, economic and political rights and standing in the gap for the most vulnerable and the underprivileged citizens, it has been under heavy criticism from the onset. A number of social commentators are not comfortable in the manner by which PIL as a phenomenon is allowed to developed haphazardly. They argued that the rise of group litigation is a cover-up for group activity[30]· Carol Harlow, one of the leading critics of PIL summed it up thus, ‘’if we allow the campaigning style of politics to invade the legal process, we may end up by undermining the very qualities of certainty, finality and especially independence for which the legal process is esteemed, thereby undercutting its legitimacy’’. In other words, one of the enduring quality of the judicial process lies in its formality of character and therefore, should not be operated like a political jamboree that is an all comer’s affairs. Harlow went further describe the emergence of PIL as a ‘’partial colonisation of the legal by the political process’’[31]. In the light of the foregoing, it has been observed by critics that different political interest who could not get the parliament or the executive play to their whims and caprices has crafty find solace in PIL as an avenue for getting their political interest massaged and popularised by the judiciary in the PIL. This is rather appalling. Chief Justice Sabyasachi Mukherji onceobserved thus:

*''While it is the duty of this court to enforce fundamental rights, it is also the duty of this court to ensure that this weapon under Article 32 should not be misused or permitted to be misused creating a bottleneck in the superior court preventing other genuine violation of fundamental rights from being considered by the court''* [32] *.*

The views of the Chief Justice Mukherji resonates with the fact that ''the primary purpose of administrative law (PIL) is to keep the powers of government within their legal bounds''[33]. It, therefore, follow that, citizens are guaranteed equal protection by the law against oppressive government policies that are anti-people[34].

Haven briefly considered the thesis and antithesis of the PIL, this paper strongly believe that the beauty of the criticism surrounding PIL lies in the fact that even though PIL is prone to abuse, it is, however causing a revolution in holding government and its agencies to account and to be more responsive to their primary responsibilities. Thus, we cannot afford ' to throw away the baby with the bathwater'. In other words, PIL has come to stay and the best we can do is to safely guide it from been hijack by mischief makers or people with hidden agendas. Furthermore, the judiciary must continue to play its role of been independence, objective and final arbiter devoid of unnecessary political interference in whatever pretence[35]. We must also bear in mind that the independence and the finality of the judiciary do not immune it from been infallible. However, when the judiciary errs in the application of PIL, it must be willing to purge itself from the perceived deviation of allowing itself to be corrupt of political manipulation in the guise of group litigation.

THE CONCLUSION:

PIL as a concept is an instrument of social change. It originated from the USA and spread rapidly to different parts of the world. Even though practice under different systems, it has a common goal of protecting citizens against the arbitrary use of governmental powers, holding the government responsible for constitutional breach as well as to promote socio justice that affects the wider society, especially the vulnerable groups, rather than those directly involved. It practices as demonstrated in USA, India and Nigeria has clearly shown it affirmative impacts and contribution to the legal jurisprudence and States constitutional accountability. Though heavily criticised for becoming an instrument capable of corrupting the judicial process, it has come to stay and its important and precedent cannot be overemphasised in the life of citizens across the globe.  PIL can rise above its challenges. Therefore, it makes sense to draw an analytical conclusion that ‘’ the judicial activism gets its highest bonus when its orders wipe some tears from some eyes[36]’.

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